Docket 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 RESPONDENTS

Team 43
Attorneys for Respondents

September 13, 2024

QUESTIONS PRESENTED

1. Does Title IX prevent a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth?
2. Does the Equal Protection Clause prevent a state from offering separate boys' and girls' sports teams based on biological sex determined at birth?

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STATEMENT OF THE CASE

A. STATEMENT OF FACTS

In April 2023, the North Greene Senate introduced Senate Bill 2750, named the Save Women's Sports Act ("SaWSA"). R. at 3. SaWSA passed both Houses of the North Greene legislature and North Greene Governor Howard Sprague signed it into law on May 1, 2023. *Id*. SaWSA was codified as North Greene Code § 22-3-4, entitled "Limiting participation in sports events to the biological sex of the athlete at birth." *Id*. As stated in the statute, "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration." *Id*. The North Greene General Assembly found that "gender identity is separate and distinct from biological sex." *Id*. at 8 (quoting N.G. Code § 22-3-16(d)). Included in SaWSA was a legislative finding that, "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).

SaWSA establishes that, "[I]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education…shall be expressly designated as one of the following based on biological sex at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. Code § 22-3-16(a). SaWSA further states that, "Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." N.G. Code § 22-3-16(b). To clarify the definitions of biological sex, North Greene explains,

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

> (2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.
> (3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.
> N.G. Code § 22-3-15(a)(1)–(3).

A.J.T. ("Petitioner"), a transgender girl who at the initiation of this lawsuit was eleven-year-old and entering seventh grade, seeks to join the girls' volleyball and cross-country teams. *Id*. at 3. Petitioner brought suit against the State of North Green Board of Education, State Superintendent Floyd Lason, the State of North Greene, and Attorney General Barney Fife ("North Green") alleging that SaWSA violates Title IX and the Equal Protection Clause of the United States Constitution. *Id*.

Petitioner was assigned the sex of male at birth but has identified as a girl from an early age.[1] *Id.* Petitioner was diagnosed with gender dysphoria in 2022 and has been going to counseling. *Id*. Although Petitioner has discussed possible multiple courses of action, including puberty-delaying treatments, Petitioner has not begun puberty-delaying treatments. *Id*. Petitioner acknowledges that, "circulating testosterone in males creates a biological difference in athletic performance." *Id*. at 9. The Fourteenth Circuit found that this acknowledgement is a tacit acknowledgement that North Greene's classification based on biological sex is substantially related to the governmental interest in providing equal athletic opportunities for females. *Id*. The Fourteenth Circuit found that it is beyond dispute that biological sex is relevant to sports and that transgender girls are "in all relevant respects alike" to biological boys. *Id.* at 7.

[1] Following the usages by the majority opinion of the Fourteenth Circuit Court of Appeals, this brief will use the terms "biological" girl(s), women, or females (or boy(s), men, or males) when referring to individuals biological sex that is assigned at birth and "transgender" girl(s), women, or females (or boy(s), men, or males) when referring to individuals who do not align their gender identity with their biological sex. R. at 3, 7.

For over fifty years, Title IX has safeguarded opportunities for women and girls to compete in sports. Deborah Blake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 15 (2000). "[F]emale student participation in athletics has risen from less than 300,000 students in 1971 to over 2.6 million students in 1999." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818 (11th Cir. 2022) (citation omitted). SaWSA, which merely codifies an implementing regulation of Title IX, ensures that progress toward female success continues in North Greene. But Petitioner seeks to halt the next five decades of progress in women's equality in the state by contending that SaWSA is discriminatory.

B. PROCEDURAL HISTORY

Petitioner brought this action in before the United States District Court for the Eastern District of North Greene. *Id.* at 2. Petitioner sought a declaratory judgment that SaWSA violates Title IX and the Equal Protection Clause of the Fourteenth Amendment and an injunction preventing North Greene from enforcing the law against Petitioner. *Id*. at 5. North Greene opposed Petitioner's motion for an injunction and moved for summary judgment. *Id*. The District Court granted North Greene's motion for summary judgment. *Id*. On January 15, 2024, the Fourteenth Circuit Court of Appeals affirmed the District Court's entry of judgment for North Greene and held that North Greene's SaWSA and enforcement of SaWSA does not violate Title IX or the Equal Protection Clause. *Id*. at 2-3. Petitioner appealed the Fourteenth Circuit's ruling, and this Court granted certiorari to consider both claims. *Id.* at 17.

SUMMARY OF THE ARGUMENT

Title IX protects against discrimination on the basis of biological sex. Dictionary definitions from the time of Title IX's enactment and context establish that the plain meaning of sex is biological sex. If Congress intended to define "sex" as gender identity, it would have needed

to do so explicitly. Because Title IX permits sex-separate sports teams, SaWSA's separation of sports teams by biological sex does not violate Title IX.

North Greene has not violated the Equal Protection Clause of the Fourth Amendment of the United States Constitution because SaWSA designates team sports in North Greene public secondary and higher education schools by biological sex—not gender identity—and in doing so, North Greene furthers the important government interest of promoting equal access to safe and competitive sports to biological women and girls. North Greene's passing of the SaWSA is substantially related to their important interest in promoting and protecting access to sports for biological women and girls.

ARGUMENT

I. Because Title IX permits the separation of sports teams by biological sex, SaWSA is not discriminatory.

"[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Under Title IX, "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Implementing regulation 34 C.F.R. § 106.41(b) allows "separate [sports] teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." The text of SaWSA is harmonious with the regulation because it provides, in patently similar language, that "teams or sports designated for females . . . shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." R. at 4. Whereas Congress did not define "sex," the North Greene legislature expressly directed teams to be designated male or female "based on biological sex determined at birth." *Id.* But the lack of explicit

definition in Title IX and its corresponding regulations is inconsequential because "sex" under Title IX nonetheless means biological sex.

a. "Sex" under Title IX has always meant *only* biological sex.

i. The ordinary meaning of "sex" when Congress enacted Title IX in 1972 was biological sex.

When the legislature does not define the statutory term at issue, "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 654 (2020); *Wis. Cent. Ltd v. United States*, 585 U.S. 274, 277 (2018) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). One common method to determine ordinary meaning is to reference dictionaries from the era of the enactment. *United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021) (citing *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016)); *see also Bostock*, 590 U.S. at 657–58. But courts do not interpret words in isolation; instead, they consider terms in the context of the entire statute. *See United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."). A term retains its original, ordinary meaning unless Congress subsequently acts to define it. *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262, 268 (2019) ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning.").

Here, reputable dictionary definitions from around the time when Congress enacted Title IX overwhelmingly evidence that the ordinary meaning of "sex" was biological sex. *See, e.g.*, *Sex*, *American Heritage Dictionary of the English Language* (1976) ("Sex" is "[t]he property or quality by which organisms are classified according to their reproductive functions."); *Sex*, *American Heritage Dictionary of the English Language* (1979) (same); *Sex*, *Female*, *Male*, *Oxford English Dictionary* (re-issue ed. 1978) (defining "sex" as "[e]ither of the two divisions of organic beings

distinguished as male and female respectively," "female" as "[b]elonging to the sex which bears offspring," and "male" as "[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation"); *Sex*, *Webster's New World Dictionary* (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions."); *Sex*, *Female*, *Male*, *Webster's Seventh New Collegiate Dictionary* (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function"); *Sex*, *Random House College Dictionary* (rev. ed. 1980) ("[E]ither the male or female division of a species, esp. as differentiated with reference to the reproductive functions.").

And the interpretation of "sex" as "biological sex" is further supported when read in context. *See Morton*, 467 U.S. at 828. There are multiple places in both the statute and the implementing regulations that support the biological binary found in the contemporaneous dictionary definitions. For example, 20 U.S.C. 1681(a)(2) addresses the process for "an institution which admits only students of *one sex* to [become] an institution which admits students of *both sexes*," and 20 U.S.C. § 1681(a)(8) requires that a father-son or mother-daughter activity provided for "one sex" is accompanied by a reasonably comparable activity for "the other sex." (emphasis added). Likewise, 34 C.F.R. permits "[h]ousing provided by a recipient to students of *one sex*, when compar[able] to that provided to students of *the other sex*," and 34 C.F.R. § 106.33 states that "facilities provided for students of *one sex* shall be comparable to such facilities provided for students of *the other sex*." (emphasis added). The wording of these sections and regulations demonstrates that "sex" refers to the biological binary of male and female.

