No. 24-2020

IN THE

SUPREME COURT OF THE UNITED STATES

A.J.T.,

PLAINTIFF-PETITIONER.

v.

STATE OF NORTH GREENE BOARD OF EDUCATION, ET AL.,

DEFENDANT-RESPONDENTS.

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

BRIEF FOR PETITIONER

SEPTEMBER 13, 2024

TEAM NUMBER 26
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether a state statute that forbids a middle school transgender girl from participating in school-related athletic girls' teams violates Title IX.

II. Whether a state statute that forbids a middle school transgender girl from participating in school-related athletic girls' teams violates the Equal Protection Clause of the Fourteenth Amendment.

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The United States District Court for the Eastern District of North Greene and the United States Court of Appeals for the Fourteenth Circuit found in favor of the Respondent on both issues. The Fourteenth Circuit's decision is available at No. 23-1023 and reprinted in the Record at 2.

RELEVANT CONSTIUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

The text of the Fourteenth Amendment to the United States Constitution pertinent to this action, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

The relevant portion of 20 U.S.C. § 1681(a) provides:

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

The relevant portion of 42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The relevant portion of 42 U.S.C. § 2000e-2(a)(1) provides:

> **(a)** It shall be an unlawful employment practice for an employer—
>
> > **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

I. Factual History

A. The Plaintiff, A.J.T.

Petitioner, A.J.T., was assigned the sex of male at birth. (R. at 3.) However, A.J.T. has identified as a girl from a very early age. (R. at 3.) By age eight, A.J.T. had begun the third grade and was living and identifying as a girl at home with her parents. (R. at 3.) Shortly after, A.J.T. began living as a girl in both public in private. (R. at 3.) She began using a name commonly associated with girls and joined her elementary school's all-girl cheerleading team. (R. at 3.) Throughout the fourth and fifth grade, A.J.T. practiced and competed with the cheerleading team without any problems from faculty, parents, or students. (R. at 3.)

In 2022, a psychologist diagnosed A.J.T. with gender dysphoria.[1] (R. at 3.) She began going to counseling and discussing the possibility of puberty-delaying treatments. (R. at 3.) Puberty-delaying treatments prevent endogenous puberty as well as all physiological changes caused by increased testosterone circulation. (R. at 3.) Although A.J.T. had not begun these treatments by the commencement of this lawsuit, it remains a viable option for A.J.T. and her family to prevent her endogenous puberty. (R. at 3.)

A.J.T., at age eleven, was about to begin the seventh grade and intended to participate in the middle school's athletics. (R. at 3.) She aspired to join both the girls' volleyball and cross-country teams. (R. at 3.) However, at the beginning of the school year, A.J.T. and her parents were informed that A.J.T. would not be able to participate on either team. (R. at 3.) The school

[1] Gender dysphoria is defined as "psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity." Jack Turban, M.D., M.H.S., *What is Gender Dysphoria?*, AMERICAN PSYCHIATRIC ASS'N (August 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

based this decision on the State of North Greene's "Save Women's Sports Act," because A.J.T. is a transgender girl. (R. at 3.)

B. State of North Greene's "Save Women's Sports Act"

In April 2023, the North Greene Senate introduced Senate Bill 2750, otherwise known as the "Save Women's Sports Act," hereinafter "the Act." (R. at 3.) On May 1, 2023, North Greene Governor Howard Sprague signed the Act into law. (R. at 3.) The Act was codified as North Greene Code § 22-3-4, entitled "Limiting participation in sports events to the biological sex of the athlete at birth." (R. at 3.)

The Act provides several definitions relevant to the issues on appeal:

> (1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.
>
> (2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.
>
> (3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.

N.G. Code § 22-3-15(a)(1)–(3). (R. at 4.)

Incorporating these definitions, the Act ultimately requires that all "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports . . . sponsored by any public secondary school or a state institution of higher education," must be categorized based on a biological sex at birth. N.G. Code § 22-3-16(a). (R. at 4.) The Act further expressly states that any athletic or sports team for females, women, or girls must exclude any student born biologically male. N.G. Code § 22-3-16(b). (R. at 4.)

Lastly, the Act makes clear that the State of North Greene does not account for gender identity by stating 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). (R. at 4.) Therefore, while the State of North Greene acknowledges the concept of gender identity, it disregards the pertinence of gender identity in young students seeking to join athletic and sports teams for a sense of belonging.

II. Procedural History

In August 2023, A.J.T., by and through her mother, filed this lawsuit against the State of North Greene Board of Education and State Superintended Floyd Lawson in the United States District Court for the Eastern District of North Greene. (R. at 4.) However, the State of North Greene moved to intervene, resulting in A.J.T. amending her complaint to name both the State and Attorney General Barney Fife as defendants (hereinafter "Respondents"). (R. at 4-5.)

A.J.T. sought declaratory judgment that the Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment as well as an injunction preventing Respondents from enforcing the Act against A.J.T. (R. at 5.) Respondents opposed the motion for an injunction and further filed a motion for summary judgment against A.J.T.'s claims. (R. at 5.) The District Court granted Respondents' motion for summary judgment, holding that the Act did not violate Title IX or the Equal Protection Clause. (R. at 5.)

