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 THE RESPONDENT

QUESTIONS PRESENTED

1. Does the text of Title IX permit a state to designate girls' and boys' sports teams based on biological sex to continue protecting female athletes' physical safety in sports?
2. Does the Equal Protection Clause of the Fourteenth Amendment permit a state to offer separate boys' and girls' sports teams based on biological sex for dissimilarities that directly impact athletic performance?

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The District Court's Memorandum opinion is unpublished. Its citation is *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment states:

"No State shall make or enforce any law which shall…deny to any person within its jurisdiction the equal protection of the laws."

Section 1681(a) of Chapter 38 of Title 20 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…"

Section 106.41(b)-(c) of Chapter 1 under Subtitle B of Title 34 of the Code of Federal Regulations states:

(b) "Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or 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. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."

(c) "Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors…"

Section 22-3-4 of the North Greene Code states:

"There are inherent differences between biological males and biological females, and that these differences are cause for celebration."[1]

Section 22-3-16(a) and (c) state:

[1] The N. Greene Code § 22-3-4 is not stated in its entirety, but this reflects what is provided in the Record at 3.

(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."[2]

(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

This Court reviews legal questions of law using the *de novo* standard. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). This case only addresses legal questions, therefore *de novo* is the proper standard of review. *Id*.

STATEMENT OF THE CASE

1. Statement of Facts

A.J.T. ("Petitioner") is an eleven-year-old intending to participate in the school athletics program by joining both the girls' volleyball and cross-country teams. Record at 3. A.J.T. was born a biological male and dresses as a boy at school but identifies as a transgender girl. *Id*. Petitioner began counseling for her diagnosis of gender dysphoria in 2022 and initiated discussions regarding certain courses of gender-affirming care, which included puberty-delaying treatments. *Id*. At the commencement of this lawsuit, A.J.T. had not initiated any puberty-delaying treatment. *Id*. A.J.T. also joined and competed with her elementary school's all-girl cheerleading team without issue. *Id*. Petitioner eventually began using a common girl's name and now lives as a girl in both public and private. *Id*.

North Green's legislature passed Senate Bill 2750, known as the "Save Women's Sport Act" ("SWSA") in April of 2023. SWSA categorizes participation in sports events by biological

[2] The N. Greene Code § 22-3-16(a) is not stated in its entirety, but this reflects what is provided in the Record at 4.

sex of the athlete at birth, requiring that "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." N.G. Code § 22-3-16(b). After teams have been designated, "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." *Id*. It further mentions the presence of "inherent differences between biological males and biological females" which are "cause for celebration." Record at 3. North Greene has expressed that the objective of SWSA is to provide female athletes with equal athletic opportunities and protect their physical safety when competing. Record at 4.

Under N.G. Code Section 22-3-15(a)(1)-(3), SWSA defines three terms: biological sex; female; and male. "Biological sex" was defined as "an individual's physical form as male or a female based solely on the individual's reproductive biology and genetics at birth." Record at 4. Under this section, "female" refers to an "individual whose biological sex at birth is female," and "women" and "girls" refer to biological females. *Id*. "Male" is defined as an "individual whose biological sex" at birth is male, and "men" or "boys" also references biological males. *Id*. This bill was signed into law on May 1, 2023, and it was codified as North Green Code Section 22-3-4. *Id*. SWSA's definitions do not consider gender identity and instead outlined that biological sex is not "determinative or indicative of the individual's gender identity." *Id*.; N.G. Code Section 22-3-16(c).

2. Procedural History

A.J.T., represented by her mother, filed this claim against the State of North Greene Board of Education because SWSA bars her participation on the girls' volleyball and cross-country teams. Record at 2-3. Petitioner is pursuing a declaratory judgment to assert SWSA infringes on Title IX and the Equal Protection Clause of the Fourteenth Amendment and is also seeking an injunction to prevent North Greene from enforcing the law against them. *Id*. In response, the Respondents have filed a motion for summary judgment on Petitioner's claims. Record at 5. The District Court granted Respondent's motion for summary judgment. *Id*. Petitioner has appealed, and this Court has jurisdiction under 28 U.S.C. § 1291. *Id*.

SUMMARY OF ARGUMENT

This Court should affirm the Fourteenth Circuit's decision because (1) Petitioner does not demonstrate that SWSA's designation of male and female sports by biological sex gives rise to a Title IX claim, and (2) SWSA determines athletic participation on separate boys' and girls' sports teams based on biological sex determined at birth, which does not violate the Fourteenth Amendment's Equal Protection Clause.

First, biological sex has long been relied upon to protect both men's and women's sports. Petitioner's claim falls outside the scope of Title IX because her complaint falls under gender identity classification. The concept of gender has been recognized only as an expansion on the objective measure of biological sex. As intended in its legislative history, Title IX relies on the distinction between biological males and females because it ensures both sexes are given equal opportunities to compete in athletics. The very premise of Title IX is to protect against sex-based discrimination. By intentionally using the term "sex," not "gender," in the language of the statute, SWSA prevents the line between the two groups from being blurred, potentially

offsetting the balance of equal treatment. SWSA empowers and protects the identity of biological women in sport, harmonizing with the intent of Title IX, which has successfully provided numerous female athletes a platform to be ambassadors for women's sports. Title IX protects female contact sports and female sports that are based on competitive skill. Expanding biological sex to include gender will make such distinctions impossible to determine and will set back the tremendous strides Title IX has made for female athletes.

Second, the Fourteenth Circuit properly granted summary judgment, holding that SWSA does not violate the Fourteenth Amendment's Equal Protection Clause. To survive an Equal Protection Clause challenge, SWSA must not discriminate on its face, groups cannot be similarly situated, and the law must survive intermediate scrutiny. Textually, SWSA does not make any preferences to a particular class, but rather sets the same standards for all athletes. However, even if this Court does find some textual preference, the law remains valid under the intermediate scrutiny standard. Next, as a transgender female, Petitioner is not similarly situated with the biological females she wants to compete with because Petitioner remains a biological male. Petitioner is entering puberty and will soon experience an increase in testosterone levels, the anabolic effects of which will create a significantly unfair advantage athletically. This difference, rooted in immutable biology, ineluctably distinguishes Petitioner from the female athletes the statute is intending to protect. This dissimilar situation between the two groups places Petitioner's claim outside the scope of the Equal Protection Clause.

Further, SWSA survives under the appropriate standard of immediate scrutiny. This Court has applied immediate scrutiny to claims of discrimination based on biological sex. This case is no exception. This statute clearly serves the important government interest of protecting females in sports because it prevents biological males from joining women's sports teams,

thereby harming and/or displacing them. The means of restricting biological males from competing on women's sports teams are substantially related to this purpose that protects and uplifts a group historically subjugated in sports.

When the allegations in Petitioner's claim are taken together, SWSA comfortably remains constitutional within the Title IX and the Equal Protection Clause framework. By ensuring female athletes are reserved a safe and equitable opportunity to compete, SWSA effectively *advances* equality. Therefore, this Court should hold that SWSA constitutionally makes distinctions in sport based on sex and affirm the holding of the Fourteenth Circuit.

ARGUMENT

This Court should affirm the Fourteenth Circuit's decision because SWSA does not violate Title IX nor the Equal Protection Clause of the Fourteenth Amendment. Title IX provides that "no person … shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any … activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In the context of sports, this requires federally funded athletics programs to provide equal opportunities to males and females. 34 C.F.R. § 106.41(c). The Equal Protection Clause provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. SWSA does not violate the Equal Protection Clause because Petitioner's biological sex makes her dissimilarly situated with the females she desires to compete with. SWSA's sex-based classification is substantially related to the important purposes of protecting female safety and promoting fairness in sports.

I. NORTH GREENE'S STATUTE DOES NOT VIOLATE TITLE IX BECAUSE SEPARATE SPORTS BASED UPON BIOLOGICAL SEX OF THE ATHLETE ARE PERMITTED, SWSA ALIGNS WITH THE LEGISLATIVE INTENT OF TITLE IX, AND SWSA DOES NOT IMPROPERLY EXCLUDE OR DISCRIMINATE AGAINST TRANSGENDER INDIVIDUALS.

To succeed on a Title IX claim, a plaintiff must first prove that she was excluded from an educational program on the basis of sex. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). Title IX expressly authorizes the separation of sports teams for biological males and females, thus implementing a fair and consistent definition of "sex" to apply in an athletic context.

A. Under Well-Established Principles of Statutory Interpretation, Title IX's Definition of "Sex" is Based on Biological Differences Between Males and Females at Birth, Not Gender Identity.

To properly determine SWSA's compliance with Title IX, this Court should first interpret "sex" based on its ordinary meaning at the time of Title IX's enactment. Second, this Court should look to the legislative intent of Title IX, which was to provide a separate space for young women to compete in sports. Under these statutory interpretation doctrines, SWSA enacted by North Greene is not a violation of Title IX.

1. The ordinary meaning of "sex" at the time of Title IX's enactment was based on biological differences between males and females at birth.

"Sex" in Title IX is ambiguous and undefined by Congress. This Court's first step to resolve ambiguity is to evaluate the term's "ordinary meaning." Jared P. Cole and Christine J. Back, Cong. Rsch. Serv., LSB10229, *Title IX: Who Determines the Legal Meaning of "Sex"?* (Dec. 12, 2018). This well-established principle of statutory interpretation encourages Courts to "use the ordinary meaning of terms unless context requires a different result." *Gonzales v. Carhart*, 550 U.S. 124, 152 (2007). As stated by Justice Gorsuch in *Bostock v. Clayton Cnty.*,

"when the express terms of a statute gives us one answer, and extratextual considerations suggest another, it's not a contest. Only the written word is law." 590 U.S. 644, 653 (2020).

A term's "ordinary meaning" is "what the text would convey to a reasonable English user in the context of everyday communication" at the time of enactment. Marco Basile, *Ordinary Meaning and Plain Meaning*, 110 Va. L. Rev. 135 (2024). When Title IX was adopted in 1972, the "overwhelming majority" of dictionaries defined "sex" on the basis of biology and reproductive functions, not by gender identity or expression. *Adams v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 812 (11th Cir. 2022). As noted by the district court in *B.P.J. v. W. Va. State Bd. of Educ.*, "gender identity is separate and distinct" from biological sex because an individual's "biological sex is not determinative or indicative of [that] individual's gender identity." 550 F. Supp. 3d 347 (S.D. W. Va. 2021). In the context of female sports especially, it is imperative this Court distinguishes these two concepts and uses the biology-based, ordinary meaning of sex to account for the physical differences between males and females.

This Court recently expanded the ordinary definition of "sex" to encompass "gender identity" within the limited context of Title VII employment discrimination claims. *Bostock*, 590 U.S. at 724; Record at 12. However, *Bostock* and the case at bar are incomparable. The rationalization for expanding the Title VII definition only applies within that statute's context, not Title IX's. In *Bostock*, certain plaintiffs were fired based upon their expressions of gender identity, which the Court interpreted as related to "sex" under Title VII. 590 U.S. at 661. Within the context of employment, a transgender individual is similarly situated with other cisgender employees because both individuals can adequately fulfill their job responsibilities irrespective of sex. However, within the context of sports, transgender girls (i.e., biological males) and biological females are not similarly situated because of advantageous physical

differences. Therefore, this Court cannot similarly extend *Bostock*'s Title VII definition and application of "sex" to Title IX cases.

Further, there are significant textual differences between Title VII and Title IX that require differing statutory interpretations. For Title IX, sex-separate sports are authorized by Congress purposely using the phrase "*each* sex" to provide categories upon the biological differences between males and females. Inherent differences between the sexes are a valid justification for sex-based classifications when those categories realistically reflect the fact that the sexes are not similarly situated in certain circumstances, like school sports teams.

If the Court reads "on the basis of sex" to include gender identity within Title IX, it creates a slippery precedential slope for statutory interpretation. As noted in *Bostock*, "if judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." 590 U.S. at 654-55. Petitioner may argue that the "ordinary meaning" of "sex" should include an individual's gender identity, but that line of thinking sets a dangerous precedent. It is this Court's duty "to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200 (1993). The practical implications of adopting *Bostock*'s interpretation would be wide reaching, impacting future judicial decisions on transgender rights. *Bostock*, 590 U.S. at 734 (Alito, S., dissenting) ("the [Judiciary] will be mired for years in disputes about the reach of the Court's reasoning").

