Docket No. 24–2020

In The

Supreme Court of the United States

October Term, 2024

A.J.T.,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the United States

Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

Counsel for Petitioner
September 11, 2024

Team 29

QUESTIONS PRESENTED

1. Whether Title IX protects a transgender student who has identified as a girl since a young age from a state's restriction designating girls' and boys' sports teams based on biological sex determined at birth.

2. Whether the Equal Protection Clause protects transgender individuals from a state's policy that bars transgender individuals from participating on sports teams aligned with their gender identity.

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This appeal concerns an alleged violation of Petitioner's Fourteenth Amendment right to equal protection. U.S. CONST. amend. XIV. The Equal Protection Clause of the Fourteenth Amendment provides:

> 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.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

On May 1, 2023, the State of North Greene ("the State") codified the Save Women's Sports Act ("the Act") under North Greene Code § 22-3-4, titled "Limiting participation in sports events to the biological sex of the athlete at birth." R.3. The statue provides that:

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

N.G. Code § 22-3-16(a). R.4. The State asserts that the purpose of the Act is "to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." R.3–4. The Act directs which students may participate on each team by stating that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill

or the activity involved is a contact sport." N.G. Code § 22-3-16(b). R.4. The Act defines the terms "biological sex," "female" and "male" as:

> (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.4. The Act continues:

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

N.G. Code § 22-3-16(c). R.4.

Petitioner, A.J.T., was an eleven-year-old transgender girl at the time of the suit. R.3. A.J.T. identified as a girl from an early age. R.3. She began her social transition in elementary school, where she started using a more traditionally feminine name, joined the girls' cheerleading team, and lived as a girl both privately and publicly. R.3. During her social transition, A.J.T. sought counseling. R.3. In 2022, she was diagnosed with gender dysphoria. R.3. Aside from counseling, A.J.T. has not received other treatment. R.3. She discussed the possibility of gender-affirming care to prevent her male puberty, which has not occurred, but she has yet to move forward with this care. R.3. When A.J.T. reached seventh grade, she wanted to join the girls' cross-country and volleyball teams. R.3. The school rejected her request, citing the Act. R.3.

II. PROCEDURAL HISTORY

A.J.T., by and through her mother, filed this lawsuit against the State of North Greene Board of Education ("School Board") and State Superintendent Floyd Lawson. The State intervened, and Petitioner amended the complaint to add the State and Attorney General Barney Fife as defendants (hereinafter, all defendants will be referred to collectively as "Defendants"). Plaintiff alleged that the Act violated her rights guaranteed under Title IX and the Equal Protection Clause of the Fourteenth Amendment. R.4–5. Defendants moved for summary judgment on A.J.T.'s claims. R.5. The District Court granted Defendants' motion, which the Fourteenth Circuit affirmed. R.4, 12. The Supreme Court granted A.J.T.'s petition concerning both her Title IX and Equal Protection claims. R.17.

SUMMARY OF THE ARGUMENT

This Court should find the Fourteenth Circuit erred by holding the Act did not discriminate against A.J.T. under Title IX. First, A.J.T. suffered discrimination "on the basis of sex" because discriminating against a transgender person is impossible without discriminating based on their sex. Additionally, the Act forced A.J.T. to play on a team according to her sex assigned at birth, which falls into Title IX's broad protections against discrimination. Next, Title IX's but-for causation standard was satisfied when the Act discriminated against A.J.T.'s transgender status. Finally, the School Board's decision discriminated against A.J.T. due to her sex, conflicting with the intent of Title IX.

Second, A.J.T. suffered harm from the Act's discrimination. A.J.T. was treated worse than her similarly situated cisgender female peers. In addition, the School Board's decision individually harmed A.J.T. because it precluded her, but not her peers, from receiving the benefits that accompany sports. Furthermore, A.J.T. cannot receive these benefits by playing on

the boys' teams, as the Act would require, because she would endure additional harm due to her gender dysphoria.

Third, forcing A.J.T. to play on a team that does not align with her gender identity has well-established risks for transgender youth. The School Board's decision created a hostile school environment, which statistically increases A.J.T.'s risk of suicide. The Fourteenth Circuit misconstrued Title IX by allowing the School Board to enforce the Act against A.J.T. Thus, this Court should reverse the lower court's decision.

This Court also should find the Fourteenth Circuit erred in ruling the Act did not violate the Equal Protection Clause of the Fourteenth Amendment. The Act violates the Equal Protection Clause because its categorical ban on transgender girls does not pass intermediate scrutiny. The Act receives intermediate scrutiny for two reasons. First, the Act classifies on the basis of sex and treats similarly situated transgender and cisgender girls differently. Second, the Act discriminates on the basis of transgender status.

The Act fails intermediate scrutiny because its categorical ban is not substantially related to the government's interests. The Act's prohibition is far too broad to support any explanation that would meet the government's demanding burden. Furthermore, the Act relies on sex stereotypes to justify the classification, which intermediate scrutiny rejects.

Even if this Court determines that the Act does not receive intermediate scrutiny, it also fails rational basis scrutiny. The Act's ban was motivated by animus because the Act's clear purpose and only effect was to discriminate against transgender girls.

