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 THE RESPONDENT

TEAM 41

QUESTION PRESENTED

1. Whether Title IX affords states the option to divide sports teams based on their biological sex determined at birth?
2. Whether a statute that prohibits biological males from competing on athletic teams designated for biological females violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution when the State has the power to afford all persons fair treatment?

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The Fourteenth Circuit's opinion in *A.J.T. v. State of North Green Board of Education, et al.*, 2023-1023 (14th Cir. 2024).

The United States District Court for the Eastern District of North Greene's opinion in *A.J.T. v. State of North Green Board of Education, et al.*, 2023-56789 (E.D. N. Greene 2023).

STATEMENT OF THE CASE

Petitioner, A.J.T., entered middle school in the North Greene public school system prior to the filing of this lawsuit. R. at 3. Though identifying as a girl, Petitioner was born male. R. at 3. While Petitioner has been attending counseling for gender dysphoria since 2022, Petitioner has not taken puberty blockers as part of treatment. R. at 3. Previously, Petitioner participated on a girls' cheerleading team. R. at 3. At the start of the new school year, Petitioner intended to participate in athletics but was unable to join the all-girls' teams because of the enactment of the statute in question. R. at 3.

In May 2023, the State of North Greene enacted the "Save Women's Sports Act." R. at 3. The act distinguishes between biological sex and gender identity, stating, "[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).

> 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).

The goal of the statute is to promote equity and safety by giving every athlete a space to compete with other athletes at the same competitive level. R. at 3. Accordingly, the statute allows for co-ed teams, male-only teams, and female-only teams. R. at 3.

Petitioner sued the North Greene Board of Education and Attorney General Barney Fife, accusing the state of violating Title IX and the Equal Protection Clause of the Fourteenth Amendment, seeking declaratory judgment and an injunction preventing the State from enforcing the statute. The District Court granted summary judgment in favor of the State. The Fourteenth Circuit Court affirmed, finding that the statute did not violate Title IX or the Equal Protection Clause.

SUMMARY OF THE ARGUMENT

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citing *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). This Court should affirm the Fourteenth Circuit's decision because it correctly found that the North Greene statute does not violate Title IX or the Equal Protection Clause of the Fourteenth Amendment.

Title IX requires proof that the petitioner was improperly discriminated against, and that discrimination caused more than *de minimis* harm. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). It is necessary that Petitioner demonstrates she received unequal treatment to those similarly situated to evidence Title IX discrimination. The Court relies upon *Bostock v. Clayton Cnty*. when examining discrimination cases, but this is inappropriate here because the scope is limited to Title VII. 590 U.S. 644 (2020). Petitioner was not discriminated against because Petitioner was not similarly situated to members of the all-girls' teams. Moreover, Petitioner did not endure the lowest level of harm required to recover in a Title IX case because no harm occurred.

The Equal Protection Clause of the Fourteenth Amendment permits legislation with sex-based discriminatory impact if the Government can prove that the legislation promotes an important governmental interest using means that are substantially related to that interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985)**.** Challenges can be either facial, which assert that the challenged legislation is unconstitutional in all situations and have the effect of striking the entire legislation, or as-applied, which assert that the legislation is only unconstitutional in specific applications. *See Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442, 444 (2008)**.** North Greene's statute survives a facial challenge under intermediate scrutiny because it promotes the government's important interests in remediating historical discrimination against women and by protecting women's physical safety. The statute's means of preventing biological males from competing on all-female sports teams is substantially related to these interests. The statute also survives a facial challenge because Petitioner is not similarly situated to biological females.

North Greene's statute does not violate Title IX because it does not create sex-based discrimination but rather promotes equality in athletics. Furthermore, it survives the appropriate intermediate scrutiny standard because the government has an important interest in remediating historical discrimination by advancing fair treatment to a previously oppressed population. This Court affirms that states have a compelling interest in enforcing equality to all persons similarly situated. *Plyler*, 457 U.S. at 216. North Greene's statute ensures that all athletes receive the same equitable treatment when joining a public sports team. This Court should hold that North Greene's statute does not violate Title IX or the Equal Protection Clause.

ARGUMENT AND AUTHORITIES

THE COURT SHOULD HOLD THAT THE NORTH GREENE STATUTE DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST ATHLETES UNDER TITLE IX OR THE EQUAL PROTECTION CLAUSE.

The Court should affirm the Fourteenth Circuit's decision because North Greene's statute does not violate Title IX or the Equal Protection Clause. When the Court reviews summary judgment verdicts, it does so *de novo*. *B&G Enters., Ltd. v. United States*, 220 F.3d 1318, 1322 (11th Cir. 2000); *Thornton v. E.I. Du Pont de Numours & Co.*, 22 F.3d 284, 288 (11th Cir. 1994). The Court "view[s] the facts and all justifiable inferences arising therefrom in the light most favorable to the nonmoving party." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013).

