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.*,

Respondents.

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

BRIEF FOR RESPONDENTS

Date: September 13, 2024

Team 20

Counsel for Respondents

Oral Argument Requested

QUESTIONS PRESENTED

1. Whether a state statute that mandates transgender girls participate in school sports consistent with their sex is a form of sex discrimination that violates Title IX of the Education Amendments of 1972?

2. Whether a state statute that classifies sports teams on the basis of sex violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution when the statute's interests are substantially related to important governmental interests?

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The opinion of the United States Court of Appeals for the Fourteenth Circuit has not yet been reported in the Federal Reporter, but it is reported at *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765 (14th Cir. 2024) and will be referenced herein as the Record on Appeal ("R"). The district court's order has not yet been published in the Federal Supplement but is reported at *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution states:

"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 any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

Title IX states:

"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." 20 U.S.C.A. § 1681(a).

The Save Women's Sports Act, North Greene Code § 22-3-15 provides a series of definitions which state:

"(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."

N.G. Code § 22-3-15(a)(1)–(3).

The Save Women's Sports Act, North Greene Code § 22-3-16 states:

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

"Athletic teas 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."

"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."

N.G. Code § 22-3-16(a)–(c).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The State of North Greene legislature introduced the Save Women's Sports Act (the "Act") "to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." R. at 3. To achieve this goal, the Act classifies students by biological sex—their reproductive biology and genetics at birth—rather than gender identity. *Id.* at 4; N.G. Code § 22-3-15(a)(1**).** The Act requires that public school sports and athletics teams be designated for biological males, for biological females, or coed or mixed. R. at 4; N.G. Code § 22-3-16(a). Accordingly, sports designated for biological 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. at 4; N.G. Code § 22-3-16(b). The Act was signed into law and codified as North Greene Code § 22-3-4 et seq. R. at 3; Clarifications ¶ 18.

A.J.T. is a transgender girl diagnosed with gender dysphoria. R. at 3. Though she was assigned a male sex at birth, A.J.T. expresses her gender identity by "using a name commonly associated with girls" and "living as a girl in both public and private." *Id.* At the initiation of this lawsuit, A.J.T. was eleven years old and had not begun puberty or puberty-delaying treatment. *Id.* No physiological or treatment changes have been noted since. *Id.* Approaching her seventh-grade year, A.J.T. intended to participate in her school's girls' volleyball and cross-country teams. *Id.* Because of the Act, however, A.J.T.'s school told her that she could not participate on these biological-female-only teams. *Id.*

II. PROCEDURAL HISTORY

A.J.T. ("Petitioner"), by and through her mother, sought a declaratory judgment that the Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment along with an injunction preventing the enforcement of the law against her. R. at 4–5. Petitioner initially named

the State of North Greene Board of Education and State Superintendent Floyd Lawson as defendants. *Id*. at 4. After the State of North Greene successfully moved to intervene, Petitioner amended her complaint to name the State of North Greene and Attorney General Barney Fife as additional defendants. *Id*. at 4–5. The government defendants ("Respondents" or collectively the "State") opposed Petitioner's motion for a permanent injunction. *Id*. at 5. Respondents also filed a motion for summary judgment on Petitioner's claims, which was granted by the District Court. *Id*. Petitioner appealed. *Id*. The Fourteenth Circuit affirmed the District Court's judgment in favor of Respondents. *Id*. at 3. Petitioner subsequently appealed that decision, and this Court granted certiorari. *Id*. at 17.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decision because it correctly held that the Act complies with Title IX. Title IX states that "[n]o 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." 20 U.S.C. § 1681(a). Title IX claims are limited, with the statute granting only an implied private right of action. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998). Petitioner cannot show that any alleged discrimination by Respondents caused her harm. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). Petitioner is not illegally discriminated against by the Act, because she is not similarly situated to her peers. To the extent she is excluded from certain activities, this complies with statutory carve-outs. *See* 34 C.F.R. § 106.41(b). Even still, none of the propagators of the Act, the Respondents, receive federal financial assistance such that the force of Title IX applies here. Petitioner has experienced no cognizable harm from the Act, with many athletic opportunities still available to her. Any action to override the legitimate purpose of the Act by enjoining the Act would damage the will of the people of North Greene and their representatives. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Because there is no genuine dispute of material fact, Respondents are entitled to summary judgment as a matter of law on Petitioner's Title IX claim.

