

2023 HOUSE HUMAN SERVICES

HB 1489

2023 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee Pioneer Room, State Capitol

HB 1489
1/24/2023

Relating to requiring institutions of higher education designating athletic teams and sports for male, female, or coed participation and limitations on use of governmental property for athletic events.

Chairman Weisz called the meeting to order at 9:59 AM.

Chairman Robin Weisz, Vice Chairman Matthew Ruby, Reps. Karen A. Anderson, Mike Beltz, Clayton Fegley, Kathy Frelich, Dawson Holle, Dwight Kiefert, Carrie McLeod, Todd Porter, Brandon Prichard, Karen M. Rohr, Jayme Davis, and Gretchen Dobervich. All present.

Discussion Topics:

- Performance of athletes based on biological sex
- Fair athletic opportunities for males and females in high school and college
- Biological females competing in male athletics
- High school athletic scholarships
- Impact on athletic females and transgender females.
- Athletic competition between males and females
- Public funding for athletics in schools and colleges

Rep. Koppelman introduced HB 1489 with supportive testimony (#16242).

Tom Tracey, citizen from Jamestown, North Dakota, spoke in favor of bill.

Margo Norr, North Dakota citizen, spoke in favor of bill.

Mark Jorristma, Executive Director for the North Dakota Family Alliance Legislative Action, opposition testimony (#16092).

Patricia Leno, North Dakota citizen, spoke in favor of bill.

Katie Fitzsimmons, Director of Student Affairs for the North Dakota University System, opposition testimony (#16183).

Gabriela Balf, on behalf of the North Dakota Psychiatric Society, offered testimony in opposition to bill (#16056).

Tracy Potter, former North Dakota legislature and lobbyist, spoke in opposition to bill.

Additional written testimony:

Jane Hirst, North Dakota citizen, parent, and grandparent, (#14869).

Elia Jay Scott, North Dakota citizen, (#14941).

Linda Thorson, North Dakota citizen, (#14986).

Debra L. Hoffarth, North Dakota citizen, (#14988).

Rev. Michelle Webber, North Dakota citizen and pastor, (#15020).

Megan Degenstein, Licensed Professional Clinical Counselor, (#15026).

Tim Baumann, North Dakota citizen, (#15106).

Sydney Glende, Licensed Professional Clinical Counselor, (#15156).

Matt Sharp, Senior Counsel, Alliance Defending Freedom, (#15253).

Faye Seidler, North Dakota citizen, (#15286).

Caius Harris, North Dakota citizen, (#15467).

Charley Johnson, Fargo Moorhead West Fargo Convention and Visitor's Bureau, (#15488).

Kaitlyn Kelly, North Dakota citizen, (#15561).

Rachel Haidle, North Dakota citizen, (#15612).

James Pursley, North Dakota citizen, (#15642).

Sylvia Bull, North Dakota citizen, (#15694).

Amalia Dillin, North Dakota citizen, (#15704).

Gregory Demme, Pastor for Grace Baptist Church in Minot, North Dakota, (#15728).

Gordon Greenstein, North Dakota citizen, (#15751).

Christopher Brown, North Dakota citizen, (#15776).

Kayla Johnson, North Dakota citizen, (#15793).

Cody J. Schuler, Advocacy Manager for the ACLU of North Dakota, (#15821).

Rebekah Oliver, North Dakota citizen, (#15828).

Naomi Tabassum, Owner and president of New Story Counseling Services PLLC, (#15843).

Maura Ferguson, North Dakota citizen, (#15844).

Charles Allen, Emergency Medicine Physician from Bismarck, North Dakota, (#15851).

Jennifer Braceras, Director of Independent Women's Law Center, (#15855).

Jamie Teeples, North Dakota citizen, (#15870).

Dr. Polly Peterson, President of the University of Jamestown, (#15900).

Rody Schultz, North Dakota citizen, (#15903).

Seth Flamm, North Dakota citizen, (#15920).

Gretchen Deeg, North Dakota citizen, (#15923).

Megan Burke, North Dakota citizen, (#15933).

Sarah Galbraith, North Dakota citizen, (#15941).

Jeff Miller, North Dakota citizen, (#15960).

Kristie Miller, North Dakota citizen, (#15995).

Shawn Nixon. North Dakota citizen, (#16003).

Wade Pulkrabek, North Dakota citizen, (#16008).

Lisa Pulkrabek, North Dakota citizen, (#16013).

Brian Murphy, North Dakota citizen, (#16016).

Nathan Brown, North Dakota citizen, (#16025).

Doug Sharbono, North Dakota citizen, (#16032).

Amber Vibeto, North Dakota citizen, (#16047).

Dr. Daniel Scrimshaw, North Dakota State Director of the American Academy of Medical Ethics, (#16052).

Dr. Lovita Scrimshaw, North Dakota State Director of the American Academy of Medical Ethics, (#16066).

Mia Halvorson, North Dakota citizen, (#16076).

Danial Sturgil, North Dakota citizen, (#16098).

Shannon Full, President/CEO of the Fargo Moorhead West Fargo Chamber of Commerce, (#16109).

Kayla Schmidt, Interim Executive Director, North Dakota Women's Network, (#16115).

Curtis Kadrmas, North Dakota citizen, (#16131).

Reed Rahrlich, North Dakota citizen, (#16143).

Erin McSparron, North Dakota citizen, (#16146).

Christina Sambor, Legislative Coordinator for North Dakota Human Rights Coalition, (#16172) (#16173).

Olivia Data, Youth Action Council Coordinator for the North Dakota Women's Network, (#16181).

Jodi Plecity, North Dakota citizen, (#16186).

Charles Vondal, North Dakota citizen, (#16189) (#16190) (#16191).

Chairman Weisz adjourned the meeting at 10:41 AM.

Phillip Jacobs, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee Pioneer Room, State Capitol

HB 1489
1/31/2023

Relating to requiring institutions of higher education designating athletic teams and sports for male, female, or coed participation and limitations on use of governmental property for athletic events.

Chairman Weisz called the meeting to order at 3:57 PM

Members Present: Chairman Robin Weisz, Reps. Karen A. Anderson, Mike Beltz, Clayton Fegley, Kathy Frelich, Dawson Holle, Dwight Kiefert, Carrie McLeod, Todd Porter, Brandon Prichard, Karen M. Rohr, and Gretchen Dobervich.

Members not Present: Vice Chairman Matthew Ruby and Rep. Jayme Davis

Discussion Topics:

- Committee work
- Proposed Amendments
- College athletes that compete with transgender athletes
- Scholarships

Chairman Weisz called for a discussion on HB 1489 and the proposed amendments 23.0967.01003 (Testimony #19595)

Rep. Prichard moved to amend HB 1249.

Rep. Kiefert- Second the motion

Motion carries by voice vote.

Rep. Prichard moved a Do Pass as Amended.

Rep. Rohr- Second the motion

Roll Call Vote:

Representatives	Vote
Representative Robin Weisz	Y
Representative Matthew Ruby	AB
Representative Karen A. Anderson	Y
Representative Mike Beltz	N
Representative Jayme Davis	AB
Representative Gretchen Dobervich	N
Representative Clayton Fegley	N

Representative Kathy Frelich	Y
Representative Dawson Holle	Y
Representative Dwight Kiefert	Y
Representative Carrie McLeod	Y
Representative Todd Porter	Y
Representative Brandon Prichard	Y
Representative Karen M. Rohr	Y

Motion carries 9-3-2. Carried by Rep. Anderson.

Chairman Weisz adjourned the meeting at 4:04 PM

Phillip Jacobs, Committee Clerk by Risa Berube

Bill was brought up for reconsideration but failed by a 7-7-0 vote on Feb. 7th 2023

YA 1-31-23

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1489

Page 1, line 14, replace "reproductive anatomy" with "nonambiguous sex organs"

Page 1, line 17, replace "a school" with "an institution"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1489: Human Services Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 3 NAYS, 2 ABSENT AND NOT VOTING). HB 1489 was placed on the Sixth order on the calendar.

Page 1, line 14, replace "reproductive anatomy" with "nonambiguous sex organs"

Page 1, line 17, replace "a school" with "an institution"

Renumber accordingly

2023 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee Pioneer Room, State Capitol

HB 1489
2/7/2023

Relating to requiring institutions of higher education designating athletic teams and sports for male, female, or coed participation and limitations on use of governmental property for athletic events.

Chairman Weisz called the meeting to order at 10:23 AM

All Members Present: Chairman Robin Weisz, Vice Chairman Matthew Ruby, Reps. Karen A. Anderson, Mike Beltz, Clayton Fegley, Kathy Frelich, Dawson Holle, Dwight Kiefert, Carrie McLeod, Todd Porter, Brandon Prichard, Karen M. Rohr, Jayme Davis, and Gretchen Dobervich.

Discussion Topics:

- Reconsideration

Rep. Rep. Rep. Rohr- Move to reconsider HB 1489

Rep. M. Ruby- Seconds the motion:

Voice Vote- Motion undecided Roll Call vote was taken:

Representatives	Vote
Representative Robin Weisz	Y
Representative Matthew Ruby	Y
Representative Karen A. Anderson	Y
Representative Mike Beltz	Y
Representative Jayme Davis	N
Representative Gretchen Dobervich	N
Representative Clayton Fegley	Y
Representative Kathy Frelich	N
Representative Dawson Holle	N
Representative Dwight Kiefert	N
Representative Carrie McLeod	N
Representative Todd Porter	Y
Representative Brandon Prichard	N
Representative Karen M. Rohr	Y

Motion Fails 7-7-0 Bill will remain unchanged since meeting on the 31st of January.

