No. 24-2020

IN THE SUPREME COURT OF THE UNITED STATES

A.J.T.,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR RESPONDENTS

TEAM #35

QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States District Court for the Eastern District of North Greene (*A.J.T. v. North Greene Board of Education, et al.*, No. 23-2460, judgment entered September 7, 2023) were:

A.J.T. by and through Next Friend (Plaintiff);

State of North Greene Board of Education (Defendant);

Floyd Lawson, State Superintendent, State of North Greene Board of Education (Defendant);

State of North Greene (Defendant-Intervenor); and

Barney Fife, Attorney General, State of North Greene (Defendant).

The parties to the proceeding in the United States Court of Appeals for the Fourteenth Circuit (*A.J.T. v. North Greene Board of Education, et al.*, No. 23-1023, decided January 15, 2024) were:

A.J.T. by and through Next Friend (Appellant);

State of North Greene Board of Education (Appellee);

Floyd Lawson, State Superintendent, State of North Greene Board of Education (Appellee);

State of North Greene (Appellee); and

Barney Fife, Attorney General, State of North Greene (Appellee).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

> 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.

Section 1681 of Title IX of the Education Amendments Act of 1972 (20 U.S.C. § 1681(a)) states:

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

Limiting participation in sports events to the biological sex of the athlete at birth (N.G. Code § 22-3-4 et seq.) states:

> 22-3-4. There are inherent differences between biological males and biological females, and that these differences are cause for celebration.
>
> 22-3-15(a). (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.

> 22-3-16. (a) Interscholastic, 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. (b) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. (c) Gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity. Classifications based on gender identity serve no legitimate relationship to the State of North Greene's interest in promoting equal athletic opportunities for the female sex.

STANDARD OF REVIEW

The United States Supreme Court may review de novo a grant of summary judgement. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 454 (1992). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

STATEMENT OF THE CASE

Both houses of the North Greene legislature approved Senate Bill 2750 in April 2023 to provide equal opportunities for female athletes and to protect the female athlete's physical safety. (R. 3, 4). Recognizing the inherent differences between biological male and biological female athletes, the Senate introduced the bill, known as the "Save Women's Sports Act," to separate sports teams based on the biological sex of the athletes at birth. (R. 3, 4). The statute, codified on May 1, 2023 as North Greene Code § 22-3-4 (the "Act"), classifies gender identity as "separate and distinct" from biological sex, and one's biological sex is not determinative of an individual's gender identity. (R. 4).

A.J.T. ("Petitioner"), age eleven, was diagnosed with gender dysphoria in 2022. (R. 3). Petitioner was assigned the sex of male at birth and now presents as female in both public and private life. (R. 3). When entering the seventh grade, Petitioner expressed interest in joining the girls' volleyball and cross-country teams; however, under the Act, girls' volleyball and cross-country teams are designated for biological female athletes. (R. 3). As of the filing of this brief, Petitioner has yet to undergo any surgical or medical treatments for gender dysphoria, including puberty-delaying treatments. (R. 3).

Petitioner, by and through Next Friend, brought this lawsuit against the State of North Greene Board of Education and State Superintendent Floyd Lawson (collectively known as the "Respondents") for alleged violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment. (R. 2, 4.) The State of North Greene successfully intervened as a defendant-intervenor and Plaintiff named Attorney General Barney Fife as a defendant. (R. 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 a permanent injunction to prevent Defendants' enforcement of the Act. (R. 5.) Defendants opposed Plaintiff's motion and filed a motion for summary judgment on Plaintiff's claims. (R. 5.) The United States District Court for the Eastern District of North Greene granted defendants' motion for summary judgment. (R. 5.) Plaintiff appealed the grant of summary judgment to the United States Court of Appeals for the Fourteenth Circuit. (R. 5.) The Fourteenth Circuit affirmed the grant of summary judgment. (R. 12.)

Petitioner., by and through Next Friend, now appeals the decision of the Fourteenth Circuit.

SUMMARY OF THE ARGUMENT

Title IX prohibits discrimination on the basis of sex. The statute's plain meaning, paired with Congress' unmistakable intent makes it clear: discrimination on the basis of sex is discrimination on the basis of biological sex – not gender identity. Congress enacted Title IX to protect women, who were systematically excluded from educational opportunities, and such intent would be negated by reading gender identity into the statute. Furthermore, Title IX's regulatory scheme permits the separation of athletic teams on the basis of biological sex. The Act falls squarely into the regulatory carveout, and therefore, there is no discrimination on the basis of sex. As such, this Court should affirm the Fourteenth Circuit's decision.

The District Court properly granted defendants' motion for summary judgment because there was no genuine dispute as to any material fact and defendants were entitled to judgment as a matter of law. Petitioner has not met her burden in proving facial discrimination based on transgender status because the plain language of the statute delineates team membership based on sex at the time of the individual's birth. Transgender status is a mutable characteristic that falls short of inclusion in a quasi-suspect class and garners rational review. Under both rational review and intermediate scrutiny, the Act rationally furthers its close and substantial government interests of providing equal athletic opportunities for females and protecting female athletes' physical safety. Because Petitioner's Equal Protection Clause challenge fails, this Court should affirm.

ARGUMENT

I. TITLE IX'S STATUTORY AND REGULATORY SCHEME PLAINLY PERMIT NORTH GREENE TO DESIGNATE GIRLS' AND BOYS' SPORTS TEAMS BASED ON BIOLOGICAL SEX DETERMINED AT BIRTH TO PROTECT THE OPPORTUNITIES OF BIOLOGICALLY FEMALE ATHLETES.

In 1972, the 92nd United States Congress responded to pervasive discrimination against women by enacting Title IX. *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004). Title IX prohibits sex discrimination in education by mandating no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. § 1681(a). The legislation was modeled after the Civil Rights Act of 1964, and for over fifty years, Title IX has protected female athletes by giving them the chance to be champions. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979); *McCormick*, 370 F.3d at 295.

Petitioner only succeeds on a Title IX claim if she proves (1) that she was 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 her harm. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). Separating sports teams by members of each sex is not considered exclusion on the basis of sex where selection is based on competitive skill, or the activity is a contact sport. 34 C.F.R. § 106.41(b).

North Greene's separation of sports teams by biological sex does not constitute exclusion on the basis of sex because the plain language of Title IX indicates the act only prohibits discrimination on the basis of biological sex. Given the plain meaning of sex at the time of Title IX's enactment, it is clear sex is a binary, biological distinction, and the Act falls squarely into Title IX's statutory and regulatory carveouts that permit separate athletic teams based on this biological distinction when selection is based on competitive skill or the activity is a contact sport.

Therefore, the Act does not discriminate against transgender girls, like Petitioner, because Petitioner is similarly situated to the members of her biological sex rather than her gender identity.

Similarly, Petitioner fails to show how the Act would cause her harm. As the Fourteenth Circuit indicated, Petitioner is not excluded from athletics under the Act. (R. 11). The Act merely designates on which team Petitioner would play. (R. 3). § 106.41 requires schools to provide equal athletic opportunities for both sexes. Yet a superficial interpretation of "equal opportunity" ignores the historical exclusion of biological female athletes in sports that Title IX attempts to correct, and statutory provisions limiting athletic opportunities of biological male athletes to protect opportunities for biological female athletes are in fact permitted under Title IX's regulatory scheme. Thus, Petitioner has not been excluded from any educational program. Rather, Petitioner must elect to compete on a coed, mix, male, boys, or men's athletic team or sport. (R. 4).

A. THE STATUTORY LANGUAGE OF TITLE IX IS CLEAR: SEX IS A BINARY DESIGNATION BASED ON AN INDIVIDUAL'S BIOLOGICAL FUNCTIONS AT BIRTH, AND READING GENDER IDENTITY INTO THE DEFINITION OF SEX IS A REWRITE OF TITLE IX'S PROVISIONS.

i. Title IX is unambiguous, and its provisions must be interpreted in its ordinary meaning at the time it was enacted.

Consistently designating girls' and boys' sports teams based on biological sex determined at birth does not violate Title IX, and therefore, the appellate court's decision to uphold the State of North Greene's Save the Women's Sports Act should be affirmed.

When interpreting a statute, this Court first determines whether the language at issue has a plain and unambiguous meaning. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[I]nquiry must cease if the statutory language is unambiguous." *Id*.

This Court must follow the fundamental canons of construction: an undefined word is to be interpreted at taking its ordinary, contemporary meaning. *Perrin v. United States*, 444 U.S. 37,

42 (1979). Specifically, the interpretation must be consistent with the ordinary meaning at the time congress enacted the statute." *Wis. Cent. Ltd v. United States,* 585 U.S. 274, 277 (2018); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) *quoting Sex, Female, Male,* Oxford English Dictionary (re-issue ed. 1978) (defining "sex" as "[e]ither of the two divisions of organic beings distinguished as male and female respectively," "female" as "[b]elonging to the sex which bears offspring," and "male" as "[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation"); *Sex, n.*, Oxford English Dictionary (2d ed. 1989) (defining sex as a distinction between male and female … the sum of those differences in the structure and function of the reproductive organs …); *Sex,* Merriam Webster, https://www.merriam-webster.com/dictionary/sex#word-history (last visited September 12, 2024 at 5:32 p.m.) (noting the definition of sex as "two major forms of individuals … distinguished respectively … especially on the basis of their reproductive organs …" has been used since the fourteenth century); *Discrimination*, Oxford English Dictionary (2d ed. 1989) (defining as the perceiving, noting, or making a distinction or difference between things).

Even this Court described sex in biological, binary terms by referring to sex as an "immutable characteristic" determined "solely by the accident of birth …" *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973).

Discussions surrounding the definition of sex at the time of Title IX's enactment hardly deviated from its binary, biological definition. The term "gender identity" only began appearing in academic literature in the early 1960s.[1] It was not until the 1980s, the term gender moved beyond academic and activist circles. *Id*.

[1] Grace Abels, *What are 'sex' and 'gender'? How these terms have changed and why states now want to define them*, Poynter (March, 25, 2024), https://www.poynter.org/fact-checking/2024/definition-gender-sex-changed-meaning-state-laws/

In 1972, defining sex within the Title IX provisions was unnecessary to enact legislation with unequivocal meaning. Oxford English Dictionary and Merriam Webster's Dictionary indicate the plain meaning of sex was a binary classification based on the reproductive functions at birth. Congress was clear: "on the basis of sex" meant on the no person should be excluded or subject to discrimination on the basis of one's biological sex. As such, the statutory language of Title IX is unambiguous, and no further inquiry is necessary as to its interpretation.

Furthermore, "subjected to discrimination" read in tandem with "sex" indicates that Title IX's prohibition on differential treatment means treating one biological sex worse than the other, in light of subjected to's negative connotation. And even then, Title IX's carveout in §106.41 permits the separation of athletic teams by biological sex. The regulatory scheme merely requires educational institutions to provide equal opportunities for members of both sexes. Thus, providing separate athletic teams for each sex is not tantamount to discrimination on the basis of sex.

ii. Petitioner points to an outlier definition of sex, and even so, gender identity cannot be read into Title IX's provisions.

Moreso, even if multiple definitions of a word exist, a statute can still be considered unambiguous. Ambiguity is a creature not of definitional possibilities but of statutory context. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This Court, for instance, crossed-references the usage of the certain words as they appear elsewhere in the statute to determine whether or not an ambiguity exists. *Id*. at 117-118; 20 U.S.C. § 1681(a)(6) (discussing institutions changing from admitting students of one sex to institutions admitting both sexes); 20 U.S.C. § 1681(a)(6) (exempting social fraternities, social sororities, Boy Scouts and Girl Scouts from Title IX's prohibition of discrimination on the basis of sex).

Petitioner's argument stating sex is ambiguous merely because of outlier definitions is unfounded. Even if sex were to have multiple dictionary definitions, it is clear from the statutory

language throughout Title IX that sex is to be defined by as binary and biological. For instance, 20 U.S.C. § 1681(a)(2) explicitly mentions "both sexes," and 20 U.S.C. § 1681(a)(6) and § 1681(a)(7) provides carveouts for fraternities, sororities, Boy Scouts, and Girl Scouts. Such exemptions presume a binary classification of male and female. The carveouts would otherwise be meaningless if students could choose between joining a social fraternity based on biological sex or a social sorority based on gender identity. When cross-referencing the remainder of Title IX, it becomes even more clear sex is a binary, biological distinction. Simply put, reading gender identity into the statute makes sex a fluid concept that is contrary to its ordinary meaning.

B. THIS COURT MUST GIVE WEIGHT TO TITLE IX'S DOMINANT LEGISLATIVE PURPOSE: TO PROTECT WOMEN WHO WERE SYSTEMATICALLY EXCLUDED FROM EDUCATIONAL OPPORTUNITIES.

When congressional intent is clear, that is the end of the inquiry, and no deference is given to an agency's interpretation. *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2254, 2261 (2024). Agencies are not free to adopt unreasonable interpretations of statutory provisions. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014). Even if 20 U.S.C. § 1681(a) is ambiguous, the courts must exercise independent judgment in deciding whether an agency has acted within its statutory authority. *Loper*, 144. S. Ct. at 2273.

This Court must give weight to the dominant legislative purpose of Title IX when interpreting the statutory language to comport the cardinal canons of construction. *United States v. Nader*, 542 F.3d 713, 720-21 (9th Cir. 2008). A text "cannot be divorced from the circumstances existing at the time [the statute] was passed, and from the evil which Congress sought to correct and prevent." *United States v. Champlin Refin. Co.*, 341 U.S. 290, 297 (1951); *McCormick*, 370 F.3d at 286, 295 (noting Title IX was enacted in response to evidence of pervasive discrimination

against women with respect to educational opportunities, and the act gives female athletes the chance to be champions).

Agencies are creatures of statues and only possess the authority congress provides. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin*., 595 U.S. 109, 117 (2022). It is a core administrative-law principle that agencies are not free to rewrite clear statutory terms to suit its own sense of how a law should operate. *Util. Air Regul. Grp*., 573 U.S. at 328; 20 U.S.C. § 1682 ("Each Federal department … is authorized to effectuate the provisions … which shall be consistent with the achievement of the objectives of the statute …").

Reading gender identity into § 1681 negates the legislative purpose of Title IX. When urging fellow senators to vote in favor of Title IX, Senator Birch Bayh recounted the overt discrimination faced by women in the academic community. 118 Cong. Rec. 5804 (1972). Senator Birch lamented women are often viewed as going to college to find a husband and get married, and the Senator further dispelled the myth that women were the weaker sex. 118 Cong. Rec. 5804 (1972). Senator Birch positioned this legislation as fixing the inequality between the two sexes. Thus, reading gender identity into title IX would flout the legislative intent to protect women's rights.

Here, the Department of Education's (the "Department") exceeded its authority by reading gender identity into the definition of sex. §1682 of Title IX only authorizes the promulgation of rules consistent with the objective of the statute. Yet Final Rule, 89 Fed. Reg. 33,474 subverts an entire half century of interpretation by redefining sex discrimination to include discrimination on the basis of gender identity. Thus, deference should not be given to the Department's final rule, as 20 U.S.C. § 1681(a) is unambiguous, and allowing the Department to redefine sex would amount to rewriting the statutory provision.

Furthermore, Title IX's statutory and regulatory scheme have successfully achieved Congress' intent – especially in the realm of women and girls' athletics. § 106.41, requires educational institutions to provide equal opportunities for female and male athletes. Since Title IX's enactment, girls' high school participation in interscholastic sports has increased by more than 1,000%. *Fast Facts: Title IX,* Nat'l Ctr for Educ. Stat., https://bit.ly/3MIAeiC (last visited September 12, 2024 at 11:24 a.m.). Providing separate sports teams for women was pivotal to this increased participation. Because of the innate physiological differences between biological males and females, the gap between the best female and the best male athletes in often dramatic. Chris W. Surprenant, *Accommodating Transgender Athletes*, 18 Geo. J.L. & Pub. Pol'y 905, 909 (2020). For instance, the winner of the 100m sprint at the men's USA Track & Field Outdoor Championship won with a time of 9.99 seconds, with the last place runner finishing the race in 10.66 seconds. *Id.* In the same 100m event for women, the champion won with a time of 11.20 seconds – a full .54 seconds behind the last place runner in the men's event. *Id.*

Separating male and female athletic teams based on gender identity would decrease the opportunities biological females have attained since the enactment of Title IX. Recent studies have found transgender women retain some advantages of their former male physiology, even after a full year of hormone therapy. Taryn Knox, Lynley Anderson & Alison Heather, *Transwomen in elite sport: scientific and ethical considerations*, 45 J. of Med. Ethics 395 (2019). Testosterone is central to male physiology and athletic performance, and lowering a transwoman's testosterone to under 10 nmol/L does not fully mitigate the transwoman's prior exposure. *Id.* Indeed, women – both trans and biological – have been historically marginalized and deserve protection. Yet the expansion of opportunities for one should not come at the dismantling of protections for another marginalized group.

