No. 24-2020

IN THE SUPREME COURT OF THE UNITED STATES

_____

A.J.T.,

Petitioner,

v.

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

Respondent

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

_____

BRIEF FOR THE RESPONDENT

Team 21

QUESTIONS PRESENTED

1. Whether Title IX prohibits a state from having sex-separate sports that limit participation based on the biological sex of the athlete at birth?
2. Whether the offering of separate girls' and boys' sports teams comports with the Equal Protection Clause of the Fourteenth Amendment when it distinguishes between biological sex determined at birth to protect female student athlete's physical safety and equal athletic opportunity?

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The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at *A.J.T. v. North Greene Bd. of Educ*., 2024 WL 98765 (14th Cir. 2024) and reprinted in the Record on Appeal ("R") at 2-12. The District Court's order has not yet been published 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

The Fourteenth Amendment to the United States 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 to any person within its jurisdiction the equal protection of the laws."

N.G. Code § 22-3-4 is entitled:

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

N.G. Code § 22-3-15(a)(1)-(3) defines:

(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 § 22-3-16(a) states:

"Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education," "shall be

expressly designated as one of the following based on biological sex at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed."

N.G. Code § 22-3-16(b) states:

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

N.G. Code § 22-3-16(c) states:

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

20 U.S.C. § 1681(a) states:

"No person… shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

I. Statement of Facts

The Statute. The State of North Greene ("Respondent") enacted North Greene Code § 22-3-4 ("the Act") in response to the State of North Greene Board of Education's growing concern regarding equal athletic opportunities and the physical safety of female athletes competing in competitive and contact sports. R. at 3. The Act categorized biological sex as the designating factor for team sports. The legislature defined "biological sex" as "an individual's physical form as a male or female based solely on the individual's reproductive biology and

genetics at birth." *Id*. at 4. The Act clarifies that differences between the biological sexes are "cause for celebration." *Id*. at 3. It stipulates that athletic teams that are designated for females, women, or girls and are based on competitive skill or contact activity are not open to students of the male sex. *Id*. at 4.

North Greene Governor Howard Sprague signed the "Save Women's Sports Act" into law on May 1, 2023 after its introduction in the North Greene Senate and approval from both Houses of the North Greene legislature.

The Legislative Intent. The Act recognizes that "there are inherent differences between biological males and females." *Id*. at 3. The Act's objective is to protect female student athlete's equal athletic opportunities and physical safety. It further defines "biological sex," "female," and "male" in order to designate "interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education" based on the student's biological sex at birth. *Id*. at 4. The Act also clarifies that its definition of biological sex, not gender identity, relates to its goal of protecting female athletes.

The Student. Petitioner, A.J.T., is a transgender girl who, at the time of the suit, was entering seventh grade and wishes to play on the girls' volleyball and cross-country teams. *Id*. at 3. Even though Petitioner's biological sex is male, and there is no evidence that she has begun puberty or puberty-delaying treatment, Petitioner argues that she should compete with and against biological females.

Petitioner was assigned the sex of male at birth but identified as a girl from an early age. *Id*. Petitioner still dressed as a boy at school in the third grade but lived as a girl at home. *Id*. Petitioner was diagnosed with gender dysphoria in 2022 and has since gone to counseling to

discuss puberty-delaying treatments. *Id*. Even though Petitioner has discussed the possibility of beginning treatment, she has not begun any treatment to "prevent endogenous puberty and therefore any physiological changes caused by increased testosterone circulation." *Id*.

The definitions in the "Save Women's Sports Act" designate teams based on biological sex at birth. *Id*. at 4. Although Petitioner cannot fulfill her initial wish of joining the girls' volleyball and cross-country teams since the codification of the Act, it does allow her to join the boys' sports teams since it accords with her biological sex.

II. Procedural history

A.J.T., by and through the child's mother, brought suit against 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. A.J.T. sought a declaratory judgment of North Greene Code § 22-3-4 and an injunction preventing Defendants from enforcing the law against Plaintiff. R. at 5. Defendants opposed Plaintiff's motion for a permanent injunction and filed a motion for summary judgment, which the United States District Court for the Eastern District of North Greene granted. The Fourteenth Circuit Court of Appeals affirmed. *Id*.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decision because it correctly found that Title IX and the Equal Protection Clause does not prevent a state from designating and offering separate girls' and boys' sports teams based on biological sex determined at birth.