Chairman Weisz- Closes the meeting for HB 1489 at 10:25 AM

Phillip Jacobs, Committee Clerk by Risa Berube

2023 SENATE JUDICIARY

HB 1489

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1489
3/27/2023

A bill relating to requiring institutions of higher education designating athletic teams and sports for male, female, or coed participation.
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2:45 PM Chairman Larson opened the meeting.

Chairman Larson and Senators Myrdal, Luick, Estenson, Sickler, Paulson and Braunberger were present.

Discussion Topics:

- Fair Competition
- Human physiology

2:45 PM Representative Ben Koppelman introduced the bill and testified. #26750

2:56 PM Matt Sharp, Senior Counsel, Alliance Defending Freedom, testified in favor of the bill and provided written testimony #26603.

3:01 PM Margo Knorr, testified in favor of the bill. #26584

3:09 PM Mark Jorritsma, Executive Director, North Dakota Family Alliance Legal Action, testified in favor of the bill. #26723

3:12 PM Patricia Leno testified in favor of the bill. #26842

3:17 PM Katie Finzsimmons, Director of Student Affairs, North Dakota University System, testified opposed to the bill. #26708

3:38 PM Caedmon Marx, Outreach Coordinator, Dakota Outright, testified opposed to the bill. #26743

3:41 PM Kiersten Davis spoke opposed to the bill.

3:45 PM Christina Sambor, Lobbyist, North Dakota Human Rights Campaign, North Dakota Human Rights Coalition, and Youthworks, testified opposed to the bill. #26727, #26726

3:47 PM Chairman Larson closed the public hearing.

Additional written testimony:

Faye Seidler #26642

Celeste McCash #26638

Doug Sharbono #26637

Elizabeth Loos #26632

Kristie Miller #26621

Andrew Alexis Varvel #26611, 26610

Gordon Greenstein #26597

Mariah Deragon Ralston #26586

Alannah Valenta #26568

Linda Thorson #26526

Cody Schuler #26776, 26706

Karen Van Fossan #26720

Charlton Stanley #26716

Jacob Holter #26715

Cionda Holter #26714

Kelsey Davis #26713

Thea Holter #26711

Gina Sandgren #26700

Shaunna Upgren #26687

Shannon Full #26682

Patricia Burckhard #26592

3:47 PM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1489
3/28/2023

A bill relating to requiring institutions of higher education designating athletic teams and sports for male, female, or coed participation

9:32 AM Chairman Larson opened the meeting.

Chairman Larson and Senators Myrdal, Luick, Estenson, Sickler, Paulson and Braunberger are present.

Discussion Topics:

- Committee action

9:33 AM Senator Myrdal moved to Do Pass the bill. Senator Luick seconded the motion.

9:38 AM Roll call vote was taken.

Senators	Vote
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Jonathan Sickler	Y
Senator Ryan Braunberger	N
Senator Judy Estenson	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion passes 6-1-0.

Senator Myrdal will carry the bill.

This bill does not affect workforce development.

9:38 AM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1489, as reengrossed: Judiciary Committee (Sen. Larson, Chairman) recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Reengrossed HB 1489 was placed on the Fourteenth order on the calendar. This bill does not affect workforce development.

TESTIMONY

HB 1489

House Human Services Committee members:

I am a lifelong resident of North Dakota, raising 3 children in Minot and watching 2 grandchildren grow up in our city. I am writing to ask for a Do Not Pass on HB 1489, which bans transgender students from competing on the team that aligns with their gender identity in institutions of higher learning in our state as well as restricting the use of government property for certain athletic events. This is very similar to a bill that was voted on two years ago, which did not become law, and has the same issues that were present at that time.

If we start with the definition used to determine which sports team an individual could participate with, I would like to point out that the biology of sex/gender is not as simple and straightforward as some would have you believe (XY Chromosomes). It is a complex system that involves chromosomes, genes, neurobiology and endocrinology. I know it may be hard for those of us from a different generation to understand, but I think it is important to look at the science of today, which gives us a much better understanding of this complicated system.

This bill is again a non-issue and a bill to address a problem that does not exist in our state. The NCAA has spent a great deal of time and discussion coming up with a policy to address transgender athletes who wish to compete on a team that they identify with. This policy aligns with the Olympic (IOC) Framework for Fairness, Inclusion, and Non-discrimination, which is based on peer reviewed evidence-based research. I would encourage all of the committee members to make yourself aware of the NCAA policy as well as the IOC Framework. The NCAA Policy took a sport-by-sport approach to the issue and requires documentation of at least one year of testosterone lowering treatment as well as having the athlete meet the sport specific documented testosterone levels at the beginning of the season as well as six months later. This provides transgender athletes the opportunity to compete while ensuring fairness, inclusion and safety for all athletes involved. I am tired of our state legislators feeling that they know more than the experts in the field, who have spent years studying this issue. It is a waste of time and taxpayers' money to make a law to address a non-existent problem or one that already has a documented policy.

I have heard people argue that transgender female athletes always have an advantage over cisgender female athletes due to an increased level of testosterone, red blood cells, and muscle mass in the body. This could be an issue for collegiate adult athletes who did not transition until they were past puberty but that is the reason for the documentation of testosterone suppressing hormone usage for at least one year as well as the testosterone level of the athlete. Studies have shown that there is a dramatic decrease in red blood cells, muscle mass and strength within a year of the athlete using testosterone suppressing treatment. If the student is using estrogen therapy, this change is even more dramatic.

Contrary to some legislator's views, this bill does go against Title IX, is discriminatory and will make our state open to lawsuits. It goes against NCAA policy and the inability of our state to host athletic events that involved teams that allow transgender athletes to compete puts our athletic teams at a disadvantage and would cost our state revenue from the hosting of those events. The financial implications of this bill could be enormous as well as the fact that our state will be known as one that discriminates against a group of young people who have already experienced enough struggles in their young lives. Please note that the suicide attempt rate of transgender individuals ranges from 32% to 59% worldwide. With all of the bills

attacking sexual and gender identity this session, it will make these people more vulnerable to depression and suicidal thoughts.

Playing sports can provide student-athletes with important lessons about self-discipline, teamwork, success and failure as well as giving them the opportunity to improve their physical and mental health. Playing on a team also provides them a chance to meet other students and form lifelong friends outside of college. It teaches the importance of hard work, respect and acceptance of others. All students, including those who are transgender, deserve access to all of these benefits and the people who should be setting these guidelines and addressing the issue of transgender athletes participating in a sport should be the experts in the field, not legislators with a political agenda.

I find this bill to be discriminatory and a waste of taxpayers' dollars. I ask that you give this bill a Do Not Pass.

Thank you for your time,

Jane Hirst
Minot, ND

Elia Jay Scott,
Fargo, ND 58103 (district 46).

Please stop the war on trans lives.

Imagine (if you are not) that you are Catholic. And imagine that your state legislature proposes **21 bills** targeting, demonizing, and persecuting the Catholic community. One bans you from wearing a crucifix in public. One bans you from privately praying anywhere near a school. And one bans sale of alcohol for religious purposes, making it illegal for your church to obtain the spiritual medicine that keeps your soul alive, the Eucharist.

Now, instead, imagine that you are **transgender**. Instead of banning crucifixes, the state wants to ban you from going outside your house in clothes consistent with your identity. Instead of banning prayer in schools, they want to ban any school accommodation for your condition, gender dysphoria. And instead of banning the Eucharist, they want to ban the evidence-based, lifesaving healthcare that has saved your **actual, physical life**, and the lives of so many of your beloved friends.

That is what the North Dakota state legislature is doing right now. Republicans have introduced 21 – yes, 21 – bills, targeting, demonizing, and persecuting the transgender community, doing all I have described above and more.

This bill, HB 1489, aims to overrule the scientific judgement of sports certifying boards, and replace actual science with uninformed mob moral panic. Let sporting regulations be based on **actual science**, not culture war hysteria.

Chair and members of the committee, if you are Catholic, Christian, or simply a human being of conscience, I ask you ***please to vote NO on all these anti-transgender bills***, and to stop this merciless, hateful war on our trans neighbors – whom, if we are Catholic, Christian, or people of conscience, we are commanded by God and human decency ***to love as ourselves***.

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CONCERNED
WOMEN *for* AMERICA
LEGISLATIVE ACTION COMMITTEE

January 24, 2023
House Human Service Committee
Testimony in Support of HB 1489

Chairman Robin Weisz and members of the House Human Services Committee, I am Linda Thorson, State Director for Concerned Women for America (CWA) of North Dakota. We are the largest public policy women's organization in our state and in the country, with over five-hundred thousand members in the United States. Today, I am testifying for Concerned Women for America Legislative Action Committee in support of HB 1489.

Fair competition and equality in women's sports for all *North Dakota* female athletes competing *at institutions of higher education* is protected with the passage of this pro-woman legislation which prohibits male-born athletes from entering women's sports as transwomen. Female athletics are a pathway to development, opportunity, and success for girls and women in America. So, when male-born athletes are permitted in women's sports as transwomen, female-born athletes lose hard-fought opportunities, which came through the feminist movement in the implementation of Title IX.

Concerned Women for America (CWA) of North Dakota urges you to protect biological females who train and work hard to excel in their chosen sport, strive for college scholarships, and *compete at the collegiate level when their athletic skills are at their zenith*. Females should not suffer the loss of opportunity because a biological male who claims transgender status as a woman receives her spot.

- Preserve women's sports for collegiate athletes in North Dakota.
- Ensure fairness in women's sports in North Dakota.
- Support biological facts and basic civil rights for women in North Dakota.

Male athletes should not be competing in *women's* sports, regardless of how they identify. I invite you to read Concerned Women for America's position paper, [How Gender Identity Policies Hurt the Progress of Women and Girls](#), and [the letter from a female athlete](#) describing her experiences as a woman seeking to compete on a level playing field at the collegiate level.

Concerned Women for America of North Dakota strongly supports the protection of all women's sports at our high schools and at our institutions of higher education and urges a "Do Pass" on HB 1489.

WRITTEN TESTIMONY IN OPPOSITION TO HB 1489

House Human Services Committee on House Bill 1489

Date of Hearing: January 24, 2023 9:15 a.m.

Debra L. Hoffarth, 1320 11th Street SW, Minot, ND 58701

This written testimony is presented in opposition to HB 1489, which effectively prevents participation of transgender and nonbinary athletes in high school, collegiate, or club sports. The North Dakota High School Activities Association (NDHSAA)¹, the National Collegiate Athletic Association (NCAA)², and the International Olympic Committee (IOC)³ have rules in place on this issue. The purpose of these organizations is to promote athletes, with an eye toward preserving the well-being of the athlete and to promote fair play. HB 1489 seeks to ignore the work done by these organizations and instead enact a law that is discriminatory. Any thought that this somehow protects student athletes is misguided.

North Dakota law and federal law prohibit discrimination based upon sex. The North Dakota Human Rights Act prohibits discrimination based upon sex.⁴ Title VII of the Civil Rights Act prohibits discrimination based upon sex, and this includes gender identity.⁵ President Biden issued an executive order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation which states "all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."⁶

This proposal also violates the privileges and immunities clause. North Dakota Constitution. Article I, Section 21 states: No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." This proposed legislation allows straight and binary individuals privileges, which transgender and nonbinary individuals are not allowed – participation in state funded facilities.

As the parent of a transgender individual, I can assure you that all every person wants (regardless of gender identity or sexual orientation) is to be accepted as they are. More than half of transgender and nonbinary youth have contemplated or attempted suicide.⁷ 83% of transgender and nonbinary youth are worried about being denied participation in athletics due to state or local laws.⁸ If those same students are surrounded by peers, teachers, coaches, and others who are affirming, the suicide rate lowers significantly. Excluding or marginalizing transgender students puts their mental health and their lives at serious risk.

This bill also prohibits use of the state, a political subdivision, or any entity receiving state funding from allowing use of facilities that allow athletic events which allow participation by transgender or nonbinary individuals. This will cause our universities and other entities to lose the ability to host national

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https://d2q0tptsfejku7.cloudfront.net/uploads/files/Policies/NDHSAA_Transgender_Student_Board_Regulation.pdf

² <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>

³ <https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>

⁴ NDCC § 14-02.4-01.

⁵ *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

⁶ Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation | The White House- <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

⁷ The Trevor Project, "National Survey on LGBTQ Youth Mental Health 2022"

⁸ The Trevor Project, "National Survey on LGBTQ Youth Mental Health 2022"

tournaments or other athletic events. This will undoubtedly cause economic losses to those communities.

Like all young people, transgender students want to participate in school activities with their friends, have a community that is supportive, and be part of a team. They are not seeking an advantage to win awards. Sports teach students many things: confidence, sportsmanship, teamwork, and leadership. Transgender students need these skills, just like any other student. What transgender athletes need is compassion and inclusion, not hatred and exclusion. All people within the State of North Dakota deserve dignity and respect and to be included as part of the community.

Please oppose HB
1489.

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1489. I ask that you give this bill a Do Not Pass.

It is too far reaching to require private institutions to also adhere to regulations the state makes for state funded institutions. My college-aged off spring has chosen not to apply to North Dakota schools because of the bills submitted to the legislature this year.

As I was reading this bill, I didn't support the need to be so specific about male and female only sports, but didn't feel the need to advocate against it, until I read section II. As far as I'm concerned, getting rid of section II is a necessary step! Many of the bills proposed this year assume that you can tell someone's "sex" at birth, which is scientifically fallacious. This bill states that participation in sports is to be based on "chromosomes and endogenous hormone profile at birth." I have no record of my chromosomes and endogenous hormone profile at birth, nor does their exist one for my college-age off spring. This bill, if passed, would result in a slew of lawsuits against the state, costing time and money that North Dakota can ill afford. Section II is not only offensive, but scientifically and legally indefensible.

Thank you for your time, consideration, and service to our state

Best regards,

Rev. Michelle Webber

I strongly oppose this bill. Banning trans athletes from playing sports is harmful and could potentially increase mental health problems in college students who are trans. Students should be able to have the opportunity play sports with peers who are their same gender. There is no scientific basis for banning young adults who are trans from playing sports in college. The fact that this bill is being considered is embarrassing for our state. It shows such ignorance of factual information and the extreme prejudice of our lawmakers.

Megan Degenstein, Ph.D.
Licensed Professional Clinical Counselor

January 22, 2023

To Whom It May Concern,

My name is Tim Baumann and I live at 1308 35th Ave. SW in Minot. I am writing today to express my opposition to HB 1489. This legislation puts the thriving university athletic programs in our state at risk for not being in compliance with NCAA standards.

Respectfully Submitted,

Tim Baumann

1308 35th Ave. SW

Minot, ND 58701

Sixty-eighth
Legislative Assembly
of North Dakota

To whom it may concern,

I am writing this letter in opposition to the House bill #1489.

A person who is transgender isn't playing sports in their identified gender to hurt anyone, but to simply be themselves and enjoy the activity, just like any other person.

To limit the use of government facilities based on sex / gender, is simply deplorable and for you to even be caring enough to worry about or know what someone else has for their genitals, is perverted.

I would also love to take this opportunity to ask each and every one of you to reflect on how the LGBTQ community is actually harming anyone- reflect on your own homophobia for there to be such a witch hunt in this and other upcoming bill proposals.

Thank you,

Sydney Glende, LPCC



**North Dakota House Human Services Committee
House Bill 1489**

**Written Testimony of Matt Sharp
Senior Counsel, Alliance Defending Freedom**

Alliance Defending Freedom is the nation's leading nonprofit legal organization that advocates for religious liberty, free speech, life, and marriage and the family. We regularly analyze proposed laws and their effect on constitutional freedoms. ADF also currently represents female athletes in West Virginia, Connecticut, Idaho, and other states in federal court who have personally lost out on championships and other athletic opportunities to biological males who were permitted to compete in female sports.

Women deserve to compete on a level playing field. Allowing males to compete in women's sports destroys fair competition and women's athletic opportunities.

HB 1489 protects opportunities for young women in athletics by ensuring they are not forced to compete against men playing on women's sports teams. The bill simply requires that all collegiate sports teams be designated as either male, female, or co-ed based on biological sex and makes clear that males are not eligible to compete on female teams. It also protects a college that follows the law from any adverse action by a government entity, accrediting or licensing organization, or any athletic association.

While this bill is legally sound and consistent with a similar bill from West Virginia that was recently upheld in federal court, it is missing one key component: protections for girls in K-12 sports. We strongly urge that the bill be amended to protect all women and girls – from kindergarten through college – and guarantee them a fair and level playing field.

Biological sex is indisputably the single biggest driver of athletic advantage. Males have a 10-50% performance advantage (depending on the sport) over females. Having separate teams for men and women is the time-tested way to ensure that women have the opportunity to showcase their talents and become champions. The science shows that comparably fit and trained males will always have physical advantages over women. Even the world's best female Olympic athletes would lose to thousands of boys and men on any given day. That's the reason we have women's sports as a separate category.

Unfortunately, across the country, we are seeing a growing number of instances in which biological males have taken away championships, records, and countless athletic opportunities from female athletes. For example:

- In 2019, CeCe Telfer, a biological male who identifies as female, dominated the NCAA Division II National Championship in the 400m Hurdles. Telfer actually *improved* in several track and field events after a year of testosterone suppression.
- In Connecticut, two biological males captured 15 girls' high school state championship titles, set 17 new individual meet records, and took over 80 opportunities to advance in competition in the 2017-19 seasons alone that rightfully belonged to females. One of the males competed for three seasons in the male category and never qualified for a championship, and then switched just a couple of weeks later to begin competing in the girls' category and dominated girls' track events. That hurt female athletes like Chelsea Mitchell and Alanna Smith that my firm represents in a challenge to Connecticut's policy.
- June Eastwood, who competed on the University of Montana men's track team before switching to the female team, easily beat the female competitors to win the women's mile at the Big Sky Indoor Track & Field Championship in 2019. It was one of several instances in which female athletes in the Big Sky Conference lost opportunities because of Eastwood.
- University of Pennsylvania swimmer Lia Thomas, a male who identifies as female, won several women's titles and broke several records, including three new records at the Ivy League Championship and an NCAA Championship last spring. Thomas jumped from #462 in the male division to #1 in the female rankings. In a letter, sixteen of Thomas's teammates spoke out about the unfairness of Thomas competing on the women's team. "Lia's inclusion with unfair biological advantages means that we have lost competitive opportunities. Some of us have lost records.... To be sidelined or beaten by someone competing with the strength, height, and lung capacity advantages that can only come with male puberty has been exceedingly difficult."

Women are already losing out. We shouldn't make them pay the price while we wait to protect their opportunities to compete on a fair playing field.

Scientific research continues to point to the necessity of policies that protect women's athletic opportunities by ensuring girls and women are not forced to compete against men. Evidence confirms that suppression of testosterone in a male after puberty does not substantially eliminate the male athletic advantage. One

recent scientific study found that “superior anthropometric, muscle mass and strength parameters achieved by males at puberty, and underpinning a considerable portion of the male performance advantage over females, are not removed by the current regimen of testosterone suppression” permitted by the International Olympic Committee and other sports organizations. See <https://doi.org/10.1007/s40279-020-01389-3>.

Another study of the physical fitness of Air Force personnel reached a similar conclusion: “[T]he pretreatment differences between transgender and [biological] women persist beyond the 12 month time requirement currently being proposed for athletic competition by the World Athletics and the IOC.” See <https://bjsm.bmj.com/content/early/2020/11/06/bjsports-2020-102329>.

HB 1489 has become more urgent than ever—especially for collegiate athletes—after the NCAA declined to adopt a policy that ensures fairness for women. Instead, the NCAA punted to a patchwork of unaccountable national and international organizations—some of which allow male-bodied athletes to compete on women’s teams with no preconditions, and others of which have no policy at all. It is vital for states to step up and set a clear, fair, and scientifically based policy to guide schools and colleges throughout the state and to guarantee equal opportunities for our daughters and granddaughters to participate and win.

Indeed, 18 states have already acted to protect fairness in women’s sports. These states want to attract and retain the best women athletes to their colleges and universities with a guarantee that they will never lose their spot on a team to a male competitor. And none of them has experienced any economic consequences for doing so: no lost NCAA tournaments or events; no boycotts; and no businesses pulling out of their states. This should be unsurprising because poll after poll shows that Americans believe that women and girls should not lose medals or opportunities to male athletes.

But this isn’t just about losing medals or championships. Allowing males on girls’ teams means that a young woman will also lose the many benefits that flow from participating in sports—learning teamwork, how to overcome adversity, and leadership skills. In fact, a recent survey of women business leaders from Inc.com found that 94% of these leaders participated in sports. They described how vital those athletic experiences were to their professional development. Every girl in North Dakota—many of whom will grow up one day to be business and community leaders—should have to the same athletic opportunities available to her.

Finally, HB 1489 is consistent with both the U.S. Constitution and federal law, including Title IX. Federal courts have long recognized that it is constitutional to provide separate programs based on biological sex—including sports teams, locker rooms, or even single-sex schools.

In the Supreme Court’s decision in the Virginia Military Institute (VMI) case in which the court ruled that women must be permitted to attend VMI, Justice Ginsburg wrote that once women were admitted to VMI, female students would “undoubtedly require” separate physical fitness standards, precisely because of the “physiological differences between male and female individuals.” *United States v. Virginia*, 518 U.S. 515, 533, 550 n. 19 (1996). It is for just this same reason that men and women “undoubtedly require” separate physical competitions—which is to say, athletics.

The 9th Circuit Court of Appeals upheld an Arizona policy that, like HB 1489, merely said that males are not eligible to compete on female team. The court found that it is a “physiological fact” that “males would have an undue advantage competing against women,” and the evidence was clear that “due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions” on the women’s team. *Clark v. Ariz. Interscholastic Ass’n.*, 695 F.2d 1126, 1131 (9th Cir. 1982). The result would be that “athletic opportunities for women would be diminished.” *Id.*

And just a few weeks ago, a federal court in West Virginia upheld a nearly identical women’s sports law that protected fairness for women and young girls alike, concluding that the law did not violate the Constitution or Title IX. The court recognized that “biological males generally outperform females athletically,” and thus “[t]he state is permitted to legislate sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.” *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875, at *8 (S.D.W. Va. Jan. 5, 2023).

In sports, biology is what matters. When we ignore science and biological reality, women pay the price. Allowing males to compete in girls’ sports reverses nearly 50 years of advances for women. That’s neither fair nor equal. The solution is HB 1489, which ensures that all female athletes have a level playing field to compete and win.

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1489. I ask that you give this bill a Do Not Pass.

I look at this piece of legislation directly after looking at HB 1249 and see that there is virtually no difference. This impacts colleges, instead of high schools. In many regards this bill has even more consequences to our state than HB 1249 and serves to override our state colleges and athletic programs.

So, the reason I ask you to Not Pass this bill is that two years ago when Representative Ben Koppelman was asked why we are introducing an anti-trans sports bill, when there is no problem in our state, he assured us a problem was coming and we needed to stop it. Action was necessary. Here we are two years later and there is still no problem in our state, with the exception that trans athletes still have no capacity, support, or opportunity to play sports and the repercussions that has on their social belonging, mental health, and risk factors associated with suicide.

I think it's worth reflecting on the [153 pieces of testimony](#) against the trans sports bill two years ago. This testimony included doctors, religious figures, athletes, coaches of women's sports, human rights organizations, city leaders, and our North Dakota University System. The concerns they brought up then are still valid. The damage to our state, to our students, and to our infrastructure is unforeseeable.

In 2022, Utah read a similar bill to this, with similar opposition. Like our state, their bill was vetoed by their republican Governor Spencer Cox. He vetoed it with a letter talking about how he couldn't understand all of this effort to hurt one kid in their state, who was already struggling. When he vetoed the bill and sent it back to the house and senate, he urged the representatives to not override the veto. That it was not necessarily. His words were not heard and over a hundred politicians successfully passed a bill targeting one girl.

I've put in more than a hundred hours of researching fairness in sports during HB 1298 and over the last two years. That's approximately 50 times longer than most representatives will consider this piece of legislation. I've followed the Olympic committee, I've followed major sporting organizations, I've followed the research and listened to the problems facing women in sports.

In 2021, we addressed this topic by insisting it *was about* women in sports. The problem facing women in sports is a lack of funding, opportunity, and sexual harassment/abuse by coaches. And when I see the penalty associated for damages in a bill like this, I can't help but wonder if we wouldn't all better be served by simply better funding women in sports in our state? How much of a problem would trans women pose, if we simply gave all young girls more opportunities? And when I don't see that legislation on the table. When I only see legislation that restricts trans athletes or lets cisgender folk sue them, I do really have to wonder about the intent. What are we really trying to do here?

The other consideration is fairness in sports. Do trans women have a competitive advantage? I've seen Rep Koppelman's research presented before. And I don't think anyone disagrees that cisgender men will statistically outperform cisgender women. Men are encouraged into sports, rewarded for being strong, funded in virtually every sport they care to participate in.

So, do trans girls enjoy those same benefits? Well. There may be some benefit to testosterone or androgenized puberty. However, not all trans girls experience that. Some are on puberty blockers, some go through an estrogen dominant puberty. What advantage would they have? Further, when we think about the top athlete in any league or division, we're often thinking about someone who has had the right genetics to excel at the sport they play. Regardless of sex. Remember those other 22 chromosomes, they do stuff too.

To really understand this, take one random boy and compare him to fifty random girls. What are the odds he will be better at every single girl in every single sport? It's pretty unlikely. Trans individuals are about 2% of the population and have fifty times less the genetic diversity that creates conditions to excel at sports. The reason we divide men and women's sports is because statistically men will on average be stronger or faster than women and division serves a meaningful purpose for opportunity. I will offer that there are other social and cultural factors around and informing division, but the point is that Transgender individuals as a demographic have not been shown to be statistically better than the gender they identify as. You cannot simply call a trans woman a cisgender man, because they are not the same demographic nor do they have the same biological profiles considering hormone therapy and transitional medicine. A study on cisgender men is simply not applicable or transferable in any meaningful way.

Another simple way to understand fairness in sports outside of studies on biology is actual performance. Transgender individuals are 2% of the population, so they should be winning 2% of the titles. If they were fairly competing, they would win that much. If they won 3% of the titles then they have an unfair advantage. Currently they win approximately 0 titles. We had one famous trans swimmer once and that was justification that all trans people needed to be removed from sport or develop their own league. The reality is that trans individuals are extremely under represented. And even while we claimed Lia Thompson was proof positive of this concept of male dominance in women's leagues, she also lost and had times far slower than some of the best female swimmers.

The catch 22 around trans people in sports is by virtue of saying it enough, we just assume all of their performance is unfair. We assume that because cisgender men have a statistical demographic likelihood of better athletics, any single trans woman will have advantage over every single cisgender girl in the world. And that simply isn't how the research even works. Some men will be disadvantaged in sports against women. They will be biologically less capable. Statistics aren't meaningful on the individual level. We all know men who are short and unathletic and can't put on muscle no matter how much they go to the gym. Men who would never even place in a female division because they're so bad at sports.

This is why we have trans people competing in states without any of the problems that Rep Koppelman talked about two years ago or will likely talk about in 2023. The same problems he'll probably talk about in 2025 and 2027 or for as long as he has a political career and trans people still have a shot.

I get if some people want restrictions, I get if those restrictions are medically based and we prevent cisgender men from lying to compete. I get wanting to assess individuals for competitive advantage to make sure every player feels like they can contribute and have a chance to win. What I don't get is arbitrarily banning an entire demographic with diverse experiences and bodies. I don't think that really achieves any goal except being purposely discriminatory and reminds me of the arguments we heard against black athletes not even that long ago from a historical standpoint.

