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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. Whether the Save Women's Sports Act violates Title IX by categorically excluding transgender females from participating in women's sports on the basis of their biological sex.

II. Whether the Save Women's Sports Act violates the Equal Protection Clause by singling out transgender females and discriminating against them on the basis of their biological sex.

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of North Greene is unreported but is available at *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765 (14th Cir. 2024). The decision of the United States Court of Appeals for the Fourteenth Circuit is unreported and set out in the record on appeal. (R. at 2–16).

CONSTITUTIONAL PROVISIONS

AMENDMENT 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 FACTS

A.J.T., The Petitioner

A.J.T. is an eleven-year-old girl from North Greene. (R. at 3). When A.J.T. entered middle school, she had hopes of joining the girls' volleyball and cross-country teams. (R. at 3). However, A.J.T.'s hopes were cut short when she was informed by her school that she was not allowed to join either team. (R. at 3). The reason why: because she is transgender.[1]

At a young age A.J.T. knew she was born in the wrong body. (R. at 3). With her family's support, A.J.T. privately began living as a girl in third grade. (R. at 3). Eventually she felt

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[1] Transgender means "a person whose sense of personal identity and gender does not correspond to that person's sex at birth, or which does not otherwise conform to conventional notions of sex and gender." Oxford English Dictionary, *Transgender, Adj. & N.*, December 2023, https://doi.org/10.1093/OED/5173995713.

comfortable presenting herself as a girl to her community and changed her name to be more feminine. (R. at 3). A.J.T.'s interest in athletics was sparked when she joined her elementary school's all girls competitive cheer team. (R. at 3). While on the team, A.J.T. competed without any issues. (R. at 3).

A.J.T. was officially diagnosed with gender dysmorphia in 2022. (R. at 3). Since her diagnosis, A.J.T. has attended counseling to determine the best course of treatment. (R. at 3). Puberty delaying treatment is one option A.J.T. could explore. (R. at 3). This treatment would prevent endogenous puberty and avoid any physical changes that are a result of increased testosterone circulation. (R. at 3). Biological males typically begin puberty between the ages of 9 and 14. (R. at 3). While it is unclear if A.J.T. has chosen this path of treatment, she still may have time to make that decision with her counselor.

The Save Women's Sport's Act

In 2023, North Greene's "Save Women's Sports Act" (the Act) was introduced by its Senate, approved by both of its Houses, and signed into law by the Governor all within a month. (R. at 3). In North Greene's Code, the Act bears the title "Limiting participation in sports events to the biological sex of the athlete at birth." (R. at 3). The Act acknowledges up front that "there are inherent differences between biological males and biological females" that are "cause for celebration." (R. at 3).

The stated objectives of the Act are to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." (R. at 4). The Act commands all state-funded schools from middle school through college to designate their athletic teams based on the narrow definitions of "male" and "female" as stated in the Act. (R. at 4). The Act prohibits biological men from participating on teams designated for women "where the selection for such teams is based upon competitive skill or the activity involved is a contact

sport." (R. at 4). The Act further states that it views "biological sex" and "gender identity" as two distinct concepts, and that "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." (R. at 4).

Procedural History

A.J.T initiated this lawsuit in the Eastern District of North Greene. (R. at 4). The North Greene Board of Education and State Superintendent Floyd Lawson were the original defendants named in the lawsuit, but the State of North Greene and Attorney General Barney Fife were subsequently added. (R. at 4-5). A.J.T sought a declaratory judgment, claiming that the Act violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. (R. at 5). Additionally, A.J.T requested an injunction to prevent the Respondents from enforcing the law against her by refusing to allow her to join the girls' volleyball and cross-country teams. (R. at 5). The Respondents opposed A.J.T's request for a permanent injunction and filed a motion for summary judgment. (R. at 5). The District Court granted the defendants' summary judgment motion. (R. at 5). The Fourteenth Circuit affirmed the District Court's holding. (R. at 5). A.J.T appeals the Fourteenth Circuit's decision, making a facial challenge to the constitutionality of the Save the Women's Sports Act and its legality under Title IX.

SUMMARY OF ARGUMENT

Issue I: Title IX protects and promotes equal access to educational opportunities. A.J.T and transgender female students alike are stripped of the opportunity to play sports because of the Save Women's Sports Act. This is a violation of Title IX because it excludes transgender females from a federally funded educational program on the basis of sex and subjects them to improper discrimination as a result. This Court has previously held that discrimination on the

basis of gender identity is inextricable from discrimination on basis of sex. Transgender females, who are similarly situated to their cisgender classmates, would have the same treatment as everyone else but for their biological sex. This causes harm because it denies transgender females' the benefits of sports, while also perpetuating their feelings of rejection and marginalization. Title IX's athletic regulation regarding sex-separated sports does not authorize schools to discriminate against transgender students. All that provision does is establish that having a boys' and girls' team is not inherently discriminatory. Manipulating Title IX's text to be a weapon against transgender students would require this Court to read words into a statute that do not exist and depart from the very purpose of Title IX, which is to promote equality and opportunity.

