Docket No. 24-2020

In the
Supreme Court of the United States

A.J.T.,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the
Supreme Court of the United States

PETITIONER'S OPENING BRIEF

TEAM NO. 23
Counsel for Petitioner

STATEMENT OF THE ISSUES

1. Does a state violate Title IX when it prohibits transgender girls from participating in school-sponsored sports based solely on their transgender status?
2. Does the Equal Protection Clause of the Fourteenth Amendment prevent a state from excluding transgender girls from virtually all sports in secondary schools because of stereotypes that are associated with transgender girls?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourteenth Circuit is reported in *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765 (14th Cir. 2024). It is reprinted in the Record at 2–16.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fourteenth Amendment to the Constitution** provides, in relevant part: "No state shall deny to any person within its jurisdiction the equal protection of the laws."

Title IX of the Education Amendments of 1972—specifically **20 U.S.C. § 1681(a)**—provides, in relevant part: "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."

North Greene's "Save Women's Sports Act," N.G. Code §§22-3-15(a)–(c) is partially reproduced at App.1a.

STATEMENT OF THE CASE

Jesse Owens' historic gold medal wins at the 1936 Olympics in Berlin, Germany disproved all prevailing theories of race that "science" supported at the time. Owens' athletic achievements were a conduit to social change, shifting the world's perception of science versus stereotypes. Sports, in their purity, reveal inherent truths at a pace faster than society can admit. This case presents an opportunity to reveal the "inherent truths" that are far too often associated with transgender people. This Court's decision could prevent transgender girls from challenging stereotypes on the one stage that has historically reshaped society's perceptions in revealing actual truths. American law acknowledges and consistently reaffirms its commitment to revealing actual truths through the Equal Protection Clause and Title IX. Sports are inextricable

from American identity and values—uniting people, spurring social progress, and breaking down stigmatic barriers. Refusing to grant transgender girls, like A.J.T., this opportunity directly contradicts the fundamental principles that have shaped our nation.

Throughout history, the Equal Protection Clause has served as the gateway for minorities to seek justice in the courts and assert their constitutional rights. As courts affirmed their commitment to the Constitution, Congress reaffirmed its commitment to proscribing discrimination in schools when it enacted Title IX. As society evolves towards equality for all people, the Equal Protection Clause and Title IX continue to serve as crucial catalysts in defeating prejudice against discriminated groups and advocating progressive beliefs.

I. FACTUAL BACKGROUND

A.J.T. is an eleven-year-old in the seventh grade who was denied from joining the volleyball and cross-country teams at her school because of her gender identity. R. at 1. Previously, the all-girl cheerleading team at her elementary school welcomed her as she practiced and competed without issue. But in April 2020, North Greene's legislature denied this opportunity to A.J.T. when it introduced the "Save Women's Sports Act" (the Act). R. at 3; N.G. Greene § 22-3-4. A.J.T. is a transgender girl and has identified as a girl since an early age. A transgender girl is a self-identifying girl whose sex at birth was a biological boy. Record. 3. Since the third grade, she has lived at home as a girl. R. at 3. Thereafter, she transitioned socially in all aspects of her life and used a name associated with girls. Record 3.

After being diagnosed with gender dysphoria in 2022, A.J.T. began exploring options to embrace her identity, such as counseling and puberty-delaying treatments. R. at 4. This medical treatment would prevent endogenous puberty, therefore preventing the physiological changes that result from testosterone. R at 4. A.J.T. has not begun puberty nor begun puberty-delaying treatment yet and some biological boys do not hit puberty until age 14. R. at 14.

II. PROCEDURAL HISTORY

A.J.T., by and through her mother, initiated this suit after she was informed by her school that she could not join the women's cross-country and volleyball teams. R. at 3–4. Petitioner filed suit against the State of North Greene Board of Education and State Superintendent Floyd Lawson. R. at. 4. Petitioner amended its complaint naming the State and Attorney General Barney Fife as defendants. R. at 4–5. Petitioner filed for a declaratory judgment that the Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment and further sought an injunction against Defendants. R. at 5. The District Court granted Defendant's motion for summary judgment and Petitioner appealed to the Fourteenth Circuit. R. at 5.

On appeal, the United States Court of Appeals for the Fourteenth Circuit concluded that the District Court properly granted Defendant's motion for summary judgment on grounds that the Act did not violate the Equal Protection Clause of the Fourteenth Amendment or Title IX. R. at 12. The court acknowledged a sex-based classification, and that the legislature intended to prevent transgender girls from playing on biological girls' sports teams, but nonetheless held that the statute did not discriminate against transgender girls violating the Equal Protection Clause. R. at 6, 9. The court further held that the statute did not violate Title IX because transgender girls are given equal opportunity since they may play on only boys' teams as opposed to their cisgender counterparts. R. at 11. This Court then granted A.J.T.'s timely petition for writ of certiorari to resolve the questions presented.

SUMMARY OF ARGUMENT

Stereotypes justifying discrimination are challenged and repealed through the broad framework and guiding principles our Constitution and Federal law are aimed to eradicate. State

law justifying the exclusion of transgender girls from sports teams cannot avoid the broad reach anticipated by legal precedent.

A statute violates Title IX's protection against discrimination when it treats individuals—on the basis of their sex—worse than others who are similarly situated. Anti-transgender statutes like the Act violate Title IX. These statutes overtly discriminate against transgender girls because of their transgender status, which this Court considers sex-based discrimination. These statutes also discriminate on the basis of sex because it is impossible to discriminate against someone for nonconformity to their biological sex—based entirely on classical sex stereotypes—without first accounting for that individual's biological sex. These statutes invidious intent is to exclude transgender girls from participating in school-sponsored sports, these statutes treat transgender girls worse than other students and cisgender girls. In doing so, these transgender girls lose out on the immense emotional and physiological benefits of sports, causing them harm.

