Docket No. 24-2020

IN THE

Supreme Court of the United States

A.J.T.,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the

United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

TEAM NO. 42

Counsel for Respondent

ISSUES PRESENTED FOR REVIEW

I. Does a State law violate Title IX when it assigns student-athletes to sports teams based on their biological sex given that Title IX expressly allows for sex-segregated sports and only prohibits discrimination on the basis of biological sex?

II. Does a State law violate the Equal Protection Clause when it protects female athletes by preventing biological males from competing on girls' sports teams?

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The Fourteenth Circuit's opinion is *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765 (14th Cir. 2024). The Eastern District of North Greene's opinion is *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023).

CONSTITUTIONAL AND STATUTORY PROVISIONS

See APPENDIX

STATEMENT OF THE CASE

I. FACTUAL HISTORY

On May 23, 2023, the State of North Greene's (the "State") Governor Howard Sprague signed the "Save Women's Sports Act" (the "Act") into law. R. at 3. The asserted objective of the Act is to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." R. at 4. The act offers definitions of "biological sex," "male," and "female" based solely on an individual's reproductive biology and genetics at birth. R. at 4. Importantly, the act requires "[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" to be designated as male, female, or co-ed, and to restrict access to each team based on biological sex as defined. R. at 4.

At the time the underlying suit was initiated, A.J.T. ("Petitioner") was an eleven-year-old prepubescent transgender girl. R. at 3. Petitioner's school receives federal funding. R. at 5 n.4. Under the Act, Petitioner—as well as other transgender girls—are unable to join female-designated sports teams despite identifying as females. R. at 3. Petitioner was diagnosed with gender-dysphoria in 2022, and has not undergone any puberty-delaying treatments. R. at 3.

Petitioner has conceded that the State's goal of providing equal athletic opportunity to females is an important government objective. R. at 9. Further, Petitioner admits that the creation of sex-separate sports teams is substantially related to furthering that objective. R. at 9. Petitioner's stated objection to the Act is that transgender girls should be allowed to participate on female-only sports teams because their gender identity matches that of cisgender girls. R. at 9

II. PROCEDURAL HISTORY

In the District Court of the State of North Greene, Petitioner, sued State of North Greene Board of Education, State Superintendent Floyd Lawson, the State of North Greene, and Attorney General Barney Fife (the "Respondent") for violating Title IX and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. R. at 3. Petitioner brought the claim because she could not participate in sports consistent with her gender identity. R. at 3. The Respondent moved for summary judgment, Petitioner moved for a permanent injunction, and filed a motion for summary judgment on her claims. R. at 3, 5. The District Court held for the Respondent and granted summary judgment denying the injunction and finding that the Act did not violate Title IX or the Equal Protection Clause. R. at 3, 5. Petitioner appealed the lower court opinion. R. at 5.

The United States Court of Appeals for the Fourteenth Circuit (1) affirmed the District Court's properly granted summary judgment and (2) found the Act did not violate Title IX or the Equal Protection Clause. R. at 3. The Court of Appeals found the Respondent on both issues. First, the Act did not violate the Equal Protection Clause because the Act segregates sports based on biological sex is substantially related to the important government interest of (1) providing equal athletic opportunities and (2) protecting the physical safety of female athletes when competing. R. at 10. Second, the Act did not violate Title IX because the Act did not

discriminate on the basis of sex. R. at 12. The Supreme Court of the United States granted Petitioner's petition for a Writ of Certiorari. R. at 17.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decision because it correctly found that the Act does not violate Title IX or the Equal Protection Clause. The Act is lawful because Title IX allows for sex-designated sports teams, and assigning student-athletes to teams according to their biological sex is not prohibited discrimination. Further, the Act is lawful under the Equal Protection Clause because it survives intermediate scrutiny by being substantially related to an important government objective.

This case is about acknowledging that sport, athletic performance, and physical competition are wholly separate from employment and cultural liberties. Because of this, innovative and modern frameworks developed to mitigate long-standing inequalities related to employment, marriage, or culturally-based stereotypes are inadequate tools to resolve the present issues. Female-only sports teams–also an innovative and modern concept developed to address long-standing sex-based inequalities–face a potential erosion of relevance if these related but incompatible frameworks are bent and forced into service interpreting the issues before this Court. Female-only teams, legally created by Congress and culturally endorced by society, should remain free of unfair interference from biological males by affirming the lower court's decision related to the Act, Title IX, and the Equal Protection Clause.

First, under Title IX, "sex" unambiguously means biological sex because at the time Title IX was enacted in 1972, "sex" meant biological sex. Additionally, the context provided by the exceptions to Title IX's prohibitions on discrimination shows that Congress intended "sex" to mean biological sex. However, if "sex" means gender identity, the exceptions to Title IX's prohibitions on discrimination would become meaningless. Even if this Court finds the meaning

of "sex" ambiguous, the purpose of Title IX shows that "sex" means biological sex because Title IX prevents discrimination against biological females in education. Finally, all similarly situated student-athletes are treated the same because transgender female athletes are similarly situated to biological males, and an equal selection criterion applies to every athlete without animus.

Second, under the Equal Protection Clause, the Act is lawful because its sex-based team designations are substantially related to the State's important stated objective of providing safe opportunities for female athletes. Unequal treatment based on the classification of biological sex is lawful because athletic performance between these two sexes is unequal. Because athletic performance is the most relevant criteria in sports, and because the average biological male is more athletic than the average biological female, prohibiting all biological males from competing on women's sports teams is substantially related to women's safety and access to opportunities.

Accordingly, this Court should affirm the Fourteenth Circuit and hold that the Act does not violate Title IX or the Equal Protection Clause.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, drawing all reasonable factual inferences in favor of the nonmoving party. *Hixson v. Moran*, 1 F.4th 297, 302 (4th Cir. 2021). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994).