C. THIS COURT CANNOT IMPORT ITS REASONING FROM *BOSTOCK* AND APPLY ITS TITLE VII BUT-FOR TEST TO DETERMINE DISCRIMINATION.

i. Petitioner misinterprets the holding *Bostock* to suggest this Court read gender identity into the definition of sex.

Both Title IX and Title VII interpret sex to mean classification based on biological functions. The holding of *Bostock* has been misinterpreted to mean the definition of sex in the statutory language of Title VII includes gender identity. This Court made no such decision. In fact, this Court proceeded on the presumption that sex signified biological distinctions between male and female. *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 655 (2020). Rather than deciding discrimination because of one's gender identity was discrimination on the basis of sex, this Court decided an employer firing someone for being transgender fires that person for traits it would not have questioned in members of a different sex. *Id*. at 651-52.

ii. Title VII employs a but-for analysis, which leads to differing results from Title IX when determining if there was discrimination on the basis of sex.

Rather than reading gender identity into Title VII, this Court conducted a but-for analysis to determine whether discrimination exists. *Id*. at 656. An employer who intentionally treats a person worse because of an action or attribute it would tolerate in an individual of another sex violates Title VII. *Id*. at 658. Thus, this Court's interpretation of sex in *Bostock* relies on the binary and biological definition of sex when applying the but-for test. *Id*. at 656; *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 224 (6th Cir. 2021) (noting the Court in *Bostock* was clear on the narrow reach of its holding and its limit to Title VII).

Furthermore, this Court must consider the language differences between Title IX and Title VII. Title IX prohibits discrimination on the "basis of sex." 20 U.S.C. § 1681(a)(2). Distinctly, Title VII prohibits discrimination "because of ... sex." 42 U.S.C.A. § 2000e-2. Title IX may have

been modeled after Title VII, but Congress explicitly chose differing language for Title IX. "[W]hen Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things." *Neese v. Becerra*, 640 F. Supp. 3d 668, 679 (N.D. Tex. 2022) *quoting* Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 224 (1967). Thus, importing *Bostock's* reasoning without considering the critical difference in statutory language risks a rewrite of Title IX.

iii. Title IX, unlike Title VII, contains statutory and regulatory carveouts that permit distinctions on the basis of sex.

Moreover, Title VII is without the statutory and regulatory carveouts of Title IX. As this Court noted in Bostock, Congress chose not to include any exceptions, so the rule applies broadly. *Bostock*, 590 U.S. at 646. Title IX, however, explicitly permits differentiating between sexes in certain instances including athletic teams, locker rooms, and bathrooms. 34 C.F.R. § 106.41. Importing *Bostock's* holding would "swallow the carve-outs and render them meaningless" because such carveouts inherently classify each sex, which would constitute but-for discrimination because of sex. *Adams*, 57 F.4th at 859 n.7.

iv. This Court's holding in *Bostock* fails to resolve the issue at hand: whether sports teams separated by biological sex constitutes discrimination on the basis of sex.

Transgender status is distinct from the concept of sex. *Bostock*, 590 U.S. at 669. This Court in *Bostock* determined that discrimination based on one's transgender status was discrimination because of sex. *Id*. Yet when addressing distinctions based on biological sex, *Bostock* fails to resolve the issue at hand. *Adams*, 57 F.4th at 808.

This Court should import its reasoning *Geduldig v. Aivello*. In *Geduldig*, this Court held there was no discrimination on the basis of sex when a state insurance program exempted work loss resulting from pregnancy from coverage. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

There was no discrimination on the basis of sex because there was no risk from which men were protected and women were not. *Id*. This Court explained there was a "lack of identity," even though those excluded were exclusively female because the "fiscal and actuarial benefits of the program thus accrue to members of both sexes." *Id*. at 505 n20. The Eleventh Circuit in *Adams* imported this Court's reasoning when it concluded there was a "lack of identity" between transgender status and the policy separating bathrooms based on biological male and female distinctions because the bathroom options were "'equivalent to th[ose] provided [to] all' students of the same biological sex." *Adams*, 57 F.4th at 809 *quoting Geduldig*, 417 U.S. at 496-497.

There is a "lack of identity" between the transgender status and the Act. Just like in *Adams*, Petitioner was not discriminated against because of her transgender status. (R. 3). Rather, here, the distinction is based on her biological status. (R. 3, 4). The Act does not classify students based on their transgender status. (R. 4). In fact, transgender students can be in both the biological female and biological male groups. Thus, options for joining athletic teams or clubs under the Act are "equivalent to those provided to all students of the same biological sex."

D. PETITIONER FAILS TO SHOW THE ACT EXCLUDES ON THE BASIS OF SEX OR THAT PETITIONER EXPERIENCED A CONCRETE HARM GREATER THAN A "GENERAL SENSE OF UNFAIRNESS."

i. The Act falls within 34 C.F.R. § 106.41's carveout that permits separate teams for members of each sex.

Not all sex distinctions that exclude members of the opposite sex violate Title IX. 34 C.F.R. § 106.41. As such, biological males and females are not always similarly situated, especially as they enter into most athletic endeavors. *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 863 (Ill. 1979); *Kleczek v. Rhode Island Interscholastic League, Inc.,* 612 A.2d 734, 738 (R.I. 1992)

("Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition.").

§ 106.41 requires schools receiving federal funding to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). One factor considered when determining compliance this provision is "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Id*. at § 106.41(c)(1). Yet, as aptly noted by the Ninth Circuit and Third Circuit, "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs." *Neal v. Bd. of Trustees of Cal State Univs.*, 198 F.3d 763, 767 (9th Cir. 1999) *quoting Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir.1993). Title IX narrows that gap between biological male and female athletes by leveling the "proverbial playing field." *Neal*, 198 F.3d at 767.

Title IX altered women's preferences, making them more interested in sports, and more likely to become student athletes. *Neal*, 198 F.3d at 769. In fact, the percentage of college athletes who were women rose from fifteen percent to thirty-seven percent in the first twenty-five years Title IX was enacted. *Id*.

To correct the historical exclusion faced by women, circuit courts have consistently held educational institutions can comply with Title IX and provide equal opportunities for both sexes by blunting the athletic opportunities of the biological male counterparts. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (holding a university can maintain its compliance with Title IX regulations by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender).

Furthermore, a student's opportunities have not been previously limited simply because only the male athletes are prohibited from competing on female athletic teams. *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993). Even if biological girls have the opportunity to try out for biological male sports teams, that does not make biological boys' opportunities previously limited by their inability to try out for the girls' sports teams. *Id*. Such opportunities are often illusory. *Id*. For instance, in *Williams*, the school district's athletic director testified in his twenty-seven years' experience, only two girls at best were carried on a boys' sports team. *Id*. Biological girls displacing a biological boy on a boys' sport were the exceptions, with exceptions being "very, very few." *Id.*

Here, prohibiting biological males, men and boys from competing on the biological female's athletic teams does not diminish the equal opportunities between the sexes. The Act does not deprive transgender girls and biological males, who are similarly situated in the context of Title IX, of any meaningful athletic opportunity. The Act merely designates on which teams biological males and biological females would compete. (R. 3).

Prohibiting biologically born male students from competing with female students provides equal opportunities for both sexes. The circuits courts have indicated, in light of the systematic exclusion of female athletes, it can be necessary to blunt the opportunities of biological male athletes to create equal opportunities for the female athletes, and here, the Act accomplishes just that. By reserving sports designated for females, girls, and women to biologically born females, the Act levels the playing field for female students by allowing them to compete against physiologically similar athletes. Allowing students with the physiology of male athletes to compete with female athletes would weaken a class of athletes who have been historically excluded.

Because opportunities between biological male and female sexes are equal under the Act, this Court should find there is no discrimination on the basis of sex.

ii. Petitioner fails to articulate a concrete harm beyond an emotional grievance.

Petitioner must offer concrete examples of specific impacts to establish harm under Title IX. *Doe v. Bd. of Regents*, 615 F. Supp. 3d 877, 886 (W.D. Wis. 2022). Emotional harm, alone, is not enough. *Id*.

Here, Petitioner – like all students who were born biologically similar – has the opportunity to compete on teams designated for coed, mixed, males, boys and men. (R. 4). At most, Petitioner could not join the girls' volleyball and cross-country teams. The Act merely required the Petitioner to compete on the appropriately designated teams, and the record does not indicate Petitioner even attempted to join a Coed or the male designated cross country or volleyball team. (R. 3). Like in *Board of Regents*, any harm amounted to a feeling of unfairness; however, emotional harm is not enough to satisfy the third prong of a prima facie case of discrimination on the basis of sex.

II. NORTH GREENE'S SEPARATION OF MALE AND FEMALE SPORTS TEAMS SURVIVES EQUAL PROTECTION CHALLENGES WHEN TEAM COMPOSITION IS DETERMINED BY BIOLOGICAL SEX AT BIRTH.

Enforcement of the Act does not violate the Equal Protection Clause of the Fourteenth Amendment because it is facially neutral to gender orientation and the athletic restrictions are narrowly tailored to the legitimate government purposes of equality and safety in women's sports. Therefore, this Court should affirm the Fourteenth Circuit.

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying people within their jurisdiction equal protection of the laws. U.S. CONST. amend. XIV, § 1. This provision directs states to treat all similarly situated persons alike, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), which keeps governmental decision-makers from

differently treating persons who are in all relevant respects alike, *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Legislatures presumably act within their constitutional power even when, in practice, their laws result in some inequality. *Nordlinger*, 505 U.S. at 10. Accordingly, unless a classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes based on a suspect or quasi-suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *Id.*

Petitioner's claims fail for two reasons: (1) Petitioner did not meet her burden in proving facial discrimination based on transgender status, and (2) North Greene's legislation rationally furthers its close and substantial government interests of providing equal athletic opportunities for females and protecting female athletes' physical safety. Therefore, this Court should affirm the Fourteenth Circuit.

A. THE ACT DOES NOT FACIALLY DISCRIMINATE BASED ON TRANSGENDER STATUS.

The plain language of the Act, supported by its legislative history, establishes that it only differentiates based on biological sex at birth when regulating competitive and contact female sports teams. Since Petitioner has failed to show that the Act facially discriminates based on gender identity, gender orientation, or transgender status, and failed to plead an as-applied challenge, this Court should affirm the Fourteenth Circuit.