A.J.T. appealed to the United States Court of Appeals for the Fourteenth Circuit where the issues were argued on October 15, 2023. (R. at 2, 5.) The Fourteenth Circuit affirmed the District Court's judgment in a two to one majority on December 15, 2024. (R. at 2-3.) In regards to the Equal Protection Claim, the Fourteenth Circuit reasoned that the Act's "definition of '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 female athletes when competing." (R. at 10.) In regards to Title IX, the Fourteenth Circuit briefly reasoned that the Act is not discriminatory because it only designates which teams A.J.T. may join. (R. at 11-12.)

A.J.T. petitioned for writ of certiorari to the Fourteenth Circuit, which was granted. (R. at 17.) The issues specifically relating to Title IX and the Equal Protection Clause are now before this Court.

STANDARD OF REVIEW

The issues before this Court are (I) whether a state statute that excludes a middle school transgender girl from school-related athletic girls' teams violates Title IX and (II) whether a state statute that excludes a middle school transgender girl from school-related athletic girls' teams violates the Equal Protection Clause of the Fourteenth Amendment. This Court reviews constitutional and statutory challenges *de novo*. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991). De novo review requires a court to "consider[] the matter anew and freely substitute[] its own judgment" for that of the lower courts. *Violette v. Town of Cornelius*, 283 N.C. App. 565, 569, 874 S.E.2d 217, 220 (2022) (quoting *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32, 732 S.E.2d 614, 618 (2012)).

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit, because a statue statute that forbids a middle school transgender girl from participating in school-related athletic girls' teams violates Title IX and the Equal Protection Clause of the Fourteenth Amendment in the United States Constitution.

Firstly, the Act violates Title IX, because it satisfies the first prong of excluding Petitioner, A.J.T., from an educational program on the basis of sex. The plain reading of Title IX establishes

that if an individual would not have been discriminated against but for that individual's sex, then the discrimination has violated Title IX. When a transgender is excluded from opportunities and others of the same biological sex are not, then the transgender individual has been discriminated against on the basis of sex. Specifically, the transgender individual has been treated worse, by being excluded, than others who are similarly situated.

Although this Court established that discrimination "based on sex" applied to discrimination based on sexual orientation in regards to Title VII, circuit courts have applied the same plain reading to Title IX. Because Title VII and Title IX use the same language with the purpose of preventing discrimination "on the basis of sex," circuit courts have now established that discrimination based on sexual orientation also applies to educational programs under Title IX.

Additionally, the Act violates Title IX, because it satisfies the last prong of the discrimination causing harm to A.J.T. Any resulting physical, emotional, and dignitary harm due to the improper discrimination of transgender students is clearly identifiable under Title IX. A.J.T. suffered not only from the physical consequences of not being able to participate in athletics that corresponded with her gender identity, but she also suffered from the emotional and dignitary harm of being ostracized from others she identifies with.

It should also be noted that, unlike the Equal Protection Clause, once a plaintiff has established discrimination and causational harm, no showing is necessary of a substantial relationship to an important governmental interest. It simply cannot serve as an institution's defense to its discriminatory policy because Title IX does not fall under a constitutional challenge, but rather, a statutory one.

Secondly, the Act's sex-based classification is not only impermissible under Title IX, but it also violates the Equal Protection Clause of the Fourteenth Amendment. Primarily, the law in this case warrants intermediate scrutiny review because it establishes a sex-based classification, which excluded the petitioner, A.J.T., and other transgender female students from participating on a school sports team that corresponds with their gender. This Court in *Bostock* made clear the discrimination on sexual orientation is sex-based discrimination in terms of employment discrimination. In the same context to Title IX, circuit courts have also recognized that the required showings for a claim under both acts are nearly identical. In doing so, circuit courts have established that treating sex-based classification encompasses discrimination on the basis of sexual orientation, warranting intermediate scrutiny review.

In the alternative, a facially neutral law still warrants intermediate scrutiny review if it disproportionately impacts a quasi-suspect class. Because transgender classification satisfies the required elements of a quasi-suspect class and disproportionately impacts A.J.T. and transgender females, intermediate scrutiny review is warranted.

Additionally, the Act violates the Equal Protection Clause because it fails to satisfy intermediate scrutiny. This Court has established that, for a law to treat similarly situated people differently, the classification must substantially relate to an important governmental interest. Respondents fail to justify a substantial governmental interest in protecting equal opportunity and safety among female athletes because the characteristics of A.J.T., an eleven-year-old, do not justify excluding her from middle school sports.

However, even if Respondents show an important government interest, prohibiting A.J.T. from competing in middle school sports does not substantially relate to achieving an interest in equal opportunity and safety for female athletes. Respondents have failed to present evidence of

instances where transgender females have deprived a cisgender female of an athletic opportunity. Moreover, the claim that a transgender female poses a heightened risk in girls' sports is unfounded, given that the physical effects of puberty are minimal for an eleven-year-old biological male.

ARGUMENT

I. A state statute that forbids a middle school transgender girl from participating in school-related athletic girls' teams violates Title IX.

Title IX "prohibits sex discrimination by an elementary or secondary school or any college or university that receives federal financial assistance." *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 726 (2020) (Alito, J., dissenting); *see* 20 U.S.C. § 1681(a). To prevail on a Title IX claim, a plaintiff must prove 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 of discrimination; and (3) that "improper discrimination caused [her] harm." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)).