Consequently, Petitioner requests this Court overrule the Fourteenth Circuit's decision.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact. *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 249 (1986). A genuine dispute of material fact exists when a reasonable jury could find in favor of the nonmoving party. *Scott v. Harris*, 550 U.S. 372 (2007). On a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party. *Id.* This Court reviews summary judgment decisions *de novo*. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 465 n. 10 (1992).

ARGUMENT

I. THE STATE'S ACT VIOLATES TITLE IX BY BARRING A.J.T. FROM PARTICIPATING ON THE GIRLS' SPORTS TEAMS.

With the passage of Title IX, Congress intended all students to be treated equally and fairly. A.J.T. is not the exception. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To grant summary judgment on a Title IX claim, the court must find (1) the petitioner was excluded "on the basis of sex" from participating in an educational program, (2) the petitioner was harmed by the discrimination, and (3) the educational institution received federal funding at the time of the incident. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

The Fourteenth Circuit wrongfully upheld that Title IX allows the State to restrict sports participation to sex assigned at birth. First, A.J.T. was excluded "on the basis of sex" from participating on the girls' cross-country and volleyball teams. Second, A.J.T. suffered discrimination and harm from the Act. Third, public policy implications compel allowing A.J.T.

to participate on the girls' cross-country and volleyball teams. Finally, it is not in contention that the school was receiving federal funding at the time of A.J.T.'s discrimination. Accordingly, this Court should hold that Title IX prevents states from limiting male and female sports to the sex that students are assigned at birth.

A. Prohibiting A.J.T. from the Girls' Sports Teams was Discrimination "On the Basis of Sex."

First, A.J.T. was discriminated "on the basis of sex" because this Court in *Bostock* determined discrimination against a transgender person is discriminating based on sex. 590 U.S. 644, 660 (2020). Second, the Act's discrimination towards A.J.T. falls under Title IX's broad prohibition on discrimination, instead of the narrow exceptions. Finally, the Act contradicts the purpose of Title IX.

1. Discrimination against transgender individuals, like A.J.T., is discrimination "on the basis of sex."

The Fourteenth Circuit incorrectly found the Act does not discriminate against transgender students "on the basis of sex" because this Court held in *Bostock* that discrimination based on transgender status is inextricable from sex-based discrimination. *See Bostock v. Clayton County*, 590 U.S. 644, 660 (2020). *Bostock* found "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* This Court and various circuit courts use the interpretation of Title VII in *Bostock* to guide interpretations of Title IX. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VII of the Civil Rights Act of 1964 and passed Title IX with the explicit understanding it would be interpreted as Title VII was interpreted."); *Grimm*, 972 F.3d at 616 (describing that *Bostock* guides a court's interpretation of Title IX); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (stating that courts should

look Title VII precedent when evaluating claims brought under Title IX). In addition, the Justice Department and Department of Education interpret *Bostock* to extend to Title IX. *See* Memorandum Pamela S. Karlan, Principal Deputy Assistant Att'y Gen. C. R. Div., to Fed. Agency C. R. Dirs. & Gen. Couns. (Mar. 26, 2021) (on file with U.S. Dep't. of Just.); Rachel Tomlinson Dick, *Play Like a Girl: Bostock, Title IX's Promise, and the Case for Transgender Inclusion in Sports*, 101 NEB. L. REV. 283, 293 (2022).

Here, the Act prevents A.J.T. from participating on the girls' volleyball and cross-country teams because it limits "participation in sports events to the biological sex of the athlete at birth." N.G. Code § 22-3-4. A.J.T. was prohibited from participating in female sports because she is transgender, thus, the Act discriminated against her "on the basis of sex." Accordingly, because this Court has held discrimination against a transgender person is inconceivable without discriminating based on that person's sex, the Act violates Title IX.

2. The Act falls under Title IX's broad prohibition on discrimination.

The Act's discrimination against transgender individuals falls within Title IX's broad proscriptions on discrimination. Title IX is a "broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *See Peltier v. Charter Day Sch.*, 37 F.4th 104, 128 (4th Cir. 2022) (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005)). The exceptions to Title IX are limited to those enumerated. *See United States v. Johnson*, 529 U.S. 53, 58 (2000). For example, Title IX has exceptions for religious and military institutions, and even sororities and fraternities; however, it does not enumerate an exception for transgender people. 20 U.S.C. § 1681(a)(3)–(6).

Here, the Act discriminates against transgender students by placing them on sports teams according to their sex assigned at birth, falling outside Title IX's enumerated exceptions. R.3.

Expressio unius, an interpretive canon created by this Court, states that if something is explicitly mentioned, it assumes the exclusion of others. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017). Congress wrote very specific and narrow exceptions to Title IX that do not include transgender status. Therefore, its absence implies protection under Title IX for transgender individuals.