ARGUMENT

I. THE ACT DOES NOT VIOLATE TITLE IX BECAUSE IT PROPERLY DESIGNATES SPORTS TEAMS ON THE BASIS OF BIOLOGICAL SEX AND TREATS ALL SIMILARLY SITUATED STUDENT ATHLETES THE SAME.

Title IX states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The Education Amendments of the 1974 Act directed the Department of Education (the "Department") to add carve-outs in Title IX that allow discrimination on the basis of sex. Pub.L. No. 93–380, § 844, 88 Stat. 484, 612 (1974); 34 CFR § 106.41 ("The Athletics Regulation"). The Athletics Regulation allows for separate sports teams on the basis of sex where selection for such teams is "based upon competitive skill or the activity involved is a contact sport." 34 CFR 106.41(b). The Athletics Regulation further clarifies that activities receiving funding must "provide equal athletic opportunity for members of both sexes." § 106.41(c). The Athletics Regulation allows a State to create competitive sports teams for each biological sex. § 106.41(b)

To successfully claim a statute violates Title IX, Petitioner must prove (1) that they were excluded from an educational program on the basis of sex, (2) such discrimination was improper and caused harm, and (3) such program receives federal funding. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

Here, the State passed the Act to allow State-sponsored sports teams to be male, female, or co-ed. N.G Code § 22-3-16(a). The State assigns athletes to teams based on their biological sex determined at birth. *Id*. Under the Act, biological females must participate in female or co-ed teams, while biological males must participate in male or co-ed teams. Transgender males may participate in male teams; however, transgender females may not participate in female teams. N.G Code § 22-3-16(b).

The Act does not violate Title IX because (1) assigning student-athletes to teams according to their biological sex is lawful because "sex" means biological sex and (2) such assignment is proper because all similarly situated student-athletes are treated the same.

A. Under Title IX, "sex" means only an individual's biological sex determined at birth.

This Court should enforce the plain and unambiguous meaning of "on the basis of sex" according to its terms. *King v. Burwell*, 576 U.S. 473, 486 (2015).

"Sex," under Title IX, means biological sex because of the (1) meaning of the statutory text and (2) legislative purpose of Title IX. Furthermore, the Department's interpretation of "sex" is irrelevant, and *Bostock* does not apply to Title IX.

1. The textual interpretation of "sex" means biological sex determined at birth.

The textual interpretation of "sex" in Title IX unambiguously permits assigning student-athletes to teams based on their biological sex because of the (1) plain meaning of the text and (2) context provided by the surrounding code.

i. The plain meaning of "sex" is biological sex determined at birth because its meaning was fixed when Title IX was enacted.

This Court must presume that Congress intended for the text of Title IX to provide its meaning. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The meaning of "sex" is best understood by the ordinary public meaning of the term in 1972, when Title IX was enacted. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020). The text of Title IX best represents the law adopted by Congress and approved by the President. *Id*. The use of extratextual sources and normative interpretations of statutory text impermissibly amend the text in a manner exclusively reserved for the legislative process. *Id*. at 654-55.

The plain meaning of "sex" is the traditional concept of biological sex, where there are only two sexes, male and female. *Kansas v. U.S. Dep't of Educ.*, No. 24-4041-JWB, 2024 WL 3273285, at *8 (D. Kan. July 2, 2024); *Grimm*, 972 F.3d at 655 (finding when Title IX was enacted in 1972, the term "sex" meant the biological distinction between males and females, particularly concerning physiological differences); *Bostock*, 590 U.S. at 655 (assuming that "sex" in Title VII referred only to the "biological distinctions between male and female"). Since the meaning of "sex" is plain and unambiguous, the Court does not need to consider other canons of statutory interpretation. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (finding this Court's inquiry begins and ends with the statutory text if the text is unambiguous).

When Congress enacted Title IX in 1972, reputable dictionaries defined "sex" as a biological distinction, referring specifically to the physical differences between males and females. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 821 (11th Cir. 2022). The 1970 American College Dictionary defines "sex" based on biology and reproductive function. *See* Female, American College Dictionary (1970) ("a human being of the sex which conceives and brings forth young; a woman or girl"); *see* Male, American College Dictionary (1970) ("belonging to the sex which begets young, or any division or group corresponding to it").

Gender identity is a modern concept that refers to an individual's sense of gender, which may or may not differ from the sex assigned at birth. *See* 89 Fed. Reg. 33809. When Congress enacted Title IX in 1972, gender identity did not have an ordinary meaning. *Bostock*, 590 U.S. at 715 (J., Alito, dissenting) (noting the term "gender identity" first appeared in an academic article in 1964 and was not in common parlance until the 1980s). The rigid binary definition of biological sex is incompatible with the concept of gender identity because one cannot choose the sex they are assigned at birth. For example, in the present case, Petitioner was born male and

remains male biologically, though they now identify as female. Despite this gender identity, their "sex" is still male. These definitions show that when Congress prohibited discrimination on the basis of "sex" in Title IX, it meant biological sex, not gender identity. *Adams,* 57 F.4th at 812.

Therefore, the ordinary meaning of "sex" means only biological sex.

ii. "Sex" means biological sex because of the context of the surrounding code.

The context provided by the surrounding code shows that Congress intended "sex" to mean biological sex. *King,* U.S. at 486 (finding statutory text is not to be read in isolation but in the context provided by the surrounding code). This Court should interpret Title IX as a whole, giving each provision meaning and without rendering any language meaningless. *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (finding each requirement in a racketeering statute had independent meaning because each served a distinct purpose not covered by the other law provisions).

