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 OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether Title IX prevents a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth.

2. Whether the Equal Protection Clause prevents a state from offering separate boys' and girls' sports teams based on biological sex determined at birth.

STATEMENT OF THE CASE

I. Factual Background

At the initiation of this lawsuit, A.J.T. was an eleven-year-old transgender girl preparing for the seventh grade. *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765, at *3 (14th Cir. 2024). A.J.T. was assigned the sex of male at birth, however, at an early age she began to identify as a girl. *Id*. by the time she had started third grade, she was living as a girl at home but would dress as a boy at school. *Id.* Eventually, she began using a name commonly associated with girls and lived as a girl in both public and private settings. *Id.* She also joined the elementary school's all-girl cheerleading team, practicing and competing without incident. *Id*.

In 2022, A.J.T. was diagnosed with gender dysphoria and began counseling and discussing the potential for courses of action, such as taking puberty delaying treatments. *Id.* According to A.J.T.'s expert witness, these treatments would prevent endogenous puberty, preventing physiological changes caused by increased testosterone circulation. *Id*. At the commencement of this lawsuit, A.J.T. had not yet begun puberty or any puberty delaying treatment. *Id*. As of the writing of this brief, the court has not learned of any subsequent change in A.J.T.'s treatment. *Id*.

In April of 2023, the North Greene legislature approved Senate Bill 2750, also known as the "Save Women's Sports Act" ("the statute"). *Id*. On May 1, 2023, the governor of North

Greene signed the bill into law, codifying it as North Greene Code § 22-3-4, and titling it "Limiting participation in sports events to the biological sex of the athlete at birth." *Id*. The statute states that "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration." *Id.* The State asserts that the objective of the Act is to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." *Id*. at *3-4.

The North Greene statute provides a series of definitions:

(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).

Furthermore, 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 statute further states 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).

Lastly, the statute explains that "[g]ender 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).

A.J.T. intended to participate in school athletics on both the girls' volleyball and cross-country teams. *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765, at *3 (14th Cir. 2024). However, because of the "Save Women's Sports Act" she was informed that she would not be able to join either of the girls' sports team due to her being a biological male. *Id*.

II. Procedural History

A.J.T., by and through the child's mother, filed this lawsuit against the State of North Greene Board of Education and State Superintendent Floyd Lawson. *Id.* at *4. The State of North Greene moved to intervene, and that motion was granted. Plaintiff then amended the complaint to name both the State and Attorney General Barney Fife as defendants. *Id*. at *4-5.

Plaintiff sought a declaratory judgment that the North Greene Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment and an injunction preventing Defendants from enforcing the law against Plaintiff. *Id.* at *5. Defendants opposed Plaintiff's motion for a permanent injunction and filed a motion for summary judgment on Plaintiff's claims. The District Court granted Defendants' motion for summary judgment.

Plaintiff appealed to The United States Court of Appeals for the Fourteenth Circuit. *Id*. The appellate court affirmed the district court's decisions on both the Equal Protection and Title

IX claim. *Id*. at *12. Plaintiff then petitioned for Writ of Certiorari in The Supreme Court of the United States on the issue of Title IX and the Equal Protection Clause. *Id.* at *17.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit Court of Appeals was correct in holding that A.J.T. was not entitled to relief under Title IX. The "Save Women's Sports Act" does not discriminate against A.J.T. in any way that is prohibited by Title IX. Title IX specifically authorizes the separation of sports teams on the basis of sex. Furthermore, the act does not discriminate based on transgender status. Even if the act were to do so, discrimination based on transgender status is not prohibited by Title IX. The drafters of Title IX intended to prohibit against discrimination based on biological sex and did not consider transgender status when drafting the statute. In addition, A.J.T. cannot show any harm as a result of the "Save Women's sports act". Nothing within the record shows that A.J.T. has suffered in any legally cognizable way under Title IX. All A.J.T. has shown is a disagreement with the act. A.J.T. has not been deprived of any access to educational or school related opportunities.

The Fourteenth Circuit Court of Appeals was also correct in holding that the State of North Greene's "Save Women's Sports Act" and the Board's enforcement of that statute did not violate the Equal Protection Clause of the United States Constitution. The statute facially classifies individuals by their biological sex. Due to sex's historical use as a basis of invidious discrimination, intermediate scrutiny must be applied to this law. In accordance with Supreme Court precedent, this law can only be upheld is an extremely persuasive justification for the classification is shown. That threshold is met if the statute's defenders can demonstrate that the classification serves an important government objective and that the discriminatory means

employed substantially relate to accomplishing that goal. Ensuring fair, safe athletic opportunities for women and girls is an important government objective. Excluding biological men from all-women's teams is substantially related— if not necessary— to that goal. Without those exclusions, biological males would have undue physiological advantages over biological females to the point that young women and girls would be at risk of being displaced or injured by their faster, taller, stronger counterparts. Moreover, Petitioner claims that the statute discriminates based on transgender status. That category has not been accorded intermediate scrutiny by the Supreme Court, and Petitioner fundamentally asks the Court to change that. Such a move would not be easily undone. Thus, Respondents strongly caution against such a harrowing displaying of judicial activism.

