No. 24-2020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

A.J.T.,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR PETITIONER

Team 4

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does the State of North Greene's designation of single-sex sports by biological sex which prevents transgender women from participating in State-sponsored women's sports violate Title IX's prohibition on denying protections or excluding participation in federally funded education programs or activities on the basis of sex?
2. Is the State of North Greene's prohibition of transgender women from participating in a State-sponsored school's women sports programs discriminate against sex, thus the Fourteenth Amendment's guarantee of equal protection of the laws as it applies to transgender women?

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CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATUTORY PROVISIONS

Title IX of the United States Code provides in relevant part:

"No person … shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The "Save Women's Sports Act," codified as North Greene Code § 22-3-4 et seq., provides in relevant part:

N.G. Code § 22-3-15(a)

(1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.

(2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.

(3) “Male” means an individual whose biological sex determined at birth is male. As used in this section, ‘men’ or ‘boys’ refers to biological males.

N.G. Code § 22-3-16(a)

Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education, shall be expressly designated as one of the following based on biological sex at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed.

N.G. Code § 22-3-16(b)

Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.

N.G. Code § 22-3-16(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.

STATEMENT OF THE CASE

Factual Summary

In April 2023, the State of North Greene (“State”) passed Senate Bill 2750 (“SB2750”), the “Save Women’s Sports Act,” to limit participation in sports events to the biological sex of the athlete at birth. R. at 3. SB2750, as enacted, prohibits biological males, including A.J.T., from participating in “[a]thletic teams or sports designated for females, women, or girls ... where

selection for such teams is based upon competitive skills or the activity involved is a contact sport." R. at 4. Additionally, it includes the statement that "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration." *Id.* The State asserted the objective of SB2750 was to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing. R. at 4.

Petitioner, A.J.T., is an eleven-year-old starting the seventh grade. R. at 3. Although A.J.T. was assigned the sex of male at birth, she identifies as a girl, including using a girl's name and living as a girl in both public and private. R. at 3. A.J.T. was diagnosed with gender dysphoria in 2022 and has met with a counselor about the possibility of puberty-delaying treatment but has not yet begun puberty or puberty-delaying treatment. R. at 3. While in elementary school, A.J.T. joined the school's all-girl cheerleading team and had no issues practicing and competing with them. R. at 3. A.J.T. intended to continue participating in in school athletics and hoped to join the girls' volleyball and cross-country teams. R. at 3. However, A.J.T.'s school informed her that the Act prevented her from joining either team. R. at 3.

Procedural History

Petitioner filed suit against the State of North Greene Board of Education and State Superintendent Floyd Lawson in the United States District Court for the District of North Greene. R. at 4. The State of North Greene moved to intervene, and the Petitioner amended the complaint to name both the State and Attorney General Barney Fife as defendants. R. at 4-5. Petitioner sought a declaratory judgment that the North Greene Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment and an injunction preventing Respondent

from enforcing Senate Bill 2750. R. at 5. Respondent filed a motion for summary judgment on the Petitioner's claim, which was granted by the District Court. R. at 5. Petitioner appealed to the United States Court of Appeals for the Fourteenth Circuit, which affirmed. R. at 12.

SUMMARY OF THE ARGUMENT

The State of North Greene's "Save Women's Sports Act" is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because its classification of transgender girls does not have a suitable justification and is prohibited by Title IX of the United States Code because it discriminates against transgender girls on the basis of sex, as relates to their gender identity. This Court must reverse the Fourteenth Circuit and enjoin enforcement of SB2750.

SB2750 violates Title IX because it excludes transgender girls from participating in sports associated with their gender identity, treats them worse than others similarly situated, and authorizes, and designates sports teams based on biological sex. Excluding transgender girls from participating in sports with their gender identity is discrimination on the basis of sex because a transgender person's gender identity, is based on the biological sex of that person, and Title IX does not define sex, let alone define it as biological sex. SB2570 discriminates against transgender girls by treating transgender girls differently from cisgender girls. Moreover, the State treats transgender girls worse than transgender boys because the State allows transgender boys to participate in men's sports, while transgender girls cannot participate in women's sports. Finally, North Greene cannot substitute its classification of "biological sex" for that of the undefined "sex" in Title IX. As Title IX explicitly prohibits sex discrimination, and gender and gender identity are derivatives of sex, SB2750 is a violation of Title IX.