The context provided by the exceptions to discrimination "on the basis of sex" in § 1681 shows that Congress intended "sex" to mean only biological sex, not gender identity. Title IX presumes two classes based on sex— males and females— requiring equal treatment of each "sex." *Adams*, 57 F.4th at 812. However, Title IX provides exceptions for discrimination on the basis of sex. *See* § 1681(a)(1)-(9). The language Congress used in crafting the exceptions shows that Congress intended "sex" to mean biological sex.

For example, Title IX allows schools to change "from being an institution which admits only students of *one sex* to admitting students of *both sexes.*" § 1681(a)(2) (emphasis added). Another exception states if an institution provides father-son or mother-daughter activities for "one sex," the institution must provide reasonably comparable activities for "*the other sex*." § 1681(8) (emphasis added). Referencing "one sex" and "both sexes" creates a binary distinction. The fact that Congress chose to provide an exception for mother-daughter activities where

opportunities were present for "other sex" shows that Congress intended for "sex" to refer to biological sex because the ability to become pregnant connects mothers and daughters and separates biological females from the other sex. Therefore, the statutory language shows that "sex" refers to the traditional binary concept of biological sex.

Additionally, this Court has consistently concluded that treating one biological sex better than the other constitutes impermissible discrimination under Title IX. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982) (finding Title IX prohibits discrimination on the basis of biological sex related to employment practices in federally funded educational institutions); *Cannon v. U. of Chicago*, 441 U.S. 677, 608 (1979) (finding a female student had a private right of action under Title IX when public medical school excluded her on the basis of her biological sex). Therefore, this Court's precedent shows that "sex" under Title IX means biological sex.

Furthermore, if this Court were to interpret "sex" under Title IX to mean gender identity, the exceptions that allow for sex-segregated sports teams, programs, and living facilities would become meaningless. *Beck*, 529 U.S. at 506. Interpreting "sex" to mean gender identity would unreasonably expand the meaning of sex because the clear, objective criteria that has traditionally governed sex-segregated activities would become subjective and fluid. Using the concept of gender identity, someone can choose to identify with a given sex for any reason or no reason at all. "Sex" cannot be conflated to mean gender identity because such a definition "would swallow the carve-outs and render them meaningless." *Adams,* 57 F.4th at 814 n.7.

Assuming, *arguendo,* that "sex" means gender identity, the rationale for sex-separated living facilities, mother-daughter activities, and sports teams becomes meaningless. If individuals can identify as either sex, then maintaining separate facilities, activities and teams based on biological sex becomes impossible, undermining the privacy and safety concerns that

justify these separations. *Id*. at 806, 817. If "sex" means gender identity, it would render all of the exceptions meaningless. For example, the need for sex-segregated bathrooms would be unnecessary if a student was able to identify in a manner inconsistent with their biological sex.

Therefore, defining "sex" as gender identity would render the exceptions to § 1681 meaningless and would effectively repeal Congressional legislation. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (finding the canon against surplusage is strongest when an interpretation would render another part of the same statutory scheme meaningless).

Therefore, the meaning of "sex" is unambiguous and means only biological sex.

2. Even if this Court finds "sex" is ambiguous, the purpose of Title IX shows that "sex" means biological sex determined at birth because of Congressional intent.

The plain meaning of "sex" in Title IX is unambiguous; therefore, this Court need not consult the legislative purpose. *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000). However, even if this Court does look to the legislative purpose for guidance on the meaning of "sex," this Court will find that "sex" means biological sex because the purpose of Title IX is to prevent discrimination in education on the basis of biological sex determined at birth. *Kansas*, 2024 WL 3273285, at *9. The legislative history, structure, and historical context illustrate the purpose of a statute. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). This Court should find that the purpose of Title IX shows that "sex" means only biological sex determined at birth because of (1) the historical context of Title IX and (2) the legislative history of Title IX.

First, this court should find that the structure and historical context of Title IX illustrates a purpose that prohibits discrimination on the basis of biological sex, not transgender status or gender identity. *Gen. Dynamics Land Sys.*, 540 U.S. at 600. "On the basis of sex" means discrimination based on biological sex because Congress enacted Title IX to prohibit treating one biological sex worse and denying opportunities solely because they are that sex. *AT&T Mobility*

LLC v. Concepcion, 563 U.S. 333, 344, (2011). Congress passed Title IX in response to evidence of pervasive discrimination against biological women in education. *Cannon v. Univ. of Chi*., 441 U.S. 677, 704 & n.36 (1979); Congress enacted Title IX to address the unequal treatment of women and men in admissions opportunities, scholarships, and sports. *Kansas v. U.S. Dept. of Educ.*, 2024 WL 3273285 at *9.

Congress also sought to promote and protect women's interests because of the historic emphasis on men's athletic programs to the detriment and exclusion of women's athletic programs. *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993). Forcing biological women to compete against biological men fundamentally undermines this objective because it disregards the physical differences between the sexes, which Title IX acknowledges and was designed to protect. *Id*. Congress intended an even playing field for women, ensuring equal opportunity to compete for scholarships in education and athletics without interference by men. Allowing biological men to displace women in an arena reserved for biological women fundamentally undermines the purpose of Title IX.

Title IX expressly aims to accommodate physiological differences between biological men and women by ensuring equal athletic opportunities. In the context of sports, men and women are not physically the same because, on average "equally fit men and women demonstrate their fitness differently." *Bauer v. Lynch*, 812 F.3d 340, 350–51 (4th Cir. 2016). Forcing women to compete on the same teams as men would displace them and deny them the opportunity to compete in sports.

Here, the Act furthers the purpose of Title IX to protect biological women by separating sports teams based on biological sex to ensure safety and competitive fairness. Allowing transgender females to compete against biological females undermines the purpose of Title IX.