The Act does not violate Title IX. Title IX prevents discrimination in education "on the basis of sex." 20 U.S.C. § 1681(a). North Greene's "Save Women's Sports Act" discriminates based on gender identity, not sex. Because Title IX does not protect gender identity and because transgender girls are similarly situated to biological boys, the statue does not violate Title IX.

Second, the Act does not improperly discriminate because it does not treat an individual worse than others who are similarly situated. There is a difference between gender identity and biological sex, and the Act accordingly finds biological males to be similarly situated to transgender females. Since the Act does not exclude transgender girls from competing in school sports, this Court should find that the Act treats Plaintiff the same as similarly situated biological males.

Finally, the facts in *Bostock* and *Grimm* are materially different and non-binding on this Court. The decisions plainly ignore the plain language of Title IX by stating that sex is defined as gender identity. These are two distinct terms that should be treated separately.

The Act is constitutional under the Equal Protection Clause. For a law to be scrutinized under the Equal Protection Clause, the party opposing the law must show that it does not treat people who are similarly situated alike. Biological females, however, are not similarly situated to transgender girls. A person's gender identity is separate from their biological sex and should not be used to argue that students that identify as girls should be allowed to be placed on girls' sports teams.

Additionally, placing athletes on sports teams based on their biological sex does not facially discriminate against transgender females. The Act does not treat transgender athletes

differently from cisgender athletes. Since the Act applies to all students who wish to play sports, it cannot be facially discriminatory.

Moreover, even if this Court does find that transgender girl are similarly situated to biological females, and that the Act facially treats the similarly situated athletes differently, this Act is still constitutional because it survives heightened scrutiny. Just because the Act prevents transgender girls and biological men from playing on biological girls' sports teams does not mean that the Act is invalid. This classification is substantially related to the important government interest in ensuring equal athletic opportunities and protecting the physical safety of female athletes.

For these reasons, this Court should hold that North Greene's statute does not violate Title IX or the Equal Protection Clause.

ARGUMENT

Standard of Review. This Court reviews legal questions of law using the de novo standard. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment issues are 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).

I. The State of North Greene's "Save Women's Sports Act" designation of girls' and boys' sports teams based on biological sex complies with Title IX.

This Court should affirm the Fourteenth Circuit's decision because North Greene's "Save Women's Sports Act" (the "Act") complies with Title IX. Title IX provides that "no person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To succeed on a Title IX claim, a plaintiff must prove that 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 at 616 (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). Parties stipulate that the educational institution receives federal funding and is subject to the regulations of Title IX.

This Court should find North Greene's statute does not violate Title IX for three reasons. First, the Act does not discriminate on the basis of sex because gender identity is not sex. Second, the Act does not improperly discriminate because it does not treat an individual worse than others who are similarly situated. Finally, the facts in *Bostock* and *Grimm* are materially different and non-binding on this Court.

A. Gender Identity is not protected by Title IX.

The Save Women's Sports Act does not violate Title IX because sex, not "gender identity" is protected by Title IX. Title IX provides that "no persons . . . shall, *on the basis of sex*, be excluded . . . denied . . . subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a) (emphasis added). Plaintiff can only succeed on a Title IX claim if any alleged discrimination is based on sex. Because the alleged discrimination is based on gender identity, it fails.

Statutory interpretation starts and ends with the statute's text if it is unambiguous. *Bedrock Ltd. v. United States*, 541 U.S. 176, 183 (2004). In the case of Title IX, "sex" unambiguously refers to "biological sex." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818 (11th Cir. 2022) (Lagoa, specially concurring) ("a definition of sex beyond biological sex would . . . cut against the vast weight of drafting-era dictionary definitions)

(internal citation omitted); *See also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F. 3d 586, 632(4th Cir. 2020) (Niemeyer, J., dissenting) ("virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females"). This position is further supported by subsequent federal regulations.

Following the passage of Title IX, Congress passed the Javits Amendments, which directed the Health, Education, and Welfare department (now named Department of Education) to make "reasonable provisions considering the nature of particular sports." PUB. L. NO. 93-380, § 844, 88 STAT. 484, 612 (1974). This resulted in Congress explicitly authorizing sex-specific segregated teams "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). Thereby Congress created a carve out against Title IX's anti-sex discrimination goals in order to protect and promote biological female sports. *Adams*, 57 F. 4th at 811; *see also Cohen v. Brown Univ.*, 101 F. 3d 155, 188 (1st Cir. 1996) ("What stimulated [the] remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports").