SB2750 is unconstitutional according to the Fourteenth Amendment's Equal Protection Clause, which prohibits States from denying any person within its jurisdiction the equal protection of its laws. Courts use a heightened scrutiny standard when applying the Equal Protection Clause to a sex- or gender-based classification, such as the State's classification of transgender girls preventing their participation in women's sports. The State of North Greene must establish an exceedingly persuasive justification for the classification. In attempting to satisfy this burden, the State advances interests in providing equal athletic opportunities for female athletes and protecting the physical safety of athletes when competing. The State's rationale is neither exceedingly persuasive, nor is it rationally related to either interest. First, there is no evidence sufficient to suggest that women and girls lack equal athletic opportunities because of transgender women. Second, there is not a threat to women's safety during sports that justifies a categorical exclusion of transgender women. Instead, the State has a plainly discriminatory purpose of preventing transgender women from possessing the same opportunities as their peers. Because SB2750's definitional criteria constructively discriminate against transgender women only, denying them equal protection of the laws based on sex, it is unconstitutional under the Fourteenth Amendment's Equal Protection Clause.

STANDARD OF REVIEW

In reviewing a grant of summary judgment by the lower court, this Court shall review the record *de novo*. When a court rules on a motion for summary judgment, "all justifiable inferences are to be drawn in [non-movant's] favor." *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

ARGUMENT

I. SB2750 VIOLATES TITLE IX

The Fourteenth Circuit wrongly concluded that SB2750 does not violate Title IX. Title IX provides that "[n]o person … shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX is violated if (1) an individual is excluded from an educational program on the basis of sex; (2) the educational institution was receiving federal financial assistance at the time of the alleged discrimination;[1] and (3) improper discrimination caused the individual harm. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

SB2750 violates Title IX for several reasons. First, it excludes transgender girls from participating in sports that align with their gender identity, which is explicitly sex discrimination, because it is impossible to discriminate against a person for being transgender without discriminating against them based on sex. Second, SB2750 discriminates against transgender girls by treating them worse than others who are similarly situated, by allowing everyone but transgender girls to participate in sports that align with their gender identity. Third, SB2750 causes transgender girls emotional and dignitary harm by denying them meaningful athletic opportunities with members of their sex. Finally, while Title IX authorizes separate-sex sports teams, designating such teams based on biological sex determined at birth goes beyond Title IX's carve-outs.

A. <u>SB2750 Excludes Transgender Girls Based on Sex.</u>

SB2750 violates Title IX because it excludes transgender girls from participating in sports that align with their gender identity. 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

[1] There is no question that Respondents receive federal funding. Thus, this brief will only address the first and third elements of a Title IX claim.

discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Discrimination based on gender identity is discrimination based on sex, and the Fourteenth Circuit erred when it concluded otherwise. R. at 12, n. 10; *see Grimm,* 972 F.3d at 616 ("[T]he discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions."). The State excludes transgender girls based on sex, so the first requirement to show a Title IX violation is met.

In *Bostock v. Clayton County*, the Supreme Court held that Title VII of the Civil Rights Act's prohibition of discrimination "because of sex" includes discrimination based on gender identity as "it is impossible to discriminate against a person for being … transgender without discriminating against that individual based on sex." 590 U.S. 644, 660 (2020). "Because their statutory prohibitions against sex discrimination are similar, the Supreme Court and other federal courts consistently look to interpretations of Title VII to inform Title IX." Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, C.R. Div., Memorandum re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021) (citing *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.,* 482 F.3d 686, 695 (4th Cir. 2007); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001)). The Court should do the same here.

Courts of Appeals have used *Bostock* as support for overturning government discrimination against transgender students. The Fourth Circuit relied on *Bostock* to conclude that a School Board's policy requiring students to use the bathrooms that correlated to the "biological gender" marked on their birth certificate excluded Grimm, a transgender boy, from male restrooms based on sex. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir.