In the states trans people are able to be who they are, they thrive. Sports isn't interrupted there nor has it fallen apart. The only real difference seems to be trans people get to exist and be themselves. I hope we're not simply looking to stop that with this piece of legislation. I also hope that we are not simply bullying this demographic out of sports to give our cisgender kids just less people they need to compete with and just that tiny extra bit of advantage.

If we're talking about colleges, this would just be like North Dakota succeeding from college athletics and NCAA opportunities to be its own bold state. Absolutely legendary. Needless to say, no trans individuals would be moving to ND for college. I know this is a small price to pay for...discriminating against transgender student athletes?

But it's up to the state to determine what price it is willing to pay to treat the category and classification of biological sex as a philosophical state of being determined at birth by three attributes. I think when we take a moment to understand the intent of classifying sex in the way they do in this legislation, we can understand how extremely silly and contrived it is, how little purpose it actually serves, and how utterly it fails to account for the lived realities we share. I have never once looked at a person and had to ask them their DNA, hormones, or sex organs at birth before determining their sex. And if that is the case for virtually everyone else, what does it matter at all?

It is for these reasons and the 153 reasons submitted two years ago, that I ask you to vote Do Not Pass.

Thank you for your time, consideration, and service to our state.

Best regards,
Faye

I knew that I was different from a very young age. Growing up in Texas with immigrant parents & in a poor immigrant community, my perspective of the world was limited. The first time I kissed a girl, we were hidden in her closet at midnight, scared of being found by her parents. It was a beautiful & deeply sad moment. A memory that should be cute and awkward and funny is tainted forever because of it was clouded by our terror of being found out to be “wrong”. We weren’t wrong.

I’m a fantastic actor. My greatest performance, to date, was convincing those around me that I was heterosexual & cisgender. I hid my feelings, my personhood, & my joy for over a decade. When I learned the word transgender, after I had spent my whole life convinced that I was completely alone, I was beside myself with grief over my life so far & utter joy at the life I now had the chance to start living. My family didn’t accept that I wasn’t their daughter. I attempted suicide multiple times. One attempt landed me in a medically induced coma. When I woke up, to the surprise of even my doctors, my family told me how happy they were that their “little girl” came back to them. I kept trying to kill myself, I ran away from home, my parents threw me out & my guardians in North Dakota took me in. They didn’t accept me either, so I went back to acting.

Three years later, at 18, I was homeless, traumatized from years of abuse, & **still transgender**. No beating took it out of me, no vitriolic words could stem who I was, lack of support couldn’t make me a different person. Now that I have transitioned socially, medically, & legally, I am three years free from a suicide attempt, two years sober, & finally at home within myself. I have friends. I have a place to live. I have pets. I am alive & happy to be so.

The attack on transgender rights all across the country will not stop people from being transgender. Centuries of history have shown, time and time again, from book burnings to murders to genocides, that transgender people cannot be subdued into nonexistence. Even if every single transgender person were to die tomorrow, more would be born the next day. The outcome of bills like these is that transgender people are made to suffer more for existing, suicide rates of transgender people increase dramatically, & the murders of transgender people are normalized.

The Lemkin Institute for Genocide Prevention has classified the actions of lawmakers within the GOP against the LGBTQ+ community as a movement driven by fascistic, genocidal ideology. Transgender people, whether adults or children, deserve the freedom to identify as themselves & to seek treatments that are deemed appropriate by World Health Organization, the World Professional Association for Transgender Health, & other unbiased medical organizations that rely on science to determine the proven safest treatments that lead to the proven best outcomes for people. Transgender people do not pose **any** risk to non-transgender people. Transgender people, very simply, wish to live our lives, as ourselves, in peace.

The push to ban transgender participation in sports is due to mounds of misinformation about transgender bodies. Transgender people have never taken space or opportunity away from cisgender athletes. Transgender athletes have had the ability to participate in the Olympics since 2004 & the National Collegiate Athletic Association since 2010 – yet no transgender woman has received an athletic scholarship in the NCAA & only one transgender woman has competed in the Olympics. In fact, transgender athletes are underrepresented within sports.



January 23, 2023

Honorable Robin Weisz, Representative and Human Services Chair

Representative Weisz and Members of the Committee:

I'm writing to express my opposition to HB 1249 and HB 1489. Both bills deal with designation of athletic teams by gender/sex and "limitations on use of governmental property for athletic events."

As the leader of an organization that works to attract sporting events of all kinds to use our communities' facilities, stay in our hotels, eat in our restaurants, and shop in our stores, I am particularly concerned about Section 2 of each bill, which would prohibit use of any publicly funded facility for youth sports (U18) that allow participation by an athlete who identifies in a gender different from that of their birth. These bills, just like previous iterations in 2021, are anti-business. Why? Because they could cause national sanctioning bodies, like USA Wrestling or USA Swimming, to eliminate any facility in North Dakota from consideration for tournaments. If that happens, we will lose millions of dollars in direct visitor spending in our cities. In addition, it would prevent our local youth organizations—sanctioned by national bodies—from hosting any tournaments in their home facilities.

I continue to believe that the governing bodies of youth sports are far more qualified to deal with these issues than any legislature in any state. To that point, in August of 2022, the North Dakota High School Activities Association revised its policies to prevent students from participating in competitions that do not conform to the sex assigned to him/her at birth.

The fact that these measures have been brought back for another run at passage suggests to me that sponsors and supporters are more concerned about making some sort of cultural statement than they are about the national perception of North Dakota and its cities as welcoming places that are actually—not in statement only—open for business. I implore you to vote no on these ill-advised measures.

Sincerely,

Charley Johnson
President & CEO

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MINUTES**North Dakota High School Activities Association
August 24, 2022, Conference Call**

Members present: Aanenson, Bakke, Baxley, Clooten, Diegel, Fridley, Johnson, Jordan, Jundt, Schoch

Absent: Baesler

Audience:

President Schoch called the meeting to order on July 27, 2022, at 10:00 am CST.

Motion by Baxley to approve the agenda, seconded by Aanenson. Motion carried unanimously.

Schoch presented the consent agenda:

- 1) Coop Dissolutions
 - a) Oak Grove and Grace Lutheran in volleyball, 7-8, 2023-24
 - b) Oak Grove and Grace Lutheran in boys basketball, 7-8, 2022-23
 - c) Oak Grove and Grace Lutheran in girls basketball, 7-8, 2022-23
 - d) Oak Grove and Grace Lutheran in boys track and field, 7-8, 2022-23
 - e) Oak Grove and Grace Lutheran in girls track and field, 7-8, 2022-23
- 2) Coop Applications
 - a) Wahpeton and Breckenridge St. Mary's (MN) in girls tennis, 7-12, 2022-23, no fee
 - b) Bismarck Public Schools and Bismarck St. Mary's in girls wrestling, 7-12, 2022-23, no fee
 - c) May-Port-CG and Finley-Sharon in girls wrestling, 7-12, 2022-23, no fee
 - d) Wyndmere, Lidgerwood and Hankinson in girls basketball, 7-12, 2022-23, late fee

Motion by Aanenson to approve the consent agenda, seconded by Clooten. Motion carried unanimously.

President Schoch presented the Executive Board's report from Tuesday August 23, 2022.

The Executive Board reviewed changes to the 2022 boys tennis format proposed by tennis advisory.

Motion by Bakke to make changes to the 2022 boys tennis format as proposed by tennis advisory, seconded by Diegel. Motion carried unanimously.

The Executive Board reviewed a revision draft of the transgender board policy. The committee has been working directly with NDHSAA legal counsel since last spring due to the NCAA changing their transgender policy in January. The Executive Board proposed a revision to the regulation as shown below:

NDHSAA Transgender Student Board Regulation

A transgender student will be defined as a student whose gender identity does not match the sex assigned to him or her at birth.

Any transgender student who is not taking hormone treatment related to gender transition may participate in a sex-separated interscholastic contest in accordance with the sex assigned to him or her at birth.

The following clarifies participation in sex-separated interscholastic contests of transgender students undergoing hormonal treatment for gender transition:

- *A trans male (female to male) student who has undergone treatment with testosterone for gender transition may compete in a contest for boys but is no longer eligible to compete in a contest for girls.*
- *A trans female (male to female) student being treated with testosterone suppression medication for gender transition may continue to compete in a contest for boys but may not compete in a contest for girls.*
- *Updated medical treatment and/or hormone therapy verification is required annually.*

If a trans male or trans female student can show, from a medical perspective, that the student does not have a competitive advantage based on their testosterone treatment or prior physical development as a male, the student's member school may submit a letter and medical evidence to the NDHSAA Executive Director. The Executive Director will then review, investigate, and render a decision. If the student disagrees with the Executive Director's decision, the student's member school may appeal to the NDHSAA Board of Directors for a final decision.

NDHSAA Board Approved: November 2015

Revised: August 2022

Motion by Johnson to except the revisions to the transgender board policy with the addition of verbiage that each approval will be reviewed yearly as seen fit by NDHSAA legal counsel. Seconded by Clooten. Motion carried unanimously.

The Executive Board also reviewed the football guidelines in regard to Parshall football. Parshall has forfeited their 9B football season due to the inability to field enough players. Executive Board will be issuing the penalty as prescribed in item 13 of the football regulations.

Motion by Aanenson to approve the executive board report, seconded by Jordan. Motion carried unanimously.

The next scheduled Board meeting will be held on September 22, 2022 at 10:00 am CDT in Valley City at the NDHSAA Office.

President Schoch adjourned the meeting at 9:30 am CDT.

Respectfully submitted,
Nickolas Walton
Assistant Director

Signed: _____ Approved Date: _____

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1249. I ask that you give this bill a Do Not Pass.

The reason for this is that I am against bills that endorse discrimination as policy. This bill hurts our state as it intrudes on individual liberties and causes actual harm to LGBTQ+ people in North Dakota, contributing to higher suicide rates among LGBTQ+ youth and mass exodus of youth from our state whether they are LGBTQ or not.

Among queer youth in North Dakota:

- 74.7% Have ever seriously considered suicide (Middle School Data)
- 46.3% Have ever attempted suicide (Middle School Data)
- 94.4% Do not talk to parents when feeling sad, empty, hopeless, or angry (High School Data)
- 72.7% Didn't feel safe at school most of time or always (High School Data)
- 61.0% Bullied on School Property (Middle School Data)
- 27.0% Didn't Sleep in Parents Home + 20.0% Have Run away or homeless (High School)

Thank you for your time, consideration, and service to our state

Best regards,

Kaitlyn Kelly

Women's sports teams are being decimated by permitting biological males to compete on these teams. It is scientific fact that male and female sex is determined immediately following conception and endures throughout a person's life. No amount of mental gymnastics can change this fact, nor is it scientifically or clinically possible to change sex. The physiological difference between males and females cannot be suppressed or changed by any amount of synthetic hormones or puberty blockers. The British Journal of Sports Medicine's review of a couple dozen medical studies depicts the athletic advantages of males at the cellular level. There are advantages in muscle mass, lean body mass, muscle strength, and two measurements of endurance (hemoglobin and hematocrit). There are also indirect measures of efficacy of oxygenation transportation and delivery. The review concludes that even after three years of hormone therapy these advantages still remain. The recognizable physiologic and metabolic differences between males and females is exactly what sex-specific sports are designed to correct for. Please pass HB 1489 to ensure women's sports teams remain open only to biological women. Thank you.

North Dakota Travel Alliance Partnership

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MEMBERS

- Basin Electric Power Cooperative
- Bismarck Airport
- Bismarck-Mandan CVB
- Bottineau Area Chamber of Commerce
- Bry's Guide Service
- Destination Marketing Association of North Dakota
- Devils Lake CVB
- Dickinson CVB
- Eastbay Campground
- Fargo Air Museum
- Fargo-Moorhead CVB
- Friends of Lake Sakakawea
- Greater Grand Forks CVB
- Hampton Inn & Suites Minot Airport
- International Peace Garden
- Jamestown Tourism
- Leistikow Park Campground
- McKenzie County Tourism
- Minot Convention & Visitors Bureau
- Missouri Valley Heritage Alliance/
Fort Abraham Lincoln Foundation
- Municipal Airport Authority of the City of Fargo
- National Hospitality Services
- Newman Outdoor Advertising
- North Dakota Association of Rural Electric Cooperatives
- North Dakota State Fair
- North Dakota Tourism Division (ex-officio)
- Odney
- RMI
- Roosevelt Park Zoo
- State Historical Society of North Dakota Foundation
- Staybridge Suites
- Theodore Roosevelt Medora Foundation
- Valley City Tourism
- Williston CVB

**Testimony of James Pursley
Executive Director, ND Travel Alliance Partnership
In Opposition to HB 1489
January 24, 2023**

Chairman Weisz and members of the House Human Services Committee, my name is James Pursley, and I am the executive director of the ND Travel Alliance Partnership. On behalf of TAP, I am testifying in opposition to HB 1489, particularly Section 2, which would forbid the use of publicly funded facilities for collegiate level athletic events that do not restrict participation of transgender athletes under the age of 18 or those enrolled in high school.

Under HB 1489, organizations that allow transgender athletes to compete based on their gender identity would be barred from hosting tournaments and other activities in venues like the Fargodome or the Bismarck Event Center.

This bill would require competitors in North Dakota to participate as males or females based strictly on the "biological state of being female or male, based on an individual's nonambiguous sex organs, chromosomes, and endogenous hormone profile at birth." We believe competitive balance should be left to sanctioning bodies with expertise in such matters.

HB 1489 would harm North Dakotans and the cities that have devoted years and invested thousands of dollars making our state the preferred destination for organizations like the NCAA, the NAIA and other sanctioning bodies.

While TAP understands that this bill seeks to retain a competitive balance for all competitors while offering equal opportunities for competition among "males, men and boys" and "females, women and girls," the potential economic harm that may be caused by Section 2 of HB 1489 outweighs the benefit.

TAP urges the House Human Resources committee to consider a do not pass for HB 1489.

Thank you.

January 23, 2023

Chairperson Lee and Committee Members,

I strongly urge a Do NOT Pass on BH 1489. How would this bill possibly be enforced in a humane way? When there is an accusation that a violation has occurred, how could it possibly be proven apart from invasive questions and tests that a former or current athlete would be forced(?) to undergo in violation of their privacy and rights? This is unnecessary legislation that involves significant government overreach.

I urge a Do NOT Pass on HB 1489.

Sincerely,
Sylvia Bull
522 N 16th St
Bismarck, ND 58501

Bill HB1489 excludes and discriminates against the people who are MOST in need of community and support from full participation with their peers and within their schools. It further marginalizes a group of people already subject to bullying, abuse, and harassment for being brave enough to exist as their true selves. They deserve to be able to be part of teams that reflect the people they know themselves to be!! LITERALLY THIS IS THE SAME NONSENSE FROM BILL 1249 being applied to higher ed!!! DO NOT PASS this bill.

FURTHERMORE: We, as a state, already fought against a version of this bill once, and rejected it. NOTHING HAS CHANGED in regard to how damaging this bill (and every incarnation of it we've seen across the country) will be to these people and their ability to participate in their communities and pursue their passions and interests. NO ONE is asking for this bill, and NO ONE needs this bill, because the number of trans athletes participating in sports in this state is so vanishingly small that there is absolutely no reason for such an outsized investment in driving them out of sports teams designated for "Girls" or "women."

And let's not kid ourselves: When the state of North Dakota allows its PRE-EMINENT WOMEN'S HOCKEY PROGRAM at UND, a program which produced TEAM USA OLYMPIANS, to be cut, we lost ALL credibility when it comes to fairness in women's sports. What was fair about that, for all the athletes who were recruited into that program? for all the women in the state and outside it who had worked HARD to earn their place on that team? All this state is trying to do is take away MORE opportunities from MORE people--to TARGET transathletes specifically and exclude them from receiving any of the scraps we throw to women's sports in higher ed at all. It's discriminatory and as a state, we should be ashamed of our legislators for putting this kind of nonsense forward and wasting both our time and our tax dollars in its pursuit. Tax dollars that would have been better spent supporting the sports programs and athletes they're so suddenly concerned about "protecting" against a threat that doesn't exist.

Because transwomen athletes threaten no one. Their inclusion in sports teams threatens NO ONE. They're not taking a spot from anyone more deserving. They're not winning titles at any kind of rate that suggests an unfair advantage.

What this bill WILL do, in addition to driving trans athletes out of sports altogether and socially and lawfully punish them for existing, is allow bullying, abuse, and harassment of any woman on a women's team who doesn't LOOK feminine enough. Just as EVERY SINGLE ONE OF THESE transparently discriminatory anti-trans bills will ultimately do.

Sure, these athletes will likely have documentation of their "sex"--I'd imagine the result of this bill will require that everyone provide said documentation in order to participate in higher ed sports at all (and its convenient that the bill ignores the existence of intersex athletes, of course--where do they belong??? Or would the state legislature like them to be bullied out of existence and participation in society as well?). But the psychological damage to that person whose gender has been called into question, the way that accusation will follow them through the rest of their career won't be so quickly cleared up. You cannot attack and target transwomen without allowing and encouraging the attack and targeting, the bullying and harassment, of ALL women.

Just let people live! Let them play! Let them compete! Let them pursue the athletic feats they excel at as far as they can go! (And the number of people who have the right combination of personality and roll of the dice genetics to get ANYWHERE as a professional athlete ALREADY works against such a very tiny population sliver of people!) Let them be part of teams and enjoy their lives on their own terms! There is absolutely no reason for the state to interfere in any of this.

Members of the House Human Services Committee,

“My name is Gregory Demme. I am a bi-vocational pastor who resides in District 3. I am asking that you please render a DO PASS on House Bill 1489.”

There is a mountain of evidence that shows that, in general, male athletes are bigger, stronger, faster, possess better hand-eye coordination, and are more spatially aware than their female counterparts, all of which clearly give men the advantage. Males even have the advantage after one year of gender-affirming hormone therapy. Trans women are not women. They are males no matter how much estrogen they swallow or body parts they alter. Please do not allow subjective ideology to trump established biological facts. Please protect the hard-won sex-based rights of women and the opportunities that come from being an athlete.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Gregory Demme, Pastor

Grace Baptist Church of Minot

5220 14th ST SE

Minot, ND 58701

HB 1489 Do Pass

Gordon Greenstein

Bismarck, ND District 35

Chairman Weisz and the House Human Services Committee, I recommend a Do Pass on HB 1489. This is a bill that would protect women athletes from competing with transgender men. Protect our female athletes and Pass HB 1489.