The Act also complies with the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. Even so, States may enact statutes that classify individuals differently so long as those statutes withstand the requisite level of judicial scrutiny. *See Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 271 (1979). Here, as stated

in the Act, the Act classifies on the basis of sex—not gender or any other classification type. When a statute classifies on the basis of sex it is reviewed under intermediate scrutiny. *See Reed v. Reed* 404 U.S. 71, 75–77 (1971). To survive intermediate scrutiny, a sex classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Here, the Act is substantially related to achievement of the important governmental objectives of providing fair and safe athletic opportunities to female students. For these reasons the Act passes intermediate scrutiny, and the lower court was correct in finding the Act to be constitutional. Therefore, because there is no genuine dispute of material fact, Respondents are entitled to summary judgment on Petitioner's Equal Protection claim.

ARGUMENT

This case arrives on appeal from a summary judgment ruling for Respondents. R. at 5. Summary judgment is appropriate where there "is no genuine issue as to any material fact" and the moving party is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court is "required to view the facts and all justifiable inferences arising there from in the light most favorable to the nonmoving party." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 312 (4th Cir. 2013). The grant or denial of summary judgment is reviewed de novo. *B&G Enters., Ltd. v. United States*, 220 F.3d 1318, 1322 (11th Cir. 2000); *Thornton v. E.I. Du Pont de Numours & Co.*, 22 F.3d 284, 288 (11th Cir. 1994). A moving party is entitled to a judgment as a matter of law where "the nonmoving party has failed to make a sufficient showing on an essential element of [their] case with respect to which [the party] has the burden of proof." *Celotex Corp.*, 477 U.S. at 323. Courts caution against "an injunction against the enforcement of a presumptively valid state statute." *Brown v. Gilmore*, 533 U.S. 1301, 1301 (2001). Rather, "injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

Although Title IX and Equal Protection claims are similar, they are "not . . . wholly congruent." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009). So while the overarching facts regarding each of the claims here are the same, the legal analysis varies. Because there is still no genuine dispute of material fact, even when viewing the facts in the light most favorable to the Petitioner, and Petitioner has failed to establish essential elements of her case, summary judgment in favor of the Respondents remains proper. The State of North Greene's Save

Women's Sports Act does not violate Title IX or the Equal Protection Clause of the Fourteenth Amendment.

I. THE ACT COMPLIES WITH TITLE IX.

Title IX was passed as part of the Education Amendments of 1972 and "patterned after" the Civil Rights Act of 1964. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–96 (1979)). Title IX provides that, subject to a few exceptions, "[n]o 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." 20 U.S.C. § 1681(a). The purpose of Title IX is evident from a plain reading of its text, to prohibit sex discrimination in education. *Id.*

Though Title IX does not explicitly grant a private right of action, courts have recognized the implication of a private remedy under Title IX. *Gebser*, 524 U.S. at 281; *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (explaining the Supreme Court "ha[s] consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination"). This private action has "consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals." *Fitzgerald*, 555 U.S. at 247. In a suit brought pursuant to this implied private right, both injunctive relief and damages are available. *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 76 (1992). Title IX has been held to cover organizations that "control[ ] and manage[ ]" direct funding recipients, in addition to the recipients themselves. *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (emphasis removed); *see Williams v. Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007).

For her Title IX claim to succeed, Petitioner must show she was (1) excluded from an educational program on the basis of sex; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that "improper discrimination caused [her] harm." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (holding that school board's policy requiring students to use bathrooms based on their biological sex unlawfully discriminated against student) (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). Petitioner has not and cannot sufficiently show that any of these three elements are satisfied, let alone all three. For this reason, summary judgment in favor of the Respondents remains proper on Petitioner's Title IX claim.

A. Petitioner Is Not Similarly Situated To Her Peers Whose Gender Reflects Their Sex.

Under the first element of a Title IX claim, the Petitioner must show that she was excluded from an educational program on the basis of sex. *Grimm*, 972 F.3d at 616. More precisely, she must show intentional discrimination. *Id.* Under Title IX, "discrimination 'mean[s] treating [an] individual worse than others who are similarly situated.'" *Id.* at 618 (first alteration in original) (emphasis added) (quoting *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 657–58 (2020)). "[A] policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." *Adams by & through Kasper*, 57 F.4th at 812. The fundamental fact is that Petitioner is not "similarly situated" to biological females, and that dissimilarity dooms her claim.