2020). There, the court reasoned that "the Board could not exclude Grimm from the boys' bathrooms without referencing his 'biological gender' under the policy." *Id.* at 616. Grimm's biological sex was a "but-for cause [of] the Board's actions," as the reason for exclusion was Grimm's identity as a transgender boy. *Id.* at 616-17.

SB2750 violates Title IX because it excludes transgender girls based on sex by prohibiting them participating in sports that align with their gender identity. Like the bathroom policy in *Grimm*, the State requires students to participate in sports that correspond to their biological sex determined at birth. R. at 3; *see* 972 F.3d at 616. Consequently, it excludes transgender girls from female sports teams because of their sex as "discrimination based on … transgender status necessarily entails discrimination based on sex." *Bostock v. Clayton Cnty*., 590 U.S. 644, 669 (2020). There is "insufficient evidence to support the assumption that sex can only mean biological sex," despite the Fourteenth Circuit's contention that there is "no serious debate" that Title IX refers to biological sex. *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023); R. at 12-13. As the Seventh Circuit acknowledged, "Title IX does not define sex [and] [d]ictionary definitions from around 1972 (when Title IX was passed) are equally inconclusive." *Martinsville*, 75 F.4th at 770 (citing Black's Law Dictionary, *Sex* (4th ed. 1968) (defining sex narrowly as "[t]he sum of peculiarities of structure and function that distinguish a male from a female organism' and broadly as 'the character of being male or female"); Webster's New World Dictionary, *Sex* (2d ed. 1972) ("defining sex both 'with reference to ... reproductive functions' and broadly as 'all attributes by which males and females are distinguished")).

B. SB2750 Unlawfully Discriminates Against Transgender Girls

SB2750 unlawfully discriminates against transgender girls by only treating transgender girls differently. Under Title IX, "discrimination 'mean[s] treating [an] individual worse than others who are similarly situated." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644,657 (2020)).

Courts across the country have found that "[t]ransgender girls and cisgender girls are similarly situated." *Doe v. Hanover Cnty. Sch. Bd.*, No. 3:24cv493, 2024 WL3850810, at *7 (E.D. Va. Aug. 16, 2024); *see Evancho v. Pine-Richland Sch. Dist.,* 237 F. Supp. 3d. 267, 285 (W.D. Pa. 2017) (determining that the transgender plaintiffs, who "fully identify as girls and are identified by others as girls", were similarly situated to biological girls); *Doe v. Horne*, 683 F. Supp. 3d. 950, 968 (D. Ariz. 2023) (finding that "transgender girls, who have not yet experienced male puberty, play like girls"); *Roe v. Utah High Sch. Activities Ass'n*, No. 220903262, 2022 WL3907182, at *6 (Utah Dist. Ct. Aug. 19, 2022) (rejecting the argument that transgender girls, "biological boys," are not similarly situated to biological girls). In *Doe v. Hanover County School Board*, the court found that the School Board's athletics policy, which required a transgender girl to "to play on a sports team that does not conform with [her] gender identity," treated "similarly situated students different because of their gender identity." 2024 WL3850810, at *7. In that case, cisgender students could play on the team that corresponded with their gender identity, but transgender students were excluded from doing so. *Id.* The Eastern District of Virginia court found that the policy "treats transgender girls differently from cisgender girls, which is–literally–the definition of gender discrimination," because it banned transgender student-athletes from participating on a team that aligned with their gender identities. *See id.* at *8 (citing *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 565 (4th Cir. 2024)).

