No. 23-1023

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 PETITIONER

Oral Argument Requested

Team #39 *Attorney for Petitioner*

Questions Presented

1. Under Title IX can states designate students to sports teams based on their biological sex at birth when the designation is inconsistent with the student's gender identity?
2. Does the Equal Protection Clause protect transgender athletes from state prohibitions limiting participation in sports based on biological sex?

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Title IX states, in relevant part, "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." 20 U.S.C.A. § 1681 (West).

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution states:

> "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." U.S. Const. amend. XIV, § 1.

The Save Women's Sports Act that was signed into law on May 1, 2023, states in Section 22-3-4: "Limiting participation in sports events to the biological sex of the athlete at birth." N.G. Code § 22-3-4. The act continues saying "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration." *Id.*

The Save Women's Sports Act defines multiple key terms as:

> "(1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.
> (2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.
> (3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males." N.G. Code § 22-3-15(a)(1)–(3).

Further, the Save Women's Sports Act in Section 22-3-16(a)-(b) provide that:

> "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education," "shall be expressly designated as one of the following based on biological sex at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. Code § 22-3-16(a). 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." N.G. Code § 22-3-16(b).

Additionally, the Save Women's Sports Act discusses gender identity in Section 22-3-16(c) stating:

> "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." N.G. Code § 22- 3-16(c).

Statement of the Case

I. Statement of Facts

The State of North Greene's recent Save Women's Sports Act mandates the classification of all sports as either male, female, or coed. R. at 4. Athletes are then categorized based solely on their reproductive organs and chromosomes at birth as either male or female. *Id*. Males, and only males, are then prohibited from participation on female sports teams, thus expanding the already existing North Greene school athletic rules from only banning cisgender males from female teams, to also now ban transgender girls from female teams. R. at 13.

Since early childhood, A.J.T. has experienced life as a girl, used a girl's name, and previously competed on an all-girl cheerleading team. R. at 3. In 2022 A.J.T. was diagnosed with gender dysphoria. *Id.* A.J.T. is a transgender girl. *Id.* As an eleven-year-old A.J.T. was prohibited from joining the girls' volleyball and cross-country teams because of the newly enacted Save Women's Sports Act. *Id.* The State's objectives behind the act were to provide safety and fairness to girls. R. at 3-4. When A.J.T.'s school told her school that she could not join the girls' teams, she had not yet begun puberty. R. at 3. Male puberty causes the circulation of testosterone and therefore physiological changes that impact male performance. R. at 7. If A.J.T. begins puberty-delaying treatments it could prevent endogenous puberty, physiological changes, and any potential

advantages, however, at the time the suit was filed A.J.T. had not begun puberty-delaying treatments. R. at 3.

II. Procedural History

Petitioner, through A.J.T.'s mother, filed a declaratory action against the North Green Board of Education and State Superintendent Floyd Lawson seeking to challenge the Save Women's Sports Act on the basis that it violates the Equal Protection Clause and Title IX. R. at 4-5. At a later date, Plaintiff amended the initial complaint and named the state of New Greene and the Attorney General Barney Fife as additional defendants. *Id.*

A.J.T., in their complaint, sought an injunction which would not allow Respondents to enforce the Save Women's Sports Act. R. at 5. As a result, Respondents filed a motion for summary judgment in the district. *Id.* The district court granted the Respondents motion of summary judgment. *Id.*

A.J.T. appealed to the United States Court of Appeals for the Fourteenth Circuit. *Id.* The court of appeals affirmed the lower court's ruling that the Save Women's Sports Act does not violate the Equal Protection Clause and Title IX. R. at 12. The Supreme Court of the United States has granted certiorari.