In this case, it is undisputed that the Act applies to public schools and that A.J.T. attends a public school that receives federal funding. Because the Act treats transgender girls worse than other students who are similarly situated and causes harm to transgender girls, the Act violates Title IX. Furthermore, it is irrelevant that the Act provides athletic opportunities for each sex equally, because "Title IX protects the rights of individuals, not groups, and does not ask whether the challenged policy treats [one sex] generally less favorably than [the other]." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130 (4th Cir. 2022) (*en banc*). Therefore, this Court should reverse the Fourteenth Circuit's decision and hold that the Act violates Title IX.

A. The Act excludes A.J.T. from an educational program on the basis of sex, because it treats transgender girls worse than others who are similarly situated.

A.J.T. was excluded from an educational program on the basis of sex, because A.J.T. was intentionally excluded from school-related girls' sports teams due to her gender identity. Under Title IX, discrimination is defined as "treating [an] individual worse than others who are similarly situated." *Preston*, 31 F.3d at 618 (quoting *Bostock*, 590 U.S. at 657-58). Additionally, in "disparate treatment" cases, this Court has consistently held that "the difference in treatment based on sex must be intentional." *Bostock*, 590 U.S. at 658; see, *e.g.*, *Watson v. Fort Worth Bank & Trust*, 487, U.S. 977, 986 (1988). However, this Court has also made clear that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 590 U.S. at 660. Therefore, it is not a defense to claim that "intentional discrimination based on homosexuality or transgender status is not intentional based on sex." *Bostock*, 590 U.S. at 658, 590 U.S. at 646.

1. This Court has already ruled in *Bostock* that discrimination on the basis of gender identity is inherently discrimination on the basis of sex.

The Act discriminates against A.J.T. on the basis of sex, because this Court has explicitly ruled that it is simply not possible to "discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock*, 590 U.S. at 660. In *Bostock*, there were three cases before this Court that all contained the same fact: an employer fired a long-time employee after discovering the employee is homosexual or transgender. *Id*. at 653. One man won national awards for his work. *Id.* Another man had worked at his company for several years. *Id.* And a woman, who presented as male when first starting her service with her company, had successfully worked at her company for six years. *Id.* It was not until each of these employees made their sexuality or gender identity know to their employers that they were told "this is not

going to work out." *Id.* Each of the plaintiffs brought suit under the Civil Rights Act of 1964, otherwise known as Title VII. *See* 42 U.S.C. § 2000e-2(a)(1).

This Court indisputably held that "an employer who fires an individual merely for being gay or transgender *defies the law*." *Id*. at 682 (emphasis added). This Court reasoned that the plain terms of Title VII state that individuals "shall be made free from any discrimination based on . . . sex." 42 U.S.C. § 2000e-2(a)(1); *Bostock*, 590 U.S. at 653 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only written word is the law, and all persons are entitled to its benefit.").

Title VII expressly "prohibits all forms of discrimination because of sex," by reason of sex, or on account of sex. *Id*. at 656 (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350 (2013)). Due to Title VII's "because of" and "on the basis of" language, this Court used the but-for causation test, requiring this Court to answer—but for the individual's sex, would have the employer discriminated against the employee? *Id*. at 656. The answer is no. And this Court explained itself with a simple analogy:

> Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual's sex plays an unmistakable role in the discharge decision.

Id. at 660.

Therefore, this Court has already recently explained that intentionally excluding individuals on the basis of their sexuality or gender identity treats an individual worse than others

who are similar situated, thereby discriminating on the basis of sex and in violation of Title VII. In this case, A.J.T. is a biological male that presents herself as and identifies as female. (R. at 3.) She was excluded from middle school sports teams only because she identifies as a transgender girl. (R. at 4.) However, all other individuals who were born biologically female and identify as female remain eligible to play. In conclusion, just as the employees in *Bostock*, the Act discriminated against A.J.T. because of her biological sex at birth.

2. Circuit courts have applied the interpretation of Title VII in *Bostock* to Title IX.

Because the same language is used in Title VII and Title IX for the purpose of preventing "discrimination on the basis of sex," circuits courts have applied the holding and reasoning in *Bostock* to Title IX claims. In *Grimm*, the student was biologically born female, but "always knew he was a boy." *Grimm*, 972 F.3d at 597. Although the student was enrolled at his high school as a female, the student identified as a transgender male, used male pronouns, and used men's public restrooms "with no incidents or questions asked." *Id*. at 599. During the student's sophomore year in high school, the student used the boys' restrooms at the high school without incident for almost two months. *Id*. However, the county's school board passed a policy which prohibited him from using the boys' restroom. Although he had begun hormone therapy, which deepened his voice and increased his growth in facial hair, the student was only allowed to use the girls' restrooms or a singular bathroom located in the nurse's office. *Id*. at 599-600.

The United States Court of Appeals for the Fourth Circuit held that the school board's application of its restroom policy against the student violated Title IX. *Id*. at 619. The Fourth Circuit reasoned that, "although *Bostock* interprets Title VII . . . it guides our evaluations of claims under Title IX." *Id*. at 616; *see Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *cf. Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after

Title IV . . . with the explicit understanding that it would be interpreted as Title IV was." (citation omitted)).

