No. 24-2020

In The

Supreme Court of the United States

October Term 2024

A.J.T.,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR RESPONDENTS

Team # 33
Counsel for Respondents
September 13, 2024

QUESTIONS PRESENTED

I. Whether a state statute violates Title IX by requiring athletes to participate on the athletic team that aligns with their biological sex, when Title IX explicitly permits sex-separate athletic programs if it involves a contact sport or is based on competitive skill, when it does not exclude transgender students from participating in school athletics, and when it does not discriminate on the basis of gender identity?

II. Whether a state statute violates the Equal Protection Clause of the Fourteenth Amendment when it requires educational institutions and club programs to offer separate athletic teams on the basis of biological sex determined at birth, where it expressly states gender identity is separate and distinct from biological sex, and where the objective of the statute is to promote and maintain the physical safety and equal athletic opportunities for female athletes?

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The Memorandum opinion of the United States District Court for the District of North Greene is unpublished and may be found at *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023. The opinion of the United States Court of Appeals for the Fourteenth Circuit is unpublished and may be found at *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765 (14th Cir. 2024, and appears on pages 2–16 of the Record.

CONSTITUTIONAL PROVISION

U.S. CONST. amend. XIV, § 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 the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Facts

On May 1, 2023, the Governor of the State of North Greene signed a bill into law referred to as the "Save Women's Sports Act."[1] R. at 3. The Act was codified as North Greene Code § 22-3-4 *et seq.*, and it is entitled "Limiting participation in sports events to the biological sex of the athlete at birth." *Id.* The purpose of the Act, according to the State of North Greene, is to protect equal athletic opportunities for female athletes and to protect their physical safety while competing. R. at 3-4. The statute acknowledges the inherent biological differences between males and females with the intent of providing equal athletic opportunities to female athletes while protecting their physical safety within competitive athletics. *Id.* at 3. Biological sex is defined in the statute as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." *Id.* at 4.

By relying on the State's definition, the statute requires that athletic teams sponsored by any public secondary school or state institution of higher education must be designated as male, female, or coed based on biological sex. *Id.* The statute further specifies who may participate on the designated teams by providing 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." *Id.* The statute's definition of biological sex does not involve an individual's gender identity. *Id.* Rather, it explains that gender identity is separate from biological sex, that an individual's biological sex is not determinative or indicative of a person's identity, and that classifications based on gender identity have no legitimate relationship to the State's interest in promoting equal athletic opportunities for the female sex. *Id*.

[1] The Save Women's Sports Act will be referred to as "the Act," "the North Greene Act," and "the statute."

Petitioner, who was beginning the seventh grade at the time this lawsuit was filed, aspires to join the girls' volleyball and cross-country teams. R. at 3. Although biologically assigned male at birth, Petitioner has identified as a female from a young age. *Id.* By the third grade, she transitioned to living as a girl at home, but she remained dressing as a boy at school. *Id.* Shortly after, she began using a name more commonly associated with girls and began identifying as a girl in public in addition to her private life. *Id.* She even joined the elementary school's all-girl cheerleading team. *Id.*

In 2022, Petitioner was diagnosed with gender dysphoria, and she began discussing appropriate courses of action with a counselor. *Id.* A potential approach was for Petitioner to start undergoing puberty-delaying treatments.[2] *Id.* The average age for puberty in biological males is twelve, while it can occur anytime between the ages of nine and fourteen. *Id.* at n.2. At the commencement of this proceeding, Petitioner, age eleven, had neither begun experiencing male puberty nor begun puberty-delaying treatments. *Id.* at 3. Petitioner's school notified her that she could not join the girls' volleyball or cross-country team as a transgender female because allowing her to do so would violate the Save Women Sports Act. *Id.*

Procedural History

Petitioner, by and through her mother, commenced this suit against the State of North Greene Board of Education and its Superintendent Floyd Lawson. *Id.* at 4. The State of North Greene moved to intervene, and the district court granted the motion. *Id.* Petitioner amended the complaint to include the State of North Greene and the Attorney General as defendants. *Id.* Petitioner sought a declaratory judgment and an injunction preventing Respondents from enforcing

[2] Petitioner's expert witness opined that puberty-delaying treatments would prevent endogenous puberty, and consequently, the absence of increased testosterone circulation would thwart any physiological changes. R. at 3.

the law against Petitioner alleging that the Act violates Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 5.

Respondents contested Petitioner's claim by filing a motion for summary judgment. *Id.* The district court granted the motion, holding that the North Greene Act did not violate the Equal Protection Clause because defining females on the basis of 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." *Id.* Further, the district court held that the Act did not violate Title IX. *Id.* at 12. Petitioner timely appealed the district court's order. *Id.* On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's determination that summary judgment should have been granted in favor of Respondents. *Id.* at 6-12.

SUMMARY OF THE ARGUMENT

The North Greene Save Women Sports Act is compliant with both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act of 1972 and should be upheld as constitutional. First, the North Greene Act does not violate Title IX because it exercises sex-based distinctions in the context of sports, which Title IX permits, and the Act does not unlawfully discriminate against Petitioner. Second, the Act does not violate the Equal Protection Clause because it relies on biological sex distinctions to ensure that equal athletic opportunities are provided to female athletes and to protect the physical safety of female athletes when competing.