Summary of Argument

Title IX does not allow states to designate students to sports teams based on their biological sex at birth. Statutes that discriminate on the basis of gender identity constitute sex discrimination under Title IX. Acts that treat similarly situated students differently are considered discriminatory. The Save Women's Sports Act is discriminatory under Title IX because it treats similarly situated students differently through its designation of sports teams to students based on their biological birth sex. Further, acts that discriminate on the basis of gender identity are considered to be

discriminatory under Title IX. The Save Women's Sports Act discriminates based on gender identity because it designates students to sports teams based upon their biological sex at birth. Emotional and dignitary harm constitutes harm under Title IX. The Save Women's Sports Act creates emotional and dignitary harm to transgender students because it does not allow these students to compete on sports teams that conform with their gender identity like the other students.

The Equal Protection Clause protects transgender athletes from North Greene's prohibition based on biological sex. The singular effect of the Save Women's Sports Act was to ban transgender girls from participating on teams that align with their gender identity because there were already rules in place prohibiting cisgender boys from participating on girls' teams. Therefore, there is a disparate impact, exclusively, on transgender girls. This outcome motivated the legislation and is achieved by facially discriminatory language that defines terms and metrics in such a way that creates and enforces proxy discrimination.

The Save Women's Sports Act also goes on to treat transgender girls differently than similarly situated biological females. In all relevant respects transgender girls must be comparable to either cisgender girls or transgender boys, both of which the statute would label as "biological females." Neither cisgender females nor transgender boys face prohibitions created by the Save Women's Sports Act.

Lastly, The Save Women's Sports Act's discrimination is not substantially related to the claimed compelling interests when an abundance of people impacted and prohibited from sports does nothing to make sports fairer or safer. This results from the Save Women's Sports Act's indiscriminate prohibition needlessly applying to all transgender girls regardless of if they have received any alleged benefits that only manifest via going through male puberty.

Argument

I. Title IX prohibits states from designating girls' and boys' sports teams based on biological sex determined at birth.

The North Greene Save Women's Sports Act requires that:

> "interscholastic, intercollegiate, intramural, or club athletics teams or sports that are sponsored by any public secondary school or state institution of higher education … 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." R. at 3-4; N.G. Code § 22-3-16(b).

The statute further provides multiple definitions for relevant terms including:

> ""Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.
> "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.
> "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males." R. at 4; N.G. Code § 22-3-15(a)(1)–(3).

While Title IX and Equal Protection Clause claims may both apply to a particular set of facts, the threshold for establishing liability is "not … wholly congruent." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 247 (2009). Rather, under Title IX "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." 20 U.S.C.A. § 1681 (West). For a defendant to be found liable under Title IX the plaintiff must have (1) been prevented from being involved in the program (discriminated against) on the basis of sex, (2) the educational institution must have been receiving federal assistance at the time of the alleged violation, and (3) the discrimination caused harm. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020).

Discrimination within the bounds of Title IX means treating someone worse than those who are "similarly situated". *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024); *Grimm*, 972 F.3d at 618 (quoting *Bostock v. Clayton Cnty., Georgia*, 590 U.S.

644, 657 (2020)). Emotional or dignitary harm meets the threshold for harm under Title IX. *Grimm*, 972 F.3d at 618.

Given Respondent is the State of North Greene Board of Education, prong two of the Title IX analysis which requires the educational institution to receive federal assistance at the time of the alleged violation is clearly met given the Respondent is a government entity. Thus, that prong will not be further analyzed, rather the first and third prongs are analyzed.

a. Exclusion on the basis of transgender gender identity constitutes sex-based discrimination under Title IX

Title IX prevents discrimination by way of exclusion from educational programs, including sports teams on the basis of sex. 20 U.S.C.A. § 1681 (West); *Grimm*, 972 F.3d at 616. Discrimination grounded in gender identity is considered sex-based discrimination under Title IX. *B.P.J. by Jackson,* 98 F.4th at 563; *Grimm*, 972 F.3d at 616. Laws that treat similarly situated students differently are also in violation of Title IX. *B.P.J. by Jackson* at 563.