Due to this Court defining discrimination within Title VII as "treating [an] individual worse than others who are similarly situated," the Fourth Circuit adopted this definition to discrimination within Title IX. *Grimm*, 972 F.3d at 615. The Fourth Circuit further explained that the student was indeed treated worse than other students who he was similarly situated with, because only he was not allowed to use the restroom that corresponded with his gender identity. *Id.*

Additionally, the United States Court of Appeals for the Seventh Circuit has stated that "applying *Bostock's* reasoning to Title IX, [it had] no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes." *A.C. v. Metro. Sch. Dist. Of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023). After three transgender boys were mandated to use the girls' bathrooms at school, the boys sought a preliminary injunction in their actions against the school district for violating Title IX. The Seventh Circuit upheld the district court's decision to grant the preliminary injunction. The Seventh Circuit made clear that the boys were likely to succeed on the merits, because the "gender-neutral alternatives were not true alternatives," thereby treating the transgender boys worse than other boys only because of their transgender status.

In the case before us, A.J.T. is a student that also previously had no issues with participating in sports that corresponded with her gender identity until a law was put into place that expressly prohibited it. (R. at 3.) Additionally, similar to the student in *Grimm*, A.J.T. is the only student not allowed to participate in school-related athletic teams that correspond with her gender identity. (R. at 3.) She was forced to be excluded from school-related athletic girls' teams only because her

gender identity did not correspond with her biological sex. (R. at 3-4.) However, if her sex differed, there would be no question that A.J.T. could participate in and join girls' sports teams.

Because the Act discriminates on the basis of gender identity and the language of Title IX and Title VII mirror each other, this Court should hold that the language "discrimination on the basis of sex" within Title IX encapsulates and includes discrimination based on gender identity. *See* 20 U.S.C §1681(a). Therefore, in this case, this Court should hold that the Act discriminates against A.J.T. on the basis of sex in violation of Title IX.

B. The Act's improper discrimination causes harm to transgender girls.

By the Act excluding Petitioner, A.J.T., from school-related athletic girls' teams that correspond with her gender identity, the Act caused detrimental emotional and dignitary harm to A.J.T. and other transgender girls like her. To prevail on a Title IX claim, a petitioner shall not only show that she experienced worse treatment than those who are similarly situated, but also that the plaintiff's "improper discrimination caused [her] harm." *Grimm*, 972 F.3d at 616. Therefore, Title IX "implicitly recognize[s] the necessity of causation." *Preston*, 31 F.3d at 206. Any resulting physical, emotional, and dignitary harm due to the improper discrimination of transgender students "is legally cognizable under Title IX." *Grimm*, 972 F.3d at 617-18.

The Act's improper discrimination harms A.J.T., because she suffered emotional and dignitary harm at her school daily that then followed her to her home. In *Grimm*, a student that identified as a transgender male was forced to use an alternative restrooms in the nurse's office and three single-use restrooms. *Grimm*, 972 F.3d at 617. The restroom in the nurse's office as well as the few single-use restrooms were remote from the student's classes, oftentimes, causing the student "to be late for class or away from class for longer than students and teachers perceived as normal." *Id*. Additionally, because those restrooms were closed after school hours, the student

had to find a ride and be driven away from school just to use the restroom. *Id*. Not only did the student face physical inconveniences daily, but the student suffered from the negative attention and stigma that surrounded him. *Id*. at 18. Even the student's "high school principal understood [the student's] perception that the [school's] policy sent the following message: [the student] *was not welcome*." *Id*. (internal citations omitted) (emphasis added).

The Fourth Circuit held that "there is no question that [the student] suffered legally cognizable harm. . . . " *Id*. at 617. The Fourth Circuit reasoned first that the physical inconveniences of having to use bathrooms much further than the other girls' and boys' restrooms was a sufficient harm under Title IX. *Id*. Furthermore, the court compared the exclusion of transgender identifying individuals to the history of racial segregation by noting "[s]egregation not only makes for physical inconveniences, but it does something spiritually to an individual." *Id*. (quoting Martin Luther King, Jr., "Some Things We Must Do," Address Delivered at the Second Annual Institute on Nonviolence and Social Change at Holt Street Baptist Church (Dec. 5, 1957)). Therefore, the exclusion of a transgender student "'invite[s] more scrutiny and attention' from other students" and creates an emotional and dignitary harm to the transgender student affected. *Id*. (citing *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, (3d Cir. 2018) (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017)).

Additionally, even if there is no inconvenience in using gender-neutral facilities, there is no plausible defense that the failure to do so is a "self-inflicted" harm. *Whitaker*, 858 F.3d at 1045-46. In *Whitaker*, a transgender boy was forced to use gender-neutral bathrooms at his high school. *Id*. at 1039. The school district argued that the boy's harm of choosing not to use the gender-neutral bathrooms was self-inflicted. *Id*. at 1045. However, the Seventh Circuit held that the harm that the transgender boy endured could not be deemed as self-inflicted. *Id*. at 1046. The Seventh

Circuit reasoned that "the school district actually exacerbated the harm," by forcing the boy to use an individual bathroom where he was the only student who had access. *Id*. at 1045. Specifically, being singled-out and being forced to use a separate restroom caused even more negative attention regarding his gender identity, which "further intensified his depression and anxiety surrounding the [s]chool [d]istrict's [bathroom] policy." *Id*. at 1045-46.