Thank You

Gordon Greenstein

US Navy (Veteran)

US Army (NDNG Retired)

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1489. I ask that you give this bill a Do Not Pass.

I am a public school educator and a 29 year resident of North Dakota. HB 1489 actively harms the students I serve and people I love – family, friends, and community members.

All students deserve a free and appropriate public education. Please do not take away extracurricular opportunities for trans and non-binary students. Ostracization and isolation does not create a healthy community.

Thank you for your time and consideration.

Sincerely,

Christopher Brown

Members of the House Human Services Committee,

“My name is Kayla Johnson and I reside in District 26. I am asking that you please render a DO PASS on House Bill 1489.”

There is a mountain of evidence that shows that, in general, male athletes are bigger, stronger, faster, possess better hand-eye coordination, and are more spatially aware than their female counterparts, all of which clearly give men the advantage. Males even have the advantage after one year of gender-affirming hormone therapy. Trans women are not women. They are males no matter how much estrogen they swallow or body parts they alter. Please do not allow subjective ideology to trump established biological facts. Please protect the hard-won sex-based rights of women and the opportunities that come from being an athlete.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Kayla Johnson

House Judiciary Committee
 HB1249 and HB 1489
 January 24, 2023

Chair Weizz, Vice Chair Ruby, and Committee members:

The ACLU of North Dakota opposes both HB 1249 and HB 1489. There is virtually no difference between these bills other than applying the first applying to high school and the second to college and universities thus we enter joint testimony of opposition. This legislation is deeply harmful to transgender students in our state and violates both the Constitution and federal law. If passed, HB 1249 and HB 1489 will likely entrench North Dakota in a drawn out, costly legal battles. We urge you to vote **do not pass** on this legislation for the following reasons:

HB 1249 and HB 1489 will harm transgender students.

Trans youth, just like all youth, simply want to participate in the activities they love, including athletics. This is no different for college age transgender students. Trans students participate in sports for the same reasons other young people do: to challenge themselves, improve fitness, and be part of a team. This bill would deprive a subset of students and young people of the opportunities available to their peers and, if passed, would send a message to vulnerable transgender youth that they are not welcome or accepted in their communities.

HB 1249 and HB 1489 Violates the Constitution and Title IX of the Civil Rights Act

By singling out transgender young people and enacting a sweeping ban on participation in athletics, HB 1249 violates both the United States Constitution and Title IX of the Civil Rights Act.

Where a law singles out people based on the fact that they have a gender identity that does not match the sex assigned to them at birth, it necessarily discriminates on the basis of sex and trans status, thus triggering heightened equal protection scrutiny under the Constitution. “[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.”¹ As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”² There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.³ The bill, if passed, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status.

In 2020 an Idaho court enjoined a similar ban on transgender women and girls participating in women’s athletics and reached the “inescapable conclusion that the Act discriminates on the basis of transgender status” and thus triggered heightened scrutiny.⁴ The court reasoned, “the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity.”⁵ The federal court’s order granting the motion for preliminary injunction (which is still in effect today) is attached to this document in full for your review.

¹ See, e.g., *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at *31 (D. Idaho Aug. 17, 2020)(finding that “there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all”).

² *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020).

³ *United States v. Virginia*, 518 U.S. 515, 555 (1996).

⁴ See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

⁵ *Hecox*, 2021 WL 4760138 at *27.





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Parties who seek to defend gender-based and trans-status based government action must demonstrate an “exceedingly persuasive justification” for that action.” Under this standard, “the burden of justification is demanding and it rests entirely on the State.”⁶ The bill sponsors have so far offered no justification for 1249 and HB 1489 except for hypothetical future problems that have not arisen. But under heightened scrutiny, justifications “must be genuine, not hypothesized or invented post hoc in response to litigation.”⁷ This demanding standard leaves no room for a state to hypothesize harm and impose a categorical exclusion far exceeding anything utilized even at the most elite levels of competition. Applying this standard, the *Hecox* court enjoined Idaho’s ban on women and girls participating in women’s sports solely because they are transgender, finding the state’s proffered justifications wholly insufficient.⁸ Idaho, like North Dakota, already had regulations in place governing the participation of transgender athletes in student athletics and could not justify the additional ban.

Likewise, if passed, HB 1249 and HB 1489 would violate Title IX of the Civil Rights Act of 1964. Title IX protects all students—including students who are transgender—from discrimination based on sex. Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁹ The overwhelming majority of courts to consider the issue have held that discrimination against transgender students in schools is prohibited sex discrimination under Title IX.¹⁰ Since the Supreme Court’s decision in *Bostock*, two federal appeals courts have affirmed that Title IX’s prohibition on sex discrimination likewise prohibits discrimination against transgender students when accessing single-sex spaces and activities.¹¹

HB 1249 and HB 1489 Risks the Loss of Significant Amounts of Education Funding and Will Result in High Litigation Costs

The current presidential administration has made clear that it intends to enforce federal civil rights statutes, including Title IX, consistent with the Supreme Court’s holding in *Bostock*.¹² This means that should North Dakota pass 1249 and HB 1489 or bills like it that target transgender students for discrimination, it will not only likely face litigation by private parties but also by the federal government. And such a violation of Title IX will not only cost the state substantially in litigation costs but will also put the state’s federal education funding at risk. For North Dakota in FY 2021, the estimated federal funding for primary and secondary education was over \$132 million and total funding for education, over \$407 million.¹³

⁶ *Id.*

⁷ *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021).

⁸ *Virginia*, 518 U.S. at 531.

⁹ *Id.* at 533.

¹⁰ *Hecox*, 2020 WL 4760138, at *31-*35.

¹¹ 20 U.S.C. § 1681(a).

¹² *See, e.g., Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 719-722(D. Md. 2018).

¹³ *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020)(applying *Bostock* and holding that school policy of excluding boy from restroom solely because he was transgender violated Title IX).

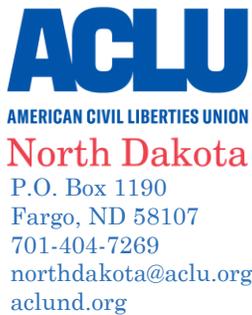
Additionally, litigation costs that would arise out of the passage of 1249 and HB 1489 are likely to be extremely high. As a chapter of ACLU National, the ACLU of North Dakota has consulted with litigators on the Idaho case to get a sense of the costs North Dakota can anticipate should 1249 and HB 1489 pass and end up in court and will result in high costs that will be carried by North Dakota taxpayers.

In conclusion, extreme policies such as HB 1249 and HB 1489 are out-of-step with prevailing international and national norms of athletic competition, violate the United States Constitution and federal civil rights law, and put North Dakota at risk of losing hundreds of millions of dollars in federal funding. This bill will harm transgender youth and do so in an attempt to solve a problem that plainly does not exist.

Transgender students already live and go to school in North Dakota, they play sports and enjoy time with their friends, and they deserve the chance to succeed and thrive like any other student.

For these reasons, we strongly urge your do not pass vote on HB 1249 and HB 1489.

Cody J. Schuler
Advocacy Manager
ACLU of North Dakota
cschuler@aclu.org



DO PASS – HB 1489

Dear Chairman Weisz and Members of the House Human Services Committee,

My name is Rebekah Oliver and I write as a private resident of North Dakota. Please recommend a Do Pass on House Bill 1489.

The distinct differences between males and females were the original incentive to create female sports, allowing women to compete safely, and to have equal opportunity to earn athletic recognition, awards, and scholarships. Given the increasing frequency of transgenders, and the unwillingness of sporting organizations to address the issue, state legislation is needed to protect the rights of female athletes.

Please recommend a Do Pass on this critical legislation.

Sincerely,

Rebekah Oliver

01/23/2023

HB 1489

Testimony in Opposition

Chairperson and Members of the Committee:

I urge you to vote DO NOT PASS on HB 1489.

This bill is prejudiced against the transgender community within our state of North Dakota. There is no significant data to represent unfair advantage that transgender women have in competitive sports. Therefore, there is not reasonable objective to this bill, other than to restrict and disadvantage a valuable group in our state.

This topic is better managed by the academic and sporting institutions who already have their own policies and regulations for participation in sporting events. This bill is an overreach of the government.

This bill passing will sent a message to the nation and the world that North Dakota is not a welcome place for hosting sporting events and could therefore impact tourism and revenue in our state.

Thank you for your time,

Naomi Tabassum

Owner/President

New Story Counseling Services PLLC

New Story Properties LLC

Fargo, ND

Chairman Weisz and members of the House Human Services Committee,

My name is Maura Ferguson and I am writing this testimony as a resident of ND and independently from my employer. My views do not represent my employer. I write to you today as a community organizer, a mother, and as someone who cares very much about the LGBTQIA+ community.

HB 1489 is a proposed bill that is rooted in fear. We need not be afraid of trans athletes, in fact, quite the opposite. We should do all we can to support them and encourage them to follow their dreams. Participation in athletics can be a protective factor for the mental health of trans students. Trans students should be able to play on teams that align with their gender identity. They should be able to use locker rooms and bathrooms that align with their gender identity.

This bill is wrong, needless, and I urge you to vote Do Not Pass.

Thank you for your time, consideration, and service to ALL North Dakotans.