Petitioner bears the burden of proving that a statute facially violates equal protection by showing that the Act explicitly distinguishes between individuals on protected grounds. *Shaw v. Reno*, 509 U.S. 630, 642 (1993). A facial challenge to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual, and does not speculate about hypothetical or imaginary cases. *Wa. State Grange v. Wa. State Republican Party*, 552 U.S.

442, 449–50 (2008). To determine the plain meaning of the text of the statute, the words within are to be understood in their ordinary everyday meanings, which are based on dictionary definitions and common usage. *Peoples Drug Stores, Inc. v. D.C.*, 470 A.2d 751, 753 (D.C. 1983). When the plain meaning is unambiguous, the drafters' intent is not called into question, and the judicial inquiry is complete. *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989). When ambiguity arises, the drafters' intent is examined through the Act's legislative history. *Peoples Drug Stores*, 470 A.2d at 754.

The Act divides sports teams into three categories 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). In determining which individuals fall under each team, the Act delineates based on biological sex at birth. N.G. Code § 22-3-16(a)(1). North Greene defines "biological sex" as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." *Id.*

The plain language of the Act does not explicitly or implicitly distinguish between transgender and cisgender. North Greene's definition comports with Merriam-Webster's definition of "sex" as "either of the two major forms of individuals . . . and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures." *Sex*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/sex (last visited Sep. 12, 2024). Merriam-Webster notes that among those who study gender and sexuality, a clear delineation between sex and gender is typically prescribed, with "sex" as the preferred term for biological or physiological forms, and "gender" limited to behavioral, cultural, and psychological traits. *Id.* Biological sex has been long used as a metric for separation in sports to provide a basis

for fairness. Madeline M. McGovern et. al, *Sports Medicine Considerations When Caring for the Transgender Athlete*, 5 ARTHROSCOPY, SPORTS MEDICINE, AND REHABILITATION (2023).

Furthermore, the Act does not attempt to regulate gender identity, gender orientation, or transgender persons as a class. The term "transgender" is an umbrella term for people whose gender identity or gender expression differs from what is typically associated with the sex they were assigned at birth. *Transgender People*, GLAAD MEDIA REFERENCE GUIDE, https://www.glaad.org/reference/transgender (last visited Sept. 12, 2024). The Act does not exclude individuals' participation in sports based on gender identity. Instead, the Act bans athletes of the male sex from participating in sports designated for athletes of the female sex. The statute is neutral toward transgender status on its face. Rather than a pretext to exclude transgender women from women's athletics, the legislature's use of "biological sex," which is a neutral legal concept, to determine athletic team membership is facially neutral. Just like a legislative classification concerning pregnancy is not automatically a sex-based classification, even though only women can become pregnant, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993), a legislative classification concerning biological sex determined at birth is not automatically a transgender-based classification—especially when the Act is facially neutral as to transgender status. The North Greene legislative classification and intention is clear from the plain language of the Act. They designed this Act to protect the health, safety, and equality of biological females in competitive and contact sports. N.G. Code § 22-3-16(c). Therefore, the North Greene legislature properly delineated based on sex—rather than gender identity—to protect female student athletes.

North Greene exercised its sovereign police powers to legislate for the health, safety, and welfare of female student athletes through this Act because they deemed it necessary to supersede the North Greene School Athletic Rules in this area of the law. Rather than a pretextual attempt to

exclude transgender persons from sports, this Act provides a uniform athletic code by which entities and individuals within the North Greene athletic system can delineate athletic team membership.

As Petitioner has not alleged that the Act, as applied to her, discriminates based on transgender status and because the Act does not explicitly distinguish between transgender and cisgender individuals this Court should affirm the Fourteenth Circuit.

B. PETITIONER'S CLAIM MUST BE DETERMINED UNDER RATIONAL BASIS REVIEW SINCE TRANSGENDER STATUS IS A MUTABLE CHARACTERISTIC THAT FALLS SHORT OF INCLUSION IN A QUASI-SUSPECT CLASS.

Three different judicial standards of review apply depending on how government action affects suspect, quasi-suspect, or non-suspect classes. *City of Celburne*, 473 U.S. at 440. Heightened scrutiny is appropriate when the class: (1) has been historically subjected to discrimination; (2) has a defining characteristic bearing no relation in its ability to perform or contribute to society; (3) has obvious, immutable, or distinguishing characteristics; and (4) is a minority or is politically powerless. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012). Suspect classes, such as race, national origin, religion, and alienage, satisfy all four factors and warrant strict scrutiny review. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Sex classifications receive intermediate scrutiny review, *Craig v. Boren*, 429 U.S. 190, 208 (1976), and are quasi-suspect because a person's sex determined at birth is an immutable characteristic of that person's being, *Frontiero*, 411 U.S. at 686.

On the other hand, gender identity, like transgender status, is not a suspect class and does not receive intermediate scrutiny under an equal protection challenge. The fluidity of gender identity throughout an individual's life is the antithesis of an immutable characteristic enshrined

within that individual at the time of his, her, or their birth. *See id.* at 687, 686. Thus, rational review applies.

Judicial interpretation of a federal statute does not govern future applications of constitutional prohibitions on unequal treatment. *Washington v. Davis*, 426 U.S. 229, 238-39 (1976) (reversing the circuit court because it erroneously applied the broader Title VII definition of racial discrimination to the Equal Protection Clause of the Fourteenth Amendment). Thus, the Court's reasoning in *Bostock* does not bear weight on the determination of transgender status as a protected class under the Equal Protection Clause. While the Court determined that the term "sex" in Title VII includes sexual orientation and gender identity, the Court did so because of a causal relationship between sex and gender identity. *Bostock*, 590 U.S. at 660 (holding that an individual's transgender status is not relevant to employment decisions). Unlike *Bostock*, where the Court extended protection because it found a causal relationship to a congressionally protected group under Title VII, here status as a suspect or quasi-suspect class is not conferred via congress or causal relationship to a statutorily protected class. Rather status depends on a judicial evaluation of the class's historical discrimination, defining and distinguishing characteristics, and political power. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012). Because Petitioner failed to prove the defining and distinguishing characteristics of gender identity necessary for intermediate scrutiny protection under the Equal Protection Clause, rational review applies.