Here, it is clear that the improper discrimination of excluding A.J.T. from middle school athletic girls' teams inevitably caused her harm emotionally and potentially physically. The Act forbids A.J.T. from participating with other individuals that she identifies with: girls. By being excluded from girls' athletics, it invites more scrutiny and attention by other students at school by singling A.J.T. out. It creates a dignitary harm to A.J.T., which could cause mental health issues as well as more identity problems. The emotional and dignitary harm is clear. At the young age of eleven years old, the Act told A.J.T. "you are not welcome."

Additionally, A.J.T. choosing not to participate in school-related athletic boys' teams does not mean that the harms A.J.T. have suffered are self-inflicted. It is quite the opposite—she is trying to protect herself from physical harm. Because A.J.T. identifies as a transgender girl publicly, the unfortunate reality is that the heightened attention she receives is not positive. If A.J.T. attempted to include herself and join an athletic boys' team, she would open the door to bullying, sexual harassment, as well as potential physical harm. Recent events have shown that transgender boys and girls attempting to conform to policies, laws, and societal norms are subject to all of these torments.[2] Today, there is no exception.

[2] Bevan Hurley, *Oklahoma banned trans students from bathrooms. Now Next Benedict is dead after a fight at school*, INDEPENDENT (Feb. 20, 2024), https://www.independent.co.uk/news/world/americas/nex-benedict-dead-oklahoma-b2501844.html (stating that a transgender boy was forced to use girls' bathrooms because of his biological sex and then was beaten to death by three girls in the school's girls' bathroom).

Because the Act excluding Petitioner, A.J.T., from school-related sports teams that correspond to her gender identity caused extreme isolation, heightened scrutiny, negative attention, and exclusion from others that she identifies with, the Act's discrimination inherently caused emotional and dignitary harm to A.J.T.

C. Under Title IX, no showing of a substantial relationship to an important governmental interest can save an institution's discriminatory policy.

It should also be noted that, for a Title IX claim, once a plaintiff demonstrates that she has been discriminated against and that discrimination caused her harm, no showing of a substantial relationship to an important governmental interest can save an institution's discriminatory policy. Title VI, which prohibits discrimination on the basis of race, color, or national origin, by programs and activities that receive federal financial assistance, "does not direct courts to subject these classifications to one degree of scrutiny or another." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll*., 600 U.S. 181, 309 (2023) (Gorsuch, J., concurring); 42 U.S.C. § 2000d. In other words, discrimination towards any of these persons that causes harm is unlawful, despite any governmental interest that the defendant can provide. *Id*.

If Title VI, whose language also mirrors Title IX, is not subject to the levels of scrutiny requirements, then Title IX should not be subject to such standards either. The three requirements in a Title IX claim have been made clear. A plaintiff must establish 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 of discrimination; and (3) that "improper discrimination caused [her] harm." *Grimm*, 972 F.3d at 616 (4th Cir. 2020) (citing *Preston.*, 31 F.3d at 206).

Because Petitioner, A.J.T., was discriminated against based on her gender identity, to remain consistent with this Court's holding in *Bostock*, this Court must hold that she was inherently discriminated against on the basis of sex. Additionally, it is not disputed that A.J.T. had met the

second requirement that the educational institution she was discriminated against was receiving federal financial assistance at the time. Lastly, because A.J.T. suffered emotional and dignitary harm due to being excluded from athletic teams that correspond with her gender identity, she has also demonstrated that the improper discrimination caused her harm. By reason of A.J.T. establishing all three of the requirements to a successful Title IX claim, this Court should reverse the Fourteenth Circuit's decision and hold that the Act is in violation of Title IX by discriminating against A.J.T. on the basis of sex.

II. A state statute that forbids a middle school transgender girl from participating in school-related athletic girls' teams violates the Equal Protection Clause of the Fourteenth Amendment.

The Respondents' claim that the Act does not violate the Equal Protection Clause is misplaced, because the sex-based classification used to determine student eligibility for school athletics does not substantially relate to an important governmental objective.

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. In essence, this means "that all persons similarly situated should be treated alike." C*ity of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). While the Fourteenth Amendment does not prohibit states from treating distinct classes of people differently, it does restrict states from enacting laws that classify individuals in ways "wholly unrelated to the objective of [a] statute." *Reed v. Reed*, 404 U.S. 71, 75 (1971).

Any law that differentiates between males and females is subject to scrutiny under the Equal Protection Clause. *Craig v. Boren*, 429 U.S. 190, 197 (1976). When the government does elect to enact a law that discriminates on the basis of sex, intermediate scrutiny applies, and the government must prove "at least that the [challenged] classification serves 'important

governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)). In order for a classification to substantially relate, the justification must be "exceedingly persuasive." *Id.* (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

In this case, the Act regulates student eligibility for participation in athletic teams sponsored by state schools based exclusively on the sex determined at birth. (R. at 4.) A simple reading of the Act reveals two main requirements. First, the Act strictly requires that teams or sports sponsored by any public secondary school or a state institution of higher education must be designated into groups based on biological sex at birth. N.G. Code § 22-3-16(a). Second, once the teams are classified into groups, the Act prohibits students assigned male at birth from participating in sports designated for females. N.G. Code § 22-3-16(b). While Respondents assert an objective of ensuring equal opportunities and safety for female athletes, this is merely a facade for its actual intent: to exclude transgender girls from participating in sports consistent with their gender identity.