To have a valid claim, Title IX requires a petitioner to prove that they were (1) excluded from an educational program on the basis of sex; (2) the educational institution was receiving federal financial assistance at the time; and (3) "improper discrimination caused harm." *See Grimm*, 972 F.3d at 616 (citing *Preston v. Va ex rel. New River Cmty. Coll*., 31 F.3d 203, 206 (4th Cir. 1994)). The issue of whether Petitioner was discriminated against depends on the question of whether Petitioner was "treated worse than others who are similarly situated." *Grimm*, 972 F. 3d at 618 (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657-58 (2020)). Petitioner was not treated any differently than the similarly situated athletes of North Greene. Moreover, *Bostock* does not apply because the opinion is limited in scope by Title VII. *Bostock*, 590 U.S. at 644. Even if Petitioner was discriminated against, there is no valid cause of action under Title IX because Petitioner was not harmed in any way.

The Court should find that North Greene's statute does not violate the Equal Protection Clause because it is substantially related to the important government interests of remediating

historical discrimination and protecting the safety of females, satisfying intermediate scrutiny. North Greene's statute survives a facial challenge because males and females are not similarly situated in terms of physiology. It also survives an as-applied challenge because Petitioner is not similarly situated to female athletes.

I. THE NORTH GREENE STATUTE DOES NOT VIOLATE TITLE IX BECAUSE IT CREATES EXCEPTIONS FOR SEPARATE SPORTS TEAMS BASED ON BIOLOGICAL SEX.

The Court's definition of discrimination hinges on the issue of whether being similarly situated is contextually specific. In women's sports, the answer is yes. Without discrimination, there cannot be harm. Therefore, because Petitioner did not suffer from any discrimination, there is no valid claim. Even if Petitioner did encounter some form of discrimination, Petitioner must also suffer more than *de minimis* harm to have a Title IX claim. 34 C.F.R. § 106.31(a)(2) (2024). Circuits are split between whether transgender athletes must be allowed to compete on the team most aligned with their gender identity. The Second, Fourth, and Ninth Circuits have gestured that preventing transgender athletes from playing on their preferred teams is discriminatory. *See Soule v. Conn. Ass'n of Schs., Inc.*, 90 F.4th 34 (2d Cir. 2023); *also see, e.g., Grimm*, 972 F.3d at 586; *also see, e.g., Doe v. Horne*, 683 F. Supp. 3d 950 (D. Ariz. 2023). In contrast, the Fifth, Sixth, and Eleventh Circuits held that restricting team membership based on biological sex did not violate Title IX. *See, e.g., Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000); *also see, e.g., Yellow Springs Exempted Vill. Sch. Dist. Bd. of Ed. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651 (6th Cir. 1981); *also see, e.g., D.N. ex rel. N. v. DeSantis*, 701 F. Supp. 3d 1244 (S.D. Fla. 2023).

A. North Greene's Statute Does Not Violate Title IX Because It Does Not Fall Under the Title's Definition of Discrimination.

The Sixth Circuit addresses issues related to sex-based rules in high school athletics, highlighting that Title IX standards differ from constitutional standards. *See Horner v. Ky. High*

Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994). For instance, while Title IX may prohibit certain sex-based exclusions, such as preventing girls from participating in interscholastic contact sports, the Constitution may allow for separate boys' and girls' teams if it serves an important governmental objective. *See id.* at 276. This distinction is crucial in understanding how different courts might approach the issue of transgender athletes under Title IX versus the Equal Protection Clause. Moreover, Title IX allows for the exclusion of males from girls' teams even if there is no comparable boys' team, and vice versa. Courts have interpreted this regulation differently, however, by prohibiting the exclusion of qualified male students from girls' teams when no equivalent boys' team exists. *See, e.g.*, *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993). Courts' discrimination analysis is based on whether athletes were "treat[ed] . . . worse than others who are similarly situated." *Grimm*, 972 F. 3d at 618 (quoting *Bostock*, 590 U.S. at 657). This variability in interpretation underscores the complexity and evolving nature of Title IX applications in the context of gender identity and sports participation.

1. Bostock does not apply to interscholastic athletics because it is limited in scope by Title VII.

Bostock should not be applied in a Title IX context because it is limited by the purview of Title VII, where persons "similarly situated" is drastically different for people in a workplace and adolescents physiologically competing. *Bostock*, 590 U.S. at 657-58. *Bostock* is the standard that lower courts typically rely upon to inform Title IX discrimination cases. However, this is incorrect. *Bostock* does not apply because it concerns workplace discrimination, whereas Petitioner brings a claim alleging athletic discrimination.

The Supreme Court states that Title VII "prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them," referring to gender identity and biological sex interchangeably. *Id.* at 670. The Court also reasoned

that the use of "because of" language is traditional but-for causation, and any reference to sex is the but-for cause of sex discrimination under Title VII. *Id.* at 646.

In an employment situation, this definition of sex is logical because physiology is not relevant to most jobs and is nonconsequential. The workplace is a setting that allows men and women to be valued for their minds, work ethic, and skill, regardless of their gender identity. This, however, is not true for sports. Such view does not work in student athletics because an athlete's value is not just for their mind but also for their physiology.

Title IX also creates carve-outs for differences in sex and gender identity that Title VII simply does not. While Title IX generally prohibits discrimination based on biological sex, it recognizes situations where differentiation is appropriate. For example, single sex organizations like fraternities, sororities, the Boy Scout of America, and Boy or Girl Conferences are allowed to maintain their exclusivity. 20 U.S.C. § 1681(a)(6)-(7). This also includes single-sex schools. *Id.* § 1681(a)(3), (5). The original intent of Title IX regulations recognized that different treatment for different sexes was sometimes necessary to ensure equal opportunities. These regulations acknowledge that single-sex teams are aimed to provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(b)-(c).

Under the 1974 Javits Amendments, the Department of Education allows some inequality between men's and women's teams under Title IX with "reasonable provisions considering the nature of particular sports." 34 C.F.R. § 106.41(b). This amendment's intention is that, if the person is not allowed on a certain team and has equal access to other athletic teams, there is no discrimination. Petitioner can try out for the cross-country team, it is just a matter of whom Petitioner would be competing with. Petitioner also has access to more sports than the biological

girls, namely, football and baseball teams. These teams are in place to compensate for any biological boy's desire to be on the volleyball team.

The Southern District of Florida in *D.N. v. DeSantis* found that Florida's SB 1028 does not violate Title IX due to a carve-out for sex-separated sports teams. 701 F. Supp. 3d at 1265. It reasoned that Title IX creates distinct exceptions acknowledging the biological differences between women and men. *Id.* at 1257. Reinforcing this idea that Title VII and Title IX must be interpreted differently, the court further explains that Title IX does not provide protection for both biological sex and gender identity. *Id.* at 1258.

Petitioner and the North Greene statute almost identically parallel the plaintiff in *D.N.* and Florida's SB 1028. They create distinct categories for each biological sex and a co-ed division. Both Petitioner and the plaintiff in *D.N.* were previously allowed to participate on sports teams consistent with their gender identity rather than biological sex. The change in treatment from the state correlated with the level of play, where biological females would be disadvantaged. The plaintiff in *D.N.*, was even on puberty blockers and estrogen and the court still found that there were unfair advantages to the plaintiff over biological females. *Id.* at 1248, 1256. Further, it found that Title IX expressly allows for state laws to develop exceptions for biological sex. *Id.* at 1256. Based on this analysis, the North Greene statute does not discriminate against Petitioner because biological females would be disadvantaged by Petitioner's addition to the all-girls teams.

2. The North Greene statute is a safeguard to ensure equity for aspiring athletes.

The North Greene statute was designed to afford equal opportunities to all athletes who are similarly situated to each other. It allows them to participate with and compete against peers on an equal playing field. The most equitable solution in this situation is to limit Petitioner to competing

on male or co-ed teams, because it ensures that competing athletes are physiologically similarly situated.

When biological men reach puberty, they develop significantly greater muscular mass, bone density, and testosterone than the average, fully-grown, biological woman. *See generally* Logen Breehl, Omar Caban, *Physiology, Puberty*, National Library of Medicine, (Mar. 27, 2023). The study states that puberty often proceeds in a "less-than-predictable way," and that when and how puberty proceeds vary. *Id.* This factor is uncontrollable in humans unless a child is put on puberty blockers. Petitioner is not on puberty blockers and is therefore similarly situated to boys of the same age. Consequently, if Petitioner competes on the girls' team, Petitioner could begin puberty at any time and receive a physiological advantage over every biological girl on the team.

Petitioner wishes to participate in girls' volleyball and cross country. R. at 3. In volleyball, this may be dangerous because a jump spike may come down much faster and harder in comparison to a biological girl's ability to hit. *See generally* P. X. Fuchs, *et al. Spike Jump Biomechanics in Male Versus Female Elite Volleyball Players*, 37 JOURNAL OF SPORTS SCIENCE 21, pp. 2411–2419. (Jul. 6, 2019). A study done by the Journal of Sports Science reports that male "sub-elite athletes" have "increased approach speed, more dynamic arm swing including upper body lean, and greater lowering of [center of mass] in males compared to females during the volleyball spike jump," which is an entirely different body movement that makes their jump approach much higher and at a different angle than female athletes. *Id.* In short, biological men can jump higher and hit harder than any biological female athlete. *Id.* at 2419.

In cross country muscle mass, bone density, and testosterone may serve as an advantage to Petitioner in accordance with the stamina and speed required by athletes, making it unfair for biological girls. Regardless of a biological girl's athletic abilities, she will never have the same

genetic advantages as Petitioner will have simply from puberty. The Frontiers in Physiology found in a recent study that, out of the top twenty runners, biological men at their lowest were 12.8 percent faster than women and 16.2 percent faster at their greatest gap. Lydia C. Hallam, Fabiano T. Amorim, *Expanding the Gap: An Updated Look into Sex Differences in Running Performance*, 12 FRONTIERS IN PHYSIOLOGY 1, 4 (2022). Immature athletes had even greater gaps in speed. *Id.* Thus, just because Petitioner chose noncontact sports does not mean that there would be no harm or decreased opportunities for female teammates, which Title IX and the North Greene statute are intended to protect.

According to the Notice of Proposed Rulemaking from the Department of Education, limitations on transgender athletes under Title IX must be substantially related to achieving an important educational objective and minimize harms to transgender students. 88 Fed. Reg. 22860 (May 13, 2023) (amending 34 C.F.R. § 106). These limitations may be different across elementary school, middle school, high school, and collegiate levels. *Id.* The criteria for these objectives and standards may not be "overly broad" but must be consistent with the capacities of male and female athletes. *Id.* at 22873.

This standard is consistent with the North Greene statute and Petitioner's experience. Petitioner could participate in elementary girl's cheer with no issue because at that age, education level, and competition level, it is irrelevant whether there are physiological differences between pre-pubescent boys and girls. R. at 3. Elementary schools have team sports to encourage physical exercise, learn effective teamwork skills, and participate in healthy competition. Such activities are important for young children's social development and are not necessarily impacted by physiological differences. In contrast, Petitioner may not participate on middle school girls' teams because of the rapidly increasing differences in competition level, and because of puberty.

Some courts hold that middle-school-aged children are similarly situated based solely on their gender identity. This, however, cannot be the case from a purely scientific standpoint. In *Grimm v. Gloucester Cnty. School Brd*., the court found that not allowing a transgender boy to use the boy's restroom was gender discrimination because he was similarly situated to other boys regarding restroom use. 972 F.3d at 586. The court's statement that "the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender" makes sex a but-for cause of the discrimination. *Id.* at 616. This is consistent with the *Bostock* case, as it refers to matters that do not affect other individuals' rights, but is inconsistent with the present case. Allowing a transgender boy to use the boys' restroom does not harm other boys, just as allowing a transgender person to work does not harm other employees. Allowing a transgender girl to compete against biological girls does harm biological girls.

Petitioner is not the only person affected by the North Greene statute, nor does the statute aim to penalize anyone. Although Petitioner identifies as a girl, she is not the target of this policy. The statute in question and Title IX were created to afford equitable solutions for a class who would otherwise have fewer options in athletics due to their physiology. If this statute is stricken, the only discrimination that would occur would be against a class that must compete for spots on a team with people at a greater genetic advantage, which is precisely the issue here. Although this may appear unfair on its face, it does not violate Title IX because the definition of discrimination requires an individual to be treated differently from those with whom they are similarly situated. *Grimm*, 972 F. 3d at 618. There are different ways that individuals are similarly situated depending on the criteria in a given circumstance. It is only fair that individuals are compared based on their physiology, because physiology is the crux of athletics.

The purpose of the statute is to protect women's sports, not to discriminate against transgender women. Because transgender women are not similarly situated to biological women, it is impossible for biological women to compete fairly, which subverts the legislative intent of Title IX. *See Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014 (7th Cir. 1997). There are many instances in which transgender women outperform biological women, and taking away opportunities such as state titles, scholarships, and collegiate opportunities for biological women would be harmful and a disservice to female athletes everywhere. *See, e.g.*, *Soule*, 90 F.4th at 34. These opportunities were not always available to biological women, and allowing transgender women to compete in women's sports puts transgender women at a significant advantage over biological women, threatening to destroy the entire institution of women's athletics and the very purpose of Title IX.

B. Even If the North Greene Statute Is Discriminatory, It Does Not Cause *De Minimis* Harm Under Title IX.

A cause of action requires a harm for which there is a remedy. *See TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). Under Title IX, the threshold for harm or injury requires more than *de minimis* harm. 34 C.F.R. § 106.31(a)(2); *Alabama v. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994 (11th Cir. Aug. 22, 2024). This Court has identified discrimination as a "concrete, *de facto*, injur[y]." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021). In discrimination cases, the harm is often two parts: "plaintiffs are discriminated against and that discriminatory treatment results in the denial of certain benefits that they would otherwise have enjoyed." *Soule*, 90 F.4th at 46. This standard is almost identical to the standard for Title IX violations but clarifies what the harm must be: the denial of benefits that Petitioner would have enjoyed.

Title IX specifies that adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects

a person to more than *de minimis* harm. 34 C.F.R. § 106.31(b). Any policy or practice that hinders a transgender student from accessing facilities or participating in activities consistent with their gender identity would be considered more than *de minimis* harm and thus prohibited under Title IX, except where statutory or regulatory exceptions apply. *See* 20 U.S.C. § 1681. The Department of Education has clarified that sex separation in certain contexts, such as bathrooms or locker rooms, is generally not considered to impose more than *de minimis* harm. *Id.*; *see Doe*, 683 F. Supp. 3d at 950.

Those special cases for separating transgender students from participating in certain programs through statutory exceptions is the exact niche of the North Greene statute. The purpose of the statute is not to exclude transgender students but to protect fair play. As discussed, limitations on transgender athlete participation should be dependent on the age, education level, purpose of the sport, and level of competition. The purpose of school athletics is to teach children the facets of fair play, competition, and leadership principles. Fair play cannot happen if a single athlete has a significant, uncontrollable biological advantage over other athletes. Allowing transgender athletes to participate on female teams not only banishes females from the winner's circle: it also discriminates against female athletes under Title IX because allowing transgender girls to compete causes more than *de minimis* harm.

The Second Circuit found that biological females had standing to challenge a Connecticut law allowing transgender students to participate on teams consistent with their gender identity. The plaintiffs alleged that the policy denied them equal athletic opportunities and caused them to lose titles and placements in competitions. *Soule*, 90 F.4th at 34. The plaintiffs in this case had concrete and particularized injuries because competing against transgender girls limited their

ability to be on teams, win, and receive scholarships. *Id.* at 56. Concreate and particularized injuries are greater than *de minimis* harm and surpass the threshold for a Title IX claim. *Id.* at 66-67.

Allowing transgender athletes to participate in women's sports creates standing for biological female athletes to pursue equal opportunity claims through Title IX. Once again, North Greene statute exists to protect women's rights, not to exclude transgender athletes. Petitioner here does not have a particularized or concrete injury because Petitioner is not being denied benefits that Petitioner would have otherwise enjoyed. Even though Petitioner could formerly play on a girls' team, Petitioner can still compete on a co-ed or boys' team. This gives Petitioner the benefit of enjoying competition with athletes who are biologically similarly situated. The only benefit Petitioner would miss by competing on boys' teams is a biological advantage over females.

The District of Arizona addressed the Arizona "Save Women's Sports Act," which created a private cause of action against schools for allowing transgender girls to participate on girls' sports teams. *Doe*, 683 F. Supp. 3d at 950. The court ruled that excluding transgender girls from school sports could cause significant social, emotional, physical, and mental health injuries to the plaintiffs. *Id.* The plaintiffs asserted a claim using speculative harm: the alleged injuries did not happen at the time of the suit. Therefore, there was no *de minimis* harm. The *Doe* court uses "would" and "will" regarding injuries asserted to cause emotional and stigmatic harm. *Id.* at 964. This is simply not *de minimis* harm. *Id.* at 964.

There are two key distinctions between Arizona's act and North Greene's. First, Arizona categorically banned transgender women and girls from participating in all sports. Under the North Greene act, there is still opportunity to compete in sports for transgender athletes, either on teams consistent with their biological sex or on co-ed teams. The second difference between the acts is that the court considered imaginary harm to athletes, citing *potential* emotional and stigmatic harm.

Id. Plainly, there is no real injury when the damage stems from potential emotional harm that may never occur. Even if Petitioner does eventually experience some emotional and stigmatic harm, there is no available remedy because these are not considered actual harm. This Court should correct the mistakes of the District of Arizona and recognize that potential harm does not meet the more-than-*de-minimis* threshold. Therefore, this Court should find that the North Greene statute does not violate Title IX.

II. THE COURT SHOULD HOLD THAT THE NORTH GREENE STATUTE DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST TRANSGENDER GIRLS.

The Equal Protection Clause of the Fourteenth Amendment states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. The clause's central goal is to ensure that "all persons similarly situated [are] treated alike." *City of Cleburne*, 473 U.S. at 439.

State legislation that discriminates on the bases of race, national origin, alienage, and religion is treated with strict scrutiny, and stricken unless the State can show that the legislation's classifications are necessarily related to a compelling state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *Plyler*, 457 U.S. at 210–16. The Court applies intermediate scrutiny to sex-discriminatory legislation, requiring that a state show that the legislation furthers an important government interest using means that are substantially related to that interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976). For other classifications, the Court applies rational basis scrutiny, which only requires a State to prove its legislation is rationally related to a legitimate government interest. *City of Cleburne*, 473 U.S. at 441 (1985). Classifications subject to strict and intermediate scrutiny are determined by whether they have "[a]s a historical matter . . . been subject to discrimination," have "obvious, immutable, [] distinguishing characteristics, [] distinguishing characteristics that

define them as a discrete group," by minority status, and by lesser political power. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

An Equal Protection challenge may be either facial or as-applied. *See Wash. State Grange*, 552 U.S. at 444. Facial challenges assert that a piece of legislation violates the Fourteenth Amendment in all circumstances and have the effect of striking a state act entirely, whereas successful as-applied challenges result in narrowly tailored relief. *Id.* at 450. The Court generally disfavors facial challenges because of their broad effects. *Id.* The North Greene statute easily survives both a facial challenge and an as-applied challenge under intermediate scrutiny.

A. The North Greene Statute Is Not Facially Invalid Under Equal Protection Intermediate Scrutiny.

Until now, the Court has never taken up the issue of the applicability of the Equal Protection Clause to transgender individuals in intercollegiate sports and, as mentioned, there is a circuit split.[1] This issue involves sex discrimination resulting from State legislation, so intermediate scrutiny applies.

1. *The North Greene statute remediates historical discrimination and prevents the threat of physical danger to females.*

The North Greene Legislature passed the statute in question for the express purpose of providing equal opportunity in sports competitions to female athletes and to protect female athletes' physical safety. R. at 4. Thus, it aims to remediate historical discrimination against women in sports and athletics and to protect women's physical safety, both of which are important government interests under this Court's precedent.

[1] The cases cited in Section I address both Title IX and the Equal Protection Clause.

This Court has previously held that the government has an important interest in remediating past societal discrimination, and that the Court will strike down legislation that rests upon "old notions" and "'archaic' generalizations". *See Califano v. Goldfarb*, 430 U.S. 199, 210–211 (1977) (citations omitted). Historically, women have been discriminated against in sports. For that reason, separate teams were created to provide equal opportunity to women in athletics. This discrimination is not unique to the United States, nor the modern era, but goes back to antiquity. In ancient Greece, women were barred by law from attending the Olympic Games, under penalty of death by being thrown off of a cliff.[2] While this was changed in 1900 after the Olympics were re-established, the founder of the International Olympic Committee decried the inclusion of women's sports as "impractical, uninteresting, unsightly, and we are not afraid to add: incorrect." Pierre de Coubertin, *Les Femmes Aux Jeux Olympiques*, 79 REVUE OLYMPIQUE 109, 110 (1912) (translated from the original, "Impratique, inintéressante, inesthétique, et nous ne craignons pas d'ajouter: incorrecte, telle serait à notre avis cette demi-Olympiade féminine.").

This societal discrimination has also been part of the American experience. In the nineteenth century, women's sports were not competitive but were recreational "play activities." Richard C. Bell, *A History of Women in Sports Prior to Title IX*, THE SPORT J. (2008), https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/. Eventually, women's sports associations began to form, but institutions did not grant these associations the same status as men's sports. *Id.* After women began to participate in intramural collegiate sports, the Carnegie Foundation still argued that "there should be a way to give 'athletics back to the boys.'" *Id.* The push for women to have access to intercollegiate sporting competitions was a part

[2] Public Broadcasting Service, What the Olympic Games Were Actually Like, https://www.pbs.org/empires/thegreeks/background/2b_p1.html (last visited Sept. 12, 2024).

of the feminist movement of the 1960s. *Id.* Women's rights to participate in sports were not fully guaranteed until Title IX of the Civil Rights Act, and the number of women participating in collegiate and high school sporting events has exploded since its passage. *Id.* Considering this history, it is clear to see that women have faced historical discrimination in the field of athletic competitions. As such, the government has an important interest in rectifying these past discriminations, and some lower courts have begun to recognize this fact. *See D.N.*, 701 F. Supp. 3d at 1253.

It is not a question that this statute has a disparate impact on transgender girls. The statute explicitly defines "male, men, and boys" in biological terms, and then explicitly excludes male participation in women's sports, logically excluding transgender girls from female-only teams. R. at 4. Simple disparate impact, however, does not automatically violate the Fourteenth Amendment. *Reed v. Reed*, 404 U.S. 71, 75 (1971); *Plyer*, 457 U.S. at 243 (1982) (Burger, J., dissenting). This is especially true in cases of sex discrimination, where the Court notes that "physical difference between men and women" are "inherent," "enduring," and are "cause for celebration." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The issue is whether "all persons similarly situated [are] treated alike." *City of Cleburne*, 473 U.S. at 439.

Transgender girls and biological girls are not similarly situated. An individual's gender identity does not change her sex. Sex is unchanging and binary, whereas gender expression is not. Carolyn M. Mazure, *What Do We Mean By Sex and Gender?*, YALE SCH. OF MED. (Sept. 19, 2021), https://medicine.yale.edu/news-article/what-do-we-mean-by-sex-and-gender/. The academic literature shows that biological men have a great physical advantage over females. Depending on the event, males outperform females by ten percent to thirty percent because "men are typically stronger, more powerful, and faster than women of similar age and training status" due to

"fundamental sex differences in anatomy and physiology dictated by sex chromosomes and sex hormones." Sandra K. Hunter *et al.*, *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine*, 8 TRANSLATIONAL J. OF THE AM. COLL. OF SPORTS MED. 1 (2023). Further, the Journal of Sports Science and Medicine has shown, by observing and analyzing the performances of men and women in eighty-two Olympic events, that "[s]ex is a major factor influencing best performances and world records." Valérie Thibault *et al.*, *Women and Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9 J. OF SPORTS SCI. & MED. 214. It specifically found that since 1983, the average gender gap between male and female performances is ten percent, with a difference as high as about nineteen percent for some categories. *Id.*

Further, these biological differences have shown themselves in high-profile cases and examples. One example comes from 2017, when the U.S. women's national soccer team lost to the FC Dallas Under-15 team by five to two. Chantz Martin, *Former USWNT Star Carli Lloyd Admits Losing to Under-15 Boys Team: 'Yes, It's True'*, FOXSPORTS.COM (Nov. 9, 2023), https://www.foxnews.com/sports/former-uswnt-star-carli-lloyd-admits-losing-to-under-15-boys-team-yes-its-true. Another example is the swimming career of Lia Thomas, a transgender woman who competed on the University of Pennsylvania swimming team from 2017 until 2022. In 2022, Thomas won the NCAA Division I 500-yard freestyle race ahead of Emma Weyant, an Olympic silver medallist, despite being ranked sixty-fifth in men's 500-yard freestyle.[3]

These biological differences not only threaten to make females uncompetitive in their own sports leagues, but it also threatens their very safety. If the North Greene statute is overturned on

[3] Katie Barnes, *Lia Thomas Controversy Surrounds NCAA Swimming Championships, Incites National Debate*, ESPN.COM (Mar. 15, 2022), https://www.espn.com/college-sports/story/_/id/33492251/lia-thomas-controversy-surrounds-ncaa-swimming-championships-incites-national-debate.

a facial challenge, then it and all other similar statutes will be struck down across the country, opening all of women's sports, including combat sports, to biological men. *See Wash. State Grange*, 552 U.S. at 451 (explaining that facial challenges are disfavored because they have the effect of striking down legislation). This puts females at real risk of serious bodily injury, the prevention of which this Court has deemed an important governmental interest. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977). That biological men are a serious threat to females in combat is the statistical reality. The Journal of Science and Medicine in Sport has shown that female soldiers on average have fifty percent less upper-body strength and thirty percent less lower leg strength than male soldiers. Esther O. Dada *et al.*, *Sex and Age Differences in Physical Performance: A Comparison of Army Basic Training and Operational Populations*, 20 J. OF SCI. & MED. IN SPORT S68 (2017). Unsurprisingly then, a Journal of Experimental Biology study found that males punch, on average, with 162 percent more punching power than females. Jeremy S. Morris, *Sexual Dimorphism in Human Arm Power and Force: Implications for Sexual Selection on Fighting Ability*, 223 J. OF EXPERIMENTAL BIOLOGY 1, 4 (2020) (evaluating arm crank power between males and females). This physical threat to females is baked into nature. Deciding in favor of Petitioner on a facial challenge exposes females to real, physical harm, which the government has an overwhelmingly important interest in preventing. *See Dothard*, 433 U.S. at 336 (1977) (explaining that protecting women from violence arising from their comparatively lesser physical strength is an important government interest.)

Males do not generally outcompete females by accident: the disparate performance between males and females are based upon real biological differences, which threaten to destroy women's sports as a category. Justice John Paul Stevens put it succinctly: "[w]ithout a gender–based classification in competitive contact sports, there would be a substantial risk that boys would

dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor v. Board of Ed. of School Dist. 23*, 449 U.S. 1301, 1307 (1980). Female athletes have been discriminated against since the time of the Ancient Greeks, and only recently has this been rectified. To allow biological boys to compete in women's sports not only threatens to do what the Carnegie Foundation wanted to do, but it also threatens the very physical safety of young females and biological girls in athletics everywhere. From this, it is clear that the government has an important interest in protecting women's sports, both to rectify the historical discrimination against women, and to protect their physical safety.

2. *The North Greene statute's exclusion of biological males is substantially related to the government's interest.*

North Greene's exclusion of biological men from women's sports is substantially related to the objective of protecting women's sports. Substantial relation is determined by whether the means employed by the legislation is effective in furthering that goal. *See M. v. Superior Court*, 450 U.S. 464, 473 (1981) (holding that a statutory rape law penalizing only men furthered the interest of preventing unmarried teenage pregnancies by deterring male perpetrators); *Tuan Anh Nguyen v. I.N.S*, 533 U.S. 53, 61 (2001) (upholding a statute creating more stringent citizenship requirements for illegitimate children born abroad to American fathers because it furthered the goal of ensuring biological parent-child relationship). The Fourteenth Amendment does not mandate "that a statute necessarily apply equally to all persons" or require that "things which are different in fact . . . be treated in law as though they were the same." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966) (quoting *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940)). This, however, does not give the State a free pass to haphazardly discriminate against different classes. The State cannot discriminate "on the basis of criteria wholly unrelated to the objective," and any classification must be non-arbitrary and based on real differences. *Reed*, 404 U.S. at 75-76.

It is abundantly clear that the present statute furthers the State's goal. The State aims to protect equal opportunity in sports and the physical safety of women. Scientific data consistently proves that physiological differences between biological males and females give males both an upper hand in competitive athletic events and threatens the physical safety of females. To accomplish this goal, the State must prevent biological males from performing on all-female sports teams.

On top of this, the statute does not deny the free expression of gender identity to transgender women and girls because these persons are not limited strictly to playing on men's and boys' teams. While the statute does prohibit biological males from competing on women's teams, it also allows for co-ed or mixed teams. N.G. Code § 22-3-16(a)-(b). By competing on co-ed teams, transgender women are not automatically identified with a particular sex or gender expression. Thus, they have a legitimate outlet to express their preferred identity. In other words, if transgender women are on female teams, they express their identity while maintaining an unfair advantage over and physically threatening female competitors. If they compete in co-ed sports, however, transgender women do not necessarily have an advantage over other competitors and can *still* express their preferred gender identity.

The North Greene statute has the intended purpose rectifying historical discrimination and protecting the physical safety of female athletes, both of which are important governmental interests. These interests are furthered by the exclusion of biological males from female sports and is thus substantially related to the government's important interest. Biological males and females are not similarly situated, so the disparate treatment of transgender women is not disqualifying under the Fourteenth Amendment, and the North Greene statute is constitutional under Equal Protection intermediate scrutiny.