The benefits provided by sex-separated sports teams are diminished when the biological sexes are commingled and create an unsafe and unfair environment for biological females. For example, Payton McNabb, a biological female volleyball player, sustained severe neck injuries, mental distress, and partial paralysis after being hit in the head by a volleyball struck by a transgender athlete. *McClure,* After a Male Caused Her Concussion, Payton McNabb Fights to Protect Women's Sports, *Indep. Women's Forum* (Apr. 26, 2023), https://www.iwf.org/female-athlete-stories/payton-mcnabb/. Similarly, another female field hockey player sustained severe facial injuries, including the loss of several teeth, when she was stuck in the face by a ball hit by a transgender athlete. *Impelli*, Shocking Field Hockey Injury Sparks Fight Over Transgender Athletes, *Newsweek* (Aug. 23, 2024), https://www.newsweek.com/shocking-field-hockey-injury-sparks-fight-over-transgender-athletes-1840845. These examples show the significant safety risk biological females face when they are forced to compete against biological males because of the athlete's inherent physical differences. Biological differences cannot be ignored. Female athletes are at a disadvantage in terms of safety and their ability to compete on equal footing. Therefore, the fundamental purpose of Title IX is ignored when biological women no longer have equal opportunities in women's sports.

Finally, the legislative history of Title IX shows the statute's purpose was to address discrimination against biological women within education. *Adams*, 57 F.4th at 814. The primary sponsor of Title IX, Senator Birch Bayh, stated the statute sought to "provide for the women of America something that is rightfully theirs-an equal chance to develop the skills they want." 118 Cong. Rec. 5808 (1972). Senator Bayh also emphasized that the "primary evil" Title IX aimed to address was the denial of pregnancy and childbirth leave at educational institutions. *Id*. at 5811. Nothing in Senator Bayh's comments shows that Congress intended to address gender identity

issues within Title IX. Senator Bayh expressed concerns specific to biological women: pregnancy and childbirth. *Id*. Nothing in the legislative history indicates that "sex" was intended to mean a person's subjective view of their gender. *Kansas*, 2024 WL 3273285, at *9, *12.

Therefore, this Court should interpret "sex" to mean biological sex determined at birth.

3. The Department's interpretation of § 1681 is not entitled to deference or respect.

The Department's interpretation of "sex," under § 1681, to include gender identity and transgender status, is not entitled to (1) *Chevron* deference or (2) *Skidmore* respect.

i. The Department's interpretation of § 1681 is not entitled to Chevron *deference because* Chevron *was overruled.*

The Department's interpretation of §1681 would only be permissible to the extent this Court would reach the same conclusion after "applying all relevant interpretive tools." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). This Court does not owe the agency any deference because this Court overruled *Chevron*. *Id*. Thus, this Court need not and may not consult any agency action related to this issue. *Id*. at 2273.

Even if this Court considered The Department's interpretation in Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (the "Final Rule") defining sex discrimination to include discrimination "on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity," this Court enjoined its enforcement. 89 Fed. Reg. 33886 (2024); *Dept. of Educ. v. Louisiana*, No. 24A78, 2024 WL 3841071 (U.S. Aug. 16, 2024).

Therefore, this Court may not defer to the Department's interpretation of "sex" in § 1681.

ii. The Department's interpretation of § 1681 is not entitled to Skidmore *respect because the interpretation is not persuasive.*

Under *Skidmore*, this Court determines the best construction of a regulation and may "respect" an agency's interpretation, giving it whatever weight it reasonably deserves. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). An agency's interpretation is not entitled to respect when the interpretation lacks persuasiveness, thoroughness, and consistency. *Id*. However, even the most persuasive agency interpretation is not binding on this Court. *Id*.

Here, the Department's regulation interpreting § 1681 to include gender identity is not entitled to *Skidmore* respect because the interpretation is not (1) consistent or (2) thorough.

First, the Department's interpretation of "sex" under Title IX has been inconsistent, making it difficult for institutions to implement the regulation effectively over the past decade. On May 13, 2016, under the Obama administration, the Department issued guidance on prohibiting discrimination on the basis of a student's gender identity." U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter on Transgender Students* (May 13, 2016). However, on February 22, 2017, under the Trump administration, The Department rescinded the guidance and returned to the historical view that "sex" refers to biological sex. U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter on Title IX and Sexual Violence* (Feb. 1, 2017). On June 16, 2021, reversing course, under the Biden administration, the Department issued an interpretation that clarifies that discrimination based on gender identity violates Title IX in light of *Bostock.* 86 Fed. Reg. 32638 (2021). This inconsistent approach complicates institutional implementation.

Finally, the Department's interpretation lacks thoroughness because it fails to discuss the statutory language and does not consider the Congressional purpose. The Department's re-interpretation of "sex" to include gender identity fails to consider the ordinary meaning of the

statutory text at the time of enactment. *See* 86 Fed. Reg. 32638-39 (2021). However, in *Bostock*, this Court emphasized an originalist approach to interpret statutory text. 590 U.S. 655. Additionally, the regulation does not address the purpose of Title IX, which was to protect biological women from discrimination in education. *Louisiana*, 2024 WL 2978786 at * 11 (finding that *Bostock* does not apply to Title IX because the purpose of Title VII to prohibit discrimination in hiring is different than Title IX's purpose to protect biological women from discrimination in education); *Kansas*, 2024 WL 3273285, at *17 (finding the Department's Final Rule is arbitrary and capricious because it offers an implausible explanation for agency action and is a sharp departure from prior action without a reasonable explanation).

Therefore, the Department's interpretation of "sex" in § 1681 is not entitled to respect.