As a result, the Act discriminates against A.J.T. on the basis of sex, which constitutes intermediate scrutiny. Furthermore, the Act fails to pass intermediate scrutiny, because its classification does not substantially relate to achieving the government's objective. Therefore, this Court should reverse the Fourteenth Circuit's decision and hold that the Act violates the Equal Protection Clause of the Fourteenth Amendment.

A. Because the Act discriminates on the basis of sex, this Court should apply intermediate scrutiny.

Although the lower courts erred in finding that the Act did not violate the Equal Protection Clause, it was correct to apply intermediate scrutiny. When confronting an equal protection

challenge, a court must first identify the appropriate level of scrutiny for the classification "and then decide whether the policy at issue survives that level of scrutiny." *Hecox v. Little*, 104 F.4th 1061, 1073 (9th Cir. 2023). The Act establishes a sex-based classification by strictly designating school athletic teams according to sex assigned at birth, thereby excluding transgender females from participating on girls' sports teams. As a result, the Act discriminates on the basis of sex, which constitutes intermediate scrutiny review. Alternatively, transgender individuals are recognized as a distinct "quasi-suspect class," which necessitates applying intermediate scrutiny for equal protection purposes.

1. This Court should extend the Bostock ruling to the Equal Protection Clause, finding that the Act discriminates based on sex.

This Court should extend its ruling in *Bostock*, which establishes that Title VII prohibits employment discrimination based on sexual orientation or gender identity, to the Equal Protection Clause.

As mentioned above, the *Bostock* Court made clear that discrimination against an individual for being transgender is discrimination "on the basis of sex." *Bostock*, 590 U.S. at 660. Its reasoning was encapsulated by the notion that, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* While the *Bostock* Court was concerned with gender discrimination in the context of Title VII, the scope of its reasoning should be extended to *equal-protection* claims for two reasons.

Firstly, a close examination of the Equal Protection Clause and Title VII reveals that the two laws are closely intertwined with one another. Kaleb Byars, *Bostock: An Inevitable Guarantee of Heightened Scrutiny for Sexual Orientation and Transgender Classifications*, 89 TENN. L REV. 483, 484 (2022). In cases of discrimination based on sexual orientation, it is common for plaintiffs

to file claims under both Title VII and the Equal Protection Clause, as in the case at hand. *See, e.g., DeFrancesco v. Ariz. Bd. of Regents*, 2020 WL 4673165, at 3 (D. Ariz. Aug. 12, 2020) (alleging the plaintiff's termination due to his sexual orientation violated both Title VII and the Equal Protection Clause). Additionally, claims under both laws require that individuals who are "similarly situated" be treated differently. Byars, *Bostock, supra* at 489, 506. In fact, the connection between Title VII and the Equal Protection Clause has been recognized this Court, noting that "in some instances, the requirements of Title VII and the Equal Protection Clause are identical." *See Johnson v. Transp. Agency*, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring).

Moreover, the Sixth Circuit has repeatedly noted that proving a disparate treatment claim under Title VII requires the same showing as proving an equal protection claim. *Smith v. City of Salem*, 378 F.3d 566, 576-77 (6th Cir. 2004). The mirrored requirements of intent for Title VII and the Equal Protection Clause claims indicate that courts should consider both laws when interpreting the other. Byars, *Bostock, supra* at 521. Therefore, because the requirements for Title VII closely align with the requirements for the Equal Protection Clause, this Court should extend *Bostock's* holding that discrimination based on sexual orientation is a form of sex discrimination within the Equal Protection Clause.

Secondly, this Court should extend *Bostock* to the Equal Protection Clause, because, in doing so, it would promote consistency among the law. It would be inconsistent to hold that *Bostock's* reasoning applies only in the context of Title VII. If this Court previously reasoned that discrimination on sexual orientation is sex discrimination, "there is no reason courts should hold that sex discrimination does not encompass LGBTQ discrimination in all contexts." Byars, *Bostock, supra* at 498. To do so would result in inconsistent application of the law, resulting in the potential of future issues.

Thus, this Court should extend *Bostock* to the Equal Protection Clause, finding that discrimination on sexual orientation is sex discrimination. Consequently, this Court should examine the Act under intermediate scrutiny.

2. Alternatively, transgender individuals constitute a distinct "quasi-suspect class" for equal protection purposes.

Although Petitioner argues that this Court should apply intermediate scrutiny because the statute facially discriminates against transgender females, arguendo, transgender individuals are a quasi-suspect class. Therefore, the Act disproportionately affects their class, thus warranting intermediate scrutiny under the Equal Protection Clause.

When a state enacts a law that appears neutral on its face, it is subject to intermediate scrutiny when it is made with discriminatory intent, thereby disproportionately affecting a quasi-suspect class. *Washington v. Davis*, 426 U.S. 229, 244-46 (1976). To determine whether a classification is quasi-suspect, this Court analyzes four factors: "(1) whether the class has been historically subjected to discrimination"; (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (4) whether the class is "a minority or politically powerless." *Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir. 2012). When a legislature enacts a discriminatory law against a quasi-suspect class, intermediate scrutiny is warranted. *Craig*, 429 U.S. at 197.