These anti-transgender statutes also violate the Equal Protection Clause. Excluding transgender girls from sports teams without age consideration, medical interventions, or actual athletic ability violates the Equal Protection Clause. As a historically discriminated minority because of their innate and immutable characteristic, state law must provide important governmental interest it is classifying this quasi-suspect class. Justifications for discrimination because of sex-related "inherent physiological differences" reveals North Greene's purpose—to punish transgender girls for non-conformity to male stereotypes.

Analyzing the statute's application reveals it is not substantially related to equality and safety for girls in sports. The statute's broad definition of sex, acknowledgment of gender identity, and explicit elimination of anyone born with male biology and genetics at birth from girls sports overtly describes what it means to be a transgender girl. The Act unconstitutionally prohibits all

transgender girls from sports, relying on characteristics unrelated to physical advantage and hormones that cannot guarantee competitive advantage nor shared by all transgender girls. Using physical characteristics as its scapegoat to protect these interests, the statute fails to explain why some physical characteristics are more tolerated than others, especially those unrelated to sex.

For these reasons, this Court should **REVERSE** the lower circuit's decision and **REMAND** to the District Court.

ARGUMENT

I. STATUTES THAT USE BIOLOGICAL SEX TO SEPARATE BOYS' AND GIRLS' SPORTS TEAMS—LIKE NORTH GREENE'S "SAVE WOMEN'S SPORTS ACT"—VIOLATE TITLE IX.

Title IX provides, in pertinent part, "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). A Title IX violation occurs when a federally funded institution excludes an individual from participation in an education program or activity "on the basis of sex" and that improper discrimination caused harm. *Grimm v. Gloucester Cnty. Schl. Brd.*, 972 F.3d 586, 616 (4th Cir. 2020).

It is undisputed that A.J.T.'s school receives Federal financial assistance, so the only two issues this Court is faced with answering is whether sex and gender identity should be treated equivalently—as this Court declared in *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020)—and whether those transgender girls who are effectively banned from playing school sponsored sports have suffered recognizable harm. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 669 (2020) ("discrimination based on…transgender status necessarily entails discrimination based on sex"). Anti-transgender statutes like North Greene's "Save Women's Sports Act" violate Title IX

because—though it explicitly discriminates against transgender girls—it inherently discriminates on the basis of sex. These statutes also cause appreciable emotional and dignitary harm to transgender youth, which is cognizable under Title IX. *See Grimm*, 972 F.3d at 617–18. For these reasons, statutes like the Act violate Title IX.

A. Statutes Like North Greene's "Save Women's Sports Act" Discriminate "On the Basis Of Sex."

Title IX provides that protected persons shall not, *on the basis of sex*, be subjected to discrimination. 20 U.S.C. § 1681(a) (emphasis added). Statutes like North Greene's "Save Women's Sports Act" discriminate on the basis of sex in several ways. First, statutes that discriminate explicitly against transgender individuals inherently discriminate on the basis of sex, as this Court held in *Bostock*. Second, an analysis of the legislative history shows that Congress intended Title IX's protections to be wide-ranging, covering discrimination broadly. Third, a textual—and contextual—analysis of Title IX in comparison to Title VII prove that the two statutes should be treated similarly. Lastly, statutes that discriminate based on sex stereotypes inherently discriminate on the basis of sex.

1. Discrimination on the Basis Of Transgender Status Is Inherently Discrimination on the Basis Of Sex Because this Court's Holding in *Bostock* Is Applicable to Title IX.

In *Bostock*, this Court held that discrimination based on transgender status is "inextricably bound up with sex," and thus should be treated as discrimination on the basis of sex. *Bostock*, 590 U.S. 644 at 660–61 (2020). The Court reasoned that one cannot discriminate against an individual for failing to conform with their sex assigned at birth without considering that person's biological sex. *Id*. Thus, any statute that discriminates against a transgender individual because they are transgender inherently does so on the basis of sex. *Id*.

Lower courts have consistently applied *Bostock*'s reasoning to Title IX. *See B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024) (affirming *Grimm*, 972 F.3d at 616; *see also*; *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130 (4th Cir. 2022) (quoting *Bostock* to aid in interpreting Title IX); *see also Whitman-Walker Clinic, Inc. v. United States HHS*, 485 F. Supp. 3d 1, 39–40 (D.D.C. 2020) (stating "[t]here is no apparent reason why the Court's conclusion [in *Bostock*] would remain cabined to Title VII and not extend to other statutes prohibiting sex discrimination"); *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023) (stating "[a]pplying Bostock's reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes"); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023) (affirming the harmonization of *Bostock*'s Title VII holding with Title IX).

In *B.P.J.*, the Fourth Circuit Court of Appeals was faced with an unmistakably similar question: Does the Court's broad definition of sex in *Bostock* regarding Title VII apply to Title IX? *B.P.J.*, 98 F.4th at 563. The Fourth Circuit—affirmed its prior holding in *Grimm* and held that "discrimination on gender identity is discrimination on the basis of sex under Title IX." *Id*. In *Grimm*, the Fourth Circuit stated, "[a]lthough *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), it guides our evaluation of claims under Title IX…." *Grimm*, 972 F.3d at 616.

Before the North Greene Act's enactment, cisgender boys could not play on cisgender girls' sports teams per Title IX. The same remains true after the passage of the Act; the only contribution the Act makes to North Greene athletics is to prohibit transgender girls from participating on female sports teams, in violation of Title IX. "[W]here a statute's 'undisputed purpose and only effect…is to exclude transgender girls…from participation on girls sports

teams,' that statute discriminates on the basis of transgender status." *Hecox v. Little*, 104 F.4th 1061, 1077 (9th Cir. 2023) (citing *B.P.J*, 98 F.4th at 556).

2. An Analysis of The Legislative History Of Title IX Shows Legislators Intended to Extend Its Protection to All Student-Athletes—Including Transgender Athletes.