In addition, the Act discriminated against A.J.T. because her transgender status constitutes but-for causation under Title IX. This Court, in its reading of Title IX, interprets "on the basis of sex" to create but-for causation. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 857 (11th Cir. 2022) (Wilson, J., dissenting) (arguing that but-for causation was met when a transgender boy was discriminated "on the basis of sex" by a school policy which limited bathroom use to sex assigned at birth). But-for causation implies "a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 590 U.S. at 656. Here, the Act barred A.J.T. from participating on the girls' teams because it did not align with her biological sex at birth. R.3. Consequently, but-for A.J.T. being assigned male at birth, she would be able to play on the girls' teams. Accordingly, the School Board's exclusionary policy satisfies the requisite causation standard under Title IX.

3. The Fourteenth Circuit's decision contravenes the purpose of Title IX.

The Act and its discrimination against A.J.T. contradict the purpose of Title IX. Title IX's intent is to prohibit sex discrimination in education. *See Adams*, 57 F.4th at 811. Here, the Act discriminated against A.J.T. when it barred her from competing on the girls' teams solely because of her sex. R.3. The State's actions directly contravene the purpose of Title IX because the statute works to eliminate all sex-based discrimination in education. *See Adams*, 57 F.4th at 811.

The Act targets A.J.T. based upon her sex—the exact scenario Congress created Title IX to prevent.

B. The Act's Restriction on A.J.T.'s Participation Constitutes Harm Under Title IX.

First, the Act discriminated against A.J.T. because she was treated worse than her similarly situated cisgender female peers. Second, A.J.T. suffered individual harm from the Act's policies. Finally, A.J.T. does not have an alternative choice to play on the boys' teams.

1. A.J.T. is similarly situated to and treated differently than cisgender girls her age.

The Act discriminated against A.J.T. because she was treated inferior to the cisgender girls at school. Title IX defines discrimination as treating an individual worse than others who are similarly situated. *See Grimm*, 972 F.3d at 618 (quoting *Bostock*, 590 U.S. at 657). Circulating testosterone explains most, if not all, differences between biological males and females in sports. *See* David J. Handelsman et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 ENDOCRINE REVS. 803, 823 (2018). However, the average levels of circulating testosterone are "essentially no different" between young girls and boys. *See* Rebecca Kea Strong & James M. Dabbs Jr., *Testosterone and Behavior in Normal Young Children,* 28 PERSONALITY & INDIVIDUAL DIFFERENCES 909, 912 (2000). In fact, one study found that prior to puberty, biological males and females exhibited no difference in athletic performance due to similar circulating testosterone levels. *See* Handelsman et al., *supra* 9, at 823. For example, there is less than a five percent difference between the running and swimming capabilities of biological boys and girls between the ages of ten and twelve. *See id.* at 813.

From both a biological and social perspective, A.J.T. is similarly situated to cisgender girls. At eleven years old, A.J.T. is younger than the age biological boys typically begin puberty. R.3. Consequently, A.J.T. has no difference in circulating testosterone than other girls, so she has no athletic advantage over them. In addition to athletic skill, A.J.T. is similarly situated to girls on a social level. A.J.T. identifies and presents herself as a girl in all aspects of her life. R.3. Accordingly, on both a social and biological level, A.J.T. is similarly situated to girls.

Further, A.J.T. was treated worse than similarly situated young girls because the Act prevents A.J.T. from playing on the girls' teams. R.3. Due to the prohibition, A.J.T. is unable to receive the benefits sports offer, such as building personal relationships and improving teamwork skills. Further, A.J.T. cannot obtain the benefits physical activity sports provide. Accordingly, the Act discriminated against A.J.T. because it treated her worse than her similarly situated cisgender peers.

2. A.J.T. suffered individual harm.

A.J.T. suffered individual harm when she was excluded from the girls' sports teams. To prevail on a Title IX claim, a plaintiff must show the "improper discrimination caused [them] harm." *B.P.J. by Jackson v. West Virginia State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024) (quoting *Bostock*, 590 U.S. at 657). Once a plaintiff establishes discrimination exists, Title IX dictates that "no showing of a substantial relationship to an important government interest can save an institution's discriminatory policy." *Id.* (citing *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 309 (2023) (Gorsuch, J., concurring)). Cognizable harm under Title IX exists when a school deprives a student of benefits enjoyed by similarly situated classmates. *See Doe v. Horne*, 683 F. Supp. 3d 950, 974 (Ariz. Dist. Ct. 2023)

(holding a statute that prevented transgender girls from competing on girls' sports teams was in violation of Title IX).

Here, A.J.T. suffered harm because the Act prevented her, but not her classmates, from participating on the girls' cross-country and volleyball teams. R.3. Hence, the School Board deprived A.J.T. of the various benefits provided to her female peers. R.3. School sports teams allow students to form friendships, learn teamwork, and build confidence. Among other benefits, children who participate in sports with their peers have up to forty percent higher test scores and are fifteen percent more likely to attend college. *See* RICHARD BAILEY ET. AL., SPORTS, EDUCATION AND SOCIAL POLICY 152 (Gudrun Doll-Tepper et al. eds., 1st ed. 2016). Overall, the Fourteenth Circuit erred in granting summary judgment because A.J.T. suffered harm.