An act that treats similarly situated students differently violates Title IX. *B.P.J. by Jackson* at 563. In *B.P.J.*, the state of West Virginia promulgated their states Save Women's Sports Act which stated that sports or sports teams designated for females are not open to males. *Id.* at 550. The act further defined male as "an individual whose biological sex determined at birth is male." *Id.* The plaintiff in *B.P.J.* is a thirteen-year-old transgender girl, who has identified as a girl since she was in third grade and undergone hormone therapy. *Id.* at 551. The plaintiff was prohibited from joining two girls' sports teams at her school. *Id*. The court in *B.P.J.* found that the West Virginia law violated Title IX because the act (1) discriminates based on gender identity, (2) discriminates based on sex at birth, and (3) treats similarly situated students differently. *Id.* at 563. The *B.P.J.* court found that the language of the act only forbids transgender girls from participating on sports teams that conform with their gender identity, not transgender boys. *Id.* Similarly, the

B.P.J. court held that the law treats similarly situated students differently through its outright ban on only transgender girls competing in girls' sports without any exceptions. *Id.* The court in *B.P.J.* held that the West Virginia "Save Women's Sports Act" violated Title IX because it discriminated based on sex at birth and treated similarly situated students differently. *Id.*

An act that discriminates against an individual for their transgender gender identity is said to discriminate on the basis of sex. *Grimm*, 972 F.3d at 616. The relevant policy being challenged in *Grimm* was a bathroom statute that required students to use only the bathrooms that coincide with their "biological gender" (sex at birth). *Id.* at 593. The plaintiff in *Grimm* is a transgender man whose biological sex is female; however, the plaintiff legally changed the sex on his birth certificate to male. *Id.* In analyzing the plaintiff's Title IX case, the *Grimm* court cited the holding in *Bostock v. Clayton County* that held that under Title VII of the Civil Rights Act of 1964 discrimination against transgender or homosexual people is considered "on the basis of sex." *Id.* at 616; *Bostock,* 590 U.S. at 651-652. The policy was held by the Fourth Circuit to be invalid and in violation of Title IX because it discriminated against transgender students and thus discriminated on the basis of sex. *Grimm*, 972 F.3d at 619.

New Greene's Save Women's Sports Act violates Title IX because it treats similarly situated students differently. The language in New Greene's Save Women's Sports Act mirrors that of the West Virginia act from *B.P.J.* Like in *B.P.J.,* where the Save Women's Sports Act for West Virginia defined a male as "an individual whose biological sex is determined at birth," here, the New Greene Save Women's Sports Act also defines male as "an individual whose biological sex is determined at birth is male." R. at 4.; *B.P.J. by Jackson* at 550. Further, like in the act in *B.P.J.* that stated "athletic teams or sports designated for females, women or girls shall not be open to students of the male sex," here, the New Greene act's language is similar stating, "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." R. at 4; *B.P.J. by Jackson* at 563. The language used in the New Greene statute is nearly identical to that language used in the West Virginia statute that was found to violate Title IX.

While the findings in *B.P.J.*, and many Title IX cases, are relatively fact specific, the facts of *B.P.J.,* like the statutory language, are incredibly similar to those here. Like in *B.P.J.,* where the plaintiff was a thirteen year old transgender girl who had been identifying as a girl since she was in third grade and was prohibited from joining her junior high sports teams, here, A.J.T. is an eleven-year-old girl who in the third grade began living as a girl at home and also began using a girl name while living as a girl both publicly and privately. However, one distinct different between A.J.T. and the plaintiff in *B.P.J.* is that A.J.T. has not begun hormone therapy or any puberty delaying treatment. While A.J.T. has not begun puberty delaying treatment that should not matter because A.J.T., at the time of the lawsuit, had not hit puberty and was only eleven-years old as opposed to the thirteen-year-old plaintiff in *B.P.J.* A.J.T. was discriminated against by the Save Women's Sports Act because she was treated differently than similarly situated students just like the plaintiff in *B.P.J.* was.