Title IX can only be understood to mean biological sex for practical reasons. States cannot coherently classify sports teams based on subjective metrics because it would require schools to engage in the very type of sex discrimination Title IX sought to abolish. Without the objective metric of biological sex, states would be forced to classify sports teams based on whoever "walks more femininely, talk[s] more femininely, dress[es] more femininely, wear[s] make-up, ha[s] her hair styled, and wear[s] jewelry." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality op.), superseded by statute on other grounds 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Further, poor-performing males would be incentivized to participate in girls' sports to

obtain scholarships. Title IX and North Greene's definition of "sex" protects women from this discrimination. *See McCormick ex. rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F. 3d 275, 286 (2nd Cir. 2004) ("Title IX was enacted in response to evidence of pervasive discrimination against women with respect to education opportunities").

North Greene's passage of the Act aligns with the principles, purposes, and application of Title IX. The Act includes a statutory definition of "sex" defining it as an individual's physical form based on reproductive biology and genetics at birth. N.G. CODE § 22-3-15(a)(1)-(3). Aligning with Title IX, the statute's definition of "biological sex" does not include gender identity. Both Title IX and the Act definition of "sex" refers to biological women. Therefore, it is impossible to allege discrimination on the basis of sex because gender identity does not equate to sex.In an attempt to rebut Title IX's definition of sex, Plaintiff cite to sex discrimination employment suit under Title VII. *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644 (2020).

Bostock's understanding of Title VII does not prohibit biological sex-specific sports under Title IX because the textual differences between the statutes render Bostock's holding irrelevant in the context of Title IX. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005) (acknowledging Title IX and Title VI are vastly different statutes). Title VII concerns hiring and firing in the workplace while Title IX involves education. Importantly, Title IX explicitly allows and at times requires separation based on sex. *See Meriwether v. Hartop*, 992 F. 3d at 510 n. 4 (6th Cir. 2021) (cautioning courts against taking "principles announced in the Title VII context [and] automatically apply[ing] [them] in the Title IX context"). Further, the parties in *Bostock* stipulated that "sex" referred to biological sex. *Bostock,* 590 U.S. at 644. Unlike the workplace, sports depend on sex-specific opportunities to account for physiological differences to provide

fairness and safety to female athletes. Bostock even acknowledges the limits of its holding in stating it did not intend to "sweep beyond Title VII to other federal and state laws." *Id.* at 681.

Plaintiff fails to carry their burden of proof to show gender identity is included in the definition of sex. The standard of proof in a summary judgment motion is that the moving party must show that there is no genuine issue of material fact, and that they are entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). This means, based on the evidence presented, no reasonable jury could find in favor of the non-moving party on any essential of the case. *Id*. "Although the burden of demonstrating the absence of any genuine issue of material fact rests on the movant, a nonmovant may not rest upon mere denials or allegations, but must instead set forth specific facts sufficient to raise issue for trial". *Rohr v. Reliance Bank*, 826 F. 3d 1046, 1052 (8th Cir. 2016) (quoting *Wingate v. Gage Cty. Sch. Dist.*, No. 34, 528 F. 3d 1074, 1078-79 (8th Cir. 2008)).

Here, Defendants present evidence to show no genuine dispute of material fact regarding the definition of sex in the context of Title IX. R. at 11. Plaintiff failed to present any evidence that the definition of sex under Title IX included gender identity. Instead, Plaintiff upon mere allegation to support their position. Because Plaintiff fails to present competent evidence to dispute the definition of sex, their argument fails as a matter of law.

Title IX prohibits discrimination solely on the basis of sex, which is defined as biological sex, not gender identity. The Act discriminates based on gender identity, not sex. Therefore, the first prong of a Title IX violation cannot be satisfied.

