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.*,

Respondents.

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

BRIEF FOR PETITIONER

Team 5
Counsel for Petitioner

QUESTIONS PRESENTED

1. Title IX mandates that state actors provide equal athletic opportunities to all students. A State violates Title IX when it excludes a student from a federally-funded educational program on the basis of sex, and that exclusion harms the student. Here, North Greene bans all transgender girls from participating in girls' sports. Does North Greene violate Title IX when it deprives transgender girls of the opportunity to participate in federally-funded sports consistent with their gender identity?
2. A State must have an exceedingly persuasive justification to classify based on sex. If the classification is not substantially related to an important state interest, it violates the Equal Protection Clause of the Fourteenth Amendment. Here, North Greene claims two interests: providing equal athletic opportunities for, and protecting the physical safety of, female athletes. Does North Greene's exclusion of transgender girls from girls' sports violate the Equal Protection Clause?

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The opinion of the United States Court of Appeals for the Fourteenth Circuit is reproduced in the Record on pages 2–16. The opinion of the United States District Court for the Eastern District of North Greene is unpublished but reported at 2023 WL 56789 (E.D. N. Greene 2023).

CONSTITUTIONAL PROVISIONS INVOLVED

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. A.J.T. Has Long Identified As a Girl.

A.J.T. is an eleven-year-old transgender girl. Record at 3. She was assigned male at birth, but has identified as a girl since she was young. *Id.* In third grade, A.J.T. began living as a girl at home. R. at 3. With time, A.J.T. grew comfortable living as a girl publicly. *Id.* She began living authentically at home and school, and started using a name typically associated with girls. *Id.* A.J.T. also joined an all-girls cheerleading team, practicing and competing alongside her teammates without issue. *Id.* By the end of elementary school, A.J.T. had fully socially transitioned. See *id.*

A.J.T. has also consulted with medical professionals to support her transition. See R. at 3. In 2022, she was officially diagnosed with gender dysphoria. *Id.* Since her diagnosis, she has been receiving counseling. *Id.* A.J.T. is considering puberty-delaying treatments, though she has not yet started puberty. *Id.* At trial, A.J.T. presented expert testimony that puberty-delaying treatments prevent transgender girls from undergoing physiological changes caused by male puberty. *Id.* A.J.T. continues to seek medical advice on this issue. *Id.*

Going into seventh grade, things took a turn. R. at 4. A.J.T. hoped to join the girls' volleyball and cross country teams, but that hope was quickly quashed. *Id.* The school barred A.J.T. from playing on girls' sports teams and cited North Greene's recent "Save Women's Sports Act" ("Act") as the basis for its actions. *Id.*

II. The Act Excludes Transgender Girls.

The Act was introduced in April 2023 and signed into law within a month. R. at 3. The Act was codified at North Greene Code § 22-3-4. *Id.* The section's title is, "Limiting participation in sports events to the biological sex of the athlete at birth." N.G. Code § 22-3-4.

The Act contains several relevant definitions. First, it defines biological sex as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." N.G. Code § 22-3-15(a)(1). Second, the Act defines "female" as an individual whose biological sex determined at birth is female," and sweeps "women" and "girls" into this definition. *Id.* at § 22-3-15(a)(2). The definition for "male" follows the same pattern—"male" includes "men" and "boys." *Id.* at § 22-3-15(a)(3). The Act recognizes that "[g]ender identity is separate and distinct from biological sex," but claims that "[c]lassifications based on gender identity serve no legitimate relationship to the State of North Greene's interest." *Id.* at § 22-3-16(c).

The Act contains two directives. First, it requires that public secondary schools[1] "expressly designate" all sports or club athletic teams as male, female, or coed. N.G. Code § 22-3-16(a). Second, it forbids "students of the male sex" from participating on teams designated for those assigned female at birth if "selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* at § 22-3-16(b). The Act does not bar students assigned female

[1] The Act also applies to state institutions of higher education, but that provision is not relevant here. See N.G. Code § 22-3-16(a).

at birth from participating on teams designated for males. See *id.* The State asserts the Act's purpose is to "provide equal athletic opportunities for" and "protect the physical safety of" female athletes. R. at 4. Even before the Act was in place, North Greene's school athletic rules prohibited "cisgender boys from participating on female-designated sports teams." R. at 13.

III. The Proceedings Below.

A.J.T. challenged the Act under Title IX and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. R. at 4. By and through her mother, A.J.T. brought this action in the United States District Court for the Eastern District of North Greene suing both the State of North Greene Board of Education and State Superintendent Floyd Lawson. *Id.* The State of North Greene later moved to intervene, and A.J.T. amended her complaint to include both the State and Attorney General Barney Fife as defendants.[2] *Id.*

In district court, A.J.T. sought a declaratory judgment that the Act violates Title IX and the Equal Protection Clause and, relatedly, to enjoin the State from enforcing the law. R. at 5. The State filed a motion for summary judgment, and the District Court granted that motion. *Id.* A.J.T. appealed to the Fourteenth Circuit. *Id.* On appeal, the court held that the Act did not violate the Equal Protection Clause or Title IX, and it affirmed the District Court's ruling. *Id.*

Judge Knotts wrote a dissenting opinion. R. at 13. Judge Knotts would have held that the Act violates both the Equal Protection Clause and Title IX. *Id.* As to the Equal Protection Clause, he reasoned that banning transgender girls from girls' sports is not substantially related to an important government interest. R. at 13–14. As to Title IX, he concluded the Act discriminates against transgender girls on the basis of sex and causes them harm. R. at 15–16.

[2] This Brief will refer to Defendants collectively as "State" or "North Greene."

SUMMARY OF ARGUMENT

I. Title IX prohibits discrimination on the basis of sex. A State violates Title IX if, while receiving federal funds for its educational program, it excludes a student from that program because of sex, and the student suffers harm as a result. Although regulations interpreting Title IX allow for sex-segregated sports, they do not abridge the broader Title IX requirement that a State may not discriminate based on sex.

Here, the State discriminated based on sex. The Act excludes transgender girls from girls' sports based on their sex assigned at birth. To discriminate because one's sex assigned at birth does not match gender identity is discrimination based on sex. And this discrimination causes serious harm, shown in two separate ways. First, under a recent amendment to Title IX regulations, this exclusion is definitionally harm. Second, Plaintiff has shown that transgender students suffer severe psychological harm and social repercussions when barred from teams consistent with their gender identity. North Greene's federally funded sports programs exclude transgender girls—like A.J.T.—causing serious psychological harm. The Act thus constitutes unlawful discrimination under Title IX.

II. North Greene's Act also runs afoul the Equal Protection Clause. The Act triggers heightened scrutiny for two reasons. It discriminates both on the basis of transgender status and on the basis of sex. Laws that classify based on quasi-suspect classes get heightened scrutiny, and transgender status bears all the hallmarks of a quasi-suspect class: transgender individuals form a minority with distinguishing characteristics, and they have historically suffered discrimination. As such, this Court should recognize transgender status as a quasi-suspect class. The Act discriminates against transgender girls using biological terms as a proxy, and that merits heightened scrutiny.

Transgender status aside, the Act merits heightened scrutiny regardless. Sex is a quasi-suspect class, and classifications based on sex are subject to heightened scrutiny. Because the Act explicitly references students' biological sex, it creates a sex-based classification that warrants heightened scrutiny. Either way, heightened scrutiny applies. Under this level of scrutiny, a State must show the classification is substantially related to an important government interest. Heightened scrutiny is a high bar—it requires an "exceedingly persuasive justification."

Here, North Greene asserts two interests: providing equal athletic opportunities for, and protecting the physical safety of, female athletes. These interests are important. But North Greene does not show how barring all transgender girls from girls' sports is substantially related to either interest. The Act fails on the substantially related prong because it is both over- and under-inclusive. As such, it violates the Equal Protection Clause. This Court should reverse.

ARGUMENT

I. The Act Violates Title IX.

Title IX prohibits discrimination on the basis of sex. A State violates Title IX when: (1) it receives federal funds for an educational program; (2) a student is excluded from participation in that program based on their sex; and (3) this exclusion causes the student harm. The parties agree North Greene receives federal funds for education.[3] And A.J.T. has carried her burden with respect to exclusion and harm. North Greene has violated Title IX.

[3] The Act applies only to "sports that are sponsored by any public secondary school or a state institution of higher education." N.G. Code § 22-3-16. Plaintiff here sued the State Board of Education, State Superintendent, and State Attorney General. R. at 4–5. The lower court acknowledged that "all necessary Defendants have been included in this action" and all "Defendants are properly before [the] [c]ourt." *Id.* at 5. It can thus be inferred that all parties agree North Greene receives federal funding for education. See *id.*

A. The Act Discriminates Against Transgender Girls, Like A.J.T., On the Basis of Sex.

Title IX bars discrimination on the basis of sex. See 20 U.S.C. § 1681(a). It states, "[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." *Id.* Regulations applying Title IX permit sex-segregated sports, but even in the sports context, the general rule applies—a State may not discriminate. See 34 C.F.R. § 106.41(a), (b).

Discrimination involves "differences in treatment." See *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 59 (2006). The State treats an individual differently if it treats them "worse than others who are similarly situated." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 657 (2020). In the Title VII context, this Court recognized that a State discriminates based on sex when it "penalizes" someone—say, a person assigned male at birth—for characteristics it "tolerates" in another—someone assigned female at birth. *Bostock*, 590 U.S. at 669. This logic applies with equal force to Title IX. Because transgender status is "inextricably" linked to sex, discrimination based on transgender status "cannot happen" without discrimination based on sex, too. *Bostock*, 590 U.S. at 657, 660.

Here, several provisions of the Act work in tandem to discriminate based on sex. First, the Act acknowledges that gender identity and sex are different. N.G. Code § 22-3-16(a). But it collapses "women" and "girls" into the definition of "female," and "men" and "boys" into "male." *Id.* Then, it bars "students of the male sex" from participating on teams designated for females. *Id.* at § 22-3-16(b). Oddly, the Act is silent about students assigned female at birth playing on teams designated for males. See *id.* The net result of these provisions is simple: transgender girls are barred from girls' sports. This "difference[] in treatment" is discrimination. *Burlington*, 548

U.S. at 59. And it's discrimination based on sex because the Act "penalizes" transgender girls for their sex assigned at birth. *Bostock*, 590 U.S. at 657. As in Title VII, discrimination based on transgender status is necessarily discrimination based on sex. *Bostock*, 590 U.S. at 660.

Transgender girls get the short end of the stick, compared to all other girls and all other student athletes. In short, they are treated "worse than others who are similarly situated." *Bostock*, 590 U.S. at 657. To start, transgender girls are treated worse than all other girls. A.J.T. has been living publicly as a girl for many years. R. at 3. She has a girls' name, wears girls' clothes, and—up until now—has been participating on girls' sports teams. *Id.* Yet now, only transgender girls like her are excluded from girls' sports. *Id.* While all other girls can compete in girls' sports, transgender girls cannot. *Id.* Transgender girls are also treated worse than all other student athletes. The Act bars only transgender girls from girls' sports—not transgender boys from boys' sports. See N.G. Code § 22-3-16(b). So all other students—cisgender girls, cisgender boys, and transgender boys—can play on teams consistent with their gender identity. But transgender girls cannot. The Act treats transgender girls worse than similarly situated peers because of their sex, and this is discrimination.

B. The Act Excludes Transgender Girls, Causing Emotional and Dignitary Harm.

The Act discriminates on the basis of sex and causes harm. Recent amendments to Title IX regulations clarify that exclusion from teams consistent with one's gender identity is harm under Title IX. And even beyond these regulations, the evidence shows that transgender individuals suffer severe psychological and social harm when barred from participating on sports teams consistent with their gender identity. Because the Act's sex discrimination harms transgender girls, it is impermissible under Title IX.

The Department of Education ("Department") has power to promulgate regulations interpreting Title IX. See 34 C.F.R. § 106.31(2). Those regulations clarify Title IX's liability and scope. See *id.* Even in the "limited circumstances" (such as in sports) where Title IX permits different treatment on the basis of sex, different treatment that causes more than "*de minimis* harm" is not allowed. *Id.* Recently, the Department amended the regulation to elucidate one type of harm that is *per se* "more than *de minimis*": preventing a person from "participating in an education program or activity consistent with the person's gender." *Id.* at § 106.31(2).

Here, this regulation squarely addresses the issue. The Act prevents transgender girls from participating on girls' teams. See N.G. Code § 22-3-16(b). Transgender girls, by definition, identify as girls. So the Act prevents them from participating in a sport "consistent with" their gender. 34 C.F.R. § 106.31(2). The regulation alone, thus answers the question: the Act's discrimination causes impermissible harm under Title IX. See *id.*

To the extent this regulatory framework is under dispute,[4] harm can be shown without it anyways. Plaintiff, here, is a prime example. A.J.T. has been living as a girl for some time. R. at 3. A.J.T. is socially accepted as a girl—she dresses as a girl, uses a name more commonly associated with girls, and has played in girls' sports for years. *Id.* But the Act derails all this. *Id.* When North Greene bars transgender girls from girls' sports, it "very publicly brands all transgender [girls] with a scarlet 'T.'" *Doe by & through Doe* v. *Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018). Social stigma is one of the most defining—and painful—parts of the transgender experience. Tom Lewis et al., *Stigma, Identity and Support in Social Relationships of Transgender People throughout Transition: A Qualitative Analysis of Multiple Perspectives*, 79

[4] There is ongoing litigation about these regulations. See *Dept. of Educ.* v. *Louisiana* and *Cardona* v. *Tennessee*, 144 S. Ct. 2507 (2024).

J. SOCIAL ISSUES 108, 109–110 (2022). The Act invites more of it. Moreover, "the suicide risk in transgender people is higher than in the general population." Chantal Wiepjes et al., *Trends in Suicide Death Risk in Transgender People: Results from the Amsterdam Cohort of Gender Dysphoria Study (1972-2017)*, 141 ACTA PSYCHIATRICA SCANDINAVICA 486, 486 (2020). Transgender individuals are a vulnerable population, and social rejection and isolation only makes that worse. Lewis et al., *Stigma, Identity and Support* at 122–23 (2022). "Transgender youth already face more scrutiny and attention." *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 617–18 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (citing *Boyertown*, 897 F.3d at 530). When the State takes a transgender girl off the team consistent with her gender identity, it removes a Jenga block that could tumble the whole tower. This is harm forbidden by Title IX.

The Act treats transgender girls worse than similarly situated students in multiple ways—worse than other girls who can participate in girls' sports, and worse than all other student athletes who can participate on teams consistent with their gender identity. And this discrimination causes harm, which likewise can be established in two ways: recent regulations plainly state this exclusion is "harm" under Title IX, and the exclusion creates social stigma and shame, which also qualifies as harm. Any way you slice it, the Act violates Title IX.

II. The Act Violates the Equal Protection Clause.

The Act is also unconstitutional. A law that classifies based on a quasi-suspect class is subject to heightened scrutiny. The Act merits heightened scrutiny for two reasons. First, it discriminates on the basis of transgender status. Transgender status bears all the hallmarks of a quasi-suspect class, so it's time to call a spade a spade: transgender status is a quasi-suspect class. Beyond this, sex is a quasi-suspect class. The Act gets heightened scrutiny in either case. Under this level of scrutiny, the State must show the classification—barring all transgender girls from girls' sports—is substantially related to an important government interest. It is not.

A. The Act Should be Analyzed Under Heightened Scrutiny.

Laws that target quasi-suspect classes are subject to heightened scrutiny. This Court should recognize, as several Circuits already have, that transgender status is a quasi-suspect class. And the Act discriminates based on transgender status. The Act also discriminates based on sex, which is already a quasi-suspect class. Either way, the Act gets heightened scrutiny.

1. The Act Warrants Heightened Scrutiny Because It Discriminates Based on Transgender Status.

Heightened scrutiny should apply because the Act discriminates against transgender people. From time to time, courts acknowledge a new class as "quasi-suspect." Though not a set-in-stone test, there are four factors to consider—and transgender status checks each box. This Court should thus acknowledge transgender status as a quasi-suspect class.

The Act discriminates against transgender people. It uses biological terms to allow only students assigned female at birth to participate in girls' sports. In other words, the Act ousts transgender girls from girls' sports. The Act does not use the phrase 'transgender girls,' but it discriminates against them—and only them. As such, it warrants heightened scrutiny.

a. This Court Should Recognize Transgender Status is a Quasi-Suspect Class.

Transgender status has all the traits of a quasi-suspect class. Because of that, discrimination against transgender people should trigger heightened scrutiny.

This Court considers four factors when it deems a class quasi-suspect. First a quasi-suspect class is defined by "obvious, immutable, or distinguishing characteristics." *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986); see *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). Sex, for example, is a quasi-suspect class partly because people assigned female at birth are defined by the "high visibility of the sex characteristic." *Frontiero*, 411 U.S. at 686. Second, the class's defining characteristic must "bear[] no relation to the individual's ability to participate in or contribute to

society." *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). For instance, illegitimacy is a quasi-suspect class partly since being born out of wedlock does not prevent someone from contributing to society. *Id.* at 505. Third, people belonging to a quasi-suspect class have historically "been subjected to discrimination." *Lyng*, 477 U.S. at 638. Finally, a quasi-suspect class is a minority or lacks political power. *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987).

Transgender status fits each criterion. First, transgender people share an obvious distinguishing characteristic: their "gender identit[ies] do[] not correspond to their sex assigned at birth." *Hecox v. Little*, 104 F.4th 1061, 1068–69 (9th Cir. 2024). And transgender people are defined by a "high[ly] visibl[e]" characteristic. See *Frontiero*, 411 U.S. at 686. Transgender people, like A.J.T, take steps to live in accord with their gender identity by changing their names, dressing in the opposite sex's clothing, and socially transitioning. R. at 3. Transgender status is a distinguishing characteristic.

Second, transgender status has no bearing on one's ability to contribute to society. Just as people born out of wedlock are perfectly capable of flourishing in society, so too are transgender people. Medical experts agree that being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *Grimm*, 972 F.3d at 612.

Third, transgender people have suffered prejudice. That prejudice takes the form of violence, harassment, "high rates of employment discrimination, economic instability, and homelessness." *Grimm*, 972 F.3d at 611–12. Legal discrimination against transgender people has pervaded the military, the workplace, and even schools. See *Karnoski* v. *Trump*, 926 F.3d 1180, 1189 (9th Cir. 2019); *Bostock*, 590 U.S. at 665; *B.P.J. by Jackson* v. *W.V. Bd. of Educ.*, 98 F.4th 542, 557 (4th Cir. 2024). A CDC study found transgender youth report "higher incidents of being bullied, feeling unsafe traveling to or from school," and "being threatened with a weapon at

school" because of their gender identity. *Hecox*, 104 F.4th at 1087. And just four years ago parties before this Court argued their intentional discrimination against transgender employees was legal under Title VII. *Bostock*, 590 U.S. at 665. The history of discrimination against transgender people is pervasive.

Finally, transgender people are a minority lacking political power. Only 0.6% of Americans over 13 years old identify as transgender. *Hecox*, 104 F.4th at 1069. As such a small minority, transgender people have not "yet been able to meaningfully vindicate their rights through the political process." *Grimm,* 972 F.3d at 613. Rampant legal discrimination against transgender people evinces the class's lack of political power. Taken together, transgender status is a quintessential quasi-suspect class.

But Circuit courts are coming to different conclusions. They differ widely on if and how heightened scrutiny applies to laws classifying based on transgender status. Some courts recognize transgender status, *per se*, as a quasi-suspect class. See *Hecox*, 104 F.4th at 1079; *Grimm*, 972 F.3d at 610 (collecting cases). Others decline to answer if transgender status is a quasi-suspect class, instead reaching heightened scrutiny through sex discrimination. See *Fowler* v. *Stitt*, 104 F.4th 770, 794 (10th Cir. 2024); *A.C. by M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 768 (7th Cir. 2023); *Brandt by & through Brandt* v. *Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022). Still other circuits have held transgender status is not a quasi-suspect class at all. See *L.W. by & through Williams* v. *Skrmetti*, 83 F.4th 460, 480 (6th Cir. 2023); *Brown* v. *Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995). An arbitrary patchwork of inconsistent legal rights is insufficient to protect a vulnerable group. This Court should resolve this confusion.

Transgender status is a prototypical quasi-suspect class. Discrimination based on transgender status is always sex discrimination, and sex discrimination always warrants heightened

scrutiny. So discrimination based on transgender status always warrants heightened scrutiny. This Court should cut out the middleman—discrimination against transgender people independently triggers heightened scrutiny.

b. The Act Discriminates Based on Transgender Status.

The Act facially classifies based on transgender status. It uses sex assigned at birth as a proxy for transgender status. And proxy discrimination is facial discrimination. When transgender status is properly acknowledged as a quasi-suspect class, discrimination on that basis warrants heightened scrutiny.

A law can facially discriminate against a group without mentioning that group by name. A law that uses criteria closely associated with a disfavored class "subject [that class] to discrimination" on its face. *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003). For instance, this Court held "[a] tax on wearing yarmulkes is a tax on Jews." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). And a law limiting voting rights based on "ancestry is a proxy for race." *Rice* v. *Cayetano*, 528 U.S. 495, 514–15 (2000). At least one circuit has applied this Court's proxy discrimination doctrine to laws identical to the Act—finding facial discrimination. *Doe* v. *Horne*, 2024 WL 4113838, at *13 (9th Cir. Sept. 9, 2024); *Hecox*, 104 F.4th at 1078. Even where a law targets only a subset of a protected class, proxy discrimination can still occur. See *Bray*, 506 U.S. at 270; *Rice*, 528 U.S. at 514–15; *Mathews*, 427 U.S. at 504 n.11; *Guinn* v. *United States*, 238 U.S. 347, 364–65 (1915). A State does not escape scrutiny by affecting a smaller percentage of a protected class.

Here, North Greene has engaged in proxy discrimination. At first blush, the ban seems to turn on "biological sex." N.G. Code § 22-3-15(a)(1). But in effect, it turns on gender identity. See *id.* Though the Act never uses the word "transgender," it explicitly reads out gender identity

from the definition of "girl." See N.G. Code § 22-3-16(c). It defines "girl" as "an individual whose biological sex determined at birth is female," a definition that *only* makes sense if meant to *exclude* transgender girls. *Id.* The Act minimizes gender identity and focuses on sex determined at birth—traits closely associated with transgender status—and thus facially discriminates against transgender girls. Just as a tax on yarmulkes is a tax on Jews, a ban on athletes whose feminine gender identity differs from their biological sex determined at birth is a ban on transgender girls. North Greene cannot defend its prejudice by pointing out the Act targets only transgender girls and not transgender boys. See N.G. Code § 22-3-16(b). The State allows transgender boys on boys' sports teams—but that exception that proves the rule. *Id.* The Act defines "girls" as a pretext to block only transgender girls from girls' sports. The Act discriminates by proxy against transgender girls, and so facially discriminates on the basis of transgender status.

The State tries to hide its discrimination against transgender girls by using biological terms closely associated with transgender status to discriminate against them. Those terms are inextricably tied to transgender people. This proxy discrimination is facial discrimination against a quasi-suspect class, and so warrants heightened scrutiny.

2. The Act Also Merits Heightened Scrutiny Because It Discriminates Based on Sex.

Sex is a quasi-suspect class, and the Act discriminates on that basis too. This is another reason it deserves heightened scrutiny.

Sex-based classifications are "inherently suspect." *Frontiero*, 411 U.S. at 682. For this reason, "*all* gender-based classifications" get heightened scrutiny. *U. S.* v. *Virginia*, 518 U.S. 515, 555 (1996) (emphasis added). This includes classifications that use "gender specific terms" to account for "biological difference[s]." *Nguyen* v. *INS*, 533 U.S. 53, 64 (2001). Even a "benign

justification" for a sex-based classification must face heightened scrutiny. *Virginia*, 518 U.S. at 535.

Here, the Act classifies based on sex. And the sex-based line drawing is a feature, not a bug. The codified Act is entitled "[l]imiting participation in sports . . . to the biological sex." N.G. Code § 22-3-4. As explained in the Title IX analysis, the purpose, definition, and operative provisions of the Act are all based on sex. See N.G. Code § 22-3-16. So North Greene used "gender specific terms" to account for "biological difference[s]." *Nguyen*, 533 U.S. at 64. The State claims the Act is based on "inherent differences" in biology, and that these differences are reason to "celebrate." N.G. Code § 22-3-4. But celebration or not, the scrutiny is the same. See *Virginia*, 518 U.S. at 535. The Act must answer to heightened scrutiny.

B. The Act Fails Heightened Scrutiny.

North Greene's Act can't pass constitutional muster. Legislation survives heightened scrutiny only if the classification is substantially related to an important government interest. Here, all parties agree the State's interests are important. But the discriminatory means are not substantially related to those goals.

"Substantially related" is an issue of tailoring. Heightened scrutiny requires a close means-end fit. *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982). Courts approach legislation that excludes an entire class from some benefit with great skepticism—especially when that categorical exclusion totally disregards individual merit. *Virginia*, 518 U.S at 546. For sex-based classifications, the State must offer an "exceedingly persuasive justification" for its discrimination. *Hogan*, 458 U.S. at 724. Archaic notions about the relative capabilities of individuals based on their sex assigned at birth will not do. See *Virginia*, 518 U.S. at 533. Legislation that relies on sweeping and untailored measures cannot meet this standard. See *id.* One red flag that a State's classification is too sweeping to pass heightened scrutiny is when "more accurate and impartial

lines can be drawn." *Sessions* v. *Morales-Santana*, 582 U.S. 47, 63 n.13 (2017). And this is a high bar. See *Virginia*, 518 U.S. at 534.

Here, North Greene asserts two interests: providing equal athletic opportunities for, and protecting the physical safety of, female athletes. But the means don't fit the ends—the Act is both under- and over-inclusive. It is too broad because it bars all transgender girls from girls' sports. And it is too narrow because it allows transgender boys to play in boys' sports. As a result, the classification is not substantially related to the State's interests.

1. The Act Is Over-Inclusive.

First, the classification is not substantially related to the asserted interests because the Act sweeps too broadly. The Act's ban has no exceptions. N.G. Code § 22-3-16(a). It affects all transgender girls from secondary to graduate school, and applies to all types of sports, including intramural games. *Id.*

This overbreadth shows that the classification is not substantially related to either interest. See *Virginia*, 518 U.S. at 534. Looking to the fairness interest first, there is no evidence that transgender girls have displaced or are displacing cisgender girls in sports. See *Horne*, 2024 WL 4113838, at *16. A mere 0.6% of Americans over 13 years old identify as transgender. See Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST. 1, 1 (2022) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf. A fraction of a percentage point of the population (transgender girls) poses no credible threat of displacing half of the population (cisgender girls) in athletics. See *A.J.T.* v. *N.G. Bd. of Educ.*, 2024 WL 98765, at *14 (14th Cir. 2024). And it's not the case that a competitive advantage always exists for the athlete assigned male at birth. See *A.J.T.*, 2024 WL 98765, at *14 (Knotts, J., dissenting). There is great variation among individuals within these groups. Standing

alone, sex assigned at birth does not determine which sports team an athlete is best suited for. See *A.J.T.*, 2024 WL 98765, at *14 (Knotts, J., dissenting). The Act sweeps too broadly when it categorically bars all transgender girls—even those who have not gone through puberty—from participating on girls' sports teams. "A vague, unsubstantiated concern that transgender women might one day dominate women's athletics is insufficient to satisfy heightened scrutiny." *Hecox*, 104 F. at 1086.

The overbreadth also undermines the safety interest. See *Sessions*, 582 U.S. at 63 n.13. Barring all transgender girls from girls' sports is not substantially related to protecting the physical safety of female athletes. To start, many sports have little safety concerns at all. For example, swimming and cross-country are two sports that involve no contact between players—each player competes in their own lane. *A.J.T.*, 2024 WL 98765, at *14 (Knotts, J., dissenting). Hosts of other non-contact sports—gymnastics, tennis, track and field—reinforce the point. And even in contact sports where safety concerns might exist—like football, boxing, or soccer—all players wear protective gear. *Id.* In some cases, this protective gear is elaborate, requiring helmets, padding, and shin guards. Plus, contact sports often involve high risks of injury to players regardless of whether biological males and biological females compete against one another. *Id.* Permitting transgender students to play on the sports team that is consistent with their gender identity does not pose an independent safety risk to the cisgender girls that would justify discrimination. The Act's overbreadth undermines the State's asserted interests.

2. The Act Is Under-Inclusive.

The classification also fails on the substantially related prong because the Act sweeps too narrowly. The ban applies only to transgender girls. See N.G. Code § 22-3-16(b). If the Act were truly meant to protect the safety athletes with an eye toward sex assigned at birth, then it certainly

would have something to say about the safety of athletes assigned female at birth playing with those assigned male at birth. But the Act doesn't bat an eye. See *id.* It does not bar females from playing on the boys' team. *Id.* And it also permits coed teams for any sport—including the most aggressive contact sports. *Id.* This underinclusive problem belies any serious argument that the classification provides a close means-end fit.

The Act rests on outmoded notions of the relative capabilities of men and women. Assuming all individuals assigned male at birth pose an inherent threat to individuals assigned female at birth is a prime example of the type of sweeping generalization that fails heightened scrutiny. See *Virginia*, 518 U.S. at 534. Under the weight of heightened scrutiny, the Act crumbles. North Greene's classification is not substantially related to the State's interest and thus violates the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse.