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.*,

Respondent.

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

BRIEF FOR THE PETITIONER

Team 40
Counsel for Petitioner
September 13, 2024

QUESTIONS PRESENTED

I. Whether Title IX prevents North Greene from designating girls' and boys' sports teams based solely on biological sex determined at birth and without regard for gender identity.

II. Whether the Equal Protections Clause prevents North Greene from enacting a statute which seeks to separate boys' and girls' sports teams based on biological sex at determined birth when the statute creates an additional classification based on gender identity.

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FACTUAL BACKGROUND

The Save Women's Sports Act

In April 2023, the North Greene legislature approved the passage of the "Save Women's Sports Act" (hereinafter referred to as the "SWSA" or "the Act"), signed into law by Governor Howard Sprague on May 1, 2023, and codified as N.G. Code § 22-3-4 *et.seq.* (R. at 3). North Greene, through counsel, has asserted that the SWSA is a legislative effort to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." (R. at 3-4.)

To accomplish this, the act commands 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). Once this designation is properly made, the statute provides,"[a]thletic 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).

The Act additionally provides the following set of definitions informing the language in §§ 22-3-16(a)&(b):

> (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).

Finally, the Act conveys, "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).

Petitioner A.J.T.

Petitioner A.J.T. was assigned the sex of male at birth but identified as a girl from an early age. (R. at 3). In 2022, A.J.T. was diagnosed with gender dysphoria. (R. at 3). A.J.T. has since undergone continuous counseling and has considered more drastic medical intervention, including treatment which would prevent A.J.T. from undergoing puberty. (R. at 3). Prior to this diagnosis, however, A.J.T. had openly identified as a girl, began using a name associated with girls, and even competed on her school's all-girls cheerleading squad. (R. at 3). At the commencement of this action A.J.T. was eleven years old, about to commence the seventh grade, and hopeful to participate in the girls' volleyball and cross-country teams. (R. at 3).

Procedural History

A.J.T. was informed that she would no longer be allowed to participate in girls' sports under the SWSA and timely filed this suit, alleging that the Act violates both Title IX and the Equal Protections Clause. (R. at 3). The United States District Court for the Eastern District of North Greene granted summary judgment as to Defendants State of North Greene Board of Education, State Superintendent Floyd Lawson, the State of North Greene, and Attorney General Barney Fife. (R. at 3). A.J.T. appealed. (R. at 3).

On appeal, the United States Court of Appeals for the Fourteenth Circuit, affirmed the district court's grant of summary judgment (R. at 12). The Fourteenth Circuit determined that the SWSA did not violate the Equal Protections clause because the court refused to recognize gender identity as a relevant factor, comparable to biological sex, in the context of sports performance. (R. at 7-8). This analysis informed the court's finding that transgender girls were more similarly situated with biological boys than biological girls. (R. at 6). Applying heightened scrutiny, the Fourteenth Circuit held that the North Greene legislature's framing of "women" and "girls" as based on "biological sex is substantially related to the important government interest of providing equal athletic opportunities for females and protecting the physical safety of female athletes." (R. at 6). Further, the court held that "Title IX does not prohibit a state from having sex-separate sports that limit participation based on the biological sex of the athlete at birth." (R. at 11) (interpreting the use of the word, "sex," in the language of Title IX to only encompass biological sex). A.J.T. appealed to this Honorable Court.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit and hold that North Greene's SWSA designating sports teams based solely on biological sex violates Title IX because it discriminates against transgender women. Under the *Bostock* framework, gender identity discrimination is discrimination on the basis of sex. While *Bostock* dealt specifically with Title VII, this Court should apply the same substantive standards to this Title IX case because courts have routinely used Title VII as a model for Title IX, and the *Bostock* reasoning fits seamlessly–and without contradiction–into Title IX jurisprudence.