Rational basis review only requires the state to demonstrate that the classification is rationally related to a legitimate governmental purpose. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). A statutory classification fails rational basis review when it rests on grounds wholly irrelevant to the achievement of the State's objective. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978). Courts generally will not inquire into the government's

interest so long as it reasonably could have been a goal of the legislation. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981).

Transgender status is a mutable characteristic that falls short of inclusion in a quasi-suspect class; therefore, petitioner's claim must be determined under rational basis review.

C. EVEN IF TRANSGENDER STATUS IS A PROTECTED CLASS, THE ACT SURVIVES INTERMEDIATE SCRUTINY BECAUSE THE STATE HAS AN EXCEEDINGLY PERSUASIVE JUSTIFICATION THAT IS CLOSELY AND SUBSTANTIALLY RELATED TO ITS IMPORTANT GOVERNMENT INTERESTS.

The Act survives heightened scrutiny on Petitioner's gender identity discrimination allegation because the North Greene legislature's distinction on biological sex at birth serves the important government objectives of providing women equal opportunities and a safe environment in women's sports. This distinction is substantially related to the achievement of these objectives; therefore, this Court should affirm the Fourteenth Circuit.

Intermediate scrutiny requires that a state actor shows that a challenged gender classification promotes important governmental objectives and that the classification is substantially related to the achievement of those objectives. *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015).

The Constitution does not mandate a specific method by which the government must satisfy its burden under heightened judicial scrutiny. *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012). On the contrary, the nature and quantity of any showing of empirical evidence will vary with the novelty and plausibility of the justification raised. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Even when applying strict scrutiny, which is a higher threshold than applied here, the government may carry its burden by relying solely on history, consensus, and simple common sense. *Carter*, 669 F.3d at 418. Thus, while the government must carry its burden to

establish the fit between a statute and a governmental interest, it may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense. *Id.*

Even if the Act facially discriminates based on transgender status, Respondents met their burden in showing that: (1) the classification serves the important governmental objectives of providing women equal opportunities and a safe environment in women's sports; and (2) the government action of preventing biological males from participating in women's competitive and contact sports are substantially related to the achievement of those objectives.

i. The Act furthers North Greene's important interests of providing equal athletic opportunities for females and protecting the physical safety of female athletes.

Government objectives are important when they do not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Such important government objectives include laws grounded in meaningful physiological differences between men and women and counteracting the harmful effects of past societal discrimination against women. *Kelly v. Bd. Of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994).

States may give legislate different treatment under the law based on physical differences between the sexes assigned at birth. *Miller v. Albright*, 523 U.S. 420, 445 (1998). In *Clark ex rel. Clark v. Ario. Interschol. Ass'n*, the Ninth Circuit held that due to the average physiological differences between the sexes, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. 695 F.2d 1126, 1131 (9th Cir. 1982). Thus, athletic opportunities for women would be diminished. *Id.* The court determined that these average real differences between the sexes are legitimate government interests instead of classifications based on archaic and overbroad generalizations, sexual stereotypes, invidious

discrimination, or stigmatization. Here, just like the government actor in *Clark*, the North Greene legislature is simply recognizing the physiological fact that males would have an undue advantage competing against women for positions on the contact and competitive sports team. Here there is a substantial relationship between the exclusion of males from female sports teams to redress past discrimination and provide equal opportunities for women in competitive sports. The Act protects opportunities for female athletes to demonstrate their skill, strength, speed, endurance, and other athletic abilities. N.G. Code § 22-3-16(b).

Males enjoy physical performance advantages over females within competitive sports, with advantages becoming especially significant during puberty. Emma N. Hilton and Tommy R. Lundberg, *Transgender Women in the Female Category of Sport*, SPORTS MED. (2020). So even though transgender women represent only 0.6 percent of the general population, (R. 14), the effects of transgender women's greater skill, strength, speed, endurance, and other athletic abilities while competing in female events limit women athletes' opportunities for selection to competitive teams, Beth Hands, *Many Sports are Tightening their Transgender Policies—Can Inclusion Co-exist with Fairness, Physical Safety and Integrity?*, THE CONVERSATION, https://theconversation.com/many-sports-are-tightening-their-transgender-policies-can-inclusion-co-exist-with-fairness-physical-safety-and-integrity-231597 (last visited Sept. 12, 2024). The male-female gap in current world records for athletic events is between 4 and 16 percent in favor of males. *Id.* For example, in the 100m butterfly, champion US swimmer Missy Franklin is nine seconds slower than her male counterpart Ryan Lochte even though they have the same height and arm span. *Id.* When a transgender woman competes in female events, there is a high probability that she will set records that cisgender women could never match. *Id.* Lia Thomas, a transgender woman swimmer, set an Ivy League record for 200-yard freestyle, beating out her next closest competitor by over a minute.

Eric Levenson, *Transgender Swimmer Lia Thomas Sets Ivy Record in 200-yard Freestyle at Ivy Championships*, CNN, https://www.cnn.com/2022/02/18/sport/lia-thomas-transgender-ivy-league-swim-championships/index.html (Feb. 18, 2022). This causes fewer opportunities for women athletes to be selected throughout all competitive levels. Hands, *Many Sports are Tightening their Transgender Policies*. But it is not just about competition, there are certain bodily injury risks that the North Greene legislature mitigates with this Act.

The inherent risk associated with contact sports increases due to the biological differences between men and women. Women in Sport, Safe and Fair Sport for Women and Girls, https://womeninsport.org/creating-change/policy-positions/transgender-inclusion-sport/safe-and-fair-sport-for-women-and-girls/ (last accessed Sept. 12, 2024). Collisions, tackles, and other contact between boys and girls, men and women are inherently much more dangerous for girls and women. The fear of this kind of physical injury can, and does, lead to self-exclusion by women. *Id.* This self-exclusion exacerbates the current issues of sexual discrimination in school athletics.

No question that removing the legacy of sexual discrimination in sports and promoting equality of athletic opportunity between the sexes are legitimate and important government interests justifying rules excluding males from female sports. *Clark*, 695 F.2d at 1131; *Kelly*, 35 F.3d at 272. In *Clark*, the Ninth Circuit upheld a policy prohibiting young men from playing on a women's high school volleyball team to redress past discrimination against women in athletics and promote equality of athletic opportunity between the sexes. 695 F.2d at 1131-32. Here, like in *Clark*, the North Greene legislature passed this Act for a clear and legitimate purpose—to ensure equal opportunity between the sexes by prohibiting men from women's teams, when selection for the team is based upon competitive skill. N.G. Code § 22-3-16(b).

Without this Act, those assigned male at birth benefit over those assigned female at birth due to the higher levels of testosterone. Hilton, *Transgender Women in the Female Category of Sport*. Especially at the onset of puberty, these high levels result in categorically different strength, speed, and endurance. *Id.* As a result of physiological differences—on which the act differentiates—transgender girls and biological girls are not similarly situated for purposes of equal opportunities within female athletic competitions. Therefore, North Greene acted to further equality, fairness, and safety in female athletics.

ii. The Act's definition of "Biological sex" and "Female" and policy prohibiting males from female teams are substantially effective in furthering North Greene's interests in providing equal athletic opportunities and protecting female athletes' physical safety.

A policy is substantially related to an important governmental objective when there is enough of a fit between the policy and its asserted justification. *Danskine v. Mia. Dade Fire Dep't*, 253 F.3d 1288, 1299 (11th Cir. 2001). However, the Equal Protection Clause does not demand a perfect fit between means and ends. *See Nguyen v. INS*, 533 U.S. 53, 70 (2001).

A legislature satisfies heightened scrutiny regarding sex-based classifications even if its sex-based rule is not the most precise fit that a legislature could have designed. In *Clark*, the court determined that a policy of excluding males from female sports substantially related to the goal of providing fair and equal opportunities for females to participate in athletics. 695 F.2d at 1132. Further, the court found that specific athletic opportunities could be equalized more fully in several ways. *Id.* at 1131. The circuit found that absolute necessity is not required before a gender-based classification can be sustained. *Id.* The court noted while equality in specific sports is a worthwhile ideal, it should not be purchased at the expense of ultimate equality of opportunity to participate in sports. *Id.* at 1132.

Here, like in *Clark*, wiser alternatives than the one chosen by the North Greene legislature do not serve to invalidate the Act since there is substantial evidence showing that the definitions of "Biological sex" and "Female" and the policy prohibiting male participation relates to the goal of providing fair and equal athletic opportunities for females and protecting female athletes' physical safety. Furthermore, alternatives, such as requiring testosterone suppression, would not meet North Greene's goals as the effects of testosterone suppression on muscle mass and strength in transgender women consistently show very modest changes. Hilton, *Transgender Women in the Female Category of Sport*. This is because the loss of lean body mass, muscle area, and strength typically amounts to only 5 percent after twelve months of testosterone suppression. *Id.* Therefore, the muscular advantage enjoyed by transgender women is only minimally reduced when testosterone is suppressed, making that alternative weak in light of the potential risks to injury and equal opportunity.

Even if the Act facially discriminates based on transgender status, Respondents met their burden in showing that: (1) the classification serves the important governmental objectives of women's opportunities and safety in athletics; and (2) the discriminatory means by preventing biological males at birth from participating in biological women at birth competitive and contact sports are substantially related to the achievement of those objectives.

CONCLUSION

North Greene's separation of athletic teams and sports by biological sex determined at birth does not violate Title IX because the plain language of Title IX is clear: sex is a binary, biological distinction, and Title IX's regulatory scheme permits such distinction when selection is based on competitive skill, or the activity is a contact sport. The Act falls squarely into this regulatory carveout. Furthermore, Petitioner fails to show how the Act would cause harm. Petitioner has not

been excluded from participating on an athletic team; rather, the Act merely designates on which team the Petitioner can compete. Therefore, the Fourteenth Circuit's conclusion that the Act does not violate Title IX by discriminating on the basis of sex should be affirmed.

Petitioner failed to meet her burden in proving facial discrimination based on transgender status because the plain language of the statute separates athletic teams and sports by biological sex determined at birth. Even if Petitioner established a facial discrimination, Petitioner's claim must be submitted under rational review because transgender status is a mutable characteristic that falls short of inclusion in a quasi-suspect class. Under both rational review and intermediate scrutiny, the Act rationally furthers its close and substantial government interests of providing equal athletic opportunities for females and protecting female athletes' physical safety. Therefore, the Fourteenth Circuit's conclusion that the Act does not violate the Equal Protections Clause should be affirmed.

Respectfully submitted,

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