The Fourteenth Circuit's conclusion that transgender girls "are not similarly situated to biological females for the purpose of athletics," is wrong on both the facts and the law. R. at 11. A.J.T. identifies as a female. R. at 3. She uses a name commonly associated with girls and lives as a girl both publicly and privately. R. at 3. Additionally, A.J.T. has not undergone puberty associated with testosterone.[2] R. at 3. Thus, A.J.T. does not "possess any inherent athletic advantages based on being transgender." R. at 15. A.J.T. lives and identifies as a girl, interacts with others as a girl, and has not yet experienced male puberty, and so she is similarly situated to biological females and should be treated as such. *See Roe v. Utah High Sch. Activities Ass'n*, No. 220903262, 2022 WL3907182, at *6 (Utah Dist. Ct. Aug. 19, 2022); *Evancho v. Pine-Richland Sch. Dist.,* 237 F. Supp. 3d. 267, 285 (W.D. Pa. 2017). However, the State does not treat A.J.T. as a girl. Instead, the State treats A.J.T. worse than biological girls by excluding her, on the basis of her sex, from participating in sports consistent with her gender identity. Similarly, the State treats transgender girls worse than transgender boys by allowing transgender boys to participate in men's sports even though they are biological females under the State's definition. *See* R. at 11. SB2750 is silent as to whether sports designated for men are open to students of the female sex, while specifically proscribing the male sex, which for the purposes of the Code includes transgender girls, from joining "athletic teams or sports designated for females." N.G. Code § 22-3-16(b). Thus, a transgender boy could join male designated sports teams, which would be consistent with their gender identity. The Fourteenth Circuit claimed that transgender girls are not treated worse than their similarly situated peers because transgender girls "may try out for

[2] While A.J.T. has not started puberty delaying treatment, she has discussed the possibility of starting such treatment to "stop[] [her] from going through puberty as a boy." R. at 3; *See Doe v. Hanover Cnty. Sch. Bd.*, No. 3:24cv493, 2024 WL 3850810, at *2 (E.D. Va. Aug. 16, 2024) (granting a preliminary injunction to allow a transgender girl to play women's tennis).

the boys' teams, regardless of how they express their gender." R. at 11. However, the fact that transgender girls are the *only* students who "could not [participate in sports] corresponding with [their] gender" treats them worse than every other student. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020).

Similarly, North Greene cannot rely on its own invented classification, "biological sex determined at birth," to exclude transgender girls from participating in sports that align with their gender identity. R. at 3-4. Neither Title IX nor its implementation regulations define the term "sex." *See* 20 U.S.C. § 1681; 34 C.F.R. § 106.34 (2020). Nevertheless, the Fourteenth Circuit concluded that Title IX uses "sex" in the biological sense because the purpose of the statute was to "promote sex equality" and the "motivation for the promulgation of the regulation was to increase opportunities for women and girls in athletics." R. at 11 (quoting *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993) (internal quotations omitted). This conclusion is incorrect as legislative history and "legislators' expected applications of a statute 'can never defeat unambiguous statutory text." *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 564 (4th Cir. 2024) (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020) (internal quotations omitted). Title IX explicitly prohibits sex discrimination and "because a regulation must be consistent with the statute it implements," the athletic regulation must accord with the statute. *Id.* (citing *Kentuckians for Commonwealth, Inc. v. Rivenburgh,* 317 F.3d 425, 440 (4th Cir. 2003). Therefore, the regulation's allowance for sex-separate sports "cannot override [Title IX's] statutory prohibition against discrimination on the basis of sex." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020). Thus, the Fourteenth Circuit wrongly concluded that Title IX and its athletic regulations permitted the State to exclude transgender girls from participating in sports.

II. SB2750 VIOLATES THE EQUAL PROTECTION CLAUSE

By the execution of its text, SB2750 denies transgender students within the state of North Greene the equal protection of the laws. The statutes impermissibly classify and exclude students from school sports based on their transgender status. On its face, this discrimination fails to substantially relate to any of the cited goals of the legislation under heightened scrutiny or any level of scrutiny. The Court of Appeals' pervasive inaccuracies led it to enter summary judgment against A.J.T. on her equal protection claim. This Court should direct the entry of summary judgment in favor of A.J.T.

A. The Equal Protection Clause Prohibits Unequal Treatment Against a Class of People When the Treatment Fails to Advance Stated Interests

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. That is, "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When considering an equal protection claim, this Court's "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. States may not discriminate against a class of people for an asserted goal that is "arbitrary or irrational" to that classification, nor shall they do so with the "bare . . . desire to harm a politically unpopular group. *Id.* at 446–47 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973). The Equal Protection Clause forbids any statute from treating groups of people differently if the "ground of difference" has no "fair and substantial relation to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971).