B. The Act does not improperly discriminate because transgender girls are not similarly situated to biological girls.

The Act does not violate Title IX because transgender girls are not similarly situated to biological girls. To succeed on a Title IX claim, a plaintiff must show that "improper discrimination caused [her] harm." *Grimm*, 972 F. 3d at 616. "In the Title IX context, discrimination 'mean[s] treating [an] individual worse than others who are similarly situated.'" *Id.* at 618 (quoting *Bostock*, 590 U.S. at 657-58). Once a Title IX plaintiff shows she has been discriminated against in the relevant sense and suffered harm, now showing of a substantial relationship to an important government interest can save an institution's discriminatory 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"). Plaintiffs argue that the stigma of being unable to participate on a team with one's peers constitutes "emotion[al] and dignitary harm . . . [that] is legally cognizable under Title IX. *Grimm*, 972, F. 3d at 617-18. Defendants agree but assert this harm is not based on sex.

The Act's prohibition on biological boys from competing on girls' sports teams does not treat transgender girls differently from similarly situated individuals. Plaintiff can only show worse treatment based on gender identity. As stated, gender identity is not the same as sex. Therefore, the Act only violates Title IX if it treats transgender girls differently than biological boys. Because the Act treats transgender girls the same as biological boys, it complies with Title IX.

Plaintiff cites exclusion from competing in school sports as the "worse treatment." Contrary to this assertion, the Act does not exclude transgender girls from competing in school

sports. A transgender girl may still try-out or compete on a biological boys' sports team. *See* N.G. Code § 22-3-15 While this does not guarantee participation, it treats Plaintiff the same as similarly situated biological males who may lack athletic skill, size, or speed to compete on the biological boys' teams. Title IX does not guarantee participation; it only prohibits exclusion based on sex. Plaintiff relies on *Grimm* to support its position that transgender girls are similarly situated to biological girls.

Grimm is distinguishable from the present case and wrongly held that "sex" under Title IX is defined as "gender identity." *Grimm*, 972 F. 3d 586. In *Grimm*, a school district implemented a restroom policy that prohibited transgender students from using the restroom corresponding with their gender identity. *Id.* at 600. The Court found the policy of forcing the student to use a separate single-stall restroom violated Title IX. *Id.* at 618. The Court based its decision on the notion that the school board's definition of "sex" as biological gender was a "discriminatory notion" and an "invented classification" by the Board. *Id.* This *Grimm* majority ignores the plain language of Title IX and is non-binding on this Court.

Title IX permits restrooms to be separated by sex, but the *Grimm* majority maneuvered to reach a different result, concluding that Title IX requires "sex" be defined as "gender identity." As a result, compliance with Title IX required restrooms be separated based on gender identity. *See B.P.J. by Jackson v. West Virginia State Bd. of Educ.*, 98 F. 4th 542, 579 (4th Cir. 2024) (Agee, J., concurring in part). The *Grimm* holding contradicts drafting-era definitions, plain language, and reason. *See* 20 U.S.C. § 1686 ("Notwithstanding anything to the contrary contained in this chapter, *nothing contained herein shall be construed to prohibit an education institution* . . . from maintaining separate living facilities for the different sexes . . . including toilet, locker

room, and shower facilities") (emphasis added). The *Grimm* Court made an erroneous decision that is non-binding and should not be followed by this Court.

Plaintiff's last argument to prove the Act is discriminatory is it forbids transgender girls, but not transgender boys, from participating on teams consistent with their gender identity. This argument also fails. Title IX permits sex-separated sports based on considerations of competitive advantage and safety. *See* 34 C.F.R. § 106.41(b). Allowing transgender boys to participate in athletic events with biological boys does not present the same concerns about athletic opportunity and safety. *McCormick,* 370 F. 3d 275, 295 (acknowledging that sex-specific sports give females "the chance to be champions"). The Act addresses these concerns using the same language as Title IX. Plaintiff is, in effect, suggesting that Title IX would violate itself.

The Act does not improperly discriminate because transgender girls are similarly situated to biological boys, not biological girls. Because the Act does not improperly discriminate, Plaintiff fails to meet the "improper discrimination" prong required to succeed on a Title IX violation.

To succeed on a claim for a Title IX violation a plaintiff must prove they were discriminated against on the basis of sex and that discrimination was improper. The Act does not discriminate based on sex, but rather on gender identity. Because sex is defined by biological sex, the Act does not violate Title IX. For similar reasons, the Act does not violate the Equal Protection Clause. This Court should find that the Act does not violate Title IX.