4. The Department's interpretation of § 1681 is not entitled to deference or respect.

This Court's holding in *Bostock* should not be expanded from Title VII to cover Title IX. In *Bostock,* this Court considered whether an employer can fire a transgender or homosexual individual because of their sex without violating Title VII. *Bostock,* 590 U.S. at 650-51. This Court held that an employer who fires an individual merely for being transgender or homosexual violates Title VII's prohibition on discrimination "because of sex." *Id*. *Bostock* prohibits discrimination against traits or actions that the employer would not have questioned in members of a different sex, because sex plays a necessary and undisguisable role in the decision. *Id*. at 655. However, this Court's reasoning in *Bostock* should not be extended to Title IX, because Title IX and Title VII (1) use different language and (2) serve different objectives. *See Adams*, 57 F.4th at 808 (finding this Court's reasoning in *Bostock* does not apply to Title IX).

First, *Bostock* addressed different statutory language in Title VII, which prohibits an employer from discriminating "because of sex." While the statutory texts of Title IX and Title

VII are similar, there are some significant differences. This Court has long recognized that when Congress uses different terms in different statutes, the language conveys differences in meaning. *Rudisill v. McDonough*, 601 U.S. 294, 308 (2024) (finding "coordination of entitlement" carries a different meaning than "election of entitlement").

This Court should distinguish between the meaning of "on the basis of sex" in Title IX and "because of sex" in Title VII. *See* 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e–2(a)(1). Title IX contains specific exceptions that permit discrimination, unlike Title VII, which does not include any lawful exceptions for discrimination because of sex. *See* § 1681(a)(1)-(9). A wholesale importation of this Court's reasoning in *Bostock* would render such carve-outs meaningless. *Beck*, 529 U.S. at 506. The rationale behind sex-separated facilities and sports teams becomes meaningless if someone can participate based on their subjective gender identity and not only based on their biological sex determined at birth. This is true because the need to segregate based on collapses when someone is permitted to join a group inconsistent with their biological sex.

Furthermore, this Court carefully crafted its decision not to "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" or address other issues not before this Court. *Bostock*, 590 U.S. at 681. In *Bostock*, this Court made it explicitly clear that its analysis of Title VII cannot be extended to "address bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. Locker rooms are areas that are traditionally associated with sports. *Bostock* does not prohibit discrimination on the basis of gender identity in locker rooms and sports because this Court explicitly cabined its analysis on employment and did not consider the broader policy implications or other legal contexts. *Id.* at 680-81. *Bostock* cannot both apply to Title IX and fail to address bathroom and locker rooms, which fall under the purview of Title IX. 590 U.S at 681; *Adams*, 57 F.4th at 817 (noting a school's living facilities, locker rooms,

showers, and sports teams fall under Title IX). This differential treatment between Titles VII and IX prevents *Bostock* from applying to Title IX.

Additionally, many Circuit courts have found *Bostock* did not consider the meaning of "on the basis of sex" in Title IX. *See e.g Soule v. Conn. Ass'n of Schs.*, *Inc.*, 90 F.4th 34, 62–63 (2d Cir. 2023) (Menashi, J., concurring) (explaining "important differences" between Title VII and Title IX in the context of *Bostock*); *L.W. v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023) (explaining that the "text-driven reasoning" of Bostock "applies only to Title VII, as *Bostock* itself and many subsequent cases make clear"); *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (finding this Court's holding in *Bostock* "extends no further than Title VII"); *Adams*, 57 F.4th at 1336 (Pryor, C.J., dissenting) (explaining that Bostock "does not extend to Title IX"). Therefore, this Court can confirm the approach taken by the Second, Sixth, and Eleventh Circuits to prevent the expansion of the meaning of "sex" to include gender identity.

Finally, Congress enacted Title IX and Title VII for distinct reasons. Congress passed Title IX to provide equal opportunities in education and sports, whereas Title VII ensures equal opportunities in the workplace. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (finding that schools must be treated differently than the adult workplace). In employment, sex is irrelevant to employee selection, evaluation, or compensation. *Bostock*, 590 U.S. at 660. However, in education, sex must often be considered in decision-making. *Meriwether v. Hartop,* 992 F.3d 492, 510 n.4 (6th Cir. 2021) (finding that the legal requirements in Title VII do not automatically apply to Title IX). Sex is relevant to the selection and evaluation of athletes because without sex separated sports, "the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977). Maintaining sports

teams based on biological sex is essential to maintaining competitive fairness and ensuring that female athletes receive the opportunities promised under Title IX. In contrast, sex is not related to one's ability to perform at work, and there is no reason for a sex-segregated workforce.

Therefore, this Court's reasoning in *Bostock* does not apply to Title IX.

B. The Act is does not violate Title IX because Title IX allows for discrimination on the basis of biological sex, where all similarly situated student-athletes are treated the same.

Under Title IX, unlawful discrimination means "treating that individual worse than others who are similarly situated." *Grimm,* 972 F.3d at 618. Sex is relevant to the team selection process because of inherent physical differences between the biological sexes. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (finding the "physical differences between men and women ... are enduring: the two sexes are not fungible"). Student-athletes' physical performance is not related to their gender identity. R. at 8; *Clark, By and Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982) (finding differences in physical performance justify excluding biological males from women's team); *see also B.P.J. by Jackson v. W. Virginia State Bd. of Educ.,* 98 F.4th 542, 567 (4th Cir. 2024) (Agee, J. concurring in part and dissenting in part) (noting that it is "beyond dispute" that biological sex is relevant to sports).

Here, all student-athletes, including Petitioner, are treated equally to others who are similarly situated. All athletes are assigned to teams based on their biological sex determined at birth, regardless of their gender identity or transgender status. *See* § 22-3-16(a). Transgender students are not being excluded from sports because they are transgender. The Act allows individuals who choose not to participate on the team based on their biological sex the option to participate and compete on coed teams. § 22-3-16(a).

