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Play Like a Girl: Bostock, Title IX's Promise, and the Case for Transgender Inclusion in Sports

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Comment*

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I. INTRODUCTION

State-level legislation focused on the transgender[1] community has exploded over the last several years.[2] Proposed laws mandating the exclusion of transgender individuals from specific sectors of society have been increasingly focused on trans children and youth.[3] In 2021, legislatures in thirty-one states introduced bills that would prohibit transgender student-athletes from taking part in school sports in a manner consistent with their gender identities.[4] Eight of those states

1. "Transgender" or "trans" is used to describe a person whose gender identity is not the same as the sex they were assigned a birth. Linell Smith, *Glossary of Transgender Terms*, JOHN HOPKINS MED. (Nov. 20, 2018), https://www.hopkinsmedicine.org/news/articles/glossary-of-terms-1 [https://perma.cc/35GE-2PXB]. This word is often described as an "umbrella term," meaning it is a broad label used to reference a group of related yet distinctive concepts. *See Umbrella*, OXFORD LEARNER'S DICTIONARY (2021); *Umbrella Term Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/u/umbrella-term/ [https://perma.cc/BZ85-J58F] (last visited May 29, 2021). "Transgender" encompasses a range of gender identities, including individuals whose gender identity or expression does not fit within the binary classifications of man or woman. *See* GLAAD, MEDIA REFERENCE GUIDE (11th ed. 2022), https://www.glaad.org/reference/trans-terms [https://perma.cc/FXL9-T5S2]. It is crucial to note that the transgender community is not a monolith; in general, determinations regarding the language used to describe a trans person should be determined by that individual alone. *See id.*
2. Jo Yurcaba, *"State of Crisis": Advocates Warn of "Unprecedented" Wave of Anti-LGBTQ Bills*, NBC NEWS (Apr. 26, 2021, 1:48 PM), https://www.nbcnews.com/feature/nbc-out/state-crisis-advocates-warn-unprecedented-wave-anti-lgbtq-bills-n1265132 [https://perma.cc/N9FA-FLH5].
3. Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021, 9:46 AM), https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html [https://perma.cc/K88V-Y5R3].
4. *Id.* Bills regulating transgender students' participation in sports were introduced during 2021 in Alabama, Arkansas, Arizona, Connecticut, Florida, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, New

ultimately passed laws barring young women who are trans from participating in girls' and women's sports programs sponsored by federally-funded schools.[5] Idaho enacted a bill that blocked transgender women and girls from competing in sex-segregated athletics in 2020.[6] Additionally, during the first several months of 2022, three additional states have passed legislation regulating transgender youth's participation in sports, bringing the total number of states with such laws to twelve.[7]

Opponents of transgender inclusion in sports allege that allowing trans girls and women to participate in girls' and women's sports will harm their cisgender[8] peers.[9] Arguments about these alleged harms primarily center on the concept of fair play in women's sports.[10] Legis-

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Jersey, New Mexico, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin. *See id.*; *Legislation Affecting LGBT Rights Across the Country*, ACLU, https://www.aclu.org/legislation-affecting-lgbt-rights-across-country [https://perma.cc/R3E5-VVHY] (last visited Oct. 5, 2021) .

5. Dan Avery, *Texas Bill Banning Transgender Students in School Sports Heads to Governor's Desk*, NBC NEWS (Oct. 18, 2021, 6:10 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/texas-bill-banning-transgender-students-school-sports-heads-governors-rcna3203 [https://perma.cc/A4YL-3AKA]. Florida, Mississippi, Arkansas, Tennessee, West Virginia, Montana, Alabama, and Texas all passed laws during 2021 regulating transgender student-athletes' participation in sports. *Id.* Such a bill also passed in Louisiana, but Governor John Bel Edwards vetoed it, stating the "bill was a solution in search of a problem." Melinda DeSlatte, *Louisiana Governor Vetoes Transgender Sports Ban Proposal*, ASSOC. PRESS (June 22, 2021), https://apnews.com/article/louisiana-government-and-politics-02bfec3097bcbb857c656557a1718632 [https://perma.cc/Y9CE-KKAB].

   South Dakota's governor also vetoed a bill barring transgender girls and women from participating in women's sports. Devan Cole, *South Dakota's Governor Issues Executive Orders Banning Transgender Athletes from Women's Sports*, CNN (Mar. 31, 2021, 3:47 PM), https://www.cnn.com/2021/03/30/politics/south-dakota-transgender-sports-kristi-noem/index.html [https://perma.cc/NHW7-AK3Z]. However, after facing intense backlash, she issued two executive orders prohibiting "transgender girls and women from competing on women's sports teams at public high schools and colleges." *Id.*

6. *See* IDAHO CODE §§ 33-6201 to -6206 (2020).

7. *Utah Bans Transgender Athletes in Girls Sports Despite Governor's Veto*, NPR (Mar. 25, 2022, 5:10 PM), https://www.npr.org/2022/03/25/1088908741/utah-transgender-athletes-veto-override [https://perma.cc/6W4T-N6MK]. In 2022, Iowa, South Dakota, and Utah all passed laws prohibiting transgender students from participating in athletics in a manner consistent with their gender identity. *See* MOVEMENT ADVANCE. PROJECT, LGBTQ YOUTH: BANS ON TRANSGENDER YOUTH PARTICIPATION IN SPORTS 2, 5 (2022), https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf [https://perma.cc/4CRM-DPF3].

8. "Cisgender" or "cis" refers to individuals whose gender identity is consistent with their sex assigned at birth; that is, people who are not transgender. GLAAD, *supra* note 1.

9. See subsection III.B.1 for an examination the alleged justifications for bills regulating transgender girls and women's participation in sports.

10. In fact, many bills passed by state legislatures limiting transgender students' participation in athletics include the word "fairness" in the title. *See, e.g.*, Fairness in Women's Sports Act, H.B. 500, 65th Leg., 2d Reg. Sess. (Idaho 2020) (codi-

lators introducing such bills claim that transgender athletes will displace cisgender athletes without wholesale bans on transgender women's participation.[11]

This Comment will examine transgender girls' and women's access to sex-segregated sports under Title IX. Part II will provide an overview of relevant law, including Title IX, Title VII, and the Equal Protection Clause. Part III will analyze state laws regulating transgender students' participation in sex-segregated sports. Section A will apply the Equal Protection Clause, scrutinizing the dividing line between permissible distinctions based on "real" physiological differences and impermissible distinctions based on gender stereotypes and the means-ends fit between the recent bans and stated policy aims. Section B will analyze and apply Title IX's plain language and purpose, ultimately concluding that transgender women and girls must be allowed to participate in athletics in a manner consistent with their gender identity.

II. BACKGROUND

A. Overview of Title IX and its Application to Athletics

Congress enacted Title IX in 1972 to ensure equity "in educational settings, including in admissions and programming, and in benefits and treatment."[12] Title IX states that federally-funded schools may not exclude students from participating in academic and extracurricular opportunities or treat them differently "on the basis of sex."[13] However, the term "sex"[14] is not defined by Title IX or by related regulations enacted by the Department of Education.[15]

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fied as IDAHO CODE §§ 33-6201 to -6206 (2021); Mississippi Fairness Act, S.B. 2536, 2021 Reg. Sess. (Miss. 2021) (codified as MISS. CODE ANN. §§ 37-97-1 to -5 (2021)).

11. *See infra* notes 132–34 and accompanying text. Ironically, many of the bills passed to solve this alleged problem also apply to transgender children who have not yet gone through puberty, and regulate athletics of all kinds, including intramural sports. See subsection III.B.2 for an in-depth analysis of such laws' means-ends fit.
12. Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69 (2020).
13. 20 U.S.C. § 1681.
14. Generally, the term "sex" means an individual's categorization as male or female. GLAAD, *supra* note 1. Sex is used within this Comment with the understanding that it is a normative term for something that is, in reality, a complex and nuanced constellation of physical characteristics, including "chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics." *Id.*
15. Dylan O. Malagrinò, *May They Play:* Soule v. Connecticut Association of Schools, Inc*., Title IX, and a Policy of Inclusion for High School Transgender Athletes*

Title IX's statutory and regulatory framework employs a "hybrid" strategy.[16] Scholars have noted that Title IX itself establishes "a sex-blind non-discrimination rule," whereas the regulations guiding its implementation contain narrow "sex-affirmative exceptions."[17] The regulations governing athletics under Title IX (the Athletic Regulations) first set a baseline that any exclusion or discriminatory treatment based on sex is impermissible.[18] The Athletic Regulations then provide two exceptions to this general rule. First, separate teams are allowed in "contact sports," defined as those where physical contact is necessarily involved.[19] Second, separate teams are permissible where players will be selected based on ability; however, teams must permit members of the other sex to try out if "opportunities for members of that sex have previously been limited."[20] The Athletic Regulations also require schools to ensure gender parity in the athletic opportunities they offer.[21]

1. Title IX's Enactment

Initially, whether Title IX would apply to athletics was an open question. Congress did not include a committee report with the final bill, and the congressional record is largely devoid of discussions regarding the Act's applicability to sports.[22] However, congressional action in the years immediately following Title IX's passage clarified that it was to cover school athletic programs with full force.[23]

In 1974, Senator John Tower introduced a bill to amend Title IX to exclude sports that produced revenue for schools from the Act's equality mandate.[24] Senators rejected this amendment in favor of an alter-

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Without Prerequiring Hormone Therapy or Puberty Blockers, 31 MARQ. SPORTS L. REV. 35, 68 (2020).