3. A.J.T.'s only option under the Act to participate in sports would cause her additional harm.

Playing on the boys' teams would cause A.J.T. to suffer additional harm. Offering a transgender student the choice to participate on a team that contradicts their gender identity offers no choice at all. *See B.P.J. by Jackson*, 98 F.4th at 564. Such a restriction threatens their social transition and treatment protocols for gender dysphoria. *See id.* In 2022, A.J.T. was officially diagnosed with gender dysphoria. R.3. Gender dysphoria is when transgender individuals experience "clinically significant distress" because of the lack of alignment between their gender identity and biological sex. *Williams v. Kincaid*, 50 F.4th 429, 430 (4th Cir. 2022). As someone who has solidified her identity as a girl from a young age, A.J.T. being forced to play on the boys' teams would exacerbate her symptoms. In sum, forcing A.J.T. to play on the boys' teams would worsen her gender dysphoria, and thus cause additional harm.

C. The Benefits of A.J.T. Playing on the Girls' Teams Outweigh the Costs.

Finally, A.J.T. should play on the girls' sports teams because young transgender girls face well established risks when forced to compete on sports teams that do not align with their gender identity. Discrimination against transgender students invites scrutiny and harassment from others and "very publicly brand[s] all transgender students with a scarlet 'T'." *Grimm*, 972 F.3d at 618 (quoting *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018)). When transgender students suffer discrimination or stigma in their educational settings, their risk of suicide increases. *See* Dick, *supra* 7, at 314. Approximately eighty-five percent of transgender students in the U.S. have "seriously consider[ed] suicide" and over half have attempted suicide as a result of discrimination. *See id.* However, there is a direct correlation between a decrease in transgender suicide and transgender-inclusive school policies. *See id.* at 315 (recognizing that transgender students earn higher grades and have overall increased physical, social, and emotional well-being when transgender friendly policies exist). In fact, the American Academy for Pediatrics recommends that transgender students participate in sports that align with their gender identity. *See* Mollie McQuillan et. al., *A Solution in Search of a Problem: Justice Demands More for Trans Student-Athletes to Fulfill the Promise of Title IX*, 33 MARQUETTE SPORTS L. REV. 195, 219 (2022). The Act prevents A.J.T. from participating on teams that align with her gender identity. R.3. Thus, the discriminatory policy only serves to further the potentially life threating consequences that transgender students.

The Fourteenth Circuit distorted the underlying values of Title IX when it allowed the State to maintain its discriminatory policy against transgender students. As such, this Court should reverse the lower court's decision.

II. THE ACT VIOLATES A.J.T.'S FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION BY CATEGORICALLY BARRING TRANSGENDER GIRLS FROM GIRLS' SPORTS.

Congress created the Fourteenth Amendment to protect persecuted individuals from irrational and discriminatory laws. The Fourteenth Amendment intentionally includes broad language to curtail the discrimination the Act perpetuates. The Equal Protection Clause mandates that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In sum, state laws must treat all "similarly situated" persons alike. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Under the Equal Protection Clause, states must meet a requisite level of scrutiny when treating classes of similarly situated individuals differently. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982). If the law invokes a classification that states historically have used to enforce invidious discrimination, like race or sex, courts presume the law is suspect and apply heightened scrutiny. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). When an individual mounts an equal protection challenge to a legislative act in its entirety, the courts deem this a facial challenge. *See Sabri v. United States*, 541 U.S. 600, 609 (2004). An individual prevails on a facial challenge if the individual can "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The Fourteenth Circuit misunderstands Fourteenth Amendment jurisprudence and the application of the Equal Protection Clause. This Court should reverse the Fourteenth Circuit's grant of the Defendants' summary judgment motion because the Defendants did not establish that a categorical ban on transgender girls survives intermediate scrutiny. In the alternative, this Court should reverse the judgment under rational basis scrutiny because the State's categorical exclusion of transgender girls was motivated by animus.

A. The Act's Use of Quasi-Suspect Classifications Receives Intermediate Scrutiny, which it Fails.

The Act receives and fails intermediate scrutiny. If a law classifies based on sex, the law receives intermediate scrutiny. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982). A law passes intermediate scrutiny only when the classification is "substantially related" to an "important governmental objective." *United States v. Virginia*, 518 U.S. 515, 533 (1996). This Court noted that, although intermediate scrutiny is less rigorous than strict scrutiny, intermediate scrutiny still poses a "demanding" burden on the state to justify the classification. *Id*. In other words, the justification should be "*exceedingly persuasive*" and "must not rely on overbroad generalizations" or stereotypes about the sexes and their abilities. *Id.* (emphasis added). Here, the Act receives intermediate scrutiny for two reasons. First, the Act blatantly classifies on the basis of sex and treats similarly situated transgender and cisgender girls differently. Second, the Act uses a biological sex classification to discriminate against transgender girls. The justifications for treating transgender girls differently are not substantially related to the government's objectives. Consequently, the Act fails intermediate scrutiny.

1. The Act receives intermediate scrutiny because it classifies on the basis of sex and treats transgender and cisgender girls differently.

The first reason the Act receives intermediate scrutiny is because it classified on the basis of biological sex. The circuit courts that have addressed laws similar to the Act all held that intermediate scrutiny applied because the laws, on their face, classified by biological sex. *See B.P.J. by Jackson*, 98 F.4th at 556; *Hecox v. Little*, 104 F.4th 1061, 1074 (9th Cir. 2024). In a similar vein, circuits that have addressed equal protection claims by transgender students who challenged state laws concerning bathroom use applied intermediate scrutiny due to the biological sex classifications. *See, e.g.*, *Grimm*, 972 F.3d at 607 (applying intermediate scrutiny

to a law segregating bathroom use by biological sex because the policy "rests on sex-based classifications"); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (finding intermediate scrutiny applies to a law restricting bathroom use by biological sex because the policy "is inherently based upon a sex-classification"). Here, the Act creates classifications for males and females and requires that sports teams "shall be expressly designated as one of the following *based on biological sex* at birth: (A) Males . . . ; (B) Females . . . ; or (C) Coed." N.G. Code § 22-3-16(a) (emphasis added); R.4. In sum, the Act's use of biological sex classifications triggers intermediate scrutiny.

The Act discriminates against transgender girls because it prevents only transgender girls, not cisgender girls, from participating on sports teams that align with their gender identity. Courts have found that forcing a transgender girl, but not a cisgender girl, to live contrary to her gender identity constitutes discriminatory treatment. *See, e.g.*, *Grimm*, 972 F.3d at 616 (holding that preventing a transgender boy from using the boys' restroom violated the Equal Protection Clause); *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024) (stating that preventing a transgender individual from changing the sex listed on their birth certificate likely violated the Equal Protection Clause). Courts have recognized that a transgender individual's inability to play on the sports team with which they identify constitutes discriminatory treatment. *See, e.g.*, *B.P.J.*, 98 F.4th at 561 (holding that preventing a transgender girl from participating on the sports team aligned with her gender identity constituted discriminatory treatment); *Hecox,* 104 F.4th at 1088 (finding that restricting a transgender girl from participating on the sports team aligned with her gender identity likely violated the Equal Protection Clause). Here, A.J.T. sought to join the girls' cross-country and volleyball teams because they aligned with her gender identity. R.3. But the School Board prevented her from joining either team because the Act required the school to

exclude transgender girls from girls' sports. R.3. Since the Act prevented A.J.T. and other transgender girls, but not cisgender girls, from joining the sports teams aligned with their gender identities, the Act treated transgender and cisgender girls differently.

The Fourteenth Circuit incorrectly held that transgender and cisgender girls are not similarly situated because biological sex is not dispositive of athletic advantage. This Court has determined that all persons similarly situated are those that are "similarly circumstanced" in all relevant respects. *See Reed v. Reed*, 404 U.S. 71, 76 (1971); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Fourteenth Circuit determined that biological sex was the sole relevant factor as to whether transgender and cisgender girls are similarly situated. R.7. But this logic falls victim to the sort of sex stereotyping that intermediate scrutiny prohibits. *See Virginia*, 518 U.S. at 516. Circulating testosterone has been found to determine physical advantages in sports—not biological sex. *See* Handelsman et al., *supra* 9*,* at 812. Further, children and adults who had similar circulating testosterone exhibited nearly identical physical capabilities. *See id*. As such, the Fourteenth Circuit erred in determining that transgender and cisgender girls are not similarly situated by using biological sex as the only relevant factor.

Transgender and cisgender girls are similarly situated because of their gender identities. Although the Act excludes gender identity from the definitions of male and female, it ignores that biological sex is an oversimplification of the complex relationship between sex and gender. *See Roe by & through Roe v. Critchfield*, No. 1:23-CV-00315-DCN, 2023 WL 6690596, at *7 (D. Idaho Oct. 12, 2023) (holding that a school's biological sex bathroom use policy likely violates the Equal Protection Clause). In fact, "structural and functional brain characteristics are more similar between transgender people and control subjects with the same gender identity than between individuals sharing their biological sex." C. E. Roselli, *Neurobiology of Gender Identity*

& Sexual Orientation, NIH NAT'L LIBR. OF MED. (Aug. 2, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6677266/; *see also* Toni Baker, *Gene Variants Provide Insight into Brain, Body Incongruence in Transgender*, SCIENCEDAILY (Feb. 5, 2020), https://www.sciencedaily.com/releases/2020/02/200205084203.htm (finding that transgender girls' brain development is more similar to biological females' than biological males', irrespective of gender affirming care); J. Graham Theisen et al., *The Use of Whole Exome Sequencing in a Cohort of Transgender Individuals to Identify Rare Genetic Variants*, SCI. REPS. (Dec. 27, 2019), https://www.nature.com/articles/s41598-019-53500-y (describing how an individual's exposure to certain hormone levels in utero correlates with their gender identity). In all, these studies advocate that brain development shapes gender identity. Just as cisgender girls know they are girls because of their brain development, so does A.J.T. For example, A.J.T. began living privately as a girl as early as the third grade. R.3. A.J.T. then began expressing her gender identity publicly by dressing as a girl and joining the girls' cheerleading team. R.3. Thus, transgender girls, like A.J.T., are similarly situated to their cisgender classmates because of their gender identity.

2. In the alternative, the Act receives intermediate scrutiny because it discriminates on the basis of transgender status.

Even if this Court determines that transgender and cisgender girls are not similarly situated, the Act receives intermediate scrutiny because it uses biological sex to discriminate against transgender girls. Heightened scrutiny still applies to a classification that "is an obvious pretext" for discrimination. *Feeney*, 442 U.S. at 272-73 (warning that gender discrimination through apparent pretextual classifications is "the touchstone for pervasive and often subtle discrimination."). This Court will look to whether the state legislature created the classification "because of, not merely in spite of, its adverse effects." *Id.*

The Act's text shows a clear purpose to discriminate against transgender girls. The Act states that "biological sex is not determinative or indicative of . . . gender identity." N.G. Code § 22-3-16(c). The discriminatory purpose is evidenced by the State's unsubstantiated and irrelevant claim that biological sex has no relationship with gender identity. The State does not further its objectives by asserting that gender identity has no biological basis. Rather, the only purpose the State achieves is to enforce a political agenda that disparages and excludes transgender people.

The Act's apparent purpose was to exclude transgender girls from girls' sports. Not only did sex-separated sports already exist in the State prior to passing the Act, but transgender girls could compete in girls' sports. R.14. The Act's only effect was "to entirely exclude transgender women and girls" from girls' sports. R.14. This was no disproportionate impact—this was a complete bar that *only* affected transgender girls. Thus, the Act's text and effect show a clear intent to discriminate against transgender girls.

i. Bostock dictates that discriminating on the basis of transgender status constitutes discrimination on the basis of sex, which is a quasi-suspect class.

Discriminating on the basis of transgender status compels intermediate scrutiny because discriminating on transgender status is sex discrimination. This Court in *Bostock* determined that "*it is impossible* to discriminate against a person for being homosexual or transgender without discriminating against that individual based on [biological] sex." *Bostock*, 590 U.S. at 660 (emphasis added). Circuit courts have extended this holding to the Equal Protection Clause. *See, e.g.*, *Fowler*, 104 F.4th at 790 (noting that this Court "did not indicate that its logic concerning the intertwined nature of transgender status and sex was confined to Title VII"); *Grimm*, 972 F.3d at 616 (describing how the court had "little difficulty holding that a bathroom policy precluding

[a transgender boy] from using the boys restrooms discriminated against him on the basis of sex") (internal quotations omitted); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that firing a transgender girl based on her gender identity was sex discrimination). Likewise, this Court should have little trouble upholding its reasoning.

ii. Transgender status alone is a quasi-suspect class because it fulfills the Windsor factors.

Even assuming this Court refuses to extend *Bostock* to Equal Protection, transgender individuals still constitute a quasi-suspect class which triggers intermediate scrutiny. Many other courts have recognized transgender status as a quasi-suspect class. *See, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (finding that a law prohibiting transgender individuals from joining the military received intermediate scrutiny because transgender people are a quasi-suspect class); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (determining that a police precinct's treatment of a transgender detainee was subject to intermediate scrutiny because transgender people are a quasi-suspect class); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 872 (S.D. Ohio 2016) (adopting *Adkins* reasoning, almost in its entirety, to establish that transgender people are a quasi-suspect class); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 119 (N.D. Cal. 2015) (describing how intermediate scrutiny applied to a state's conduct of preventing a transgender inmate's access to gender-affirming care because transgender people are a quasi-suspect class). Courts generally use *Windsor*'s four-factor test to determine whether a class is quasi-suspect. *See Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013). The factors include whether the class (1) has been "subjected to discrimination" historically, (2) shares a characteristic that frequently bears a relation to their inability to perform or contribute to society,

(3) has distinguishing characteristics "that define them as a discrete group," and (4) is a minority or "politically powerless" group. *Id*. Transgender status satisfies all four factors.

Transgender status is a quasi-suspect class because transgender individuals routinely have faced, and continue to face, discrimination. The first factor considers whether the class has been subjected to discrimination historically. *See id*. When the Seventh Circuit discussed whether to recognize transgender status as a quasi-suspect class, the court noted that "[t]here is no denying" that transgender individuals face and have faced invidious discrimination. *Whitaker By Whitaker*, 858 F.3d at 105 (describing how, as a consequence of discrimination, transgender children have higher risks of physical assault, sexual assault, verbal harassment, and dropping out than their cisgender peers). Circuit courts have recognized that transgender students have been subjected to single-sex bathroom policies and birth certificate amendment policies that specifically discriminated on the basis of transgender status. *See, e.g.*, *Grimm*, 972 F.3d at 616; *Fowler*, 104 F.4th at 770. Overall, transgender status as a quasi-suspect class easily satisfies the first factor.

Next, transgender status is a quasi-suspect class because an individual's gender identity does not bear on their ability to function in society. The second factor considers whether differential treatment of a class may be warranted if the class shares a characteristic that significantly affects their ability to perform in and contribute to society. *See Windsor*, 699 F.3d at 181. Transgender individuals' distinguishing characteristic is that their gender identity does not align with their biological sex. *Whitaker By Whitaker*, 858 F.3d at 1048. However, not all transgender individuals have gender dysphoria. *Williams*, 50 F.4th at 767. Any argument that transgender status alone affects transgender individuals' ability to perform and function in society relies on the inaccurate stereotype that all transgender individuals experience intense emotional trauma. As such, transgender status as a quasi-suspect class fulfills the second factor.

Additionally, transgender status is a quasi-suspect class because gender identity distinguishes transgender people as a distinct group. The third factor considers whether the class has identifiable characteristics "that define them as a discrete group." *See Windsor*, 699 F.3d at 181. The very essence of being transgender is that the individual's biological sex does not align with their gender identity. Consequently, transgender status satisfies the third factor.

Lastly, transgender status is a quasi-suspect class because transgender individuals are a minority with a weaker political position than their cisgender peers. The fourth factor considers whether the class is a minority or politically powerless. *See Windsor*, 699 F.3d at 181. Out of approximately 337,000,000 individuals in the United States, transgender individuals only account for approximately 5,400,000, or 1.6 percent. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited Sep. 10, 2024); Anna Brown, *About 5% of Young Adults in the U.S. Say their Gender is Different from their Sex Assigned at Birth*, PEW RSCH. CTR. (Jun. 7, 2022), https://www.pewresearch.org/short-reads/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth/. The lack of representation by virtue of being a small class alone disadvantages transgender individuals, weakening their political position. *See* Katherine Schaeffer, *118th Congress Breaks Record for Lesbian, Gay and Bisexual Representation*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/short-reads/2023/01/11/118th-congress-breaks-record-for-lesbian-gay-and-bisexual-representation/ (describing there are no openly transgender people in Congress). As such, transgender status satisfies the fourth factor and constitutes a quasi-suspect class under *Windsor*.

3. The Act Fails Intermediate Scrutiny because the Classification Is Not Substantially Related to the Government's Objectives.

Whether this Court finds the Act discriminates on the basis of sex or transgender status, intermediate scrutiny applies. To survive intermediate scrutiny, the classification must be "substantially related" to an "important governmental objective." *Virginia*, 518 U.S. at 533. The government's explanation for the classification must be "exceedingly persuasive" and "[t]he burden of justification is demanding and it rests entirely on the State." *Id*.

Concededly, the Act's purpose of providing girls equal athletic opportunities and promoting physical safety in sports are important government objectives. But a categorical ban on all transgender girls from competing is not substantially related to achieving such goals because the ban reaches too broadly.

The first reason the Act fails intermediate scrutiny is that it ignores how age differences play a vital role in determining whether the average transgender girl has a competitive advantage over the average cisgender girl. Age is relevant to whether the broad ban is substantially related to achieving the objectives because age is a reliable indicator of when transgender girls go through puberty. *See How Tall Will Your Child Be?*, CLEVELAND CLINIC HEALTH ESSENTIALS (Nov. 21, 2022), https://health.clevelandclinic.org/child-growth-and-development. The Act's ban on transgender athletes extends to "any public secondary school or a state institution of higher education." N.G. Code § 22-3-16(a). The average age of transgender girls starting public secondary school is eleven years old. *See School Age and Grade Levels by The American School System*, EDUWW, https://eduww.net/parent-resources/school-age-grade-levels/ (last visited Sep. 10, 2024). Meanwhile, the average age a transgender girl undergoes puberty is twelve. R.3. But transgender girls may undergo puberty anywhere between nine and fourteen. *See How Tall Will*

Your Child Be?, *supra* 22. For example, the Act ignores A.J.T.'s age and whether she likely has undergone puberty. R.3. Like many eleven-year-olds, A.J.T. has not undergone puberty, which results in an unreasonable exclusion of her and many other transgender girls. R.3. The arbitrary nature of the Act does not meet the government's demanding burden of justification because a categorical ban is not substantially related to its objective.

Whether a transgender girl has undergone puberty is essential to the analysis because circulating testosterone is the physical characteristic that gives transgender women an advantage in sports. As noted by the Fourth Circuit, it is not until puberty that "sex-based differences begin to emerge." *B.P.J.*, 98 F.4th at 560. This is because girls and boys exhibit "essentially no difference" in circulating testosterone levels before puberty. Strong & Dabbs, *supra* 9. Circulating testosterone "is the key determinant of the higher muscle mass and strength characteristic of males compared with females." Handelsman et al., *supra* 9*,* at 812; *see* David J Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68, 68 (2017) (finding biological males began outperforming biological females between ages twelve and thirteen in strength, speed, and agility because of circulating testosterone differences after puberty). By ignoring age, the Act relied on sex stereotypes that biological boys outperform biological girls despite respected medical evidence showing the inaccuracy of the proposition. In sum, the Act is not substantially related because it bars younger transgender girls who do not have a physical competitive advantage.

The second reason the Act fails intermediate scrutiny is that it ignores how hormone therapy may mitigate transgender athletes' physical competitive advantages. There are no studies that address whether puberty blockers paired with gender-affirming hormones affect athletic performance. *See* Ethan Moreland, *Implications of Gender-Affirming Endocrine Care for*

Sports Participation, NIH NAT'L LIBR. OF MED. (Jun. 8, 2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10262668/. But medical professionals have indicated that "there would not be a reason to predict measurable athletic advantages accruing to transgender people who received puberty blockers at the onset of puberty and then hormone treatment aligned with gender identity afterward." Joshua D Safer, *Fairness for Transgender People in Sport*, NIH NAT'L LIBR. OF MED. (Mar. 17, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8944319/. For this reason, World Aquatics, the international federation that governs rules for Olympic swimming, permits transgender girls to compete in female competitions if they demonstrate their hormone therapy prevented them from experiencing "any part of male puberty." World Aquatics, *Policy on Eligibility for the Men's and Women's Competition Categories*, at 8 (Mar. 24, 2023). Even with the lack of studies, there exists a medically recognized presumption that hormone treatment likely mitigates any physical advantages that transgender girls would gain over cisgender girls. *See id.* at 3–4 (describing how World Aquatics used "the most up-to-date scientific knowledge" on how gender-affirming care mitigated transgender girls' performance advantages). As such, the categorical bar on transgender girls without accounting for hormone treatment does not pass the demanding burden of intermediate scrutiny.

The third reason the Act fails intermediate scrutiny is that it assumes all transgender girls threaten the safety of cisgender girls in contact sports. For the reasons above, whether a transgender girl has higher levels of circulating testosterone is the key marker of physical advantage. Without undergoing male puberty, the state cannot seriously suggest that transgender girls pose a threat to cisgender girls in contact sports. Accordingly, the Act's imprecision utterly fails intermediate scrutiny.

The fourth reason the Act fails intermediate scrutiny is that the ban's inclusion of intramural sports is not substantially related to promoting girls' competitive opportunities. The Act mandates that transgender girls cannot compete in intramural sports sponsored by the school and designated for cisgender girls. *See* N.G. Code § 22-3-16(a). Furthermore, the Act dictates that schools must designate teams as male, female, or coed when the "selection for such teams is based upon competitive skill." N.G. Code § 22-3-16(b). But *every* sport, including intramurals, requires competitive skill. Thus, the Act excludes transgender girls from every intramural sport. Although intramurals require competitive skill, the very essence of intramurals is that students play them for fun. Preventing transgender girls from participating on these informal, recreational teams does not affect a serious competitor's athletic opportunities. As such, the State cannot contend that preventing transgender girls from intramural sports protects girls' competitive opportunities.

Overall, the Act's categorical ban is not substantially related to the State's interests because an outright ban does not consider opportunities where transgender girls do not have competitive advantages nor threaten the safety of cisgender girls in contact sports.

B. The Act Fails Rational Basis Scrutiny because the Transgender Ban Was Motivated by Animus

Even if the Court determines that heightened scrutiny does not apply, the Act still fails rational basis scrutiny. If the law does not involve suspect or quasi-suspect classifications, it receives rational basis scrutiny. *See Cleburne*, 473 U.S. at 440. The state must show that the classification is "rationally related" to furthering a "legitimate interest." *Id*.; *see Romer v. Evans*, 517 U.S. 620, 632 (1996) (highlighting that tourist status and profession are classifications that receive rational basis scrutiny). But a law motivated by animus fails rational basis scrutiny

because the "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *See Romer*, 517 U.S. at 634–35. To identify animus, this Court looks at whether the "*sheer* breadth" of the classification "is so discontinuous with the reasons offered for it" that the law can only be explained by animus. *Id.* at 632. When pairing the sheer breadth of the Act's categorical ban on transgender girls with its purpose and effect, the Court should find that animus motivated the biological sex classification.

As discussed in the intermediate scrutiny analysis, the Act was overly broad because it neglected to consider transgender girls' circulating hormone levels. The Act also could not substantiate how transgender girls that have not undergone male puberty posed a credible safety threat to cisgender girls in contact sports. Moreover, it failed to draw any line by defining sports with an unlimited scope, including intramurals. In sum, the ban's sheer breadth is discontinuous with the State's goals of safeguarding girls' competitive opportunities and physical safety.

As discussed in the classification section, the Act's use of biological sex was motivated by animus because its purpose and effect were to bar transgender girls from girls' sports. The text of the Act showed discriminatory purpose by making an unwarranted and unrelated claim about gender identity's relationship with biology. Additionally, the Act's only effect was to bar transgender girls from girls' sports because the State already had sex-separated sports and permitted transgender girls to participate in the team aligning with their gender identity. As such, the Act fails rational relationship scrutiny because the Act's biological sex classification was motivated by animus.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court reverse the Fourteenth Circuit Court of Appeals' decision and find the Act violated Title IX and the Equal Protection Clause when it prevented A.J.T. from playing on the girls' cross-country and volleyball teams.

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Respectfully submitted,

Team 29

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