All student-athletes, including Petitioner, are assigned to a team according to their biological sex to promote competitive fairness and safety within the two differentiated biological

sexes. *See* § 22-3-16(a). Petitioner and other transgender female athletes are not being targeted because they are transgender. The Act assigns athletes to teams that are consistent with their biological sex because significant differences in physical performance exist between the biological sexes. R. at 7 (finding post-pubescent biological males jump 25% higher, throw 25% further, run 11% faster, and accelerate 20% faster than females on average). Segregation is essential to maintain competitive fairness because of these physical differences between the biological sexes. *Bostock*, 590 U.S. at 728 (J., Alito dissenting) (noting transgender female athletes have a significant advantage over biological females). Separating transgender females from biological females prevents the displacement of biological females in competitive sports. *Id.* at 727 n.48 (noting that, since 2017, two biological males in Connecticut have collectively won 15 women's state championship titles previously held by ten girls). Segregating sports teams based on inherent physical ability ensures similarly situated athletes compete against each other.

Therefore, transgender female athletes are similarly situated to biological males because they retain the inherent physical performance advantages that persist since birth. R. at 11.

Discrimination on the basis of sex exists when someone is treated worse because of their biological sex, not transgender status or gender identity. *Adams,* 57 F.4th at 851. However, discrimination on the basis of sex does not exist when male and female students are treated the same. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1229 (9th Cir. 2020). Similar treatment suggests the absence of gender and sex animus. *Id*. Lower courts have held that prohibitions on transgender females competing against biological females in sports does not violate Title IX. *D.N. by Jessica N. v. DeSantis*, 701 F. Supp. 3d 1244, 1256 (S.D. Fla. 2023).

In *D.N.*, a Florida statute prohibited transgender females from participating in school-sponsored sports teams inconsistent with their biological sex. *Id*. at 1253; *see* Fla. Stat. §

1006.205(3)(a) (2021). The Florida statute also provided a coed team option. 1006.205(3)(a). The district court defined "sex" under Title IX based on biological sex and reproductive function. *D.N.,* 701 F. Supp. 3d at 1264. The district court held the statute did not violate Title IX because Title IX's implementing regulations included carve-out for sex-separated sports teams, and the state statute allowed teams designated for males to be open to students of female sex. *Id*. at 1265.

Here, like in *D.N*., the Act treats male and female athletes equally because they are assigned to teams based on their biological sex, matching athletes' inherent performance capabilities. All athletes, regardless of transgender status, are subject to the same selection criteria. Furthermore, the selection criteria are tied to physical performance, not gender identity, ensuring competitive fairness. Title IX aimed to increase women's athletic opportunities and to prevent them from competing against males for limited educational opportunities. *Williams*, 998 F.2d at 175. Assigning teams according to biological sex promotes this goal by allowing women to compete on an even playing field against others with similar physical traits. All athletes, regardless of gender identity, are treated equally to promote competitive fairness.

Furthermore, the Act treats all athletes equally, as the selection criteria are applied uniformly and do not require individualized assessments for each person. *See* § 22-3-16(a). The Act sets a consistent, repeatable standard for assigning athletes to teams. *Id*. The State does not need to make individualized determinations on the extent of one's transition or relative hormone levels. The Act furthers the goals and purpose of Title IX, protecting athletic opportunities for each sex by treating all athletes equally. *Williams*, 998 F.2d at 175. The Act lacks gender or sex animus because it treats Petitioner and all similarly situated transgender athletes the same.

Finally, Title IX does not protect transgender status. *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015). If Congress had intended to prevent discrimination under Title IX on the basis of gender identity, they could have done so expressly. *Whitfield v. United States*, 543 U.S. 209, 216 (2005) (finding Congress included an express overt-act requirement in at least 22 other conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so). Congress has passed other legislation to protect against discrimination. For example, the Americans with Disabilities Act ("ADA") was enacted in 1990 to protect against discrimination against individuals with disabilities. The ADA excludes "gender identity" and "transsexualism" from its definition of disabilities. 42 U.S.C. § 12211(b)(1). Thus, Congress has created protections related to gender identity and has chosen not to do so in Title IX. If Congress intended to prohibit discrimination on the basis of gender identity under Title IX, it could have done so explicitly. Therefore, if Title IX is to be amended, Congress must act, not this Court. *Adams*, 57 F.4th at 817. (noting amending Title IX should be left to Congress, not the courts)

Therefore, the Act does not violate Title IX because segregating student-athletes according to their biological sex is lawful and is not discrimination "on the basis of sex."

II. THE ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION BECAUSE IT IS SUBSTANTIALLY RELATED TO AN IMPORTANT GOVERNMENT.

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. However, the Supreme Court has long held that a State's law "may press with more or less weight upon one than upon another," or unequally burden certain individuals. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). While no law treats all individuals identically, this Court demands that laws be designed "not to impose unequal or

unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good." *Id.* at 32. A law should impose an unequal burden only as much as necessary to promote the general good. *See Reed v. Reed*, 404 U.S. 71, 75 (1971) (finding a State may not "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute").

Here, the Act classifies students based on biological sex. § 22-3-15(a)(1)–(3). Because of this classification, (1) intermediate scrutiny is the appropriate standard of review. *Virginia*, 518 U.S. at 534. Satisfying intermediate scrutiny requires passing a two-part test, where a State must show (2) its sex-based differential treatment serves important governmental objectives and that (3) the discriminatory means employed must be substantially related to the achievement of those objectives. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980). Importantly, the Act's stated purpose is an important government objective, and restricting access to sports teams designated for women to only biological women is substantially related to that important objective. Therefore, the Act passes intermediate scrutiny, and does not violate the Equal Protection Clause.

A. Intermediate scrutiny is the appropriate standard of review because the Act classifies individuals on the basis of sex.