By contrast, gender identity is not binary. *See, e.g.*, A Glossary: Defining Transgender Terms, 49 Monitor on Psychology 32 (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary. The American Psychological Association defines "gender identity" as "[a]n internal sense of being *male, female or something else*, which may or may not correspond to an individual's sex assigned at birth or sex characteristics." *Id.* (emphasis added). Similarly, the Cleveland Clinic and the Mayo Clinic confirm there are *many* genders, and gender is not a binary. *Understanding Gender Identity*, CLEVELAND CLINIC (Mar. 30, 2022), https://health.clevelandclinic.org/what-is-gender-identity (providing a "not all-inclusive" list of gender identities, including agender, androgenous, bigender, butch, cisgender, femme, FTM (female-to-male), intersex, MTF (male-to-female), nonbinary, omnigender, pangender, polygender, transgender, and two-spirited); *Transgender Facts*, Mayo Clinic (Feb. 13, 2023), https://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/transgender-facts/art-20266812 ("The terms 'transgender' and 'gender diverse' . . . move past the idea that all people can be classified as only one of two genders—female or male . . . . Gender identity is the internal sense of being male, female, neither or some combination of both."). Even GLAAD, a large non-profit organization that advocates for LGBTQ+ rights, teaches that "gender identity does not fit neatly into one of those two binary genders." *Glossary of Terms: Transgender*, GLAAD Media Reference Guide – 11th Ed. (last visited Sept. 10, 2024), https://glaad.org/reference/trans-terms. Thus, given the plain meaning of "sex" both on its face and in context, "sex" in Title IX can only mean biological sex.

ii. Even if "sex" were ambiguous, SaWSA does not violate Title IX.

Congress used its powers under the Spending Clause to enact Title IX. U.S. Const. Art. I, § 8, cl. 1; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999) ("[W]e have repeatedly

treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause."). "[L]egislation enacted pursuant to [Congress's] spending power is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Any conditions imposed on a grant of federal funds under the Spending Clause must therefore be unambiguous, *id.*, because recipients cannot "knowingly accept" federal funds without "'clearly understand[ing] . . . the obligations' that would come along with doing so." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022) (quoting *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006)). "Further, 'private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue.'" *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 815 (11th Cir. 2022) (quoting *Davis*, 526 U.S. at 640)).

Accordingly, a finding that SaWSA violates Title IX is only proper if "sex" under Title IX *unambiguously* means "gender identity." But there is no support for such a finding. Instead, the abundance of evidence outlined above shows that "sex" unambiguously means "biological sex." And even if this Court nevertheless determined "sex" to be ambiguous, Respondent's interpretation of "sex" as biological sex and subsequent enaction and enforcement of SaWSA pursuant to that interpretation is not a Title IX violation because Respondents did not "ha[ve] adequate notice" they would be liable for separating teams based on biological sex. *Davis*, 526 U.S. at 640.

iii. Congress intended "sex" to mean biological sex.

"Courts should construe laws in harmony with the legislative intent and seek to carry out legislative purpose." *Foster v. United States*, 303 U.S. 118, 120 (1938). One of Congress's

motivations in enacting Title IX was to protect biological women's privacy interests. For example, in support of the implementing regulations, Senator Birch Bayh explained: "Title IX necessarily 'permit[s] differential treatment by sex' in certain circumstances, including 'in sport facilities or other instances where personal privacy must be preserved.'" *Texas v. Cardona*, No. 4:23-CV-00604-0, 2024 WL 3658767, at *32 (N.D. Tex. Aug. 5, 2024) (quoting 118 Cong. Rec. 5807 (Feb. 28, 1972) (Statement of Sen. Birch Bayh)). The need for personal privacy is linked to biological sex because it involves physical sex characteristics. *Doe v. Luzerne County*, 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing individuals have "a constitutionally protected privacy interest in his or her partially clothed body" and this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining "the constitutional right to privacy ... includes the right to shield one's body from exposure to viewing by the opposite sex"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining "[t]he right to bodily privacy is fundamental" and "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be overserved by an officer of the opposite sex while producing a urine sample). Additionally, Senator Bayh specifically mentioned "pregnant women" and their need for privacy. 118 Cong. Rec. 5807 (Feb. 28, 1972) (Statement of Sen. Birch Bayh). Given that only biological women can become pregnant, Congress must have considered "sex" to be biological sex.