STANDARD OF REVIEW

Both issues presented should be reviewed de novo. "We review decisions granting summary judgment de novo." *Jock v. Ransom*, No. 07-3162-cv 2009 U.S. App. LEXIS 6048, at *2 (2nd Cir. Mar. 20, 2009). "We review a district court's grant of summary judgment in a Title IX case de novo, 'construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor.'" *Balwin v. New York State*, 690 Fed. Appx. 694, 697 (2nd Cir. 2017).

ARGUMENT

I. The "Save Women's Sports Act" Does Not Violate A.J.T.'s Title IX Rights Because the Statute Does Not Discriminate against A.J.T. on the Basis of Sex and There Is No Evidence of Any Harm Done to the Plaintiff.

The district court correctly held that North Greene's "Save Women's Sports Act" does not violate Title IX. 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). In order to successfully plead a Title IX claim, the plaintiff must show (1) that they were excluded from participation in an education 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 them harm. *Grimm v. Gloucester Cty. Sch. Bd.* 972 F.3d 586, 616 (4th Cir. 2020). While there is no dispute on the fact that the North Greene Board of Education was receiving federal funding at the time that this dispute arose, the plaintiff's Title IX claim fails because North Greene's "Save Women's Sports Act" does not improperly discriminate on the basis of sex under Title IX. Even if this court were to determine that the statute does in fact discriminate on the basis of sex, the plaintiff has failed to show any harm resulting from the act.

A. The "Save Women's Sports Act" Does Not Improperly Discriminate on the Basis of Sex for the Purposes of Title IX.

Title IX was enacted to serve two principal objectives. Those being "to avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274. (1998). Title IX serves these objectives by denying federal funding to any educational

program or activity that excludes, denies, or discriminates on the basis of sex. 20 U.S.C. §1681(a). For the purposes of Title IX, discriminating means "treating [an] individual worse than others who are similarly situated." *Grimm v. Gloucester Cty. Sch. Bd.,* 972 F.3d 586, 618 (4th Cir. 2020). However, it cannot be said that Title IX is meant to protect against discrimination based on transgender status. This can be seen in the text of Title IX itself.

The drafters of Title XI determined that separation on the basis of sex is sometimes necessary, or at the very least, advantageous. For this reason, Title XI provides several exceptions to its prohibition of sex discrimination. Among them being for "[e]ducational institutions commencing planned change in admissions … 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", 20 U.S.C. §1681(a)(2), and "educational institution[s] [in] 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 Commissioner of Education" *Id.* The drafters of Title IX have elected to use the phrase "both sexes" within the text of the statute. It would be nonsensical to assume that "both sexes" would account for anything other than two categories of sex. Title IX provides exceptions for "boy or girl conferences" 20 U.S.C. §1681(a)(7). This indicates that "both sexes" refers to biological boys and girls.

If congress intended for transgender status to be protected by a prohibition against sex discrimination, they would be applying protection to at least four different classifications of sexes; those being biological men, biological women, transgender men and transgender women. Clearly, this is in excess of "both sexes". There is no question that Congress intended to protect only biological men and women with Title IX. At the time of Title IX's drafting in 1972,

"virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females — particularly with respect to their reproductive functions." *Grimm,* 972 F.3d at 632 (Niemeyer Dissent citing several prominent dictionaries including *Random House College Dictionary* 1206 (rev. ed. 1980); *Webster's New Collegiate Dictionary* 1054 (1979); and *The American College Dictionary* 1109 (1970)).

While the plain reading of the dictionary definitions of "sex" unambiguously accounts for physical characteristics of men and women, there is no significant authority implying that the drafters in Title IX intended to account for the mental, social, and biological characteristics that play into transgender status. Even though Congress has had over 52 years to amend the statute, Title IX still makes no mention of gender identity or transgender status.

Furthermore, Title IX allow schools to provide separate living facilities, restrooms, locker rooms, and shower facilities separated on the basis of sex, implying that Title IX is based on the physical characteristics of sex. *See* 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33.

> To state the obvious, what bathroom, locker room, shower, and living facilities all have in common is that they are places where people are, at some point, in a state of partial or complete undress to engage in matters of highly personal hygiene. An individual has a legitimate and important interest in bodily privacy that is implicated when his or her nude or partially nude body is exposed to others. And this privacy interest is significantly heightened when persons of the opposite biological sex are present, as courts have long recognized.