When applying *Bostock*, it is evident that North Greene's SWSA discriminates against transgender women under Title IX. The Act treats transgender women worse than others similarly situated because biological women are free to play sports with others who share their gender identity, but transgender women may only play sports with biological men. In fact, transgender women are the only group precluded from participating in sports with individuals sharing the same gender identity. Further, the Act's only function is to preclude transgender women from participating in women's sports. This discrimination causes emotional and dignitary harm to transgender women, which is actionable under Title IX. Accordingly, this Court should reverse the Fourteenth Circuit's ruling and hold that North Greene's statute designating sports teams based solely on biological sex violates Title IX.

This Court should further reverse the Fourteenth Circuit and hold that the SWSA's attempt to separate boys' and girls' sports by biological sex violates the Equal Protections Clause because its language creates a gender identity classification which does not possess a substantial relationship to North Greene's interest in promoting equal opportunities for female athletes. This

language creates an extreme disparity between the treatment of transgender boys and girls, allowing transgender boys to participate in gender affirming medical treatment, including exogenous testosterone, and still compete in female-only sports, while transgender girls are only allowed to play against biological males or not all.

Not only does the SWSA explicitly state that this gender classification has no legitimate relationship with its interest in safeguarding female athletics, but it also opens the floodgates for the widespread use of performance enhancing drugs in female athletics. This court should find that the SWSA's gender identity classification, is not substantially related to North Greene's interest in promoting equal opportunities for female athletes and, thus, violates the Equal Protections Clause.

ARGUMENT

I. NORTH GREENE'S SWSA VIOLATES TITLE IX BECAUSE ITS DESIGNATION OF TEAM SPORTS BASED SOLELY ON BIOLOGICAL SEX UNLAWFULLY DISCRIMINATES AGAINST TRANSGENDER WOMEN.

This Court should overturn the Fourteenth Circuit's ruling that North Greene's SWSA does not violate Title IX because (1) the *Bostock* Title VII applies to Title IX; (2) S.B. 2750 discriminates on the basis of sex; and (3) the statute's discrimination causes harm. First, although *Bostock* ruled on Title VII, Title IX was intended to follow Title VII's substantive standards, and the *Bostock* Court's reasoning properly encompasses Title IX. Second, the SWSA treats women worse than those with whom they are similarly situated, and its sole contribution to North Greene's sporting landscape is the exclusion of transgender women from women's sports. Lastly, the

emotional and dignitary harm caused by the SWSA is cognizable under Title IX. Accordingly, this Court should find that the SWSA violates Title IX.

A. The Supreme Court's Title VII ruling in Bostock applies to Title IX cases.

The *Bostock* decision controls under Title IX for two reasons. First, clear legislative history and the prevalent application of Title VII jurisprudence to Title IX cases demand that the *Bostock* decision applies. Second, the *Bostock* Court's reasoning did not rely on any considerations unique to Title VII. The *Bostock* framework seamlessly fits into Title IX jurisprudence, and this Court should hold the same.

a. Clear legislative history and the prevalent application of Title VII jurisprudence to Title IX cases demand that the Bostock decision apply to Title IX

When Congress enacted Title IX, its provisions were heavily informed by the existence of Title VII. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) (noting that the legislative history of Title IX "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII."); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023).

Accordingly, courts have routinely borrowed from Title VII when deciding unsettled questions of law under Title IX. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *Chisholm v. St. Marys City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 351 (6th Cir. 2020); *Mabry v. State Bd. of Cmty. Colleges & Occupational Educ.*, 813 F.2d 311, 317 (10th Cir. 1987) (noting that "[b]ecause Title VII prohibits the identical conduct prohibited by Title IX…we regard it as the most appropriate analogue when defining Title IX's substantive standards[.]"). More specifically, multiple circuits have held that *Bostock* itself applies to Title IX. *See Hecox v. Little*, 104 F.4th 1061, 1076 (9th Cir. 2024); *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th

542, 563 (4th Cir. 2024); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), *Cert. denied sub nom. Metro. Sch. Dist. of Martinsville v. A.C.*, 144 S. Ct. 683, 2017 L. Ed. 2d 382 (2024).