The Save Women's Sports Act in New Greene discriminates against transgender students in violation of Title IX. Like in *Grimm*, where a policy discriminated against transgender students by not giving them the same rights as their cisgender co-students and the court extended the *Bostock* holding to apply to Title IX claims, here, the Save Women's Sports Act is a policy that discriminates against transgender students and does not give them the same rights as their cisgender co-students and the *Bostock* holding should also be extended to the Title IX claim here. A.J.T. was discriminated against here by not being allowed to play sports that conform with her

gender identity while other, cisgender, students were allowed to play in sports that conform with their gender identity. Thus, this court should apply the *Grimm* holding to the case of A.J.T.

While the present case is similar to *Grimm*, there are some factual differences. Unlike in *Grimm*, where the plaintiff legally changed his sex on his birth certificate to male differing from his sex at birth, here, A.J.T., based on the provided facts, has not legally changed her gender to female. However, that factual difference does not affect the relevance of the *Grimm* case to A.J.T. because like in *Grimm*, where the policy at issue required the students to use bathrooms based on their biological gender, which was their sex at birth, here, the act requires students to participate on sports teams based on their biological gender which is their sex at birth. The plaintiff in *Grimm* legally changing his sex has no bearing on what his biological gender is under the policy. For that reason, the factual difference that the sex of the plaintiff in *Grimm* was legally male, while the sex of A.J.T. here is still legally male, does not matter because the statute in this case, like in *Grimm*, only discusses the biological sex of the individual regardless of their legal sex.

The Save Women's Sports Act in New Greene violates Title IX because it treats similarly situated students differently which violates Title IX. Further, because the act discriminates on the basis of gender identity, which constitutes discrimination on the basis of sex under Title IX.

b. A.J.T. suffered harm by not being allowed to participate on the women's sports teams because she suffered emotional and dignitary harm.

An additional requirement under Title IX is that the discrimination cause harm to the individual. *Grimm*, 972 F.3d at 616. Emotional and dignitary harm constitutes a legally sufficient harm within the bounds of Title IX. *Id.* at 618. Forcing transgender students in schools to use facilities based on their biological sex, rather than their gender identity may constitute harm under Title IX. *Parents for Priv. v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018),

aff'd sub nom. Parents for Priv. v. Barr, 949 F.3d 1210 (9th Cir. 2020); *Grimm*, 972 F.3d at 618; *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018).

Emotional or dignitary harm is sufficient to prove that discrimination caused a plaintiff harm. *Grimm*, 972 F.3d at 618. In *Grimm*, the policy at issue was a bathroom policy that required students to use the bathroom that coincided with their biological sex rather than their gender identity. *Id.* at 593. The school in *Grimm* however, created a separate bathroom for students who had "gender identity issues" and that bathroom, according to the plaintiff, was used only by the plaintiff. *Id.* at 618. The court found the stigma and public perception of the plaintiff being forced to use a separate bathroom rather than the bathroom that aligns with their gender identity constitutes harm under Title IX because it created more public attention around the plaintiff making the plaintiff stand out because of his bathroom usage. *Id.* at 617-618.

Policies that restrict the facilities available to transgender students based on their birth sex cause harm under Title IX. *Doe by & through Doe*, 897 F.3d at 530. In *Doe by & through Doe v. Boyertown Area Sch. Dist.* ("*Boyertown*"), the plaintiffs, a group of cisgender students, opposed a policy that allows transgender students to use the locker rooms and restrooms that align with their gender identity. *Id.* at 524-525. The plaintiffs argued that transgender students should be required to use restrooms and locker rooms that conform with their birth sexes or in the alternative, use single-user bathrooms and locker rooms. *Id.* at 530. The *Boyertown* court found that if transgender students were not allowed to use restrooms that align with their gender identity they would be harmed. *Id.* at 529-530. The *Boyertown* court continued to reason that the policy proposed by the plaintiff that would require transgender students to use bathrooms and locker rooms based on their birth sex or use single-user facilities would be harmful to the transgender students because it would "very publicly brand all transgender students with a scarlet "T"." *Id.* at 530. Thus, a policy that

restricts the ability of transgender students to function within their gender identity creates harm because it publicly "brands" the students which is a cognizable harm under Title IX. *Id.* at 530-531.