II. The State of North Greene's "Save Women's Sports Act" Accords with the Equal Protection Clause.

The Fourteenth Amendment prohibits states from "denying to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1, cl. 4. This Court has "consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed*, 404 U.S. 71, 75 (1971). The Equal Protection clause allows for the states to create different classes of persons for legislative purposes as long as the classifications do not place persons into "different classes on the basis of criteria wholly unrelated to the objective of that statute." *Id.* at 75-76.

Here, the State passed North Greene Code § 22-3-4 which determines what team students in sports events can participate in based on the biological sex of the athlete at birth. R. at 3. This Court should find North Greene's statute does not violate the Equal Protection Clause for three reasons. First, transgender girls are not similarly situated to biological girls, and so the Equal Protection Clause is inapplicable. Second, the Act does not discriminate against transgender athletes on its face. Third, even if this Court finds that the Act does facially treat similarly situated individuals differently than Plaintiff, the Act survives heightened scrutiny.

A. Barring transgender girls from competing while allowing cisgender girls to compete does not violate the Equal Protection Clause because transgender girls are not similarly situated to biological girls.

This Court has historically recognized that "the Equal Protection Clause does not forbid classifications" and that it instead "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Equal Protection Clause is only applicable when finding that "all persons *similarly*

situated be treated alike." *City of Cleburne, Tex., v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added).

Despite Petitioner's argument that transgender females are similarly situated to biological females, this Court has previously held that "the truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both." *Ballard v. United States*, 329 U.S. 187, 193 (1946). Based on this Court's reasoning, transgender girls and biological females cannot be similarly situated because there are inherent differences between the biological sexes. Therefore, the Equal Protection Clause does not apply to Petitioner's claim.

1. The Act does not raise an Equal Protection Claim because participation is based on biological sex, which is separate and distinct from gender identity.

To begin an Equal Protection analysis, Petitioner must demonstrate that transgender girls receive disparate treatment as a result of the Act. However, this Court requires that Equal Protection claims concern "persons similarly circumstanced." *F.S. Royster Guana Co. v. Virginia*, 253 U.S. 412, 415 (1920).

An Equal Protection claim is not triggered because the Act classifies sports teams by the student's sex at birth. To do this, "similarly situated" students, like biological females, are placed on a team together. When examining the physical characteristics of the genders, biological females are unequivocally not "similarly situated" to transgender girls who identify as female. The statute explicitly states that "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." N.G. CODE § 22-3-16(c).

Biology is the most relevant factor in determining whether students are "similarly situated" to each other and can safely and fairly play on the same teams. Biological sex determines an athlete's physical characteristics and competitive advantage. This Court has ruled that "to fail to acknowledge even our most basic biological differences… risks making the guarantee of equal protection superficial, and so disarming it." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001). Alternatively, gender identity does not change a person's biology or physical characteristics. R. at 8. Gender identity is irrelevant to the state's objective of competitive advantage and physical safety and should not be used to place students into sports teams. If female sports teams are created based on gender identity, biological females will not be protected under the Fourteenth Amendment because physical differences between the sexes will be ignored.

This Court has recognized that, in many scenarios, sex-specific distinctions are necessary. In *Nguyen*, sex distinctions were proper because "the differences between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender." *Tuan Anh Nguyen*, 533 U.S. at 73. This decision came in response to a challenged statute for a child's acquisition of citizenship that placed requirements on whether the mother or the father was the citizen parent.

Here, as the Circuit Court explained, "Plaintiff asserts that Plaintiff- a biological boy- is nonetheless similarly situated to biological girls. In doing so, Plaintiff essentially makes gender identity the only relevant factor when determining the individuals with whom Plaintiff is similarly situated. This is plainly incorrect." R. at 7-8. Biologically, males are inherently different from females. After biological males undergo puberty, they have "physiological advantages over biological females that significantly impact athletic performance." R. at 7. Further, the

Defendants' expert opined that "often biological boys have a competitive advantage over biological girls even before puberty." *Id.* The dissent in *B.P.J.* concludes that the person most alike to a transgender girl's biological sex is a biological boy. *B.P.J.*, 98 F. 4th at 567. It is imperative that biological sex, not gender identity, should be taken into account when determining whether Petitioner and biological girls are similarly situated.

