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 RESPONDENTS

Team 7
Counsel for Respondents

QUESTIONS PRESENTED

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

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STATUTES AT ISSUE

North Greene Code § 22-3-4 provides:

(1) There are inherent differences between biological males and biological females, and that these differences are cause for celebration.

North Greene Code § 22-3-15 provides:

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

(2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.

(3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.

North Greene Code § 22-3-16 provides:

(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.

STATEMENT OF THE CASE

A. Factual Background

In 2023, the North Greene General Assembly introduced and Governor Sprague approved the "Save Women's Sports Act" (hereinafter the "Act"). (R. at 3.) This piece of legislation was codified as North Greene Code § 22-3-4 et seq. (R. at 3.) Specifically, the Act requires "interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or state institution of higher education" to be categorized as either a male, female, or coed team. (R. at 4.) The Act sought to acknowledge and promote athletic programs by providing clear standards by which schools are to adhere to. (R. at 4.) The Act additionally prescribes that female "athletic teams or sports" that involve a contact sport or selection is based on competitive skill are limited in participation to only female students. (R. at 4.) The Act bases its categorization on students' biological sex at birth. (R. at 4.) Biological sex is defined in the Act as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." (R. at 4.)

Petitioner, A.J.T., "was assigned the sex of male at birth" and currently attends a public secondary school in North Greene. (R. at 3.) Prior to the litigation of this matter, Petitioner sought to join the North Greene school's female volleyball and cross-country teams. (R. at 3.) In adhering to the Act, the school informed Petitioner that their participation in the female teams was prohibited due to both female teams involving either a contact sport or selection based on competitive skill. (R. at 3.)

Petitioner identifies as a girl and has sought treatment for a gender dysphoria diagnosis received in 2022. (R. at 3.) Upon information and belief, Petitioner has received treatment in the form of counseling. (R. at 3.) Petitioner has not received any formally recognized gender-affirming care, including puberty-delaying treatment. (R. at 3.) Additionally, Petitioner has not changed their sex on any legal identification documents, including their birth certificate. (R. at 3.)

B. Procedural History

Petitioner initiated a lawsuit against the State of North Greene Board of Education and State Superintendent Floyd Lawson through their mother. (R. at 4.) Following the initiation of the lawsuit, the State of North Greene's motion to intervene was granted and Petitioner amended their complaint to name North Greene Attorney General Barney Fife and the State of North Greene. (R. at 4-5.)

Petitioner alleged that the Act violated Title IX and the Equal Protection Clause of the Fourteenth Amendment of the Constitution and sought a declaratory judgment and injunction against Respondents. (R. at 5.) In response, Respondents filed a motion for summary judgment and opposed the permanent injunction. (R. at 5.) The District Court found that there was no existing genuine issue of material fact and granted the Respondents' motion for summary judgment. (R. at 5.) Petitioner subsequently appealed the District Court's grant of Respondents' motion for summary judgment. (R. at 5.).

The United States Court of Appeals for the Fourteenth Circuit granted Petitioner's appeal and affirmed the District Court's grant of Respondents' motion for summary judgment. (R. at 3.) The Fourteenth Circuit held that Respondents' adherence to the Act did not violate the Equal Protection Clause of the Fourteenth Amendment or Title IX. (R. at 3.) The court reasoned that

the purpose of the Act is substantially related to important government interests and further does not discriminate against Petitioner on the basis of sex. (R. at 10-12.)

SUMMARY OF THE ARGUMENT

Title IX is a landmark piece of legislation that expressly prohibits against sex discrimination in federally funded educational institutions. 20 U.S.C. § 1681 et seq. (1986). The text, history, and purpose of Title IX directly points to the intention to provide members of the female sex with greater opportunity in educational environments. In doing so, the Department of Education has implemented many regulations allowing Title IX institutions to provide separate accommodations for the sexes. *See* 34 C.F.R. § 106.41(b) (2024); 34 C.F.R. § 106.33 (2024). Specifically, Title IX allows for sex-separate athletic teams that involve a contact sport or members are selected based on competitive skill. The original and intended meaning of Title IX requires that sex be read to only include biological sex at birth. Here, the Act falls squarely in the safe harbor provision of Title IX by separating their competitive sports teams based on sex.

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying any person within its jurisdiction "equal protection of the laws." U.S. Const. Amend. XIV, § 1, cl. 4. Where a class of persons has been denied unequal protection, the Clause requires the state actor to provide sufficient justification for such classification. Here, the Act does not deny unequal protection of the law because its classification meets the high burden of justification.

ARGUMENT

STANDARD OF REVIEW

A "grant of summary judgment" is reviewed "de novo, construing the evidence and all reasonable inferences therefrom in favor of the nonmoving party." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1050 (11th Cir. 2015) (citing *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755, 759 (11th Cir. 2006)). Summary judgment is granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "fact is material if, under the applicable substantive law, it might affect the outcome of the case" and "genuine if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Urquilla-Diaz*, 780 F.3d at 1050 (citing *Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014)) (internal quotation marks omitted). "[T]he nonmoving party must make a showing sufficient to permit the jury to reasonably find on its behalf" to defeat a motion for summary judgment. *Id.*

I. Title IX Allows a State to Consistently Designate Girls' and Boys' Sports Teams Based on Biological Sex Determined at Birth.

"Title IX of the Education Amendments of 1972" was enacted to prohibit the discrimination or exclusion from federally funded education programs and activities on the basis of sex. 20 U.S.C. § 1681 et seq. (1986). Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." *Id.* The Department of Education is charged with enforcing Title IX "by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." 20 U.S.C. § 1681(a) (1986). In regard to education institutions providing athletic programs, Title IX allows for a recipient of federal funding to "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." 34 C.F.R. § 106.41(b) (2024). Additionally, Title IX allows education institutions to provide "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33 (2024). Title IX requires that sex-separate facilities be "comparable to such facilities provided for students of the other sex." *Id.*

Petitioner must prove the following to be successful on a private Title IX action: (1) exclusion from participation in an education program on the basis of sex; (2) the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused Petitioner harm. *Grimm v. Gloucester Cnty. Sch. Bd*., 972 F.3d 586, 616 (4th Cir. 2020). In this case, the educational institution and the North Greene Board of Education received federal financial assistance at all times relevant. This element is not at issue in this case. The issues to be determined are whether Petitioner was excluded from an educational program on the basis of sex and if so, whether Petitioner was harmed. Due to the purpose, history, and jurisprudence surrounding Title IX it is clear that Petitioner was not discriminated against or excluded from educational programs or activities on the basis of sex and subsequently was not harmed by improper discrimination.

A. <u>The meaning of "sex" under Title IX does not include gender identity.</u>

Title IX expressly prohibits discrimination on the basis of sex in educational institutions that receive federal funding. 20 U.S.C. § 1681 et seq. (1986). The scope of Title IX is ultimately determined by the meaning of sex. The text, history, and purpose of Title IX clearly supports the notion that sex refers to biological sex under Title IX.

1. Sex is not an ambiguous term as used in Title IX.

Sex is a clear and unambiguous term in Title IX. Employing conventional methods of statutory interpretation involves looking to the "original meaning" of terms within a statute at the time it was enacted. *Adams v. Sch. Bd. of St. Johns Cnty*., 57 F.4th 791, 812 (11th Cir. 2022). In the case of Title IX, the meaning of the word "sex" is determined by its use and meaning in 1972 when first enacted.

Senator Birch Bayh sponsored Title IX and offered comments during floor debates on the day of enactment that display the true purpose of Title IX. Senator Bayh stated that Title IX was intended "to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education." *Conley v. Nw. Fla. State Coll*., 145 F. Supp. 3d 1073, 1078 (N.D. Fla. 2015) (citing 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh)). Senator Bayh additionally commented on the discrimination women faced in the graduate school admissions process. *Id.* It is clear from Senator Bayh's comments that Title IX was intended to be a piece of legislation that would foster the inclusion of women in educational institutions and programs. The previous discrimination women faced based on stereotypes associated with their sex was to be prohibited in educational institutions that received federal financial assistance. In this context, on the basis of sex refers directly to an individual being discriminated against or excluded from benefits of an institution due to an immutable characteristic, that being sex.

Additionally, courts have considered dictionary definitions from the time of enactment by Congress to determine the intended meaning and context of a word. *Adams*, 57 F.4th at 812. The court in *Adams* specifically referred to the definition of sex in the 1972 edition of "Webster's New World Dictionary", which defines sex as "either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive

functions." *Id.* It is clear that in 1972 the meaning of the word "sex" directly referred to the reproductive organs of an individual assigned at birth.

The interpretation that sex is a categorization assigned at birth based on the reproductive organs an individual possesses is further cemented by the recognized exceptions to Title IX that Congress implemented. As previously mentioned, Title IX allows for separate toilets, showers, and living facilities to be provided "for the different sexes." 20 U.S.C. § 1686(b)(1986). Further, to comply with Title IX educational institutions "housing provided by a recipient to students of one sex" must be "comparable in quality and cost" to housing provided to "students of the other sex." 34 CFR 106.32(b)(2024). These regulations were enacted to advance the enforcement and application of Title IX in educational institutions as it applies to multiple programs and facilities. It is clear by the language of Title IX itself and of its accompanying regulations that Congress recognized that there would be exceptions to Title IX based on sex. Additionally, that sex encompassed males and females. The simple reference to "one sex" and "the other sex" displays the frame of mind Congress possessed at the time of drafting and its intent to allow for separate, comparable facilities to be offered to male and female students at educational institutions. The notion that sex is to be defined under Title IX as beyond the framework of a binary categorization is not supported by the language used in Title IX and its accompanying regulations.

Here, the Act at issue references and defines sex in the same context as Title IX. The terms "female" and "male" under the Act comport with the 1972 meaning of sex as these categorizations are determined by "biological sex determined at birth." N.G. Code § 22-3-15(a)(1)–(3) (2023). Additionally, "biological sex" is further defined as an "individual's physical form as a male or female based solely on the individual's reproductive biology and

genetics at birth." *Id.* Title IX used the word "sex" purposefully to set a standard for educational institutions to abide by. The standard is easily identifiable by looking at the context of the statute itself and the meaning of the word "sex" in today's world and in 1972. The North Greene General Assembly followed the language and regulations of Title IX closely when drafting the Act as the same standard of reproductive functions at birth is used to determine sex. The Act complies with the standards and requirements of Title IX in providing separate accommodations when authorized for members of the different sexes. Further, the Act follows decades of precedent in the educational athletic environment that designates competitive sports teams based on sex. This type of classification is one of the most recognized and utilized exceptions to Title IX.

2. Extending the breadth of Title IX will eradicate its original protections against sex discrimination.

Courts have previously agreed with the notion that sex and gender identity are not synonymous and schools have the authority to utilize Title IX exceptions and regulations. In *Adams*, the Eleventh Circuit held that sex is not an ambiguous term and refers to an individual's "biological sex" in the context of Title IX. *Adams*, 57 F.4th at 815. The court in *Adams* examined a school policy that designated students to use the bathroom that corresponded with their sex. *Id.* at 797. Ultimately, the court held that the school was acting within the boundaries of Title IX by providing sex-separate bathrooms. The court reasoned that the prohibition on sex discrimination in Title IX does not extend to a student's gender identity. *Id.* at 814. Additionally, the court emphasized how interpreting Title IX to include gender identity would destroy the entire purpose of the statute to prohibit discrimination on the basis of sex. *Id.*

As seen in *Adams*, Title IX and its current statutory scheme cannot survive if sex is read to include gender identity. Here, the North Greene Board of Education has complied with Title IX in the same fashion as the school in *Adams.* The Board complied with the Act by designating sex-separate teams that fit into a well-established regulation of Title IX. Title IX does not offer an accommodation or exception relating to gender identity. The only recognized exceptions of Title IX include providing sex-separate accommodations for students in certain situations. Reading Title IX to include more than sex creates a broad sweeping effect that ultimately erases its purpose of providing inclusivity for the separate sexes. If Title IX were to be interpreted to include for situations where a student's gender identity does not align with their sex, schools would be unable to follow the regulations explicitly allowed by Title IX. It would render Title IX and its accompanying regulations useless. Here, the Act directly comports with the purpose and requirements of Title IX by providing for sex-separate athletic teams.

Additionally, this Court has declined to permit broad sweeping regulations to change the nature and scope of Title IX. As previously mentioned, the Department of Education is charged by Congress to implement regulations for the enforcement of Title IX that are "consistent with achievement of the objectives of the statute." 20 U.S.C. § 1681(a) (1986). In 2024, the Department of Education issued a rule that expanded the breadth of sex discrimination under Title IX to include gender identity. 89 Fed. Reg. 33886 (2024). The rule was set to take effect in August of 2024 but has received negative treatment from circuit courts across the country. This Court has specifically declined to grant partial stays of the preliminary injunctions lower courts have placed on the new rule. *See Dept. of Educ. v. Louisiana and Cardona v. Tennessee*, 603 U. S. ____ (2024).

The treatment of the new rule attempted to be enacted nationwide by the Department of Education is indicative of how disruptive a change in the meaning of sex discrimination in the context of Title IX is. Extending the breadth of Title IX does not equate to extending protection to more individuals. It accomplishes the opposite. Title IX is unable to protect against sex and gender identity discrimination at the same time due to its original purpose supporting only the prohibition of sex discrimination. Sex and gender identity are not synonymous and therefore extending the scope of Title IX to include gender identity completely erases the protection of discrimination on the basis of sex.

This Court should find that the Act comports with Title IX's allowance of educational institutions to provide sex-separate accommodations for students.

3. The Act aligns with the limitations the Spending Clause places on legislation.

The Act further complies with Title IX due to the requirement for notice of standards placed on federal funding by the Spending Clause. U.S. Const. art. I, § 8, cl. 1. Compliance with Title IX is a requirement for educational institutions to receive federal financial assistance. Abiding by the requirements of Title IX serves as a "condition on the grant of federal moneys." *Adams*, 57 F.4th at 815 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). When determining conditions to receive federal funds, Congress "must do so unambiguously." *Id.* The states must be on notice of the conditions of federal funding. *Id.*

The requirement of Congress to set unambiguous conditions on federal funding furthers the Act's interpretation of sex. Title IX clearly recognized the male and female sexes at the time of enactment. The main sponsor of Title IX spoke of the discrimination and exclusion the female sex had faced in educational institutions. *Conley*, 145 F. Supp. 3d at 1078. Congress gave no indication whatsoever that sex should include anything other than the biological

determination one receives at birth. An attempt to expand the scope of Title IX by extending sex to gender identity directly conflicts with the unambiguous nature of Title IX. States like North Greene must be on notice of any requirements to receive federal funding. The notice that Title IX provides regarding compliance clearly allows for separate facilities and competitive teams to be created for the different sexes. The North Greene General Assembly complied with the terms and conditions of Title IX in its enactment of the Act.

This Court should find that sex under Title IX refers only to biological sex.

B. The text and jurisprudence surrounding Title IX allows for distinctions based on sex.

A private cause of action under Title IX must show that Petitioner was discriminated against on the basis of sex and due to the improper discrimination was ultimately harmed. *Grimm*, 972 F.3d at 616. In the context of Title IX, discrimination is displayed by "treating an individual worse than others who are similarly situated." *Id.* at 618 (citing *Bostock v. Clayton Cnty.,* 590 U.S. 644, 657 (2020)). The court in *Grimm* held that in the context of sex-separate bathroom policies, "emotional and dignitary harm" is recognized as a sufficient showing of improper discrimination that caused harm to the individual. *Id.* at 617. Here, Petitioner has failed to present sufficient evidence to create a genuine issue of material fact regarding discrimination on the basis of sex and harm endured.

1. The implementation of the Act does not discriminate against or harm Petitioner on the basis of sex.

Throughout these proceedings, Petitioner has relied on *Bostock* and *Grimm* to further the argument that the meaning of sex includes gender identity under Title IX. In *Bostock*, this Court found that terminating an employee due to their status as homosexual or transgender violated Title VII. *Bostock*, 590 U.S. at 682. Title VII prohibits an employer from terminating, failing to

hire, or discriminating against an individual due to their "race, color, religion, sex, or national origin." *Id*. at 655. In *Bostock*, this Court analyzed the element of sex in the employment context of Title VII. *Id.* at 651-52. Additionally, this Court focused on the prohibition on discriminating against employees who do not conform to stereotypes based on their sex. *Id.* at 662.

The application of *Bostock* in this case is inconceivable due to the stark distinctions between Title VII and Title IX. In *Bostock*, this Court discussed the purpose and history of Title VII and its later trajectory in the context of case law. *Id.* at 650-53. Although sex discrimination is addressed in both statutes, the legislative and judicial branch have not applied and analyzed these laws in the same manner. Title VII prohibits discrimination in the workplace "because of" a protected characteristic while Title IX prohibits sex discrimination in schools "on the basis of sex." Title VII places emphasis on an employer making a decision because of a protected characteristic. Title IX specifically allows institutions to make decisions based on students' sex. Additionally, adherence to Title IX is a condition for being a recipient of federal funding. Compliance with Title VII is not a condition for employers, but a requirement under federal law. Title IX and Title VII do not regulate the same spaces and therefore have vastly different policies and objectives. *Bostock* is inapplicable in this case due to the lack of commonality between Title IX and Title VII.

The concerns of the school policy in *Grimm* are not present in this case. In *Grimm*, the Fourth Circuit analyzed a school bathroom policy in relation to a transgender student. *Grimm*, 972 F.3d at 593. The bathroom policy required that students use the bathroom that corresponded with their "biological gender" and additionally provided for unisex bathrooms. *Id.* The student in *Grimm* went through the necessary steps to change the sex on his birth certificate to reflect his

sex as male. *Id.* at 603. The Fourth Circuit ultimately held that the school's refusal to amend the student's school records to reflect his updated birth certificate and allow the student to use the bathroom that corresponded with his gender identity violated Title IX. *Id.* at 619. The court also held that the student sufficiently displayed harm suffered from improper discrimination due to urinary tract infections he received from not feeling comfortable using the bathrooms at school. *Id.* at 593.

The facts of *Grimm* present significant differences from the case at hand. Additionally, the court in *Grimm* incorrectly interprets the "similarly situated" aspect of discrimination. *Id.* at 617. In *Grimm*, the court reasoned that a transgender student is similarly situated to students whose sex corresponded with the transgender student's gender identity. *Id.* In the context of Title IX, gender identity and sex are not similarly situated terms or identifiers. Title IX expressly allows for sex-separate accommodations. To be similarly situated to other individuals within the context of Title IX requires individuals to share the same sex.

In *Grimm*, the student brought suit due to a school bathroom policy which requires differing considerations as opposed to choosing members for a sports team. *Id.* at 593. Athletics and bathrooms are both listed as exceptions to Title IX but ultimately serve drastically different purposes. A bathroom is a necessary facility that a student must have access to while attending school. Athletics require different considerations, such as ability and strength, as shown in Title IX regulations that not only can schools offer sex-separate teams but may do so when competitive skill is assessed or for a contact sport.

Here, Petitioner has not been treated worse than those similarly situated to them. The Act limits participation in sports teams based on biological sex and further disallows biological males from competing on female competitive sports teams. (R. at 4.) At this time, Petitioner is a

biological male and is being treated exactly the same as biological males in North Greene schools. (R. at 3.) Although Petitioner does not identify as a biological male, for the purposes of interpretation under Title IX there is no other evidence at this time that supports the fact that Petitioner is not a biological male. (R. at 3.) In *Grimm*, the student challenged the bathroom and school record policy due to the student changing their sex on their birth certificate. This is not the case here. Petitioner has not provided any evidence or information that supports the notion that their sex has changed, and therefore has not provided evidence sufficient to support any genuine issue of material fact as to the claim that they have been discriminated against on the basis of sex.

Lastly, the student in *Grimm* successfully showed harm by presenting evidence of urinary tract infections from not feeling comfortable using the bathroom in school. *Id.* at 593. Petitioner has not presented or forecasted any evidence comparable to the suffering of the student in *Grimm*. (R. at 3-4.) The harm suffered by the student in *Grimm* is incredibly telling of how inapplicable *Grimm* is in this case due to the vastly different facts presented.

This Court should hold that the Act does not discriminate against on the basis of sex or harm Petitioner.

2. The Act operates in a safe harbor of Title IX for contact sports or teams selected based upon competitive skill.

The Act differentiates itself from a general prohibition against males joining female sports teams by setting its application to only contact sports or teams selected based upon competitive skill. As previously mentioned, Title IX regulations allow for sex-separate teams in the case of contact sports or consideration of competitive skill. 34 C.F.R. § 106.41(b)(2024). The North Greene General Assembly pulled directly from Title IX language in its creation of the Act to ensure compliance.

Here, Petitioner has brought suit due to the intention to participate on female volleyball and cross-country teams. (R. at 3.) By nature, both of these teams endure a familiar process of try-outs and selection based on ability and competitive skill. Requiring competitive sports teams to select members based on sex comports with the original purpose of Title IX. Ensuring that female athletes have the opportunity to compete successfully among other female athletes was and still is the ultimate goal of Title IX. Petitioner's contention that they have been discriminated against by not being able to participate on female sports teams that are selected based on competitive skill has no basis in the context of Title IX. Petitioner has not been forbidden from participating in athletics, only directed to try out for or participate in sports teams that align with their sex. Title IX serves the purpose of bringing opportunities to the female sex that were historically denied. It does not serve the purpose of ensuring that males are able to participate in female sports teams. The activities that Petitioner intends to participate in are selected based on competitive skill and therefore fall squarely within the safe harbor regulation of Title IX.

This Court should find that the "Save Women's Sports Act" and the North Greene Board of Education's implementation of the Act complies with the requirements of Title IX.

II. The Save the Women's Sports Act Does Not Prevent a State From Offering Separate Boys' and Girls' Sports Teams Based on Biological Sex Determined at Birth.

The Equal Protection Clause states that no State shall deny similarly situated persons within its jurisdiction equal protection of the laws. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Because most laws inevitably create classes of persons, this Court has said that the Equal Protection Clause merely acts as a bar against intentional discriminant treatment or impact

of the law against "persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

To prevail on an equal protection claim, a plaintiff must show that the challenged law "explicitly distinguish[es] between individuals on [protected] grounds." *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (involving a facial classification where the statute stated that "males must be preferred to females"). Generally, to satisfy equal protection, a law's classification must rationally further a legitimate state interest; however, if the classification is suspect in nature, such as gender-based, the law is subject to heightened review known as intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515 (1996).

This Court should affirm the lower court's ruling for two reasons. First, the Act does not discriminate against transgender individuals on its face. Second, even if this Court determined the Act facially discriminatory, it survives intermediate scrutiny.

A. The Save the Women's Sports Act does not facially discriminate against transgender individuals.

A law shall not "purposefully discriminate[] against [a person] because of their membership in a particular class." *Fowler v. Stitt,* 104 F.4th 770, 783-84 (10th Cir. 2024). A facial classification must be identified through a distinction on the policy's face. *Id.* at 785. Such determination should be made while looking at the text of the law itself, not the effect of its application. *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). A law that is neutral on its face requires further evaluation for an inference of purposeful discrimination. *Fowler*, 104 F.4th at 784. Purposeful discrimination requires a finding that the challenged policy was selected "because of […] its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). A court should weigh, among other things, any

potential or current existence of a disparate impact, "the historical background of the decision, the specific sequence of events leading up to the challenged decision, and departures from the normal procedural sequence." *Fowler*, 104 F.4th at 784 (internal citations omitted).

A policy may lawfully classify based on biological sex without unlawfully discriminating against transgender status. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022). In *Adams*, a school's bathroom policy designated student restrooms to be ermined based on the student's biological sex determined at birth. *Id.* at 802. Adams argued the policy discriminated on the basis of sex and sex and transgender status because it barred him, a biological female, from using male restrooms that corresponded with his gender identity. *Id.* At 801. The Eleventh Circuit found the contention that such policy "single[d] out transgender students" to be a mischaracterization. *Id.* at 808. The bathroom policy did not reference transgender status or identity, in fact, "both sides of the classification – biological males and biological females – include[d] transgender students." *Id.* The court determined a "'lack of identity' [existed] between the policy and transgender status" as the policy options available to transgender students were "equivalent to those provided to all students of the same biological sex." *Id.* at 809 (internal quotations omitted). Such lack of identity lead the court to hold that the policy did not violate the equal protection clause. *Id.*

A policy that is neutral on its face but guided by animus cannot stand. *Fowler*, 104 F.4th at 770. In *Fowler*, the state of Oklahoma issued an order prohibiting the amendment of sex designations on birth certificates. *Id.* at 774. Finding that the policy was facially neutral and disparate impact alone is not enough to find purposeful discrimination, the Tenth Circuit looked to the totality of the relevant facts. *Id.* at 775. The record makes clear that the Governor of Oklahoma implemented such policy to prohibit the amendment of transgender individuals' birth

certificates to conform to their gender identity. *Id.* at 787. In fact, the Governor stated, "I believe that people are created by God to be male or female. Period." *Id.* at 787. Given such animus, the court found that the policy "was implemented at least in part because of the effect it would have on transgender people[,]" the court found the policy to be a violation of equal protection. *Id.*

Petitioner's argument that she, a transgender girl, is similarly situated to biological girls in reference to sports is wholly misplaced. The Act clearly creates a facial gender-based classification, but such classification does not amount to discrimination against transgender athletes. Gender identity is separate and distinct from one's biological sex and like the bathroom policy challenged in *Adams,* both sides of the Act's sex-based classification include transgender students. The Act provides the same athletic opportunities to transgender students as it does to all students of the same biological sex, rendering Petitioner's argument of facial discrimination null. Following the Eleventh Circuit, this Court should find a lack of identity exists between the policy and transgender status, finding an absence of an equal protection violation.

While Petitioner may argue the Act, similar to the policy in *Fowler,* causes a disparate impact on transgender individuals, the policy in *Fowler* is entirely distinguishable from the one at hand. Unlike *Fowler*, the record is clear in that the Act was not created out of, or to embrace animosity. In fact, the Act does just the opposite, calling for a celebration of differences. (R. at 3.) This court should find that the potential for disparate impact, when viewed under the totality of relevant facts, does not amount to purposeful discrimination.

B. Even if this Court finds the Act facially discriminatory, its sex-based classification is substantially related to its stated objective, thus satisfying intermediate scrutiny.

To withstand intermediate scrutiny, a gender-based classification must be exceedingly persuasive in that it "serves important governmental objectives and that the discriminatory means [by which they are] employed [is] substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533. While the government's objective need not be perfect, it must "fit between the policy and its asserted justification." *Adams*, 57 F.4th at 801 (quoting *Virginia*, 518 U.S. at 533.).

An objective "cannot rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* It "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation[.]" *Gilpin v. Kan. State High Sch. Activities Asso*, 377 F. Supp. 1233, 1240 (D. Kan. 1973) (quoting *Reed v. Reed,* 404 U.S. 71, 75 (1971)). Furthermore, the objective shall not use the classification in such way as to bolster the inferiority of women but may be used to compensate disability suffered by women, "to promote equal employment opportunity, and to advance full development of the talent and capacities of our Nation's people." *Virginia*, 518 U.S. at 533. A proper remedy violation of equal protection is one that closely fits the constitutional violation and places the aggrieved persons "in the position they would have occupied in the absence of discrimination…to eliminate so far as possible the discriminatory effects of the past and" its future potential. *Id.* at 547.

Sex-separate sports teams are permitted to promote the objective of increasing girls' participation in sports. *O'Connor v. Board of Education*, 645 F.2d 578, 581 (7th Cir. 1981). In *O'Connor*, a female middle school student sought a preliminary injunction after she was denied an opportunity to join her school's boys' basketball team because she is female. *Id. at* 579. O'Connor was an exceptional player whose talent was beyond her age, she wanted to join the

boys' team to enhance her athletic abilities as the boys' team outperformed the girls'. *Id.* O'Connor's school belonged to an interscholastic conference that required separate male and female sports teams for contact sports to advance its objective of maximizing female participation in sports. *Id.* Allowing boys to participate on girls' teams would result in male domination and the school's policy to maintain sex-separate teams were "equal" on the basis of objective criteria such as funding and facilities. *Id. a*t 581. Because the only true difference between the teams was the level of competition, which was ultimately a result of "the abilities of the team members themselves[,]" the Seventh Circuit Court of Appeals determined the record was sufficient to support a finding that the policy's gender-specific approach was substantially related to the stated objective, ultimately denying enforcement of a preliminary injunction. *Id. a*t 581-582 (quoting *Leffel v. Wisconsin Interscholastic Athletic Ass*o, 444 F. Supp. 1117, 1121 (E.D.Wis.1978)).

Following the Seventh Circuit, in *Clark,* the Ninth Circuit determined a policy prohibiting boys from participating on all-girls' sports team is permitted to advance the goal of providing females equal athletic opportunities in interscholastic athletics. *Clark v. Ariz. Interscholastic Asso.,* 695 F.2d 1126, 1132 (9th Cir. 1982). In *Clark*, male plaintiffs sought an opportunity to play on their high school girls' volleyball team as their school did not sponsor a male team. *Id.* at 1172. The students were prohibited from participating on the team due to a school policy that barred boys from playing on the girls' volleyball team. *Id.* at 1172. Such policy was implemented to compensate for the historical scarcity of opportunity for girls in interscholastic sports since "boys have had ample opportunity for participation," and allowing male participation on an all-girl team "would displace girls from those teams and further limit their opportunities for participation in interscholastic athletics." *Id.* at 1127. The court stated

that due to physiological differences between males and females, "males would displace females to a substantial extent if they were allowed to compete for positions on the […] team[,]" resulting in diminished opportunities for females. *Id.* at 1131. Citing scarce opportunities for female athletes, not only did the court conclude as a matter of law that the gender-based classifications created under the policy are substantially related its stated objective, but "the only feasible classification" to achieve such objective. *Id.* at 1128.

The designation of an all-girls' volleyball team satisfies equal protection if such classification is "consistent with [the] long-standing tradition in sports of [creating] classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition." *Petrie v. Ill. High Sch. Asso.*, 75 Ill. App. 3d 980, 988 (1979). In *Petrie*, a high school male challenged policies barring him from participating on the girls' volleyball team. *Id* at 980. The government's objective was to maintain, foster, and promote athletic opportunities for females. *Id.* Evidence established that while high school girls generally "have no disadvantage as to balance, coordination, strategic acumen, or quickness (as distinguished from running speed)," they are "at a substantial physical disadvantage in playing volleyball." *Id.* at 987. The Fourth District forecasted various consequences likely to arise should boys be permitted to participate on girls' teams, noting, for example, a likelihood that most open positions on co-ed teams would be held by boys, or girls who otherwise qualify for advanced placement in tournaments would likely be surpassed in performance by their male counterparts. *Id.* at 988. While gender classifications for athletic competition are both "overbroad and underbroad in that it includes females who are athletically superior to many males and excludes males who are less well-endowed athletically than most females[,]" such classification of high school athletic teams are not archaic as the classification

"itself is based on the innate physical differences between" *Id.* at 989. The court found that the policies in place did not violate the Equal Protection Clause as prohibiting boys from participating on a high school girls' volleyball team "is consistent with a long-standing tradition in sports of setting up classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition[;]" thus, such act was found to be substantially related to and serves the achievement of the government's objective. *Id.* at 988.

The Act creates "equal" teams for both males and females to promote its objective of providing athletic opportunities to females. (R. at 4.) Following *O'Connor*, male participation in female teams would result in male domination, minimizing opportunities for female athletes. Performance studies have shown that "biological males have physiological advantages over biological females that significantly impact athletic performance." (R. at 7.) For this reason, this Court should find that the Act's sex-specific approach was substantially related to its objective.

The Act's definitional use of "biological sex," "girl," and "woman" are substantially related to the State's interest in providing equal athletic opportunities for females. As the Ninth Circuit correctly noted in *Clark*, male participation on all-girl teams would result in the displacement of female athletes due to the inevitable physical differences. *Clark*, 695 F.2d at 1131. Such displacement would clearly create a result adverse to the Act's stated objective of providing equal athletic opportunities to female students.

The Act is consistent with the long-standing tradition found in *Petrie*. The lower court correctly noted that "male [and] female sex chromosomes determine[] many physical characteristics relevant to athletic performance." (R. at 9.) The Act aims to provide equal athletic opportunities and to protect female athletes from injury by creating "classifications

whereby persons having objectively measured characteristics likely to make them more proficient are eliminated" from participation. As the *Petrie* court forecasted, without the existence of the Act, female athletes will be placed at a disadvantage as they are likely to be displaced by their biological-male classmates.

A policy, regardless of its interests' *legitimacy*, will not pass intermediate scrutiny if "based upon sheer conjecture and abstraction." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1052 (7th Cir. 2017). In *Whitaker*, a high school student, a publicly transitioned transgender boy, used the boys' restroom while at school and events for nearly six months until he was forced to use female-designated restrooms, or alternatively, the single-sex restroom located in the administrative office. *Id.* at 1040. Whitaker's inequity stemmed from his school's restroom policy that based restroom assignments on the sex identified on students' birth certificate. *Id*. The policy was aimed at protecting students' privacy rights within restrooms. *Id.* at 1052. Lack of evidence in opposition to Whitaker's use of the boys' restroom, outside of a single complaint, was not enough "to support [the] position that [the school's] policy is required to protect the privacy rights of each and every student." *Id*. The court ruled that Whitaker's presence was "no more of a risk to other students' privacy rights than [that of] an overly curious student of the same biological sex[.]" *Id*. While the Seventh Circuit Court of Appeals conceded that protection of one's privacy rights in a bathroom is a legitimate governmental interest, the school's policy failed "to establish an exceedingly persuasive justification for the classification[,]" as the policy was based in arbitrary standards. *Id.* at 1053.

It is unlikely that any governmental objective could justify providing one sex with the opportunity to compete in interscholastic contact sports while outright denying such opportunity to the opposite sex. *Leffel*, 444 F. Supp. at 1119. A class of female students moved for summary

judgment on the basis that their school's athletic association's policy which prohibited their qualification and participation on the boys' baseball, swimming, and tennis teams, directly violated equal protection. *Id*. The students were attempting to join the boys' team as their school did not have a girls' team. *Id.* at 1117. The school maintained that its interest in enforcing gender-separate teams was to prevent injuries to female athletes due to "anatomical and physiological differences between 'boys and girls' and 'differences in athletic abilities[.]'" *Id.* at 1122. The policy's total bar on co-ed competition, in addition to its lack of corresponding girls' teams left the students with no remedy to cure any trace of discriminatory effects. *Id.* Ruling as a matter of law that such exclusion of females "[was] not fairly or substantially related to a justifiable governmental objective in the context of the fourteenth amendment[,]" the court granted plaintiff's motion for summary judgment. *Id. at* 1122-23.

Expanding from this idea, a policy that simultaneously promotes and embraces what is the competitive nature of interscholastic sports while denying an otherwise qualified class of participants an opportunity on a team based solely on their sex is unconstitutional. *Brenden v. Independent School Dist*., 477 F.2d 1292, 1303 (8th Cir. 1973). In *Brenden*, two female high school students were interested in participating in various non-contact sports such as tennis, cross-country skiing, and cross-country running and sought to join the boys' teams because their school did not offer such teams for girls. *Id.* at 1294, 1299. Despite their athletic ability, the students were precluded from trying out for said teams due to a rule enacted by the Minnesota State High School League ("the League") prohibiting any comingling in the interscholastic athletic program. *Id.* at 1294. Despite the League's assertion that the stated purpose for such rule was to "assure that persons with similar qualifications compete among themselves[,]" the League failed to produce sufficient evidence to support the conclusion "that [girls] are incapable

of competing with [boys] in non-contact sports." *Id.* at 1299-1300. Moreover, the League failed to establish any form of objective "nondiscriminatory minimum standards [outlining] evaluating qualifications for non-contact […] athletics." *Id.* at 1300, 1302. Failure to provide an adequate remedy resulted in an unequal opportunity for female athletes as compared to those provided for males. *Id.* at 1302. The court concluded that under *Reed,* a state may not use "assumptions about the nature of females as a class, to deny to females an individualized determination of their qualifications for a benefit provided by the state." *Id.* Because the League's use of a sex-based classification does not "fairly and substantially promote[] the purposes of" their rule, the court found that such rule violated the Equal Protection Clause. *Id.* at 1303.

Distinguishable from *Whitaker,* the Act, and its underlying classifications is not born out of speculation and conjecture. Performance studies have in fact shown that "biological males have physiological advantages over biological females that significantly impact athletic performance." (R. at 7.) This includes biological males who now identify as transgender women and girls. *Adams,* 57 F.4th at 819. The exclusion of biological males from female teams is necessary to ensure equal opportunities for biological females as "biological differences affect typical outcomes in sports." (R. at 8.) This Court should find that such necessary classification is not a result of speculation or guesswork and that the Act established an exceedingly persuasive justification for such.

Unlike *Leffel*, the Act does not simultaneously allow one sex the opportunity to participate in sports while outright denying the other. Alternatively, the Act leaves aggrieved parties with two alternatives, the opportunity to participate on a team designated for the student's biological sex, or to participate on a coed team. (R. at 4.) Such remedy cures any trace of discriminatory effect,

and as such, this Court should determine that the Act's classification was substantially related to its governmental objective.

The Act does not use assumptions about the nature of females as a class to deny individualized determinations of qualifications for participation in athletics. Unlike in *Brenden*, Petitioner did not face a total bar to participation on her school's athletic teams. (R. at 3.) In fact, Petitioner was provided two alternative opportunities to participate in interscholastic athletics, one on the boys' team and another on her school's co-ed team. *Id*. The Act's use of sex-based classifications simultaneously promotes and embraces what is the competitive nature of interscholastic sports without outright denying an otherwise qualified class of participants an opportunity to participate. Such employment fairly and substantially promotes the Act's purpose of providing equal athletic opportunities for female athletes, further supporting this Court's decision of constitutionality.

The Save the Women's Sports Act (the "Act") does not violate the Equal Protection Clause of the Fourteenth Amendment and as such, the Court of Appeals decision to affirm Defendant's Motion for Summary Judgment was proper.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the holding of the United States Court of Appeals for the Fourteenth Circuit.