The classification of those individuals facing an unequal burden—either by a statute's definition or by its practical effect—is a critical variable which determines the standard of review for a court's analysis. *See generally Tuan Anh Nguyen v. INS,* 533 U.S. 53 (2001) (discussing scrutiny implications based on classifications and their effect). Such classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Cases

where legislatures draw classification lines based on "quasi-suspect classes" like gender and sex require a heightened analysis, known as intermediate scrutiny. *See Virginia*, 518 U.S. at 534 (finding differential gender treatment requires an "exceedingly persuasive" justification).

The Supreme Court has found that those who do not conform to gender stereotypes are essentially members of a protected class based on sex. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (finding that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"). Similarly, in *Glenn v. Brumby*, a plaintiff brought suit in an employment discrimination context based on her desire to transition from presenting as male to female at work. *Glenn v. Brumby* 724 F. Supp. 2d 1284, 1302 (N.D. Ga. 2010). In *Brumby*, the court found that plaintiff had shown a prima facia case of sex discrimination because she had failed to comport with her employer's stereotype of how a biological male should dress and behave. *Id.* at 1302.

Here, the Act explicitly designates student athletes to sports teams based on biological sex. "Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." § 22-3-16(b). The motivating reason for the designations is based on physical differences between biological men and women, and how those physical differences affect athletic performance. § 22-3-4. Athletic performance differences between biological men and women are unrelated to the culture-based stereotypes in *Brumbly*, because the Act refers only to competitive skill and not behavioral norms. § 22-3-16(b). Further, significant quantitative and objective differences in performance cause post-pubescent males to "jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster than females' on average." *Adams*, 57 F.4th at, 820 n.4; R. at 7. Therefore, since the Act

expressly defines teams based on biological sex, and makes no mention of behavioral norms or stereotypes, intermediate scrutiny is the appropriate level of equal protection analysis.

B. Promoting equal opportunity and safety for female athletes is an important governmental objective.

In order to withstand the heightened standard of intermediate scrutiny, gender and sex-based classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The objective of a statute falls short of this standard when it treats sexes differently based on outdated stereotypes about the roles of women. *Id.* Further, redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is a legitimate and important governmental interest. *Clark,* 695 F.2d at 1131; R. at 7.

In *Clark*, plaintiffs–high school aged biological boys–wished to participate in the girls-only volleyball team at their school. *Clark* 695 F.2d at 1127. Due to a biological-female-only restriction on the women's team, the plaintiffs were prohibited from joining. *Id*. The Ninth Circuit held that "[t]here is no question that ['redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes'] is a legitimate and important governmental interest." *Id.* at 1131. Importantly, the court noted that there is no stigma of inferiority attached to prohibiting boys from joining girls teams. *Id*. Despite the court recognizing that sex-separate team rules are both underinclusive and overinclusive, in that they do not exactly draw perfect lines between physical skill levels, the court held that biological sex-based teams are the only feasible classification to promote the legitimate and substantial State interest of providing for interscholastic athletic opportunity for girls. *Id.* at 1132.

In *Craig*, an Oklahoma statute prohibited the sale of low-alcohol-content beer to males under the age of 21 and to females under the age of 18. 695 F.2d 1126 at 192. According to the

Oklahoma Attorney General, the stated objective of the legislation related to traffic safety. While the *Craig* court determined that such an objective was adequately important, the means to further that objective were not substantially related to its achievement. *Id.* at 199. The Court distinguished the government objective from others which were deemed inadequately important, such as "reducing the workload on probate courts," and "administrative ease." *Id.* at 198.

Here, the State contends that athletic opportunities for females require protection by excluding biological males from participating in female team sports. § 22-3-4. Further, Petitioner concedes that the Act's purpose of " providing equal athletic opportunity to females" is an important government objective. R. at 9. As in *Clark* and *Craig,* the Act pursues the important government objective of providing equal opportunities for female athletes while promoting their safety. Professional sports do not bar women from participation, they are simply unable to out-compete their male athletic peers. *Clark,* 695 F.2d at 1131. Hence, it is necessary to establish female-only leagues which prohibit participation by biological men in order to offer and protect athletic opportunities for biological women and exclude unfair competition. *Bostock*, 590 U.S. at 728 (J., Alito dissenting). Therefore, the preservation of female-only sports teams, as the Act seeks to accomplish, is an important governmental objective.

C. Designating participation on women's sports teams by biological sex is substantially related to promoting safety and equal opportunity for female athletes.

In order for a discriminatory State action to survive intermediate scrutiny, the means of characterizing the affected group must be substantially related to an important government objective. *Virginia*, 518 U.S. at 534. The Act first defines biological sex based on innate genetic attributes, then designates which sports teams categorized athletes may join. § 22-3-15(a)(1)–(3); § 22-3-16(b). This definition and designation is permissible (1) because biological sex, as defined, correlates to athletic performance, and is substantially related to preserving athletic

opportunities and safety of female athletes. Therefore, (2) transgender girls are similarly situated to biological boys, and (3) other classifications, such as transgender status, are improper.

1. The Act's definitions of biological sex, male, and female, are substantially related to promoting safety and equal opportunity for women because athletic ability is inextricably linked to these definitions.

Determining the relationship between a sex-based classification and an important government objective must be done "free of fixed notions concerning the roles and abilities of males and females." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). Stereotypical, archaic, and altogether harmful notions of female inferiority have no place in such an analysis. *Id.* Gender and sex-based classifications "may not be used, as they once were … to create or perpetuate the legal, social, and economic inferiority of women." *Virginia*, 518 U.S. at, 534. However, the designation of athletic teams on the basis of sex in sports is itself "based on the innate physical differences between the sexes. It is not based on generalizations that are archaic." *Clark,* 695 F.2d at 1130.