This Court in *Windsor* held that the classification of homosexuality is subject to intermediate scrutiny because homosexual individuals are a quasi-suspect class. *Windsor*, 699 F.3d at 185. In *Windsor*, this Court found it easy to conclude that homosexual individuals have been historically discriminated against, as made obvious by the fact homosexuality was historically a crime in the United States. *Id*. at 182. The same rationale applies to transgender individuals,

who have historically fallen victim to "high rates of violence and discrimination in education, employment, housing, and healthcare access." *Grimm*, 972 F.3d at 611. The *Windsor* Court satisfied the second element by finding that homosexuals possessed no impairment in their ability to perform and contribute to society. *Windsor*, 699 F.3d at 182.

Correspondingly, the Fourth Circuit in *Grimm* recognized that "seventeen of our foremost medical, mental health, and public health organizations agree that being transgender 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'" *Grimm*, 972 F.3d at 612. In *Windsor*, this Court relied on the term "immutable" to find that "homosexuality is a sufficiently discernible characteristic to define a discrete minority class," since married same-sex couples are the most visible population to the law. *Windsor*, 699 F.3d at 184. In this case, transgender individuals are a discrete group with immutable characteristics. *Grimm* relied on a medical amici to illustrate the fact that being transgender is immutable to being cisgender, as both are natural and not a choice. *Grimm*, 972 F.3d at 612-613. However, unlike cisgender individuals, being transgender subjects the group to different treatment. Id. Finally, the *Windsor* Court held that homosexual individuals were significantly encumbered in terms of being politically powerless. *Windsor*, 699 F.3d at 184. Equivalently, transgenders have little political power, as just 0.5% of American adults identify as transgender.[3]

The *Windsor* Court reasoned that each element's satisfaction supported its conclusion that homosexual individuals were a quasi-suspect class. *Windsor*, 699 F.3d at 185. Applying this same reasoning, because each element is satisfied under an analysis of transgender individuals, this

[3] Jody Herman, Andrew Flores, & Kathryn O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA SCHOOL OF LAW WILLIAMS INSTITUTE (June 2022), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/.

Court should find that homosexual individuals are a quasi-suspect class. Consequently, intermediate scrutiny should apply.

B. The Act fails to satisfy intermediate scrutiny.

The Act's sex-based classification excluding A.J.T. from girls' sports teams fails to satisfy intermediate scrutiny, because Respondents neither present a legitimate government interest nor show how the exclusion of transgender girls substantially relates to achieving their purported government interest.

1. The Act does not present an important governmental interest.

The purported governmental interest presented by Respondents falsely represents the true objective of the Act: to intentionally exclude A.J.T. and other transgender girls from participating in school-related girls' athletic teams. As a result, an important governmental interest is absent in this case.

It is a well-settled principle that "a bare. . .desire to harm a politically unpopular group cannot constitute a *legitimate* government interest." *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 535 (1973). Beyond that, transgender girls, such as A.J.T., "like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law." *Cleburne*, 473 U.S. at 447.

In determining a sufficient governmental interest, the question is whether it is *important* to treat transgender girls *differently*. *Id.* at 449. In *Cleburne*, a living center for the mentally disabled brought suit against the city after the city denied the center's application for a special use permit for operating a group home for the mentally disabled. *Id*. at 435. The application was denied on the basis of a municipal zoning ordinance which required a permit for such homes. *Id*. This Court ruled in favor of the center, reasoning that the city's denial of a permit violated the Equal Protection

Clause. *Id*. at 435. It specified that the characteristics of mentally disabled individuals do not rationally justify denying those individual, while permitting group homes for other purposes. *Id*. at 449. Therefore, this Court found that the city's purported interest of having concern for the size of the center's group home was merely a cover for it's true objective: to prevent mentally disabled individuals from residing in the city. *Id*. at 450.

Here, although Respondents falsely assert that the Act serves a governmental objective of ensuring equal opportunity and safety of female athletes, the true objective of the statute can be found straight from the Act's text, which provides that the differences between biological males and females "are cause for celebration." (R. at 3.) In *Cleburne*, the center was denied a special permit on the basis of occupying mentally disabled residents. 473 U.S. at 435. Likewise, A.J.T. was denied from participating on a girls' sports team on the basis of her transgender status. The city in *Cleburne* denied the permit under a local zoning ordinance. *Id*. at 435. Here, Respondents excluded A.J.T. from an educational program. In *Cleburne,* the city asserted a false interest in concern of the facility's size. *Id*. at 449. Equivalently, Respondents assert a false interest in equal opportunity and safety of female athletes. This Court in *Cleburne* reasoned that the characteristics of mentally disabled individuals did not justify a governmental interest in preventing that class of people from occupying the group home. *Id*. at 449-450. Therefore, this Court should apply the same reasoning to find that the characteristics of an eleven-year-old student does not justify an important governmental interest, because the physical advantages between males and females are not present in children who have not finished puberty.

In conclusion, this Court should hold that the Act's classification of A.J.T. and other transgender girls fails an intermediate scrutiny test, because there is not a justified important governmental interest in banning eleven-year-old males from competing on a girls' sports team.