Students who were born female are not similarly situated to their transgender peers who identify as female but are of the male sex. The inherent differences between biological males, even those who express a female gender identity, and biological women are a valid justification for sex-based classifications when they realistically reflect the fact that the sexes are not similarly

situated in certain circumstances. *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) ("[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.") (internal citations omitted); *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women [ ] are enduring."). That is the case here where Petitioner was assigned a male sex at birth and therefore experiences all the physical and biological characteristics of males who identify as male even when her gender is not male. R. at 3. This is especially true considering that Petitioner has socially transitioned but has not yet, if she ever will, perform other measures so that her physiology will reflect her gender identity. *Id*. ("As of the commencement of this lawsuit, [Petitioner] had not begun puberty or puberty-delaying treatment, and the court has not learned of any subsequent change in [Petitioner]'s treatment."). A number of factors in the life of a transgender person render them unlike their peers whose gender matches their sex, both socially and biologically. Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guidelines*, 102 J. Clinical Endocrinology & Metabolism 3869, 3874 (Nov. 2017). Even if Petitioner had taken puberty-delaying treatment or gender-affirming treatment to conform to biological expectations more closely tied to her gender, the outcome of that treatment is uncertain. *Id*. at 3877. Because Petitioner is not similarly situated to her peers, there cannot be discrimination here to satisfy the first element of Title IX.

Petitioner may contend that the Supreme Court's holding in *Bostock* renders this element an immediate victory for Petitioner, but that would be mistaken. In *Bostock*, the court described that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." 590 U.S. at 660. While this is strong

language, it is misguided, as it treats sexual orientation and gender identity as a part of one's sex without any basis other than the assertion itself. *Id*. at 660–61 ("[H]omosexuality and transgender status are inextricably bound up with sex"). Yet the court also acknowledged that each of these is their own distinct concept. *Id*. at 669 ("We agree that homosexuality and transgender status are distinct concepts from sex."). Most relevant is that *Bostock* is a Title VII case, which plainly did not address transgender athletes, so the holding there is not dispositive. *Id*. For this reason, the court in Bostock expressly limited its ruling to Title VII employment cases. *Id.* at 681. Title VII generally prohibits employment discrimination "*because of* such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2, while Title IX generally prohibits education discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Though "[a]n individual employee's sex is not relevant to the selection, evaluation, or compensation of employees," *Bostock*, 590 U.S. at 660 (internal citation omitted), courts and Congress have historically agreed that sex is relevant "in the athletics context," *Cohen v. Brown Univ.*, 101 F.3d 155, 178 (1st Cir. 1996). The text behind the statutes differ too. "Because of" in Title VII implies a broader but-for implication, while "on *the* basis of" in Title IX implies a distinct basis for which exclusion takes place. Compare this to "with sex as *a* basis." Here, one's sex may be connected to their transgender status, but they are not equivalent such that any exclusion of a transgender person must be exclusion on the basis of sex. Though the ends of the statutes are the same, their means are not. Therefore, a Title VII holding like *Bostock* cannot control here.

Petitioner may also argue that by simply showing she has been discriminated against in some relevant sense, no more can be done to save the allegedly discriminatory state policy. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 309 (2023) (Gorsuch, J., concurring) (noting that Title VI, whose language Title IX mirrors, "does not

direct courts to subject these classifications to one degree of scrutiny or another"). This, however, relies on inapplicable precedent on Title VI. Title VI is much broader in scope, referring to "any program or activity receiving Federal financial assistance" in the context of race. 42 U.S.C. § 2000d. Race and sex are obviously different characteristics with their own separate histories of discrimination. To treat these statutes as equivalent despite their different scopes would be inappropriate. Though their means are parallel, their ends are not. Therefore, a Title VI holding like *Students for Fair Admissions* cannot control here.

Title IX also includes express statutory and regulatory carve-outs for differentiating between the sexes that similar statutes lack. *See Adams by & through Kasper*, 57 F.4th at 811; *see also Jackson*, 544 U.S. at 175 ("Title VII . . . is a vastly different statute" than Title IX). In fact, Title IX authorizes sex-separate sports just like the Act, so long as overall athletic opportunities for each sex are equal. 34 C.F.R. § 106.41(b)–(c). More specifically, Title IX authorizes sex-separate sports where selection for such teams is based upon competitive skill or the activity involved is a contact sport. 34 C.F.R. § 106.41(b). The Act reflects this federal language. N.G. Code § 22-3-16(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."). Though Petitioner's school did not provide details, it "categorized the volleyball and cross-country teams as sex-separate sports designated for females, women, or girls where selection is based upon competitive skill or the activity involved is a contact sport" in keeping with this statutory carve-out. Clarifications ¶ 19. Though the meaning of "contact sport" is not clearly defined under any of the relevant statutes, it can be fair to assume that volleyball and cross-country are not contact sports, as no physical contact occurs between participants in the same way as sports such as football or wrestling where physical contact would

be essential. This agrees with common definitions of "contact sport." When a term is undefined, as here, courts give it its ordinary meaning. *United States v. Santos*, 553 U.S. 507, 511 (2008) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). So, the sports at issue are then ones designated for biological females where selection is based on competitive skill such that even if there were discrimination based on sex, it would be allowed under Title IX regulations. This further conforms with common sense, as students born with male physiology have an inherent advantage in many athletic contexts relative to their peers assigned a female sex at birth.