The purpose of Title IX is to prohibit discrimination on the basis of sex in educational programs. There is no dispute that the North Greene Act does make sex-based distinctions because it determines which team student-athletes may participate on based on their biological sex.

However, when Title IX was enacted, its use of the term "sex" specifically referred to biological sex, determined at birth, and Title IX expressly allows sex-based distinctions to be made in certain circumstances. One such circumstance allows for biological sex-separate sports where selection for such teams is based upon competitive skill, or the activity involved is a contact sport. Both sports that Petitioner wants to participate in, girls' cross-country and volleyball, are competitive in nature, and volleyball has the potential to cause harm to other athletes through contact.

Respondents are sympathetic to the difficulties that Petitioner faces as a transgender female. In many analyses, Petitioner would be considered similarly situated to a biological female. However, because athletics are considered from the perspective of physical ability, which is determined by biological sex, Petitioner must be considered as a biological male in the context of sports. The North Greene Act treats Petitioner no differently than a biological boy, which allows her to participate either on the designated male athletic teams or on the coed teams designated for both sexes. The Act does not discriminate against Petitioner when it does not equate her with a biological female because she is physiologically similar to a male and the purpose of the Act is to promote equality and safety for female athletes.

The North Greene Act also does not violate the Equal Protection Clause of the Fourteenth Amendment because it makes a sex-based distinction that is furthered by two important government interests, and the distinction is substantially related to those interests. The Act does not discriminate on the basis of gender identity. It uses biological sex-based classifications to protect female athletes and ensure they are provided equal athletic opportunities. Gender identity, while important in almost any other context, is not relevant to athletics. There are distinct biological characteristics that are determined by the chromosomes an individual is born with that influence their physical abilities. It would not be fair or safe for female athletes to have to compete

against biological males who are inherently faster and stronger. Simply because the Act may cause a disparate effect by limiting transgender participation to a specific team, does not invalidate the constitutionality of the Act.

The constitutionality of the Act is supported further because it satisfies intermediate scrutiny. Sex is considered to be a quasi-suspect class that triggers heightened scrutiny. To satisfy intermediate scrutiny, the Act's classifications need to serve an important governmental objective and be substantially related to the achievement of those objectives. The North Greene Act serves the important objectives of maintaining female athletes' safety and ensuring they are provided equal opportunities. The Act is also substantially related to achieving those objectives, and to be substantially related, the Act does not have to employ the most restrictive means possible to achieve the government interest.

Because the North Greene Save Women Sports Act does not violate either Title IX or the Equal Protection Clause, this Court should affirm the Court of Appeals for the Fourteenth Circuit's holding and find that the Act is constitutional.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment and a "constitutional challenge to a statute" *de novo*. *United States v. Trotter*, 478 F.3d 918, 920 (8th Cir. 2007).

ARGUMENT

I. The North Greene Act Complies with Title IX.

Title IX of the Education Amendments Act of 1972 establishes 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). For a law to violate Title IX, the reviewing court must

find (1) that the plaintiff was prohibited from participating in an educational program "on the basis of sex"; (2) "that the educational institution was receiving federal financial assistance at the time"; and (3) that the improper discrimination caused the plaintiff 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)).

The parties do not dispute that Respondents received federal funding as an educational institution or that the athletic program is part of the educational program. The remaining issues before this court are (1) whether the statute prohibits Petitioner's participation in the athletic programs on the basis of her sex, and (2) whether the statute constitutes unlawful discrimination that causes Petitioner harm. This Court should affirm the Court of Appeals and hold that although the North Greene Act designates athletic teams on the basis of sex, Title IX includes express authority for such sex-based distinctions. It should further affirm the Court of Appeals and hold that the Act does not discriminate against Petitioner because she is not excluded from participating on an athletic team and she is treated the same as any other biological male.

A. The Act Exercises Sex-Based Distinctions in Accordance with the Exceptions Permitted by Title IX.

The central purpose of Title IX is to prevent sex discrimination within educational institutions. *See United States v. Bryant*, 996 F.3d 1243, 1264 (11th Cir. 2021). However, Title IX recognizes that the male and female sexes are not mutually interchangeable due to prevailing physical and biological differences. *See United States. v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"). As a result of these physiological differences, males and females are not similarly situated with regard to athletic competitions. *See Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 739 (R.I. 1992). To ensure both sexes are afforded equal opportunities, Title IX explicitly

authorizes sex separate athletic teams "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).

1. Title IX Prohibits Exclusion and Denial from Participation on the Basis of Sex, Not Gender Identity.

Title IX is clear in stating that no person "shall, on the basis of sex, be excluded from participation in, [or] be denied the benefits of . . . any education program or activity." 20 U.S.C. § 1681(a). Where the text of a statute is unambiguous, the words must be read and interpreted in accordance with their ordinary meaning at the time Congress enacted the statute. *See Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). To determine the ordinary meaning of a word, courts can look to dictionary definitions provided around the time of the statute's enactment. *See United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021) (citing *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016)).

When Congress enacted Title IX to prohibit discrimination on the basis of sex in education, Congress could have only been referring to the distinction of male and female based on biological sex, not gender identity. At the time, both before and after Title IX's enactment, sex was largely defined as "either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions." *Sex*, WEBSTER'S NEW WORLD DICTIONARY (1972); *see also Sex*, *Female*, *Male*, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function"); *Sex*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1976) ("The property or quality by which organisms are classified

according to their reproductive functions."). One year after Congress enacted Title IX, the Supreme Court bolstered this interpretation of the word by noting that "sex" is "an immutable characteristic" determined at "birth." *Fontiero v. Richardson*, 411 U.S. 677, 686 (1973).