B. Heightened Scrutiny Applies to Sex- and Gender-based Classifications

This Court has applied a heightened standard of review under gender-based classifications. *United States v. Virginia ("VMI")*, 518 U.S. 515, 533 (1996). Under heightened scrutiny, "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification." *Id.* at 532-33. "The burden of justification is demanding and [] rests entirely on the State." *Id.* at 533. Higher scrutiny is appropriate because "[gender] generally provides no sensible ground for differential treatment." *City of Cleburne*, 473 U.S. at 440. The justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533.

The Fourteenth Circuit correctly found that heightened scrutiny applies, but the court erred in its analysis by broadening the basis of discrimination present. R. at 6. As the lower court stated, the SB2750 discriminates "on the basis of . . . sex." *Id.* The State justifies its discrimination against transgender women by asserting the purpose of the sex-based discrimination is to provide equal opportunities for female athletes and to protect the physical safety of female athletes while competing. R. at 4. However, these justifications ignore the SB2750's plain language and transparent effect of discriminating explicitly against transgender women by categorically excluding them from female sports. *See* N.G. Code §§ 22-3-4 to -16. As this Court has iterated, "[d]iscrimination based on transgender status necessarily entails discrimination based on sex." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 669 (2020).

Multiple U.S. Courts of Appeals applied heightened scrutiny when adjudicating a sex-based classification. *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 556 (4th Cir. 2024); *Hecox v. Little*, 79 F.4th 1009, 1021 (11th Cir. 2023); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 764 (7th Cir. 2023). The Seventh Circuit held heightened

scrutiny applied to the Martinsville School Board's bathroom access policy, which effectively punished gender non-conformance. *See Martinsville*, 75 F.4th at 768. The Eleventh Circuit applied heightened scrutiny when Idaho used the neutral terminology of "biological sex" as "proxy discrimination" to exclude transgender girls from female sports. *Hecox*, 79 F.4th at 1021. Finally, the Fourth Circuit held that a sports act warranted heightened scrutiny because its *text and effects* impermissibly treated cisgender boys and transgender girls the same. *B.P.J.*, 98 F.4th at 556. Using such language is "just another way of treat[ing] transgender girls differently from cisgender girls." *Id.* The State's SB2750 deserves the same scrutiny because both its text designating sports by biological sex and its effects of discrimination against transgender women only, is another way of discriminating against transgender girls vis-à-vis cisgender girls, without an exceedingly persuasive justification.

C. The State's SB2750 Facially Discriminates Against Transgender People.

i. The State's SB2750 Facially Discriminates Based on Gender Identity

A plain reading of the State's SB2750's text demonstrates discrimination based on transgender status. *See* R. at 4 ("'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 . . . Athletic teams or sports designated for females . . . shall not be open to students of the male sex"). Read together, The State's definitions of biological sex, female, and male–and its requirement that teams be designated based entirely on said definitions–function as a ban on transgender women. Writing a definition with "neutral criteria that are so closely associated with the disfavored group" constructively acts as "facial discrimination against the disfavored group." *Hecox v. Little*, 79 F.4th 1009, 1024 (9th Cir. 2023); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Lawrence v. Texas*,

539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . ."). Section 22-3-16(a) divides sports teams into three categories based on the definition of biological sex from section 22-3-15. Teams are either: "(A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. Code § 22-3-16. Section 22-3-16(b) further prohibits students of the male sex from participating on teams designated for "[f]emales, women, or girls." The mechanism to define "biological sex" is based on an "individual's reproductive biology and genetics *at birth*." *Id.* § 22-3-15(a)(1) (emphasis added). The definitions of the statute are narrowly written to carve out only transgender women from women's sports, and thus are a sex-based classification.