Because Petitioner is not similarly situated to her peers as a transgender girl and the history of Title IX allows the distinctions of the Act, it cannot be said that Petitioner was discriminated on the basis of sex under Title IX. Accordingly, summary judgment for the Respondents is proper based on this second Title IX element.

B. No Respondent Receives Federal Financial Assistance Or Otherwise Directs Federal Financial Assistance.

The less discussed, though no less essential, second element of the Title IX claim requires that Petitioner show that the educational institution at issue was receiving federal financial assistance at the time of the alleged discrimination. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). This financial assistance must be direct to a recipient, because Title IX coverage is not triggered when an entity merely benefits from federal funding. *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641 (1999); *see also Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, 96 F.4th 707, 714–15 (4th Cir. 2024) (holding religious school experiencing federal tax exemptions without direct federal funding was not covered under Title IX). Petitioner names multiple state parties in her suit, including the State of North Greene Board of Education, State Superintendent Floyd Lawson, the State of North Greene, and Attorney General Barney Fife. R. at 3. Yet, Petitioner's school effectively enforced the Act. *Id.*;

Clarifications ¶ 20 ("An administrator at each school is responsible for compliance with the Save Women's Sports Act."). No party disputes that "the school received federal financial assistance at all relevant times and is subject to Title IX." Clarifications ¶ 15. None of the Respondents, however, receive such direct federal funds. Therefore, they cannot be subject to Title IX.

Some courts have held that if an entity that controls an educational program's federal funds, like a school board, unfairly discriminates on the basis of sex, demonstrating that fact would be sufficient for a showing under the second Title IX element. *See, e.g., Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994); *Williams v. Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007). Even when expanding the scope of this element, however, Petitioner's claim must fail because the record is silent on any facts that suggest any single Respondent directs the funding of Petitioner's school sufficient to be subject to Title IX. In the legally analogous case of *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, for instance, defendants did not include the school which enforced a statute related to transgender athletics, but these entities included as defendants oversaw the school and three out of the four received federal financial assistance themselves. 98 F.4th 542, 562–63 (4th Cir. 2024) ("Three defendants named in B.P.J.'s Title IX claim (the State of West Virginia, the State Board of Education, and the County Board) also do not deny they receive federal financial assistance, and we have already concluded the fourth (the Commission) may be sued under Title IX because it controls entities that receive such assistance."). It was because of this financial assistance and the control of it that these defendants were subject to Title IX. *Id*. There are no such facts here. Because the receipt of federal financial assistance to a relevant educational program is essential to a Title IX claim, the lack of any such financial assistance stops Petitioner's claim in its tracks. Accordingly, summary judgment for the Respondents is proper based on this second Title IX element.

C. Petitioner Is Not Harmed By Being Unable To Play On Teams Designated Only For Biological Females.

The third element of the Title IX claim requires that Petitioner show the alleged discrimination caused her harm. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). "[E]motional and dignitary harm . . . is legally cognizable under Title IX." *Id*. at 617. Still, many courts "have routinely rejected the notion that a student suffers irreparable harm by not being permitted to participate in interscholastic athletics" as a means to support injunctive relief. *McGee v. Va. High Sch. League, Inc.*, 801 F. Supp. 2d 526, 531 (W.D. Va. 2011).

Here, no facts point to any legally cognizable harm. Petitioner does not allege, for instance, that she has experienced social stigma or some other social scrutiny from being unable to participate on female sports teams. *See Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) (quoting *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017)) (transgender student alleging that social scrutiny would result from policy requiring student to use single-user, gender neutral facilities). Petitioner has not even suggested some inconvenience or deprivation of joy. No fact of actual harm has been implied, referenced, gestured to, or signaled to in any form available to the court.

In reality, an injunction delaying the enforcement of the Act would harm Petitioner's peers of the female sex. The space reserved for Petitioner in any given sports team will displace another girl, a girl that Title IX is intended to protect from exclusion. As long as Petitioner is on the team, another girl will not be. When biological males displace females "even to the extent of one player . . . the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Clark By & Through Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th Cir. 1989). Allowing biological females to participate on the sports teams at-issue aligns with the clear objective of the Act, "to provide equal athletic opportunities for female athletes and to protect the

physical safety of female athletes when competing." R. at 4. Similarly, "it cannot be ignored that the motivation for the promulgation of [Title IX]" was to increase opportunities for women and girls in athletics. *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993). While Petitioner's concerns are not unfounded, the balance of harms does not favor her where biological females' harms are so obvious and established under the law.