This Court has not explicitly ruled on what discrimination on the basis of sex means under Title IX, so Title VII's substantive standards should apply. Not only did Congress intend Title VII to function as a guiding principle for Title IX, but courts have also consistently employed Title VII's standards to unanswered questions of law in Title IX cases. Therefore, the Title VII sex discrimination decision in *Bostock* should control this question of sex discrimination under Title IX.

b. The Bostock holding applies to Title IX because the Court's reasoning was not dependent on a Title VII application.

In *Bostock v. Clayton Cnty., Georgia*, this Court held that Title VII's prohibition of discrimination on the basis of sex protects transgender and homosexual individuals. 590 U.S. 644, 650 (2020). The relevant portion of Title VII at issue in *Bostock* states that "[i]t shall be unlawful…for an employer…to discriminate against any individual…because of such individual's…sex[.]" 42 U.S.C. § 2000e-2(a)(1). In evaluating the causal requirement under the statute, the Court found that the terms "on the basis of," "by reason of," "because of," and "on account of" all fell under the traditional "but-for" causation standard. *Bostock*, 590 U.S. at 649-656. Thus, under Title VII, actionable discrimination occurs when an employee would not have been fired "but-for" her sex. *Id.* at 656.

That causal standard, the Court explained, means that sex need only be a motivating factor of the firing decision, not the main cause. *Id.* at 657. The Court concluded that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against

that individual based on sex." *Id.* at 660. The Court's reasoning was based on the language of Title VII itself–not legislative history, policy considerations, or any other extraneous factors. *Id.* at 660-664. The Court provided several examples to prove its logic, illustrating that when a transgender person is discriminated against, a motivating factor for the discrimination is that the person's gender identity does not match their biological sex. *Id.* at 660. Stated another way, the person would not have been discriminated against if their biological sex matched their gender identity. Thus, sex was a motivating factor for the adverse treatment. *Id.*

In the instant case, *Bostock*'s principles should apply because the Court's reasoning seamlessly fits with the language of Title IX. Title IX's wording closely mirrors that of Title VII: "[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…receiving federal financial assistance[.]" 20 U.S.C. § 1681(a). In terms of statutory construction, Title IX is nearly identical to Title VII: both forbid sex to be a but for cause of adverse treatment. Further, nothing the Court relies on in *Bostock* cannot equally apply to Title IX.

The Fourteenth Circuit held that Title IX does not follow the *Bostock* Framework because Title IX provides "express statutory and regulatory carve-outs for differentiating between the sexes," while Title VII does not. R. at 12. While Title IX undoubtedly includes such carve-outs, the Fourteenth Circuit wrongly conflated the terms "discrimination" and "differentiation": one is permitted under Title IX, and the other is not. Differentiation means "to understand or point out the difference in." *Differentiate*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2020). Discrimination, on the other hand, means to treat an individual worse than those who are similarly situated. *Bostock*, 590 U.S. at 657. The Fourteenth Circuit's misguided conflation of these very different terms should not carry weight with this Court.

The Fourteenth Circuit also cited the Eleventh Circuit's opinion in *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.* as a basis for rejecting *Bostock's* framework under Title IX. 57 F.4th 791, 811 (11th Cir. 2022) (en banc). The *Adams* court spent much of its analysis considering whether the term "sex" was ambiguous, and whether gender identity fit within the meaning of that term. *Id.* at 815-818. Finding that "sex" was confined to biological sex, the court held that *Bostock* could not apply, since parts of Title IX and its regulations have specific carve-outs for separate facilities on the basis of sex. *Id.* at 818. The court bolstered its findings by stating that if *Bostock* applied, the validity of sex separated sports teams would be called into question. *Id.* at 817.

There are, however, three monumental problems with the court's ruling. First, the court used its definition of "sex" to distinguish Title IX from *Bostock*, even though *Bostock* defined "sex" in the *exact same terms* as the *Adams* court. Although the plaintiff in *Adams* defined sex to include gender identity, the *Bostock* Court did not, and still concluded that gender identity discrimination is discrimination on the basis of sex. Thus, using the definition of the term "sex" as a basis for differentiation was wholly improper.