The Department of Education's justifications for its implementing regulations are also helpful in determining congressional intent. After all, "[t]he Title IX regulations became effective only after direct and extensive congressional review, including six days of House hearings to determine whether the regulations were 'consistent with the law and with the intent of the Congress in enacting the law.'" U.S. Dep't Educ., Memo. on *Bostock v. Clayton Cty.*, (quoting *N. Haven Bd.*

of Educ. v. Bell, 456 U.S. 512, 531–33). Additionally, despite several amendments to Title IX since its initial enactment, Congress has not attempted to change the Department's interpretation. "Where an agency's statutory construction has been 'fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Bell*, 456 U.S. at 531–32.

Notably, the Department's reasoning for prohibiting schools from using "a single standard of measuring skill or progress in physical education classes" shows the motivation was to prevent discrimination against females because of their typically lower levels of strength compared to males: "[I]f progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex." U.S. Dep't of Educ., Office for Civil Rights, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Final Rule, 85 Fed. Reg. 30,178 (May 19, 2020) (explaining the Department's reasoning for the implementing regulations).

Further, as recently as 2015, Congress has tried and failed to amend Title IX multiple times to include "gender identity." *See, e.g.*, H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). But until it does so, "Title IX's ordinary public meaning remains intact." *Neese v. Becerra*, 640 F. Supp. 3d 668, 684 (N.D. Tex. 2022); *see Cochise Consultancy, Inc.*, 587 U.S. at 268 ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning."). These attempts also highlight that Congress believes "sex" in Title IX as currently written does not include gender identity. And "[s]ince [Congress enacted Title IX in] 1972, the Department of Education has consistently interpreted the word 'sex' in Title IX to mean only biological sex—not

sexual orientation and not gender identity." *Texas v. Cardona*, No. 4:23-CV-00604-0, 2024 WL 3658767, at *42 (N.D. Tex. Aug. 5, 2024) (citing Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026-01, 30,178 ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department's current regulations . . . reflect this presupposition.")). Thus, the plain meaning of "sex" in the text, congressional intent regarding the statute and its implementing regulations, and over fifty years of agency interpretation and congressional inaction all point to the same conclusion: "sex" under Title IX means biological sex.

b. Interpreting "sex" to include gender identity will cause harm.

i. Post-pubescent males pose a risk to female safety.

While some may argue that a male who has not undergone puberty is biologically similar to a female,[2] there is no debate that males and females differ significantly after puberty. *See* Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in The Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Medicine 200–01 (2021) ("[T]he biological effects of elevated pubertal testosterone are primarily responsible for driving the divergence of athletic performances between males and females."); *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Pol'y 1 (Jan. 2019) (emphasizing that biological males have: "greater lean body mass," i.e., "more skeletal muscle and less fat"; "larger hearts," "both in absolute terms and scaled to lean body mass"; "higher cardiac outputs";

[2] In fact, some experts contend that "biological boys have a competitive advantage over biological girls even before puberty." R. at 7; Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in The Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Medicine 200–01 (2021); (explaining that pre-puberty physical differences between males and females that affect athletic performance are "not unequivocally negligible"); *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 561–62 (4th Cir. 2024) (noting experts reported that "even apart from increased circulating testosterone levels associated with puberty, there are "significant physiological differences, and significant male athletic performance advantages in certain areas").

"larger hemoglobin mass"; larger maximal oxygen consumption (VO2 max), "both in absolute terms and scaled to lean body mass"; "greater glycogen utilization"; "higher anaerobic capacity"; and "different economy of motion"); Jennifer C. Braceras, et al., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports*, Indep. Women's F. & Indep. Women's L. Ctr. 20 (2021) (explaining that, on average, post-pubescent males can "jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, . . . accelerate (20%) faster than females[,] . . . lift 30% more than females of equivalent stature and mass," and punch with significantly greater force).

The effect of this Court finding "sex" means "gender identity" is that states will not be able to "exclude transgender girls from biological girls' sports teams even when the transgender girls have gone through puberty and it is even clearer that they have a significant physiological advantage over biological girls." *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 572 (4th Cir. 2024) (Agee, J., dissenting).

Such a decision will endanger the physical safety of female athletes. *See, e.g.*, Valerie Richardson, *North Carolina on verge of transgender sports ban after hearing from injured female athlete*, Washington Times (Apr. 21, 2023), https://www.washingtontimes.com/news/2023/apr/21/north-carolina-verge-transgender-sports-ban-after-/ (describing severe injuries suffered by a female competitor after a male playing in a girls' volleyball game spiked a ball at her head); Tom Joyce, *Transgender athletes pose a safety threat to girls*, Washington Examiner (Feb. 20, 2024, 3:30 PM), https://www.washingtonexaminer.com/opinion/beltway-confidential/2864813/transgender-athletes-pose-safety-threat-to-girls/ (noting several instances of transgender boys injuring biological girls in athletic competition).

ii. Interpreting "sex" to mean "gender identity" will lead to an absurd result.

As explained above, gender identity is not binary. *See supra* Part I.a.i. If the court adopts Petitioner's interpretation of "sex" as signifying "gender identity," then non-binary students[3] will automatically have a Title IX discrimination claim against all Title IX states and institutions that separate sports on the basis of sex—*even if* the separation is based on gender identity rather than biological sex. After all, Petitioner's stated harm is that under SaWSA she will have to play on a team that does not fit her gender identity and reveal to society that she is a male. R. at 16. But the same argument becomes untenable when applied to non-binary athletes because they are similarly forced to choose between two teams that do not fit their gender identity. Such a nonsensical result is possible if this Court finds in favor of Petitioner.

II. The Fourteenth Circuit properly found that SaWSA does not violate the Equal Protection Clause because SaWSA does not facially discriminate against transgender individuals by separating participation in team sports by biological sex and SaWSA's categorization on the basis of biological sex is a valid government interest.[4]

The Fourteenth Circuit Court properly affirmed the District Court's grant of summary judgment in favor of North Greene and finding that SaWSA does not facially violate the Equal Protection Clause. Through the enactment of SaWSA, the North Greene legislature made a constitutionally valid legislative decision to categorize team sports in school-sponsored leagues by biological sex. SaWSA protects women and girls' ability to participate in team sports with other biological women and girls, promoting the safety and level playing field that are crucial to the successful participation in team sports for biological women and girls in North Greene. SaWSA

[3] Non-binary means the individual does not identify as either a man or woman. *Understanding Gender Identity*, Cleveland Clinic (Mar. 30, 2022), https://health.clevelandclinic.org/what-is-gender-identity.

[4] If this Court agrees with the Title IX analysis above, then SaWSA cannot violate the Equal Protection Clause, unless this Court believes that Title IX itself is a violation of the Equal Protection Clause.

does not facially discriminate against transgender women. Rather, SaWSA affirms the long-standing practice of separating team sports by biological sex to promote the important government interests of providing equal athletic opportunities for biological females to those enjoyed by biological males and to allow these athletic opportunities to be competitive and safe for biological females.

a. SaWSA designates team sports in North Greene public secondary and post-secondary schools by biological sex – not by self-identified gender identity.

North Greene's SaWSA does not discriminate based on transgender status or gender identity because SaWSA specifically categorizes sports in North Green public secondary and higher education schools by biological sex. The statute in question states, "[I]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education…shall be expressly designated as one of the following based on biological sex at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. Code § 22-3-16(a).

The Fourteenth Amendment to the United States Constitution establishes that no State shall make or enforce any law that denies, "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. This Court has clarified that the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike," *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Here, the most relevant respect in which Petitioner is not similarly situated to biological women and girls is the biological and physiological differences between biological men and boys from biological women and girls. Petitioner's challenge to SaWSA is a facial challenge. R. at 6. This court has held that when considering a facial challenge, the Court

must be careful to not go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases. *Wa. State Grange v. Wa. State Republican Party,* 552 U.S. 442, 449–50 (2008).