The Save Women's Sports Act creates emotional and dignitary harm to A.J.T. violating Title IX. Like in *Grimm*, where the plaintiff was forced to use a separate bathroom rather than the bathroom that aligned with his gender identity, here, A.J.T. is being forced to not participate in sports team that identify with her gender identity. Just like the plaintiff in *Grimm* suffered emotional and dignitary harm from not being allowed to use the bathroom that aligned with their gender, here, A.J.T. is facing that issue as it pertains to sports teams. A.J.T. being forced to compete on teams that do not align with her gender identity create a stigma and public perception that amount to emotional and dignitary harm.

While bathroom bills and sports are clearly different, the holding from *Grimm* should still apply to the present issue of the Save Women's Sports Act. A.J.T. likely suffered emotional and dignitary harm by being singled out and not allowed to play on teams that align with her gender identity just as the *Grimm* plaintiff did as it pertained to the restroom policy. The factual differences of sport versus bathroom should carry no weight here because the result of the policies is the same, emotional and dignitary harm suffered by the plaintiffs which violates Title IX.

The Save Women's Sports Act harms transgender students by disallowing transgender students from participating in sports teams that align with their gender identity. Like in *Boyertown*, where the court reasoned that restricting transgender students to restrooms and locker rooms that align with their birth sex rather than their gender identity causes harm by publicly "branding" or singling out those students, here, the Save Women's Sports act also causes harm in violation of Title IX by publicly branding or singling out transgender students through restricting transgender

students to the sports teams that align with their birth sex rather than their gender identity. An athlete like A.J.T. who openly and publicly identifies as a girl being forced to compete in men's sports solely because her birth sex was male would publicly brand her with the same scarlet T that the court in *Boyertown* was concerned about. Whether the act pertains to sports, or bathrooms like in *Grimm* and *Boyertown*, the result is still the same, transgender students would be harmed by policies that that require them to be grouped with the sex they were assigned at birth and not their gender identity.

Because The Save Women's Sports Act in New Greene harms A.J.T. immensely, it is in violation of Title IX. The Save Women's Sports Act causes emotional and dignitary harm in violation of Title IX by excluding transgender students from sports that align with their gender identity. Additionally, the Save Women's Sports Act causes harm to A.J.T. by singling her and other transgender students out as individuals who are not allowed to participate on teams that are consistent with their gender identity.

II. The Equal Protection Clause Protects Transgender Individuals from State-Mandated Discrimination.

The Equal Protection Clause of the Fourteenth Amendment provides that no state may deny any person within its jurisdiction "equal protection of the laws." U.S. Const. amend. XIV, § 1. In other words, "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause prohibits placing people into different classes and treating them unequally, on the basis of sex, for reasons "wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). If a law seeks to treat distinct groups of people differently, it must do so "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76. Furthermore, "[t]he burden of justification… rests

entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 2275, 135 L. Ed. 2d 735 (1996).

North Greene's act is facially unconstitutional because it violates the Equal Protection Clause of the 14th amendment. The Save Women's Sports Act ("The Act") is unconstitutional by its text alone for three reasons. First, the act cannot claim facially neutral language in the face of legislative intent shows discriminatory purpose. Second, The Act is facially discriminatory towards transgender girls because it mandates unequal treatment amongst those that are similarly situated. Lastly, the Act's use of sex is not limited to avoid unnecessary discrimination that fails to serve the State's compelling interests.

a. North Greene's Act is Discriminatory per its Purpose, Facially Discriminatory, and Discriminatory in Effect.

The "disproportionate effect of official action provides an important starting point" for determining whether a "[discriminatory] purpose was [its] motivating factor." *Crawford v. Board of Education*, 458 U.S. 527, 544 (1982). The presence of facial discrimination "does not depend on why" the policy discriminates, "but rather on the explicit terms of the discrimination." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc*., 499 U.S. 187, 199 (1991). The Court therefore has two separate grounds whereby to find The Act violates the Equal Protection Clause, The Act's effect, and its terms.

1. The Act's discriminatory effect and purpose come together to clearly demonstrate that North Greene's legislature was intentionally targeting transgender girls with The Act.