16. Coleman et al., *supra* note 12, at 69.
17. *Id.*; *see* 20 U.S.C. § 1681; 34 C.F.R. § 106 (2020).
18. 34 C.F.R. § 106.41(a) (2020).
19. *Id.* § 106.41(b).
20. *Id.*
21. *Id.* § 106.41(c). This overall approach has been described as "permissive" because schools are free to pursue approaches that do not account for sex, so long as they do not result in disparities. *See* Coleman, *supra* note 12, at 82.
22. There were "only two mentions of intercollegiate athletics during the congressional debate," both from Senator Birch Bayh, one regarding potential privacy concerns in "athletic facilities," and another assuring the body that sex-segregated football teams would still be permitted under the Act. Cohen v. Brown Univ. (*Cohen I*), 991 F.2d 888, 893 (1st Cir. 1993) (first citing 118 CONG. REC. 5,807 (1972) (statement of Sen. Bayh about privacy); and then citing 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh regarding football teams)).
23. *See, e.g.*, Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 19–20 (2003).
24. S. 2106, 94th Cong. (1975); *see* Samuels & Galles, *supra* note 23, at 19–20.

native bill introduced by Senator Jacob Javits.[25] The Javits Amendment instructed the U.S. Department of Health, Education, and Welfare (HEW) to promulgate regulations governing Title IX's implementation in a host of areas, including "intercollegiate athletic activities."[26] As many scholars have observed, this made abundantly clear Congress intended Title IX to apply to athletics programs at federally-funded schools.[27]

As instructed, HEW issued proposed regulations in 1974, which received nearly 10,000 comments—most of which concerned athletics.[28] The finalized regulations were published in 1975.[29] Under federal law at the time, Congress had the opportunity to review and comment before regulations took effect and could reject regulations—either in whole or in part—through a joint resolution.[30] Congress held extensive hearings on the regulations, during which representatives presented nine different resolutions and bills aimed at narrowing or eliminating Title IX's application to sports.[31] Title IX's proponents in

25. *See* Elementary and Secondary Education Amendments, Pub. L. 93-380, 88 Stat. 484 (1974).
26. *Id.*
27. *See, e.g.,* Samuels & Galles, *supra* note 23, at 19–20.
28. *Id.* at 20 n.44.
29. Cohen v. Brown Univ. (*Cohen I*), 991 F.2d 888, 893 (1st Cir. 1993); *see also* Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95, 101 (2003) (discussing the notice and comment period for HEW's Title IX regulations in 1974, and "the intensity of the reaction" the regulations caused).
30. *See* Samuels & Galles, *supra* note 23, at 20. Section 431(d)(1) of the General Education Provisions Act allowed Congress to review a regulation before its implementation to ensure it was not "inconsistent with the Act from which it derive[d] its authority." N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531–32 (1982). Congress then had forty-five days to pass a concurrent resolution disapproving of a regulation, thereby overriding it. *Id.*
31. Between the House and Senate, six resolutions were introduced. *See* S. Con. Res. 46, 94th Cong., 121 CONG. REC. 17300–01 (1975) (introduced by Sen. Helms) (providing that the regulations governing athletics were inconsistent with Title IX); S. Con. Res. 52, 94th Cong., 121 CONG. REC. 22940 (1975) (introduced by Sen. Laxalt) (declaring that requiring proportionality in athletics scholarships between men and women under the regulations amounted to an impermissible quota system); H. Con. Res. 310, 94th Cong., 121 CONG. REC. 19209 (1975) (introduced by Rep. Martin); H. Con. Res. 311, 94th Cong., 121 CONG. REC. 19209 (1975) (introduced by Rep. Martin); H. Con. Res. 329, 94th Cong., 121 CONG. REC. 21687 (1975) (introduced by Rep. O'Hara); H. Con. Res. 330, 94th Cong., 121 CONG. REC. 21687 (1975) (introduced by Rep. O'Hara). Additionally, multiple bills were introduced to amend Title IX. *See* S. 2106, 94th Cong. (1975) (introduced by Sen. Tower) (excluding athletic programs that provide revenue from Title IX); S. 2146, 94th Cong. (1975) (introduced by Sen. Helms) (prohibiting Title IX from being applied to athletics); H.R. 8394, 94th Cong. (1975) (introduced by Rep. O'Hara) (allowing schools to put any money brought in by revenue-producing sports back into only those sports); H.R. 8395, 94th Cong. (1975) (introduced by Rep. O'Hara) (also providing that schools may re-invest money brought in by revenue-producing sports into those sports, regardless of the institution's overall

Congress fought to ensure the Act would require equity in athletics, emphasizing the need to ensure women and girls were not denied access to "the educational opportunities that have been the assumed right of their brothers."[32] During these hearings, "Congress expressly considered arguments that requiring equal opportunity in athletics would impose quotas, result in reverse discrimination against men, or conflict with" the plain text of Title IX.[33] Ultimately, Congress rejected attempts to water down or eliminate Title IX's application to athletics and instead implemented the Athletic Regulations.[34]

2. Opposition to Title IX, and Congressional and Agency Responses

Title IX's history shows its application to sports have repeatedly made similar arguments, to which Congress has repeatedly responded by reaffirming—and even strengthening—the statutory scheme.[35] Opponents have frequently expressed consternation about Title IX's potential negative impact on the resources and opportunities allocated to young men.[36] Before the Athletic Regulations' finalization in 1975, the head of the NCAA wrote to President Gerald Ford, exclaiming that, if

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gender parity). All the aforementioned resolutions and bills ultimately failed. *See* Samuels & Galles, *supra* note 23, at 22.

32. *Sex Discrimination Regulations: Hearings Before the House Subcomm. on Post-Secondary Educ. of the Comm. on Educ. & Labor*, 94th Cong. 166 (1975) (statement of Sen. Bayh).

33. Samuels & Galles, *supra* note 23, at 22.

34. *See id.*

35. *See, e.g.*, Samuels & Galles, *supra* note 23, at 24 ("[T]he history of Title IX demonstrates that the same arguments have repeatedly been made to challenge Title IX's application to athletics and that Congress has understood, adopted, and reaffirmed the statute, its regulations, and its athletics policies each and every time they have faced attack.").

36. *See* Coleman et al., *supra* note 12, at 72–73; Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 348–50 (2012). For example, in *Kelly v. Board or Trustees*, cisgender male student-athletes challenged the University of Illinois' decision to cut its men's, but not its women's, varsity swimming team, arguing that if Title IX required such a result, it should also "require the university to eliminate women from the academic departments where they are over[-]represented." Kelley v. Bd. of Trs., 35 F.3d 265, 269–70 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). The Seventh Circuit Court of Appeals ultimately rejected the plaintiffs' claim, reasoning that "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems." *Id.* at 270. The Court also upheld the Athletic Regulations, including the proportionality test established in the agency's 1979 Policy Interpretation. *Id.* at 271–72; *see* Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

approved, the regulations "could seriously damage if not destroy the major men's intercollegiate athletic programs."[37]

Congress has taken affirmative action to ensure the continued application of Title IX to athletic programs. In *Grove City College*, the U.S. Supreme Court held that private institutions' receipt of federal funds in student financial aid did not require them to comply with Title IX throughout all their programs and activities.[38] This ruling significantly limited the scope of Title IX, with a marked impact on collegiate-level sports—unless athletic programs directly benefitted from federal funds, Title IX's equity mandate would not apply.[39] Congress passed the Civil Rights Restoration Act of 1987 in direct response to the Court's decision.[40] The Civil Rights Restoration Act clarified that the definition of "program or activity" under Title IX demanded institution-wide coverage.[41] Thus, one program's acceptance of federal funds required all programs and activities within that school comply with Title IX.[42] Congressional debate on the Act emphasized Title IX's equity requirement in the context of sports, stating that it was necessary to remedy past discrimination against women in athletics.[43]

The legality of Title IX and the Athletic Regulations has been litigated extensively, and courts have repeatedly rejected arguments that the regulations transformed Title IX "from a statute which prohibits

37. Staurowsky, *supra* note 29, at 102. Additionally, the NCAA—which only included men's collegiate sports at the time—filed suit in 1976, disputing the legality of Title IX's application to athletics. *See id.* at 102 n.38; *History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/ [https://perma.cc/5WGJ-SMBB]. The suit was ultimately dismissed in 1978; however, the NCAA continued to fight, even offering up the Association's own legal counsel to assist Grove City College in its landmark suit challenging the scope of Title IX. *See* WOMEN'S SPORTS FOUND, *supra*; Staurowsky, *supra* note 29, at 104.

38. Grove City Coll. v. Bell, 465 U.S. 555, 573–74 (1984).

39. WOMEN'S SPORTS FOUND., *supra* note 37; *see also* Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 58 (1996) (observing that following the Court's decision in *Grove City*, the Office of Civil Rights "immediately dropped or narrowed almost forty pending Title IX athletics investigations").

40. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1987). Stating in the Act's opening paragraph that its purpose was to "restore" Title IX's "broad scope of coverage,"; *see also* Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 86 ("The Civil Rights Restoration Act was specifically targeted to overcome the *Grove City* decision.").

41. *See* Civil Rights Restoration Act § 3(a) (codified at 20 U.S.C. § 1687).

42. *Id.*

43. *See* Cohen v. Brown Univ. (*Cohen I*), 991 F.2d 888, 894 (1st Cir. 1993) (citing statements of multiple Senators during debate to support the premise that the Civil Rights Restoration Act "was aimed, in part, at creating a more level playing field for female athletes"); Samuels & Galles, *supra* note 23, at 23.

discrimination on the basis of sex into a statute that mandates discrimination against males" by establishing a "gender-based quota system."[44] In rejecting challenges to Title IX, courts have found that Congress intended Title IX to require institutions to actively work "to remedy discrimination that results from stereotyped notions of women's interests and abilities." [45]

B. Title VII's Relevance and the Significance of *Bostock*

Title VII of the Civil Rights Act of 1964 prohibits employment-related discrimination against individuals based on "race, color, religion, sex, or national origin."[46] Title IX's legislative history demonstrates that its drafters drew inspiration from the Civil Rights Act,[47] and courts have consistently looked to cases that construed Title VII when interpreting Title IX.[48] Indeed, the U.S. Supreme Court has examined Title VII when applying Title IX on multiple occasions.[49]