Consequently, Petitioner cannot prove that biological females are substantially similar to transgender girls because there are characteristic differences between the sexes. Since the statute makes clear that transgender girls are not "in all relevant respects alike" to biological females, there should be no analysis of the Act under the Equal Protection Clause. *Nordlinger*, 505 U.S. at 10.

B. The Act does not discriminate against transgender athletes on its face.

For the Court to find the Act facially unconstitutional, "no set of circumstances exists under which the statute would be valid." *Fla. Dep't of Rev. v. Cty. Of Gainesville*, 918 U.S. 250, 256. A statute can only violate equal protection on its face if the plaintiff proves that it "expressly distinguish[es] between individuals on [protected] grounds." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). This Court has ruled that facial challenges are disfavored because the claims "often rest on speculation" because the statute is prematurely interpreted with factually scant records. *Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 450 (2008). Facial claims also "run contrary to the fundamental principle of judicial restraint" by anticipating a constitutional law question before deciding on it and broadening a constitutional law rule beyond the "precise facts to which it is to be applied." *Id.* Facial challenges also threaten the democratic because it squashes the intent of the elected representatives of the people. *Id.* at 451. Facial challenges are

"the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid*." United States v. Salerno*, 481 U.S. 739, 745 (1987) (holding that a statue was constitutional on its face because it was based on the compelling interest of concern for the people's safety and the opposing party's argument about future dangerousness did not prove the statute facially unconstitutional).

The Act does not facially discriminate because Petitioner has not proven that it burdens students based on their transgender status. As stated by the Circuit Court, "although the Act explicitly treats biological boys and biological girls differently, it does not expressly treat transgender individuals differently." R. at 8. The Act does not single out or mention a ban on transgender girls from being able to play on a sports team. It does not forbid the "safeguards that others enjoy or may seek without constraint." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Designating athletic programs as for "males," "females," and "coed" does not exclude a transgender student from participating. N.G. CODE § 22-3-16(a). Instead, it solely identifies which team the student can play on. The plain language of the Act invites all students to participate on sports teams, as long as they do so in accordance with their biological sex. Unlike *Romer v. Evans*, where a statute attempted to "repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination," the objective of the Act is to protect female athlete's physical safety and competitive fairness. *Romer v. Evans*, 517 U.S. 620, 629 (1996). Petitioner has offered no evidentiary basis to conclude the scientific fact that "gender identity is separate and distinct from biological sex" treats transgender individuals differently. N.G. CODE § 22-3-16(a).

The Act survives a facial challenge because its application to transgender girls is valid. Petitioner's fear that the Act categorically excludes transgender girls from teams and school

sports altogether is a "mere possibility" that cannot incite a facial challenge to the statute. *Wa. State Grange*, 552 U.S. at 455 (finding that a statute cannot be struck down on its face because of the mere possibility of voter confusion). Just because it is possible that the effect of the statute might exclude transgender girls from sports is not a sufficient basis to find a statute unconstitutional. Without concrete evidence, there is no reason to conclude that the Act, on its face, burdens and categorically excludes transgender girls from sports teams.

C. Even if this Court finds that the Act does facially treat similarly situated individuals differently than Plaintiff, the Act should still stand in effect because it survives heightened scrutiny.

Moreover, even if this Court finds that the Act does facially treat similarly situated individuals differently than Plaintiff, the Act still complies with the Equal Protection Clause because it survives heightened scrutiny. Ensuring equal protection opportunities for females is a sufficiently important government interest and the separation of sports by sex is substantially related to that interest.

The Supreme Court did not apply a heightened review to a gender classification until 1976 with *Craig v. Boren*. In it, the Court held that an Oklahoma statute that established different drinking ages for the sexes violated the Equal Protection Clause. *Craig v. Boren*, 429 U.S. 190 (1976) (holding that the statute created unconstitutional gender classifications because there was not a substantial relationship between the age-sex differentials in the law and its purported purpose of maintaining traffic safety). Since the *Craig* ruling, "intermediate scrutiny applies to laws that discriminate on the basis of a quasi-suspect classification, like sex." *United States v. Virginia*, 518 U.S. 515 (1996).

To survive intermediate scrutiny, the Supreme Court requires the government to demonstrate that the law is substantially related to an important state interest. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 464 (1978). Courts require a close relationship between the state's interest and objective in gender-specific cases that trigger intermediate scrutiny "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725-726 (1982). This Court has noted that "a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id*. at 728.