Therefore, this Court should conclude that Title IX used "sex" in the biological sense, not based on "gender identity," because the ordinary meaning of the term at the time of adoption was based upon biological distinctions. With no Congressional legislation in place to

guide enforcement of an alternative standard, it is too dangerous for this Court to expand Title IX's definition.

2. SWSA does not violate Title IX's legislative intent to create a safe space for women to compete in sports.

Some of our nation's greatest athletic success stories, across many decades and sports alike, are only possible because of Title IX – Mia Hamm, Simone Biles, Katie Ledecky and Caitlin Clarke – to name a few. Even at the high school level, the ratio of girls to boys participating in high school sports rose from 8% in 1971-1972 to 53% a decade later. Neil Paine, *Which Women's Sports Benefited the Most from Title IX?*, FIVETHIRTYEIGHT (Jun. 21, 2022, 6:00 AM), https://shorturl.at/wFiaV. This Court should continue to "construe laws in harmony with [their] legislative intent and … legislative purpose" to safeguard the historic success of Title IX. *Foster v. United States*, 303 U.S. 118, 120 (1938). In following this precedent of statutory review, the Court should uphold the constitutionality of SWSA, which furthers Title IX's legislative purpose of increasing opportunities for women and protecting their physical safety in sports.

The legislative objective of SWSA is to increase athletic opportunities for women and girls in athletics and to protect their physical safety when competing in school sports. *Williams v. Sch. Dist.*, 998 F.2d 168, 175 (3d Cir. 1993). In effect, SWSA furthers the purpose of Title IX. SWSA was not intended to limit, but rather provide, more opportunities for biological women in a historically male-dominated area. Since Title IX's enactment, sports teams have been divided by biology, not gender identity, to ensure a clear legal standard of which individuals can play on each team. Non-binary teenagers who may struggle to identify with one particular gender, may face challenges with selecting their appropriate sports' team if SWSA includes "gender identity" as the determining factor. These students could arbitrarily choose between male and female

teams, taking advantage of their biological competitive advantages for each sport. SWSA maintains a clear standard to avoid such confusion.

As noted by the Eleventh Circuit in *Adams*, "transgender persons fall into the preexisting classifications of sex—i.e., male and female." 57 F.4th at 814. The delineation between male and female, as assigned at birth and recorded on birth certificates, is easily enforceable. Although gender-affirming care and policies to re-classify gender on driver's licenses and birth certificates exist, these steps do *not* address the underlying differences in biology between males and females. In line with Title IX's legislative intent, the biological composition of an individual must be considered before a biological male is granted the status protections of a historically underrepresented class.

Extending Title IX protections designed for biological women to an unintended class of individuals, creates numerous negative externalities and neglects their interests. At the time of Title IX's passing, the legislature did not consider America's small population of transgender individuals and therefore could not properly address how to protect them. There has been no clear guidance from Congress on when a transgender individual officially "transitions" to another sex. Without a Congressional classification on sex, organizations have employed appalling methods to check male or female status. One method includes the disturbing practice of "nude-parades" adopted by the Olympic Committee in the late 1960s, where female athletes were forced to walk nude in front of physicians to verify the presence of female genitalia, or else be disqualified. Alice Park, *Woman Enough?*, TIME (Jul. 2, 2012), https://olympics.time.com/2012/07/02/how-the-ioc-tests-for-gender/. Other historical methods have included chromosome checks and testosterone checks, which are alienating and offensive to the transgender population. *Id*. These invasive procedures for determining sex are appalling, but

especially if such processes are adopted for sports at the elementary, middle, and high school levels.

The moment a biological male unfairly competes against biological females, the purpose of Title IX is completely undermined. Expanding Title IX to include "gender identity" would also allow post-pubescent high school athletes to compete on the other sex's team and dominate the athletic playing field. This presents a significant physical danger for biological female athletes. A.J.T. has not pursued any gender-affirming care, so her body continues to have all the physical characteristics of a male. Record at 3. Merely "*discussing* the possibility" of puberty delaying treatments, is not enough for this Court to allow Petitioner to re-classify her sports team. Record at 3. As Petitioner continues to age and goes through puberty, the biological shifts in her body will give her a competitive advantage over biologically female athletes.

In April of 2023, the Department of Education released a notice of proposed rulemaking introducing additional language to Title IX that would evaluate statutes that "limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106). If the original intent of Title IX was to include gender identity as related to sex, these supplemental guidelines would not be necessary. This proposed regulation went into effect on August 1, 2024, and preliminary injunctions have already been widely granted in the district courts, holding that the Department of Education exceeded its statutory authority. *State v. Cardona*, No. CIV-24-00461-JD, 2024 U.S. Dist. LEXIS 135314 (W.D. Okla. July 31, 2024); *Louisiana v. United States Dep't of Educ*., No. 3:24-CV-00563, 2024 U.S. Dist. LEXIS 105645 (W.D. La. June 13, 2024) (applied

to Louisiana, Mississippi, Montana and Idaho). This definitional dispute is not for the executive branch to resolve; this Court must make the determination. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2247 (2024) (stating "ambiguity [does not] reflect a congressional intent that an agency, as opposed to a court, [should] resolve the resulting interpretive question").

Therefore, "on the basis of *sex*" should not be construed to include "on the basis of *gender identity*," as this was not the ordinary meaning nor the legislative intent of Title IX. Before this Court today is a question of interpreting Title IX as it is, not perhaps as it should be. *Bostock*, 590 U.S. at 734 (Alito, S., dissenting). And as it is, SWSA is constitutional under Title IX.

B. Even If "Gender Identity" Is Included As "On the Basis of Sex," Petitioner Does Not Succeed Under a Title IX Claim Because SWSA Does Not Exclude or Unfairly Discriminate.

If this Court expands the definition of "sex," Petitioner's claim of discrimination still fails. To succeed under a Title IX claim, Petitioner must prove she was: (1) excluded from an educational program on the basis of sex; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that "improper discrimination caused [her] harm." *Grimm*, 972 F.3d at 616 (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)); Record at 11. The second prong of this inquiry is not contested. SWSA does not *exclude* Petitioner from athletics, since there are equal opportunities available for her to compete. There was also no "improper discrimination" against Petitioner nor transgender girls as a group. As such, Petitioner does not meet the first and third requirements of a Title IX claim.