Grimm 972 F.3d at 633 (Niemeyer, dissenting). The exceptions provided by Title IX are based on the physical differences in men and women that determine when separation of the sexes is necessary.

Historically, courts have also understood the existence of only two categories of sex in the context of Title IX. Several District and appellate courts have used the phrase "both sexes"

within the text of their decisions regarding the administration of Title IX. *See Clausen v. Nat'l Geographic Soc'y*, 664 F. Supp. 2d 1038, 1049 (D.N.D. 2009) ("Discrimination does not exist merely because one gender wins more frequently than the other when both have an equal opportunity to participate in the same event."); *Equity in Ath., Inc. v. Dep't of Educ.,* 639 F.3d 91, 95 (4th Cir. 2011). ("The first benchmark used to assess whether an educational institution is effectively accommodating the interests and abilities of members of both sexes … is whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments").

Petitioners have attempted to use holdings from *Bostock* to determine that discrimination against gender identity constitutes sex discrimination under Title IX. Although not a Title IX case, *Bostock v. Clayton Cnty.,* addresses the issue of sex discrimination based upon gender identity within the context of employment under Title VII. 590 U.S. 644 (2020). Title VII makes it unlawful for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex". 42 U.S.C.S § 2000e-2(a)(1). *Bostock* addressed multiple cases in which employees were terminated because of their status as transgender. Ultimately, the court used these cases to determine that discriminating based on sexual orientation or transgender status violates Title VII. *Bostock*, 590 U.S. at 652. During consideration of the relevant arguments, the court elected to use the definition of "sex" suggested by the employers. *Id*. at 657. That definition being an individual's "status as either male or female as determined by reproductive biology." *Id.* at 655. The employees in these cases presented a different definition, however, they conceded to the employer's definition for the sake of argument.

Clearly, the decision in *Bostock* pertains only to Title VII and employment discrimination and should not be used to address concerns related to Title IX. The Supreme Court stated, "The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'" *Id*. at 681. The majority in *Bostock* expressly refused to address the potential issues associated with the administration of sex discrimination laws in the context of "bathrooms, locker rooms, or anything else of the kind." *Id.*

However, even if this court were to apply the same standards as *Bostock*, the petitioner would still be unable to prevail on their Title IX claim. In determining that termination based on sexual orientation or transgender status violates Title VII, The Supreme Court used a "but for" causation test. *Id*. at 656. "[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id*. "So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law." *Id*. The majority reasoned that an employer that announces it will not employ anyone who is homosexual, intends to penalize male employees for being attracted to men and female employees for being attracted to women while allowing their male employees to be attracted to females and their female employees attracted to males. *Id.* at 667. Similarly, a transgender employee may be penalized for identifying as a particular sex while employees who were assigned that sex at birth are not penalized for identifying as such. *Id.* at 669. If we were to apply this but-for test to an athlete's gender identity under Title IX, their transgender status would not affect the sports teams they are restricted to. Title IX specifically authorizes sex-separate sports where selection for such teams is based upon competitive skill or the activity involved is a contact sport. 34 C.F.R. § 106.41(b). If an athlete is determined to be a biological male who identifies as a female, that person will be

required to play on a male sports team. If the same athlete instead identified as a male, they would still be required to play on the same male sports team. Under the *Bostock* test for sex discrimination, a transgender athlete cannot prevail under Title IX because their transgender status does not at all determine the sports teams they are restricted to.

The same applies to A.J.T. in the case at hand. The "Save Women's Sports Act" separates athletes into two sexes protected by Title IX. Those being "males" (biological males) and "females" (biological females). N.G. Code § 22-3-15(a)(1)-(3). The act then, in accordance with Title IX's sex-separate sports authorization, separates sports teams by the sexes, designating teams as "(A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. Code § 22-3-16(a). A.J.T. has been determined to be a biological male and as such, is required to play on the boys' sports teams. The fact that A.J.T. identifies as a transgender girl is irrelevant. Even if she did not, she would still be required to play on the boys' sports teams. This shows that the act does not treat A.J.T. worse than others similarly situated. A.J.T. is a biological male and is being treated the same as other biological males regardless of her transgender status. Even if this court were to determine that A.J.T. has been treated worse of the basis of A.J.T.'s transgender status, it is clear that Title IX does not protect transgender status or gender identity from discrimination. For these reasons, North Greene's "Save Women's Sports Act" does not discriminate against A.J.T. on the basis of sex under Title IX.