Issue II: The Equal Protection clause of the U.S. Constitution's Fourteenth Amendment protects classes of individuals from unjust discrimination. The Act violates the Equal Protection Clause in two primary ways. First, it has a discriminatory purpose and effect. Only one class of individuals is deliberately targeted by the Act: transgender females. The Act unjustly singles out transgender females by categorizing students based on biological sex and ignoring gender identity, and failing to impose similar restrictions on transgender men or cisgender women. As a result, transgender women are the only class of individuals that are negatively affected by the Act. Second, the Act fails intermediate scrutiny. The Act is overinclusive because it categorically bans transgender females from participating in sports without any exceptions or consideration of the level of play, safety risks, or age of the athletes. The means employed by the Act to achieve its objective extends to more individuals and situations than is necessary for the government's interest to be satisfied. Furthermore, the Act is not substantially related to the goals of creating athletic opportunities for women and protecting women's safety. The transgender female

population is too small to displace cisgender females. Additionally, the "evidence" of advantages for transgender females in women's athletics is both minimal and suspect. The government relies on studies that ignore relevant factors and use incorrect measures when claiming that transgender women have any advantage over cisgender females. Finally, there is no evidence that cisgender female safety is at risk from transgender females. The government has provided no data to support its claim and relies on a single anecdote of an injury with the assumption that it was due to a woman's transgender status.

STANDARD OF REVIEW

This Court should review the United States District Court for the Eastern District of North Greene's opinion regarding underlying findings of fact for clear error, and its conclusions of law de novo. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1349 (11th Cir. 2009).

A district court's grant of summary judgment is reviewed de novo. *Avenoso v. Reliance Standard Life Ins. Co.*, 19 F.4th 1020, 1024 (8th Cir. 2021). Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Thompson v. D.C.*, 832 F.3d 339, 344 (D.C. Cir. 2016) (quoting Fed. R. Civ. P. 56(a)). When reviewing a lower court's ruling on a motion for summary judgment, this Court should give no deference to the lower court's decision. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 465 n.10 (1992). When reviewing a motion for summary judgment, this Court should view evidence and "draw all reasonable inferences" in favor of the non-moving party, here, the Petitioner. *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S JUDGMENT BECAUSE THE SAVE WOMEN'S SPORTS ACT VIOLATES TITLE IX BY DISCRIMINATING AGAINST TRANSGENDER FEMALES.

Title IX ensures that, "no person … shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). For a student to succeed on a Title IX claim they must establish the following elements: (1) they were excluded from an educational program on the basis of sex; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that "improper discrimination caused [them] harm." *Preston v. Va. ex rel. New River Cmty. Coll*., 31 F.3d 203, 206 (4th Cir. 1994).

The Petitioner asserts that the Save Women's Sports Act is in violation of Title IX because it subjects transgender females to discrimination and excludes them from participation in sports on the basis of sex. The Petitioner does not argue that the categorical inclusion of transgender females in all women's sports is necessary to satisfy Title IX. Rather, provisions must be in place to ensure that transgender females are not excluded on the basis of sex alone. Because the Petitioner satisfies all three elements of a Title IX claim as a matter of law, this Court must reverse the lower court's decision.[2]

A. The Save Women's Sports Act Excludes Transgender Females From Women's Sports "On the Basis of Sex."

The Act discriminates against transgender females "on the basis of sex" by allowing cisgender females to play on teams consistent with their gender identity but not allowing transgender females to do the same. (R. at 4). It further discriminates by allowing transgender

[2] There is no dispute that the Petitioner has met element (2), only elements (1) and (3) are at issue in this case.

males to play on teams consistent with their gender identity but prohibiting the same for transgender females. (R. at 4). As recognized by four U.S circuit courts, this type of discrimination is forbidden under Title IX because it is on the basis of sex. *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018); *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022).

1. Gender identity discrimination is "on the basis of sex."

In *Bostock v. Clayton Cnty., Ga*., this Court was tasked with determining whether the term "because of sex" in Title VII includes discrimination based on sexual orientation and gender identity. 590 U.S. 644 (2020). In doing so, the Court stated, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id*. at 660. Contrary to this statement, the Fourteenth Circuit found that discrimination based on gender identity is not "on the basis of sex" for purposes of Title IX. (R. at. 12). The Fourteenth Circuit's position is incorrect and *Bostock*'s interpretation of "because of sex," must apply to IX for two reasons.

First, the same rationale from *Bostock* applies to Title IX. Like in Title VII, the word "sex" in Title IX is not defined. *Bostock* 590 U.S. at 655; 20 U.S.C. § 1681. The Petitioner does not dispute that when Title IX was enacted, the term "sex" was confined to its biological meaning. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 813 (11th Cir. 2022). The majority in *Bostock* also did not dispute this fact regarding Title VII. *Bostock* 590 U.S. at 655. Defining sex was just the "starting point," and not what was truly at issue. Like in *Bostock*, the actual issue before this Court is what it means to discriminate on *the basis* of sex, not what sex means and if gender identity is included in that definition. *Id*.

This Court held that gender identity discrimination is on the basis of sex because unlike other traits such as race and religion, "homosexuality and transgender status are inextricably bound up with sex," and "to discriminate on these grounds requires . . . intentionally treat[ing] individual[s] . . . differently because of their sex." *Bostock* 590 U.S. at 660. Nothing in the plain language of Title IX disturbs the application of this reasoning. Schools, like employers, cannot discriminate against a student's gender identity without treating them differently because of their sex.

Second, because Title VII and Title IX are both statutes in the Civil Rights Act, the interpretation of one should align with the other. This Court looks at the entirety of an act to answer questions of statutory interpretation. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("[s]tatutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere . . ."). Title IX's legislative history further shows that it was modeled after other statutes in the Civil Rights Act that preceded it. *See Grove City Coll. v. Bell*, 465 U.S. 555, 586 (1984) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964.").

Title VII and Title IX use similar plain language that is interchangeable. *Snyder*, 28 F.4th at 114 (noting "the similarity in language prohibiting sex discrimination in Titles VII and IX" and holding that *Bostock's* logic applies to Title IX). Both protect against the discriminatory treatment of individuals, not groups. 20 U.S.C. § 1681(a) ("no person"); 42 U.S.C. § 2000e-2(a)(1) ("any individual"). Both also require "but for" causation. 20 U.S.C. § 1681(a) ("on the basis of"); 42 U.S.C. § 2000e-2(a)(1) ("because of"); *see also Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235-36 (4th Cir. 2016) ("We see no 'meaningful textual difference'

between [the term 'on the basis of'] and the terms 'because of,' 'by reason of,' or 'based on'—terms that the Supreme Court has explained connote 'but-for' causation."). Further, it is important to note that neither statute explicitly makes an exception for treatment based on gender or sexual identity. 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e-2(a)(1).

Title VII's application to Title IX is also confirmed by the fact that this Court has consistently examined Title VII when evaluating Title IX claims. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175–77 (2005); *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 286–87 (1998); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 524–27 (1982). Lower courts have adopted this practice when analyzing Title IX issues. *Emeldi v. Univ. of Or*., 673 F.3d 1218, 1224 (9th Cir. 2012) (holding, "the Supreme Court has often looked to its Title VII interpretations of discrimination in illuminating Title IX."). Additionally, Justice Alito, in his *Bostock* dissent, emphasized that the language in Title VII and Title IX "mirror" each other, and suggested the high likelihood of the majority opinion's reasoning extending to Title IX. 590 U.S. at 724-27.

2. The Fourteenth Circuit's vocabular distinction between "designate" and "exclude" is immaterial.

The Fourteenth Circuit further argued that the Act does not "exclude" A.J.T. from playing sports, rather it "designates" what team she plays for. (R. at 11). Regardless of whether this Court uses the word "exclude" or "designate," it arrives at the same conclusion: but for A.J.T.'s biological sex she would be able to play sports with the gender she identifies as. This word play applies the same logic as the "separate but equal" doctrine which was rejected by this Court. *Brown v. Bd. of Educ*., 347 U.S. 483, 495 (1954).

The doctrine of "separate but equal" was flawed because it inherently treated one group as inferior, despite being provided the "same" opportunities. *Id.* at 492. Similarly, framing the Act as a "designation" rather than "exclusion" does not change the underlying reality of A.J.T.

being treated differently from her cisgender peers. This separation implies an inherent inferiority which has a negative impact on education and daily life of transgender females. *Id*. at 494. ("A sense of inferiority affects the motivation of a child to learn."); *see also Dodds* v. *U.S. Dep't of Educ.,* 845 F.3d 217, 221-22 (6th Cir. 2016) (highlighting the serious and immediate negative impact on the daily life and well-being of an eleven-year-old transgender girl due to the denial of equal treatment.).

B. <u>The Save Women's Sports Act Subjects Transgender Females to "Improper Discrimination" That Causes Harm.</u>

Discrimination means "treating that individual worse than others who are similarly situated." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006). For Title IX, experiencing worse treatment is not enough, rather it must be established that the "improper discrimination caused harm." *Grimm v. Gloucester Cnty. Sch. Bd*., 972 F.3d 586, 618 (4th Cir. 2020).

1. Transgender females are treated worse from others who are similarly situated.

Transgender female students are similarly situated to their cisgender classmates. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1317 (M.D. Fla. 2018) ("There is no evidence to suggest that [the transgender plaintiff's] identity as a boy is any less consistent, persistent and insistent than any other boy."). A.J.T., like other girls at her school, is a female presenting student who seeks to participate in sports that correspond to her gender identity. (R. at 2).

The Act causes harm to transgender females by what it forbids them from doing, and by what it forces them to do if they want the same opportunities as their peers. *B.P.J.,* 98 F.4th at 564. Title IX not only protects students from discrimination but also shields them from being

excluded from an educational program on the basis of gender. *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). By denying transgender females the opportunity to play women's sports, transgender females are effectively excluded from all non-co-ed sports which is the very harm Title IX sought to prevent. *B.P.J.,* 98 F.4th at 564.

Harm to emotional well-being and dignity is harm for purposes of Title IX. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017); *Grimm*, 972 F.3d at 618; *Boyertown*, 897 F.3d at 530. In *Whitaker*, the Seventh Circuit recognized the stigma transgender students face by being forced to use a single stall restroom. 858 F.3d at 1045. Similarly, in *Grimm*, the Ninth Circuit wrote that forcing transgender students to use single stall restrooms "invite[s] more scrutiny and attention" from other students, "very publicly brand[ing] all transgender students with a scarlet 'T.'" 972 F.3d at 618 (citing *Boyertown*, 897 F.3d at 530.).