1. Petitioner was not "excluded" from her school's athletics program.

Pursuant to NCAA guidelines, an individual is only "excluded" under Title IX if they are provided no other athletic opportunities. *Title IX Frequently Asked Questions*, NCAA,

https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions#exclude (12. Is any sport excluded from Title IX?) (last visited Sep. 12, 2024). Here, Petitioner had multiple opportunities available to her for athletic participation at her school. First, she is permitted to join co-ed sports teams (e.g., cross-country or track, in this case). She can also try out for "non-contact" sports teams for biological women and any sports team designated for her biological sex. These ample opportunities for Petitioner negate her contention that she was excluded under Title IX.

First, on co-ed teams where there is no separation of the sexes, Petitioner can participate and fully express her gender identity. As recently as December of 2023, a Pennsylvania district court has addressed this issue stating "as long as the females had an opportunity to try out for the co-ed team, the Title IX requirements were fully met." *Brooks v. State Coll. Area Sch. Dist.*, No. 4:22-CV-01335, 2023 U.S. Dist. LEXIS 225112 (M.D. Pa. Dec. 18, 2023). This Court should apply the same reasoning because not only is this inference clearly enunciated in the text of Title IX, but also continues to protect biological women by providing a space designed for both sexes.

Second, a school may separate teams by "members of each sex where … the activity involved is a contact sport." 34 C.F.R. § 106.41(b). Contact sports include sports where the purpose or major activity involves bodily contact. *Id*. Title IX provides that for "non-contact sports … covered institutions must allow members of an excluded sex to try out for single-sex teams." *Mercer v. Duke Univ.*, 190 F.3d 643, 647-48 (4th Cir. 1999). SWSA complies with Title IX because compliance is assessed by the NCAA based on schools offering any available sport, not just one specifically. *Title IX Frequently Asked Questions*, NCAA, https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions#exclude (12. Is any

sport excluded from Title IX?) (last visited Sep. 12, 2024). For individual athletes, this Court should employ the same standard as the NCAA. A sport-by-sport analysis to determine whether Petitioner was excluded would not fairly capture the full context of Petitioner's athletic opportunities.

SWSA explicitly states that biological males are only excluded from female teams that are "based upon competitive skill or the activity involved is a contact sport." N.G. Code § 22-3-16(b). Cross-country is based upon competitive skills of speed and endurance, and biological males have significant anabolic advantages over females for both characteristics. Petitioner's participation also risks displacing other females from the school's cross-country team, immediately undermining the purpose of Title IX. However, cheerleading, a non-contact sport, has a minimal physical risk from bodily contact between dissimilarly situated males and females. Record at 14. Therefore, Petitioner may lawfully practice and compete with the girls' cheerleading team, as she did in elementary school without incident. Record at 3.

Title IX's list of "contact sports" is illustrative, not exhaustive. *Williams*, 998 F.2d at 180. There are other contact sports that are unlisted, such as lacrosse, soccer, and water polo. Petitioner contends that girls' volleyball is a non-contact sport from which she was excluded; however, volleyball should be considered a contact sport. In *Williams*, the Third Circuit held that plaintiff (a biological male) was rightfully barred from trying out for the girls' high school field hockey team because there was evidence "bodily contact does occur frequently" and the rules of field hockey require protective equipment, making field hockey a contact sport. 998 F.2d at 173. Although player-to-player contact is a violation of the rules of volleyball, it does occur frequently. Volleyball also poses significant physical risks to players if they are not biologically similar – primarily from differences in height and strength, which can be used for

more powerful blocking and hitting. While not currently included within Title IX, we urge the legislature to carefully review the modern rules of each sport to appropriately discern which sports truly pose risks for biologically dissimilar individuals.

Lastly, regardless of where a transgender girl is in her gender-affirming care process, the option to participate on boys' teams is always available. Record at 11. The exceptions to Title IX exist to protect females from the competitive advantages a post-puberty, biological male has in a contact sports. However, given the spectrum of non-contact sports available to Petitioner, A.J.T.'s contention that she has been excluded from the school's athletic programs is unsubstantiated.

2. SWSA does not unfairly discriminate against transgender girls.

The definition of "discriminate" under Title IX is "treating [an] individual worse than others who are similarly situated." *Grimm*, 972 F.3d at 618 (quoting *Bostock*, 590 U.S. at 657). SWSA is not treating transgender girls worse than others similarly situated, because biologically male competitors are not similarly situated with biological females. This regulation maintains an equal application to boys and girls, separating them based on biology. This determination is not intended to be related to gender identity, as supported by Congress' silence within Title IX. Separation, in the athletic context, is not discrimination.

First, transgender girls are not classified as a discrete and insular minority class of people. Per *United States v. Carolene Products, Co.*, minorities are classified when "individuals are so disfavored and out of the political mainstream that the courts must make extra efforts to protect them, because the political system will not." 304 U.S. 144 (1938). Gender identity, as opposed to sex, is a fluid characteristic, as can be evidenced by non-binary individuals. If a category is not concrete, it cannot be "discrete" like race, or a disability would be. While understanding that gender identity may not *feel* impermanent to certain transgender

students, there are no set determinants regarding when a girl biologically becomes a boy, which is what the Court must focus on here.

Social issues as politically charged as transgender rights should not be written into law by precedent; these issues must be determined by the people's representatives. *Kincaid v. Williams*, 143 S. Ct. 2414, 2419 (2023) ("voters … and the legislators they elect will lose the authority to decide how best to address the needs of transgender persons"). By upholding SWSA, the Court sends a clear message to Congress: supplemental legislation to protect transgender girls in sports is needed. At the time of Title IX's enactment, the issues facing transgender kids of school-age were unknown to most of Congress and the electorate. Without knowledge of the challenges facing this population of individuals, it would have been impossible for Congress to appropriately protect transgender interests.

II. SWSA IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE BECAUSE MALES AND FEMALES ARE NOT SIMILARLY SITUATED IN THE CONTEXT OF SPORT, AND IT SURVIVES THE APPLICABLE STANDARD OF INTERMEDIATE SCRUTINY.