B. The North Greene Statute Survives an As-applied Challenge Under Intermediate Scrutiny.

The North Greene statute also withstands an as-applied challenge. An as-applied challenge "does not speak at all to the substantive rule of law necessary to establish a constitutional violation," *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019), but only to "the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy.'" *Id.* (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)). The North Greene statute does not violate Petitioner's Fourteenth Amendment rights, and holding that it does would create hardships for other similarly situated persons attempting to be exempt from the law.

Petitioner would only be exempted from the broader application of the law by the fact that, though assigned male at birth, Petitioner has neither undergone puberty nor begun gender-affirming hormone therapy. R. at 3. If prepubescent boys and girls do not have substantial performance differences, or if hormone therapy and puberty blockers removed the advantage that biological boys have over girls, then these classes would be similarly situated and the statute would be unconstitutional. *City of Cleburne*, 473 U.S. at 439. It cannot be shown, however, that prepubescent boys perform at the same level as prepubescent girls. When tested for strength, speed, aerobics, agility, flexibility, and balance, prepubescent boys still outperformed prepubescent girls in all categories except for flexibility and balance. Carlos C. Marta *et al.*, *Physical Fitness Differences Between Prebuscent Boys and Girls*, 26 J. OF STRENGTH & CONDITIONING RSCH. 1756 (2012). Petitioner, who was prepubescent at the time of filing, seeks to compete in girls' volleyball and cross country. R. at 3. These sports require strength, speed, and agility. Petitioner therefore still maintains an inherent natural advantage over prepubescent female competitors. There is also not enough statistical data to establish whether puberty blockers actually remove biological advantages afforded to transgender girls.

Further, the resulting policy implications would be burdensome upon those children that this carve-out is intended to protect. First, it would require school administrators and coaches to inquire into the sensitive medical history of each athlete. They would need to determine whether the athlete has begun puberty, how early into puberty the athlete is, the extent to which the athlete is receiving gender-affirming care, and other medical information relating to the sexual development of the child. In fact, this has already happened. *See Hecox v. Little,* 104 F.4th 1061 (9th Cir. 2024). While it is neither unreasonable nor uncommon for school-aged athletes to undergo routine physicals, a routine physical is a far cry from inquiring into the sexual development of a child. Such would be an intense invasion of privacy that itself would deter some transgender girls from enrolling in school sports all together.

Second, this would also expose students to unnecessary embarrassment. Not all transgender people decide to seek out hormone therapy. Indeed, Petitioner has not, as of filing, elected to do so, and may never decide to do so. R. at 3. If Petitioner is allowed to compete because of prepubescence, never takes puberty blockers, and is then disqualified after hitting puberty, then the onset of Petitioner's puberty and decision not to take hormone treatment become public knowledge. Petitioner's private life would be broadcast to the entire school upon removal from the girls' teams. Even if Petitioner does eventually take puberty blockers, that medical decision is also broadcast because Petitioner would be allowed to compete. If the Court creates a narrow exception to allow transgender girls who are prepubescent or on puberty blockers to compete in girls' sports, it is very likely to not only disclose sensitive medical information to school faculty, but also to the entire student body and perhaps even the entire population of North Greene.

Third, if the Court wishes to carve out an exception for children on puberty blockers, it runs the risk of putting undue pressure on the parents of transgender girls to hastily start hormone

therapy. Since puberty could begin anywhere from age nine to fourteen, and the onset of puberty would disqualify transgender athletes, parents whose children wish to participate in sports teams aligning with their gender identity may rush through preliminary treatments and try to begin puberty blockers as quickly as possible. This would incentivize reckless medical treatment that not only may be inappropriate for the child in question, but for what is potentially a short-term stint in elementary and middle school athletics. Further, if Petitioner has not yet hit puberty, this exception would be irrelevant to the case regardless.

While it may seem that the threat to physical danger is not present in volleyball and cross country, this is not accurate. There are serious risks of danger in volleyball. According to Current Reviews in Musculoskeletal Medicine, there exists a surprising risk of concussions in volleyball. *See* Warren K Young *et al.*, *Epidemiology of Common Injuries in the Volleyball Athlete*, CURRENT REVS. IN MUSCULOSKELETAL, 229, 232 (2023). Volleyball has the highest rates of concussions "amongst limited-contact sports including softball, swimming/diving, and baseball." *Id.* Considering the already significant risk of concussions with the higher average strength of a prepubescent boy, it is evident that allowing biological boys to compete in volleyball exposes girls to countless avoidable head injuries.

Transgender girls are only similarly situated to biological girls if it is shown that prepubescent biological boys have no natural physical advantage over biological girls, or that undergoing hormone therapy erases any natural physical differences. Not only can neither of these be conclusively shown, but the opposite can be shown. Carving out an exception for transgender girls who are prepubescent or on puberty blockers risks violating their privacy and exposing them to embarrassment. Further, if Petitioner has not begun hormone therapy, the exception for transgender girls on puberty blockers is irrelevant. Thus, the North Greene statute survives an as-

applied challenge and does not violate the Equal Protection Clause. Accordingly, the statute should be upheld by the Court.

CONCLUSION

For the foregoing reasons, we respectfully request this Court to AFFIRM the Fourteenth Circuit Court's judgment.

Respectfully Submitted,

s/ Team 41

Attorneys for Respondents