Transgender students face the same, if not worse, emotional harm when forced to play sports not consistent with their gender identity. For starters, it runs counteractive to transgender student's medical treatment of gender affirming care which is put in place to protect their mental health. *See* Shoshana K Gold Berg & Thee Santos, Fact Sheet: *The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS (Sep. 2, 2024, 2:45 PM), https://www.americanprogress.org/article/fact-sheet-importance-sports-participation-transgender-youth/. Moreover, it impedes transgender students' social development as it forces them to be part of groups in which they feel out of place, and heightens the risk of bullying from peers who may not accept their identity – especially if their trans status was unknown prior to joining the sport. Sandy James Et Al., *Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality. 11 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

2. Transgender female's "option" to play sports with biological males does not remedy the harm done by excluding them from women's sports.

This Court cannot reasonably view transgender female's "option" to play male sports as a legitimate choice. *B.P.J.,* 98 F.4th at 564. Transgender females often transition at young ages and therefore spend a large chunk of their life as girls before entering secondary education. *Id*. Transgender females take several steps to align with their gender identity such as changing their name, outward appearance, and taking puberty blockers to prevent their body from experiencing male adolescence. *Id*. A.J.T., for example, has been privately living as a girl since she was in third grade, but has since publicly transitioned by changing her name and how she dresses. (R. at 2). A.J.T.'s family, friends, teachers and classmates all know A.J.T. as a girl and she has only ever participated in girls' athletics. (R. at 2).

To ask transgender females to participate on male teams would force them to regress on their medical treatment and to countermand all social progress they have made. *Id*. Moreover, it would expose transgender females who have undergone puberty blockers to the same physical dangers the Act claims to be protecting cisgender woman against. *Id*. Opponents of same-sex marriage made similar arguments by claiming that lesbian and gay people are not prevented from marrying altogether because they could marry someone of a different sex. *Hecox v. Little*, 479 F. Supp. 3d 930, 984 (D. Idaho 2020). This Court rejected that argument in *Obergefell v. Hodges* by acknowledging that "same-sex marriage is [gay and lesbian individuals] only real path to this profound commitment." 576 U.S. 644, 658 (2015). Similarly, A.J.T. and other transgender females "only real path" to playing sports is on female sport teams.

C. <u>Title IX Does Not Authorize a Categorical ban on Transgender Females in Women's Sports.</u>

The crux of the Fourteenth Circuit's opinion relies on the assertion that "Title IX authorizes sex-separate sports in the same scenarios outlined in the Act." (R. at 11). To make this argument the lower court offered no empirical evidence that Title IX's text or drafters supported this view. (R. at 11); *Bostock,* 590 U.S. at 683 ("Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."). An actual analysis of Title IX's plain language and history demonstrates that Title IX does not support the discrimination against transgender females.

1. Title IX's plain language does not authorize a categorical ban on transgender females in women's sports.

Nothing in the plain text of Title IX or its regulations authorize the categorical discrimination against transgender females. As previously explained in Section I.A.1., Title IX's language directly forbids discrimination on the basis of gender identity; therefore, it cannot simultaneously permit it. Title IX's Athletic Regulation allows schools to "sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(a)-(b). It further provides that schools must "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). This language simply establishes that separating sports by sex does not constitute discrimination on its own. *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981) (striking down high school athletic association rule mandating sex-separation for all teams as inconsistent with Title IX). The Petitioner is not challenging a school's ability to create sex separated teams. (R. at 4.) Title IX is

ultimately silent as to how a school should categorize transgender students. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd*., 822 F.3d 709, 720 (4th Cir. 2016).

The alleged biological differences between transgender females and cisgender females do not act as an inferred exception to Title IX's statutory prohibition against the discrimination of sex. *Bostock,* 590 U.S. at 689. (" . . .when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.). To read this exception into Title IX, this Court would be restricting its text to limit its coverage. *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla*., 693 F.3d 1303, 1311 (10th Cir. 2012) ("Title IX does not limit its coverage at all, outlawing discrimination against any 'person,' broad language the Court has interpreted broadly.") If North Greene was actually concerned with the safety of cisgender females or fairness in competitive skill, they would have applied more narrow regulations rather than a broad ban on the basis of sex.

2. Title IX's object and purpose does not support a categorical ban on transgender females in women's sports.

Congress passed Title IX with two purposes: to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices. *C.S. v. Madison Metro. Sch. Dist*., 34 F.4th 536, 540 (7th Cir. 2022) (citing *Cannon v. Univ. of Chi*., 441 U.S. 677, 704 (1979)). At its promulgation, a large motivator behind Title IX was to increase athletic opportunities for women. *Williams v. Sch. Dist. of Bethlehem, Pa*., 998 F.2d 168, 175 (3d Cir. 1993). The Fourteenth Circuit used this motivator as its basis for explaining why the Act is in line with Title IX's purpose. (R. at 11). This position is misguided.

Title IX at its core is about equal opportunity for all students. *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004). By passing Title IX, congress acknowledged the harm that discrimination and a lack of opportunity causes students.

Id. Transgender students know this harm all too well. Transgender youth have an elevated risk of suicide that only increases with discrimination in the educational setting. Jody L. Herman & Kathryn K. O'Neill, *Suicide Risk and Prevention for Transgender People: Summary of Research Findings*, UCLA School of Law Williams Inst., 1 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Suicide-Summary-Sep-2021.pdf. Excluding transwomen from sports would be perpetuating the same harm Title IX was passed to prevent; therefore, contradicting its very purpose.