These definitional criteria constructively discriminate against "gender status" because "transgender status [is] inextricably bound up with sex." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660–61 (2020) (holding employers may not fire employees based solely on transgender or homosexual status). This Court in *Bostock* declared "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* The State's explanation that "an individual's biological sex is not determinative or indicative of the individual's gender identity" is contrary to this Court's holding in *Bostock*. N.G. Code § 22-3-16(c). Biological sex determines gender identity, and it is impossible to have one without the other. If a person is born as one sex but later identifies as the other, they are transgender. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020) (explaining "people who 'consistently, persistently, and insistently' express a gender, that on a binary, we would think of as opposite to their assigned sex . . . are transgender.") Individuals then choose teams based on that gender identity, as they always have in North Greene. R. at 13. Yet the State suddenly

decreed that cisgender athletes may continue to compete for teams consistent with their gender identity, while prohibiting transgender women from competing on teams consistent with their gender identity. *See* N.G. Code § 22-3-16(b).

This prohibition is the present case. A.J.T. is a transgender girl who has lived and been recognized as a girl for years following her birth. R. at 3. Administering a statute that groups A.J.T. and others in the same class as cisgender boys treats them differently from cisgender girls because of their transgender status. "Biological sex," as used by the Code, denies the existence of A.J.T.

ii. The State's SB2750 Discriminates Based on Sex

The State discriminates based on sex because only women and girls are subject to disputes on sex. Heightened scrutiny applies when "women and girls are subject to separate requirements for education opportunities which are 'unequal in tangible and intangible' ways from men." *Hecox v. Little*, 79 F.4th 1009, 1021 (9th Cir. 2023) (quoting *VMI*, 518 U.S. at 547) (affirming a lower court's preliminary injunction against a similar Act's enforcement). In *Hecox*, the Ninth Circuit held heightened scrutiny applied when an act only raised questions of sex verification on female teams. *Id.* As the State of North Greene did by enacting SB2750, the State of Idaho in *Hecox* expressly prohibited "students of the male sex" from participating in "[a]thletic teams or sports designated for females, women, or girls." *Id.* at 1027. According to the text of SB2750, all students may play on male teams, but not all students may play on female teams. *Id.* Therefore, the only questions of sex verification arise on teams designated as female. *Id.*

By only precluding access to female teams, both the State of North Greene and the State of Idaho imposed the "risk and humiliation of having [one's] sex 'disputed'" only onto women.

Id. The State of North Greene forces all women to face questions of identity and verification, much like the lived experiences of transgender people. Such unequal treatment warrants heightened scrutiny.

iii. The State of North Greene SB2750's Only Effect is Discrimination Based on Gender Identity

The Fourteenth Circuit ignored the practical discriminatory effect of the State excluding transgender girls from women's sports teams. R. at 7. "Disproportionate effect[s] of official action provides an important starting point for determining whether a [discriminatory purpose was [its] motivating factor." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982). The lower court denied that the State discriminates based on transgender status because it determined the relevant class was the male sex, which contains both cisgender boys and transgender girls. R. at 8. The court did so because it assumed transgender girls are "in all relevant respects alike" to a biological boy. *Id.* at 7 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The record is clear that transgender girls receive different treatment from their supposed counterparts with the introduction of these statutes. R. at 13.

Under the old regime, schools already separated sports by sex in North Greene. "Before the Act's passage, the North Greene school athletic rules prohibited cisgender men and boys from participating on female designated sports teams, but *there were no prohibitions against transgender athletes competing*." *Id.* (emphasis added). The lower court even acknowledged "the record makes clear that, in passing this law, the North Greene General Assembly intended to prevent transgender girls from playing on biological girls' sports teams." R. at 9. A.J.T. does not challenge sex separation in sports, nor would a judgment in her favor prevent North Greene from continuing to maintain separate girls' and boys' teams. *Id.* A.J.T. only requests this court find the

State's redefined sex separation serves only one possible purpose. SB2750 only acts to discriminate against transgender girls. As such, heightened scrutiny applies.

D. The State's Transgender Ban is not Substantially Related to Any of the Proffered Interests

To survive heightened scrutiny, the government must provide an "exceedingly persuasive justification" for SB2750's discriminatory classification. *United States v. Virginia ("VMI")*, 518 U.S. 515, 531 (1996). "The burden of justification is demanding and [] rests entirely on the State." *Id.* at 533. Higher scrutiny is appropriate because "[gender] generally provides no sensible ground for differential treatment." *City of Cleburne*, 473 U.S. at 440. The justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533.

The State offers two proffered interests for prohibiting transgender girls from participating in athletics with their peers. R. at 4. The first is that the State should provide equal athletic opportunities for female athletes. *Id.* The second is to protect the physical safety of athletes when competing. *Id.* Neither the lower court nor North Greene have shown an "exceedingly persuasive justification" that categorically banning transgender girls from all girls' sports substantially advances either interest. *VMI*, 518 U.S. at 531.

i. Categorical Exclusion of Transgender Girls Is Not Substantially Related to Equal Opportunity for Women

The State has not demonstrated any connection, let alone one "exceedingly persuasive," between barring transgender girls from multiple levels of recreational sports and protecting against insubstantial displacement of cisgender female athletes. *VMI*, 518 U.S. at 534. The State's and the lower court's principal arguments depend on misleading constructions of facts and precedent.

First, the lower court incorrectly holds that the Ninth Circuit's precedent permits excluding biological males from female sports. R. at 8. In *Clark I*, the Ninth Circuit held that public high schools could prohibit male athletes from joining women's teams to further the important government interests of "*redressing past discrimination* against women in athletics and promoting equality of opportunity between the sexes." *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n (Clark I)*, 695 F.2d 1126, 1131 (9th Cir. 1982) (emphasis added). The *Clark I* court reasoned that "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Id.*

In this case, the Ninth Circuit's decision in *Clark I* is no more persuasive than it is controlling. The lower court asserts that since, after puberty, cisgender boys have "physiological advantages" over cisgender girls, transgender girls must always hold those same advantages over cisgender girls. R. at 7. However, the critical difference between Clark and A.J.T. is gender identity. *Compare* R. at 1, *with Clark I*, 695 F.2d at 1127. Differences in gender identity lead to different "courses of action, including the commencement of puberty-delaying treatment." R. at 3. Nothing in the record allows North Greene to show that all transgender girls will have gone through or will ever go through endogenous puberty, which would prevent "any physiological changes caused by increased testosterone circulation." R. at 3. Therefore, it is not clear the categorical ban creates "fairness in sports." R. at 10.

Second, there is no reason to believe that transgender women would "displace" cisgender women from sports. *Clark I*, 695 F.2d at 1131. The Seventh Circuit has upheld preliminary injunctions that order schools to grant transgender boys access to boys' bathrooms and boys' locker rooms. *A.C. ex rel. M.C. v. Metro. Sch. Dist. Of Martinsville,* 75 F.4th 760, 764 (7th Cir.

2023). Like Petitioner A.J.T. here, A.C. transitioned at an early age, living as a male in both private and public. *Id.* While the Court of Appeals there refused to express an opinion on how Equal Protection Clause affected the immediate problem of sex-segregated bathrooms in schools, they showed that students should be served by the government when they genuinely need the requested accommodation, and that accommodation is reasonably determined by a demonstrable enduring gender identity with gender-marker changes. *Id.* at 773. Petitioner A.J.T has identified as a girl since an early age, has been diagnosed with gender dysphoria, and attends regular counseling about puberty-delaying treatments. R. at 3. "Much of life reflects social relations and desires rather than instructions encoded in DNA." *Martinsville*, 75 F.4th 760, 775 (Easterbrook, J., concurring). Cisgender women can, and will, continue to be able to participate in sports regardless of the participation of transgender women, "because transgender women represent about 0.6 percent of the general population." R. at 14. Preventing the participation in women's sports by Petitioner is an outright attempt by the State of North Greene to deny Petitioner, and many other transgender girls like her, of her rights based upon her sex, in clear violation of the Equal Protection Clause.