In *Adams by and through Kasper v. School Board of St. Johns County*, the Eleventh Circuit held that the School Board's bathroom policy of separating bathrooms by biological sex was a sex-based classification. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022). Drew Adams, a transgender boy with the chromosomal structure and anatomy of a female, sought to use the biological male designated bathrooms at school. *Id.* at 796-97. Adams entered ninth grade at Allen D. Nease High School, who provided female, male, and sex-neutral bathrooms for their students. *Id.* at 797. The communal female bathrooms had stalls, and the communal male bathrooms had stalls and undivided urinals. *Id*. The Eleventh Circuit held that Florida's policy facially classified bathrooms by biological sex—not transgender identity. *Id.* at 808. This policy division of bathrooms by biological sex includes transgender students who are classified by their biological sex in the same way that other students were classified. *Id*.

Relying on *Adams*, the District Court for the Southern District of Florida found that the State of Florida's "Fairness in Women's Sports Act," which was signed into law in 2021, did not violate the Equal Protection Clause. *D.N. by Jessica N. v. DeSantis*, 701 F. Supp. 3d 1244, 1262 (S.D. Fla. 2023). In *D.N. by Jessica N. v. DeSantis*, D.N., a biological male who identified as a girl, challenged Florida's Fairness in Women's Sports Act, which designated team sports at public secondary and postsecondary schools by biological sex. *Id.* at 1248. The court found that D.N. sought to challenge Florida's act for violating the Equal Protection Clause both facially and as applied to D.N. *Id.* at 1251. D.N. sought to use statements by Florida Governor DeSantis and Florida State Senator Stargel to show that the Act's neutral terms were instead masking a discriminatory intent against transgender students. *Id.* at 1255-56. The district court found that

these statements, which focused on the biological and physiological differences between biological men and women, actually supported Florida's position that designating sports by biological sex—not gender—was the goal of this legislation. *Id.* at 1256-57. The district court held that by allowing transgender athletes to compete on co-ed teams and transgender boys to try out and compete for biologically male teams, Florida did not discriminate against transgender students. *Id*. at 1257.

Like in *Adams*, where the School Board separated bathrooms into biological boys, biological girls, and sex-neutral bathrooms, North Greene separates the team sports programs in secondary and higher education public schools into the categories of biological men and boys, biological women and girls, and co-ed or mixed teams. In both instances, all students are treated equally to those who share their biological sex. In the context of athletic competitions, transgender girls, like Petitioner are not in all respects relevant to athletics alike to biological girls, but rather are alike to biological boys.

North Greene's SaWSA is nearly identical in language and application to the Florida act challenged in *Jessica N*. Petitioner is free to try out and compete for teams designated for her biological sex as well as any co-ed teams that may be offered by her school. Other transgender students in North Green, including transgender boys, have those same opportunities. In this case, the Court should be careful not to overlook the plain text of the statute. North Greene has made it clear that SaWSA designates teams based on sex—the biological sex of athletes. North Greene does not legislate an individual's deeply personal decision to self-identify as the gender they so choose.

Because North Greene has designated sports by the biological sexes of participants, North Green has used a sex-based classification, not a gender identity classification. The Fourteenth

Circuit correctly affirmed that North Greene's sex-based classification passes the necessary scrutiny.

b. North Greene's sex-based designations for team sports in its schools satisfies intermediate scrutiny because SaWSA advances the important government interests of protecting biological women and girls' safety and access to competitive sports and separating team sports by biological sex substantially relates to this government interest.