Discriminatory purpose is evidenced when "a state legislature, selected or reaffirmed 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). Lastly, where a statute's "undisputed purpose — and only effect . . . is to exclude transgender girls

. . . from participation on girls sports teams," that statute discriminates on the basis of transgender status. *B.P.J. by Jackson*, 98 F.4th at 556.

The act in question disproportionately, and exclusively, impacts transgender girls and was passed "because of this effect." *Feeney*, 442 U.S. at 279. Prior to the passage of the "Save Women's Sports Act" the North Greene school athletic rules already "prohibited cisgender men and boys from participating on female-designated sports teams," but no exclusion of transgender athletes was in place. R. at 13. This highlights the fact that the singular effect of The Act was to then place a prohibition on transgender athletes and therefore discriminate on the basis of transgender status. *See Jackson*, 98 F.4th at 556. Where the act only has one effect, on one group, it has a disparate impact by default which allows the Court to inquire as to whether that "[discriminatory] purpose was [its] motivating factor." *Crawford*, 458 U.S. at 544.

Ultimately, because of the prior ban on cisgender men playing in female sports the North Greene legislature signals that it took this course of action because of that adverse effect it would have on transgender girls. Therefore, because North Greene chose to pass legislation with the "bare . . . desire to harm a politically unpopular group," The Act cannot survive the Equal Protection challenge. *Cleburne*, 473 U.S. at 447.

2. The Save Women's Sports Act is facially discriminatory despite its attempts to hide behind allegedly "neutral language."

The Act's classifications are inherently discriminatory against transgender girls because it prohibits their participation on teams categorized as "biologically female," which is defined to exclude transgender girls; thus, The Act fails the Equal Protection challenge.

"Proxy discrimination" occurs when legislation uses "seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Pac. Shores Properties, LLC*

v. City of Newport Beach, 730 F.3d 1142, 1160 (9th Cir. 2013).; *see also Lawrence v. Texas*, 539 U.S. 558, 575, (2003) (finding the criminalization of homosexual conduct violated Equal Protection because that law was an invitation to subject homosexual persons to discrimination).

Where The Act explicitly categorizes male and female sports and their respective participants on the basis of their biological sex, to the exclusion of transgender girls, the use of biological sex serves the purpose of facilitating proxy discrimination. The State cannot claim neutrality where "'[b]iological sex' means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." N.G. Code § 22-3-15(a)(1). And "teams or sports designated for females . . . shall not be open to students of the male sex." N.G. Code § 22-3-16(b)." This goes to ignore that "[a] person's sex encompasses the sum of several biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, and gender identity." *Hecox v. Little*, 104 F.4th 1061, 1076 (9th Cir. 2024). Furthermore, it precisely excludes transgender girls whose gender identity does not align with their sex, whose existence The Act acknowledges when it states, "gender identity serve[s] no legitimate relationship to the State of North Greene's interest in promoting equal athletic opportunities for the female sex." N.G. Code § 22-3-16(c).

The Court cannot ignore that The Act facially discriminates against transgender individuals. By tailoring its definition and use of the term "biological sex" to exclude transgender women and girls from sports by looking "solely [to] the individual's reproductive biology and genetics at birth" The Act is discriminatory in its language and effect. *Id.*; N.G. Code § 22-3-15(a)(1).

b. The Act violates Equal Protection by mandating unequal treatment amongst similarly situated "biological" females.