B. A.J.T. Has Not Shown Any Harm Done as a Result of Improper Sex Discrimination.

Even if a Title IX plaintiff were to succeed in showing discrimination on the basis of sex, they would still need to show that the discrimination caused them harm. *Grimm* 972 F.3d at 616. *See also Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203 (4th Cir. 1994)

(Denying a plaintiff relief in a Title IX employment discrimination case after determining that the plaintiff would not have received the position even if they weren't discriminated against). Absent any evidence of harm done to the plaintiff, a Title IX claim should not succeed. To be harmed under Title IX, the plaintiff must be deprived of "access to the educational opportunities or benefits provided by the school". *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613 (6th Cir. 2019). Furthermore, Emotional harm standing alone is not a redressable Title IX injury. *Id*. Even if the plaintiff is emotionally distressed by a defendant's action, there must be an actual deprivation of benefits provided by the school.

Several courts, including The Supreme Court, have determined what detriment is necessary to constitute harm. In *Davis v. Monroe County Bd. of Educ*., 526 U.S. 629 (1999), The Supreme Court was faced with a Title IX case regarding sex discrimination derived from sexual harassment. In *Davis,* the plaintiff, a high school girl, was the victim of severe sexual harassment from another student while at her school. *Id*. at 634. The plaintiff notified the school of the harassment several times, however, the school refused to take appropriate action in a timely manner, leading to several months of sexual abuse before action was taken. *Id*. After determining that the allowance of this harassment may rise up to the level of "discrimination" prohibited by title IX, the issue was whether a defendant "may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment." *Id*. at 639. The court then concluded that "funding recipients are properly held liable in damages only where … sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id*. at 650. The court discussed different scenarios that would satisfy this threshold such as "a case in which male students physically

threaten their female peers every day, successfully preventing the female students from using a particular school resource". *Id*. at 650-651. The court also described scenarios that would fail to meet Title IX's threshold of injury. "It is not enough to show… that a student has been 'teased' or 'called offensive names'". *Id*. at 652. An "overweight child who skips gym class because the other children tease her about her size"; the student "who refuses to wear glasses to avoid the taunts of 'four-eyes'"; and "the child who refuses to go to school because the school bully calls him a 'scardy-cat' at recess" will not alone be enough for Title IX damages. *Id*. In addition to mere name calling not being enough, any harm that a plaintiff does suffer, such as a decline in grades, must not only be linked to the alleged Title IX violation, but the persistence and severity of the harm must be factored into determining whether the conduct is "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." *Id.* The court used this reasoning to determine that the plaintiff in *Davis* had suffered harm under Title IX. *Id.* at 654. The plaintiff in *Davis* was subjected to severe verbal abuse and offensive touching over a five-month period. *Id.* This resulted in her previously high grades dropping as she became unable to concentrate on her studies and the eventual writing of a suicide note by the plaintiff. *Id*. at 634. The harm was so severe that the student responsible for the abuse pled guilty to criminal sexual assault. *Id*. at 654. The court deemed the conduct "severe, pervasive, and objectively offensive". *Id*. at 653.

Other federal courts have also required similarly harmful conduct in order to constitute harm under Title IX. *See Jennings v. Univ. of N.C.*482 F.3d 686 (4th Cir. 2007) (Plaintiff endured sexual harassment in order to play soccer, resulting in fear and negative impact on the soccer field); *Roe v. Cypress-Fairbanks Indep. Sch. Dist*, 53 F.4th 334 (5th Cir. 2022) (Plaintiff was subject to sexual assault, an abusive relationship, harassment and bullying); *Peltier v.*

Charter Day Sch., Inc., 8 F.4th 251 (4th Cir. 2021) (Plaintiffs unable to engage fully in school activities in way such as being removed from class, avoiding physical activities, and being unable to participate in emergency drills).

While the standard for harm used by the 6th Circuit in *Kollaritsch* is rational and fair in regard to its application in Title IX, the petitioner insists on the standard set forth in *Grimm v. Gloucester Cty. Sch. Bd.* 972 F.3d 586, 616 (4th Cir. 2020). *Grimm's* requirement for harm under Title IX is similar to the requirements in *Kollaritsch*, however, the court in *Grimm* recognized "emotional and dignitary harm" as legally cognizable under Title IX. *Id.* at 618. In *Grimm*, the plaintiff, a transgender male sued his school under Title IX for restricting him from using cisgendered male bathrooms. *Id*. at 594. While respondents are not implying that emotional and dignitary pain and suffering could not exist, these harms would not make sense to recognize in the Title IX context. Claims for purely emotional distress are "not favored in the law." *Ney v. Landmark Educ. Corp.* No. 92-1979, 1994 U.S. App. LEXIS 2373, at *8 (4th Cir. Feb. 2, 1994). "Courts are reluctant to embrace such claims, because they require difficult questions of proof and causation, and fraudulent emotional injuries can be difficult to detect." *Id*. at *9. Allowing Title IX claims based on nothing but emotional harm would force courts to undertake the strenuous task of accurately determining a plaintiff's mental condition in order to award damages.