When considering whether a state's legislation violates the Equal Protection Clause, this Court has instructed that various levels of scrutiny apply to different classifications. *Clark v. Jeter*, 486 U.S. 456, 461(1988). This Court has established that intermediate scrutiny applies to laws that discriminate based on quasi-suspect classes, like sex. *United States v. Virginia*, 518 U.S. 515 (1996). To satisfy intermediate scrutiny, the government must show "that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

When deciding what is an important governmental interest, consideration should be given to issues as they arise and as legislatures decide to address them. This Court has clarified that, "The classification must serve an important governmental interest today, for 'new insights and societal understandings can reveal unjustified inequality…that once passed unnoticed and unchallenged.'" *Sessions v. Morales-Santana*, 582 U.S. 47, 48 (2017) (quoting Obergefell v. Hodges, 576 U.S. 644, 673 (2015)). While North Greene may not have previously explicitly divided team sports in schools by biological sex, with the increase in students identifying as transgender across the country, the legislature of North Greene has now validly identified this as an issue that required clarification. Separating school sports by biological sex has increasingly become an issue and North Greene has a valid, important interest in addressing it.

The government has an important interest in preserving the competitive landscape of organized sports by allowing biological women and girls to compete with and against members of the same biological sex. This Court has stated that, "without 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. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980). Though one of the sports in which Petitioner seeks to compete is non-contact, North Greene still has a valid interest in protecting the competitive landscape for female athletes in all sports and the safety of female athletes in contact sports.

In *Clark, By & Through Clark v. Arizona Interscholastic Association*, the Ninth Circuit held that prohibiting biological boys from the biological girls' volleyball team did not violate the Equal Protection Clause. *Clark, By & Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1132 (9th Cir. 1982). In *Clark*, a group of male students in Arizona high schools sought to compete on their schools' volleyball teams, but the schools only offered the sport for female students. *Id.* at 1127. The Ninth Circuit held that the government had a legitimate and important interest in redressing past discrimination against women in athletics and promoting equality of athletic opportunities. *Id.* at 1131. Citing the clear physiological differences between males and females, the Ninth Circuit found that males would displace females to a substantial extent if they were allowed to compete for positions on the female volleyball team. *Id.* The Ninth Circuit further stated, "In this case, the alternative chosen may not maximize equality, and may represent trade-offs between equality and practicality. But since absolute necessity is not the standard, and absolute equality of opportunity in every sport is not the mandate, even the existence of wiser

alternatives than the one chosen does not serve to invalidate the policy here since it is substantially related to the goal." *Id*. at 1131–32.

North Greene has not violated the Equal Protection Clause by protecting women and girl designated sports teams because the government has a valid interest in protecting access and safety for women and girls competing in sports and designating specific teams for biological women and girls substantially relates to this interest. As stated in the dissent by Justice Knotts, "Undoubtedly, furthering women's equality and promoting fairness in female athletic teams is an important state interest." R. at 14. Mirroring the Ninth's Circuits holding in *Clark*, the Fourteen Circuit found that there is a clear physiological difference between males and females, especially following puberty. R. at 7. In both Arizona and North Greene, designating sports by biological sex is substantially related to furthering the goal of providing biological women and girls with the opportunities to participate in competitive sports. Regardless of whether there are other ways to achieve this government interest, North Green's method of promoting and protecting women and girls in sports is valid and substantially relates to protecting the athletic landscape for women and girl athletes, just like the Arizona Interscholastic Association's method of doing so.

In *B.P.J. by Jackson v. West Virginia State Board of Education*, the Fourth Circuit held that West Virgina's Act the district court erred in granting the defendants' motion for summary judgment on B.P.J.'s equal protection claim by preventing B.P.J., a transgender girl, from participating on her school's girls track and cross-country teams. *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024). Critically, B.P.J.'s challenge to West Virgina's act was an as-applied challenge and. B.P.J. began a puberty blocking treatment to lower her testosterone levels to treat her gender dysphoria prior to entering the "Tanner 2" stage of biological male puberty. *Id.* at 560. The Fourth Circuit did not direct the district court to grant summary

judgment for the defendants because the court found there was a material issue of fact as it was conflicting expert testimony as to the competitive advantage of males and females due to testosterone levels prior to the beginning of puberty. *Id.* at 561.

Unlike in *B.P.J.*, Petitioner has challenged SaWSA as facially violating the Equal Protection Clause. For a challenger of a legislative act to succeed in a facial challenge, the challenger must be able to establish that under no circumstances is the act valid. *United States v. Salerno*, 481 U.S. 739,745 (1987). Petitioner is unable to establish that there are no circumstances in which SaWSA is valid because if she were, the Court would have to conclude that there are no circumstances in which separating team sports by biological sex to promote fair competition and safety for women and girls is an important government interest or that categorizing sports by biological sex substantially relates to this interest. In doing so, this Court would have to invalidate decades of this Court's opinions that have held that there are inherent physical differences between men and women. *See* e.g. *Michael M. v. Super. Ct. of Sonoma Cnty*., 450 U.S. 464, 469 (1981); *Nguyen v. INS*, 533 U.S. 53, 73 (2001). Even if this Court finds that Petitioner has also asserted an as-applied challenge, Petitioner's situation is significantly different to that of B.P.J. While Petitioner contends that she is considering undergoing puberty blocking treatment she, unlike B.P.J., has not begun this treatment. Regardless of Petitioner's personal medical decisions, SaWSA does not facially violate the Equal Protection Clause because designating team sports by biological sex is substantially related to the important government interest of providing competitive and safe athletic opportunities to women and girls.

In *Hecox v. Little*, the Ninth Circuit affirmed the district court's grant of a preliminary injunction that enjoined the State of Idaho from enforcing Idaho's Fairness in Women's Sport Act. *Hecox v. Little*, 104 F.4th 1061, 1068 (9th Cir. 2024), as amended (June 14, 2024). Idaho's act not

only categorized sports by biological sex, but also subjected all participants in women's sports to a sex dispute verification process. *Id.* at 1082. The Ninth Circuit did not address the larger question of whether any restriction on transgender participation in sports violates the Equal Protection Clause, but rather focused its finding that the district court did not err in granting a preliminary injunction as applied to Lindsay, while vacating the injunction as applied to non-parties. *Id*. at 1091.

Unlike in *Little*, North Greene does not require a sex dispute verification process where anyone can dispute the sex of a student athlete and require that athlete to go through sex verification medical exams. In both *B.P.J.* and *Little*, the Fourth and Ninth Circuits have addressed a similar issue to this instance, but the specific facts and procedural postures vary significantly. In *Little*, the sex verification process applied to all athletes playing or seeking to play in women's sports, which was much more invasive than North Greene's decision to categorize sports by sex that is assigned at birth. North Greene's focus on categorizing by biological sex, without subjecting transgender or biological women to sex verification testing, promotes a valid government interest in preserving sports opportunities for biological females and does so in a way that substantially relates to this mission.

While some may believe that North Greene's SaWSA is misguided and passed with ulterior motives, this Court has long held that, "the decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, 195 U.S. 27, 56 (1904). North Greene validly identified students playing team sports on teams designated by biological sex to be important to promoting equal access to competition and safety for female student-athletes, and passing SaWSA to designate team sports by biological

sex substantially relates to furthering this government interest. SaWSA does not violate the Equal Protection Clause because SaWSA separates school team sports by biological sex —not gender— and in doing so, forwards an important government interest which SaWSA is substantially related to furthering.

As to Petitioner's challenge of SaWSA for facially violating the Equal Protection Clause, Petitioner has failed to demonstrate a material dispute of facts. As a matter of law, Petitioner has failed to show that North Greene has enacted a law that discriminates against transgender individuals seeking to play team sports at their public schools because SaWSA expressly designates team sports by biological sex. North Greene's sex-based categorization of team sports survives the heightened scrutiny required for sex-based designations because it is within the government's interest to protect women and girls' access to safely and competitively compete in team sports and SaWSA substantially relates to furthering this important government interest. The Federal Rules of Civil Procedure instruct that, "A party's motion for summary judgment should be granted when there is no genuine material issue of fact, and the movant is entitled to judgement as a matter of law." Fed. R. Civ. P. 56. Therefore, the summary judgment granted by the District Court and affirmed by the Fourteenth Circuit should be affirmed by this Court.

CONCLUSION

North Greene's SaWSA was a valid exercise of the North Greene legislature's power and does not violate Title IX or the Equal Protection Clause of the Constitution. For the forgoing reasons, the Court should affirm the holding of the Fourteenth Circuit Court of Appeals that North Greene's Save Women's Sports Act does not facially violate Title IX nor the Equal Protection Clause of the Fourth Amendment.

Team 43
Counsel for Respondent