For an Equal Protection Clause to be successful, a claimant must show that: (1) the state law in question discriminates against them differently than it does to others similarly situated; and (2) the classification is not arbitrary and substantially related to the statute's purpose. *F.S. Royster Guano v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). SWSA is immune to a claim made under this long-recognized framework because Petitioner's biological sex makes her not similarly situated with the females she desires to compete with. Further, the statute's sex-based classification does not create a disparate impact and is substantially related to the purpose of protecting female safety.

A. SWSA Does Not Discriminate on its Face.

SWSA does not exclude or prevent transgender athletes from competing, but rather classifies athletes according to their biological sex. To prove a statute violates the Equal Protection Clause on its face, only the text of the statute should be considered. *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *see also Reed v. Reed*, 404 U.S. 71 (1971). The text must explicitly differentiate between individuals based on protected characteristics. *Shaw*, 509 U.S. at 642. A facially neutral statute cannot be challenged under the Equal Protection Clause solely due to its disproportionate impact on a minority group. *See Washington v. Davis*, 426 U.S. 229, 246 (1976). Any law that displays facial discrimination is unconstitutional if it cannot withstand the applicable level of judicial scrutiny. *Id*.

In *Reed*, this Court determined that granting preference to men over women in administering estates was arbitrary and unjustly discriminated between similarly situated individuals on its face. 404 U.S. at 76. This Court found text which explicitly mentioned that "males must be preferred to females," as facially discriminatory because it exemplified the preference towards males. *Id*. at 71. This case bears little resemblance to that of *Reed*. First, unlike in *Reed*, this case shows no preference to a class, but rather treats all individuals equally by designating sports teams based on biological sex. 404 U.S. at 73; Record at 3. There, the text of the law displays an overt preference by including the word "preferred." *Id*. at 73. In contrast, SWSA does not display an overt preference for males, females, or transgender athletes. N.G. Code Section 22-3-16(a). Since Petitioner only presents a facial challenge, per the language of the statute, SWSA only classifies "based on biological sex, not transgender status," thereby equally separating *all* students based on sex. *Id*. Although SWSA refers specifically to

"biological sex," this should not be interpreted as a proxy for discrimination. On a facial challenge, the statute does not explicitly exclude transgender individuals. *Id*. The statute simply limits participation "to the biological sex of the athlete at birth," making no mention of transgender students not being allowed to compete at all. It does not prohibit their participation in any textual sense, but rather outlines guidelines for their inclusion that aim to balance inclusivity with competitive fairness and physical safety. Further, even though the statute mentions the limitation of participation on a female athletic sports team to only biologically females, this is not facially discriminatory because transgender individuals are not a part of a protected minority class.

SWSA assigning sports teams based on biological sex does not discriminate on its face because the language in the text does not explicitly state a preference. SWSA instead sets guidelines that govern how transgender individuals may compete in a way that serves the interests of *all* athletes, making SWSA facially valid. Even if the Court determines that the SWSA is facially discriminatory, the exclusion of biological males from female sports teams is justified because the two groups are not similarly situated. This distinction withstands heightened scrutiny.

B. The Physical Differences Between Biological Males and Biological Females Makes Them Not Similarly Situated.

This Court has recognized the Fourteenth Amendment's Equal Protection Clause as a safeguard against unequal treatment of classes of individuals who are similarly situated. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (defining similar situation as those who are in "all relevant respects alike"); *F.S. Royster Guano Co.*, 253 U.S. at 415 (indicating classifications "must be reasonable, not arbitrary … so that all persons similarly circumstanced shall be treated

alike."); *City of Cleburne*, *Tex.*, 473 U.S. at 439 (characterizing Equal Protection as ensuring "that all persons similarly situated should be treated alike"). The Equal Protection Clause allows a statute to make classifications, granted they are not arbitrary or unrelated to the statute's objective. These "reasonable, not arbitrary" classifications must be grounded in a fair and substantial relation to the object of the law. *See F.S. Royster Guano Co.*, 253 U.S. at 415; *McGowan v. State of Md.,* 366 U.S. 420, 425 (1961); *Reed*, 404 U.S. at 75; Record at 6.

Latitude to apply protections of a law differently to not similarly situated entities has been granted to the states, depending on factual circumstances. *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Equal Protection Clause claims of this kind have ranged from a variety of classes claiming to be treated differently under the law. In *Tuan Anh Nguyen v. I.N.S.*, this Court determined a mother and father are not similarly situated if one parent is a citizen and the other is not when establishing their non-American-born child's citizenship. 533 U.S. 33 (2001). The court grounded its holding in the belief that a child's citizenship automatically aligns with its mother's citizenship because of the mother's presence at birth. *Id*. at 73. This holding validates laws that make classifications based on biological sex, and analogous reasoning has likewise been extended to other not-similarly situated actors such as businesses, economic actors, students, and athletes. *See also Barbier v. Connolly*, 113 U.S. 27, 30-1 (1884); *Railway Exp. Agency v. People of State of N.Y.*, 336 U.S. 106, 110 (1949); *Adams*, F.4th at 810; *Petrie v. Illinois High School Ass'n*, 75 Ill.App.3d 980, 989 (1979); *cf*. *Reed*, 404 U.S. at 74; *United States v. Virginia*, 518 U.S. 515, 533 (1996).

SWSA treats parties differently because they are not similarly situated. The "innate physical differences between the sexes" illustrates the constitutionality of this classification. *Petrie*, 75 Ill.App.3d 980 at 989. Although Petitioner identifies as a female, she remains a

biological male, and male biology differs drastically from female biology. Record at 3. Biological men have stronger, less fatigue-prone muscles, and larger cross-sectional areas of their muscle fibers. Sandra Hunter, et al., *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine*, NATIONAL LIBRARY OF MEDICINE (Dec. 1, 2023), https://pubmed.ncbi.nlm.nih.gov/37772882/. This allows male muscles to contract faster, resulting in greater output. *Id.*

The physical differences between biological males and biological females are relevant because they have a significant impact in the context of sports. These differences are pervasive in determining how rules in are implemented in male and female sports. For example: the Women's National Basketball Association uses a smaller basketball; the Ladies Professional Golf Association places tee boxes closer to the greens; shorter and lighter barbells are used in Women's Olympic Weightlifting; and a lower net height is set in professional women's volleyball. Allowing a biological male to compete in a women's sport would result in opening a door for biological males to compete under rules tailored for an entirely different biological classification.

Because a statute cannot discriminate on a "wholly irrelevant" or "wholly unrelated" basis, Petitioner's biological sex or gender identity alone does not establish grounds for SWSA to classify on. *McGowan v. State of Md.*, 366 U.S. 420, 425; *Reed*, 404 U.S. at 75. Rather, SWSA makes its distinction on the impact that her dissimilar biology has on gameplay. This is the foundation upon which the Equal Protection Clause's similarly situated analysis rests. SWSA's distinction between biological males and biological females secures such females from being compelled to compete with and against males, a class that has inherent physical advantages "solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The

impact of competing with and against a biological sex that is physically advantaged creates a slanted playing field for the athletes, especially in sports like volleyball and cross-country, which require high levels of physical output.

Such physical differences in biological males fully manifest themselves in adulthood. Petitioner is only eleven-years-old and she is on the cusp of entering puberty, which generally starts between ages nine and fourteen. Record at 3. At this age, the physiological differences between biological boys and girls becomes apparent, and the anabolic effects of increased testosterone in biological boys make sex a primary determinant of athletic performance. David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, CLINICAL ENDOCRINOLOGY (Apr. 11, 2017), https://doi.org/10.1111/cen.13350. For Petitioner, this circulation of testosterone will allow her to outperform her competition, as "gender divergence in performance for … running and jumping … is very closely aligned with the onset of male puberty." *Id*. at 70.

As Petitioner goes through puberty, her physical ability will separate her from the biological females she desires to compete with. This unequal footing places her in a class dissimilar to biologically female athletes, validating SWSA's classification under the Equal Protection Clause.

1. The biological differences between males and females make biological females vulnerable to physical harm.

SWSA's classification upon biological sex in sports is constitutional because biological males and females are not similarly situated, and "[t]he Constitution does not require things which are different in fact … to be treated in law as though they were the same." *Tigner v. Texas* 310 U.S. 141, 147 (1940). Choosing to ignore the inherent differences between the sexes in athletics as described above would be attempting to treat dissimilar classes the same way, which

can have ugly consequences. To avoid this, a consistent standard for participation in a sport must be employed to ensure female athletes are physically safe.

SWSA's classification is on biological sex, which is an objective measure not subject to socially constructed roles, making it the most consistent test to regulate who is allowed to compete on women's sports teams. *PFLAG National Glossary of Terms*, PFLAG, http://pflag.org/glossary (last visited Sep. 12, 2024). This is because a distinction based on an athlete's biology, as opposed to gender, consistently allows for a level playing field. Gender is defined as "a set of socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate related to a person's assigned sex." *Id*. Under this fluid concept of gender, a biological male can arbitrarily place themselves on a team in accordance with their preferred identity. The danger with basing entry in women's sports on the concept of gender is that a biological male, with the physical advantages that testosterone offers, may compete as a female. To preserve women's sports, SWSA constitutionally prevents individuals like Petitioner from competing in women's sports so others who are likewise physically dissimilar to biological female athletes do not take advantage of a less objective measure.

One tragic example from failing to acknowledge this biological distinction involved Payton McNabb, a female high school volleyball player in North Carolina. In September of 2022, McNabb was unexpectedly competing against a transgender female. Ashley McClure, *After a Male Caused Her Partial Paralysis, Female Volleyball Player Payton McNabb Now Fights to Protect Women's Sports*, INDEPENDENT WOMEN'S FORUM, https://shorturl.at/BECi9 (last visited Sep. 12, 2024). The team was forced to alter their entire game plan because of how hard the transgender individual was striking the ball. *Id*. One of her transgender opponent's

powerful strikes collided with McNabb's head, leaving her unconscious, and resulting in a concussion, vision problems, and partial paralysis. *Id*.

Dismissing an objective classification like biological sex to accommodate a person's subjective identity is prioritizing "abstract equivalents of conduct, [over] conduct in the context of actuality." *Tigner*, 310 U.S. at 149. This is especially the case in sports where a dissimilar situation can make immense impacts on the outcome of athletic events and the safety of their competitors. SWSA prevents the potential for harm by separating biologically male athletes from biologically female athletes. By classifying the two groups, SWSA aligns with constitutional principles, as this classification is in response to their dissimilarity on a physiological basis.

2. Disregarding biological differences between males and females in sports risks displacing female athletes.

Not only are female athletic careers threatened by the dangers of biological differences, they are also at risk of displacement. The Lia Thomas controversy at Pennsylvania State University highlights the legitimacy and importance of SWSA's purpose of maintaining female sports as biologically separated. Before Thomas made her transition as a transgender woman, she was ranked in the mid-500's among biological men nationally. After transitioning, she won a women's division-I national championship. Katie Barns, *Amid Protests, Penn Swimmer Lia Thomas Becomes First Known Transgender Athlete to Win Division I National Championship*, ESPN (Mar. 17, 2022, 7:23 PM), https://shorturl.at/uKtA0. This caused national outrage and wide debate because the second-place finisher, a biological female, was stripped of a national championship title. *Id*. SWSA responds to injuries like McNabb's and Weyant's, seeking to prevent future similar harms.

There is no genuine dispute as to any material fact that biological sex makes a difference in sports to significantly create dissimilarities among athletes. SWSA classifies between biological sex not to denigrate a group and exclude them from access to competition, but to *encourage the proliferation of biological women in sports*. To do this, SWSA classifies on biological sex to maintain biological females' momentum in an industry that for years has been dominated by biological males. SWSA does this to protect female athletics "in spite of" transgender athletes who are biological males, not "because of" them. *Adams*, 57 F.4th at 810. The classification is thus not arbitrary, but tactful and specific to achieve its principal goal and namesake: to save women's sports. Such a classification to empower biological female athletes is not a subterfuge for discriminating against transgender girls from participating in sports. Rather, it is a constitutionally grounded protection for biological female athletes with the sole aim of preserving a level-playing field.

C. Sex is a Quasi-Suspect Classification and SWSA Survives the Relevant Standard of Intermediate Scrutiny Because it is Substantially Related to Important Government Interests.

Quasi-suspect classifications demand the review of intermediate scrutiny, reserving heighted scrutiny for inherently suspect classifications like race. "Statutory classifications that distinguish between males and females are subject to scrutiny under the Equal Protection Clause." *Craig v. Boren*, 429 U.S. 190, 191 (1976). Intermediate scrutiny generally applies to discriminatory classifications that pertain to matters like sex. *Clark v. Jeter*, 486 U.S. 456, 457 (1988); *Reed*, 404 U.S. at 71. Challenged laws pertaining to sex-based classifications will pass constitutional muster only if they satisfy intermediate scrutiny. *Adams*, 57 F.4th at 796. To survive intermediate scrutiny, the purported classification must at least serve an important government interest and the alleged "discriminatory means employed" are substantially related

to achieving those objectives. *Virginia*, 518 U.S. at 519; *Adams*, 57 F.4th at 796; *see Califano v. Webster*, 430 U.S. 313, 314 (1977); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 719 (1982).

1. Intermediate scrutiny is the relevant standard for sex-based, quasi-suspect classifications.

Transgender status should be encompassed within the quasi-suspect classification of sex because it is embedded in the broader context of sex, necessitating the same standard of review: intermediate scrutiny. Even if this Court determines that transgender status constitutes a distinct classification, it would still be regarded as a quasi-suspect and the outcome would remain unchanged. *See Grimm*, 972 F.3d at 611 ("…it is apparent that transgender persons constitute a quasi-suspect class.")

This Court established the applicable level of review for cases considering sex classifications in *Virginia*. 518 U.S. at 517. There, this Court affirmed intermediate scrutiny was the relevant standard for sex, which was a quasi-suspect classification. *Id*. at 520. This Court reasoned that sex-based classifications must serve an important governmental interest and be substantially related to achieving that interest. *Id*. Additionally in *Reed*, this Court reiterated the use of the intermediate scrutiny standard for sex-based classifications, claiming policies need a "fair and substantial relation to the object of the legislation." 404 U.S. at 71. Further, the Fourth Circuit in *B.P.J.* found intermediate scrutiny to be the applicable standard since the creation of separate teams for boys and girls is a sex-based distinction, which is a trigger for intermediate scrutiny under the Equal Protection Clause. 98 F.4th at 555.

In this case, the issue at hand is not the acknowledgement of A.J.T.'s gender identity. Rather, like *B.P.J.*, it is simply whether student athletes may be divided onto sports teams based

on their sex. 98 F.4th at 574. Although sex is a protected characteristic, requiring athletes to be placed on teams based on their sex assigned at birth is not a separation of transgender students per se. Since the statute does not address transgender status and solely focuses on biological sex, it should be encompassed as a sex-based classification, which is not an inherently suspect class. Regardless of if this Court finds transgender individuals to be their own distinct class or not, the outcome remains the same. SWSA is making a sex-based categorization, and is subsequently a quasi-suspect classification, therefore intermediate scrutiny is the appropriate standard.

2. SWSA survives intermediate scrutiny because it is substantially related to its important government interests.

The government interest of promoting equal opportunities for women in sports and protecting competitor safety is sufficiently important, and SWSA survives intermediate scrutiny because it is substantially related to these interests. *See Craig v. Boren*, 429 U.S. at 197. The state must provide an exceedingly persuasive justification that the true purpose of the statute does not "rely on overbroad generalizations about the different talents, capacities and preferences of men and women." *Virginia*, 518 U.S. at 519. SWSA does not rely on false stereotypes in making its classifications, and the distinct physical differences between biological males and females provides a persuasive justification for its categorizations.

Protecting women in sports serves a significant government interest by promoting fair competition and ensuring the safety of biologically female athletes, given the clear physical differences between men and women. It further addresses the athletic context where women have traditionally and historically been disadvantaged. This Court has consistently upheld statutes where gender classifications are not individuous, but instead accurately represent the reality that the sexes are not similarly situated in certain circumstances. *See Parham v. Hughes*,

441 U.S. 347, 353 (1979); *Califano v. Webster*, 430 U.S. 313, 315 (1977); *Schlesigner v. Ballard*, 419 U.S. 498, 502 (1975); *Kahn v. Shevin*, 416 U.S. 351, 354 (1974); *Reed*, 404 U.S. at 72. Any sex-based measures must be based on "reasoned analysis rather than mechanical application of traditional, often inaccurate, assumption." *Miss. Univ. for Women*, 458 U.S. at 726.

In *M. v. Superior Court*, this Court found prevention of teenage pregnancy to be an important government interest, which exclusively fell upon the biologically female population. 450 U.S. 464. In doing so, this Court demonstrated that the nation has and should continue to have a vested interest in the physical health of young women. Furthermore, in *Reed*, this Court found the government's goals of "reducing the workload on probate courts" and "avoiding intrafamily controversy" were not important enough to justify using gender as a factor in appointing administrators for intestate estates. 404 U.S. at 76. Decisions following *Reed* have rejected administrative ease as a sufficient reason for gender-based classifications. *See Frontiero*, 411 U.S. at 677 (placing administrative burdens on female service members, but not on male service members, for seeking spousal benefits violated the Equal Protection Clause.)

In this case, the objectives of protecting the physical safety of female athletes and fostering fair competition are substantially important. Here, physical safety is rooted in common law, and physical injury is a harm that has been traditionally recognized. Arthur Ripstein, *Theories of the Common Law of Torts*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jun. 2, 2022). This interest serves to prevent injuries to biologically female athletes. Furthermore, protecting female equality is deeply embedded in longstanding legislation like Title IX. Ignoring this protection would undermine progress and hinder the advancement of female equality. Lastly, the sex-based categorization set out in SWSA is not for administrative

convenience. The primary objective is to protect female athletes, not to make the jobs of school administrators and athletic boards easier. Record at 2.

SWSA represents an important government interest that has been consistently upheld in various forms by this Court. Promoting gender equality, fostering fair competition, and ensuring equal opportunities for women to participate and excel in sports reflects a broader societal goal of achieving inclusivity that is not at the expense of others.

Next, SWSA is substantially related to the important government interest of protecting women in athletics to promote gender equality and to foster fair competition. For a gender classification to be considered substantially related to the government interest or purpose, it must not create or perpetuate legal, economic, or social inequalities for women. *Virginia*, 518 U.S. at 516. This Court does not allow reliance on "overbroad generalizations about the different talents, capacities…of males and females." *Id*. Next, for the justification to be exceedingly persuasive, it must not rely upon inaccurate proxies for germane classifications. *See Craig v. Boren*, 429 U.S. at 198. Sex can act as a dependable proxy for certain characteristics, such as athletic ability, that the legislature aims to mitigate. *Id*.