This Court's precedent in *Bostock v. Clayton County*, 590 U.S. 644 (2020), is not applicable to the present case. In *Bostock*, this Court held that it is impossible to discriminate against a transgender individual without discriminating against them on the basis of sex. *Id.* at 660. However, *Bostock* was considering the legality of employment discrimination under Title VII, which is vastly different from Title IX. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005). Title VII protects individuals from discrimination "because of . . . sex" in the employment context, 42 U.S.C. § 2000e-2(a), whereas Title IX prohibits discrimination in educational programs "on the basis of sex," 20 U.S.C. § 1681(a). The different contexts of the two statutes warrant different outcomes. *See Yates v. United States*, 574 U.S. 528, 537 (2015) ("[T]he same words, placed in different contexts, sometimes mean different things."). Sex is not relevant to how employees are evaluated under Title VII, but it is relevant in ensuring male and female students are afforded the same opportunities under Title IX. *See Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996).

Additionally, Title IX does not use sex as an ambiguous term to be considered interchangeable with gender identity because it explicitly differentiates based on sex in specific scenarios, such as the express statutory carve-out for the context of separate sports teams under 34 C.F.R. § 106.41(b). *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 813 (11th Cir. 2022) ("*Adams*"). The Eleventh Circuit in *Adams* recognized that other courts, such as the Fourth Circuit in *Grimm*, 972 F.3d 586, have interpreted the term "sex" to be ambiguous because the statute does not explicitly define the term, and dictionary definitions can vary. *See Adams*, 57

F.4th at 812-13. However, the court in *Adams* recognized that reading ambiguity into the term "sex" to also include gender identity is contrary to the actual context of Title IX. *Id.* at 813. The drafters of Title IX incorporated various exceptions for sex-based distinctions, which would be rendered meaningless if the statute were not referring to biological sex. *See id.*; *see also* 34 C.F.R. § 106.41(b).

2. Title IX Includes Express Statutory Exceptions for Differentiating Between the Sexes.

The essence of Title IX is to ensure there is no discrimination by creating opportunities for only one sex. *See VMI*, 518 U.S. at 533. Thus, Title IX acts to maintain equal opportunities by allowing for sex-based distinctions in certain circumstances, including athletics. *See* 34 C.F.R. § 106.41(b). Biological males would regularly displace female athletes to a significant extent if they were required to compete with one another. *See Clark ex rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982). Consequently, permitting sex-specific sports prevents discrimination against female athletes because it ensures equal access to the opportunity to compete against persons who are similarly situated. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004).

Title IX *permits* sex-based athletic teams "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). Though Title IX further *requires* that equal athletic opportunities be provided for members of both sexes, *id.* § 106.41(c), including "levels of competition" that "effectively accommodate the . . . abilities of members of both sexes," and equal opportunities for publicity to be garnered by both sexes, *id.* §§ 106.41(c)(1), (10). In particular, Title IX mandates that male and female athletes must be provided an equal opportunity to participate in athletic programs, and it allows those programs to be distinguished by sex if participation involves competitive skill or bodily contact.

Congress authorizes sports teams to be distinguished by biological sex in these circumstances because biological males possess inherent physiological differences that provide them with advantages with respect to athletics. *See Adams*, 57 F.4th 791 at 819 (Lagoa, J., specially concurring). This is evidenced by studies that 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.'" *Id.* at 820. The objective of the North Greene Act is to provide equal athletic opportunities for female athletes and to protect their physical safety while competing, so by prohibiting biological males from competing against females with these advantages, the Act, in fact, furthers the objectives of Title IX.

Petitioner wishes to join the girls' volleyball and cross-country teams. R. at 3. Although it is noted in the Record that Petitioner was permitted to participate on the girls' cheerleading team in elementary school, *id.*, cheerleading is a sport that involves neither competition nor bodily contact. Both cross-country and volleyball are based on competitive skill because they involve one team or individual competing against another. If biological males, including transgender females, were allowed to participate on the girls' volleyball team, Petitioner's team would be at an advantage to displace teams that may have otherwise prevailed had Petitioner not been playing on the girls' team. Similarly, cross-country teams typically involve individual students competing against students from other schools, and Petitioner would have the opportunity to defeat students from other schools in the competition. Furthermore, competitive sports, such as volleyball and cross-country, often require students to try out for the team to get a position. If Petitioner had an athletic advantage over biological females, there is a possibility that Petitioner would prevail over

a biologically female athlete and be awarded a position on the team when the biological female would have otherwise qualified for the position.

In addition to its competitive nature, girls' volleyball also involves contact that could harm other students. While athletes playing volleyball do not inherently engage in intentional bodily contact, there is still a realistic likelihood that a player could be harmed through contact with another player. For example, two players on the same team could collide while both going for the ball, or a player could aggressively spike the ball at the other team causing injury. *See* Paulina Dedaj, *High School Volleyball Player Says She Suffered Concussion After Being Injured by Trans Athlete, Calls for Ban*, FOX NEWS (April 21, 2023, 9:15 AM), https://www.foxnews.com/sports/high-school-volleyball-player-says-suffered-concussion-being-injured-trans-athlete-calls-ban. While these risks are less likely in a sport such as volleyball, they cannot be ignored when the purpose is to protect the safety of female athletes while providing them equal athletic opportunities.

It is accurate that the Act does not allow Petitioner to participate on the volleyball or cross-country teams designated for girls. However, Title IX permits this sex-based distinction because it ensures females are provided with equal athletic opportunities and it protects the safety of female athletes when competing. The Act further satisfies the remaining Title IX requirement by not discriminating against Petitioner.

B. The Act Does Not Unlawfully Discriminate Against Petitioner in Violation of Title IX.

In the context of Title IX, discrimination means "treating [an] individual worse than others who are similarly situated." *Grimm*, 972 F.3d at 618 (quoting *Bostock*, 590 U.S. at 657-58). Title IX was enacted "in response to evidence of pervasive discrimination against women with respect to education opportunities." *McCormick*, 370 F.3d at 286. "It would require blinders to ignore that

the motivation for the promulgation of the regulation" was to increase athletic opportunities for women. *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993). Title IX was not meant to "desegregate" athletic opportunities, but merely "provide equal access for women and men students to the education process and extracurricular activities in school." 117 CONG. REC. 30,407 (1971). Because men and women are not similarly situated in the context of sports, females must be compared to females, and males must be compared to males in order to provide women with the equal opportunities that Title IX strives for.

1. Transgender Females Are Not Excluded from Participating in Athletics.

Petitioner initially contends that the North Greene Act discriminates against her by categorically excluding her from all school athletics because the Act does not allow her to qualify as a female for the purpose of sports. R. at 11. It is accurate that the Act designates which teams she can play on, and ultimately prohibits her from joining the girls' teams. However, the Act does not exclude Petitioner from participating in school athletics.

Relying on statutory interpretation, the definition of "exclude" used at the time Title IX was enacted states: "to shut out," "hinder the entrance of," or "bar from participation, enjoyment, consideration, or inclusion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 793 (1966). Similarly, to "deny" is "to turn down or give a negative answer to." *Id.* at 603. Read within the context of Title IX's language, to exclude and to deny must be applied to an educational program or activity, such as an athletic sport. The North Greene Act does not exclude Petitioner from school sports because Petitioner, like any other biological male, is permitted to join either coed or male-designated athletic teams. Rather, the Act designates specific teams Petitioner is permitted to join based on biological sex.

The Act carries out the objective of Title IX by directing Petitioner to male or coed athletic teams. By applying a uniform law to all biological males, female athletes are protected from unfair competition and safety risks. Because Petitioner is similarly situated to a biological male in the context of athletics, the Act does not violate Title IX.

2. The Act Treats Transgender Females and Biological Males Equally Because They are Similarly Situated.

Petitioner has not been denied or excluded from participating in school athletics, but her participation is limited to either the male or coed teams due to her biological sex, which Title IX permits. The similarly situated analysis requires Petitioner to identify persons *materially identical* to her who have received different treatment. S*ee B.P.J. v. W. Va. St. Bd. of Educ.*, 98 F.4th 542, 575 (4th Cir. 2024) (Agee, J., concurring in part). Biological sex is "material" to sports. *Id.* at 572. Accordingly, Petitioner is similarly situated to a biological boy—and biological boys also cannot play sports on the girls' teams when the selection is based on competitive skill, or the sport is a contact sport. R. at 4; *see also* 34 C.F.R. § 106.41(b). By definition, then, Petitioner is not experiencing discrimination as it is defined under Title IX.

Being treated the same as those she is biologically similar to does not mean she must suppress, hide, or hinder her gender identity. She can embrace her gender identity—but gender identity simply has nothing to do with what occurs on the athletic field. *B.P.J.*, 98 F.4th at 568 (Agee J., concurring in part) ("Gender identity, simply put, has nothing to do with sports. It does not change a person's biology or physical characteristics. It does not affect how fast someone can run or how far they can throw a ball."). To require Petitioner to play on teams aligned with her biological sex is analogous to some schools requiring separate living facilities between the sexes—something Title IX explicitly allows. *See Adams*, 57 F.4th at 816. Further, 34 C.F.R § 106.33 specifically allows for separate locker rooms and shower facilities on the basis of sex. To contend

that maintaining sex-separate sports based on biological sex is discriminatory calls into question the entirety of Title IX's treatment of biological sex. It "turns Title IX on its head and reverses the monumental work Title IX has done to promote girls' sports from its inception." S*ee B.P.J.*, 98 F.4th at 572 (Agee J., concurring in part).

In *Grimm*, the Fourth Circuit held that the student was discriminated against in violation of Title IX because he was treated worse than students who were similarly situated to him because they could use the bathroom of their choice, and he could not. 972 F.3d at 618. What is distinguishable between *Grimm* and the present case is that there was no reason to differentiate between the sexes in *Grimm* because there is no physical advantage or safety concern in restroom use that can be mitigated by requiring separate facilities. While physiological differences do not have any bearing on restroom use, those differences do have significant causal effects on athletics, which makes Petitioner similarly situated to a biological male in the analysis of athletics.

The North Greene Act does not violate Title IX because there is explicit authorization for the Act to designate athletic teams on the basis of biological sex to promote athletic opportunities and the physical safety of female athletes while competing. The Act also does not discriminate against Petitioner because she is not excluded from participating on athletic teams, she is rather directed to join the boys' athletic teams because she is similarly situated to biological males.

II. The North Greene Act Satisfies the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In essence, the Clause prohibits government actors from treating similarly situated persons differently. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("*Cleburne*"); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1985). The Constitution does not permit sex classifications that are "wholly

unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 76 (1971). However, there is a longstanding tradition of separating the sexes in certain circumstances, and those sex-based distinctions are constitutional so long as they serve an important government interest by means that are substantially related to that interest. *See Nguyen v. INS*, 533 U.S. 53, 60 (2001).

When a claim challenges the constitutionality of a state action under the Equal Protection Clause, the court must determine which of three levels of scrutiny applies, strict scrutiny, intermediate scrutiny, or rational basis. *See Adams*, 57 F.4th at 845. A claim under the Equal Protection Clause should be considered under strict scrutiny when the state action establishes a suspect classification. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). A suspect classification makes "classifications based on race or national origin and classifications affecting fundamental rights." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The North Greene Act does not create a suspect classification and should not be reviewed under strict scrutiny.

The Act does not classify individuals based on race or national origin, and this Court has not considered a classification based on sex to be suspect. Race and national origin are considered suspect classifications because they have a "history of prior discrimination at the hands of the State and private individuals." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978). Although sex has been identified as a basis for invidious discrimination, this Court has recognized that there are cognizable differences between biological males and females that lead to circumstances permitting different treatment. *See VMI*, 518 U.S. at 533. Therefore, sex-based distinctions have been found to trigger intermediate scrutiny. *See, e.g.*, *Cleburne*, 473 U.S. at 440.

When a law is challenged under intermediate scrutiny, the state must show that the law serves "important governmental objectives" and that the law is "substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Petitioner does not

contest that the state's interest in ensuring equal athletic opportunities for females is a sufficiently important government interest. R. at 9. However, Petitioner does allege that the Act unlawfully discriminates against transgender females based on their gender identity, and the exclusion of transgender female athletes from girls' athletics is not substantially related to the important interest of maintaining equal athletic opportunities for females.

The Court of Appeals correctly held that the North Greene Act does not violate the Equal Protection Clause of the Fourteenth Amendment. This Court should similarly find that the Act does not violate the Equal Protection Clause because gender identity is not relevant to its implementation. Accordingly, the Act neither discriminates on the basis of gender identity nor has a discriminatory purpose. Further, the Act satisfies intermediate scrutiny because it serves an important government interest and is substantially related to that interest.

A. The Act Designates Students' Participation Based on Sex, Not Gender Identity.

An equal protection claim arises when at least one person has been treated differently from another without sufficient justification. *See Village of Willowbrook v. Olech*, 528, U.S. 562, 564 (2000). To state a valid equal protection claim, a plaintiff must allege intentional discrimination on behalf of a state actor. *Washington v. Davis*, 426 U.S. 229, 241 (1976). To prove discrimination, the plaintiff must identify persons who are materially identical to him or her who have received different treatment. *See Nordlinger*, 505 U.S. at 10 (providing that the Equal Protection Clause prohibits government actors from treating persons who are "in all relevant respects alike" differently). The Constitution does, however, permit laws that treat groups of people differently, so long as the grounds for doing so have a "fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed*, 404 U.S. at 76. The North Greene Act does not discriminate against Petitioner in violation of the Equal

Protection Clause because Petitioner's sex is relevant to her athletic participation, and the Act does not facially discriminate against her or promote an unconstitutional purpose.

1. Gender Identity is Not Relevant with Respect to Athletics.

Petitioner contends that transgender females are similarly situated to biological females and not biological males, and by permitting biological females to participate but not transgender females, the Equal Protection Clause is implicated. However, the Act's classification by sex is consistent with the Constitution's equal protection demand. The fundamental distinction is that the Act appropriately "reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). Athletics is a circumstance where laws can reasonably be classified "on the basis of biological sex without unlawfully discriminating on the basis of transgender status" or gender identity. *Adams*, 57 F.4th at 809.

Petitioner's contention is rooted in a mistaken belief that biology is not relevant to athletics. However, it is well known that physiological differences between the sexes are real and enduring. *VMI*, 518 U.S. at 533. The differences evident between males and females are prevalent and substantial when considering physical activities such as athletics. *See Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016). The significant disparity among athletic ability is the main incentive behind sex-specific sports teams because without the division, males would significantly displace females in combined competition. *See Clark*, 695 F.2d at 1131; *see also Cap v. Tenn Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam) (recognizing that many biological "females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement" without the option for distinct teams). As such, "sex

represents a legitimate, accurate proxy" to pursue a permissible legislative end. *Craig*, 429 U.S. at 204.

Gender identity, on the other hand, cannot be used to indicate athletic performance. An individual's gender identity does not alter their biology or physical characteristics. Consequently, gender identity alone will not affect an athlete's speed, strength, or overall physical capability. These facts make Petitioner similarly situated to a biological male for the purpose of determining Petitioner's biological sex in accordance with the Act. While Respondents are empathetic to Petitioner's circumstances and the difficulties that accompany not identifying with one's biological sex, most all other contexts consider Petitioner in reference to her gender identity, athletics is simply distinct from those other analyses. *See Cohen*, 101 F.3d at 177 (holding that athletics are distinctly different from other analyses such as admissions decisions and employment consideration where gender identity is relevant and biological sex is not). Therefore, the Act's permissible sex-based classifications do not discriminate because of gender identity, they instead associate Petitioner with other athletes who share similar physiological characteristics in a circumstance where the differences cannot be set aside.

2. The Act Does Not Facially Discriminate Based on Gender Identity.

Government action is unconstitutional when it creates an "arbitrary or irrational" distinction between classes of people out of a bare "desire to harm a politically unpopular group." *Cleburne*, 473 U.S. at 446-47 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). To demonstrate that a statute facially discriminates in violation of equal protection, the plaintiff must show that the statute "explicitly distinguish[es] between individuals on [protected] grounds." *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Reed*, 404 U.S. 71, 73 (1971) (involving a facial classification where the statute stated that "males must be preferred to females"). Petitioner asserts

that the Act uses the classification of biological sex as a means to bar transgender females from qualifying as a girl for the purpose of school athletics and, ultimately, excludes them from school athletics entirely.

Emanating from this claim, Petitioner contends that the Act facially discriminates based on gender identity. However, what Petitioner refers to as a categorical ban on transgender females' participation in school sports, is more accurately a contention that the Act disproportionately affects transgender girls who wish to participate. Although an unfortunate effect, it cannot condemn the Act because the Equal Protection Clause does not have a "disparate-impact component;" it only prohibits intentional discrimination. *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting).

Even where a neutral law is found to have a disparate impact, there is no evidence supporting the "departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("*Feeney*"); *see also Farm Lab. Org. Comm. v. Stein*, 56 F.4th 339, 352 (4th Cir. 2022) (emphasizing the holding in *Feeney* that "facially neutral laws must be treated as such, even when those laws are accompanied by disparate effects"). There are many laws that disproportionately impact certain groups, but they are constitutional if they treat members of the group no differently than all other members of the overall "class described." *Feeney*, 442 U.S. at 271-72. While the Act may disparately affect transgender females, such as Petitioner, they are ultimately treated no differently than all other biologically male athletes.

Although Petitioner relies on her gender identity as the basis for discrimination, courts must rely on the "statutory classification itself" in analyzing an equal protection claim rather than how the challenger perceives it. *Califano v. Boles*, 443 U.S. 282, 293-94 (1979). The court of appeals

correctly found that "the Act classifies based only on biological sex, not 'transgender status,' and permissibly excludes 'biological males' from female sports under established precedent." R. at 8 (citing *Clark*, 695 F.2d at 1131-32). The only occurrence of the Act referring to transgender status is in a statement where the North Greene General Assembly found that "gender identity is separate and distinct from biological sex." R. at 8 (citing N.G. Code § 22-2-16(d)). Petitioner's gender identity is therefore irrelevant in the application of the Act, but her biological sex is not.

The North Greene Act merely designates athletes to sports teams based on their biological sex. *See* N.G. Code § 22-3-16(a) (stating that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports . . . shall be expressly designated as" male, female, or coed, "based on biological sex at birth"). This distinction does treat biological girls as one class and biological boys as another, but it does not explicitly treat transgender individuals differently. When schools apply the Act, transgender female athletes are treated the same as any other biological male athlete because they all are placed on the team corresponding with their biological sex. Because the Act applies equally to all biological males, there is a disconnect between the sex-based classification and transgender individuals. *See Adams*, 57 F.4th at 809 (holding that a policy does not facially discriminate based on transgender status when it classifies students on the basis of biological sex). Therefore, the Act does not discriminate against transgender athletes on its face.

3. The Act Does Not Have a Discriminatory Purpose.

Because biological sex and gender identity are not comparable in the context of athletics and the North Greene Act plainly classifies based on biological sex, the only plausible way for the Act to intentionally discriminate in violation of the Equal Protection Clause is for it to serve an unconstitutional purpose. *See Feeney*, 442 U.S, at 273. A discriminatory purpose requires more than acting with intent while being aware of the potential consequences; it further requires the

decisionmaker to deliberately select a particular course of action because of the consequences it will have on a particular group. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (1993). Simply put, it exhibits an intent to "harm a politically unpopular group." *Cleburne*, 473 U.S. at 447 (quoting *U.S. Dept. of Agric.*, 413 U.S. at 535).

Petitioner cannot prove that the state legislature acted with a discriminatory purpose. 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." R. at 4. The Act does not specifically identify transgender athletes to detail who may or may not participate on which teams. *But see Hecox v. Little*, 104 F.4th 1061, 1074-75 (9th Cir. 2024). Alternatively, the Act 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). This signifies an intent to keep men's and women's sports separate by maintaining women's sports solely for biological females.

In *Adams*, the court held that a bathroom policy at most had a disparate impact on transgender students, and the policy did not rise to the level of a constitutional violation because no animus was shown. 57 F.4th at 811. There was no evidence to suggest that the school in *Adams* had enacted the bathroom policy because of its adverse effects on transgender students. *Id.* at 810. On the contrary, the court in *Hecox* distinguished *Adams* because the act in *Hecox* explicitly referenced transgender females as proof that the purpose of the act was to prohibit transgender female athletes from participating in school sports. 104 F.4th at 1074-75, 1078 (referencing Idaho Code § 33-6202(11), which provides: "a man [sic] who identifies as a woman and is taking cross-sex hormones 'ha[s] an absolute advantage' over female athletes"). The North Greene Act is far more representative of the constitutional policy identified in *Adams* because the purpose of the Act

is to protect female athletes, and in an effort to do so, it only references the male biological sex as an entire class that is banned from participating in female designated athletics.

The Record does indicate that the North Greene Assembly intended to prevent transgender girls from participating on biological girls' sports teams. R. at 9. However, it was not intentionally aimed solely at transgender females because the legislature was simply applying a comprehensive regulation to all members of the biological male sex. The dissent relies on the statement in *Crawford v. Board of Education*, 458 U.S. 527, 544 (1982), that the "disproportionate effect of official actions provides an important starting point" for determining whether a "[discriminatory] purpose was [its] motivating factor." R. at 13. However, that factually accurate statement is misapplied in the present case because the dissent erroneously claims that a discriminatory purpose is evidenced because the Act excludes "biological males" from female-designated teams, and by doing so, the prohibition only affects transgender female athletes. *Id.* The Act applies equally to all biological male athletes, regardless of their gender identity, by prohibiting them from participating on girls' teams.

Because the Act does not have a discriminatory purpose, it is not unconstitutionally applied to Petitioner. Even if the Act treats similarly situated individuals differently than Petitioner, the Act still survives intermediate scrutiny because it is substantially related to an important government interest.

B. The Act is Substantially Related to the Important Government Interest.

A classification based on sex must survive heightened scrutiny by supporting an important governmental interest to survive an equal protection claim. *See Nguyen*, 533 U.S. at 60. Petitioner does not contest that providing equal athletic opportunity for females is an important interest. R. at 9. Therefore, the remaining requirement is that the classification must be substantially related to

that important interest. *See Nguyen*, 533 U.S. at 60. For a law to be substantially related to an asserted important governmental objective, there must be "enough of a fit between the . . . [law] and its asserted justification." *Danskine v. Mia. Dade Fire Dep't*, 253 F.3d 1288, 1299 (11th Cir. 2001). This does not impose a requirement for a perfect fit. *See Nguyen*, 533 U.S. at 70. In fact, "the alternative chosen may not maximize equality, and may represent trade-offs between equality and practicality. But since absolute necessity is not the standard, . . . even the existence of wiser alternatives than the one chosen does not serve to invalidate" a law that is "substantially related to the goal." *Clark*, 695 F.2d at 1131-32.

Petitioner does not assert that the Act's overall purpose of maintaining sex-separate sports is not substantially related to the important government interest of providing equal athletic opportunities to females. Rather, Petitioner contends that the Act's use of the term "biological sex" and the definitions of "girl" and "woman" are not substantially related to the interest because it prohibits transgender female athletes from participating even when they have not gone through puberty. Thus, Petitioner proposes that transgender girls should be permitted to participate on girls' teams because they identify as girls, despite their biological sex. This Court should affirm the Court of Appeals and hold that distinctions based on biological sex are substantially related to the important government interest of providing equal athletic opportunities for females because even if there are alternative classifications, intermediate scrutiny does not require the legislature to employ the least restrictive means available.

1. Sex Distinctions, Which Are Not Synonymous with Gender Identity, Are Substantially Related to the Objective.

Petitioner recognizes that the classification of offering male and female sex-separate sports is substantially related to the important government interest. However, she objects to where Respondents drew the line when including the definition of "girl" and "boy" in the statute. Because

Petitioner identifies as a girl, she maintains she should be permitted to play on the girls' athletic teams. However, sex and gender, while related, are not interchangeable. *See Bostock*, 590 U.S. at 669 (recognizing "transgender status" is a "distinct concept[] from sex"); *Grimm*, 972 F.3d at 594 (distinguishing gender identity from "sex-assigned-at-birth").

Generally, a person is either born with male sex chromosomes or female sex chromosomes, and those elements largely determine physical performance abilities. Conversely, a person's gender identity does not have to be aligned with the biological sex that the chromosomes represent. Gender is not necessarily fixed at birth because it is a social construct used to classify individuals based on their roles, behaviors, activities, and attributes. *See PFLAG*, *PFLAG National Glossary of Terms* (June 2022), http://pflag.org/glossary. Gender identity, more specifically, refers to a "person's deeply held core sense of self in relation to gender." *Id.* A majority of individuals' gender identities align with their biological sex because most females identify as female, and most males identify as male. *See Grimm*, 972 F.3d at 594. But gender's reliance on a deeply held sense of self is what makes gender fluid. Both females and males can choose to present themselves however they feel most comfortable, whether that be in accordance with their biological sex or with the opposite sex. Irrespective of how a person chooses to represent their gender, their biological sex will determine their physical athletic capabilities.

Although Petitioner identifies as a girl, her biological sex is determined by the male chromosomes she was born with. An individual who possesses male chromosomes will naturally begin male puberty, which will increase the testosterone in their body. The causal link between male chromosomes and testosterone production results in physical characteristics that ultimately determine athletic ability. Respondents have established that males, on average, will athletically outperform females because of their inherent physiological differences. *See Adams*, 57 F.4th at 819

(Lagoa, J., specially concurring) ("[I]t is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports.").