"The starting point in discerning congressional intent is the existing statutory text." *Lamie v. United States Tr.*, 540 U.S. 526 (2004). Congress's intent when drafting Title IX was clear: "Congress wanted to avoid the use of federal resources to support discriminatory practices…[and]…provide individual citizens effective protection against those practices." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)). The absence of the term "biological sex" in Title IX is not merely an omission—it is intentional. Congress intended Title IX to be "broad" and "close loopholes." 118 Cong. Rec. 5803 (1972); *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("[I]f we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."). A plain reading of Title IX's "sex" language undoubtedly includes transgender girls, because Title IX meant to encompass all discrimination on the basis of sex, not just against women. "When 'the statute's language is plain, "the sole function of the courts"—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Respondent will likely try to construe the legislative history of Title IX to manufacture ambiguity, attempting to prove that Congress was somehow not clear about what kind of discrimination it sought to eliminate with the passage of Title IX. However, "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011). Respondent asks this Court to read in a word—

"biological"—that was intentionally left out of by Congress to effectuate its intent: Protect against discrimination as broadly as possible. *See Lamie*, 540 U.S. at 538 (reasoning that courts should not add an "absent word" to a statute). "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). This Court must—through the words of Congress themselves—give effect to the meaning of Title IX that Congress intended.

3. The Term "Sex" In Title IX Should Be Interpreted and Applied Analogously to Its Use In Title VII Because a Textual Analysis of the Term "Sex" Reveals Both Statutes Require "But-For" Causation.

Since the term "sex" is left undefined by Title IX, the Court should look to the treatment of "sex" in the Title VII framework for context. *See Grimm*, 972 F.3d at 616 (holding that Title IX should be interpreted similarly to Title VII because "Congress modeled Title IX after Title VI and passed Title IX with the explicit understanding that it would be interpreted as Title VI was."); *see Adams v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 811 (11th Cir. 2022) ("Title IX was passed as part of the Education Amendments of 1972 and "patterned after" the Civil Rights Act of 1964.") (citing *Cannon*, 441 U.S. at 696) ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been").

To do so, the Court may simply do the same textual—and contextual—analysis of the word "sex" that was done in *Bostock*. In *Bostock*, the Court accepted the unchallenged argument that "sex" referred to "only the biological distinctions between male and female." *Bostock*, 590 U.S. at 655. However, this Court made it clear that context matters: "[m]ost notably, [Title VII] prohibits employers from taking certain actions '*because of*' sex." *Id*. at 656 (emphasis added). The Court noted its own precedent when dealing with the term "because of," stating "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Id*. (citing *Univ. of Tex.*

Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013)) (citing *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009)). Considering that precedential definition of "because of," the Court held that Title VII's "because of" test "incorporates the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 590 U.S. at 656.

That "but-for causation" standard in Title VII is the same standard that is applied under Title IX. *See Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 237 (4th Cir. 2021) (holding "'on the basis of sex' requires 'but-for' causation in Title IX claims…"); *see also Grimm*, 972 F.3d at 616) (relying on *Bostock* to find that in Title IX, "sex remains a but-for cause" in homosexual or transgender discrimination). Thus, Title VII and Title IX prohibit the same thing: discrimination that would not have occurred but-for an individual's sex. And as this Court held in *Bostock*, "…discrimination based on…transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Bostock*, 590 U.S. at 669.

4. Statutes that Discriminate Based on Sex Stereotypes Fall Under the Scrutiny Of Title IX Because They Inherently Discriminate on the Basis of Sex.

In *Bostock*, the Court held that "[a]n employer who fires an individual for being…transgender fires that person for traits or actions it would not have questioned in members of a different sex." 590 U.S. at 651. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court made it clear that Congress "intended to strike at the entire spectrum of disparate treatment" of men or women for failing to conform to gender norms or stereotypes when drafting Title VII—and the same is true in Title IX. *Price Waterhouse*, 490 U.S. at 251. Title IX and Title VII share a common purpose: To prevent federally funded discrimination and provide protection for citizens from those discriminatory practices. *See Gebser*, 524 U.S. at 286.

Statutes like North Greene's "Save Women's Sports Act" rely entirely on the classic stereotypes that girls smaller, fragile, and weaker than men. These types of stereotypes attack

"[w]omen who do not conform to dominant cultural stereotypes of femininity and women who are simply too good at their sport…." Deborah L. Brake, *The New Gender Panic in Sport: Why State Laws Banning Transgender Athletes Are Unconstitutional*, 15 CONLAWNOW 35, 60 (2024). Preventing girls like A.J.T. from participating with other cisgender girls because they do not conform with the stereotypes assigned to their biological sex is inherently discrimination on the basis of sex.

B. Anti-Transgender Statutes Like North Greene's "Save Women's Sports Act" Are Discriminatory Under Title IX.

"In the Title IX context, discrimination 'mean[s] treating that individual worse than others who are *similarly situated*.'" *B.P.J.*, 98 F.4th at 563 (citing *Bostock*, 590 U.S. at 657) (emphasis added). Accordingly, to successfully bring a Title IX claim, one must show that they have been discriminated against, which entails being treated worse than others who are similarly situated. All individuals within a federally funded education program or activity are presumed similarly situated. *Klinger v. Dep't of Corr.*, 107 F.3d 609, 614 (8th Cir. 1997).

1. Transgender Girls Are Similarly Situated To Other Students In School Because Gender Identity Is Not A Choice.

Transgender girls are similarly situated to all students in school; they are in the same classes, participate in all the same clubs, and interact with all the same social groups. In school, these girls often grow up alongside each other, identified by their chosen name that corresponds with their gender identity. Their transgender status is part of the very fabric of their existence in public. The Act, which is nearly identical to the statute in *Grimm*, "forbids one—and only one—category of *students* from participating in sports teams 'corresponding with [their] gender': transgender girls." *B.P.J.*, 98 F.4th at 563 (citing *Grimm*, 972 F.3d at 618) (emphasis added).