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44. Kelley v. Bd. of Trs., 35 F.3d 265, 270–71 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). Courts have also repeatedly upheld the 1979 HEW policy interpretation, which applied specifically to intercollegiate sports and set up three options by which covered institutions could show they were complying with Title IX's requirements. *See* Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 26); *see also Cohen I*, 991 F.2d at 906–07 (affirming a preliminary injunction and rejecting the school's assertion that it was in compliance with first prong of the three-part test if it provided athletic opportunities to young women "in direct proportion to [their] comparative levels of interest"); Cohen v. Brown Univ. (*Cohen II*), 101 F.3d 155, 173 (1st Cir. 1996) (upholding the three-part test and asserting that agency interpretations regarding Title IX policy are entitled to deference); Neal v. Bd. of Trs., 198 F.3d 763, 773 (9th Cir. 1999) (holding that "Title IX does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies" under the three-part test).
45. *Cohen II*, 101 F.3d at 179.
46. 42 U.S.C. §§ 2000e to 2000e-17.
47. *See* Grove City Coll. v. Bell, 465 U.S. 555, 586 (1984) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964."); Anderson, *supra* note 36, at 326. During Title IX's initial introduction in 1971, Senator Birch Bayh of Indiana stated that "educational opportunity should not be based on sex," just as Congress had barred schools from discriminating based on race and national origin under the Civil Rights Act of 1964. *See* 117 CONG. REC. 30406–07 (1971).
48. *See, e.g.*, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 616 n.1 (1999); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. 2021); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020); Emeldi v. Univ. of Or., 698 F.3d 715, 724 (9th Cir. 2012); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007); Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997).
49. *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175–77 (2005) (comparing Title IX to Title VII in determining whether a claim of retaliation in response to reporting sex discrimination was cognizable under Title IX); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286–87 (1998) (examining the aims of both Acts in determining the scope of monetary damages for sexual harassment

1. Bostock *and "Because of . . . Sex"*

The U.S. Supreme Court decided *Bostock v. Clayton County* in 2020. At issue was whether discrimination "because of . . . sex" under Title VII applied to differential treatment based on an individual's sexual orientation or gender identity.[50] The Court answered this question affirmatively, holding that it was impossible to discriminate against someone for their LGBTQ+[51] status without discriminating on the basis of sex.[52] The majority found Title VII's text required this result because sexual orientation and gender identity discrimination necessarily meant treating the same acts differently based on the actor's sex assigned at birth.[53] Thus, Title VII's plain language—"because of . . . sex"—inherently prohibits discrimination against the LGBTQ+ community.

In early 2021, the Civil Rights Division of the Department of Justice published a memorandum (DOJ Memo) advising that the Supreme Court's holding in *Bostock* should be applied when interpreting Title IX.[54] The memorandum relied on two primary arguments. First, the Division asserted that both statutes' plain language prohibiting gender discrimination was interchangeable.[55] Next, it noted that both Title VII and Title IX apply to instances of individual gender discrimination.[56] The Division also emphasized that there was "nothing persuasive in the statutory text, legislative history, or case law to justify

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under Title IX); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 524–27 (1982) (comparing Title IX to Title VII in determining that Title IX extends to employment discrimination).

50. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020).

51. "LGBTQ+" is an acronym for lesbian, gay, bisexual, transgender, and queer. Kendra Cherry, *What Does LGBTQ+ Mean?*, VERYWELL MIND (Nov. 30, 2020), https://www.verywellmind.com/what-does-lgbtq-mean-5069804 [https://perma.cc/4C5H-WCLZ]. The plus sign at the end represents additional identities that are not directly represented by the letters "LGBTQ." *Id.*

52. *Bostock*, 140 S. Ct. at 1754.

53. *Id.* at 1742. A person's sex assigned at birth is the label "male" or "female" assigned to that individual when they were born "based on anatomical and physiological markers." Tim Newman, *Sex and Gender: What is the Difference?*, MED. NEWS TODAY (May 11, 2021), https://www.medicalnewstoday.com/articles/232363 [https://perma.cc/8AP7-BWWL]. This is distinct from a person's gender identity, which a someone's "internal, deeply held sense of their gender." GLAAD, *supra* note 1.

54. *See generally* Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Just. Civ. Rts. Div. to Fed. Agency Civ. Rts. Dirs. & Gen. Couns. on the Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download [https://perma.cc/45UJ-CSB5].

55. *Id.* at 2 (observing that Title VII's prohibition on discrimination "because of . . . sex" was functionally equivalent to Title XI's prohibition on discrimination "on the basis of sex").

56. *Id.*

a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly."[57]

Further solidifying *Bostock*'s likely application to Title IX, the U.S. Department of Education's Office for Civil Rights (DOE) issued a Notice of Interpretation (the Notice) in June 2021, recognizing that Title IX prohibits discrimination based on gender identity and sexual orientation.[58] The DOE also relied on the textual similarities of the two Acts, including that neither creates an exception to the broad prohibition on sex discrimination for treatment based on gender identity or sexual orientation.[59] Additionally, the DOE argued that interpreting Title IX to protect LGBTQ+ students is harmonious with Title IX's purpose of shielding students from the injuries caused by gender discrimination and assuring equitable access to educational programs and activities.[60] The Notice contained no specific references to athletics.[61] However, it asserted that the DOE would investigate and, when appropriate, act on reported Title IX violations grounded in differential treatment based on gender identity.[62]

Thus, there is substantial support for the premise that the Supreme Court's approach to construing Title VII in *Bostock* must inform future interpretations of Title IX.

C. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying people within their "jurisdiction the equal protection of the laws."[63] This provision is "essentially a direction that all persons similarly situated should be treated alike."[64]

The presence of state action is a threshold requirement for demonstrating an equal protection violation.[65] State action exists when the person or entity carrying out the challenged activity does so under the actual or apparent authority of the government and on its behalf in some capacity.[66] However, private parties can engage in state action

57. *Id.* at 3.
58. *See* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021).
59. *Id.* at 36638.
60. *Id.* at 36639.
61. *Id.*
62. *Id.*
63. U.S. CONST. amend. XIV, § 1.
64. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).
65. NCAA v. Tarkanian, 488 U.S. 179, 181–82 (1988).
66. *Id.* at 191. Although the text of the Fourteenth Amendment only applies to state governmental entities, its equality mandate also applies to the federal government through the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954), *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955); Washington v. Davis, 426 U.S. 229, 239 (1976) (asserting that

where "there is a sufficiently close nexus between the [s]tate and the challenged action," such that the act or omission can reasonably be ascribed to the government.[67] It is well established that public schools and universities are state actors subject to the Fourteenth Amendment.[68]

The first step in Equal Protection analysis is determining the appropriate level of scrutiny.[69] Different standards of review apply based on whether the law in question affects members of a suspect or quasi-suspect class or impedes fundamental constitutional rights.[70] Four factors inform whether a group should be categorized as a suspect or quasi-suspect class.[71] The first consideration is "whether the class has historically been subject to discrimination."[72] The next factor is whether "the class has a defining characteristic that bears a relation to its ability to perform or contribute to society."[73] The final considerations are whether the class can be characterized as discrete based on "obvious, immutable, or distinguishing characteristics," and whether the class lacks political power.[74]

If the community targeted by a law is not a suspect or quasi-suspect group, or if the law does not infringe on a fundamental right,

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the Due Process Clause of the Fifth Amendment prohibits the federal government from engaging in discrimination); *see also* Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 BOS. U. L. REV. 2061, 2077–83 (2019) (discussing how the U.S. Supreme Court's "reverse-incorporation" decisions developed to standardize the approach to Equal Protection challenges between the Fourteenth and Fifth Amendments).

67. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).
68. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001) (holding that an association of Tennessee high schools consisting of eighty-four percent public schools was a state actor); *Tarkanian*, 488 U.S. at 183 (noting that the University of Nevada was "a state-funded institution" whose administrators "unquestionably act[ed] under color of state law").
69. *See* Vittoria L. Buzzelli, Comment, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 PENN ST. L. REV. 187, 196 (2016).
70. *See* City of Celburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (holding that heightened scrutiny was appropriate "when a statute classifies by race," gender, nationality, or immigration status, or when "state laws impinge on personal rights protected by the Constitution"); Buzzelli, *supra* note 69, at 197 (noting that discrimination based on gender falls within the "quasi-suspect class" category and is reviewed under intermediate scrutiny). Although the Fourteenth Amendment passed following reconstruction to eliminate discrimination based on race, the U.S. Supreme Court has held that it prohibits other forms of discrimination, including discrimination based on gender. *See* Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1275 (2017).
71. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 611 (4th Cir.) (as amended on August 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (mem.).
72. *Id.* (citing Bowen v. Gilliard, 483 U.S. 587, 602 (1987)).
73. *Id.* (citing *Cleburne Living Ctr.*, 473 U.S. at 440–41).
74. *Id.* (citing *Bowen*, 483 U.S. at 602).

courts will apply rational basis review.[75] This extremely deferential standard merely requires the state to demonstrate the law is based on a legitimate governmental interest to which the means used are rationally related.[76] When applying rational basis review, courts generally will not inquire into whether the interest cited by the government is pretextual so long as it reasonably could "have been a goal of the legislation."[77]

1. Intermediate Scrutiny and Gender Discrimination

Government actions based on gender are subject to intermediate scrutiny.[78] Intermediate scrutiny requires that a state actor show "exceedingly persuasive justification" that a challenged gender classification promotes "important governmental objectives," and that the classification is "substantially related to the achievement of those objectives."[79] Further, the proffered grounds "must be genuine, not hypothesized or invented post hoc," and cannot hinge "on overbroad generalizations about . . . different talents, capacities, or preferences" based on gender.[80]

Stereotypes and "archaic and overbroad generalizations" about the sexes cannot underlie a valid government interest under the Equal Protection Clause.[81] Laws struck down for this reason are often grounded in gendered familial and caretaking expectations[82] or outdated ideas regarding the abilities and interests of women and men.[83]

75. Buzzelli, *supra* note 69, at 196–97.
76. Sarah Halbach, Comment, *Framing a Narrative of Discrimination Under the Eighth Amendment in the Context of Transgender Prisoner Health Care*, 105 J. CRIM. L. & CRIMINALITY 463, 470–71 (2015) (citing Romer v. Evans, 517 U.S. 620, 631 (1996)).
77. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975)) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'").
78. Buzzelli, *supra* note 69, at 197.
79. United States v. Virginia, 518 U.S. 515, 532–33 (1996) (citations omitted).
80. *Id.* at 533 (emphasis omitted).
81. Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).
82. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 382, 394 (1979) (striking down a New York law that allowed unmarried mothers, but not unmarried fathers, to stop their child from being adopted by withholding consent); *Weinberger*, 420 U.S. at 651–53 (striking down a portion of the Social Security Act that provided for payment of insurance benefits to widows with children, but not widowers).
83. *See, e.g.*, *Virginia*, 518 U.S. at 540, 557–58 (rejecting the Virginia Military Institute's arguments that limiting admissions to men only was necessary because most women were not suited to the adversarial method of education, and could not meet the physical standards required of cadets); Craig v. Boren, 429 U.S. 190, 200–02, 210 (1976) (finding the state's assertion that young women were less likely to drink and drive did not justify an Oklahoma law that allowed women to

Provisions that make pronounced distinctions based on gender and require divergent treatment for similarly situated men and women solely to achieve administrative convenience are also presumptively invalid.[84] However, correcting for past societal discrimination against women is generally seen as a valid governmental interest.[85] Finally, laws that differentiate based on "real" physiological differences between men and women are sometimes upheld.[86] Thus, there are essentially two tracks for equal protection claims alleging gender discrimination. Courts may uphold gender-based distinctions intended to help counteract the harmful effects of past discrimination or those grounded in meaningful physiological differences.[87] Conversely,

purchase 3.2% beer at age eighteen, but did not allow men to purchase it until age twenty-one).