Second, the *Adams* court wrongly used certain regulatory carve-outs to read into the meaning of Title IX's text, which led it to the conclusion that *Bostock* did not apply. The court failed to recognize, however, that the meaning of the statute should inform the meaning of the regulations–not the other way around. It is a well settled principle that statutes are controlling over their regulatory counterparts. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 384 (1999). Thus, if *Bostock* applies to Title IX, then Title IX's meaning will surely impact the meaning of the regulatory carve-outs. Instead of following that top down approach, the *Adams* court held that its perceived meaning of the regulations necessarily dictates that *Bostock* does not apply to Title IX.

Lastly, the *Adams* court erred in holding that *Bostock* could not apply because of the perceived consequences that would ensue–namely, that the validity of sex separated sports would be called into question. The Court in *Bostock* stated the following about such "naked policy" considerations:

> But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

Bostock, 590 U.S. at 680-681. Simply put, the implications of a statute cannot trump the plain meaning of it. Thus, the Eleventh Circuit's ruling that negative policy implications bear weight on Title IX's meaning was not proper.

Both the Fourteenth Circuit and Eleventh Circuit's decisions to exclude *Bostock* from Title IX should not be followed by this Court. *Bostock*'s logic was not predicated on anything other than Title VII's express language–language that is functionally equivalent to that of Title IX. Accordingly, this Court should hold that *Bostock* applies to Title IX cases.

Because Title VII is the "most appropriate analogue" for Title IX–due to both congressional intent and courts' repeated application of the same substantive standards–and because *Bostock*'s framework seamlessly fits the language of Title IX, this Court should hold that *Bostock* is the appropriate standard to consider under Title IX.

B. North Greene's SWSA discriminates on the basis of sex in violation of Title IX.

North Greene's SWSA unlawfully discriminates against transgender women for two reasons: (1) the statute treats transgender women worse than those with whom they are similarly situated; and (2) the sole contribution of the statute to North Greene's sporting landscape is to preclude transgender women from competing in female sports.

a. Transgender women are treated worse than those with whom they are similarly situated.

The Act discriminates against transgender women because it precludes them from competing in women's sports. Under Title IX, discrimination means treating individuals worse than others who are similarly situated. *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024).

Many courts have held that transgender individuals are similarly situated to those with whom they share a gender identity. *See Fowler v. Stitt*, 104 F.4th 770, 783 (10th Cir. 2024); *Hecox v. Little*, 104 F.4th 1061, 1073 (9th Cir. 2024); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020); *see also A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023). Further, the Court in *Bostock v. Clayton Cnty., Georgia* acknowledged that transgender status is "inextricably bound up with sex." 590 U.S. 644, 660 (2020). These holdings provide a significant basis for this Court holding that transgender women are similarly situated to biological women.

The Fourteenth Circuit held that transgender women are not similarly situated to biological women because they do not share the same biology. R. at 8. Thus, while the court rebuked the

petitioner for basing its analysis entirely on gender identity–which the petitioner emphatically denies–the court based its analysis entirely on biology. *Id.*

Biology is not irrelevant in determining which individuals are similarly situated, but the analysis must not end there. R. at 15. The Fourteenth Circuit noted that biological men are generally more athletically gifted than biological women, but failed to account for the presence of varying levels of athletic ability among transgender women: some may have tremendous ability, and others may possess very little. The court ignored this reality, and its sweeping analysis merely provides broad generalizations, not particularized insights.

Courts all over the country[1] have begun recognizing transgender women as women in various aspects of public life, yet the Fourteenth Circuit believes that this progress towards equality should stop when it comes to sports. Not only is their logic flawed, but it goes against the very core of what Title IX sought to promote: equal treatment among the sexes. Accordingly, this Court should hold that transgender women are similarly situated to biological women.

Not only are transgender women similarly situated to biological women, but the SWSA also treats them worse than their biological counterparts. The SWSA states "[a]thletic 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). The Fourteenth Circuit held that this statutory language did not violate Title IX because, even if transgender women were similarly situated to biological women, the

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[1] *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), *cert. denied sub nom. Metro. Sch. Dist. of Martinsville v. A.C.*, 144 S. Ct. 683, 217 L. Ed. 2d 382 (2024); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1114 (9th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

statute has everything to do with biology and nothing to do with gender identity. R. at 8. The court stated "the Act does not exclude [transgender women] from school athletics but just designates on which team [they] will play." *Id.*

In *Grimm v. Gloucester Cnty. Sch. Bd.*, the Fourth Circuit considered a very similar situation: Gloucester County School Board passed a school restroom bill that separated restrooms by biological sex. 972 F.3d 586 (4th Cir. 2020). The school board argued the bill did not discriminate against transgender individuals because, although it prevented individuals from using restrooms of the opposite sex, it applied to everyone equally. *Id.* at 609. The court rebuked such logic, stating "[b]ut that is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race." *Id.*

The Ninth Circuit also held that, regarding a school sports statute, limiting participation in women's sports based on biological sex was an "oversimplification of the complicated biological reality of sex and gender." *Hecox v. Little*, 104 F.4th 1061, 1076 (9th Cir. 2024). The court bolstered its stance by pointing to a separate opinion, *Latta v. Otter*, 771 F.3d 456, 467 (9th Cir. 2014), where the Ninth Circuit held that a statute classifying legal couples based on "procreative capacity" discriminated against homosexual couples even when the statute did not mention sexual orientation. *Hecox*, 104 F.4th at 1076. On that basis, the court ruled that the statute treated transgender women worse than biological women. *Id.*

This Court should set aside the Fourteenth Circuit's reasoning and hold consistent with the Fourth and Ninth Circuits. The Act's lack of mention of gender identity does not shield it from the requirements of Title IX. Just as *Grimm* stated, facial discrimination exists even when a statute is artfully crafted; segregating sports teams based solely on biological sex discriminates against transgenders in the same way that racially segregated bathrooms discriminate against people of

color. Further, sports groups defined solely by biological sex oversimplifies the interplay between sex and gender, as stated in *Hecox*, which results in the adverse treatment of transgender women. Therefore, because transgender women are similarly situated to and treated worse than biological women, North Greene's SWSA discriminates against transgender women in violation of Title IX.

b. The sole contribution of the statute to North Greene's sporting landscape is to preclude transgender women from competing in female sports.

Prior to the passage of the Act, North Greene's school athletic rules prohibited "men" and "boys" from competing in women's sports, but there was no prohibition against transgender women competing. R. at 13-14. Given that North Greene's statute also prevents men and boys from competing in women's sports, the only contribution it provides is to exclude transgender women from competing in women's sports. *Hecox*, 104 F.4th at 1076. The act also explicitly mentions gender identity, which shows that transgender women were within the contemplation of the legislature when drafting its discriminatory language. *See* R. at 14.

Further, the Act prevents transgender women–but not transgender men–from competing in sports that align with their gender identity. *See B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024) (holding that a statute preventing transgender women, but not transgender men, from competing in sports corresponding with their gender identity evidenced discrimination). Thus, the only contribution the Act provides to North Greene's sporting landscape is to unlawfully discriminate against transgender women.

The SWSA undeniably discriminates against transgender women. Not only does the statute treat them worse than biological women, but it also contributes nothing more to North Greene's sporting arena other than excluding transgender women from competing in women's sports. Accordingly, this Court should find that the Act unlawfully discriminates under Title IX.

C. The Act's discrimination has caused and will continue to cause harm to transgender women.

Transgender women are profoundly harmed under the SWSA because the it not only treats them worse than others similarly situated, but it also causes emotional and dignitary harm. Under Title IX, once a plaintiff shows discrimination has occurred, he must then show that the discrimination caused harm. "[E]motional and dignitary harm" are legally cognizable under Title IX. *Grimm*, 972 F.3d at 617. In *Grimm*, the court held that the plaintiff showed sufficient harm when he was prevented from using the boys' bathroom, as opposed to neutral restrooms or the girls' restroom. *Id.* The stigma coming from using a bathroom incompatible with the plaintiff's gender identity, the court expressed, was akin to branding him with a "Scarlett 'T'". *Id.*

Similarly, in *B.J.P.*, the Ninth Circuit ruled that a statute requiring transgender women to only compete in boys sports caused significant harm, stating that "offering [plaintiff] a 'choice' between not participating in sports and participating only on boys teams is no real choice at all. 98 F.4th at 551.