Even with the Act in effect, Petitioner has the choice of participating in sports while expressing her preferred gender identity. Coed sports teams are an option under the Act. N.G. Code § 22-3-16(a). In the same way that many establishments today wisely offer gender neutral or all-gender bathrooms to eliminate the social awkwardness that comes with bathrooms designated based on sex assigned at birth, coed sports offer an opportunity for the barriers of sex to become irrelevant for purposes of participation. *See Grimm*, 972 F.3d at 628 (J. Niemeyer, dissenting) ("Gloucester High School reasonably provided separate restrooms for its male and female students and accommodated transgender students by also providing unisex restrooms that any student could use. The law requires no more of it."). While the underlying policies of Title IX may now be considered too restrictive in light of transgender issues, it is the business of the courts to decide cases and controversies, not to override the motivations of Congress.

While there is hypothetical version of the facts at hand where Petitioner has been or could have been harmed, the material facts today show no such harm to Petitioner. Accordingly, summary judgment for the Respondents is proper based on this third Title IX element.

D. Principles Of Federalism Require A Reading Of Title IX That Does Not Extend To Transgender Status.

It is the business of the courts to decide cases and controversies, not to judge and therefore override the motivations of the legislature. The issue at hand is not the wisdom of North Greene's statutes nor the federal Title IX, regardless of modern conceptions on gender. R. at 5 ("[T]he

resolution of the constitutional and federal statutory questions raised by Plaintiff does not call on this Court to assess the wisdom of the North Greene statutes at issue here or their policy of separating sports by biological sex at birth."). This is, in part, because the federal government is one "of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Principles of federalism support a reading of Title IX that reflects Congress's will, one which does not override state law.

"Title IX was enacted as an exercise of Congress' powers under the Spending Clause." *Jackson*, 544 U.S. at 181 (citing *Davis Next Friend LaShonda D.*, 526 U.S. at 640); *see also Franklin* 503 U.S. at 74. In the interest of federalism, courts "insist on a clear" statement "before interpreting" even "expansive language in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 860 (2014). This would include public education, which is "the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Therefore, if Congress intended for Title IX to break new ground in treating gender identity as protected like sex, that would have to be clear. Congress did not incorporate gender identity within Title IX, let alone in a "clear" or "unambiguous" way. Federalism requires that this court recognize that Title IX means what it has always meant: The law guarantees equal educational opportunities for men and women according to biological sex. Discrimination on the basis of transgender status is a separate issue, one which Title IX does not and was never intended to address. Any interpretation otherwise would interfere with the ability of the State to legislate freely and in accordance with the will of its people.

Notwithstanding the elements of a Title IX discrimination claim, any reading of the Title IX text to expand sex to encompass transgender status while striking down a valid state statute at the summary judgment stage would go beyond limits of this court.

II. THE ACT SATISFIES THE EQUAL PROTECTION CLAUSE.

"All persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *see* U.S. Const. amend. XIV § 1 (providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws."). That said, "[t]here has been a long tradition in this country of separating sexes," *Adams by & through Kasper*, 57 F.4th at 801, and a sex-based classification is constitutional if it satisfies intermediate scrutiny. *See Virginia*, 518 U.S. at 513. Here, Petitioner incorrectly states that the Act is a gender-based classification. Instead, the Act is a sex-based classification that affects biological male students equally. As a result, the Act is subject to intermediate scrutiny in determining whether the sex-based classification was constitutional.

"When considering an equal protection claim, we first determine what level of scrutiny applies; then, we ask whether the law or policy at issue survives such scrutiny." *Grimm*, 972 F.3d at 607; *see also Cleburne*, 473 U.S. at 441. As stated above, intermediate scrutiny applies to sex-based classifications. *See Reed*, 404 U.S. at 75–77. Therefore, to withstand intermediate scrutiny, the Act must be "substantially related to a sufficiently important governmental interest." *Cleburne*, 473 U.S. at 441. The lower court correctly held that the Act's classification of students by their "biological sex" is substantially related to the important governmental interests of providing equal athletic opportunities for females and protecting the physical safety of female athletes when competing. R. at 10. Because of this, the Act satisfies intermediate scrutiny and does not violate the Equal Protection Clause of the Fourteenth Amendment.