84. *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017) (striking down a provision that required unmarried mothers who were U.S. citizens to show one year of "continuous physical presence" in the United States in order to pass their citizenship to their child born abroad with a non-U.S.-citizen father, but required unmarried fathers in the same situation to demonstrate five years); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (striking down an Idaho statute that required a man to be selected over a woman when both were equally qualified candidates to administer an estate).

85. For example, in *Kelly v. Board of Trustees*, the Seventh Circuit rejected the plaintiffs' Equal Protection challenge following the elimination of the University of Illinois' men's, but not its women's, swimming team. Kelly v. Bd. Of Trs., 35 F.3d 265, 272 (7th Cir. 1994) ("[R]emoving the legacy of sexual discrimination—including discrimination in the provision of extra-curricular offerings such as athletics—from our nation's educational institutions is an important governmental objective."). *See also Schlesinger*, 419 U.S. at 508–09 (upholding a law that treated female naval officers more leniently than male naval officers because the statutory scheme was not based on gender stereotypes but, rather, the reality that the two groups were "not similarly situated with respect to opportunities for professional service"); Clark *ex rel.* Clark v. Ariz. Interschol. Ass'n, 695 F.2d 1126, 1131–32 (9th Cir. 1982) (upholding a policy prohibiting young men from playing on a women's high school volleyball team because "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" was a valid governmental interest).

86. *See, e.g.*, Tuan Anh Nguyen v. INS, 533 U.S. 53, 73 (2001) ("Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real."); Miller v. Albright, 523 U.S. 420, 445 (1998) ("The biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands."); Rostker v. Goldberg, 453 U.S. 57, 79 (1981) (holding that women's exclusion from the draft did not violate the Equal Protection Clause because it merely required the government to "treat similarly situated persons similarly, not that it engage in gestures of superficial equality"); Michael M. v. Super. Ct., 450 U.S. 464, 471–73 (1981) (upholding a criminal law prohibiting statutory rape that applied only to male perpetrators because the state legislature was not unreasonable in finding that nearly all serious harms of teen pregnancy fell upon young women, and, thus, the law essentially equalized the disincentives placed upon men and young women).

87. *See supra* notes 85–86.

courts will strike down laws that burden men or women based on mere gender stereotypes.[88]

Lower federal courts have increasingly held that discrimination against transgender individuals warrants intermediate scrutiny under two distinct modes of analysis. Some circuits have determined that discrimination against trans individuals is grounded in impermissible gender stereotypes, placing such suits within existing gender discrimination equal protection jurisprudence.[89] Other circuits have held that the transgender community is a quasi-suspect class and, therefore, laws aimed at transgender individuals must receive heightened scrutiny.[90] Notably, the U.S. Supreme Court does not expand the categories of suspect or quasi-suspect classes frequently and has not yet held that the transgender community constitutes such a class.[91]

Ultimately, the Supreme Court may draw on the reasoning used in *Bostock* when analyzing discrimination against the transgender community under the Equal Protection Clause.[92] Applying *Bostock*'s reasoning would allow the Court to strike down discrimination against the transgender community without creating or meaningfully ex-

88. *See supra* notes 81–84.

89. *See, e.g.*, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1260 (2018) (mem.), *abrogated by* Ill. Repub. Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020); Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004).

90. *See supra*, notes 70–74 and accompanying text; *see, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir.) (as amended on August 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (mem.).

91. *See* Halbach, *supra* note 76, at 472–73 (noting that the U.S. Supreme Court has not added a group to the list of suspect or quasi-suspect classes "since adding nonmarital parentage in 1977"); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757–58 (2011) (arguing that the Supreme Court has, in essence, closed the "heightened scrutiny canon," and, therefore, no new groups will be added to the suspect or quasi-suspect categories).

92. Many scholars have argued that the *Bostock* majority's textualist reasoning will influence conceptions of gender discrimination in future Equal Protection Clause jurisprudence. *See, e.g.*, Michael Milov-Cordoba & Ali Stack, Note, *Transgender and Gender-Nonconforming Voting Rights After* Bostock, 24 U. PA. J.L. & SOC. CHANGE 323, 339–40 (2021) (noting that lower courts have started applying the Supreme Court's reasoning in *Bostock* to Equal Protection claims brought by transgender plaintiffs); Ho, *infra* note 93, at 367–68 (observing that courts will likely look to *Bostock*'s reasoning when assessing the level of scrutiny that should apply to Equal Protection suits challenging discrimination based on LGBTQ+ status); Sharita Gruberg, *Beyond* Bostock*: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Sept. 2, 2020), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/ [https://perma.cc/QE38-U7VV] ("An extension of the Supreme Court's finding in *Bostock* that sex necessarily includes sexual orientation and gender identity could also mean, then, that laws that target people based on sexual orientation or gender identity could be subject to heightened scrutiny.").

panding any protected categories by holding that discrimination based on transgender status necessarily involves discrimination based on someone's sex assigned at birth.[93]

2. Animus Review and Discrimination Based on Sexual Orientation

Although it remains uncertain whether applying intermediate scrutiny to discrimination based on gender identity will become the prevailing doctrinal approach, past U.S. Supreme Court decisions regarding LGBTQ+ rights have seemingly applied a more rigorous version of rational basis review.[94] Scholars refer to this approach as "rational basis with bite."[95]

Under this standard, state action is unconstitutional when it creates "arbitrary or irrational" distinctions between classes of people out of "a bare . . . desire to harm a politically unpopular group."[96] For example, the Supreme Court found that a law grounded solely on animus toward same-sex couples lacked a legitimate governmental interest.[97] In so holding, the Court stated: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[98]

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93. *See infra* notes 173–79 and accompanying text. How the Court interprets discrimination within a federal statute does not govern future applications of constitutional prohibitions on unequal treatment. *See* Washington v. Davis, 426 U.S. 229, 238–39 (1976) (reversing the circuit court's opinion, finding that it erroneously applied the broader manner in which racial discrimination is defined under Title VII to the Equal Protection Clause of the Fourteenth Amendment). However, in reality, the boundary between the Supreme Court's constitutional and statutory anti-discrimination jurisprudence is often somewhat fluid. *See* Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 98 ("[N]otwithstanding the prevailing view that Title VII and equal protection standards for establishing discrimination and assessing remedies are distinct, there is a good deal of transference between them."); Jeremiah A. Ho, *Queering* Bostock, 29 AM. U. J. GENDER SOC. POL'Y & L. 283, 368 (2021) ("[T]he jurisprudential boundaries between Title VII sex discrimination cases and constitutional sex equality cases are often porous.").

94. *See* Halbach, *supra* note 76, at 471 (quoting Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring)) (noting that courts have used "a more searching form of rational basis review" when reviewing laws that plainly discriminate against the LGBTQ+ community under the Equal Protection Clause).

95. *Id.* (citing Andrew Koppelman, *DOMA,* Romer*, and Rationality*, 58 DRAKE L. REV. 923, 928 (2010)).

96. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534, (1973)).

97. Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that a Colorado constitutional amendment allowing discrimination based on sexual orientation "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else").

98. *Id.* at 633.

D. Decisions Applying Title IX and the Equal Protection Clause to Transgender Students

Every circuit court of appeals to consider whether Title IX and the Equal Protection Clause protect the rights of transgender students has, thus far, answered affirmatively. There are two primary categories of cases that circuit courts have decided: those brought by transgender students opposing school policies barring them from using facilities corresponding with their gender identity and those brought by cisgender students challenging trans-inclusive school policies.

1. Cases Brought by Transgender Students

The Fourth,[99] Sixth,[100] Seventh,[101] and Eleventh[102] Circuits have decided cases in favor of transgender students who challenged discriminatory school policies. *Grimm v. Gloucester County School Board* is the most high-profile case construing the rights of transgender students under Title IX and the Equal Protection Clause.[103] Grimm filed suit against his local school board, challenging its policy requiring students to use only bathrooms corresponding with their "biological gender."[104] In considering Grimm's Equal Protection challenge to the policy, the Fourth Circuit Court of Appeals determined that height-

99. *See infra* notes 103–108 and accompanying text.

100. In the Sixth Circuit, a school district appealed a preliminary injunction ordering the school to allow a transgender girl to use the girls' bathroom. Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 220 (6th Cir. 2016). The Sixth Circuit denied the school district's motion to stay the injunction, finding that the "public interest weight[ed] strongly" against the stay because the injunction protected the transgender student's "constitutional and civil rights." *Id.* at 222.

101. The Seventh Circuit Court of Appeals upheld a district court's preliminary injunction, preventing a school district from implementing a policy that barred transgender students from using bathroom facilities consistent with their gender. *See* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039, 1054–55 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1260 (2018) (mem.), *abrogated by* Ill. Repub. Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020). The court also held that the student's Equal Protection claim should be reviewed under heightened scrutiny based on a sex-stereotyping theory. *Id.* at 1039.

102. The Eleventh Circuit Court of Appeals recently sided with a transgender high school student in a suit challenging his school's bathroom policy under Title IX and the Equal Protection Clause. *See* Adams v. Sch. Bd. of St. Johns Cnty. (*Adams I*), 3 F.4th 1299, 1320 (11th Cir.) (deciding the case in the transgender student's favor on Equal Protection grounds and, accordingly, declining to address the merits of the student's Title IX claim), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021). The decision was vacated on August 23, 2021, and the case will be reheard en banc. Adams v. Sch. Bd. of St. Johns Cty., 9 F.4th 1369, 1372. The now-vacated decision held that heightened scrutiny should apply. *Adams I*, 3 F.4th at 1307.

103. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir.) (as amended on August 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (mem.).