Here, the Act does just this. The overarching purpose for the enactment of the Act, as told by the State, is to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." R. at 4. By placing safeguards that recognize the "inherent differences between biological males and biological females," the Act protects the safety and equal opportunity of the disproportionately burdened group of female student athletes.

1. The Act's definitions of "biological sex," "girl," and "woman" are substantially related to the government's interest in providing equal athletic opportunities for females and protecting the safety of competing biological girls.

The State of North Greene is permitted to legislate an Act with a gender-based classification because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports. The definitions are pertinent to ensure equal opportunities for biological girls in sports because biological differences affect the outcomes of sports.

The Equal Protection Clause does not prohibit an Act from impacting people differently so long as it does not treat different classes unequally for reasons "wholly unrelated to the objective of that statute." *Reed*, 404 U.S. at 75-76. A law that treats different groups of people differently must do so "upon some ground of difference having a fair and substantial relation to the object of the legislation." *Id*. at 76.

In *M. v. Superior Court of Sonoma County*, the California Court upheld a statute that classified only males as offenders and made men alone criminally liable for unlawful sexual intercourse with underage females. The statute complied with the Equal Protection Clause even though it was based on differences between the sexes because the sex-based classification was related to the State's goal of minimizing the number of illegitimate teen pregnancies. *Michael M. v. Superior Court*, 25 Cal. 3d 608. The California Supreme Court used biology to support its finding that the law survived even strict scrutiny. The law was supported by the "immutable physiological fact that it is the female exclusively who can become pregnant" and that males are the *only* persons who may physiologically cause the result which the law properly seeks to avoid." *Id*. at 611-612.

In *Adams*, a school bathroom policy requiring students to use the bathroom in accordance with the sex determined at birth did not unlawfully discriminate on the basis of sex. Moreover, allowing transgender students to use sex-neutral bathrooms did not place a special burden on the students. The Court found that the School Board had an important government interest in "protecting students' privacy interests in school bathrooms" and the policy was substantially related to this interest because the policy "is almost a mirror of" protecting privacy interests. *Adams*, 57 F. 4th at 805.

Similarly here, one of the Act's main objectives is to provide female athletes with equal athletic opportunities. The State's classification of "biological sex" substantially relates to this objective because "whether a person has male or female chromosomes determines many of the physical characteristics relevant to athletic performance." R. at 9. The State must separate sports teams based on sex to ensure that biological females only compete against other biological females. Since "it is generally accepted that, on average, males outperform females athletically because of inherent physical differences between the sexes," females should not be forced to compete against biological males. *Id*.

Males have a significant athletic advantage over female athletes. The Eleventh Circuit Court of Appeals cites to scientific findings that "biological differences allow post-pubescent males to 'jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster than females' on average." Adams, 57 F. 4th at 820. If biological males were allowed on female sports teams, "inherent differences would no longer be the rationale for separate sex sport, and the girls and women's categories would no longer serve their equality and empowerment goals." Doriane Labelet Colemant et. al., *Re-Affirming the Value of the Sports Exception in Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 87 (2020). The North Greene General Assembly recognized that preventing transgender girls from playing on biological girls' sports teams was essential to preserve a female's right to equal athletic opportunities. Without it, women's categories would "lose their constitutional grounding." *Id*.

Petitioner was allowed to participate on an all-girl elementary cheerleading team "without incident." R. at 3. However, elementary schools commonly have co-educational programs and do not find differences between the sexes to be a large issue. The Act targets secondary schools and

state institutions of higher education because it delegates "preference for sex conscious approaches when these are necessary to meet equality goals is the basis for policies that separate males and females in athletic competition starting in middle school and beyond." Doriane Lambelet Coleman et. Al., *Re-Affirming the Value of the Sports Exception in Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 95 (2020).

Further, the State also has an objective of protecting the physical safety of female athletes when competing. Petitioner's contention that the District Court erred in relying on the safety of girls as an important interest advanced by the Act is erroneous because Petitioner did not consider the physical differences between males and females. The safety of females is at risk, even in a "non-contact" sport like volleyball, because the male sex's size and strength influences the speed and force of the ball that is hit toward the female competitors. The safety of female athletes' hinges on the disallowance of people with male chromosomes from playing on competitive or contact female sports teams.