2. The Act's sex-based classification is not substantially related to accomplish the governmental objective.

Even if this Court finds that Respondents have an important governmental interest, prohibiting A.J.T. from participating in girls' sports teams does not substantially relate to achieve that objective.

To uphold a sex-based classification, a plaintiff must provide evidence showing that including the suspect class would undermine the government's important interests. In *Hecox*, a transgender student brought suit against the State of Idaho after she was prohibited from participation in female athletics at her school. 104 F.4th at 1072. Idaho passed a law that categorically banned transgender females from participating in female athletics. *Id*. at 1068. The student argued that the transgender classification of the law failed to substantially relate to Idaho's interest in providing equal opportunity to female athletes. *Id*. at 1083. Meanwhile, Idaho asserted that "there are 'inherent [biological] differences between men and women,'. . .which include physical effects most important for sports." *Id*. at 1071. The Ninth Circuit held that the law likely violated the Equal Protection Clause, reasoning that the ban on transgender athletes did not substantially relate to its governmental objective of equal opportunity for female athletes. *Id*. at 1088. Idaho failed to show harmful evidence of previous transgender girls competing in biological female sports teams, much less that transgender athletes take away athletic opportunities and scholarships from cisgender females. *Id*. at 1089.

Similarly, Respondent fails to present evidence that permitting A.J.T. to participate on a girls' sports team would take away equal opportunities or increase danger among biological female athletes. A comparison of the law in *Hecox* and the Act in this case reveals that the laws are nearly identical to one another. *Hecox* noted that Idaho failed to show history of transgender athletes ever

competing in sports within the state, evidence of female athletes being displaced by transgender athletes, or evidence to suggest a categorical ban prohibiting "transgender female athlete's participation in sports is required in order to promote 'sex equality' or to 'protect athletic opportunities for females'. . . ." *Id*. at 1089. In this case, Respondents provide no evidence of transgender girls competing in cisgender female sports, no evidence that a transgender girl in middle school has ever deprived a cisgender female of equal opportunities, and no evidence showing that a categorical ban on transgender girl competing with cisgender females is necessary to ensure equal athletic opportunities for cisgender females.

In fact, this lack of evidence is even more apparent in the context of this case, where the relevant subjects are eleven-year-old middle school students. While Respondents fail to specify whether the cross-country and volleyball teams are based upon competitive skill or the contact nature of the sport, it is illogical to assume either mounts a basis for the classification. Often, middle school sports, unlike high school and college sports, lack the competitive nature of high school sports where the college recruiting process is present.[4] Therefore, in this case, this Court should apply the *Hecox* reasoning in finding that Respondents' sex-based classification is not substantially related to the interest of providing equal opportunity and safety for cisgender female athletes.

As mentioned above, in order for a school's classification of transgender students to effectively relate to an important governmental interest, it must promote that interest. In *Grimm*, a school discriminated against a transgender student when it enacted a school policy limiting students to only use the bathroom that matched their assigned sex at birth. 972 F.3d at 593.

[4] *Early Recruiting: When Does Recruiting Really Start for Student-Athletes?*, NCSA COLLEGE RECRUITING (2022), https://www.ncsasports.org/recruiting/how-to-get-recruited/early-scholarship-offers.

Likewise, Respondents discriminated against A.J.T. when they enacted the Act restricting student athletes to participating only in sports that match their assigned sex at birth. Both school bathrooms and athletic teams are educational programs. The school in *Grimm* asserted it had an important government interest in student privacy. *Id*. at 607. Here, Respondents assert they have an interest in the equal opportunity and safety of female athletes. (R. at 3-4.) The Fourth Circuit in *Grimm* ruled in favor of the transgender student, holding that the school policy violated the Equal Protection Clause. 972 F.3d at 619. It reasoned that, while student privacy is a legitimate government interest, prohibiting transgender males from access to biological male bathrooms does not increase bodily privacy when the student was banned from those restrooms. Id. at 614.

Applying this same reasoning, even if Respondents' true objective was to ensure equal opportunity and safety for female athletes, the categorical ban on transgender girls from competing in biological female sports does not increase safety for female athletes. Studies indicate that biological males generally begin puberty around age eleven, with some starting as late as age fourteen, and they typically do not experience physical changes through puberty until around age thirteen.[5] Given that A.J.T. is eleven years old, she is physically comparable to cisgender females in terms of potential danger and therefore does not pose an increased risk of danger to cisgender females in sports. Consequently, this Court should determine that the Act's sex-based classification does not promote a safety interest for cisgender female athletes, thereby failing to substantially relate to the objective of protecting female safety.

Respondents must demonstrate that excluding A.J.T. from participating in school-sponsored girls' sports, based on her transgender status, substantially relates to achieving their

[5] Ashley Marcin, *Navigating Puberty: The Tanner Stages*, HEALTHLINE (Feb. 10, 2023), https://www.healthline.com/health/parenting/stages-of-puberty.

alleged governmental interest in protecting equal opportunity and safety for cisgender females. Since Respondents neither present a justifying governmental interest nor show that the exclusion substantially serves this interest, the Act fails intermediate scrutiny. Therefore, this Court should reverse the Fourteenth Circuit's decision and hold that the Act violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Petitioner, A.J.T., respectfully requests this Court to reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit and hold that a state statute that forbids a middle school transgender girl from participating in school-related athletic girls' teams violates Title IX and the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution.