NO 24-2020

IN THE SUPREME COURT OF THE UNITED STATES

A.J.T.,

Petitioner,

v.

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

Respondents

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

BRIEF FOR RESPONDENTS

Team 3

Counsel for Respondents

QUESTIONS PRESENTED

1. Under Title IX's regulation of institutions receiving federal funds, does a state violate the terms of Title IX by separating youth sporting teams based upon athletes' biological sexes determined at birth when Title IX explicitly authorizes sex-based separation, the author of the statute intended to separate athletes by birth sex, and courts' historical understandings of the statute permit differentiation based upon sex?
2. Does the Equal Protection Clause prevent a state from creating a facially neutral law separating boys' and girls' sports teams based on biological sex determined at birth?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates constitutional and statutory rights regarding the separation of sports teams based on biological sex determined at birth under the Fourteenth Amendment Equal Protection Clause and Title IX. The full text of this amendment is reproduced in Appendix A. The full text of Title IX is reproduced in Appendix B. This case also involves N.G. Code § 22-3-15(a)(1-3). The full text of the statute is reproduced in Appendix C. Finally, this case involves N.G. Code § 22-3-16(a)-(c). The full text of the statute is reproduced in Appendix D.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In April 2023, the State of North Greene passed Senate Bill 2750, the "Save Women's Sports Act" ("SWSA"), with bicameral support. R. 3. North Greene Governor Howard Sprague signed the Bill into law on May 1, 2023. *Id.* The SWSA requires that public schools and state institutions of higher education separate youth sporting teams into coed, female, and male teams based upon biological sex determined at birth. R. 4. The State's objective for the law is "to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." R. 4.

Respondents State of North Greene, State of North Greene Board of Education, State Superintendent Floyd Lawson, and Attorney General Barney Fife ("North Greene leadership") are those responsible for administering North Greene youth's education in a safe and tolerant

environment. R. 3-4. The Petitioners are A.J.T. and A.J.T.'s mother ("A.J.T."). R. 3. A.J.T. was born a male but has identified as a female from a young age. *Id.* A.J.T. was diagnosed with gender dysphoria in 2022 before beginning puberty. *Id.* Following the May 2023 codification of the SWSA, North Greene leadership informed A.J.T. that she would not be able to join the girls' cross-country or volleyball teams because her biological sex determined at birth was not female. *Id.*

II. PROCEEDINGS BELOW

A.J.T., by and through her mother, filed suit against the State of North Greene Board of Education and the State Superintendent. R. 4. After the State of North Greene successfully moved to intervene, A.J.T. amended her Complaint to name the State of North Greene and the Attorney General as defendants. R. 4-5. A.J.T. sought a declaratory judgment stating that the SWSA violates Title IX and the Fourteenth Amendment's Equal Protection Clause; she also requested an injunction to prevent North Greene leadership's enforcement of the SWSA. R. 5. North Greene leadership filed a Motion for Summary Judgment against A.J.T., which the District Court for the Eastern District of Greene granted. *Id.* A.J.T. has timely appealed to the United States Court of Appeals for the Fourteenth Circuit. *Id.*

SUMMARY OF ARGUMENT

I. The State of North Greene's statute requiring sex-based separation of youth sporting teams based upon biological sex determined at birth should be upheld. The SWSA comports fully with Title IX because Title IX is intended to advance women's equal access to developmental opportunities and also explicitly provides statutory carve-outs allowing for differential treatment based on sex determined at birth.

IA. The SWSA embodies Title IX's reversal of decades of discrimination against young women by illegalizing discrimination "on the basis of sex." "Sex," as codified and understood since the 1972 enactment of Title IX, refers to an individual's biological designation from birth.

IB. The legislators who enacted Title IX specifically provided for separate treatment of men and women in teams and in public areas in accordance with their biological sex assigned at birth. The SWSA, therefore, follows the original intent of Title IX's architects.

IIA. The Save Women's Sports Act does not violate the Equal Protection Clause because transgender women and biological women are not similarly situated due to their genetic differences, which provide transgender women significant advantages in athletics. These genetic differences are a "legitimate basis for different treatment."

IIB. Excluding transgender women from women's sports is substantially related to the important government objective of providing equal opportunities for women in athletics because transgender women have and will continue to displace biological women due to their physical advantages, thereby erecting a discriminatory barrier that destroys equal competition.

IIC. A.J.T.'s claim that the Act does not promote the important government interest of physical safety since cross country and volleyball are not contact sports is without merit because transgender women have already severely injured biological women in those sports. Additionally, since A.J.T.'s claim is a facial one, if she were to win, transgender women would be allowed to play contact sports, where the size and strength differences would lead to an increase in injuries.

IID. The State of North Greene did not act with a discriminatory purpose when enacting the Save Women's Sports Act. Since disparate impact alone is not enough to satisfy an Equal Protection claim, the Act is constitutional.

ARGUMENT

I. THE SAVE WOMEN'S SPORTS ACT DOES NOT VIOLATE TITLE IX BECAUSE BOTH LAWS ALLOW STATES TO CONSISTENTLY DESIGNATE BOYS' AND GIRLS' SPORTS TEAMS BASED ON BIOLOGICAL SEX DETERMINED AT BIRTH.

Title IX of the Education Amendments of 1972 has advanced equality for over half a century by ensuring equal access to educational programs for women. Title IX provides that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). This rule applies to student athletics and allows for the separation of athletic teams according to sex. 34 C.F.R. § 106.41(b). Additionally, "where [an educational program] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex," members of the "excluded sex" must be allowed to try out for the team unless "selection is based upon competitive skill or the activity involved is a contact sport." *Id.* The State of North Greene's SWSA entitled "Limiting participation in sports events to the biological sex of the athlete at birth," is a streamlined codification of Title IX's principles. N.G. Code § 22-3-4.

To successfully bring a claim for a violation of Title IX, a A.J.T. must prove that (1) they were excluded from an educational program on the basis of sex; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that "improper discrimination caused [her] harm." *Grimm v. Gloucester Cnty. Sch. Bd*, 972 F. 3d 586, 616 (4th Cir. 2020) (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). Violations of Title IX are assessed according to the three above elements, and any claim that fails to meet the elements cannot stand.

Here, A.J.T.'s claim fails because the SWSA does not exclude her from participation in a sport because of her sex, meaning that SWSA does not violate Title IX's mandates. While it is undeniable that A.J.T.'s inability to compete in her chosen sports has caused emotional harm, her emotional harm is not the result of discriminatory interpretations of the binding terms of Title IX.

Title IX allows teams to consistently designate boys' and girls' sports teams based on biological sex determined at birth. This determinative separation affords young women the ability to pursue equal opportunity development. Language within the SWSA comports with Title IX, which in turn has decades of judicial reasoning in support. This Court should uphold the SWSA because it does not violate the tenets of Title IX.

A. The SWSA Supports Young Women's Development by Promoting Equal Opportunity Access to Formative Experiences in School

The SWSA supports Title IX advances in women's personal and professional growth by promoting equal opportunity access to development in education. Accordingly, this Court must continue to uphold the SWSA because it, like Title IX, redresses decades of institutional discrimination against young women in federally funded institutions.

In 1972, Congress enacted Title IX to illegalize discrimination "on the basis of sex" in federally financed programs, thereby ending decades of institutional discrimination against women. Kristen M. Galles, *Filling the Gaps: Women, Civil Rights, and Title IX*, AM. BAR ASSOC. (Jul. 1, 2004), https://www.americanbar.org/groups/crsj/ human_rights_vol31_2004/. Congress "enacted Title IX in response to its finding . . . of pervasive discrimination against women with respect to educational opportunities." *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996). Title IX "redress[es] past discrimination against women in athletics and promot[es] equality of athletic opportunity between the sexes." *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

Before Title IX, "the few states that offered athletic opportunities to girls subjected them to discriminatory rules . . . or scheduled them in odd seasons so the boys would not have to share their facilities." Galles, *supra.* In 1972, fewer than 300,000 girls participated in high school sports; in 2024, over 3.5 million girls now play high school sports, more than a tenfold increase. *Id.*; *see also High School Athletics Participation Survey*, Nat'l Fed'n of High School Ass'ns (Aug. 30, 2024), https://www.nfhs.org/media/2023-24-nfhs-participation-survey-full.pdf. This astronomical enfranchisement is due in large part to Title IX's prevention of sex-based discrimination in institutions using federal funding. *See* Galles, *supra*; *see also Cohen*, 101 F.3d at 188.

Confirming the meaning of the word "sex" in Title IX's language is crucial to understanding the law's continued impact and relevance. As "the overwhelming majority of dictionaries defin[e] 'sex' on the basis of biology and reproductive functions," legal interpretations of Title IX since 1972 have understood "sex" to be a purely biological reference. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022). Courts continue to evaluate the "ordinary meaning of the word ["sex"] when [Title IX] was enacted in 1972." *Id.*, quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 278 (2018). This Court itself wrote in 1973 that "[s]ex, like race and national origin, is an immutable characteristic determined solely by . . . birth . . ." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Therefore, contemporary applications of Title IX follow decades of judicial reasoning when taking the word "sex" to mean a student's biological sex determined at birth. In the case of North Greene, the statutory language in the SWSA properly comports with judicial precedent when stating that "'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." N.G. Code §22-3-15(a)(1).

Next, it is important to define and assess a core aim of Title IX: promoting women's access to "equal opportunity" in an athletic context. *See Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (holding that excluding high school boys from playing on a women's volleyball team was not a violation of Title IX because Title IX is intended to advance women's equal opportunity for development in school). Equal opportunity does not mean that boys and girls are uniformly able to explore the same extracurricular opportunities at all times; it means that institutions receiving federal funds must take steps towards "rectifying the historical denial of equal opportunities for girls in extracurricular [activities]." *B.C. v. Bd. of Educ., Cumberland Reg'l Sch. Dist.*, 220 N.J. Super. 214, 217 (Super. Ct. App. Div. 1987). Title IX's mandate of equal opportunity applies universally to programs in institutions that receive federal funds. *Id.* Here, the most pertinent consideration is Title IX's support for women in school sports. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 300 (2nd Cir. 2004) (ruling that high school soccer schedules that prevented the women's team from being able to compete in championship games were in violation of Title IX because the law fundamentally assesses whether institutions provide nondiscriminatory participation opportunities to both sexes).

Title IX intentionally promotes equal opportunity access to developmental opportunities so that young women, a segment of the American educational system denied the benefit of equal opportunity for decades, can benefit from the formative process of training and competing with extracurricular sporting teams. *Id.* Accordingly, this Honorable Court must uphold the SWSA's embodiment of Title IX in order to continue to support equal opportunity development for young women.

B. The SWSA Comports with Title IX's Sex-Based Separation Which Title IX's Proponents Intended

This Court must uphold the SWSA because it enables sex-based separation of sporting teams that Title IX's proponents considered while drafting and enacting it. Title IX is widely regarded as a success for the positive impact that it has accomplished in promoting equality for young Americans' access to opportunities. Ruth Igielnik, *Most Americans who are familiar with Title IX say it's had a positive impact on gender equality*, Pew Research Center (Apr. 21, 2022), https://www.pewresearch.org/short-reads/2022/04/21/. Part of Title IX's positive impact is due to its ability to consistently separate athletic teams by sex corresponding to an athlete's biological sex; this is a legal application that Title IX's drafters and primary advocates intentionally included in the law. *See* Jared P. Cole, *Title IX and Athletics: Legal Basics*, Cong. Rsch. Serv. (Feb. 9, 2023), https://crsreports.congress.gov/product/pdf/IF/IF12325 (explaining that while Title IX bans sex *discrimination*, it does not ban sex-based *distinctions* such as a school offering separate athletic teams for each sex where selection is based on competitive skill). The Women's Sports Policy Working Group, a bipartisan group of former elite athletes and sports administrators active in women's sports policymaking and LGBTQ advocacy, acknowledges support for biological males whose chosen gender identity is female ". . . so long as those accommodations do not diminish females' sport opportunities or financial rewards, nor females' right to fair, safe, sex-separated sports experiences." *Female Sports Are for Female Athletes*, Women's Sports Pol'y Working Grp. (May 5, 2024), https://womenssportspolicy.org/the-resolution/. Applications of Title IX as an enforcement mechanism against discrimination are intentionally prescriptive, as indicated by this Court's appreciation for "the clear terms of the statute [Title IX]." *See Davis v. Monroe City Bd. of Educ.*, 526 U.S. 629, 642 (1999) (ruling that a school board was liable for a private damages action claim of sexual harassment under Title IX

because Title IX's language is sufficiently clear to put parties subject to its enforcement on notice.) Further, the Supreme Court has also established that when statutes' text is clear, there is no need to evaluate "legislative history, purpose, and post-enactment practice." *N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 290 (2017) (holding that the language of the Federal Vacancies Reform Act was so unambiguous that petitioners' requests to include extra-textual evidence were unnecessary.) Thus, it follows that Title IX's success is due to a uniformity of application that stems from its clearly written structure.

Even if this Court were to examine the legislative history and purpose of Title IX's intentionally plain language, the results would support the continued separation of teams by sex determined at birth. Indiana Senator Birch Bayh was Title IX's author and its most outspoken proponent prior to its enactment. *See* 118 Cong. Rec. 5714, 5807 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh in support of Title IX). Senator Bayh confirmed before Congress in February 1972 that "[Title IX's] regulations would allow enforcing agencies to permit differential treatment by sex only . . . such as in classes for pregnant girls or . . . in sports facilities or other instances where personal privacy must be preserved." *Id.* Senator Bayh's continued address to Congress acknowledged that Title IX "covers discrimination in all areas where abuse has been mentioned," indicating a difference between "differential treatment" and "discrimination." *Id.* In the instant case, "differential treatment" involves Title IX's authorization of sex-based separation of teams based on their biological sex assigned at birth. By asserting that Title IX is not intended to separate teams by sex, A.J.T. asks the Court to re-interpret Title IX in a manner that is contrary to the author's intent. This Court should not begin to read Title IX's language as a prohibition on sex-separated youth sports teams because such an interpretation

conflicts with Senator Bayh's express intentions and would jeopardize the success that arises from uniform application of the clearly written statutory language.

Title IX's explicit authorization of sex-based separation of youth sports stands in stark contrast to the language of other federal laws. Title VII is among the clearest contrasts to Title IX, as Title VII is a federal law that prohibits employment discrimination but *does not* provide for sex-based differentiation under any circumstances. 42 U.S.C. § 2000e(1). Title VII prohibits employment discrimination "because of race, color, religion, sex, national origin, handicap, age, sexual orientation, gender identity, or status as a parent." *Id.* Title VII and Title IX advance equality in employment and education, respectively, but the laws accomplish their ends in distinct manners. Title VII applies uniformly to all federal employees and employers, while Title IX is unique amongst federal laws because it specifically provides for differentiation based upon a student's biological sex determined at birth.

While no Supreme Court case has explicitly answered the question of whether Title IX properly allows for the designation of separate youth sporting teams based on biological sex, lower courts' arguments support the legitimacy of sex-separate teams. *See, e.g.*, *Equity in Ath., Inc. v. Dep't. of Educ.*, 639 F.3d 91, 111 (4th Cir. 2011) (ruling that a university budget allocating more money to women's sports than to men's sports was not a violation of Title IX because the funding change aligned more closely with female student enrollment). The aforementioned *Adams v. Sch. Bd. of St. Johns Cnty*, a 2022 case from the Eleventh Circuit Court of Appeals, is especially comparable to our case and juxtaposes Title IX against Title VII to show how the former statute authorizes sex-based differentiation. In *Adams*, a transgender student ("Drew") born as a biological female began identifying as a male before ninth grade. *Adams*, 57 F.4th at 797. Drew brought a discrimination claim against his high school after the

school informed him that he had to use either "communal female bathrooms or . . . single-stall, sex-neutral bathrooms" instead of the male bathrooms he associated with his chosen gender identity. *Id.* The court found in the school's favor, noting that "[in Title IX evaluations] transgender persons fall into the preexisting classifications of sex – i.e. male and female." *Id.* at 814. Additionally, the court highlighted that "Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes when it comes to separate living and bathroom facilities, among others." *Id.* at 811. In conclusion, the court asserted that "Whether Title IX should be amended to equate 'gender identity' and 'transgender status' with 'sex' should be left to Congress – not the courts." *Id.* at 817.

A.J.T. in our case is comparable to Drew in that both students assumed a gender identity distinct from their biological birth sex while attending school. Title IX's carve-outs for differentiation based on sex prevented Drew from being able to use a bathroom that did not correspond to his birth sex. Similarly, the SWSA prevents A.J.T. from being able to compete on her school's girls' cross-country and volleyball teams because her male birth sex does not match the female birth sex of those teams. Sports teams share bathrooms, locker rooms, practice areas, and other physical spaces. The SWSA's application prevents the complicated circumstance of allowing a biological male to join a team of biological females so long as the biological male did not change near, shower near, or come into close physical proximity of teammates of the opposite biological sex.

The SWSA deserves support because its writing is consistent with the history and practice of Title IX. The SWSA and Title IX's authors intentionally included language allowing for the separation of youth sporting teams based on biological sex determined at birth. The SWSA's and Title IX's successes stem in part from their universal applicability based upon

language that is confirmed to be clearly written. The SWSA follows Title IX's language because they both explicitly authorizes sex-based separation. This Court should thus uphold the SWSA's success by maintaining support for its valid separation of youth sporting teams based upon sex determined at birth.

II. THE SAVE WOMEN'S SPORTS ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The next issue presented is whether the legislature's definition of "women" or "girls" 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. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It is well settled that when it comes to sex-based classifications, a policy will pass constitutional muster if it satisfies intermediate scrutiny. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). To satisfy intermediate scrutiny, the government must show "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Every law impacts people differently, and some "real differences" between males and females could legitimately form the basis for different treatment, which the Fourteenth Amendment allows. *See, e.g.*, *Virginia*, 518 U.S. at 533; *Reed v. Reed*, 404 U.S. 71, 75 (1971). Consequently, a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status when it recognizes "our most basic biological

differences." *See Nguyen v. INS*, 533 U.S. 53, 60, 73 (2001); *see also Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022).

A. Transgender Women and Biological Women are not Similarly Situated in Their Ability to Compete in Sports.

Transgender women and biological women are not similarly situated because their genetic differences provide transgender women significant advantages in athletics. When determining whether groups of people are similarly situated, The Court must examine the circumstances where the law seeks to separate them. *See Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). This Court has consistently upheld statutes where the classification is not invidious but realistically reflects that the sexes are not similarly situated in certain circumstances. *See, e.g., Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975). Physical differences between men and women can provide a legitimate basis for different treatment, especially when they promote equal opportunities for women. *Virginia*, 518 U.S. at 533. In *Virginia*, this Court held that the Commonwealth failed to show an exceedingly persuasive justification for excluding women from a citizen-soldier program offered at a Virginia military college in part because the government relied on "overbroad generalizations" about women to support the exclusion. *Id.* at 542.

Here, instead of relying on "overbroad generalizations," the North Greene statute separates biological women and transgender women in athletics because of their fundamental "physical differences." A.J.T. contends that the relevant factor when determining how to conduct the similarly situated analysis is gender identity. However, gender identity has nothing to do with sports. It does not change a person's biology or physical characteristics. Using a characteristic that does not impact athletic performance, such as gender identity, to determine whether classes of people are similarly situated in their athletic abilities defies logic. Therefore, the similarly

situated analysis requires determining whether transgender women and biological women are similarly situated in their athletic abilities.

The Fourteenth Circuit recognized that biological sex is relevant to sports, and its impact on an individual's physical attributes reveals that people with different biological sex at birth are not similarly situated in sports. It is evident that biological males have significant athletic advantages over biological females. Men are significantly stronger and more powerful than women relative to body mass, lean body mass, and muscle thickness. Sandro Bartolomei et al., *A Comparison between Male and Female Athletes in Relative Strength and Power Performances*, 6 J. Funct. Morphol. Kinesiol. 1, 9 (2021). "In tangible performance terms, studies have shown that these [biological] differences allow post-pubescent males to 'jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster than females' on average*." See Adams*, 57 F.4th at 820 (Lagoa, J., specially concurring). Further, while A.J.T. has not gone through puberty, Defendants' expert opined that biological boys often have a competitive advantage over biological girls even before puberty. This statistical evidence affirms the common-sense conclusion that transgender women and biological women are not similarly situated in their ability to compete in athletics.

B. Equal Opportunities for Women in Sports is an Important Government Objective, and the Classification is Substantially Related to that Objective.

If the Court believes the Act facially treats similarly situated individuals differently, the next issue is whether a sex-based classification that affects all biologically male students equally, no matter how they identify, passes intermediate scrutiny. To satisfy intermediate scrutiny, the government must show "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Mississippi Univ. for Women*, 458 U.S. at 724. Excluding biological males from

female sports teams is necessary for fair competition, and courts have long recognized that separating sexes in athletics is an effective means to ensure equal opportunities for women. *See Clark v. Arizona Interscholastic Ass'n* (Clark I), 695 F.2d 1126, 1131-32 (9th Cir. 1982) (holding that excluding boys from a girls' high school volleyball team was permissible to promote equal opportunity for women). Differences between the sexes often demand separation that satisfies intermediate scrutiny. *See Adams*, 57 F.4th at 806.

In *Adams*, the Eleventh Circuit answered whether a Florida school board's bathroom policy requiring "biological boys" and "biological girls"—in reference to their sex determined at birth—to use either bathrooms that correspond to their biological sex or sex-neutral bathrooms violated the Equal Protection Clause. *Id.* at 801. That court rejected a claim that the policy, which prevented a transgender student who identified as male from using the boys' bathroom at a county high school, violated his Equal Protection rights because the policy advances the important governmental objective of protecting students' privacy in school bathrooms and does so in a manner substantially related to that objective. *Id.* at 803. Additionally, the court relied on the fact that transgender status and gender identity are wholly absent from the bathroom policy's classification to hold that the policy does not single out transgender students. *Id.* at 808.

Here, a similar policy that recognizes the biological differences between sexes is at issue. The Save Women's Sports Act defines biological sex as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." N.G. Code § 22-3-15(a)(1). The statute requires 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). The Act also says 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). The Act, entitled "Limiting participation in sports events to the biological sex of the athlete at birth," recognizes that "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration." N.G. Code § 22-3-4.

The statute clearly states that the government's objective is to promote "equal athletic opportunities for the female sex." N.G. Code § 22-3-16(c). Ensuring equal opportunities for women is an important government objective, evidenced by the enactment of Title IX, and both parties agree. A.J.T.'s contention that the Act's definition of "biological sex" and the related definitions of "girl" and "woman" are not substantially related to the government's interest in providing equal athletic opportunities for females defies logic and empirical evidence.

It is necessary to exclude biological males from female teams to preserve equal athletic opportunities for females. The North Green statute ensures that women compete on a level playing field where everyone has equal opportunities for success. Additionally, separating athletes based on gender identity, as A.J.T. proposes, has and will continue to harm women athletes and diminish their opportunities. For example, two transgender women in Connecticut broke seventeen women's track records, took fifteen women's track championship titles, and deprived biological girls of more than eighty-five opportunities to compete at higher levels. Chelsea Mitchell, *I Was the Fastest Girl on My Team. But I Couldn't Beat Trans Athletes*, MY TURN (Jul. 06, 2023, 4:30 AM), https://www.newsweek.com/women-sport-transgender-athletes-1810782. Additionally, a transgender woman won the high jump in the New England Track & Field Championship last season. *See* Valerie Richardson, *Another Winning Transgender*

Athlete Lands Connecticut's Policy on Hot Seat, WASH. TIMES (Mar. 19, 2024), https://www.washingtontimes.com/news/2024/mar/19/another-winning-transgender-athlete-lands-connecti/. Recently, Lia Thomas made history by becoming the first openly transgender woman to win an NCAA swimming championship. *See* Matt Lavietes, *Transgender swimmer Lia Thomas has mounted a legal challenge against World Aquatics*, NBC NEWS (Jan. 26, 2024, 12:32 PM), https://www.nbcnews.com/nbc-out/out-news/transgender-swimmer-lia-thomas-mounted-legal-challenge-world-aquatics-rcna135862. These instances affirm the advantages that transgender women have over biological women and demonstrate how allowing transgender women to compete in women's sports would displace biological women. Separating athletes based on sex ensures fairness for female athletes, a goal that courts across the country and Congress have sought to achieve.

These wins for transgender women are substantial losses for biological women who are not afforded equal opportunities in athletics. Allowing individuals to choose who they want to play sports with based on gender erects a discriminatory barrier that destroys equal competition in women's sports. Biological women have incurred significant emotional harm due to such discriminatory obstacles. Chelsea Mitchell, a high school runner, described losing to transgender women in the Connecticut state championship as "heartbreaking" and "devastating." Chelsea Mitchell, *I Was the Fastest Girl on My Team. But I Couldn't Beat Trans Athletes*, MY TURN (Jul. 06, 2023, 4:30 AM), https://www.newsweek.com/women-sport-transgender-athletes-1810782. As a result of those losses, Chelsea began to dread her events. Allowing transgender women in women's sports could further demoralize women athletes, leading to less participation in sports. Given the consequences of allowing transgender women in sports, ensuring equal opportunities for biological girls in sports requires that they not have to compete against them.

The State of North Greene is permitted to legislate sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.

A.J.T. contends that excluding transgender girls who have not gone through puberty is not substantially related to the asserted interest. There is little debate that better motor skills, visual-spatial skills, and proprioception will improve coordination and subsequent athletic performance. Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19 Int. J. Environ. Res. Public Health, 1, 3 (2022). Differences in male and female brain structures are evident in childhood, and those differences lead to males showing consistently higher levels of motor and visual-spatial skills. *Id.* In a Fourth Circuit case with similar facts, a transgender girl who had not yet gone through puberty "displaced at least one hundred biological girls at track-and-field events and pushed multiple girls out of the top ten." *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 571 (4th Cir. 2024) (Agee, J. dissenting). "Similarly, by making the conference championships in two events… [Plaintiff] took away at least two biological girls' opportunities to participate in the conference championships." *Id.* While the athletic differences between males and females are greater post-puberty, biological boys still have significant physical advantages over girls before puberty, further supporting that the sex-based classification promotes equal opportunities for girls in sports.

A.J.T. contends that excluding transgender girls from the definition of "girl" in this context is unconstitutional because transgender girls can take puberty blockers or other hormone therapies to mitigate any athletic advantage over biological females. However, the mere possibility that a transgender woman can take those medications does not solve the problem. There is no guarantee that transgender women will take those medications, so separating sports

based on gender would still allow for the displacement of biological girls. Additionally, the Fourteenth Circuit recognized that there is much debate over whether and to what extent hormone therapies after puberty can reduce a transgender girl's athletic advantage over biological girls. The State of North Greene could enact legislation with a more inclusive policy that allows transgender women to play women's sports upon showing that they have no competitive advantage due to medical treatment. However, the Court cannot mandate such a rule here because the law at issue does not violate the Equal Protection Clause as sex-based classifications fall under intermediate scrutiny and, therefore, do not have a "narrowly tailored" requirement.

C. The Physical Safety of Female Athletes is an Important Government Objective, and the Sex-Based Classification is Substantially Related to that Objective.

The next issue is whether the legislature's definition of "women" or "girls" as being based on "biological sex" is substantially related to the important government interest of protecting the physical safety of female athletes when competing. The Fourteenth Circuit below recognized that protecting the physical safety of female athletes is an important government objective. R. 10. However, A.J.T. contends that the Act does not promote the important government interest of physical safety since cross country and volleyball are not the type of contact sports that often result in injuries to participants. However, there is a plethora of evidence of transgender women injuring biological women during such sporting events, and separating the sexes will directly promote safety. For example, a female high school volleyball player in North Carolina suffered severe head and neck injuries, resulting in long-term concussion symptoms, when a transgender woman spiked a ball in her face during a match. *See* Valerie Richardson, *North Carolina on verge of transgender sports ban after hearing from injured female athlete,* WASH. TIMES (Apr. 21, 2023), https://www.washingtontimes.com/news/2023/apr/21/north-

carolina-verge-transgender-sports-ban-after-/. While contact injuries in volleyball and track and field are rare, such instances would significantly increase if transgender women were allowed to compete against biological women. Further, A.J.T.'s challenge is a facial one. If she succeeds, transgender women will be allowed to compete in contact sports such as soccer and basketball, where the size and strength differences will certainly lead to an increase in injuries. Therefore, excluding transgender women from women's sports is directly tied to the goal of ensuring physical safety and easily satisfies intermediate scrutiny.

D. The State of North Greene did not Act with a Discriminatory Purpose.

The dissent argues that where a statute's clear purpose and only effect is to exclude transgender girls from participation on girls' sports teams, the statute must be said to discriminate because of transgender status. However, "[m]ost laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 271–72, (1979). Disparate impact alone does not violate the Constitution. Instead, disparate impact on a group offends the Constitution when an otherwise neutral policy is motivated by "purposeful discrimination." *Id.* at 274. The dissent proclaims that "the Act's discriminatory purpose is further evidenced by the Act's prohibition of 'biological males' from female-designated teams because that prohibition affects one group of athletes only—transgender women." However, the Supreme Court has long held that "[d]iscriminatory purpose ... implies more than intent as volition or intent as awareness of consequences." *Id.* at 279. Instead, a discriminatory purpose "implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*

At most, A.J.T.'s challenge amounts to a claim that the Save Women's Sports Act has a disparate impact on transgender women. There is no evidence suggesting that the School Board enacted the bathroom policy "because of ... its adverse effects upon" transgender students. *See id.* The State of North Greene simply sought to promote "equal athletic opportunities for the female sex." N.G. Code § 22-3-16(c). North Greene decided to separate sports teams "in spite of" its adverse effect on transgender women because separating sports by sex at birth is in furtherance of an important government objective. Additionally, transgender women are still allowed to play sports with biological males, the group they are most similarly situated with when it comes to athletic ability. The State of North Greene also accommodates transgender women by allowing them to compete on co-ed sports teams, a further indication of a lack of a discriminatory purpose. Therefore, the Save Women's Sports Act does not violate the Equal Protection Clause.

CONCLUSION

The Save Women's Sports Act does not violate Title IX or the Equal Protection Clause. The SWSA does not violate Title IX because Title IX explicitly allows for sex-based separation of youth sporting teams based on biological sex determined at birth. The SWSA does not violate the Equal Protection Clause because transgender women and biological women are not similarly situated in their ability to play sports.

For the foregoing reasons, we respectfully request this Honorable Court affirm the United States Court of Appeals for the Fourteenth Circuit's grant of summary judgment as to Issues 1 and 2.

Respectfully Submitted,

September 13, 2024 Team 3, *Counsel for Respondents*

APPENDIX A: Amendment XIV, Section 1

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 equal protection of the laws.

APPENDIX B: Title IX

20 U.S.C. § 1681: Sex

(a) Prohibition against discrimination; exceptions
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, except that:
(1) Classes of educational institutions subject to prohibition
in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
(2) Educational institutions commencing planned change in admissions in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;
(3) Educational institutions of religious organizations with contrary religious tenets
this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;
(4) Educational institutions training individuals for military services or merchant marine
this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;
(5) Public educational institutions with traditional and continuing admissions policy
in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;
(6) Social fraternities or sororities; voluntary youth service organizations
this section shall not apply to membership practices--
(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in “beauty” pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) “Educational institution” defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

APPENDIX C: N.G. Code § 22-3-15(a)

N.G. Code § 22-3-15, in its entirety, reads as follows:

(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.

APPENDIX D: N.G. Code § 22-3-16

N.G. Code § 22-3-16 reads as follows:

(a) Interscholastic, intercollegiate, intramural, or club athletic teams 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 determined at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed.
(b) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.
(c) Gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity. Classifications based on gender identity serve no legitimate relationship to the State of North Greene's interest in promoting equal athletic opportunities for the female sex.