In *Hogan,* the Mississippi University for Women had, for over 100 years since its inception, limited its enrollment to females. 458 U.S. at 720. The plaintiff, a male, applied for admission into the university's female-only nursing program and was denied admission solely because of his sex. *Id.* The plaintiff was informed that he could audit the classes, but not enroll for credit. *Id.* The State's justification for maintaining the female-only policy was to redress past discrimination against women. *Id.* at 727. The Court found the discriminatory policy unrelated to the redressing past discrimination, because the vast majority of the nursing career was composed of women, and because the school allowed males to participate by auditing classes. *Id* at 729.

In *Virginia*, a prestigious century-old military college's male-only enrollment policy was challenged. *Virginia,* 518 U.S at 520. Virginia Military Institute (VMI)—a State-funded public institution—asserted a goal of producing "citizen-soldiers:" men who graduate prepared for

leadership in both civilian life and military service. *Id.* VMI achieved this mission in part through a uniquely intense approach, described as "an extreme form of the adversative model, comparable in intensity to Marine Corps boot camp." *Id.* at 522. The Court held that VMI's instructional style was not inherently unsuitable for women, and that the State had offered no "exceedingly persuasive" justification for prohibiting female enrollment. *Id.* at 535.

Here, unlike in *Hogan*, the Act discriminates against biological males for the benefit of biological females based on actual athletic disadvantages. The Court in *Hogan* noted that a State may "evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification." *Hogan,* 458 U.S. at 728. Here, the Act is related to such a purpose, by "redressing past discrimination against women in athletics." *Clark,* 695 F.2d at 1131. Because biological females are athletically disadvantaged, participation on men's teams is often not possible. The creation of a womens' sports teams benefits biological females in precisely the way that this Court in *Hogan* endorsed as allowable. *Hogan,* 458 U.S. at 728.

Further, unlike the facts of *Virginia*, the designation of mens' and womens' sports teams in the Act are based on more than "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia,* 518 U.S at 533. The generalized athletic differences between biological males and females are real and not culturally based. *Adams*, 57 F.4th at 820. Where VMI could not offer any substantial relationship between the complete exclusion of women and their quest to produce "citizen-soldiers," the Act is directly and logically related to maintaining access to sports for biological females. N.G. Code § 22-3-4. The biologically-based performance differences between men and women are "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 534. Excluding biological males from participating on female sports teams is the only viable and efficient way to maintain the integrity of the opportunities created for biological females to compete in sports. The Act embodies the celebration of differences between the sexes highlighted by this Court in *Virginia.*

"It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tenn. Secondary Sch. Athletic Asso.*, 563 F.2d 793, 795 (6th Cir. 1977). Unlike in *Hogan* and *Virginia*, biological differences between sexes are not inaccurate assumptions. Without such separation "biological males would displace females to a substantial extent if they were allowed to compete for position" on women's sports teams. *Clark,* 695 F.2d at 1131. Therefore, the important government objective of maximizing athletic opportunities for women is substantially served by separating biological boys from participating in womens' teams.

2. Transgender girls are similarly situated to biological boys because biological sex is a materially relevant attribute related to athletic performance.

This Court has long held that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) ("no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition"). In other words, this Court defines the affected group as those "who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Here, the most relevant attribute related to athletic performance is biological sex, as defined by the Act. Biological males have physiological advantages over biological females

which can significantly impact athletic performance." *Adams*, 57 F.4th at, 820 n.4; R. at 7. Any contention that transgender girls are similarly situated to biological girls because of their shared gender identity is unrelated and without merit because gender identity is based on cultural and social norms, which do not influence athletic performance. N.G. Code § 22-3-16(c). The Act distinguishes between athletes on the basis of biological sex, making it a logical designation for determining which group Petitioner is similarly situated to. Petitioner, along with other biological males who may wish to join teams designated for women, are all similarly unable to do so. Therefore, Petitioner is similarly situated to other biological males.

3. Gender identity and transgender status are improper classifications for the analysis because they do not reference materially relevant attributes.

The State 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; *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886) ("Though the law itself be fair on its face … if it is applied and administered … so as practically to make unjust and illegal discriminations between persons in similar circumstances … the denial of equal justice is still within the prohibition of the Constitution."). In *Grimm,* 972 F.3d at 586, the court held that the plaintiff, a transgender boy, was similarly situated to biological boys based on his gender identity. *Grimm* further identified transgender status as a quasi-suspect class worthy of heightened scrutiny. The plaintiff in *Grimm*, a transgender student, raised an equal protection claim based on a lack of access to restroom facilities aligned with their gender identity.

Here, unlike in *Grimm*, the Act expressly deals with athletic performance differences between biological men and women rather than bathroom access. Attempts to designate the classified individuals based on transgender status or gender identity ignore the fact that all biological males who may want to join women's teams are similarly discriminated against. § 22-

3-16(b); *See Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982) (highlighting a disproportionate effect as a tool for analysis of discriminatory purpose). Efforts to draw attention only to transgender girls, who represent a miniscule percentage of the group affected by the Act improperly and inaccurately draws classification lines for argument purposes. Classifications such as transgender status and gender identity "serve no legitimate relationship to the State of North Greene's interest in promoting equal athletic opportunities for the female sex." § 22-3-16(c).

Therefore, transgender status, based on gender identity, is an improper classification because it encompasses no relevant attributes related to athletic performance.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the Court of Appeals for the Fourteenth Circuit.

APPENDIX

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

"No State shall … deny to any person within its jurisdiction the equal protection of the laws."

Title 20 of the United States Code, Section 1681, part of Title IX of the Education Amendments of 1972 in relevant part:

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

…

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply [...] (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

…

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex

Section 22-3-15(a) of the State of North Greene General Statutes states in relevant part:

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.

(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.

Section 22-3-16(c) of the State of North Greene General Statutes states:

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.