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

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Brief for Respondents

Team Number 6

Questions Presented

1. Under United States education law, does Title IX prevent states from promoting the safety of female athletes and the competitiveness of female sports by designating girls' and boys' teams based on biological sex determined at birth?
2. Under the United States Constitution, does the Equal Protection Clause of the Fourteenth Amendment prevent states from promoting the safety of female athletes, the competitiveness of girls' sports, and providing the equal protection of the laws to females by offering separate girls' and boys' sports teams based on biological sex determined at birth?

Parties to the Proceedings

Petitioner is A.J.T.

Respondents are State of North Greene Board of Education, Floyd Lawson, in his official capacity as State Superintendent, State of North Greene, and Barney Fife, in his official capacity as Attorney General for the State of North Greene.

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Relevant Constitutional and Statutory Provisions

U.S. CONST. amend. XIV, § 2.

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1]

20 U.S.C. § 1681(a).

"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 . . . ."[2]

N.G. Code § 22-3-4.

"There are inherent differences between biological males and biological females, and that these differences are cause for celebration."[3]

N.G. Code § 22-3-15(a)(1)–(3).

"(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.

[1] U.S. CONST. amend. XIV, § 1.
[2] 20 U.S.C. 1681(a).
[3] N.G. Code § 22-3-4.

(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.”[4]

N.G. Code § 22-3-16.

“(a) Interscholastic, 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.

(b) 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.

(c) 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.

(d) Gender identity is separate and distinct from biological sex.”[5]

Statement of the Case

The Court’s decision in this case will determine whether the American people, through representatives in their respective state legislatures, have the ability to protect the physical safety of females during athletic competition, ensure the competitiveness of women’s sports, and properly provide equal athletic opportunities to females within their borders.

[4] N.G. Code § 22-3-15(a)(1)–(3).
[5] N.G. Code § 22-3-16.

In April 2023, the North Greene legislature passed Senate Bill 2750, popularly known as the Save Women's Sports Act (the "Act"), which limited participation in girls' sports to female persons when the team or sport is "sponsored by any public secondary school or a state institution of higher education."[6] The Act defines "female" as "an individual whose biological sex determined at birth is female."[7] Because the Act was intended to protect the physical safety of female athletes and ensure the competitiveness of girls' sports, the Act further limits its application to contact sports or teams where players are selected "based upon competitive skill."

A.J.T. is a transgender girl who intends to participate in school-sponsored athletics, specifically hoping to join both the girls' volleyball and cross-country teams.[8] A.J.T. was assigned the sex of male at birth but has, for the past couple of years, been living as a girl and has been diagnosed with gender dysphoria.[9] A.J.T. is now at least twelve years old[10] and, despite having reached the average age of the onset of male puberty, has not undergone any kind of treatment to prevent or delay the onset of puberty.[11]

Under the provisions of the Act, A.J.T. is ineligible to participate on the girls' volleyball and cross-country teams but is fully eligible to participate on the analogous boys' teams.[12] Unsatisfied with this option, A.J.T., by and through her mother, filed this action against the State of North Greene Board of Education and State Superintendent Floyd Lawson to force her way onto girls' teams where she may both pose a danger to other athletes and enjoy a significant

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[6] N.G.C. 22-3-16(a).
[7] N.G.C. 22-3-15(a)(2).
[8] R. 4.
[9] R. 4.
[10] While the record does not specifically state A.J.T.'s present age, it does state that she was eleven at the time this action was filed which, being somewhat over one year ago, meaning that A.J.T. is either twelve or thirteen years old.
[11] R. 4.
[12] *See* N.G.C. 22-3-16

competitive advantage.[13] When the State of North Greene's motion to intervene was granted, both North Greene and Attorney General Barney Fife were added to the suit as respondents.[14]

Summary of Argument

I. In 1979, shortly after Title IX was adopted, the Department of Health, Education, and Welfare issued regulations implementing the provisions of the new law.[15] Those regulations clarified that sports for males and females were permitted to be separated by sex under Title IX and created an explicit carve-out to that end.[16] At the same time, the Office of Civil Rights issued a policy interpretation showing that Title IX protects equal access to athletics, not the opportunity to play on a team corresponding with a person's gender identity.[17] Not only would requiring states to allow transgender students to play on the team corresponding to their gender identity undermine the purpose of Title IX, but it would actually harm states' efforts to provide equal opportunities for both males and females.

This Court's 1979 decision in *Cannon v. University of Chicago* also implicitly created a requirement in Title IX cases that an exclusion, even if impermissible under Title IX, must have caused harm to the plaintiff for a Title IX complaint to succeed.[18]

To date, this Court has never held any exclusion of a male or female from an opposite sex athletic team to be a violation of Title IX. There is no justification for a different outcome here. Petitioner effectively asks this Court to undermine Title IX in the interest of her personal self-actualization; however, Petitioner's arguments disregard the meaning of Title IX, the nature of

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[13] R. 4.
[14] *Id.* at 4–5.
[15] *See* 34 C.F.R. § 106.41(b) (2024).
[16] *See Id.*
[17] *See A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 239 (December 11, 1979) (to be codified at 34 C.F.R. § 106.41).
[18] *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979).

what it protects, and the substantial interests of female athletes in both their own safety and competitive athletic endeavors. The provisions of Title IX reach from adolescence through intercollegiate sports and, as such, a reinterpretation of them to suit Petitioner would harm not only female athletes at the age of Petitioner but also those at least as far as the intercollegiate level, with the likelihood and probable severity of harm escalating at each level.

II. Petitioner's arguments also fail under an Equal Protection analysis because North Greene's Act pursues readily identifiable goals that are important government interests, and its means of differentiation are substantially related to those interests. As stated in *U.S. v. Virginia*, when these conditions are met, an equal protection violation does not exist under the intermediate scrutiny applicable to sex distinctions.[19]

Governments have an important interest in protecting the competitiveness of girls' and women's sports, which becomes even clearer when considering the long-term potential for economic impacts to female athletes when such competitiveness is reduced. They also have an axiomatically important interest in protecting the safety of females within their borders, including female athletes. North Greene's Act limits athletes to teams corresponding to their biological sex when those interests are at play, leaving transgender individuals to play on teams corresponding to their gender identities in all other athletic endeavors. As such, its interests are readily seen as important and its means demonstrably limited to those substantially related to the important interests. The only way to avoid profound damage to female athletics at all levels is to recognize the important interests that states have in protecting the competitiveness of female athletics and the safety of female athletes. This will not only protect individuals but states' ability to provide equal protection of the laws and equal opportunity to the sexes in the athletic context.

[19] *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Note about Terminology

At the outset, it should be noted that terminology when discussing issues related to transgenderism often differs from common usage. While terms such as "female," "woman," and "girl" are often used interchangeably in both everyday speech and legal argumentation, confusion can result from the use of any such terms in the context of transgenderism. As noted in the majority opinion of the United States' Court of Appeals for the Fourteenth Circuit in this case, some "use the terms cisgender girl(s), women, or females to refer to individuals whose gender identity corresponds with the sex assigned to them at birth."[20] Like that majority opinion, this brief uses the terms "biological girl(s)," "biological women," or "biological females" (or boys, men, or males, as applicable) to refer to all persons who are assigned female at birth, roughly matching the language of the Act and the majority opinion of the Fourteenth Circuit Court. In so doing, this brief makes no comment on the validity of transgenderism or the experience of transgender persons. These terms are used solely for clarity and consistency with the statutes at issue.

Argument

This Court should affirm the holding of the trial court and the circuit court, both of which found that Petitioner's claims under Title IX and the Equal Protection Clause cannot, as a matter of law, be meritorious.[21] In pursuit of little more than personal validation, Petitioner asks this Court to take the drastic step of eliminating the ability of states to provide females with equal athletic opportunities and protect the physical safety of female athletes.[22] Beyond sports for their own sake, states protect these interests to ensure both safety and equal opportunity between the

[20] R. 7 n.20.
[21] *See* R. 5.
[22] *See Id.*

sexes, especially for females within their jurisdiction. Petitioner's claims are so unsupported by either Title IX or the Equal Protection Clause that the trial court was correct to grant summary judgment for Respondents.

I. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT TITLE IX DOES NOT PREVENT STATES FROM SEPARATING SCHOOL-SPONSORED ATHLETIC TEAMS FOR MALES AND FEMALES BASED ON BIOLOGICAL SEX.

This Court has shown that when bringing a claim under Title IX, a plaintiff must demonstrate that (1) he or she was excluded from participation in a program "*because* of [his or] her sex,"[23] (2) the education program at issue was receiving federal money at the time of the exclusion, and (3) "improper discrimination caused . . . harm" to the plaintiff. [24] Title IX regulations have explicitly authorized sex-separated athletic teams,[25] but courts have sometimes considered the first prong from the perspective of whether an excluded person is treated worse than similarly situated persons.[26] No party disputes that the public school attended by Petitioner was receiving federal financial assistance at all relevant times, but Petitioner cannot show that she was treated worse than similarly situated persons nor that the exclusion caused her harm.

Additionally, to the extent that this Court's recent decision in *Bostock v. Clayton County, Georgia* makes discrimination on the basis of gender identity identical to discrimination on the basis of sex, this Court's opinion in that case is based on wording in Title VII that is not present IX .[27] This Court may here determine whether to duplicate in its Title IX jurisprudence the reasoning that *Bostock* applied to Title VII. But the specific statutory and regulatory carve-outs

[23] *Cannon*, 441 U.S. at 680.
[24] *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *see also Cannon*, 441 U.S. at 680.
[25] 34 C.F.R. § 106.41(b).
[26] *Grimm*, 972 F.3d at 618.
[27] *Bostock v. Clayton Cty., Ga.*, 590 U.S. 644, 656 (2020).

in Title IX allowing differentiation between the sexes do not require or support the application of that reasoning to Title IX, as noted by the United States Court of Appeals for the Fourteenth Circuit in its decision in this case.[28]

A. Petitioner was not discriminated against under Title IX because she was not treated worse than other similarly situated persons.

While Petitioner was excluded from the girls' volleyball and cross-country teams on the basis of her biological sex, regulations promulgated under Title IX allow athletic teams to be separated by sex and Petitioner was not excluded from school athletics as a whole.[29] Additionally, as the United States Court of Appeals for the Fourth Circuit clarified, "In the Title IX context, discrimination 'mean[s] treating that individual worse than others who are similarly situated.' "[30]

The Code of Federal Regulations § 106.41(b), promulgated by the Department of Health, Education, and Welfare in 1979 states that a school receiving federal funding "may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[31] In the same year, the Office of Civil Rights released a policy interpretation clarifying that the purpose of these regulations was to ensure that equal opportunity is available to the sexes, for which it would consider "availability, quality and kinds of benefits, opportunities, and treatment . . . ."[32] Thus, it is the opportunity of males and females to compete in equivalent athletic programs that Title IX was intended to cover, not the exact means of ensuring that such was provided. The United States

[28] R. 12.
[29] 34 C.F.R. § 106.41(b).
[30] *Grimm*, 972 F.3d at 618 (quoting *Bostock*, 590 U.S. at 1740).
[31] 34 C.F.R. § 106.41(b) (2024).
[32] A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 239.

Court of Appeals for the Third Circuit has also pointed out that this regulation was promulgated to increase opportunities for women and girls in athletics in response to the historic emphasis on boys' athletic programs.[33]

In *Williams*, the Third Circuit Court overturned the district court's grant of summary judgment for plaintiffs who claimed that their son was impermissibly excluded from the girls' field hockey team.[34] Owing to the lack of a boys' field hockey team at his school, the son had decided to try out for the girls' team, but the school stopped him from playing on the team because of his biological sex.[35] Noting that 34 C.F.R. § 106.41(b) allows exclusion from teams based on gender even when no analogous team exists for the excluded sex if the sport is a contact sport, the Third Circuit held that the son's exclusion was permitted under Title IX.[36] The Third Circuit Court further noted that if real physical differences between boys and girls exist, then they are "not similarly situated as they enter into most athletic endeavors."[37]

In this case, Petitioner's exclusion from the boys' athletic teams is permissible because of the carve-out for athletics created by 34 C.F.R. §106.41(b).[38] Selection for the girls' volleyball and cross-country teams at Petitioner's school is competitive, so exclusion based on biological sex is permitted by Title IX and regulations promulgated therefrom.[39] This exclusion is consistent with the purpose of this regulation, which is to increase opportunity for women and

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[33] *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3rd Cir. 1993).
[34] *Id.* at 170.
[35] *Id.*
[36] *Id.* at 171, 175–76.
[37] *Id.* at 178; *see also Virginia*, 518 U.S. at 533 ("Physical differences between men and women . . . are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).
[38] 34 C.F.R. § 106.41(b) (2024).
[39] *See* R. 8.

girls in athletics.[40] Furthermore, as the Office of Civil Rights' policy interpretation statement made clear, Title IX is satisfied so long as every individual has access to competitive athletics, and no requirement is imposed that the athletic team they play on be consistent with their gender identity.[41] Additionally, the Fourteenth Circuit's conclusion in this case "that Title IX used 'sex' in the biological sense, because its purpose was to promote sex equality" is similarly consistent with that purpose.[42]

Furthermore, Petitioner was not treated worse than similarly situated persons because Petitioner is not similarly situated to biological girls, as noted by the Fourteenth Circuit.[43] As in *Williams*, the decision to exclude Petitioner from her preferred teams, the girls' teams, is permitted by 34 C.F.R. § 106.41(b) because of its express allowance for sex-separated teams when the teams are competitive.[44] In fact, Petitioner's situation is better than the student in *Williams*, since Petitioner does have access to the boys' teams, rather than no team at all.[45] This also means that, contrary to Petitioner's assertion, "[T]ransgender girls are not excluded from school sports entirely," which fact was noted by the Fourteenth Circuit.[46] Finally, as the Supreme Court has recognized, there are "real differences" between males and females.[47] At least one Ninth Circuit Judge in *Adams ex rel. Kasper v. School Board of St. Johns County* noted that those differences include the ability of biological males to "jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster

[40] *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. at 239.
[41] *See Id.*
[42] R. 11.
[43] R. 8.
[44] *See* 34 C.F.R. § 106.41(b) (2024).
[45] R. 11.
[46] *Id.*
[47] *Virginia*, 518 U.S. at 533.

than females' on average."[48] Thus, as noted by the Third Circuit, Petitioner is not similarly situated to biological girls and, therefore, has not been discriminated against within the definition of "discrimination" applicable to Title IX.[49]

While Petitioner has not yet begun puberty such that the referenced differences are fully realized, Petitioner has reached the average age of male puberty and has not undergone any treatment to stop puberty from beginning as early as tomorrow.[50] Additionally, given that both the Act and Title IX apply from adolescence through the level of intercollegiate sports,[51] this Court is no doubt mindful that its decision will have consequences for both older athletes and those who have already undergone puberty.

Because Title IX includes carve-outs allowing distinction on the basis of gender in athletics, Petitioner is not similarly situated to biologically female athletes, and Petitioner is eligible under the Act to play on boys' athletic teams, the Act does not discriminate against Petitioner under Title IX.

B. Petitioner suffered no legally cognizable harm by being excluded from the girls' volleyball and cross-country teams.

Even if the Court were to find that Petitioner was discriminated against under the meaning of Title IX, there exists no causal connection between that discrimination and harm to Petitioner, a requirement that the Fourth Circuit has noted is recognized by this Court's jurisprudence.[52]

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[48] *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 819 (11th Cir. 2022).
[49] *See Williams*, 998 F.2d at 178.
[50] R. 3.
[51] *See* 20 U.S.C. 1681(a); *See also* R. 4.
[52] *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (Holding that since the Supreme Court included cause in its facts recitation in *Cannon*, the Supreme Court has "implicitly recognized the necessity of causation"); *see also Cannon v. University of Chicago*,

In *Grimm*, the United States Court of Appeals for the Fourth Circuit demonstrated what is required to find the requisite causal connection. In that case, the plaintiff was required to use neither the standard girls' nor boys' bathroom in his high school, instead being required to use specially designated bathrooms for students with "gender identity issues."[53] The Fourth Circuit Court noted that this required the student to be late to classes, miss more class time to use the restroom than typical or expected by teachers, leave campus to use the restroom during sporting events, and suffer anxiety related to the use of the restroom.[54]

As a result of these conditions, the student notably suffered concrete harms, including urinary tract infections caused by delayed restroom trips.[55] These infections required treatment, and the student further developed suicidal thoughts that required hospitalization, evidencing both serious and economic harm.[56] These details established a causal relationship between the action of the school and the effects on the student.[57] The Fourth Circuit Court also considered "[t]he stigma of being forced to use a separate restroom" because doing so invited "more scrutiny and attention" from other students. [58] The Fourth Circuit Court then noted that this same stigma contributed to cognizable "emotional and dignitary harm."[59]

In this case, Petitioner has not suffered any cognizable harm because of her inability to participate on the girls' volleyball and cross-country teams. Petitioner has the opportunity to play on the analogous boys' teams under the provisions of the Act, so Petitioner will not be made to

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441 U.S. 677, 680 (1979); *Grimm*, 972 F.3d at 616 ("To grant summary judgment . . . on [a] Title IX claim, we must find . . . that improper discrimination caused . . . harm.").
[53] *Grimm*, 972 F.3d at 608.
[54] *Id.* at 617.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 618 (internal punctuation and citation omitted).
[59] *Id.*

miss out on the opportunity to participate in competitive sports.[60] Petitioner also has not alleged any effects akin to those of the student in *Grimm*, with no costs incurred and no resultant medical problems.[61] Not only are none of these effects attested in the record, but also a biological male playing on teams created for biological males will not draw "more scrutiny and attention" [62] from other students. Quite the opposite, this would almost certainly reduce the amount of scrutiny and attention faced by Petitioner, effectively protecting her from the increased scrutiny and attention that she would doubtless face as side effects of playing on the girls' teams.

Because application of the Act will not prevent Petitioner from participating in competitive sports, Petitioner has not experienced harm, and Petitioner will not experience additional scrutiny and attention as a result of the Act's provisions, Petitioner has not suffered legally cognizable harm to establish a violation of Title IX.

C. *Bostock's* equivocation of gender identity discrimination and sex discrimination is not applicable in a Title IX context.

In *O'Connor v. Board of Ed. of School Dist. 23*, Justice Stevens, sitting as Circuit Justice, observed that school-sponsored athletic programs with separate teams for boys and girls comply with regulations issued by the Department of Health and Human Services pursuant to Title IX.[63] The regulation itself states, "[A] recipient [of federal financial assistance] may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[64]

[60] R. 11.
[61] *See generally* R. 3–16.
[62] *Grimm*, 972 F.3d at 618.
[63] *See O'Connor v. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980).
[64] 34 C.F.R. § 106.41(b).

In *Bostock*, this Court held that, in a Title VII context, "It is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[65] The plaintiffs were three individuals who fired shortly after their employers found out about their homosexual orientation or transgender identity.[66] On behalf of these individuals, claims were brought under Title VII against their employers, alleging sex discrimination.[67] In its determination of whether the terminations were the result of sex discrimination, this Court, based on its precedents, interpreted the statute's prohibition of certain actions by employers "because of" sex as creating a standard based on "but-for causation."[68]

The Court's application of this test was as follows: If an employer terminates a transgender woman and retains an employee who is a biological female, "the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."[69] Thus, the Court reasoned that if changing a factor would have changed the outcome of a plaintiff's situation, then that factor was present. The Court also ruled that if the factor was the biological sex of the person, then a violation of Title VII was established.[70]

This case, however, concerns Title IX which, unlike Title VII, includes express carve-outs allowing distinguishing between the sexes, such as C.F.R. § 106.41(b), as noted in the Fourteenth Circuit Court's decision in this case.[71] Additionally, the decision in *O'Connor* demonstrates that the regulations promulgated by the Department of Health, Education, and

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[65] *Bostock*, 590 U.S. at 660.
[66] *Id.* at 653–654.
[67] *Id.* at 654.
[68] *Id.* at 656.
[69] *Id.* at 660.
[70] *Id.* at 656–657.
[71] *See* 34 C.F.R. § 106.41(b) (2024); R. 12 n.10.

Wellness, along with athletic programs based on them, have been given at least tacit approval by this Court.[72]

Title IX's statutory language is also sufficiently different from that of Title VII as to be unsupportive of the reasoning applied by this Court in *Bostock*.[73] While Title VII's use of the phrase "because of" was key to the Court's decision that a basic "but-for" causation test would apply to determine whether sex discrimination was automatically present anytime that gender identity discrimination is present, that phrase is not present in Title IX.[74] Instead, it uses the phrase "on the basis of sex," requiring a higher threshold for sex discrimination under Title IX.[75]

Because of the different wording in the statutes themselves, the existence of Title IX's carve-outs allowing differentiation between the sexes, and the approval given to athletic programs based on the regulations put forth pursuant to Title IX, the reasoning of *Bostock* is not applicable to Title IX. As such, under Title IX, discrimination on the basis of gender identity is not equivalent to discrimination on the basis of sex and this Court's reasoning supporting that holding in *Bostock* is not applicable.

II. THE TRIAL COURT WAS CORRECT IN HOLDING THAT THE EQUAL PROTECTION CLAUSE DOES NOT PREVENT STATES FROM EXCLUDING BIOLOGICAL MALES FROM PLAYING ON GIRLS' SPORTS TEAMS WHEN THOSE TEAMS ARE INVOLVED IN CONTACT SPORTS OR THEIR SELECTION IS BASED ON COMPETITIVE SKILL.

While the Supreme Court has made it clear that unjustified discrimination on many bases is not tolerated by the Equal Protection Clause, differentiation on the basis of sex has been held

[72] *See O'Connor*, 449 U.S. at 1307–08.
[73] *See* 42 U.S.C. § 2000e-2(a)(1); 20 U.S.C. 1681(a).
[74] *Compare* 42 U.S.C. § 2000e-2(a)(1) (It is "unlawful . . . to discriminate against any individual *because of* such individual's . . . sex.") *with* 20 U.S.C. 1681(a) ("No person . . . shall, *on the basis of sex* . . . , be subjected to discrimination") (emphasis added).
[75] 20 U.S.C. § 1681(a).

to be constitutional when a state can show 'that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'"[76] Additionally, the Court's decision in *Virginia* made it clear that when the state administers separate programs for men and women, a finding that those programs are approximately equivalent weighs in favor of determining that the separation of the programs is justified.[77] Thus, a state statute's differentiation between males and females is permissible when (1) the distinction serves an important government objective, (2) the distinction is substantially related to that objective, and (3) approximately equivalent, though separate, programs are available for both sexes.[78]

The Act serves the important government objectives of providing equal athletic opportunities for females and protecting the physical safety of female athletes. In serving these objectives, the provisions of the Act are not only substantially but entirely related to these goals. Additionally, athletic competition on equivalent teams is available to both sexes under the Act.

A. <u>The Act serves the important government objectives of providing equal athletic opportunities for females and protecting the physical safety of female athletes, thus ensuring equal protection of the laws for males and females.</u>

There are many ways that sex classifications may be used permissibly under the jurisprudence of this Court.[79] For example, the Court has held, "Sex classifications may be used .

[76] *Virginia*, 518 U.S. at 533 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).
[77] *Id.* at 534.
[78] *See Id.* at 533–534, 548.
[79] *See Califano v. Webster*, 430 U.S. 313, 319–20 (1977) (Sex classification allowed to compensate for former economic discrimination); *see also Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 288–89 (1987) (Sex classification allowed to "promot[e] equal opportunity").

. . to promot[e] equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation's people."[80]

In *Adams ex rel. Kasper v. School Board of St. Johns County*, the United States Court of Appeals for the Eleventh Circuit demonstrated what qualifies as an important government objective under the Equal Protection Clause for a policy that distinguishes between the sexes.[81] In that case, the Eleventh Circuit Court considered the validity of requiring transgender students in public schools to use the bathroom corresponding to biological sex.[82] Upholding the policy, the Eleventh Circuit Court held that "protecting students' privacy in school bathrooms" represented an important government interest, the importance of which interest the Eleventh Circuit considered obvious because of its long-standing ubiquity in our society .[83] The Circuit Court further noted that because schools operate in loco parentis, the Supreme Court has often given substantial deference to schools' decisions regarding several constitutional issues, including interpretation of the Fourth Amendment,[84] the First Amendment,[85] and the Eighth Amendment.[86] [87]

In a case with facts similar to the case at hand, *Clark v. Arizona Interscholastic Association*, the United States Court of Appeals for the Ninth Circuit upheld the exclusion of a male student from a girls' volleyball team.[88] While the plaintiff in that case was a cisgender male who was excluded from a girls' volleyball team, the central issue in the case remained the same–

[80] *Virginia*, 518 U.S. at 533.
[81] *See Adams*, 57 F.4th at 800–04.
[82] *See Id.* at 800.
[83] *Id.*
[84] *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).
[85] *Morse v. Frederick*, 551 U.S. 393, 403–08 (2007).
[86] *Ingraham v. Wright*, 430 U.S. 651, 671 (1977).
[87] *Adams*, 57 F.4th at 802.
[88] *See Clark ex rel Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131–32 (9th Cir. 1982).

whether a biological male being excluded from a girls' athletic team violates the Equal Protection Clause.[89] The Ninth Circuit Court in that case held that this was permissible to promote equal opportunity for women. [90]

On the other hand, in *Frontiero v. Richardson*, the Supreme Court showed that a policy or statute cannot be justified by a government objective that, while having some level of importance, is easily outweighed by objectives that run contrary to the policy or statute.[91] In that case, the Supreme Court struck down a statute requiring female members of the military to prove actual dependence of a spouse to claim military dependence of the spouse while imposing no such evidentiary requirement for male servicemembers. [92] The government's claimed objective was "administrative convenience," which the Court interpreted primarily to mean "save money."[93] Noting that the government's asserted objective is a valid government purpose, the Court nevertheless stated, "'[T]he Constitution recognizes higher values than speed and efficiency.'"[94] In striking down the statute, the Court demonstrated that objectives so banal as administrative convenience are not sufficient to justify distinction based on sex.

In the case at hand, North Greene's Save Women's Sports Act pursues the objectives of providing equal athletic opportunities for females and protecting the safety of female athletes.[95] The text of the statute expressly identifies North Greene's interest as "promoting equal athletic opportunities for the female sex."[96] These objectives are at least as important as the objective of

[89] *Id.* at 1127.
[90] *Id.*
[91] *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).
[92] *See Id.* at 678–79.
[93] *Id.* at 688–89.
[94] *Id.* at 690 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).
[95] R. 6.
[96] R. 4.

"protecting students' privacy," as in *Adams*.[97] Also similar to the interests in *Adams*, these objectives have long been widely accepted in our society, as evidenced by the fact that sports teams at nearly every level have been divided on the basis of biological sex since the spread of competitive sports in the late nineteenth and early twentieth centuries.[98] Additionally, like *Adams*, this case concerns school policies and, as such, this Court should be mindful of historical holdings giving deference to school policies due to their in loco parentis status.[99]

Unlike those in *Frontiero*, the objectives here are far from being simply the pursuit of convenience or cost-cutting. Instead, they are in furtherance of ensuring equality between males and females and providing equal opportunity for female athletes and protecting their physical safety.[100] The former objective, at least, simply acknowledges in statute a fact that the Fourteenth Circuit Court in this case stated as follows: "Given how biological differences affect typical outcomes in sports, ensuring equal opportunities for biological girls in sports requires that they not have to compete against biological boys."[101] The latter objective similarly acknowledges that there can be danger to women in competitive and contact sports against biological males, as North Carolinians learned in 2022 when a female volleyball player suffered severe head and neck injuries, including symptoms of a long-term concussion, caused by a volleyball spike in her face by a biological male playing for the other team.[102]

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[97] *Adams* 57 F.4th at 800.
[98] *See* Richard C. Bell, *A History of Women in Sport Prior to Title IX* (March 14, 2008), https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/.
[99] *See* R. 4.
[100] R. 4.
[101] R. 9.
[102] Luke Andrews, *Female volleyball player, 17, left paralyzed with brain damage by transgender opponent who 'cackled with delight' after knocking her to ground*, (July 31, 2024, 1:58 PM), https://www.dailymail.co.uk/health/article-13693959/payton-mcnabb-volleyball-player-paralyzed-brain-damage-transgender.html.

Given the incredibly important state interests at hand, this Court should find that this statute does pursue an important objective under this Court's Equal Protection jurisprudence.

B. The means of differentiation used by the Act are limited to those that are substantially related to the achievement of its important objectives.

Having established that the state's objectives giving rise to the Save Women's Sports Act are not only legitimate but important, this Court will next consider whether the Act's means, separating male and female sports teams on the basis of biological sex, are "substantially related" to those objectives.[103] This Court has shown that to meet this requirement, classifications based on sex "must bear a close and substantial relationship to important governmental objectives."[104] The Court has further stated that this close relationship is required to ensure that the classification is determined to be valid by a reasonable analysis and not "through the mechanical application of traditional . . . assumptions about the proper roles of men and women."[105]

In *Adams*, the Eleventh Circuit Court determined that the means used by the statute, which kept school bathrooms separated on the basis of biological sex,[106] were substantially related to its objective of protecting students' privacy in school bathrooms.[107] The Eleventh Circuit Court determined that the bathroom policy was "clearly related to" the objective of protecting students' privacy.[108] In so doing, the Eleventh Circuit Court overturned the district court's holding that the policy was not substantially related to its objective, stating that the

[103] *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).
[104] *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).
[105] *Hogan* 458 U.S. at 726.
[106] Students were also given the option to use a gender-neutral bathroom. Regarding sports teams, as here, it is unlikely that a gender-neutral option is viable because schools are unlikely to have enough transgender students to support the creation of gender-neutral teams.
[107] *Adams* 57 F.4th at 803.
[108] *Id.* at 805.

district court only drew its conclusion by "misconstruing the privacy interests at issue and the bathroom policy employed."[109]

Conversely, in *Mississippi University for Women v. Hogan*, the Supreme Court showed that, even when an objective may be important, a policy that does not actually further the stated goal does not survive intermediate scrutiny.[110] In that case, a male nurse brought an action against the University for denying him admission solely on the basis of sex.[111] The Court held that even if there were a legitimate objective for the exclusionary policy, it would fail under the requirement that the means be substantially related to the objective because the state allowed men who chose to audit classes to fully participate in those classes, despite the state's argument being based on the fact that the presence of men in the classroom harmed women's education.[112] Based on this conflict, the Court determined that the exclusionary policy was a pretext for reinforcing a gender-based stereotype that only women should be nurses.[113]

In this case, as in *Adams*, the policy created by the statute hews closely to the objectives laid out by the North Greene, promoting equal athletic opportunities for females and protecting the physical safety of female athletes.[114] The statute notably requires that if selection for a team is competitive or the activity is a contact sport, then biological males should not be permitted to compete.[115] These limitations make it clear that this policy is not intended to exclude any person from a girls' team unless that exclusion furthers one of the two stated objectives, the application when a team is competitive ensuring that female athletics remain competitive and the application

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[109] *Id.*
[110] *Hogan*, 458 U.S. at 730.
[111] *Id.* at 720–21.
[112] *Id.* at 730–31.
[113] *Id.* at 729.
[114] *See* R. 4.
[115] *Id.*

when an activity is a contact sport protecting the physical safety of female athletes.[116] Any finding to the contrary would require misconstruing this policy entirely, as the Fourteenth Circuit Court in *Adams* noted was done by the district court.[117]

On the other hand, the policy created by the statute at issue is unlike the implementation of the policy in *Hogan*, which belied the stated intentions of the state.[118] In this case, Petitioner's school athletic programs have followed the policy of keeping biological males from reducing the competitive opportunities afforded to biological females, with no actions taken to suggest that these objectives are not truly operative in the Save Women's Sports Act.[119] Additionally, the statute does nothing to reinforce any sex-related stereotype, since it still allows both males and females to play in all available sports.[120]

Petitioner contends that the stated purpose is merely a pretext for preventing transgender girls and women from participating in sports consistent with their gender identity.[121] But Petitioner ignores the fact that the Act's exclusions only apply when selection for a team is competitive, or the activity is a contact sport.[122] Thus, Petitioner has the opportunity to participate in sports consistent with her gender identity so long as one of those criteria does not apply. To the extent that Petitioner would benefit from the social experience of participating in sports with her peers and wishes to avoid any stigma for being unable to do so,[123] she can receive

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[116] *See Id.*
[117] *Adams*, 57 F.4th at 805.
[118] *See Hogan*, 458 U.S. at 729.
[119] *See* R. 4.
[120] *See Id.*
[121] *Id.*
[122] *Id.*
[123] *See* R. 16. (Knotts, J., dissenting).

that benefit in a non-competitive or non-contact context, where her doing so would not impair the objectives advanced by the state.

As such, Petitioner's contention is without merit and it is plain that the implemented policy closely mirrors the stated objectives of the Save Women's Sports Act.

C. The Save Women's Sports Act does not discriminate against transgender persons.

Absent facial discrimination, a statute can still be held to be impermissibly discriminatory if (1) an adverse effect of the statute "reflects invidious . . . discrimination" and (2) the discrimination is purposeful.[124] Additionally, such discrimination can be cured, or held not to exist, if equal opportunities are available to both included and excluded persons.[125]

In *Feeney*, the Supreme Court determined that a policy giving veterans preference in hiring for state positions that almost exclusively benefitted men did not violate the Equal Protection Clause.[126] The Court ultimately held that while the policy at issue was facially neutral, 98% of veterans in the state at the time litigation commenced were male and, therefore, a negligible number of women would benefit and the policy would almost exclusively benefit men.[127] The dispositive factor, leading to the Court's decision to uphold the veterans' preference policy, was that the policy did not purposefully discriminate against women, with the Court noting that the course of action must be taken "because of" an adverse effect on a group, not in spite of such effect.[128]

[124] *Feeney*, 442 U.S. at 274.
[125] *See Virginia* 518 U.S. at 534.
[126] *Feeney*, 442 U.S. at 280–81.
[127] *Id.* at 270.
[128] *Id.* at 276, 279–81.

In *Virginia*, the Court also showed that an Equal Protection Clause violation does not exist when there is an equal opportunity available to the excluded group.[129] This Court noted that Virginia's plan to remedy the exclusion by creating an equivalent institution could have rendered integration at the Virginia Military Institute ("VMI") unnecessary.[130] The plan would have done so if that plan created an appropriate alternative for females who desired a similar opportunity to the one that male students had at VMI.[131] The Supreme Court ultimately determined that this was insufficient because it created a program that was entirely different from that offered at VMI, noting that while the program it would create would require participation in ROTC and a cadet corps, it did not "make VWIL a military institute."[132] VWIL would not use a "military style residence," require students to live together, eat together, or wear uniforms during the school day.[133] In short, VWIL students would miss out on both the strictures of the academic day at VMI and the barracks experience that the Court noted create "[T]he most important aspects of the VMI educational experience."[134] Thus, VWIL would be a wholly different type of program, distinguishable in nearly every way from the experience male students would have at VMI.[135]

While the Act facially discriminates on the basis of biological sex, it does not facially discriminate on the basis of transgender status, so it is the questions of discriminatory impact and purpose that must be answered.[136] While the Act does serve to prevent transgender girls from playing on girls' athletic teams, it also prevents cisgender boys from playing on the same

[129] *See Virginia*, 515 U.S. at 547–48.
[130] See *Id.*
[131] *See Id.* at 548.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *See* R. 4.

teams.[137] Thus, the Act impacts far more cisgender boys than transgender girls. Even if the Court were convinced that there was a discriminatory impact on transgender girls, it cannot show that the discrimination was purposeful because the Act's application is limited to competitive sports and contact sports. [138] That limitation demonstrates that the Act's purpose was simply to protect the competitiveness of girls' and women's sports, as well as the physical safety of female athletes. Had North Greene had a discriminatory purpose, the Act would have attempted to reach further to place limits on all sports; instead, the Act allows transgender persons to play on sports teams consistent with their gender identities at all ages so long as such competition will not interfere with its important interests of competitiveness and safety.[139] Additionally, the Act simply codified a practice that was already in place for generations during which sports were segregated based on biological sex. As such, it cannot be said that the legislature decided to separate sports into categories based on biological sex "because of" transgender students.

Additionally, Petitioner can participate on the boys' athletic teams under the provisions of the Act, teams which are in no way an inferior opportunity to that which would be provided by the girls' teams.[140] As compared to the Court's notation of the different opportunities in *Virginia,* it is clear that the facts at hand create a different outlook for Petitioner, with her having the opportunity to participate on approximately equal boys' teams.[141]

Because the Act does not impermissibly discriminate based on sex, does not discriminate based on gender identity, and all students have access to equivalent athletic opportunities, this

[137] *See Id.*
[138] *See Id.*
[139] *See Id.* at 4.
[140] *See Id.* at 4.
[141] *See Id.*

Court should uphold the Act as constitutional under the Fourteenth Amendment's Equal Protections Clause.

III. DIVIDING SPORTS TEAMS BASED ON BIOLOGICAL SEX PROTECTS THE COMPETITION OF SPORTS AND ALLOWS WOMEN AN OPPORTUNITY TO THRIVE.

A. Prohibiting the division of sports teams based on biological sex would diminish opportunities for women to compete on competitive sports teams.

The Office of Civil Rights' 1979 Title IX interpretation supports the principle that division of competitive sports teams on the basis of biological sex creates more opportunities for women in competitive sports.[142] The Office of Civil Rights interpreted Title IX as requiring that schools receiving federal funding "provide equal athletic opportunities for members of both sexes."[143] This requirement resulted in significant redistribution of university funding towards the creation, maintenance, and improvement of women's sports teams.[144] The redistribution has bolstered women's opportunity to participate in sports, as demonstrated by the percentage of female NCAA athletes increasing from 16% to more than 44% since the passage of Title IX.[145] This increased opportunity is the direct result of having sports teams based on biological sex.

Since the requirement to equalize funding, equipment, schedules, and athletic programs overall depended the division of athletics on the bases of biological sex,[146] this increased opportunity for women could not have occurred without such division. There are suggestions that alternatives in sports classifications that may produce comparable results, including allowing

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[142] *See generally A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. at 239.
[143] *Id.*
[144] *See Quick Facts About Title IX and Athletics*, NATIONAL WOMEN'S LAW CENTER (June 21, 2022), https://nwlc.org/resource/quick-facts-about-title-ix-and-athletics/#:~:text=After%20Title%20IX%20passed%20in,percent% 20of%20all%20college%20athletes.
[145] *Id.*
[146] *See A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. at 239.

both biological men and women to participate for the same teams. This would increase the breadth of opportunities available to women to participate in sports, but it would not produce a quality opportunity equaling that available with teams separated by biological sex. Under these circumstances, men would have a significant advantage over women in many competitive sports due to a biological male's physical capacity. These advantages would result in fewer women participating in competitive athletics, undermining the primary goal of Title IX. While significant progress has been made, Title IX's goal of equal opportunity for women to participate in athletics has not yet been accomplished, and prohibiting the division of sports based on sex would be detrimental to that effort.[147]

B. Prohibiting the division of sports teams based on biological sex undermines conceptions of fairness and competition within youth and collegiate sports.

The basic principle of fairness in competitive sports is that those on a given team, or in a given league, have a comparable baseline of physical capacity. Owing to the physical differences between males and females noted by this Court in *Virginia*,[148] society deems it fair that males and females compete against members of their own biological sex.

This basic principle of fairness is also prevalent in physical classifications other than those based on biological sex. Boxers are divided by weight class; youth sports are divided by age; and participants in the Paralympics are divided by impairment type.[149] None of these classifications are informed solely by the ability to perform well, as doing so would

[147] Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 2007.
[148] *Virginia*, 518 U.S. at 533 ("Physical differences between men and women . . . are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).
[149] *Classification in Para Athletics*, https://www.paralympic.org/athletics/classification (last accessed September 13, 2024).

disincentivize performing higher than other comparable individuals. For example, if we were to divide boxers purely based on the win/loss record, the best featherweight boxers would be forced to compete in higher weight classes until they reach one where they perform at a mediocre level. Similarly, we do not divide children based on their aptitude for the sport. We divide based on things like age, weight, and types of impairment because they are representative of a kind of physical capacity. These divisions incentivize the values of hard work, grit, and determination that allow one person to surpass others who started at an equal baseline. They likewise allow athletes who demonstrate these values and become great to be recognized as such. This shows that conceptions of fairness and competitiveness in sports do not target the most even level of competition, instead targeting a relatively equal baseline of physical capacity.

No two starting positions in sports will ever be exactly equal. There will always be people in classifications that are taller, faster, stronger, have more resources, or have been able to practice and play more regularly. However, basing sports classifications as nearly as possible on physical capacity expresses the sentiment and reality that one could put in enough time and effort to become great in their respective sports. Taking away those classifications significantly reduces that opportunity. A thirteen-year-old who would otherwise be the best in his or her state would rarely be able to play competitively with a seventeen-year-old, and a boxer in a featherweight class would be at a severe disadvantage in a league where he or she had to box against heavyweight fighters. Similarly, prohibiting the division of sports based on biological sex and allowing biological men to play in leagues created for biological women would severely undermine societal conceptions of fairness and competitiveness in sports.

Because eliminating divisions of sports based on biological sex would endanger equal opportunity in athletics, and would undermine conceptions of fairness and competition, relevant

policy considerations support continuing to allow states to maintain distinctions based on biological sex.

Conclusion

The judgment of the United States Court of Appeals for the Fourteenth Circuit should be affirmed.

DATED AND SIGNED this 13th day of September 2024.

/s/
Counsel for Respondents