The Fourth Circuit in *B.P.J.* makes the claim that a biological girl losing in competition to another biological girl is no different than a biological girl losing to a transgender female. 98 F.4th at 560. The court's hypothetical scenario is that a sixth-grade biological girl is projected to finish in fifteenth place at a track meet, but a new biological girl moves to town, finishes ahead, and is instead awarded the fifteenth place. *Id.* The court in *B.P.J.* alleges that a state cannot use "otherwise unconstitutional discrimination based on an asserted interest in protecting the first girl's anticipated [fifteenth] place finish." *Id.* That would be true in the hypothetical that the court provided because the two biological girls would be similarly situated in their physical abilities. But because a biological girl is not similarly situated to a transgender girl, allowing them to compete against one another would defeat the express authority provided by the Constitution to separate sports by sex.

As a result, transgender girls, who are biologically male regardless of their gender identity, exhibit the same physical characteristics and will similarly outperform female athletes. Petitioner is, therefore, predisposed to heightened physical capabilities compared to biological females, which, in the context of athletics, makes Petitioner similarly situated to biological males. Because it is evidenced that the increased circulating testosterone in biological males creates a disparity in athletic performance, a fact which Petitioner acknowledges, the Act's classification on biological sex is substantially related to the important interest of providing equal opportunities for female athletes.

2. The Classification Does Not Have to Employ the Least Restrictive Means of Achieving the Governmental Objective.

To maintain the assertion that the North Greene Act's use of biological sex is not substantially related to the important government objective, Petitioner alleges that it is unconstitutional to exclude transgender girls from the Act's definition of "girl." In Petitioner's view, transgender females do not have to experience male puberty because they can take puberty blockers or alternative hormone therapies. Nevertheless, the choices and circumstances available to some transgender female athletes do not invalidate the Act's sex-based distinction.

When this Court has reviewed gender-based equal protection claims, it has never "required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Its "relevant inquiry is not whether the statute is drawn as precisely as it might have been, but whether the line chosen . . . is within constitutional limitations." *Michael M.*, 450 U.S. at 473. Biological sex has been proven to directly correlate to athletic advantages, and the reality that medical interventions exist does not negate those inherent advantages. As Respondents' expert opined, even prior to experiencing male puberty, transgender girls, e.g., biological boys, often have a competitive advantage against biological female athletes. R. at 7. The available medical interventions only have the potential to diminish athletic advantages, they cannot guarantee equality.

When this lawsuit was initiated, Petitioner, age eleven, had not begun male puberty. R. at 3. However, there is no assurance that she has not already begun puberty or that she will not soon experience puberty, as biological boys, on average, begin puberty at the age of twelve. *Id.* Petitioner discussed puberty-delaying treatments with her therapist, *id.*, but there is no certainty that she will choose to undergo that treatment. Further, there is no requirement under the Act that

Petitioner or any other transgender female be forced to submit to medical treatment to counteract male puberty. Including such a requirement would not be constitutionally workable.

For various reasons, a transgender female may be unable to access medical treatment options, or she may choose to refrain from treatment entirely. *See generally* E. Coleman et al., *Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People*, INT'L J. TRANSGENDERISM (2012). Enforcing puberty-delaying treatment would also require transgender females to make a significant decision regarding their gender identity at a very young age. Some individuals may not recognize or accept that they are transgender between the ages of nine and fourteen. Others may socially transition but not medically confirm their gender identity until they are older. While requiring puberty-delaying treatment is an alternative that would allow some, but not all, transgender females to compete on girls' sports teams, it is not a feasible requirement.

Even if requiring medical treatment were a reasonable alternative, intermediate scrutiny does not require that alternative means be employed. So, although there are alternatives that would be more equitable in favor of transgender females, the government is not required to employ those classifications to satisfy intermediate scrutiny.

C. Safety is an Important Government Interest Advanced by the Act.

Petitioner briefly alleges that the safety of biologically female athletes is not an important interest furthered by the Act because cross-country and volleyball are not dangerous contact sports. R. at 10. The dissenting opinion from the Court of Appeals goes so far as to say that physical contact sports such as football and boxing do not even involve safety concerns attributed to biological differences because the athletes wear protective gear. R. at 14-15. However, this undermines all of the evidence that there are real physical differences between biological females

and males that create safety concerns, which are exacerbated particularly in competitive and contact sports.

Hence, the Act's classification based on biological sex furthers two important interests: the importance of safety in female athletics and the importance of equality in female athletics. Furthermore, this Court only needs to find one important government interest to uphold the constitutionality of the Act, and Petitioner already acknowledged that providing equal athletic opportunity to females is an important government interest. Therefore, this assertion is without merit.

The Court of Appeals for the Fourteenth Circuit properly affirmed summary judgment in favor of Respondents because the North Greene Act does not unconstitutionally discriminate against Petitioner as a transgender female, and the Act's definition of "girl" being based on "biological sex" is substantially related to the important government interest of providing equal opportunities to female athletes and protecting the physical safety of female athletes during competition.

CONCLUSION

For the foregoing reasons, Respondents respectfully ask that this Court AFFIRM the decision of the Court of Appeals for the Fourteenth Circuit.

Dated: September 13, 2024

Respectfully submitted,

TEAM 33
Counsel for Respondents