Finally, the evidence is not sufficient to suggest only women and girls must face questions of sex in sports, even on an intramural team, to protect athletic opportunities for females. R. at 7. In *VMI*, this Court held that "'inherent differences' between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for an individual's opportunity." 518 U.S. 515, 533 (1996). When the State of North Greene enacted SB2750, the "Save Women's Sports Act," it included a statement echoing Justice Ginsburg, that "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration." R. at 3. However, as Justice Ginsburg also

wrote, "such classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women." *VMI*, 518 U.S. at 534. This case is that and more. This case deals with a transgender girl, A.J.T., who has been participating in the women's sport of cheerleading at her elementary school, but now wishes to participate in women's volleyball and women's cross country at her middle school. R. at 3. Statutes like SB2750 serve to create legal and social inferiority of transgender women, by forbidding them to participate in sports with their peers. Additionally, by only imposing single-sex female teams, SB2750 solely places the burden of proving one's gender onto a woman. N.G. Code § 22-3-16(b). If a woman does not have the "physical form" associated with being a woman, they will face questions from parents, coaches, opposing teams, and possibly even their own teammates about their identity. *Id.* § 22-3-15(1). If a woman is too fast, they will need their birth certificate. If a woman is too strong, they will need their birth certificate. If a woman does not look like a "woman," they will need to endure the humiliation of providing proof. This statute reinforces "overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533. Only women will be questioned about their legitimacy as women. Such a statute cannot advance the interest of opportunity.

ii. Categorical Exclusion of Transgender Girls Is Not Substantially Related to Safety for Women

North Greene also has not demonstrated an "exceedingly persuasive" connection between barring A.J.T. from girls' sports and protecting the safety of cisgender girls. *VMI*, 518 U.S. at 534. The Code bans transgender women from teams where selection is based on "competitive skill or the activity involved is a contact sport." N.G. Code § 22-3-16(b). The lower court incorrectly held that one injury during a volleyball game permits the categorical exclusion of all transgender women, even in a non-contact sport like cross country. R. at 10. Heightened scrutiny

is not satisfied by a concern rooted in "fears" that have not "materialized" or at the very least been articulated. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 614 (4th Cir. 2020). The lower court failed to articulate how the physical safety of female athletes is implicated by transgender women and girls like A.J.T. participating in cross-country. *See* R. at 10. The reason is simple. Physiological differences between the sexes are not at all related to safety.

Because there is no "exceedingly persuasive justification" for categorically excluding A.J.T. from all girls' sports on the basis of her gender identity as derived from her biological sex, A.G.T. is entitled to summary judgment on her equal protection claim.

E. SB2750 Fails a Rational Basis Review

Although heightened scrutiny applies and resolves this case, the Code even fails a rational basis review. Rational basis requires a statute to have a rational relation to some legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 631–32 (1996). A statute fails rational basis when it has the "peculiar property of imposing a broad and undifferentiated disability on a single named group" and where its "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." *Id.* at 632. In *Romer*, the Court struck down a Colorado constitutional amendment that repealed statutes of local and state entities that barred discrimination based on sexual discrimination. *See id.* at 626. The amendment improperly identified people under "homosexuality, lesbian, or bisexual orientation, conduct, practices or relationships" and denied them protection across any level of government. *Id.* at 624. The stated goal was to "deny homosexuals special rights" by putting them in the "same position as all other persons." *Id.* The Code covers every sport at every level of competition–including intramurals and club teams in high school. R. at 4. North Greene underlined the needs for equal opportunity athletic

opportunities for female athletes. *Id.* However, the mere presence of a transgender girl on one intramural team among does not limit the participation by any cisgender girl. Additionally, North Greene highlighted the importance of protecting the physical safety of female athletes when competing. R. at 4. The mere presence of a transgender girl on a running club poses no possible harm. R. at 14. SB2750 is too "narrow" in its classification and "too broad" in its application. *Romer*, 517 U.S. at 633. All that remains is an animus towards transgender girls, and so SB2750 fails rational basis review.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fourteenth Circuit and enjoin the State of North Greene from enforcing SB2750. This Court should find that SB2750 violates Title IX of the United States Code's prohibition on discrimination on the basis of sex as it treats only transgender women differently from other student-athletes similarly situated. Similarly, this Court should find that SB2750, the "Save Women's Sports Act," violates the Petitioner's rights under the Fourteenth Amendment's Equal Protection Clause as the sex-based classification is unjustified by any proffered State interest.

Respectfully Submitted

Team Four

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