Respondent will likely urge this Court to shift its focus from comparing transgender girls to their academic peers and instead compare them to cisgender boys. However, as in *Grimm*,

"embedded in the [Respondent's] framing is its own bias: it believes that [Petitioner's] identity is a choice." *Grimm*, 972 F.3d at 610. A.J.T.—who suffers from gender dysphoria—has consistently identified publicly as a girl since the third grade. R. at 3. The State, just as in *Grimm*, "privileges sex-assigned-at-birth" over A.J.T.'s "medically confirmed, persistent and consistent gender identity." *Id*. Being transgender is not a choice: it is immutable.

Importantly, the similarly situated analysis should be amongst *students* because this decision impacts more than athletics. Banning transgender girls from school-sponsored sports will affect every material part of these young girls' lives, on and—more importantly—off the field.

2. Some Transgender Girls Are Similarly Situated To Cisgender Girls Because They Have Taken Affirmative Steps To Block The Physical Effects Of Puberty.

Although A.J.T. has not started puberty blockers, there exists a significant subset of transgender girls who *have* begun using puberty blockers, or *are* pre-pubescent, who *are* similarly situated to cisgender girls. In *Doe v. Horne*, No. 23-16026, 2024 WL 4113838, at *13 (9th Cir. Sept. 9, 2024), the Ninth Circuit held that "'[b]efore puberty, there are no significant differences in athletic performance between boys and girls.'" (also stating "there is 'no evidence that transgender girls on puberty suppression medication or hormone therapy have an athletic advantage over other girls.'").

By excluding all transgender girls from school-sponsored sports, the Act has eliminated the opportunity for those transgender girls that are similarly situated to cisgender girls, and thus the statute is discriminatory under Title IX. *See Peltier*, 37 F.4th at 130 ("Title IX protects the rights of '*individuals*, not groups'") (citing *Bostock*, 590 U.S. at 658) (emphasis added).

3. Under The Act, Transgender Girls Are Treated Worse Than Other Similarly Situated Students.

The North Greene Act is worded verbatim the same as the statute as in *B.P.J.*: "forbids one—and only one—category of *students* from participating in sports teams 'corresponding with [their] gender': transgender girls." *B.P.J.*, 98 F.4th at 563 (citing *Grimm*, 972 F.3d at 618) (emphasis added). As in *Doe v. Horne*, "[t]he Act's burdens…fall *exclusively* on transgender women and girls." *Doe v. Horne*, Nos. 23-16026, 23-16030, 2024 U.S. App. LEXIS 22847 (9th Cir. Sep. 9, 2024). The Act's sole purpose is to ban transgender girls from participating on cisgender girls' sports teams—effectively banning transgender girls from playing sports altogether.

C. Anti-Transgender Statutes Like North Greene's "Save Women's Sports Act" Harm Transgender Girls Because They Require Them To Choose To Suppress Their Desire To Play Sports—Missing Out On The Various Benefits Of Playing Scholastic Sports—Or Face The Stigma Of Playing With Biological Boys.

Under Title IX, "[a] plaintiff must establish that the 'improper discrimination caused [her] harm.'" *B.P.J.*, 98 F.4th at 563 (citing *Grimm*, 927 F.3d at 616). "[E]motional and dignitary harm…is legally cognizable [under Title IX]…and it requires no feat of imagination to appreciate [t]he stigma of being unable to participate on a team with one's friends and peers." *Grimm*, 972 F.3d at 617–18. In this case, A.J.T.—and all other transgender girls under statutes like North Greene's—are given an impossible challenge: either stifle their desire to play organized sports with their school peers—something *every other student is allowed to do*—or face the stigmatizing consequences of playing alongside biological boys.

"The impact of Title IX on student athletes is significant and extends long beyond high school and college; in fact, numerous studies have shown that the benefits of participating in team sports can have life-long positive effects." *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1098 (S.D. Cal. 2012). Several studies have shown the benefits of participating in scholastic sports:

> [S]ports participation provides important lifetime benefits…such as 'discipline, teamwork, time management, and leadership that further long-term personal growth, independence and well being' and 'better physical and mental health, higher self-esteem, a lower rate of depression, and positive body image, as well as the development of responsible social behaviors, greater educational success, and inter-personal skills.'

Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401 (2010). To deny *any child* the right to compete in sports "cuts to the heart of why Title IX is seen as such a success story for women's rights" in the first place. *Adams*, 57 F.4th at 820. Students "who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs…[t]hey are also more likely to lead." Beth A. Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Female Athletes the Same Funding as Men*, World Econ. F. (Aug. 25, 2016).

This is especially important when considering the pre-existing obstacles transgender youth face in society today. Transgender youth are already more likely than cisgender youth to report health risks related to violence victimization, substance abuse, mental health, and sexual health. Andrzejewski J, Pampati S, Steiner RJ, Boyce L, Johns MM. *Perspectives of Transgender Youth on Parental Support: Qualitative Findings From the Resilience and Transgender Youth Study*. HEALTH EDUC. BEHAV. (2020).

Respondent will likely argue that transgender girls suffer no harm under these statutes because they can play sports in North Greene: with biological boys, of course. As stated in *B.P.J.*, "offering [transgender girls] a 'choice' between not participating in sports and participating only on boys' teams is no real choice at all." *B.P.J.*, 98 F.4th at 564. Requiring transgender girls like A.J.T. to play with biological boys would force girls like A.J.T.—who have already established themselves as females within their social circles in school—to falsely

reestablish themselves as boys, a fabrication no person should have to endure. This harm is exacerbated when transgender girls—such as A.J.T.—suffer from gender dysphoria, which is defined in the Diagnostic and Statistical Manual of Mental Disorders as "marked incongruence between their experienced or expressed gender and the one they were assigned at birth." R. at 3; Am. *Psychiatric Ass'n, Diagnostic And Statistical Manual*. Forcing A.J.T. and other transgender girls that suffer from gender dysphoria to "overcome" their medical condition will undoubtedly harm these young girls.

Respondent also fails to explain how these anti-transgender statutes would operate in practice without causing harm to both cisgender and transgender girls. Statutes like the Act rely on a sort of "challenge" system, where "anyone—be it a teammate, coach, parent, or a member of an opposing team—may 'dispute' a player's 'biological sex,' requiring that player to visit her 'personal health care provider'" to prove that she is in fact biologically female. *Hecox*, 104 F.4th at 1086. These types of examinations are extremely invasive and traumatizing—especially for young girls. For the first time in their lives, these young girls are taken to a gynecologist, where their genitals are probed and inspected, pelvic examinations are conducted, and transvaginal ultrasounds are done to determine whether the student has ovaries. *Hecox*, 104 F.4th at 1086.

Importantly, "[t]he psychological burden of these searches falls not only on transgender women…but also on *all* women and girls who play female athletics." *Id*. The history of these types of biological sex "challenge" statutes is fraught with racism and stereotype-based discrimination. "Women who do not conform to dominant cultural stereotypes of femininity and women who are simply too good at their sport can be subjected to lengthy and embarrassing processes to prove that they are 'real' women." Brake, *supra*, at 60 (also finding that "[i]n the

history of Olympic sports, it has been the bodies of women of color who have been most likely to trigger scrutiny").

There is simply no way to enforce a ban against transgender girls playing sports with cisgender girls without causing harm. If a "vigilant" individual incorrectly identifies a cisgender girl as a transgender girl, that child is now subject to a profound level of embarrassment and trauma. Everyone loses under anti-transgender statutes like North Greene's "Save Women's Sports Act."

II. STATE LAW RESTRICTING SPORTS TEAMS PARTICIPATION SOLELY ON BIOLOGICAL SEX DETERMINED AT BIRTH UNJUSTIFIABLY STEREOTYPES TRANSGENDER INDIVIDUALS AND VIOLATES THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment states no state shall "deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV. Put another way, the government must not treat individuals "who are in all relevant aspects alike" differently. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). When a classification is directed at "discrete and insular minorities," heightened scrutiny is necessary. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 (1938). "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Groups with "historical purposeful unequal treatment" or that possess "unique disabilities," subjecting them to "stereotype[d] characteristics" not "indicative of their abilities," require heightened judicial review as quasi-suspect classes. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). Classifications on the basis of transgender status fall within this category. A party seeking to validate a statute on the basis of sex must show an

"exceedingly persuasive justification" for it to be upheld. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979). Quasi-suspect classifications "must bear a close and substantial relationship to important governmental objectives, and are in many settings unconstitutional." *Id.*

Laws that limit public school sports teams to only biological sex determined at birth, like North Greene's statute, violate the Equal Protection Clause because they exclude one specific group of student-athletes from playing on their gender identifying team—transgender people. Transgender status is a quasi-suspect class explicitly targeted by North Greene for the sole purpose of excluding transgender girls from sports. Perceiving the statute through a sex-based lens does not alter its only conclusion: a discriminatory purpose and disparate impact that excludes transgender girls from sports because of nonconformity to sex stereotypes.

Outright banning all transgender girls from sports teams regardless of age, competition level, or other medical considerations does not substantially relate to ensuring equal opportunity or adequate safety in women's sports.

A. Statutes Limiting Transgender Girls' Eligibility for Sports Teams Solely on Biological Sex Determined at Birth, like the Act, Discriminate Against a Protected Class—Transgender Individuals—Warranting Intermediate Scrutiny.

Statutes inexplicably classifying groups who possess "traditional indicia of suspectness" on its face are subjected to heightened judicial review. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). "[W]hen a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work." *Feeney*, 442 U.S. at 273. A seemingly neutral statute that results in a disparate impact on a quasi-suspect class along with a discriminatory purpose shifts the burden to the government. *Id.* at 274; *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 fn.21 (1977). Sex classifications present a "real danger that government policies that professedly are

based on reasonable considerations of fact may be reflective of archaic and overbroad generalizations of gender." *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1991). The Act's text, purpose, and only effect discriminate transgender girls from secondary school girls' sports team.

1. Transgender Status Warrants Heightened Scrutiny because It Is a Distinguishing Characteristic Among an Insular Minority Group that Carry a History of Purposeful Discrimination.

The Fourth and Ninth Circuits have held that transgender status is a quasi-suspect class. *Grimm*, 972 F.3d 611–13; *Karnoski v. Trump*, 926 F.3d 1180, 1200 (2019). The court in *Grimm* held that transgender people are a quasi-suspect class: "[T]he class has historically been subject to discrimination…the class has defining characteristics that bear[] [no] relation to its ability to perform or contribute to society…the class [has] been defined as a discrete group by obvious immutable, or distinguishing characteristics…the class is a minority lacking power." *Grimm*, 972 F.3d at 611 (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985); *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

The Fourth Circuit held that transgender people have historically been targeted for discrimination. *Grimm*, 972 F.3d at 12 (citing that the DSM labeled transgender status as a disorder until 2013, past federal legislation explicitly excluded transgender people from healthcare coverage, and current statistics of harassment and violence in schools, the workplace, and public settings). The Seventh Circuit also agreed that transgender people suffer "discrimination, harassment, and violence because of gender identity." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (citing statistics that 78% of students who identify as transgender or gender non-conformant, report being harassed in grades K-12).

To the second factor, the Fourth Circuit held that being transgender "bears [no]…relation to ability to perform or contribute to society." *Grimm*, 972 F.3d at 612 (citing consensus among medical, mental health, and public health organizations).

Third, Transgender status is a "distinguishing characteristic" that "defines them as a discrete group." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) *Hecox*, 104 F.4th at 1069 (0.6% of Americans thirteen or older identify as transgender); *Gore v. Lee*, 107 F.4th 548, 584 (6th Cir. 2024) (White, J., dissenting) (agreeing with the majority that gender identity is innate and internal but noting that gender expression is an external manifestation of gender identity that is apparent to society). Not only is it a distinguishing characteristic, "being transgender is not a choice. Rather, it is as natural and immutable as being cisgender developed at a young age." *Grimm*, 972 F.3d at 612–613.

In addition to a low population size, transgender individuals are minimally represented in each branch of government and past discriminatory legislation. *Id.* at 613 (first openly transgender judge did not take place on state's benches until 2010).