Under North Greene's statute, transgender women suffer substantial harm. Not only are they the only group forbidden from playing with those sharing their gender identity, but they also must face the stigma and shame of being excluded from the group to which they belong. Just like in *Grimm*, transgender women under North Greene's statute stand alone as if with a scarlet 'T' branded on them. And just like in *B.J.P.*, they are given the faux-choice of either playing with boys, or not playing at all. On that basis, transgender women unquestionably suffer requisite harm as a result of their unlawful discrimination under Title IX.

This Court should reverse the Fourteenth Circuit and hold that North Greene's SWSA violates Title IX for three reasons. First, legislative intent, judicial interpretation, and the *Bostock* reasoning itself demand that the *Bostock* framework apply to Title IX. Second, the Act discriminates against transgender women (i) by treating them worse than biological women, and (ii) because the statute's sole contribution to North Greene law is the exclusion of transgender women–and transgender women alone–from the sport teams aligning with their gender identity. Lastly, the Act's discrimination has caused and will continue to cause emotional and dignitary harm, which are legally cognizable under Title IX. Thus, this Court should reverse the Fourteenth Circuit's ruling and hold that North Greene's statute violates Title IX.

II. OFFERING SEPARATE BOYS' AND GIRLS' SPORTS TEAMS BASED ON BIOLOGICAL SEX DETERMINED AT BIRTH VIOLATES THE EQUAL PROTECTIONS CLAUSE.

This Court should overturn the Fourteenth Circuit's ruling that North Greene's SWSA does not violate the Equal Protections Clause because (1) the SWSA imposes a sex-based classification; (2) the SWSA further imposes a gender identity classification; and (3) the SWSA's classifications do not possess a substantial relationship with North Greene's legitimate interest in promoting equal opportunities to female athletes. Because the SWSA imposes classifications based on both sex and gender identity, heightened, or intermediate, scrutiny is required for both classifications. Under this level of scrutiny, North Greene's facially discriminatory gender identity classifications cannot be held to be substantially related to its avowed interest of providing safety and equality to female students participating in interscholastic sports. Accordingly, North Greene's SWSA violates the Equal Protections Clause.

A. North Greene's SWSA imposes a sex-based classification.

It is virtually self-evident that a statute seeking to bifurcate interscholastic sports on the basis of biological sex imposes a sex-based classification. However, this determination should be informed by this Court's prior considerations regarding the inherent differences between men and women.

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. This Court has interpreted this Equal Protection Clause as a mandate that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985). Under this rule, state action will be deemed unconstitutional when it creates "arbitrary or irrational" classifications of people out of "a bare desire to harm a politically unpopular group." *Id.* at 446-447 (quoting *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

This Court has acknowledged that, although "supposed" inherent differences between races and nationalities have long been unacceptable, "[p]hysical differences between men and women… are enduring." *Virginia*, 518 U.S. at 533; *see also Ballard v. United States*, 329 U.S. 187, 193 (1946) ("The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."). Our society appreciates these inherent differences between the sexes as "cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Virginia*, 518 U.S. at 533. Under this jurisprudence, a gender, or sex, classification is permissible to "advance full

development of the talent and capacities of our Nation's people." *Id.* However, such a classification may not be used "to create or perpetuate the legal, social, and economic inferiority of women." *Id.*

North Greene's SWSA clearly seeks to impose a classification on the basis of sex. The text of the act explicitly acknowledges the inherent differences between girls and boys and seeks to provide equal athletic opportunities for female athletes. *See* N.G. Code § 22-3-4 et seq. The effect and purpose of the act is to bifurcate interscholastic sports in North Greene between biological males and biological females. Such a bifurcation is necessarily a classification on the students' gender and sex. *See B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 555 (4th Cir. 2024) ("[C]reating separate teams for boys and girls is a sex-based distinction, which triggers intermediate scrutiny under the Equal Protection Clause.").

B. North Greene's SWSA further imposes a gender identity classification.

Because North Greene's SWSA explicitly references gender identity, which demonstrates that the purpose of the act is to categorically ban transgender girls from participating in school sports teams, the statute discriminates on the basis of transgender status.

A state action may not discriminate against classes of people in an "arbitrary or irrational" way or with the "bare . . . desire to harm a politically unpopular group." *City of Cleburne*, 473 U.S. at 446-47. A discriminatory purpose is shown when a state action is selected or reaffirmed "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). Under this inquiry, an official action's "disproportionate effect" is a vital starting point for determining "whether a

discriminatory purpose was its motivating factor." *Crawford v. Board of Education*, 458 U.S. 527, 544 (1982).

The Ninth Circuit, when tasked with evaluating a substantially identical statute, found that the statute in question discriminated on the basis of transgender status facially, purposefully, and effectually, triggering heightened scrutiny. *See Hecox v. Little*, 104 F.4th 1061, 1074 (9th Cir. 2023). There, an Idaho statute required that interscholastic sports be organized into three groups based on the students' biological sex: male, female, and coed. *Id.* at 1071. Further, the statute limited participation in sports designated to females to only those students whose biological sex was determined to be female at birth. *Id.*

In determining that the legislation discriminated on a student's transgender status, the court looked to the legislative history and how the statute classified students based upon biological sex. *Id.* at 1076. This classification was specifically authored to exclude transgender girls so completely that no amount of gender affirming care, including surgery, could ever qualify a transgender female to participate, effectuating a complete ban against transgender female students participating in female sports. *Id.* Further, the court found a discriminatory purpose in the statute's prohibition on "biological males" competing in female sports because the prohibition only served to exclude transgender females. *Id.* at 1077 ("And where a statute's 'undisputed purpose [] and only effect . . . is to exclude transgender girls . . . from participation on girl's sports teams,' that statute discriminates on the basis of transgender status.") (quoting *B.P.J. v West Va. State Board of Education*, 98 F.4th at 556).

Additionally, the court determined that the statute was facially discriminatory despite the neutrality suggested by the term "biological sex" because the criteria was "so closely associated with the disfavored group that discrimination on the basis of such criteria" was tantamount to facial discrimination against the disfavored group. *Id.* at 1078; *see also Lawrence v. Texas*, 539 U.S. 558, 575 (explaining that criminalizing homosexual conduct is an invitation to subject homosexual people to discrimination.); *Latta v. Otter*, 771 F.3d 456, 467-68 (9th Cir. 2014) (holding that a ban on same-sex marriage facially discriminated against homosexual couples where the statute in question sought to classify couples based on their "procreative capacity.").

In the case at hand, North Greene's SWSA fails for similar reasons. From the outset, North Greene's use of the terms "biological sex," "female," and "male," despite their seeming neutrality, are facially discriminatory. The statutory code specifically defines each term relative to "reproductive biology and genetics at birth." *See* N.G. Code § 22-3-15(a)(1)-(3). The following section provides, "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." N.G. Code § 22-3-16(c) (emphasis added).

This second provision proves fatal. Its plain language acknowledges that gender identity is not a separate and distinct classification for students whose biological sex is determinative or indicative of their gender identity. This creates two classes of students: a class for whom gender identity is not separate and distinct from biological sex, whose lives will proceed completely unchanged by this statute; and a class of students for whom gender identity is separate and distinct from their biological sex, who are now potentially barred from participating in a sport reflecting their respective gender identity.

Further, this Act treats varying members of the same class differently. Take, for example, a transgender a boy and a transgender girl. Both are similarly situated as members of the class of students for whom gender identity is a separate and distinct consideration from their biological sex. However, under this statutory scheme, the transgender boy would still be allowed to participate in female sports, as well as male and coed sports, regardless of whether he was taking exogenous testosterone, while the transgender girl would be barred from participating in female only sports. A statute which allows transgender boys to take performance enhancing drugs and compete against biological females and males while only allowing transgender females to compete against boys cannot be said to similarly treat members of the class of students whose gender identity is a separate and distinct consideration from their biological sex.