The definition of biological sex serves an imperative purpose of distinguishing that only the athlete's biological sex determined at birth will be taken into consideration when being placed on a sports team. Since it is scientifically shown that there are physical differences between the sexes, the Fourteenth Circuit correctly determined that the law does not violate the Equal Protection Clause because the legislature's definition of "women" or "girl" as being based on "biological sex" is substantially related to the important government interests of providing equal athletic opportunities for females and protecting the physical safety of competing biological girls.

2. Excluding transgender girls who have not gone through puberty is substantially related to the State's interest.

Excluding Plaintiff and other transgender girls who have not gone through puberty is substantially related to the State's interest in providing equal athletic opportunities and physical safety to females. The Act's distinction between biological sex and gender identity serves this goal by excluding biological males in female sports.

The Act reflects the State's desire for biological females alone to play in competitive and contact sports by specifically distinguishing between gender identity and biological sex. The statute clarifies that "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(c). However, the biological make-up of a male is of paramount importance.

The Act defines biological sex to protect the equal opportunity and the safety of female athletes from being diminished by biological males who wish to participate in female sports. Petitioner "does not contest that the state's interest in providing equal athletic opportunity to females is an important one or that sex-separate sports in general are not substantially related to that interest." R. at 9. Petitioner's only argument is that transgender girls should play on girls' teams because their gender identity is "girl."

Petitioner's argument does not recognize the substantial differences between biological sex and gender identity. While gender identity can be chosen and is fluid, biological sex is an "immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Gender identity, or a "person's deeply held core sense of self in relation to gender," has nothing to do with sports. R. at 9 (quoting *PFLAG, PFLAG National*

Glossary of Terms (June 2022), http://pflag.org/glossary). Despite Petitioner's contention that gender identity should be taken into consideration, "it is the sex of an individual and not their gender that dictates physical characteristics that are relevant to athletics." R. at 9.

Additionally, the argument that transgender girls can take puberty blockers and hormone therapies to prevent the athletic advantages caused by male puberty does not take a multitude of factors in account. Transgender girls may not want or have access to medical transitioning. There is also not enough research that any of the possible interventions will significantly reduce a transgender girl's athletic advantage over biological girls. Some transgender student athletes might not decide to play sports until after they have begun puberty. Since boys generally start puberty between the ages of nine and fourteen and there is no requirement that transgender people must medically transition, excluding transgender girls from the definition of "girl" is permitted.

For these reasons, the State correctly determined that biological sex should define the separation of sports teams, not gender identity.

3. The Act does not rely on stereotypical generalizations of the genders.

When a statute enacts a differentiation between genders, the evidence should be "sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations" in order to survive intermediate scrutiny. *Eng'g Contractors Ass'n v. Metro. Dade Cnty.*, 122 F. 3d 895, 910 (1997). The justification for the statute must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. at 533. When intermediate scrutiny is triggered because of a gender-based

distinction, "it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id*.

In *Miss. Univ. for Women,* this Court found that Mississippi University for Women's policy of excluding males from admission to the School of Nursing "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job" and failed the intermediate scrutiny test because the University did not provide a sufficient reason for maintaining a single-sex institution. *Miss. Univ for Women v. Hogan*, 458 U.S. at 729.

Here, the Act does not lean on any over-generalized stereotypes about transgender girls to reach its conclusion that sports teams should be designated as "male," "female," or "coed." . N.G. CODE § 22-3-16(a). The State directly identified the justification for the Save Women's Sports Act as protecting the physical safety and equal opportunities of female athletes. R. at 4. Further, the Act does not rely on overbroad generalizations about the sexes, but instead targets the Act's goal to provide equal athletic opportunities and protect the physical safety of female athletes.

Therefore, the Act survives intermediate scrutiny because the State has proven that the classification addresses the important governmental interest of protecting female athletes and the means of enacting the Save Women's Sports Act are substantially related to achieving this goal.

CONCLUSION

The "Save Women's Sports Act" is not a violation of Title IX or the Equal Protection Clause. Title IX does not prevent a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth. Additionally, the Equal Protection Clause does not prevent a state from offering separate boys' and girls' sports teams based on biological sex determined at birth.

For the foregoing reasons, we respectfully request this Court to affirm the Court of Appeals for the Fourteenth Circuit's judgment.

Respectfully submitted,

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Team 21
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