2. The Act's Title, Structure, and Explicit Reference to Gender Identity Is Overtly Designed to Exclude Transgender Girls from Sports.

A facially neutral law violates the Equal Protection Clause when it "can be traced back to a discriminatory purpose." *Feeney*, 442 U.S. at 272. Purposeful discrimination is "the condition that offends the Constitution." *Id.* at 274 (quoting *Swann v. Charlottte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971)). When "the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," there is a discriminatory purpose. *Feeney*, 104 F.4th at 258 (1979). A decision with a clear pattern that is unexplainable on grounds other than discrimination may

prove a discriminatory purpose. *Arlington Heights*, 429 U.S. at 266–67. "Impact provides an important starting point." *Id.* at 274.

The Act affects only one group of student-athletes—transgender women. Cisgender girls, boys, and even transgender boys may play on the team associated with their gender identity. R. 13. Before the statute's enactment, cisgender boys could not join female teams, and the NCAA allowed all transgender girls to participate under certain conditions. R. at 13; *Hecox*, 104 F.4th at 1085. The mathematical disparity of one-hundred percent participation to zero percent is irrationally prejudicial. *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977) (79% Mexican-American population with only 39% jury-summoned in eleven year period was sufficient for racial discrimination in grand jury selections).

North Greene did not attempt to mitigate the statute's effect like the school district in *Adams ex rel. Kasper v. Sch. of St. Johns Cnty.*, 57 F.4th 791, 802 (11th Cir. 2020), where the superintendent worked with LGBTQ students, parents, and set up a task force to find a workable policy before implementing the policy. The court held these advanced measures negated a discriminatory purpose. *Id.* The statute's only consideration for transgender girls is when it explicitly rejected gender identity from having any relation to school athletics. N.G. Code § 22-13-16(b).

Not only does the Act affect only one group of student-athletes, its "explicit[] references [to] transgender women…and its text, structure, [and] findings" demonstrate a discriminatory purpose. *Hecox*, 104 F.4th at 1074. "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfield*, 420 U.S. 636, 648 fn.16 (1975). This Court does not need to look

any further than the Act's name: "Save Women's Sports Act." The Act patently depicts transgender girls as threats to women's sports, having no place in athletics. An eleven-year-old transgender girl like A.J.T. is not a monster seeking athletics to displace other girls from sports.

Additionally, the Act explicitly acknowledges gender identity stating that "gender identity has nothing to do with sports." The Act would not have made this reference if it did not understand its only effect: remove transgender girls from participating in sports. By defining women as those who possess reproductive biology and genetics at birth without consideration of gender identity, the Act is defining what it means to be a transgender girl. "When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265–66.

3. The Act is Facially Discriminatory Against Transgender Individuals Because It Uses Sex Characteristics as a Proxy for Defining What a Transgender Girl Is.

"Proxy discrimination is a form of facial discrimination [and] arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *P. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 fn.23 (9th Cir. 2013). Biological sex and genetics, certain sports, and gender identity serve as proxy for transgender discrimination.

The Act prohibits individuals with male reproductive biology and genetics at birth from playing on the girls' team while noting that biological sex is not determinative or indicative of the individual's gender identity. R. at 4. The Act's neutral criteria allowing participation on the girls' teams describe a cisgender girl, while non-eligibility for girls' teams describes a transgender girl. The definition of biological sex is "carefully drawn to target transgender

women and girls, even if it does not use the word 'transgender' in the definition." *Hecox*, 104 F.4th at 1078. North Greene's statute takes one step further through explicitly mentioning "gender identity.

The State cannot justify its discrimination because it targets only a subset of biological males determined at birth. However, this Court has consistently rejected that type of argument. *Rice v. Cayetano*, 528 U.S. 495, 516–17 (2000) ("Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classifications race neutral."); *Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977) (holding that even though the statute is directed at some undocumented people, only undocumented people are harmed and is unconstitutional); *Mathews v. Lucas*, 427 U.S. 495, 504 fn. 11 (1976) (holding that discrimination among illegitimate children is the same as discrimination between legitimate and illegitimate children.)

Even though all biological boys are treated equally under the statute, it does not mean all transgender girls are treated equally. This Court in *Geduldig v. Aiello*, 417 U.S. 484, 496 fn. 20 (1974), narrowly held that although "only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification." Pregnancy is a unique, temporary characteristic not shared by all women, unlike gender identity which is shared by all people. Therefore, it this does not mean "characteristic[s] of a subset of a protected group cannot be a proxy for that group." *Kadel v. Folwell*, 100 F.4th 122, 146 (2024). This does not mean sex-characteristics may never serve as a proxy for transgender-status discrimination. The Supreme Court's distinction was that although pregnancy fell exclusively on females, the statute's objective—disability benefits—applied to both sexes. *Geduldig*, 417 U.S. at 496 fn. 20. Female productive biology and genetics can include only individuals born female (like

pregnancy for women), but distinct from *Geduldig* is that only some girls—cisgender girls—benefit from the statute's objective of creating equal opportunity and safety for women.

B. The Act Is a Sex-Based Facial Classification Warranting Intermediate Scrutiny Because It Punishes Transgender Girls For Not Conforming To Sex-Based Stereotypes In School Athletics.

"Our case law does reveal a strong presumption that gender classifications are invalid." *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1991) (Kennedy, J., concurring). "State actors controlling gates to opportunity…may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of females." *U.S. v. Virginia* (*VMI*), 518 U.S. 515, 541 (1996) (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982)). A sex-based classification is unjustifiable when it classifies on overbroad generalizations or sex-based stereotypes. *Whitaker*, 858 F.3d at 1051.

The Fourth, Eleventh, Seventh, and Ninth held that transgender status discrimination is sex discrimination because it is a "fail[ure] to conform to the sex stereotype propagated by Policy." *Grimm*, 972 F.3d at 608; *Whitaker*, 858 F.3d at 1051 (holding that punishing transgender students for using bathroom aligned with their gender identity is a sex-based stereotype); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes"); *Hecox*, F.4th at 1079 (citing other courts that hold policies discriminating against transgender people for non-conformity is reliance on sex-stereotypes). Requiring transgender girls to participate only on biological male teams affirms the State's sex-based stereotype of how males and females ought to be in their roles, abilities, and identities. The implicit assumption is that females can never compete with males due to male prowess.

Policies that restrict transgender girls from participating on sports teams "prevent transgender minors from forms of gendered socialization. They target sex-specific, homosocial

spaces and activities through which children internalize who is male or female and what social arrangements follow from this." Erik Fredericksen, *Protecting Transgender Youth After Bostock: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 YALE L.J.1149, 1204 (2023). It sends a message to transgender girls that they are not really "girls," and that their identity is incorrect.

The statute cannot escape the impermissible sex stereotype it uses as a shield: all biologically born males are physically superior to biologically born females in every circumstance regardless of non-sex related factors and it is the State's job to protect cisgender girls from the indignity of finishing behind or losing to a transgender girl. *B.P.J.*, 98 F.4th at 559–60.

C. Excluding Transgender Girls from Girls' Sports Teams Without Exceptions or Mitigating Circumstances Is Not Substantially Related to Equal Opportunities or Safety for Women in Sports.

The State cannot survive intermediate scrutiny unless it can prove that "the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Hogan*, 458 U.S. at 724. "The justification must be genuine, not hypothesized or invented post hoc in response to litigation..it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533.

In evaluating the means the law chooses to accomplish its objective, it "necessarily compares the class of individuals who come within the scope of the law's objective, and the class of individuals actually affected by the law. A law may be underinclusive, overinclusive, or both." *M.H. v. Jeppesen*, 677 F.Supp.3d 1175, 1190 (D. Idaho 2023). "The similarly situated inquiry does not just ask whether two groups are similarly situated; it asks whether they are similarly situated with respect to the statute's objective." *Kadel*, 100 F.4th at 155.

1. Inherent Differences Between Biologically Born Females and Males Cannot Justify the Exclusion of Transgender Girls from Sports.

The Act quotes Justice Ginsburg's opinion from *VMI*: "Inherent differences between men and women, we have come to appreciate, remain cause for celebration." 518 U.S. at 534. In using Justice Ginsburg's historic quote, the Act fails to finish the sentence: "…but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity…such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id.* Using "inherent biological differences" as criterion to "protect" women while simultaneously weaponizing it to exclude women is exactly what Justice Ginsburg disavowed. The State cannot use inherent differences as a shield and a sword.

The State cannot prove these "real differences" are substantially related to equal opportunity for women and safety when there is no evidence that transgender girls have displaced women in sports or injuries resulting thereof.

The real differences identified between biological females and biological males in the Act are the physical form based solely on "reproductive biology and genetics" at birth. R. at 4. This broad definition encompasses any trait that is sex-driven, including reproductive organs. But reproductive organs "are not what dictate strength, speed, or other traits related to athleticism." Laura Lane-Steele, *Sex-Defining Laws and Equal Protection*, 112 CAL. L. REV. 259, 303 (2024). If circulating testosterone levels are the main contributor for increased muscle mass and speed—assuming that is the Act's true focus—then it would focus on that aspect instead of a blanketed definition that covers all sex-related characteristics. *B.P.J.*, 98 F.4th at 560. Nor has the State proven that "reproductive biology and genetics" dictate competitive advantage. Erin E. Buzuvis, *Transgender-Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for*

Intercollegiate and Interscholastic Athletics, 21 SETON HALL J. SPORTS & ENT. L. 1, 37 (2011) (citing studies that certain athletic skills like throwing, kicking, catching, motor skills, coordination, and form account for environmental factors as much as biological factors).

Transgender girls are similarly situated to cisgender girls. Similarly situated is not a threshold, "it asks whether [the classes] are similarly situated with respect to the statute's objective." *Kadel*, 100 F.4th at 155; *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001) (holding that fathers are not similarly situated with respect to the statute's objective of "preserving a biological parent-child relationship"); *Id.* at 55 (O'Connor, J., dissenting) (arguing that the statute's objective is "opportunity for relationship" and fathers are similarly situated); Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 617–19 (2011). The disagreement among the justices in *Nguyen* was the statute's purpose because the purpose dictated the means, not vice-versa. The question is not whether transgender girls are similarly situated to biological boys, it is whether they are similarly situated with respect to "equal opportunity and safety" for *all* girls—not just cisgender girls. Transgender girls like A.J.T., who identify and live as girls privately and publicly, are girls who deserve equal opportunity in sports. If the statute's expressed purpose is to provide equality and safety for girls, it must do it for all.

2. The Act Is Unconstitutionally Overinclusive Because Not All Transgender Girls Benefit from Male Hormones That Increase Athleticism Nor Does It Always Result In A Competitive Advantage.

A statute is not substantially related to an important government interest when it regulates substantially more individuals than necessary to achieve its purpose. *Craig v. Boren*, 429 U.S. at pp. 201 (only 2% of 18-20 year old males were arrested for alcohol-related offenses). The Ninth Circuit held that prohibiting all transgender females from sports teams without considering if the person went through puberty, undertook hormone therapy, or evidence offered that transgender girls displaced cisgender female athletes was not substantially related to equal participation and

opportunities for women. *Hecox*, 104 F.4th at 1084. The statute only targets middle schools and high schools since the NCAA already regulated transgender girls in a far less demanding way. *Id.* at 1085. The Act broadly sweeps to all ages and the Fourth Circuit held that "before puberty, circulating testosterone levels do not vary." R. at 9; *B.P.J.*, at p. 560. The Act's means are not substantially related to fairness and safety when the primary factor muscle development and speed—circulating testosterone—does not vary among pre-pubescent kids.

Not only do some transgender girls take puberty blockers that eliminate the presence of testosterone before puberty, some undergo hormone therapy which decreases circulating testosterone after puberty. Emily Fox, *Fairness for All? The Implications of Adopting A Third-Gender Category in Elite Sports*, 101 WASH. U. L. REV. 1373, 1381 (2024) (citing studies that hormone treatment results in reduced lean body mass, muscle cross-sectional area, and muscular strength). Circulating testosterone is what contributes to physiological changes such as speed and muscular strength, not endogenous testosterone. *Hecox*, 104 F.4th at 1084; *B.P.J.*, 98 F..4th at 561. The resulting physiological differences are still grounded in the assumption that any testosterone leads to athletic success, but testosterone is only one biological marker among many others that may contribute to athletic advantage. Fox, *supra*, at 1381.

Even if biologically born males have some physiological differences before puberty, it is not conclusive this results in athletic or competitive advantage. *Doe v. Horne*, No. 23-16026 at *9 (rejecting studies that show prepubertal boys are sometimes taller, weigh more, and have less body fat correlating to biological factors). Sports require different levels of skill that correlate to an athletic advantage. The fact that transgender girl has more stamina than cis-gender girl does not mean they will have an advantage in a sport like volleyball whereby skill, form, and even height matter that is not immediate through virtue of being born a biological boy. Similarly, a

transgender girl with more size and weight—helpful for a sport such as rugby—is not advantageous to a sport like cross-country, which favors slimmer statures. Chan Tov McNamarah, *Cis-Woman-Protective Arguments*, 123 COLUM. L. REV. 845, 887–88 (2023) (arguing that some physiological differences are irrelevant in sports like women's shooting and some transgender women have expressed height and stride length made track hurdles harder).

Assuming that height is because of an individual's male genetics, it is not an immediate advantage: "A study by the international governing body of volleyball…failed to correlate a relationship between height and success of elite athletes. Only once in Olympic history has the women's volleyball team with the tallest average height won the gold medal" Buzuvis, *supra*, at 37. Not every physical characteristic is attributable to sex, and those that may, do not correlate to athletic success.

Hypervigilant institutions like the International Olympics Committee and the National Collegiate Athletic Association allow transgender girls to participate in competitive sports provided they take a hormone supplement for one year. "In 2020, both the IOC and NCAA required transgender women to suppress their testosterone for only a year for eligibility to compete on women's teams." *Hecox*, 104 F.4th at 1085. Intermediate scrutiny does not require the strictest means, but the statute does not tailor its means at all whatsoever. Institutions like the IOC and NCAA that prioritize the integrity and safety of their athletes are responsive to the leading science. "Even if stereotypes frozen into legislation have 'statistical support,' our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Sessions v. Morales-Santana*, 582 U.S. 47, 63 fn. 13 (2017). The Act is not substantially related to women's safety and fairness when hypervigilant athletic bodies provide attainable guidelines regardless of puberty considerations.

3. The Act Is Unconstitutionally Underinclusive Because Factors Unrelated to a Person's Sex Determined at Birth Contribute to Unequal Competitive Advantages and Safety Risks.

A statute is underinclusive if it fails to regulate a substantial number of individuals for the statute's purpose. *Craig v. Boren*, 429 U.S. at 201–2 fn. 12. The only biological differences that ensure equality and fairness for women according to the State are sex-specific "reproductive biology and genetics." Certain genetic traits that are unrelated to sex can also contribute to a physiological difference. Certain genetics that are not 'because of sex' contribute physiological advantage such as height, flexibility, neurological factors, and body proportion. Fox, *supra*, at 1381. Beyond those tied to biology, "access to financial resources, nutrition, coaching, facilitates, or opportunity" does create an advantage. McNamarah, *supra*, at 885. If the state truly prioritized fairness and safety in women's sports, it would all factors that create a competitive advantage.

"Female athletes already compete against other female athletes that are bigger taller or stronger than they are simply because everyone is unique." Fox, *supra*, at 1395. Director of he Center for Genetic Medicine Research at Children's National Hospital stated: "Even if transgender athletes retain some competitive advantages, it does not necessarily mean that the advantages are unfair, because all top athletes possess some edge of degree over their peers." Gillian R. Brassil and Jere Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions,'* N.Y. TIMES, (Aug. 18, 2020), https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html. Certain individuals may have genetic mutations or physical attributes unrelated to sex yet no one denies their success from training, and talent. Jordan Buckwald, *Outrunning Bias: Unmasking the Justifications for Excluding Non-Binary Athletes in Elite Sport*, 44 HARV. J.L. & GENDER 1, 35 (2021) (noting that several world-class athletes have above-average physical characteristics

critical to their sport that society tolerates.) Some girls are hyperandrogenic—naturally elevated levels of testosterone—and yet are not regulated under the statute even though testosterone is the culprit for athletic advantage. Under the Act, individuals with this condition do not pose the same risk of unfairness and safety risks because they are cisgender. If testosterone determines athletic performance, then the statute must restrict other biological females with high testosterone from participating.

CONCLUSION

Anti-transgender statutes like the Act violate Title IX's broad protection against discrimination because it prohibits them from playing school-sponsored sports. States cannot discriminate against transgender individuals without discriminating on the basis of sex. Barring transgender youth from participating in school-sponsored sports deprives them of the benefits sports provide.

The Act violates the Equal Protection Clause because its structure, text, and only effect is to discriminate against transgender girls. The Act is not substantially related to women's equality and safety when it excludes all girls from participating regardless of age, medical considerations, or other mitigating circumstances. If the Act's purpose is equality and safety for girls, it must do it for all girls not just cis-gender girls.

For these reasons, this Court should **REVERSE** the lower circuit's decision and **REMAND** to the District Court.

Date: September 13, 2024

Respectfully Submitted,
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APPENDIX A – NORTH GREENE STATUTE

The entirety of N.G. Code § 22-3-15 is not provided in the record and partially provided as N.G. Code §§22-3-15(a)–(c):

(a) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of high 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.

(1) ”Biological sex” means an individual’s physical form as a mal or female based solely on the individual’s reproductive bilogy or genetics at birth.

(2) ”Female” means an individual whose biological sex determined at birth is female. As used in 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.

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

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