Lastly, this statute, and its designation of "genetics at birth" is constructed so that no transgender student could ever hope to participate, consistent with their gender identity, in interscholastic sports. The Fourteenth Circuit below adeptly articulated concerns regarding the broad spectrum of biological considerations which could provide a transgender, female student a biological advantage over her biologically female counterparts. However, the "genetics at birth" requirement means that even if a perfect medical intervention existed—which would completely align a female transgender student's biological sex and physiology with her gender identity in all ways quantifiable by science—a transgender student who utilized this procedure would still be barred from competing in women's sports. Such a requirement evinces more than a vague desire to promote the equality of women's sports. It shows a bare desire to exclude transgender students.

C. The SWSA does not pass heightened scrutiny.

In analyzing whether the SWSA can survive heightened scrutiny, this Court need look no further than the statute's explicit language, which provides that "[c]lassifications 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). By the acts' own admission, its classifications, predicated on gender identity, are in no way related to its interest in promoting equal athletic opportunities for the female sex.

When a given state action seeks to impose an official classification based on gender, the State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)); *see also Miss. Univ. for Women*, 458 U.S. at 731 n.17 (explaining that where a "gender-based classification provides one class a benefit or choice not available to the other class… [t]he issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of discriminatory classification is substantially related to achieving a legitimate and substantial goal.

The State's given classification must be "exceedingly persuasive." *Virginia*, 518 U.S. at 533. For a justification to be found to be exceedingly persuasive, it must be "genuine, not hypothesized or invented post hoc in response to litigation" *Id.* Further, the justification may not rely on "overbroad generalizations about the different talents, capacities, or preferences of males

and females." *Id. See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (holding that all gender-based classifications "warrant heightened scrutiny."); *Hecox*, 104 F.4th at 1079 (explaining that "discrimination on the basis of transgender status is a form of sex-based discrimination."); *B.P.J.*, 98 F.4th at 556-57 (analyzing a virtually identical statute and determining that an additional level of heightened scrutiny was warranted where a statute imposed both a classification based on sex and a classification based on gender identity).

Here, the SWSA simply fails a heightened scrutiny analysis. While Petitioner concedes that promoting equal opportunity for female athletes is an important governmental objective, the proposed act's classification—between those for whom gender identity is a separate and distinct consideration from their biological sex, and those for whom it is not—is not substantially related to achieving that goal.

The SWSA makes two classifications. The first classification involves whether a person's gender identity is a separate and distinct consideration from their biological sex. This classification is devoid of any legitimate relationship to North Greene's interest in promoting equal opportunities for female athletes. *See* N.G. Code § 22-3-16(c).

The second classification bifurcates the class of people whose gender is a separate and distinct consideration from their biological into two groups: those whose biological sex assigned at birth is female, and those whose biological sex assigned at birth is male. This classification allows students born as biological females to take performance enhancing drugs and compete against everyone, including biological females competing without the aid of performance enhancing drugs, while only allowing those whose biological sex is male to compete against other

biological males. An act which opens the floodgates or pharmacologically derived inequality in female sports cannot be said to bear a substantial relationship to promoting equal opportunities to female athletes. Accordingly, the SWSA fails heightened scrutiny.

This Court should overturn the Fourteenth Circuit's ruling that North Greene's SWSA does not violate the Equal Protections Clause because (1) the SWSA imposes a sex-based classification; (2) the SWSA further imposes a gender identity classification; and (3) the SWSA's classifications do not possess a substantial relationship with North Greene's legitimate interest in promoting equal opportunities to female athletes. Both classifications warrant heightened scrutiny. Under heightened scrutiny, North Greene's gender identity classifications cannot be held to be substantially related to its avowed interest of providing safety and equality to female students participating in interscholastic sports because it treats transgender boys and girls differently and allows transgender boys to acquire a pharmacologically derived advantage when competing against females. Thus, North Greene's SWSA violates the Equal Protections Clause.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Honorable Court reverse the Fourteenth Circuit and find that the SWSA violates both Title IX and the Equal Protections Clause.

Respectfully submitted,

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