When starting an equal protection analysis and comparing those discriminated against with those not, "[t]he groups must be comprised of similarly situated individuals who are treated differently so that the factor(s) motivating the disparate treatment can be identified." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). The lower court mistakenly dismisses the Plaintiff's assertion that they are similarly situated to girls on the basis that "Plaintiff essentially makes gender identity the only relevant factor when determining the individuals . . . similarly situated" whereas the lower court would prefer to make genitalia and chromosomes the only relevant factor. R. at 8. However, the transgender girl is similarly situated to females because of more than just gender identity, also because "[they] are in all relevant respects alike" *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

1. Transgender girls are similarly situated to cisgender females.

More than just a shared gender identity appellant and cisgender females share the same societal perception, expectations, and gender roles. Amongst transgender individuals it is common to avoid being known as transgender for reasons like personal safety, managing dysphoria, and social acceptance. Rachel Tomlinson Dick, *Play Like A Girl: Bostock, Title IX's Promise, and the Case for Transgender Inclusion in Sports*, 101 Neb. L. Rev. 283, 315 (2022). When people are unaware that an individual is transgender that individual is then perceived as cisgender. Therefore, a transgender girl is similarly situated to cisgender women not only because of how they personally identify but also because of how they are perceived by society.

Additionally, cisgender females are more similarly situated because only allowing them to play on male teams, as The Act would limit a transgender girl, would likely result in the same negative emotions of embarrassment, isolation, emotional distress, or withdrawal from participation altogether. A cisgender male on the other hand does not experience these issues with

being relegated to only boy teams hence cisgender males are not similarly situated to transgender girls.

Transgender girls are similarly situated to cisgender girls because of more than just their gender identity. Transgender girls also share the same societal perception as cisgender girls by those who are unaware that they are trans. Furthermore, cisgender girls would likely suffer the same negative emotions and dignitary harm as transgender girls from only being allowed to play on the boys' teams. Thus, in all relevant respects transgender girls and cisgender girls are alike and the act fails Petitioner's Equal Protection challenge.

2. Transgender girls are similarly situated to transgender boys.

If this Court disagrees that Transgender girls are similarly situated to cisgender females then the Court should follow the First Circuit's reasoning and posit that they are similarly situated to biological females who identify as boys, those being transgender boys. *See Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (where the plaintiff did not receive the loan application because he was a [biological] man in women's clothing the court offered that a [biological] woman who dresses like a man would be similarly situated). Therefore, the Court must look to The Act's disparate treatment between transgender boys and transgender girls in its analysis of sex-based discrimination.

While the act requires that sports sponsored by any public institution are expressly designated as male, female, or coed, the statute goes on to only ban the participation of males from female sports and does not ban the participation of females from male sports. This means that transgender girls are negatively impacted by The Act while similarly situated transgender boys are not negatively impacted. Therefore, the act fails to overcome Petitioner's Equal Protection challenge.

c. The Act's Prohibitions Fails to Serve the State's Interests.

The Act designates sports teams as one of three categories, all based on biological sex: "(A) Males . . . (B) Females . . . or (C) Coed." N.G. Code § 22-3-16(a). Sports designated as "female[]" are not open to students of the male sex. N.G. Code § 22-3-16(b). And "biological sex" is narrowed to be "based solely on the individual's reproductive biology and genetics at birth." N.G. Code § 22-3-15(a)(1). These terms and metrics, for determining who is prohibited from sports, do not serve the compelling interests of The State.

To pass intermediate scrutiny, the government bears the burden of showing "that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co*., 446 U.S. 142, 150 (1980)). The Equal Protection Clause prohibits placing people into different classes and treating them unequally, on the basis of sex, for reasons "wholly unrelated to the objective of that statute." *Reed*, 404 U.S. at 75-76.

While it is uncontested that equal athletic opportunities and safety are compelling interests, the act does not serve these interests. The lower court came to a different conclusion because of its overly broad generalization that "it is the sex of an individual and not their gender that dictates physical characteristics that are relevant to athletics." R. at 9. Both are equally irrelevant. "Sex" defined as the "reproductive biology and genetics" of an individual are not the immediate cause of the physiological advantage that The Act seeks to address. N.G. Code § 22-3-15(a)(1). Reproductive organs and chromosomes are merely an upstream cause of male puberty, which creates advantages, but male puberty does not necessarily occur for transgender girls because of gender-affirming care and medical interventions. In these instances, transgender athlete's unequal treatment is wholly unrelated to the objectives of the statute.