The court in *Grimm* attempts to justify their holding by comparing emotional harm in Title IX cases to the dignitary harm associated with racial segregation. *Grimm*, 972 F.3d at 617. The court quotes Martin Luther King Junior, saying "in a country with a history of racial segregation, we know that 'segregation not only makes for physical inconveniences, but it does something spiritually to an individual.'" *Id*. While the emotional damage associated with racial segregation

cannot be overstated, this damage differs when compared to sex discrimination under Title IX. The dissent in *Grimm* acknowledges that "there are biological differences between the two sexes that are relevant with respect to restroom use in a way that a person's skin color is demonstrably not." *Id*. at 636. The same rationale applies to sports. Title IX authorizes the separation of sports teams on the basis of sex for the purpose of safety and fair competition, while racial segregation has historically been based on the false notion that one race is socially superior to another.

Even if emotional harms were to be legally cognizable, plaintiffs must still provide evidence supporting their claim. It would make no sense to say that the mere assertion of emotional damage is enough to satisfy Title IX's requirement for harm. If nothing but the verbal or written communication by a plaintiff that emotional harm exists was all that was necessary to constitute harm, then the harm requirement would be reduced to nothing but a dissatisfaction with an educational institution's decision. If this were the case, then the harm requirement for Title IX used in *Grimm* would be completely unnecessary, as litigation would never take place if the plaintiff agreed with a school board's decision. Even the *Grimm* court used additional, non-emotional, evidence to determine that the plaintiff had been harmed. *Id*. at 617. The record showed that the plaintiff's restriction to alternative restrooms caused him great delay in traversing the school, which led him to limit his restroom use, resulting in a urinary tract infection. *Id.* at 593. Furthermore, the entire experience from his school's restrictions resulted in the plaintiff having suicidal thoughts, which eventually led to his hospitalization. *Id*.

Applying this to the case at hand, it is clear that A.J.T. has not suffered harm under Title IX. While A.J.T. obviously disagrees with the requirements of the "Save Women's Sports Act", nothing in the record shows any actual harm as a result. Nothing in the record suggest that A.J.T. has become the victim of any bullying or harassment from being restricted to male sports teams,

nothing suggests that A.J.T. has suffered any physical injury from being restricted to male sports teams, and nothing suggests that she has been deprived of any education opportunities. If A.J.T. was subject to a harm so severe, pervasive, persistent and objectively offensive enough to limit her access to education opportunities, this harm surely would have come to light before the finders of fact in the district court. A.J.T. still has the opportunity to play the same sports she intended on playing, just with her biological male peers. The fact that A.J.T. is unhappy with this decision is not enough to constitute harm in her Title IX action.

II. The "Save Women's Sports Act" Constitutionally Groups Individuals on the Basis of Biological Sex in a Manner Substantially Related to the Goal of Maintaining Safe, Equal Athletic Opportunities for Women and Girls.

The Fourteenth Amendment's Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl.4. This 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). That said, the Court does not forbid states from treating "different classes of persons in different ways"— a statute may discriminate (in the least charged sense of the word) between groups of people. *Reed v. Reed*, 404 U.S. 71, 75 (1971). But that statute may not place people into different classes and treat them differently "on the basis of criteria wholly unrelated to [its] objective." *Id*., at 75–76 (1971). Special cause for alarm arises when a statute classifies people according to certain characteristics subject to historical mistreatment, such as race, religion, national origin, or the category before the Court today— sex. *Cleburne*, 473 U.S. at 441.

There is a "strong presumption" that statutes which classify by sex are invalid. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring), citing Mississippi

Univ. for Women v. Hogan, 458 U.S. 718, 102 (1982). Statutes that do so "call for a heightened standard of review" known as intermediate scrutiny. *Cleburne*, 437 U.S. at 440. The Supreme Court applies intermediate scrutiny rather than strict scrutiny because unlike race, religion, and national origin, there are "inherent differences" between males and females that may— in select situations— justify different treatment. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

A plaintiff challenging a statute on an equal protection basis must show that the statute is discriminatory on its face: that the text "explicitly distinguish[es] between individuals on [protected] grounds." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). The Supreme Court has not ruled on whether gender identity and transgender status are protected grounds under the Equal Protection Clause. Nevertheless, a handful of lower courts have arrived at the conclusion that statutes which discriminate on transgender status necessarily discriminate on the basis of sex— under a theory that transgender individuals are those who do not conform to stereotypes associated with their biological sex, and laws targeting them seek to force adherence to sex stereotypes. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020). *See also Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that school district bathroom policy "treats transgender students" . . . "who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently."), *abrogated by Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861, 885 (7th Cir. 2023). The Supreme Court has not lent that tortured argument any credence.