Regardless, legislators' "expected applications" of a statute "can never defeat unambiguous statutory text." *B.P.J.,* 98 F.4th at 564 (citing *Bostock* 590 U.S. at 674). Congress may not have expected Title IX to protect transgender students. Congress did, however, make a key drafting choice to focus on discrimination against individuals and not groups which "virtually guaranteed that unexpected applications would emerge over time" *Bostock* 590 U.S. at 680. Policy concerns allowing transgender females to play in women' sports are not for this Court to implement as "[t]he place to . . . address unwanted consequences of old legislation lie in Congress" *Id*. at 681.

II. THE SAVE WOMEN'S SPORTS ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION'S FOURTEENTH AMENDMENT BY DISCRIMINATING AGAINST TRANSGENDER FEMALES.

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In essence, it provides that all similarly situated individuals are to be treated alike. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Although the Equal Protection Clause does not cast a blanket prohibition on treating "different classes of persons in different ways[,]" it does prohibit treating people differently by placing them into classes "on the basis of

criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

When a statute discriminates on the basis of sex, as the Save Women's Sports Act does here, intermediate scrutiny applies. *See B.P.J. v. West Virginia State Board of Education*, 98 F.4th 542, 555 (4th Cir. 2024). Intermediate scrutiny requires a law to serve an "important governmental interest" and be "substantially related" to achieving that interest. *U.S. v. Virginia*, 518 U.S. 515, 553 (1996). The government has the burden to present an "exceedingly persuasive" argument to justify treating individuals differently on the basis of their sex. *Id.* at 531. The Fourteenth Circuit did not dispute that intermediate scrutiny applies to assessing the constitutionality of the Act. (R. at 6).

The Petitioner asserts that the Act violates the Equal Protection clause because it has a discriminatory purpose and effect which differs from its stated objective. Even if the Act is not found to be discriminatory in nature, it nonetheless fails intermediate scrutiny because the means used are not substantially related to the Act's stated objectives. Therefore, we ask this Court to reverse the decision of the lower court.

A. **The Save Women's Sports Act's Has a Discriminatory Purpose and Effect.**

The government's stated interest masks an actual purpose of preventing transgender females from participating on women's teams. Laws offend the Constitution when they have a discriminatory purpose. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). A discriminatory purpose is established when "the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). A law

can be neutral on its face but still have a discriminatory purpose. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

The Act posits that its objective "is to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." (R. at 4). However, the true purpose of the act is to ensure transgender females are prohibited from playing on teams with other females. As declared by this Court in *Bostock*, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." 590 U.S. at 660. Although the text of the Act does not call out transgender females explicitly, the operative clause of the statute, N.G. Code § 22-3-16, in conjunction with the definitions in N.G. Code § 22-3-15, give a command that illuminates an inherently discriminatory purpose and ultimately renders a discriminatory effect.

1. The definitions in § 22-3-15 (a) discriminately categorize individuals.

§ 22-3-15 (a)(1-3) categorizes students as "male" or "female" based solely upon their "reproductive biology and genetics" at the time of their birth. In *B.P.J.*, West Virginia passed an act with identical language defining "female." 98 F.4th at 551. The Fourth Circuit stated that the definition was facially based on gender identity because "the undisputed purpose—and the only effect—of that definition is to exclude transgender girls from the definition of 'female' and thus to exclude them from participation on girls sports teams." *Id.* at 556. Like West Virginia's narrow definition of female in *B.P.J.*, here, § 22-3-15(a)(1-3) has the same purpose and effect when read alongside § 22-3-16 (a), which requires teams to be categorized as male, female, or co-ed. This is discriminatory towards transgender females because they are singled out by the definition of "female" and are therefore excluded from playing women's sports.

2. The specific reference to gender identity in § 22-3-16 (c) targets transgender females.

§ 22-3-16 (c) declares that "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." By explicitly distinguishing between the two, the Act once again singles out transgender individuals because their gender identity is incongruent with their biological sex, whereas cisgender individuals have a gender identity and sex that align. Further, the Act's express acknowledgement that "classifications based on gender identity serve no legitimate relationship" to its objective demonstrates that it is treating transgender female athletes differently than cisgender female athletes, to whom they are similarly situated. § 22-3-16(c).

The Act discriminates based on sex because transgender females are prohibited from participating on a team that aligns with their gender identity, whereas cisgender females *are* permitted to do so. Essentially, the Act treats a class of people differently than those similarly situated to them, and it does so based on sex. The only thing preventing transgender females from participating on the team consistent with their gender identity is their biological sex, but nothing prevents cisgender females from doing the same. Consequently, the biological sex of a transgender female athlete plays an "unmistakable and impermissible" role in the category of team she is designated to play on. *Bostock*, 590 U.S. at 660.

3. § 22-3-16 (b) only places a restrictive burden on biological men.

§ 22-3-16 (b) only prohibits biological men from participating on teams designated for women, but there is nothing prohibiting transgender men or cisgender women from participating on teams designated for men. At first, this may seem irrelevant as the statute's objective is to promote and protect female athletes. However, the absence of a prohibition on biological women preventing them from playing on teams designated for men, regardless of whether they are a

transgender man or cisgender woman, highlights the pervasive targeting of transgender females. *See Hecox v. Little*, 79 F.4th 1009, 1024-25 (9th Cir. 2023), *withdrawn*, 99 F.4th 1127 (9th Cir. 2024).[3] Cisgender males, cisgender females, and transgender males all have the ability to participate on teams that align with their gender identity. It is transgender females, and only transgender females, that are singled out. This targeted limitation shows they are being treated differently than all other student athletes.

B. <u>The Save Women's Sports Act Fails Intermediate Scrutiny Because the Means Used are not Substantially Related to its Stated Objectives.</u>

Even if the Act is not discriminatory in purpose and effect, it still fails intermediate scrutiny. To reiterate, the Act has two stated objectives: (1) to provide and promote equal athletic opportunities for female athletes, and (2) to protect the physical safety of female athletes when competing. (R. at 4). To survive intermediate scrutiny, the Respondent has the burden to present an "exceedingly persuasive" argument to this Court that the Act's means are substantially related to its stated objectives. *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (holding the purpose of intermediate scrutiny is "to eliminate discrimination on the basis of gender stereotypes.").

For the argument to be "exceedingly persuasive" it must "be genuine, not hypothesized or invented *post hoc* in response to litigation." *U.S. v. Va.*, 518 U.S. at 533. Courts give some deference to the legislature's data to determine this, but said data must be based on "substantial evidence." *Turner Broad. Sys. v. FCC*, 512F U.S. 622, 665 (1994). Additionally, this Court held

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[3] The 9th Circuit withdrew the opinion in *Hecox v. Little*, 99 F.4th 1127 (9th Cir. 2024), but the withdrawal was to ensure consistency with *Labrador v. Poe*, 144 S. Ct. 921 (2024) (holding an injunction preventing enforcement of a law blocking gender affirming care could only be applied to the plaintiff in the case, not an entire class, until appeals were complete). The 9th Circuit explained that the *Hecox* withdrawal was "in light of" the *Labrador* decision. Therefore, the withdrawal does not result in a condemnation of the reasoning in the *Hecox* decision.

that statistics are helpful in viewing discrimination, but they can be disputed with other evidence. *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) (stating that statistics are helpful, but not dispositive, in proving employment discrimination). Arguments that "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females" fail to meet the exceedingly persuasive standard. *U.S. v. Va.*, 518 U.S. at 533; *see also Califano v. Goldfarb*, 430 U.S. 199, 217 (1977); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982).

Here, the Respondent has failed to meet their burden because the Act itself is overly broad. Additionally, any arguments made in support of the Act meeting the objectives are rooted in misguided assumptions and overgeneralized data based on stereotypes. A closer look at transgender women's presence in athletics demonstrates that the means used, a categorical ban devoid of any exceptions, harms transgender females rather than benefitting female athletics at large.

1. The Act is unconstitutionally overbroad.

Promoting and protecting women in sports may very well be an important government interest. However, the Act paints the issue of transgender women participating in sports as if it were black and white, but it is far from that. Rather, it is a nuanced issue that requires carefully crafted solutions and applications. As this Court has acknowledged, its own "decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017).

A statute is overinclusive when it applies to more situations or individuals than is necessary for the government objective to be satisfied. *See Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (holding that a campaign finance limitation on businesses, which was intended to

limit influence of foreign governments, was overbroad because it applied to domestic corporations that had no connection to foreign governments). The Act is overinclusive because it applies to athletes and teams whose inclusion fails to aid in achieving the government's purported objective of promoting and protecting women in sports. The Act is overly broad because it categorically bans transgender females from participating on female designated sports teams while neglecting to consider differences in the level of play, the physical risk involved, or the age of the athletes, and because it fails to provide exceptions of any kind.

Specifically, the restriction in § 22-3-16 (b) prohibiting transgender females from participating on teams where "selection for such teams is based upon competitive skill or the activity involved is a contact sport" casts too wide of a net. First, the Act overlooks how the various levels of play it covers are not all competitive in nature. Intramural sports, unlike interscholastic, intercollegiate, or club athletic teams, are typically void of a competitive focus, thus promoting women's equality in sports at this level by "preserving cisgender women's competitive advantage" is not justified by the Act's restriction. Rachel Tomlinson Dick, Comment, *Play Like a Girl: Bostock, Title IX's Promise, and the Case for Transgender Inclusion in Sports*, 101 Neb. L. Rev. 283, 308 (2022). Furthermore, the interest in protecting the safety of female athletes is wholly irrelevant with respect to non-contact sports. Although the only level of athletics the competitive skill provision does not cover is intramural sports, many intramural sports *are* contact sports, ultimately subjecting them to the contact sport provision. Thus, the very nature of including the competitive skill provision gives the Act a back door to assert authority over non-contact sports, because numerous non-contact sports teams select their athletes based on skill level.

The Act also fails to consider the age of athletes who participate in athletics on intramural, interscholastic, or club teams, which often have multiple age groups. Before puberty, biological male athletes do not pose a threat to their biologically female peers because they have not yet gone through the testosterone changes that give them physical advantages. *See* Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in The Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Medicine 199, 200 (2021). Nonetheless, athletes of all ages are subject to the restrictions. Although biological males may pose a safety concern to biological females post-puberty, the lack of significant physical differences between pre-pubescent children do not justify extending such restrictions to young children when it comes to promoting safety.

Finally, the Act neglects to provide any sort of exception for transgender individuals who have undergone gender-affirming treatment. The absence of such exceptions in the Act stands in stark contrast to policies that were enacted by the International Olympic Committee, which allowed transgender athletes to play on teams that align with their gender identity so long as they meet certain criteria. *See* Int'l Olympic Comm., *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, 2-3 (2015), https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com /ugd/2bc3fc_c2d4035ff5684f41a813f6d04bc86e02.pdf (requiring transgender female athletes to have and maintain a testosterone level of 10 nmol/L or lower for the 12 months preceding the competition). Although the Committee has since moved away from using testosterone levels as a benchmark to determine the eligibility of transgender athletes desiring to compete on their preferred team, the updated policy framework has progressed to become even more inclusive for transgender athletes. *See* Int'l Olympic Comm., *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, 2 (2021),

https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf. ("Everyone, regardless of their gender identity, expression, and/or sex variations should be able to participate in sport safely and without prejudice."). By barring transgender females from participating on female designated teams at the interscholastic and intercollegiate level, the Act essentially robs an entire class of individuals of an opportunity to be represented at the highest level of athletics. Without the ability to compete at a lower level of athletics, transgender females are unable to sufficiently train on a team prior to trying out for the Olympics.

2. Categorically banning transgender females is not substantially related to creating equal athletic opportunity for female athletes.

The Fourteenth Circuit argued that the Act is substantially related to creating equal athletic opportunity for female athletes because "males as a group have significant athletic advantage[s] over females." (R. at 9). This point by the Fourteenth Circuit is an attempt to weaken the burden of the Respondent. The Respondent's actual burden is to demonstrate how the exclusion of transgender females, not biological males as a whole, lessen athletic opportunity for women. This is a burden they failed to meet for three reasons.

First, transgender females do not make up enough of the population to actually displace cisgender females in athletics. Transgender females only represent 0.6 percent of the general population. (R. at 14). Of that 0.6 percent, only a small subset are competing for spots in women's sports. *B.P.J v. W. Va. State Bd. Of Educ.*, 550 F.Supp. 3d 347, 356 (S.D.W. Va. 2021). Such low numbers of transgender women competing in sports could not possibly affect cisgender females' ability to compete. *Id.*; *Hecocx,* 79 F.4th at 1030 (holding, "[it is] unlikely that [transgender females] would displace cisgender women from women's sports because transgender women are such a small portion of the population."). Without substantial

displacement of cisgender females, the Act could not be substantially related to the government's stated interest of protecting women's ability to compete in sports.

Second, any claims that transgender females have advantages over cisgender females in sports are based on overbroad generalizations. As acknowledged by the Fourteenth Circuit, the athletic advantage males have comes from increased testosterone levels, not the Y chromosome. (R. at 9); see also, *Hecox* 79 F.4th at 1023. Testosterone levels, and therefore athletic ability, vary among individuals because they are affected by factors including exercise and "disorders" at birth. Ruth I. Wood & Steven J. Stanton, *Testosterone in Sport: Current Perspectives*, Volume 61, Hormones and Behavior, 147 (January 2012). The Respondent's reliance on testosterone to justify the Act, without considering variations in individual testosterone levels, reveals that their actual concern is with chromones rather than testosterone itself. Furthermore, in *Hecox*, the court found studies cited in favor of the ban on transgender women were too general because they did not account for the transgender status of the study subjects, but simply compared males and females by their birth gender. 79 F.4th at 1031.

In addition to not accounting for different levels of testosterone in the Act itself, the studies they rely on ignore the different types of testosterones. The Respondent and Fourteenth Circuit rely on a study that measures levels of endogenous testosterone[4] affected by puberty. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th 2022) (Lagoa, J., specially concurring) (citing *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Pol'y 1 (Jan. 2019). That study is an overbroad generalization because, as in explained *Hecox*, "[there is] a medical consensus that the 'primary known driver of differences in athletic performance between elite male athletes and elite female athletes' is 'the difference in

[4] Endogenous testosterone is the testosterone biological males receive in puberty.

[circulating] testosterone' levels, as opposed to 'endogenously produced' testosterone levels." 79 F.4th at 1030-31. Therefore, by ignoring circulating testosterone, they are not actually addressing athletic ability.

The NCAA, for example, uses circulating testosterone, not endogenous testosterone, to determine eligibility for women's teams. *B.P.J.*, 550 F. Supp. 3d at 355 n.6-7. Also, circulating testosterone can be controlled with hormone therapy, adding to individual differences in circulating testosterone levels. See *B.P.J.*, 550 F. Supp. 3d at 355. The Act does not examine circulating testosterone at all. Nothing in the record indicates the legislature accounted for testosterone, let alone examining circulating testosterone. Using broad generalities of the cisgender population does not provide the "exceedingly persuasive" justification required to fulfill the governmental objective.

Additionally, the study relied on by the Respondent and Fourteenth Circuit only focuses on post-pubescent males. *Adams*, 57 F.4th at 820. However, the Act covers pre-pubescent transgender females and ignores the fact that transgender females who have undergone hormone therapy may not go through male puberty as cisgender males do. *Hecox*, 79 F.4th at 1031. Also, puberty for cisgender males can begin anytime between the ages of nine and fourteen. (R. at 3). Therefore, even accepting the precarious assumption that post-pubescent males have advantages, that assumption cannot be applied to transgender females who have not had the "advantages" of male puberty because they are either too young or have taken hormone therapy. Because the Act ignores the factual basis for its own assumptions, it cannot further the stated government interest for anyone who has not yet gone through puberty. In the present case, A.J.T. is pre-pubescent (R. at 3), so by banning her and other transgender females alike, the Act's objective is not being

substantially furthered. Similarly, banning transgender females who have undergone hormone therapy to prevent or reverse pubescent changes also fails to further the government objective.

Third, the Act, on its face, cannot accomplish the government's objectives because transgender women *are* women. Transgender females are female because they identify as female, live as females, and present to the community as female. The Act does not, and cannot, protect females while it simultaneously discriminates against people within the class. Transgender females are not participating in women's sports to take away opportunities to compete and win from females, they participate in women's sports *because* they are female. A.J.T. has identified as female for at least four years, nearly half of her life. (R. at 3). Her peers have accepted her as a female since she competed as a cheerleader prior to the implementation of the Act. (R. at 3). Transgender females already work toward the stated government interest of providing athletic opportunities to women in sports by participating in women's sports. Thus, to ban these women would necessarily go against the stated government interest.

3. Categorically banning transgender females is not substantially related to protecting the safety of women in sports.

The only evidence provided by the Respondent or the Fourteenth Circuit to show that the Act substantially furthers the interest of women's safety is one incident where a transgender female volleyball player injured another girl with a ball. (R. at 10). A single anecdote should not be sufficient to ban an entire class of people from participating in a sport. Doing so would create a problem for public policy because any single incident could then be used as a basis for excluding classes of individuals. In other words, any physical aspect could be used as a basis for discrimination without scientific justification. This violates the rule against overbroad generalizations as discussed in *Califano*. 430 U.S. at 217 (holding that requiring widowers to have had greater dependency on their wives before being eligible for Social Security death

benefits was based on an overbroad assumption that men are less dependent on women). Neither the Respondent nor the Fourteenth Circuit offer any data illustrating that there is a statistical correlation showing cisgender females are more likely to be injured by transgender females. This single anecdote does not provide statistical support, nor is it an exceptional circumstance showing that transgender females are more likely to injure cisgender females. *See Wessmann v. Gittens*, 160 F.3d 790, 806 (1st Cir. 1998) (citing *Eng'g Contractors Ass'n v. Metro. Dade Cnty.*, 122 F.3d 895, 925 (11th Cir. 1997)) (holding only in the most exceptional circumstances can anecdotal evidence alone establish institutional discrimination).

Beyond unsupported stereotypes, the Act ignores individual differences in competitors and comparative safety. Competitive ability varies based on factors beyond biological sex. The anecdote from the Fourteenth Circuit implies the transgender female injured the cisgender female due to her strength. However, the anecdote provides no evidence of any physical difference between the transgender female and any other competitor. There does not appear to be any study showing the size or strength of females that accidentally injure other competitors in school sports. Therefore, the Act is trying to solve a problem with no evidence showing a problem even exists. Numerous actions are available to reduce injuries in women's sports that would be effective. These include more or better protective equipment, better training and coaching, and creating more team divisions based on skill. These options are more likely to be substantially related to the purported goal of increasing safety because they are directly related to safety compared to an arbitrary exclusion based on birth gender.

CONCLUSION

The Save Women's Sports Act is in violation of Title IX. The Petitioner satisfies all three elements of a Title IX claim as a matter of law. First, the Act discriminates and excludes on the

basis of sex by categorically banning transgender females from women's sports because gender identity discrimination is inextricable from discrimination based on sex. Second, there is no dispute that the school in question is receiving federal funds. Third, improper discrimination is established because transgender females are similarly situated to their cisgender classmates but treated differently. This causes harm by depriving transgender females the opportunity to play sports consistent with their gender identity. Further, forcing transgender females to play only on teams consistent with their biological sex causes emotional harm because it forces transgender females to contradict their gender affirming treatment. Nothing in the plain text of Title IX authorizes this type of ban on transgender females.

The Save Women's Sports Act is in violation of the Fourteenth Amendment's Equal Protection Clause. Laws are unconstitutional when they have a discriminatory purpose rather than an actual objective. The Act has a discriminatory purpose and effect because the definitions and language used within place a burden on and specifically target transgender females. Moreover, laws that regulate based on sex are subject to intermediate scrutiny. The Act fails intermediate scrutiny because the Respondent cannot meet their burden of making an exceedingly persuasive argument that a categorical ban on transgender women in female sports furthers the Act's objectives of creating athletic opportunity for females and protecting the safety of women in sports.

It is for these reasons this Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit and its affirmation of the District Court's judgment.

Respectfully submitted,

/s/___________________

Team 36
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CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon the Respondents, State of North Greene Board of Education, *et al*., through the counsel of record by certified U.S. mail return receipt requested, on this, the 13th day of September 2024.

/s/ Attorneys for Petitioner