In the lower court's own analysis, they cite data from the *Adams* case that "studies have shown that these [biological] differences allow post-pubescent males to 'jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster than females' on average." R. at 7 (citing *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 820 (11th Cir. 2022). The lower court acknowledged the inapplicability of these post-pubescent studies to situations where "[p]laintiff has not gone through male puberty" but said nothing to make sense of its use of the misleading statistics other than to state that "[d]efendants' expert opined that often biological boys have a competitive advantage over biological girls even before puberty." R. at 7.

However, Respondent's expert is contradicted by the same study that the lower court relied upon for documenting the advantages of males in sports. That same study acknowledged that "much of the male-female athletic gap does not emerge until around age 12." Jennifer C. Braceras, et al., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports, Indep.* Women's F. & Indep. Women's L. Ctr. 26, (2021).

Additionally, while the *Adams* bathroom case that the lower court relied upon deals with a claim of transgender discrimination, it should be distinguished as an entirely different issue than the one before the Court. The lower court used the Eleventh Circuit for the proposition that "while the . . . policy at issue classifies students on the basis of biological sex, it does not facially discriminate on the basis of transgender status," but the court entirely omits two unique circumstances taken into consideration by the Eleventh Circuit before it came to its determination. *Adams*, 57 F.4th at 809.

First, in *Adams*, the case revolved around bathroom access in a school where "the bathroom options are equivalent to those provided to all students of the same biological sex" but the same

could not be said in the context of sports. *Id*. The sports available to males and females are not the same, with the most noteworthy example being volleyball. Furthermore, the claim that transgender girls are not excluded from participation in sports because they can compete as a boy on the boys' team was debunked by the Eleventh Circuit after being identified as

> "akin to the argument we rejected in *Latta*, that same-sex marriage bans do not discriminate against gay men because they are free to marry someone of the opposite sex. *See Latta*, 771 F.3d at 467 (holding unconstitutional two marriage bans that "distinguish on their face between opposite-sex couples who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized"). *Hecox*, 104 F.4th at 1083.

Second, in the *Adams* case, the court had to consider the fact that "'schools' responsibilities are so great that they can be held liable for their failures to protect students from sexual assault and harassment.'" *Adams*, 57 F.4th at 809 (citing Miami-Dade Cnty. Sch. Bd. v. A.N., Sr., 905 So. 2d 203, 204 (Fla. Dist. Ct. App. 2005)). In the context of The Act, this issue regards only participation in sports, so the Court need not weigh this same consideration.

Ultimately, the lower court correctly notes that "it is undisputed that *after* puberty biological males have physiological advantages over biological females that significantly impact athletic performance." R. at 7 (emphasis added). However, the lower court is misled by the unique circumstances of *Adams* and misuses its data. *Adams* 57 F.4th at 809. Furthermore, the lower court errors in failing to acknowledge that the Act goes too far in applying to those who have not yet or may never go through male puberty, which creates the alleged advantages. R. at 7. Thus, The Act's discrimination is not substantially related to the State's interest and cannot pass intermediate scrutiny.

Conclusion

Under Title IX states cannot designate sports teams for students based on biological sex at birth. The Save Women's Sports Act does precisely that therefore violating Title IX. The Save Women's Sports Act violates Title IX because it discriminates based on gender identity which is considered on the basis of sex for Title IX purposes. Further, the act causes harm to transgender students by causing emotional and dignitary harm by preventing these students from competing on teams that conform with their gender identity.

The Save Women's Sports Act violates the Equal Protection Clause because it intentionally discriminates, treats those similarly situated differently, and fails to serve its compelling interests. First, The Act has the singular impact of only affecting transgender girls. Second, neither of the similarly situated groups, cisgender girls or transgender boys, are banned from teams that align with their identity. Third, where safety and fairness for girls are threatened by the advantages of male puberty, discriminating against those who have not or will not undergo male puberty is unrelated to the State's interests.

Because of the aforementioned, this Court should reverse the Fourteenth Circuit Court of Appeals ruling.

Respectfully Submitted,

/s/ Team 39

Attorneys for Petitioner A.J.T.