A. The Act Classifies Students By Sex, Not Gender.

Petitioner incorrectly contends that the Act discriminates against transgender athletes on its face. Petitioner's claim turns on the false idea that excluding students from sports teams based on "biological sex" is an ends-driven way of barring transgender girls from qualifying as girls for purposes of school sports. It is also Petitioner's contention that the Act distinguishes by gender identity and categorically excludes transgender girls from sports teams. Petitioner's contentions are wrong, and Petitioner's argument fails to draw a line at who can participate on female sports teams. Instead, the lower court correctly explained that the "Act does not facially discriminate based on transgender status." R. at 8. It simply places athletes on sports teams based on their biological sex. *See* N.G. Code § 22-3-16(a) ("Interscholastic, intercollegiate, intramural, or club athletic teams or sports . . . shall be expressly designated . . . based on biological sex at birth[.]"). The lower court's decision bolsters the Act's purpose of constitutionally determining who may participate on female sports teams.

1. The Act is a sex-based classification that affects all biologically male students equally, no matter how they identify.

When determining the proper classification for purposes of equal protection analysis "scouting must begin with the statutory classification itself." *Califano v. Boles*, 443 U.S. 282, 294 (1979). By its own terms, the Act places students on sports teams based on biological sex—that is, "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." N.G. Code § 22-3-15(a)(1). Petitioner contends that transgender girls are similarly situated to biological girls and not biological males, and thus the Act's classification is gender-based rather than sex-based. Not only does Petitioner's contention disregard the statute's language, but it also muddies the already-clear water surrounding sex and

gender.[1] *See* Michael J. Lenzi, *The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 Am. U. L. Rev. 841, 852 (2018) ("Although 'gender' and 'sex' are often used interchangeably, the two terms have distinct meanings."). For instance, the term "sex" refers to "the presence of the female XX or male XY chromosomes in cells, which distinguish the two sexes." Jill Pilgrim et al., *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 Fordham Intell. Prop. Media & Ent. L.J. 495, 497 (2003). In contrast, the term "gender" refers to the "psychosexual individuality resulting in part from the societal manner of rearing (boy versus girl)." *Id.* In sum, "sex" considers what is male and what is female, and "gender" considers what is masculine and what is feminine. *Id.*

Here, the Act classifies students by the "individual's reproductive biology and genetics at birth." N.G. Code § 22-3-16(a)(1). This Court has long considered this form of classification a sex-based one. For instance, in *J.E.B. v. Alabama ex rel. T.B.*, a case involving the prosecution's elimination by peremptory challenge of all males—or individuals biologically unable to bear child—from a jury in a paternity suit, Justice Scalia explained the difference between sex and gender. *See* 511 U.S. 127 (1994) (Scalia, J., dissenting). Scalia stated that the case "does not involve peremptory strikes exercised on the basis of femininity or masculinity" instead "[t]he case

[1] While "sex" and "gender" have at times been used interchangeably in the legal world. The scientific world clearly distinguishes between the two classifications. *See, e.g.*, Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 17 (1995) ("Courts often conflate gender with sex and particularly with sexual orientation, often without acknowledging and sometimes apparently without being aware that they are doing so. They occasionally seem oblivious to the fact that apparently disparate collections of behaviors and characteristics at issue in cases before them actually form a coherent gender package when analyzed together."); *see also* Nancy Krieger, *Genders, sexes, and health: what are the connections—and why does it matter?*, International Journal of Epidemiology, Volume 32, Issue 4, August 2003, Pages 652–657, https://doi.org/10.1093/ije/dyg156 ("Gender, a social construct, and sex, a biological construct, are distinct, not interchangeable, terms; the two nevertheless are often confused.").

involves, therefore, sex discrimination plain and simple." *Id.* at 157 n.1. Further, in *J.E.B.* Scalia explained:

> The word *"gender" has acquired the new and useful connotation of cultural or attitudinal characteristics* (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.

Id. (emphasis added). This Court has also determined that "gender"—while still given the same protections as "sex"—is not interchangeable with "sex" when classifying groups of people. For example, in *Bostock*, where a county employee brought a Title VII action against the county alleging sexual orientation discrimination, this Court explained that despite the employee's contention that the term "sex" "bore a broader scope, capturing more than anatomy. . . [the Court] proceeds on the assumption that *'sex' . . . refer[s] only to biological distinctions between male and female.*" *Bostock*, 590 U.S. at 655 (emphasis added). Along with this Court's explanation that "sex" and "gender" are two different concepts, the Court reasoned that the two concepts are still closely related. *Id.* at 660. For example, "to discriminate on [gender grounds] requires an employer to intentionally treat individual employees differently because of their sex." *Id.* at 660–61. While that statement might apply in *Bostock*, as the employer discriminated based on gender, and therefore on the basis of sex, Petitioner does not make that argument here. Instead, Petitioner claims that the State classified based on "gender"—not that the State's sex-based classification is presumptively a gender-based classification because "sex" and "gender" are so intertwined. That said, even if Petitioner had brought the argument presented in *Bostock*, the converse of that argument is not necessarily true. For example, classifying based on gender forces the classifying party to look at an individual's biological sex because "'transgender' refers to an individual whose gender identity does not match the person's sex at birth." Michael J. Lenzi, *The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 Am.

U. L. Rev. 841, 851 (2018) (citation omitted)). So, inevitably, when classifying based on gender, one must look at that individual's sex at birth along with their current identity to determine the individual's gender status. However, classifying based on biological sex does not force the classifying party to look at an individual's gender. Therefore, even if this Court finds "sex" and "gender" to be closely related, because there was only a sex-based classification, no gender-based classification was triggered.

2. Just because the Act may affect transgender students, does not mean the Act classifies based on gender.

As explained above the Act classifies based on sex—not gender. Yet Petitioner still argues that the Act affects transgender students. Even if true, Petitioner's argument fails. First, Petitioner presents no evidence that the Act affects transgender students more than other similarly situated individuals. Second, even if this evidence were presented, it does not prove the Act classifies based on gender identity. "Most laws classify, and many affect, certain groups unevenly" and "when basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Feeney*, 442 U.S. at 272. Put differently, "the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Id.* Here, the Act does not affect biological males differently from each other, and the fact that there is an impact on biological males identifying as female does not doom the Act. *See Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J. dissenting) ("The Equal Protection Clause . . . prohibits only intentional discrimination; it does not have a disparate-impact component.").

This is similar to *Adams by & through Kasper*, where the Eleventh Circuit rejected an equal protection challenge to a school policy that classified bathrooms based on sex. 57 F.4th at 797. In *Adams*, like here, there was "no evidence suggesting that the School Board enacted the policy because of . . . its adverse effects upon transgender students." *Id.* at 810. There the court found

that the policy did not unconstitutionally discriminate because it was "substantially related" to the school district's important interest in securing its student's privacy and welfare. *Id.* at 811. The court added that the policy at most had a disparate impact upon transgender students which did not rise to the level of a constitutional violation. *Id.* Here, the Act, at most, has a disparate impact on transgender individuals and that is not enough to prove a violation of the equal protection clause. Because of this, the Act is a sex-based classification for the purposes of intermediate scrutiny analysis.

B. The Sex-Based Classification Is Substantially Related To Important Governmental Interests.

"The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification." *Feeney*, 442 U.S. at 271; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). When assessing an equal protection challenge, "a court is called upon only to measure the validity of the legislative classification." *Feeney*, 442 U.S. at 272. Here, the Act classifies based on sex. Statutes that discriminate based on sex, a "quasi-suspect" classification, need to withstand intermediate scrutiny review. *See, e.g.*, *Bostock*, 590 U.S. at 655; *Virginia*, 518 U.S. at 531–533; *J.E.B.*, 511 U.S. at 136–137; *Craig*, 429 U.S. at 197–199. To survive intermediate scrutiny, a sex classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197. The Act's sex-based classification is substantially related to the important governmental interests of providing and maintaining fairness and safety throughout athletic competitions for biologically female students.

1. The State has an important interest in providing fair and safe athletic opportunities for biologically female students.

The goal of the Act is to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing. R. at 3–4. Petitioner does not

contest that the State's interest in providing these equal athletic opportunities to females is an important one. R. at 9. Instead, Petitioner explains that transgender girls can "take puberty blockers" or partake in "other hormone therapies to mitigate an athletic advantage over biological females." R. at 10. This proposal justifies the interests of "fairness in competition" and "safety of athletes." It is also direct evidence that Petitioner believes biological males and biological females—regardless of their gender identity—have physiological characteristics that lead to differences in athletic performance and fairness in sports.

Not only has Petitioner impliedly conceded that safety and fairness in sports is an important governmental interest, but this Court has found the safety of minors to be an important governmental interest. For example, the Court has found it "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). More broadly, states have been afforded the authority to protect and promote the health, welfare, and safety of their citizens under the principles reflected in the Tenth Amendment. *See* U.S. Const. amend. X. Lastly, the Ninth Circuit explained that "[t]here is no question" that "promoting equality of athletic opportunity between the sexes" is "a legitimate and important governmental interest" justifying rules excluding males from female sports. *Clark*, 695 F.2d at 1131 (9th Cir. 1982). The Act excludes males from female sports to promote sex equality, protect fair opportunities for female athletes, and protect the safety of female athletes—satisfying the first half of the intermediate scrutiny test.

2. The exclusion of biological males from female sports is substantially related to fair and safe athletic opportunities for biologically female students.