First, legislation must be born out of reason to address a government purpose. *Mississippi Univ. for Women* exemplifies this Court's standard of necessitating a close relationship between the alleged government objective and the inherent purpose of the classification. 458 U.S. 718, 721 (1982). In that case, this Court found the exclusion of men from a nursing school bore no close connection to the school's alleged goal of compensating for the past discrimination against women. *Id*. This Court reaffirmed the *Mississippi Univ. for Women* standard in *Virginia* by finding Virginia Military Institute's male-only admissions policy as unconstitutional because the university failed to show that refusing admission to women was

substantially related to its alleged goal of maintaining a unique educational environment. 518 U.S. at 532. In that case, the school's classification was unconstitutional because while it relied on the physical differences between men and women, it did so in a manner that was unjustifiably separatist and insufficiently related.

SWSA is incomparable to *Mississippi Univ. for Women*. 458 U.S. 718 (1982). In that case, the school had created a false notion that women were disadvantaged in the nursing industry, which was not true. *Id*. at 725. Women have historically been disadvantaged in sports. Most high schools did not sponsor women's sports prior to the 1970's. Even if they did, the preface behind it was to promote matchmaking, encouraging women to assume the stereotypical role of a housewife. Dr. Brittany Jacobs, *Is There Gender Discrimination in Sports? How to Fix It*, AMERICAN PUB. UNIV.: NURSING AND HEALTH SCIENCES BLOG (Jan. 31, 2024), https://shorturl.at/Jahno. Here, the stereotype is not being created nor perpetuated, but rather addressed and protected. Female participation in high school sports reached a high in 2017, with over three million spots for girls to compete. Charlotte Gibson, *Report Finds Strides Made in Women's Sports in Past Few Years, but Inequality Remains*, ESPN (Jan. 15, 2020, 10:00AM), https://www.espn.com/espn/story/_/id/28489077/report-finds-strides-made-women-sports-years-inequality-remains. Yet, a gap in participation is still prevalent. *Id*. In NCAA sports, women had sixty-two thousand fewer participation opportunities than their male counterparts, while 87% of schools offered disproportionately higher numbers of athletic opportunities to male athletes. *Id*.

Further, this case is distinct from *Virginia* in several key respects. While both cases involve assessments based on factual physical capabilities, they differ significantly in context. In *Virginia*, women would be intentionally subjecting themselves to heightened physical demands

associated with the rigorous training program, while in this case, other biologically female athletes would not. Additionally, unlike VMI creating a "female" version of the program which this Court found to be an inadequate solution, the current situation involves placing athletes into established teams rather than creating separate or unequal programs for transgender individuals.

Although this Court in *Weinberger v. Wiesenfeld* recognized that stereotypes about women staying home as caretakers was an overgeneralization, this rationale does not apply to the perception that men are physically stronger than women. 420 U.S. 636, 639 (1975). There, the concern was about the unfair comparison of men and women's earning capacities based upon traditional domestic stereotypes. *Id*. In contrast, the current case involves clear and specific physical differences between the sexes that are neither overgeneralized nor stereotyped. In this instance, the sex gap between men and women is not perceived and not being perpetuated by SWSA. It may be that not every single man is more athletic than every individual woman, but looking to the full context and overall average, men have an overwhelming advantage. The law sets precedent for all, not the few. The obvious and apparent average physical differences between biological males and biological females is one rooted in fact, not fiction.

Second, sex can occasionally be a dependable proxy for classifications. In *Craig v. Boren*, this Court struck down a statute prohibiting the sale of 3.2% ABV beers to males under the age of 21, and to females under the age of 18, finding sex to be an unreliable proxy for driving capability. 429 U.S. at 197. The government's interest in promoting traffic safety was not substantially related to the statute. *Id*. Further, in *Orr v. Orr*, this Court struck down sex as an accurate proxy for dependency in assessing an Alabama law imposing alimony obligations on males, but not females. 440 U.S. at 283; *see also M. v. Superior Court*, 450 U.S. at 471.

This case is not like *Boren* and *Orr*. The use of sex as a proxy for athletic performance is justified because it is grounded in biological and scientific evidence. In contrast, *Orr* and *Boren* involve qualitative characteristics – such as intellectual skills – that are not supported by concrete evidence linking them to sex but are often based on stereotypes. Unlike the scientifically supported differences in physical strength between men and women, these stereotypes lack empirical validation and risk perpetuating these false standards.

SWSA is closely aligned with the goals of protecting women's safety and fairness in sports because, without it, women in athletics face the potential for imminent and significant harm. Striking down this policy risks compromising the progress made towards equal rights in athletics. This is not to suggest that transgender athletes do not deserve a space in sports. However, the small population of this group does not account for future growth. As societal acceptance of transgender individuals increases, the absence of guidelines for transgender participation in sports could lead to unfair treatment of women in athletics. The risks of allowing transgender athletes to compete based on gender identity rather than sex far outweigh the benefits.

Promoting fair competition, protecting physical safety, and providing equal opportunities to women in sports are important government interests and SWSA is substantially related to achieving those goals. Without SWSA, there is a high risk of women getting injured and being displaced in athletic programs. From this, the law survives the applicable standard of intermediate scrutiny and SWSA passes the exceedingly persuasive justification standard.

CONCLUSION

This Court should affirm the Fourteenth Circuit's decision because North Greene's "Save Women's Sports Act" does not give rise to a Title IX claim nor violate the Fourteenth

Amendment's Equal Protection Clause. Petitioner's Title IX claim fails because biological sex cannot safely be expanded to include "gender identity" in a sports context. By creating sex-separate teams to avoid sex-based discrimination in sports, SWSA furthers the purpose of Title IX by protecting biological females through basing its distinction on the clear standard of biology. Any other standard risks the safety of biological females and endangers the purpose of Title IX. Petitioner's Equal Protection Clause claim also fails because she is not similarly situated with biological females, and SWSA's sex-based classification is substantially related to its purpose under intermediate scrutiny. As such, SWSA presents no violation of Title IX or the Equal Protection Clause. Accordingly, Respondent respectfully requests that this Court affirm the decision of the Fourteenth Circuit.