104. *Id.* at 593.

ened scrutiny should apply because "the bathroom policy rests on sex-based classifications and because transgender people constitute at least a quasi-suspect class."[105] The court held that the policy violated the Equal Protection Clause because it was not substantially related to the school board's proffered goal of protecting students' privacy, but rather was grounded in "sheer conjecture and abstraction," as well as possible prejudice.[106]

Notably, the U.S. Supreme Court denied the Gloucester School Board's petition for a writ of certiorari, electing to leave the Fourth Circuit decision in Grimm's favor undisturbed.[107] Some experts have argued that the Supreme Court's decision demonstrated an evolving legal landscape for transgender rights.[108]

2. Cases Brought by Cisgender Students

The Ninth and Third Circuits have upheld school policies allowing transgender students to use bathroom facilities corresponding with their gender identity against challenges brought by cisgender students. The Ninth Circuit upheld a lower court's dismissal of all claims, finding that allowing transgender students access to "bathroom and locker facilities that match their self-identified gender in the same manner that cisgender students utilize those facilities" did not violate any constitutional right or amount to sexual harassment under Title

105. *Id.* at 607 (emphasis omitted).

106. *Id.* at 614 (quoting Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444, 461 (E.D. Va. 2019) (quoting *Whitaker*, 858 F.3d at 1052)). Additionally, the court explicitly relied on *Bostock* to find that the school board's bathroom policy and its refusal to amend Grimm's school records to reflect his preferred gender violated Title IX. *Id.* at 616, 619.

107. Grimm v. Gloucester Cnty. Sch. Bd., 141 S. Ct. 2878, 2878 (2021) (mem.); *see also* Jessica Scheck & Jennifer Schaller, *The Supreme Court's Transgender Bathroom Case Rebuff, What Direction Should School Districts Take?*, NAT'L L. REV. (July 9, 2021), https://www.natlawreview.com/article/supreme-court-s-transgender-bathroom-case-rebuff-what-direction-should-school [https://perma.cc/9D7Z-2Z5Y] (discussing the implications of the Court's decision not to grant certiorari).

108. For example, experienced labor and employment attorney Shannon Farmer asserted that the Supreme Court's decision denying certiorari in *Grimm* shows that "*Bostock* changed the legal landscape surrounding LGBTQ+ discrimination." Scheck & Schaller, *supra* note 107 (emphasis added). Jessica Clarke, professor of law and co-director of the George Barrett Social Justice Program at Vanderbilt University, stated: "The decision not to grant certiorari is important because it did not disrupt the emerging consensus among federal courts—not just the Fourth Circuit—that schools may not forbid transgender students from using restrooms consistent with their gender identities." *Id. But cf.* Carrie Campbell Severino, *Grimm Tidings on Certiorari in Bathroom Case*, NAT'L REV. (June 29, 2021, 10:06 AM), https://www.nationalreview.com/bench-memos/grimm-tidings-on-certiorari-in-bathroom-case/ [https://perma.cc/L5HA-44KB] ("A refusal to take up this case isn't an endorsement of the Fourth Circuit's ruling, either as a matter of legal precedent, or as a practical matter.").

IX.[109] The Third Circuit upheld a lower court's denial of a preliminary injunction, finding that the case was unlikely to succeed on the merits.[110] The U.S. Supreme Court denied the plaintiffs' petitions for certiorari in both cases.[111]

These holdings illustrate the current momentum toward protecting transgender students from invidious discrimination under Title IX and the Equal Protection Clause. It seems likely that, in general, Courts will apply Title IX's protections to transgender students. However, how schools must operationalize those protections in various contexts while balancing competing interests remains unclear. Nowhere are these issues more pronounced than in athletics.

3. Current Suits Regarding the Rights of Transgender Athletes

Transgender students and their supporters have filed suits challenging new state-level prohibitions on transgender girls' and women's participation in sports.[112] All such suits are in the early stages of litigation, but, thus far, federal district courts have unanimously granted preliminary injunctive relief to transgender student-athletes.[113] A grant of injunctive relief does not definitively signal the claim's ultimate success.[114] Still, it does demonstrate that the court found a plaintiff has made "a clear showing that she will likely succeed on the merits."[115] Regardless of their finality, these cases indicate how courts are likely to assess the validity of state laws regulating transgender women and girls' participation in sports.

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109. Parents for Priv. v. Barr, 949 F.3d 1210, 1239–40 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020) (mem.).

110. Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 521 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) (mem.).

111. *See* Parents for Priv. v. Barr, 141 S. Ct. 894 (2020) (mem.); Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 139 S. Ct. 2636 (2019) (mem.).

112. The U.S. District Court for the District of Connecticut has considered whether a local trans-inclusive athletic policy violated Title IX by placing cisgender women competing in high school sports at a "competitive disadvantage" in contravention of Title IX's Athletic Regulations. *See* Soule *ex rel.* Stanescu v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021). The Court disposed of the suit on procedural grounds, and its discussion of the merits was limited. *Id.*

113. *See* B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-CV-00316, 2021 WL 3081883, at *1 (S.D.W. Va. July 21, 2021); Hecox v. Little, 479 F. Supp. 3d 930, 947, 988–89 (D. Idaho), *appeal filed*, No. 20-35815 (9th Cir. Sept. 17, 2020).

114. *See B.P.J.*, 2021 WL 3081883, at *3 (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008)).

115. *Id.* To obtain preliminary injunctive relief, a plaintiff also must demonstrate they are likely to be irreparably harmed if the relief is not granted, "that the balance of equities" is in their favor, and "that an injunction is in the public interest." *Id.*

III. ANALYSIS

As discussed above, courts have made preliminary rulings in favor of transgender student-athletes under the Equal Protection Clause and Title IX in cases litigating trans-exclusionary state laws.[116] Consistent with these findings, this Comment argues that laws excluding transgender girls and women from athletics cannot be justified under the Equal Protection Clause, whether applying intermediate scrutiny or animus review. Although laws that delineate based on gender may be permissible, such distinctions are only viable when grounded in "real" physiological differences, not gender stereotypes.[117] Further, there must be a reasonable means-ends fit between differential treatment based on gender, as well as a viable or important governmental objective.[118] Even assuming that states' interest in promoting fair play qualifies as a sufficient objective, laws barring transgender girls and women from participating in women's sports fail for two primary reasons: they rely heavily on stereotyped, yet unproven notions about athletes' abilities based solely on their sex assigned at birth and the laws are grossly overinclusive.

Finally, Title IX's plain text requires prohibiting discrimination against transgender students. This is true even of the Athletic Regulations' exceptions to Title IX's strict prohibition on gender-based differentiation, which ensure girls and women have meaningful access to athletic opportunities.[119] Allowing transgender women and girls to participate in athletics in a manner consistent with their gender identity is fully in line with the spirit of Title IX.[120]

A. "Real Differences" or "Overbroad Generalizations"? Applying the Equal Protection Clause to the Question of Transgender Inclusion in Sports

Presuming that courts apply intermediate scrutiny to state bans on transgender girls and women's participation in sex-segregated athletics,[121] how should these cases fit within Supreme Court precedent? The Supreme Court has recognized that laws based on "[p]hysical differences between men and women" can be valid.[122] However, the Court has been clear that physiological differences cannot be used to

116. *See supra* notes 112–115 and accompanying text.
117. *See supra* notes 79–84 and accompanying text.
118. *See supra* Sections II.C.1 and II.C.2.
119. *See infra* Section III.B.1.
120. *See infra* Section III.B.2.
121. *See supra* Section II.D for a discussion on the Equal Protection Clause and the various levels of scrutiny that apply in specific instances.
122. United States v. Virginia, 518 U.S. 515, 533 (1996); *see supra* note 79 and accompanying text.

place "artificial constraints on an individual's opportunity,"[123] or to draw lines that are overbroad or based upon conjecture.[124] Therefore, possible physiological differences between transgender and cisgender girls and women are relevant but not dispositive.

Laws excluding transgender girls and women from athletics are invalid under the Equal Protection Clause because they are mainly grounded on conjectural harms and are overbroad when narrower policies could reasonably satisfy the proffered aim of protecting cisgender athletes' safety and opportunities.[125] Further, even if these laws were subject to animus review, they should still be struck down because they make an unreasonable distinction between cisgender and transgender student-athletes out of "a bare . . . desire to harm a politically unpopular group."[126]

1. Measuring "Real Difference"

It is a well-established part of the Supreme Court's Equal Protection jurisprudence that physical differences based on sex assigned at birth can create a valid reason for different treatment under the law.[127] However, it is rare for the Court to uphold such distinctions in practice.[128] The Court has held that "[i]nherent differences" based on

123. *Virginia*, 518 U.S. at 533.

124. *See id.*; Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–26 (1982); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692–93 (2017).

125. *See infra* Section III.B.1 for a discussion about the interests set forth by states enacting such laws.

126. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

127. *See, e.g.*, Tuan Anh Nguyen v. INS, 533 U.S. 53, 64 (2001) (upholding a law that set different standards on mothers versus fathers for children born abroad to unmarried parents because it was based on "a biological difference between the parents"); *Virginia*, 518 U.S. at 533 ("Physical differences between men and women, however, are enduring . . . .").

128. *Compare Virginia*, 518 U.S. at 550, 557–58 (emphasis omitted) (ruling that the Virginia Military Institute may not deny admission to women, because "generalizations about the way women are, [and] estimates of what is appropriate for most women, no longer justify denying opportunity to [all] women"), *and Miss. Univ. for Women*, 458 U.S. at 725 ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."), *with Tuan Anh Nguyen*, 533 U.S. at 64, Miller v. Albright, 523 U.S. 420, 445 (1998) ("The biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands."), Rostker v. Goldberg, 453 U.S. 57, 79 (1981) (holding that women's exclusion from the draft did not violate the Equal Protection Clause because it merely requires the government to "treat similarly situated persons similarly, not that it engage in gestures of superficial equality"), *and* Free the Nipple v. City of Springfield, 923 F.3d 508, 509 (8th Cir. 2019) (holding that an ordinance that barred women from exposing their nipples, but not men, did not violate the Equal Protection Clause).

gender may not be relied upon to diminish "the members of either sex," or to place manufactured restrictions on the opportunities available to individuals.[129] Additionally, prognostications about harms caused by gender inclusion cannot be based on conjecture or pretext.[130] Courts must also "reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn."[131]

States that have passed laws regulating transgender students' participation in athletics argue that excluding transgender girls and women is necessary to protect "opportunities for female athletes to demonstrate their skill, strength, and athletic abilities."[132] Legislative findings point to cisgender men's "higher natural levels of testosterone," and how—at the onset of puberty—testosterone results in "categorically different strength, speed, and endurance" in those assigned male at birth versus those assigned female at birth.[133] However, lawmakers have frequently been unable to point to a single

129. *Virginia*, 518 U.S. at 533–34.

130. *Id.* (first citing Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975); and then citing Califano v. Goldfarb, 430 U.S. 199, 223–24 (1977) (Stevens, J., concurring)). *See also Miss. Univ. for Women*, 458 U.S. at 729–30 (rejecting the State's argument because, although it "recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification").

131. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 n.13 (2017). *See also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994) ("Parties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias.").

132. IDAHO CODE § 33-6202(12) (2020). *See also* ALA. CODE § 16-1-52(a)(1) (2021) ("Physical differences between biological males and biological females have long made separate and sex-specific sports teams important so that female athletes can have equal opportunities to compete in sports."); ARK. CODE ANN. § 16-130-102(5) (2021) (quoting S. Res. 398, 115th Cong. (2018)) ("'This chapter seeks to address these lingering disparities and . . . 'promote equality in sports and access to athletic opportunities for girls and women.'"); FLA. STAT. § 1006.205(2)(b) (2021) ("The Legislature finds that requiring the designation of separate sex-specific athletic teams or sports is necessary to maintain fairness for women's athletic opportunities."); W. VA. CODE § 18-2-25d(a)(3) (2020) ("Biological males would displace females to a substantial extent if permitted to compete on teams designated for biological females . . . .").

133. *See* Doriane Coleman & Nancy Hogshead-Makar, Opinion, *It's not wrong to restrict transgender athletes. But base it on evidence, ethics*, ARIZ. REPUBLIC (Mar. 18, 2020, 1:57 PM), https://www.azcentral.com/story/opinion/op-ed/2020/03/17/ban-transgender-athletes-ok-but-base-evidence-ethics/5023130002/ [https://perma.cc/LCD8-PNQY]. IDAHO CODE § 33-6202(4)–(5) (first citing Doriane Lambelet Coleman, *Sex in Sport*, L. & CONTEMP. PROBS., 2017, at 63, 74; then citing Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE L. (2018), https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/ [https://perma.cc/9U8F-EG6U]); *see also* S.B. 2536, 2021 Reg. Sess. (Miss. 2021) (using nearly identical language in the Bill's legislative findings without citing to Coleman's work) (codified as MISS. CODE ANN. §§ 37-97-1 to -5 (2021)). Coleman's re-

instance of a transgender athlete outperforming her cisgender peers in girls or women's sports within their state.[134] Law professor Doriane Lambelet Coleman, whose work was explicitly referenced in many state-level bills barring transgender girls and women from sports, has urged lawmakers to reject such bans.[135] She referred to legislation that did not allow any "exceptions or accommodations" for transgender athletes and that required any athlete competing in the women's category to verify their sex upon a challenge as "legally and scientifically flawed."[136]

States have also asserted that laws excluding transgender girls and women from participating in athletics in a manner consistent with their gender identities do not violate the Equal Protection Clause because they are not singling out transgender student-athletes for invidious treatment.[137] Those defending the laws argue that transgender girls and cisgender boys are "similarly situated" for purposes of athletic competition because both groups were assigned male at birth.[138] This assertion willfully ignores that transgender girls and women navigate the world as, and are, girls and women.[139] Further, it sweeps all transgender girls and women into the same category, regardless of individualized considerations[140] and ignores the long-

search was also cited within similar bills introduced in other states that were ultimately defeated.

134. *See* B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-CV-00316, 2021 WL 3081883, at *6 (S.D. W. Va. July 21, 2021) ("Insofar as I am aware, B.P.J. is the only transgender student at her school interested in school-sponsored athletics."); Hecox v. Little, 479 F. Supp. 3d 930, 978–79 (D. Idaho), *appeal filed*, No. 20-35815 (9th Cir. Sept. 17, 2020) (quoting IDAHO CODE § 33-6202(12)) ("[T]he legislative record reveals no history of transgender athletes ever competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, and no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote 'sex equality' or to 'protect athletic opportunities for females' in Idaho.").

135. *See* Coleman & Hogshead-Makar, *supra* note 133.

136. *Id.* Coleman also asserted that recent state-level legislation was likely unlawful because "sex discrimination is only constitutional when it's necessary to secure equality for females and when the means chosen to achieve that goal are not unnecessarily broad or intrusive." *Id.* To support this assertion, Coleman cited the proposed bills' overall failure to (1) create exceptions for transgender women who had not gone through puberty prior to transition, and, therefore, never "developed the traits the classification[s] [were] designed to exclude"; and (2) account for "the multiple goals of sport at different levels of play and competition." *Id.*

137. *See, e.g.*, *B. P. J.*, 2021 WL 3081883, at *4.; *Hecox*, 479 F. Supp. 3d at 975.

138. *B. P. J.*, 2021 WL 3081883, at *4.

139. *See id.* ("[Plaintiff] is similarly situated to other girls. . . . Plaintiff has lived as a girl for years. . . . She changed her name to a name more commonly associated with girls. And of the girls at her middle school, B.P.J. is the only girl who will be prevented from participating in school-sponsored athletics.").

140. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 n.13 (2017) (laws must not make categorical distinctions based on sex "when more accurate and impartial lines can be drawn"). Further, because transgender girls and young women

standing history of discrimination against the transgender community relative to their cisgender peers.[141]

2. Bans on Transgender Girls and Women in Sports Cannot Withstand Intermediate Scrutiny

Although an interest in preserving meaningful opportunities in women's sports and upholding Title IX and its regulations may constitute important governmental interests, recent state laws regulating transgender students' participation in sports cannot withstand intermediate scrutiny.[142] These laws fail because states cannot demonstrate that a wholesale ban on transgender girls and women competing in a manner consistent with their gender identities is "substantially related to the achievement of those objectives."[143] The means-ends fit between these bills' alleged goals and chosen methods is dramatically inefficient, indicating that the proffered governmental interests are not genuine.[144]

First, data regarding transgender women's physiological advantage in athletics is—at best—emergent and unclear. Indidviduals assigned male at birth benefit from a competitive advantage because of physiological differences beginning at puberty.[145] Researchers have found that transgender women likely retain a slight competitive advantage even following one year of treatment with gender-affirming hormones.[146] However, another study found that transgender women

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make up such a small percentage of the population, delineating policy more narrowly would not be overly burdensome or difficult.

141. *See Hecox*, 479 F. Supp. 3d at 976–77 (citing Clark *by & through* Clark v. Ariz. Interschol. Ass'n, 695 F.2d 1126, 1131–32 (9th Cir. 1982)) (finding that transgender women are not similarly situated to the cisgender male plaintiffs challenging their exclusion from a women's team in *Clark*, in part, because transgender women are a historically marginalized group).

142. *See B. P. J.*, 2021 WL 3081883, at *4 (quoting *Hecox*, 479 F. Supp. 3d at 975) ("[W]hile the physiological differences the Defendants suggest support the categorical bar on transgender women's participation in women's sports may justify the Act, they do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status.").

143. *See id.*

144. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (finding that the State's proffered "benign, compensatory purpose" of counteracting past discrimination against women was not genuine where the means-end fit between that alleged interest and the policy of excluding all men from attending the University's nursing school was overbroad and reified stereotypical gendered assumptions).

145. Coleman, *supra* note 12, at 92 (citing *The Role of Testosterone in Athletic Performance,* Duke Ctr. for Sports L. & Pol'y (2019)).

146. *See* Timothy A. Roberts et al., *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organisations and Legislators*, 55 BRITISH J. SPORTS MED. 577, 580 (2021) (finding that

who have undergone "gender-affirming interventions"[147] compete at proportionally the same level in women's sports as they did in men's sports before transitioning.[148]

Second, state-level laws limiting transgender girls' and women's participation in sports are grossly overinclusive. Multiple states have enacted laws that apply to student-athletes for whom the arguments regarding testosterone and competitive advantage are wholly irrelevant. For example, statutes prohibiting transgender boys and men who were assigned female at birth from competing in men's athletics[149] or those covering children participating in sports who have not

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transwomen who had undergone one year of treatment with testosterone-suppressing medication still retained a mean run speed that was nine percent faster than their cisgender peers); Anna Wiik et al., *Muscle Strength, Size, and Composition following 12 Months of Gender-affirming Treatment in Transgender Individuals*, 105 J. CLINICAL METABOLISM 805, 818–20 (2020) (finding that after one year of treatment with testosterone-suppressing medication, transgender women's overall muscle mass and strength decreased only modestly, but stating that "it is still uncertain how the findings would translate to transgender athletes"). *But cf.* NCAA OFF. INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 7 (2011) ("Transgender women display a great deal of physical variation, just as there is a great deal of natural variation in physical size and ability among non-transgender women and men . . . the assumption that all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people is not accurate.").

147. Wiik et al., *supra* note 146, at 805–06 (defining "gender-affirming interventions" of the study as the "inhibition of endogenous sex hormones and replacement with cross-sex hormones"). Both the treatments and the purposes of gender-affirming hormone therapy vary based on factors such as an individual's age. *See* Wylie C Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRIN. & METABOLISM 3869, 3869–70 (2017). For a transgender adult, the primary goals of hormone therapy are "reduc[ing] endogenous sex hormone levels," which minimizes secondary sex characteristics associated with their sex assigned at birth and replacing those hormone levels to match their gender identity. *Id.* at 3885–86. In adolescents, sometimes medical intervention is appropriate to suppress puberty through puberty-suppressing medication. *Id.* at 3880–81.

148. Joanna Harper, *Race Times for Transgender Athletes*, 6 J. SPORTING CULTURES & IDENTITIES 1, 8 (2015); *see* Hecox v. Little, 479 F. Supp. 3d 930, 947, 980 (D. Idaho 2020), *appeal filed*, No. 20-35815 (9th Cir. Sep. 17, 2020). "Transition" refers to the process by which a transgender person harmonizes their gender expression with their gender identity. GLAAD, *supra* note 1; Smith, *supra* note 1. The transition process is unique to each person and can include hormone therapy or surgery; however, not all trans individuals seek out or desire medical interventions. *Id.*

149. *See, e.g.*, ALA. CODE § 16-1-52(b)(2) (2021) (stating that schools "may not allow a biological female to participate on a male team if there is a female team in a sport"); TENN. CODE ANN. § 49-6-310(a) (2021) ("A student's gender for purposes of participation in a public middle school or high school interscholastic athletic activity or event must be determined by the student's sex at the time of the student's birth, as indicated on the student's original birth certificate.").

yet gone through puberty.[150] Further, the competition rationale is completely irrelevant to intramural sports, yet many state-level laws limit transgender girls' and women's participation anyway.[151] Since intramural sports do not generally have the primary goal of competition, preserving cisgender women's competitive advantage does not justify such a restriction.[152]

None of the state laws passed in the last two years include any exceptions or accommodations for athletes who have undergone gender-affirming therapies. Such absolute restrictions stand in contrast to policies embraced by the NCAA and the International Olympic Committee, which both allow transgender women to compete if they meet specific criteria.[153] It is patently unreasonable to argue that an intramural middle school sports team requires a more restrictive policy to ensure fair play than the Olympic Games, where the best athletes in the world compete.

Third, these laws put more onerous burdens on everyone participating in girls and women's sports, including cisgender girls and women. This outcome occurs because anyone competing on a women's team might be forced to undergo invasive medical exams at their own

150. *See, e.g.*, IDAHO CODE § 33-6203(b)(1) (2021) (excluding any student assigned male at birth from participating in sports "designated for females, women, or girls" beginning in elementary school); ALA. CODE § 16-1-52(b)(2) (2021) ("A public K-12 school may never allow a biological male to participate on a female team."); ARK. CODE § 16-130-103(1)(A) (2021) (defining a "covered entity" to include "[a]n elementary school"); MISS. CODE ANN. § 37-97-1 (2021) (barring all students assigned male at birth from taking part in girls or women's athletics beginning in elementary school).

151. For example, the laws passed in Idaho, Arkansas, Florida, and West Virginia all cover "[i]nterscholastic, intercollegiate, intramural, [and] club athletic teams or sports." *See* IDAHO CODE § 33-6203(1); ARK. CODE § 16-130-104; FLA. STAT. § 1006.205(3)(a) (2021); W. VA. CODE § 18-2-25d(c)(1). Mississippi's law applies to intramural and interscholastic sports only. MISS. CODE ANN. § 37-97-1 (2021).

152. *See* Coleman & Hogshead-Makar, *supra* note 133 (criticizing state-level transgender sports bans for failing to account for "the multiple goals of sport at different levels of play and competition, which range from after school clubs to elite regional events").

153. Since 2011, the NCAA has allowed transgender women to compete in women's sports once they have completed "one calendar year" of treatment with testosterone-suppressing medication. NCAA OFF. INCLUSION, *supra* note 146, at 13. The International Olympic Committee allows male-to-female transgender athletes to compete in women's events if they have had less than ten nanomoles per liter of testosterone in serum for one year. INT'L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM 2 (Nov. 2015), https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_c2d4035ff5684f41a813f6d04bc86e02.pdf [https://perma.cc/95SS-Y8C7]. The policy also requires trans women to maintain the aforementioned testosterone levels throughout their athletic career, and prohibits them from changing their declared gender identity "for sporting purposes, for a minimum of four years." *Id.* at 2–3. An athlete failing to comply with the guidelines will be ineligible to compete in women's events for twelve months. *Id.* at 3.

expense to prove their sex assigned at birth.[154] There is no corollary burdening boys' and men's participation in sports.

Fourth, transgender women and girls make up a tiny percentage of the population. Transgender individuals—including trans men, nonbinary individuals, and trans women—make up less than one percent of those between the ages of thirteen and twenty-four in the United States.[155] Two important points follow from the size of the transgender population. Primarily, transgender women's participation in women's sports does not pose a significant threat of categorically displacing cisgender women. Additionally, case-by-case, individualized determinations regarding any potential safety or fairness concerns implicated by a transgender athlete's participation would almost certainly not be overly burdensome or inefficient.

Finally, transgender women are women. They exist in the world as women and deserve recognition as such. Depriving transgender women and girls of their constitutional rights is unquestionably damaging. Further, the harm inflicted on trans individuals' emotional and psychological well-being by their wholesale exclusion from women's sports far outweighs any hypothetical harm their presence may cause cisgender women.[156]

3. Bans on Transgender Girls and Women in Sports Would not Survive Animus Review

Even if the U.S. Supreme Court ultimately finds that intermediate scrutiny does not apply to discrimination based on transgender identity, these laws would still fail under animus review. The Supreme Court's 1996 decision in *Romer v. Evans* is instructive on this matter.

In *Romer*, the Supreme Court struck down a Colorado constitutional amendment that prohibited any governmental actions protect-

154. The *Hecox* majority emphasized this reality in holding that the cisgender plaintiff had standing and that her Equal Protection claim was likely to succeed on the merits. *See* Hecox v. Little, 479 F. Supp. 3d 930, 964–65, 987 (D. Idaho 2020), *appeal filed*, No. 20-35815 (9th Cir. Sep 17, 2020). Idaho's law includes a provision requiring any student whose sex assigned at birth is questioned to provide documentation of their biological sex from a medical provider. IDAHO CODE § 33 - 6203(3). The medical provider must base their assessment on "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.* Although the laws passed in other states do not include explicit provisions for how gender disputes must be handled, it is very likely that state agencies and school districts will implement similar requirements.

155. Jody Herman, et al., *Age of Individuals who Identify as Transgender in the United States*, THE WILLIAMS INST. (2017), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf [https://perma.cc/GHS5-EUAB] (finding that 0.7% of thirteen- to twenty-four-year-olds in the U.S. are transgender).

156. *See infra* notes 192–202 and accompanying text (discussing the relative harms to transgender and cisgender women and girls).

ing lesbian, gay, and bisexual individuals within the state.[157] The amendment was promulgated in response to municipalities passing ordinances that prohibited discrimination based on sexual orientation.[158] Colorado alleged that the primary interest behind the statute was protecting its citizens' constitutional right to freedom of association.[159] It also argued that the amendment merely "den[ied] homosexuals special rights," placing them "in the same position as all other persons."[160]

The Court held the amendment lacked a rational connection to any valid governmental interest because its "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward" the lesbian, gay, and bisexual communities.[161] The Court also rejected the argument that the amendment merely put lesbian, gay, and bisexual residents in the same position as all other Coloradans, noting that it withdrew "legal protection from the injuries caused by discrimination" from only that discrete minority group.[162]

As the law at issue in *Romer*, bans on transgender girls and women's participation in women's sports are "at once too narrow and too broad."[163] They include transgender girls and women for whom the proffered concerns about enhanced athletic performance based on testosterone levels are inapplicable. Further, they cover any athletic pursuit, even those with incredibly low stakes and primary goals other than competition.[164] On the other hand, the state laws rely on reductive and inaccurate conceptions of sex and entirely fail to account for the existence of intersex persons.[165] The laws also target a distinct

157. *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996).
158. *Id.*
159. *Id.* at 635.
160. *Id.* at 626.
161. *Id.* at 632.
162. *Id.* at 627.
163. *See id.* at 633.
164. See *supra* subsection II.C.2 for a more robust exploration of these arguments.
165. "Intersex" also functions as an umbrella term; it refers to "a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male." *What is Intersex?*, INTERSEX SOC'Y OF N. AM., https://isna.org/faq/what_is_intersex/ [https://perma.cc/J6A6-EQYS] (last visited Sept. 5, 2021). This can include physical characteristics and genetic factors, such as a person born with some cells with XX chromosomes and some with XY. *Id.* Although there is debate regarding the frequency with which babies are born with intersex traits, a recent study found that approximately 1.3 in 1,000 infants were born with ambiguous genitalia. Banu Kucukemre Aydin et al., *Frequency of Ambiguous Genitalia in 14,177 Newborns in Turkey*, 3 J. ENDOCRINE SOC'Y 1185, 1186 (2019). Earlier studies estimated that roughly one in 4,500 to 5,500 babies had ambiguous genitalia at birth. *Id.* (citing Peter A. Lee et al., *Global Disorders of Sex Development Update Since 2006: Perceptions, Approach and Care*, 85 HORM RES PAEDIATR 158, 158 (2016)).

and historically marginalized community and treat them differently than other groups.[166]

Thus, as in *Romer*, the fit between states' proffered motivation for these laws and the means they chose to effectuate that purpose is so poor that the only possible explanation is a pretext. And, as the Supreme Court has stated, if the Equal Protection Clause's promise "means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[167] Regardless of the degree of scrutiny ultimately applied, state-level anti-transgender sports bans cannot withstand review under the Equal Protection Clause of the Fourteenth Amendment.

B. Fulfilling Title IX's Promise

Title IX states that no one "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."[168] Examining the statute's plain language using the U.S. Supreme Court's reasoning in *Bostock*, it is clear that discrimination based on gender identity by definition relies upon and implicates discrimination "on the basis of sex."[169] Further, including transgender youth fully in all relevant educational programming and activities—including sports—is aligned with Title IX's purpose of ensuring that young people facing exclusion and marginalization based on gender have the same opportunities to thrive as everyone else.

1. Applying Title IX's Plain Language

The plain language of Title IX prevents discrimination "on the basis of sex."[170] The original public meaning of the term "sex" when Title IX was enacted in 1972 was almost certainly the categorical designation "male or female" based on physiological differences.[171] Further, "on the basis of"—like "because of" under Title VII—incorporates but-

166. As the Court stated in *Romer*, the idea that such laws merely decline to give the targeted group "special rights" is an "implausible" reading of their provisions. *See Romer*, 517 U.S. at 626.

167. *Id.* at 634 (quotation omitted) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

168. 20 U.S.C. § 1681(a).

169. *See supra* text accompanying notes 54–62.

170. 20 U.S.C. § 1681(a).

171. *See, e.g., Sex*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1966); *Sex*, AMERICAN HERITAGE DICTIONARY (1st ed. 1969). This is consistent with what the *Bostock* majority found "sex" meant in 1964 when Title VII was enacted—"biological distinctions between male and female." Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

for causation.[172] Therefore, Title IX would apply where multiple factors contributed to differential treatment, so long as it would not have occurred except for the person's sex. Finally, like Title VII, Title IX focuses on discrimination against individuals.[173] Title IX provides that "[n]o person" is to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" based on sex.[174] This emphasis on discrimination against individuals means that a school cannot avoid liability based on how it treats women overall.[175]

Thus, an analog of the "straightforward rule" established by the *Bostock* majority applies here: a federally-funded educational institution violates Title IX when it intentionally excludes or discriminates against a person "based in part on sex."[176] Under this rule, it is impossible to exclude a transgender girl from educational activities and programs because she is transgender without basing that decision, at least in part, on her sex assigned at birth.

In the realm of sex-segregated sports, excluding a transgender girl because of her sex assigned at birth would still amount to a violation of Title IX, notwithstanding the regulatory exceptions to the strict non-discrimination rule for athletics.[177] Subsection (a) of the Athletic Regulations states that no one may be excluded, discriminated against, or "treated differently from another person" in athletic opportunities offered by federally-funded schools because of that person's sex.[178] Additionally, the regulations plainly state that covered schools may not create separate sports programs on the basis of sex, except "where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[179] But even then, schools must allow a person to try out if it only sponsors a team for the other sex, and opportunities for members of the excluded "sex have previously been limited."[180]

Here, excluding a transgender girl because of her sex assigned at birth is treating her "differently from another person" based on sex.[181]

172. *See Bostock*, 140 S. Ct. at 1739 (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013)).
173. See *supra* subsection II.C.2 for a discussion on the similarities between Title VII and Title IX, including both statutory schemes' focus on discrimination against individuals.
174. 20 U.S.C. § 1681(a).
175. *See Bostock*, 140 S. Ct. at 1741.
176. *See id.* ("An employer violates Title VII when it intentionally fires an individual employee based in part on sex.").
177. *See* 34 C.F.R. § 106.41.
178. *Id.* § 106.41(a).
179. *See Id.* § 106.41(a)–(b). (defining contact sports: "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact." *Id.* § 106.41(b)).
180. 34 C.F.R. § 106.41(b).
181. *Id.* § 106.41(a).

Like the language used in the statutory scheme, the language "on the basis of" indicates but-for causation.[182] Therefore, even if her sex assigned at birth is not the only reason she is treated differently, the regulation would still apply so long as she would not have been excluded but for her sex assigned at birth.

Further, throughout subsections (a) and (b), the regulations use the terms "each sex," "one sex," and "the other sex," whereas subsection (c) refers to ensuring parity between "male and female teams" generally.[183] A commonly used canon of statutory interpretation instructs that different language indicates different meanings.[184] Thus, the promulgating agency's decisions to refer to the "sex" of individual student-athletes to prohibit discrimination and employ "male and female" when referring to ensuring institution-wide gender parity is significant. This distinction implies that more flexible and individualized determination might be made for single athletes, whereas the broad categories of men and women, and the norm of general equity between them, is to remain fixed.

2. Title IX's Object and Purpose

Contrary to assertions made by opponents of transgender inclusion in athletics,[185] Title IX's object and purpose also militate toward an inclusive approach. Congress enacted Title IX "to secure equality for women and girls in federally-funded educational settings."[186] Early opponents of Title IX voiced concerns about its possible negative impact on the resources and opportunities provided to young men.[187] However, Congress ultimately determined that such concerns were less consequential than preventing federally-funded schools from discriminating against girls and women.[188] Congress came to this decision partly because federally-funded schools had excluded and marginalized young women as a group while providing young men

182. *See supra* notes 56, 59.

183. *Id.* § 106.41(a)–(c).

184. *See* Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177, 236 (2020) (citing WILLIAM N. ESKRIDGE JR., INTERPRETING LAW 109 (2016)) (referring to the canon of meaningful variation as "a staple of the textualist toolbox").

185. *See supra* notes 132–33. Notably, in *Soule*, the plaintiffs' primary argument was that permitting transgender women to compete in girls track and field violated Title IX by injuring cisgender women's equal opportunities to compete. *See* Soule *by* Stanescu v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021).

186. Coleman et al., *supra* note 12, at 76.

187. See subsection II.A.2 for an in-depth discussion of early opposition and challenges to Title IX, particularly its application to athletics.

188. *See supra* notes 40–45 and accompanying text.

with relatively unfettered opportunities.[189] Therefore, the possibility that Title IX may cause a slight decrease in the breadth of resources schools extended to young men, although not ideal, was preferable to schools continuing to treat young women like second-class citizens.

Cisgender and transgender women are both historically marginalized groups, but transgender women face more severe discrimination in all sectors of society, including education.[190] Schools extending athletic opportunities to transgender student-athletes would substantially positively impact trans students' well-being. The profound effects of discrimination against transgender youth are well-documented and nearly undisputed.[191] Approximately eighty-five percent of transgender teenagers in the U.S. admitted to "seriously considering suicide," and over half had already attempted suicide.[192] Experiencing discrimination and stigma in educational settings is associated with an increased risk of suicidal ideations and suicide attempts.[193] Other studies have found that seventy-seven percent of

189. *See supra* notes 40–45 and accompanying text. Additionally, the plain language of the Athletic Regulations, which have been upheld by Congress and against multiple court challenges, explicitly ground Title IX's remedial scheme on addressing young women's past marginalization relative to young men. *See* 34 C.F.R. § 106.41(b); Clark *by & through* Clark v. Ariz. Interschol. Ass'n, 695 F.2d 1126, 1131–32 (9th Cir. 1982) ("[T]here is clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women.").

190. *See* Hecox v. Little, 479 F. Supp. 3d 930, 947, 977 (D. Idaho 2020), *appeal filed*, No. 20-35815 (9th Cir. Sep 17, 2020); JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011).

191. *See, e.g.*, Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 71 (2019) (finding that transgender high school students "appear to face serious risk for violence victimization, substance use, and suicide" and recommending "creat[ing] safe learning environments and provid[ing] access to culturally competent physical and mental health care" to help improve transgender students' overall health); Eric C. Wilson et al., *The Impact of Discrimination on the Mental Health of Trans*Female Youth and the Protective Effect of Parental Support*, 20 AIDS BEHAV. 2203, 2204 (2016) ("Discrimination has been linked to poor mental health outcomes among adult transgender people. Prevalence of suicide attempts in the transgender population range from 18–41%, which is 15–38 percentage points higher than in the overall U.S. population.")

192. *Study: Transgender Teens' Suicide Risk Higher Than Cisgender Peers'*, UNIV. PITTSBURGH (Jan. 21, 2020), https://www.pitt.edu/pittwire/features-articles/study-transgender-teens-suicide-risk-higher-cisgender-peers [https://perma.cc/ETN8-GZXN].

193. Jody L. Herman & Kathryn K. O'Neill, *Suicide Risk and Prevention for Transgender People: Summary of Research Findings* WILLIAMS INST., 1 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Suicide-Summary-Sep-2021.pdf [https://perma.cc/ERJ9-FA3Y].

transgender K–12 students whose transgender status was "known or perceived" had been harassed by other students and even by teachers and staff.[194] Such harassment has substantial and long-lasting adverse effects on transgender students' academic performance and psychological well-being.[195]

Conversely, when society affirms trans students' gender identities, their mental health outcomes improve significantly.[196] Social support and inclusive school policies can lower the risk of suicide among transgender youth and increase their sense of safety at school.[197] Participating in school sports, in particular, has "many positive effects on physical, social, and emotional well-being."[198] Transgender student-athletes reported earning higher grades than transgender students who did not play sports.[199]

Transgender girls and women competing in sex-segregating sports in a manner consistent with their gender identity may result in minor disadvantages for some cisgender student-athletes but there is no demonstrative evidence that transgender women have a decisive and consistent athletic advantage over cisgender women.[200] The pervasive discrimination that transgender youth experience have difinitive, severe repercussions on their health and well-being.[201] Thus, allowing transgender girls and women to participate in girls' and women's sports poses a potential minor disadvantage to cisgender student-athletes while standing to have a substantial positive impact on the well-being of transgender students.

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194. SANDY JAMES ET AL., REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, NAT'L CTR. FOR TRANSGENDER EQUAL. 11 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/PA7Y-NRQV]. Notably, the majority in *Grimm* cited this report in support of extending protection to transgender students. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 597 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. 2021).

195. JAMES ET AL., *supra* note 194, at 11; *see* JOSEPH G. KOSCIW ET AL., GLSEN, 2017 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 14–16 (2018).

196. *Grimm*, 972 F.3d at 597.

197. *See* Shoshana K Gold Berg & Thee Santos, *Fact Sheet: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS (Mar. 18, 2021, 1:14 PM), https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/03/18/497336/fact-sheet-importance-sports-participation-transgender-youth/ [https://perma.cc/WJ68-HLDH]; HERMAN & O'NEILL, *supra* note 193, at 2.

198. NCAA OFF. OF INCLUSION, *supra* note 146, at 8.

199. THE TREVOR PROJECT, RESEARCH BRIEF: THE WELL-BEING OF LGBTQ YOUTH ATHLETES 1 (2020), https://www.thetrevorproject.org/survey-2020/ [https://perma.cc/CUS6-ZMW9] (reporting that twenty-seven percent of transgender teens who played sports reported receiving mostly A's, compared with only nineteen percent of transgender youth who did not play sports).

200. *See supra* notes 145–49 and accompanying text.

201. *See supra* notes 192–200 and accompanying text.

This result is consistent with the spirit of Title IX. The statute and pertinent regulations seek to protect individuals from exclusion and discrimination based on gender while consciously accepting that, at times, doing so may reduce some opportunities offered to members of a relatively more privileged class. Thus, Title IX's object and purpose admonish federally funded schools not to deny benefits or opportunities to transgender girls and women based on sex, including the opportunity to compete with their peers in women's sports.

IV. CONCLUSION

To echo the majority in *Grimm*, "[t]he proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past."[202] In so stating, the Fourth Circuit Court of Appeals referenced the U.S. Supreme Court's decisions in *Brown v. Board of Education* and *Obergefell v. Hodges*.[203] As with the substantive rights these landmark decisions recognized, changing existing understandings and practices surrounding transgender inclusion in school sports will likely be complex and involve inevitable trade-offs. However, it too is the correct decision to make, both based on the applicable law and broad concepts of equity and fair play.

202. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. 2021).

203. *Id.* (citing Brown v. Bd. of Educ., 349 U.S. 294 (1955); and then citing Obergefell v. Hodges, 576 U.S. 644 (2015)).