Regardless, sex is a protected group, and even a statute that merely "distinguish[es] between males and females" is subject to intermediate scrutiny under the Equal Protection Clause. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (statute banning sale of "nonintoxicating" alcohol to females under age of eighteen and males under age of twenty-one deemed subject to

scrutiny under Equal Protection Clause); See also *Reed*, 404 U.S. at 75 (statute which "provides that different treatment be accorded to [individuals] on the basis of their sex . . . thus establishes a classification subject to scrutiny under the Equal Protection Clause.").

Once the Court finds that a statute to groups individuals along lines of sex, the Court must apply intermediate scrutiny and the party seeking to uphold the statute must show "an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), *quoting Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1979). The justification "must be genuine," "not hypothesized or invented post hoc in response to litigation[,]" and "must not rely on overbroad generalizations about" the sexes. *Virginia*, 518 U.S. at 533, *citing Weinberger v. Weisenfeld*, 420 U.S. 636, 643, 648 (1975).

This requires the statute's defenders to "show[] at least 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, *quoting Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980).

Put simply, the Court asks whether the statute's classification is "substantially related to a sufficiently important government interest." *City of Cleburne*, 473 U.S. at 441, *citing Mississippi Univ. for Women*, 458 U.S. at 718 *and Craig v. Boren*, 429 U.S. 190 (1976).

This Court should find that Respondents' statute does not violate the Fourteenth Amendment's Equal Protection Clause. The plain text of the statute shows it classifies by biological sex. It then survives the requisite intermediate scrutiny because the classification serves the important governmental objective of equal opportunities for women in sports and the means employed are substantially related to that goal. To rule that the statute is unconstitutional

in every circumstance, as Petitioner requests, risks irrevocably changing Equal Protection Clause jurisprudence in a staggering move of judicial activism.

Petitioner contends that A.J.T. is similarly situated to cisgender girls by virtue of sharing a common gender identity, and thus the statute unconstitutionally treats her differently than those like her due to her transgender status and gender identity. Putting aside the fact that the statute only makes a single, non-classifying reference to gender identity, N.G. Code § 22-3-16(d) ("gender identity is separate and distinct from biological sex"), for Petitioner to succeed on this facial constitutional claim— that the statute's gender status discrimination is unconstitutional in every scenario—the Court must either add gender identity to the list of protected grounds under the Equal Protection Clause or endorse the tortured argument that laws which classify by transgender status actually classify by conformity to sex stereotypes. The former ignores Congress's role in shaping Equal Protection law in a harrowing display of legislating from the bench. U.S. Const. amend. XIV, § 5 ("[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). The latter ignores fundamental biological differences between the sexes. Neither should be approved by this Court.

It is undeniable that the statute facially classifies by biological sex. Its plain text reads as follows: "[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 *Cleburne* and *Reed* courts undoubtedly would recognize the act as facially classifying by sex— as do both Petitioner and Respondents. *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765, at *7, *8 (14th Cir. 2024) For that reason alone, intermediate scrutiny applies.

The statute provides an exceedingly persuasive justification for its classification. The state's concerns about transgender girls developing male physiology during puberty are not ingenuine or hypothetical; they reflect the biological inevitability that A.J.T. has not undergone hormone therapy or received puberty blockers and will thus develop the speed, height, and strength of a male. *Id*., at *3. And while being transgender does not require one to avert puberty— and an individual biological female may outcompete an individual biological male— the fact remains that unabated puberty creates physiological differences between the sexes that allow the average biological male to crowd out the average biological female in competitive sports environments with limited spots.

Thus, this statute's classification serves the important interest of ensuring that women and girls retain opportunities to grow as people and athletes. Its means— defining girls and women as biological females and boys and men as biological males, and resultantly assigning children deemed male at birth to the physiologically male team— are substantially related to this goal.

A. The Save Women's Sports Act survives intermediate scrutiny because providing athletic opportunities to women and girls, free of unfair and unsafe competition from biological males, is an important government interest.

The Supreme Court has long recognized that the government has a significant interest in providing equal opportunities for all its citizens, regardless of sex. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 722 (1982). In doing so, "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id*., at 724–25.

A governmental objective does not rely on archaic and stereotypic notions about sex, however, when sex represents a "'legitimate accurate proxy' in a regulatory scheme." *Clark, By & Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1129 (9th Cir. 1982), *quoting*

Craig v. Boren, 429 U.S. 190, 204 (1976). A statute which groups by sex is considered to serve an important government objective if it "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 468–69 (1981).

Women and girls' access to equal opportunities to better themselves through sports is one such important government objective. *Clark*, 695 F.2d at 1131 (9th Cir. 1982) ("There is no question that [promoting equality of athletic opportunity between the sexes] is a legitimate and important governmental interest"). *See also B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 559 (4th Cir. 2024) (recognizing "competitive fairness" in youth sports as "important government interest"). The sexes are not similarly situated in that arena, because young men— especially after puberty has commenced— have physiological advantages that would often "displace" young women from sports teams if not for sex-separate teams. *Clark*, 695 F.2d at 1131. *See also Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J. specially concurring) ("In tangible performance terms, studies have shown that these physical 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"). Moreover, young women were subject to past discrimination and a lack of equal athletic opportunities— intensifying the need for a policy that redresses past wrongs. *Clark*, 695 F.2d at 1131.

Inevitably following from this are claims the proponent's interest is actually "ensuring that cisgender girls do not lose ever to transgender girls", *B.P.J. by Jackson*, 98 F.4th at 559. (internal quotations omitted), and that such restrictions are tantamount to preventing cisgender girls from competing with athletically superior cisgender girls. *Id*. (analogizing a ban on

transgender players to preventing a cisgender athlete who recently moved to town from competing in the county track meet). That argument incorrectly equates the variety of athleticism among cisgender girls to the near certainty that biological males possess physiological advantages over biological females in many sports.

Since mitigating the physiological disparities between players is essential to maintaining fair play and safety in youth sports, a policy dividing adolescents by biological sex is analogous to weight classes, *Adams By & Through Adams v. Baker*, 919 F. Supp. 1496, 1501-02 (D. Kan. 1996), and (though legal precedent is hard to come by) age categories— both of which are commonplace and necessary in ensuring that competitors play safely and do not lose opportunities to grow as athletes and people to other competitors with "undue advantage[s]". *Clark*, 695 F.2d at 1131.

The objective sought to be served here is not one reliant upon archaic stereotypes, as biological sex is a legitimate proxy for athleticism. This is especially true for middle schoolers like Petitioner, as at that age both variants of puberty begin and the physiological disparities between biological males and biological females widen. Thus, adolescent biological females are clearly differently situated than adolescent biological males as it pertains to athletic performance.

The statute, in creating separate teams based on biological sex, serves the important state interest of ensuring that girls in North Greene have the opportunity to learn and grow without losing limited spots to physiologically advantaged biological males.

Petitioner does not disagree that North Greene's interest in providing safe and equal athletic opportunities to girls is an important objective. *A.J.T. v. North Greene Bd. of Educ.*, 2024

WL 98765, at *9 (14th Cir. 2024). Petitioner simply contends that, when it comes to joining a sports team, A.J.T.'s gender identity trumps her physiology. *Id*., at *7, *8. While Respondent's sympathies abound for young A.J.T., the simple fact is that she has not begun any treatment that would prevent her from undergoing male puberty. *Id*., at *3. As she undergoes this change, she will develop physiological advantages that enable her to rapidly outclass her cisgender competitors. It is unlikely a spectator would call a wrestling bout between a middleweight towering over a lightweight, or a thirteen-year-old running circles around a U10 soccer team "safe" or "fair". The Court must not consider a match or meet between cisgender women and a person with the speed, height, and strength of a male to be safe or fair either.

B. The Save Women's Sports Act survives intermediate scrutiny because the classification based on real, physical differences between males and females is substantially related to achieving the important goal of ensuring fair, safe play.

Fundamentally, the substantial relation question "asks whether any real differences exist between boys and girls which justify the exclusion; i.e. are there differences which would prevent realization of the goal if the exclusion were not allowed." *Clark, By & Through Clark v. Arizona Interscholastic Association*, 695 F.2d 1126, 1131 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). This does not mean that laws classifying by sex "must be capable of achieving its ultimate objective in every instance[,]" *Nguyen v. INS*, 533 U.S. 53, 70 (2001), just that there be "enough of a fit between the ... [policy] and its asserted justification." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022), *quoting Danskine v. Mia. Dade Fire Dep't*, 253 F.3d 1288, 1299 (11th Cir. 2001).

The Eleventh Circuit found that because it is a "physiological fact that males would have an undue advantage competing against women for positions on the volleyball team", a policy

forbidding males from playing on an all-women's team was "substantially related to the goal" of providing safe and equal opportunities to women. *Clark*, 695 F.2d 1131, 1132.

A particularly instructive case on this point is *B.P.J. by Jackson v. West Virginia State Board of Education*, from the Fourth Circuit. West Virginia's State Board of Education faced suit over its own Save Women's Sports Act, wherein the definitions of "Biological Sex", "Male", and "Female"— and the gravamen of the legislation— were virtually identical to the North Greene statute. W. Va. Code Ann. § 18-2-25d (West).