As discussed above, the Act seeks to promote the important governmental interests of fair and safe opportunities in female sports. The only question that remains, then, is whether the

exclusion of biological males from female sports is substantially related to this interest. Phrased differently, "[t]he question really asks whether any real differences exist between boys and girls which justify the exclusion." *Id.* at 1131. The answer is yes. When applying heightened scrutiny, this Court "must accord substantial deference to the predictive judgments" of legislative bodies. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994). In doing so, the legislature concluded that the Act would have societal effects of protecting female athletes in competition. Along those same lines, using common sense alone would allow this Court to understand the physical advantages biological males have over biological females. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). That said, if common sense is not enough, the data establishes these advantages. For instance, the Eleventh Circuit explained that "in comparison to biological females, biological males have: greater lean body mass, . . . higher cardiac outputs; larger hemoglobin mass; larger maximal oxygen consumption (VO2 max), . . . greater glycogen utilization; higher anaerobic capacity; and different economy of motion." *Adams by & through Kasper*, 57 F.4th at 819–20 (Lagoa, J., specially concurring) (quotations omitted). Further, "[a]mong adults, men are on average 10% bigger than women" and "[t]he average man has longer arms, bigger and stronger legs, and more muscle fiber than the average woman." Scott Skinner-Thompson, Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 Wis. J.L. Gender & Soc'y 271, 286 (2013) (citations omitted). Although the physical differences are less significant before puberty, once students enter junior high and high school the disparities become more pronounced. *Id.* at 287; *see, e.g.*, Michael J. Lenzi, *The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 Am. U. L. Rev.

841, 853 (2018) ("For example, the 2017 Maryland High School Class 4A Track and Field Championship highlights the extent of these sex-based distinctions. In the 100-meter dash, the three fastest girls ran an average time of 12.22 seconds, while the three fastest boys ran an average time of 10.88 seconds.").

Here, Petitioner contends that cross country and volleyball are not the type of contact sports that can often result in injuries to participants, nor would biological males create unfairness in these respective sports, and so the disparity between males and females is not substantially related to the interest of promoting fairness and safety. This contention fails to consider the Ninth Circuit's finding in *Clark* that "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Clark*, 695 U.S. at 1131. Petitioner's contention also disregards the fact that the size and strength of competitors influence the speed and force with which runners run or volleyball players hit the ball—inevitably increasing the danger to competitors as speed and force increase. These very real physical differences between men and women increase safety risks and decrease fairness in sports. Therefore, the Act's classification based on biological sex is substantially related to the State's interest in protecting the safety of female athletes.

3. The choices and circumstances of some transgender females do not invalidate the Act's classification.

Petitioner contends that excluding transgender girls from the definition of "girl" is unconstitutional because transgender girls can take puberty blockers or other hormone therapies to "even the playing field." Puberty blockers, hormone therapies, or other treatments might negate the physical advantage inherently present in biological men at times. Even so, a potential disconnect in a few cases between the Act's purposes and application would not be reason to strike it down. This is because none of this Court's sex-based classification equal protection cases have

required that the statute be able to achieve its ultimate objective in every instance. *See Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 70 (2001). The relevant inquiry is not whether the Act's purpose is fulfilled in every instance, but "whether the line chosen . . . is within constitutional limitations." *Michael M.*, 450 U.S. at 473. Here, the line chosen—separating biological males and females—is within constitutional limits. Petitioner's claim that transgender females can take measures to be physically similarly situated with biological males does not nullify the line drawn between biological males and females. Instead, the suggestion to make subclasses such as "transgender females who take puberty blockers" or "transgender females who participate in hormone therapy" creates too much variety to be constitutionally workable. In sum, the Act constitutionally draws the line for what individuals can participate in female sports and Petitioner merely disagrees with that line.

Further, because sex is a "quasi-suspect" class, intermediate scrutiny applies, not strict scrutiny. Therefore, the Act need not be "narrowly tailored to further compelling governmental interests" *Grutter v. Bollinger*, 539 US. 306, 326 (2003), it must only be "substantially related to an important governmental interests." The Act's sex-based classification is substantially related to the important governmental interests of providing fair and safe athletic opportunities to females, so certain circumstances that might arise surrounding physical treatments of individuals do not render the Act unconstitutional.

CONCLUSION

The Act's purpose is to ensure safety and fairness in female sports. Because of this, Petitioner's claims fail. First, the Act does not violate Title IX because it does not discriminate against Petitioner as she is not similarly situated to her peers. Second, the Act does not violate the Equal Protection Clause of the Fourteenth Amendment because the Act is a sex-based classification that is substantially related to important governmental interests.

For these reasons, we respectfully request that this Court affirm the decision of the Fourteenth Court of Appeals.

Respectfully submitted,

/s/ Team 20

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