The plaintiff, B.P.J., was an assigned-male-at-birth transgender middle school student (who wished to compete with her school's cross county and track teams for girls. 98 F.4th 542, 551 (4th Cir. 2024). The Plaintiff was prevented from doing so by West Virginia's equivalent to the Statute, and litigation ensued. *Id*.

A three-judge panel from the Fourth Circuit ruled that because B.P.J. was currently receiving (male) puberty blocking medication and (female) gender affirming hormone therapy— such that B.P.J. would never experience the physical advantages derived from "increased levels of circulating testosterone"— the statute's exclusion of the plaintiff was not substantially related to the goal of preventing school-age girls from losing athletic opportunities to physiologically advantaged biological males. *Id*., at 560-61.

This statute's sex-based classification is substantially related to achieving the goal of preserving girls' sports in large part to one real, glaring difference between B.P.J. and Petitioner: B.P.J. will not experience male puberty, but Petitioner will. It is undisputed that Petitioner has "not begun puberty or puberty-delaying treatment, and the court has not learned of any subsequent change in A.J.T.'s treatment." *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765,

at *3 (14th Cir. 2024). Unless she changes course, Petitioner will undergo male puberty and obtain its comparative physical advantages. Male puberty, of course, creates a real difference between biological males (like Petitioner) and biological females. That real difference— and the gaps in speed, height, and strength it creates— threatens the ability of young women to compete fairly and safely in athletic environments.

Thus, a policy that acknowledges that real difference and separates biological males from biological females clearly relates to achieving the statute's end of providing fair and safe athletic opportunities to women.

The Fourth Circuit did not rule on whether West Virginia's statute was unconstitutional in all circumstances; that case dealt with an as-applied challenge. *B.P.J.*, at 561. Yet its reasoning is still applicable here.

This case is a facial challenge, and this Court must rule against the proposition that in all circumstances, this statute's discriminatory means are unrelated to the noble goal of protecting young women's athletic opportunities from unfair, unsafe competition. In doing so, this Court must rely on the *Clark* holding. The Eleventh Circuit quickly recognized that the average pubescent biological males' undue advantage over biological females risks depriving young girls of safe opportunities to grow as an athlete and a person on the volleyball team— the very thing Respondents warn against in this brief.

Petitioner will almost certainly claim the discriminatory means employed here do not substantially relate to the statute's asserted goal. Despite that being clearly refuted above, the Court must also understand exactly what Petitioner is asking for. Petitioner levies a facial

challenge against the statute, essentially asking the court to find that it is unconstitutional in any scenario to define "girls" as only "biological females" for the purpose of youth sports.

In doing so, this necessarily mandates that gender identity now becoming a protected ground under the Equal Protection Clause (either directly or through the "gender identity discrimination-as-sex stereotyping" maneuver)— as a ban on confining girlhood to biological sex alone clearly requires gender identity to be a consideration in statutory definitions of "girl". Such a move is nigh-irreversible.

What Petitioner either does not realize or declines to mention is that in section five of the Fourteenth Amendment, the ability to expand the Equal Protection Clause's reach is explicitly vested in Congress.

Yes, the Petitioner asks the Court to cross the separation of powers in an act of brazen judicial activism. Petitioner cannot seriously claim in one breath that the statute's means do not correctly fit its stated ends and in the next ask the Court to sidestep a democratically elected state and federal legislature just so a student can join a middle school cross-country and volleyball team.

The Petitioner asks the Court to breach the separation of powers. Respondent just wants young women to have a chance at fair play.

The Court must hold that North Greene's Save Women's Sports Act constitutionally classifies individuals based on their biological sex, and reject the proposition that this law is unconstitutional in all circumstances. No Supreme Court precedent supports the claim that it illegally discriminates based on transgender status. It does facially classify individuals by biological sex, and survives the resulting intermediate scrutiny.

The statute passes that heightened examination because there is an exceedingly persuasive justification for the classification. There is an important objective in ensuring women and girls have access to fair and safe sports environments. Excluding biological males, whose physiological advantages risk displacing and harming female athletes, from women's and girls' leagues is substantially related to— if not necessary— to accomplishing that goal. To rule otherwise risks irreversibly altering breaching the separation of powers and depriving girls of the chance to grow as athletes and people.

CONCLUSION

The Supreme Court should affirm the Fourteenth Circuit Court of Appeal's determination that the State of North Greene's "Save Women's Sports Act" and the Board's enforcement of that statute are not in violation of either Title IX or the Fourteenth Amendment's Equal Protection Clause. The Court should reject Petitioner's appeal to the contrary.