Maura Ferguson, LMSW
Grand Forks

Testimony in Regard to HB 1489

Charles Allen, DO, FACOEP, Emergency Medicine Physician

January 23, 2023

Representatives Koppelman, Louser, Meier, Novak, S. Olson, Steiner, VanWinkle Senators Estenson, Myrdal, Paulson, Wobbema

My name is Charles Allen and I am a practicing emergency physician in Bismarck, ND. I am a long distance runner with 17 completed marathons including 4 Boston Marathons. I am testifying in regard to House Bill 1249 and I respectfully request that you render a "DO PASS" on this bill only.

It is scientific fact that there are genetic differences between the male and female sexes in regards to sports performance. The differences relate to how male and female sexes were designed- males are noted to have greater muscle mass, oxidative capacities and lower fat mass¹ and thus males have an advantage at sports. Genetic males as defined in this bill do perform better than females in swimming, jumping, skating, weightlifting, and cycling (among other athletic events) and in this particular study men were found to perform between 5.5% and 36.8% better than females². Elite female runners are 10-12% slower than their male counterparts¹. It is unwise and unfair to genetic females to allow genetic males to participate in female sports.

Another recent journal article states "Males consistently outperform females in athletic endeavors, including running events of standard Olympic distances...It is apparent that females are the disadvantaged sex in sport...The best male athletes consistently outperform their female peers."³

This is a good and common sense bill. It is correct physiologically. If this bill does not pass then genetic females will be discriminated against simply for being designed differently. Again, I recommend a "Do Pass" on this bill.

Thank you for the opportunity to testify on this important matter.

¹ Joyner MJ. Physiological limits to endurance exercise performance: influence of sex. *J Physiol*. 2017 May 1;595(9):2949-2954. doi: 10.1113/JP272268. Epub 2017 Feb 9. PMID: 28028816; PMCID: PMC5407964.

² Thibault V, Guillaume M, Berthelot G, Helou NE, Schaal K, Quinquis L, Nassif H, Tafflet M, Escolano S, Hermine O, Toussaint JF. Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983. *J Sports Sci Med*. 2010 Jun 1;9(2):214-23. PMID: 24149688; PMCID: PMC3761733.

³ Hallam LC, Amorim FT. Expanding the Gap: An Updated Look Into Sex Differences in Running Performance. *Front Physiol*. 2022 Jan 4;12:804149. doi: 10.3389/fphys.2021.804149. PMID: 35058806; PMCID: PMC8764368.



IW Supports Efforts To Protect Women's Sports

January 24, 2023

Dear North Dakota State Legislators,

I urge you to support legislation protecting women's sports.

In the realm of athletics, biological sex differences matter. Without separate women's teams, men will dominate women in sports where strength, size, or speed are relevant factors. This is not hyperbole. This is science.

Allowing biological males to compete in women's sports not only limits women's chances of winning events. At the collegiate level, where institutions of higher education try to recruit top athletes in each sport, it can also take playing time, scholarships, and educational opportunities from female athletes.

To be clear, any institution that allows a biological male to displace even a single female athlete — at the podium, on the field, or on the roster — discriminates on the basis of sex. Because the Biden administration has abdicated its responsibility to fully enforce federal laws against sex discrimination in athletics, it is imperative that the states act now to protect women's sports.

Respectfully,

Jennifer C. Braceras
Director, Independent Women's Law Center

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1489. I ask that you give this bill a Do Not Pass. The reason for this is that it has unintended consequences within the bill itself.

The way the bill is written it forbids any "male" athlete from participating in any "female" sport, but does not forbid the reverse. This creates an unevenness to the laws that govern the state.

I also question what is the purpose of the law, and how does it serve the people? Has this become a substantial problem for the state of ND?

Thank you for your time, consideration, and service to our state
Best regards,

-Jamie



North Dakota House Human Services Committee
Chairman Robin Weisz
January 23, 2023

Re: House Bill 1489

Chairman Weisz and members of the House Human Services Committee,

My name is Dr. Polly Peterson, President of the University of Jamestown. I am writing in opposition to HB 1489 which places limitations on higher education institutions regarding athletic events and property.

A North Dakota private higher education institution, its facilities, and athletic teams fall outside the purview of the state, and therefore should not be included in this legislation.

However, a larger issue is at hand. The University of Jamestown, along with all other higher education institutions with athletic teams participating in conference competition, is subject to specific college athletic conference rules. Those rules would conflict with the language proposed in HB 1489, and threaten the participation of North Dakota athletes in conference competition, potentially depriving them of athletic opportunities.

We would urge a Do Not Pass recommendation on HB 1489.

Should this bill proceed with amendments, for reasons stated above, we would ask that the words on lines 11-12, “or a private institution of higher education whose athletic teams compete against an institution under the control of the state board of higher education,” be stricken from the bill.

Thank you for your time and consideration.

Dr. Polly Peterson
President University of Jamestown

Dear Chair Weisz and members of the House Human Services Committee,
My testimony is in opposition to House Bill 1249. I ask that you give this bill a Do Not Pass. The reason for this is that it is harmful to our children and you are attacking the constituents that you are relying on to keep you in office. You are wasting the tax payers money attacking them and their children.

- a. Personal Impact: This bill impacts the people I care about, because I have children who are non-conforming and they have friends who are non-conforming.
- b. Unintended Consequence: This bill creates inconsistency with interstate competition and could invite lawsuits, other consequences may include children harming themselves or even attempting suicide. Both things I will not hesitate to make known the role you played in causing this.

Thank you for your time, consideration, and service to our state
Best regards,
Rody Hoover Schultz

Members of the House Human Services Committee,

My name is Seth Flamm and I reside in District 27. I am asking that you please render a DO PASS on House Bill 1489.

There is a mountain of evidence that shows that, in general, male athletes are bigger, stronger, faster, possess better hand-eye coordination, and are more spatially aware than their female counterparts, all of which clearly give men the advantage. Males even have the advantage after one year of gender-affirming hormone therapy. Trans women are not women. They are males no matter how much estrogen they swallow or body parts they alter. Please do not allow subjective ideology to trump established biological facts. Please protect the hard-won sex-based rights of women and the opportunities that come from being an athlete.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Seth Flamm

January 23, 2023

Chairperson Lee and Committee Members,

I strongly urge a Do NOT Pass on HB 1489. This proposed bill is a step backwards in higher education safety and a violation of federal law.

First, 15.1-41-03 would be detrimental to women and a step away from women's equality. This section could easily be used to turn away any complaint that an institution is providing subpar interscholastic or intramural athletic teams or sports for women. This section could be used to shut down conversations in higher education and athletic departments about how women's sports could be improved. By barring investigations, it could also be used to hide inappropriate and detrimental behavior towards female students.

Furthermore, this bill would prevent individuals who are born with ambiguous sex organs, atypical chromosomes, or hormone imbalances from participating in the most appropriate way for them. Enforcing this bill would also require students to prove the status of their sexual organs or chromosomal makeup to higher education institutions, which would be a violation of an individual's privacy and against federal law which gives the legal right to health information privacy at age 12.

Do NOT Pass HB 1489.

Sincerely,
Gretchen Deeg
Bismarck, ND

My name is Megan Burke and I look forward to sharing my testimony in committee tomorrow.

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1489. I ask that you give this bill a Do Not Pass. Two years ago we were at this same crossroads with another anti-trans sports bill and it was decided then that there was no issue. Yet we find ourselves again wasting money and time to reintroduce this again. You are all intelligent adults. The science is already on the side of the athletes for inclusion. You can't say that you want to protect the children of North Dakota and then pick and choose. Truly it is that simple. The fact you want to put each university and higher education standard in jeopardy due to your own "moral grounds" is very concerning. There hasn't been a problem and yet you make one?

It is for these reasons that I ask you to vote Do Not Pass. Thank you for your time, consideration, and service to our state.

Best regards,

Sarah Galbraith

Please vote to support HB 1249, HB 1489 and HB 1522

Jeff Miller
707 Aster Loop
Minot, ND 58701
District 38

Cell # 701-208-1234

HB #1489

68th Legislative Session

Senators: Estenson, Myrdal, Paulson, Wobbeman

Representatives: Koppelman, Louser, Meier, Novak, S. Olson, Steiner, VanWinkle

I am writing in opposition to HB #1489. This bill is lacking knowledge and true understanding of what transgender is. The authors of this bill not only doesn't know the science of what transgender is but also the process that a transgender person goes through to become whole.

How many transgender people do you know? How many parents have you sat down with and listened to their story? Very few if any have. What this bill is doing is discriminating against a protected class of people that you just refuse to understand. If you all have any true willingness to learn about transgender people you would have reached out and taken advantage of opportunities when people such as myself have reached out to talk to a Senator. Had the Senator really wanted to learn and understand, the meeting would have taken place instead of avoiding a conversation and learning about the issue. People should NEVER stop wanting to learn and evolve. Only those who want to live in fear will not take the necessary steps to become enlightened.

College is a time to learn to think for yourself, to learn that people are very diverse and different than those who live in your little home town. Colleges have people from different states and even different countries. What an opportunity to learn about people you have never been exposed to living in a small town in North Dakota.

This bill is cruel because it takes away the opportunity to play at a higher level in sports. There has not been any incident in which a transgender college athlete has dominated a sport. Not one! You're making an issue where there isn't an issue. The governing body which handles college sports already has guidelines in place for transgender college athletes. So why are you trying to remove sports from transgender athletes? Fear and fake news. Laws should be made concerning facts not myths, rumors and what people who are not experts say, that would be classified as gossip.

The harm this bill will do to transgender people is unjust and unfounded. The college coaches know more about this issue than yourselves, so let the college coaches do their job.

What will this bill do to those teams who want to come into North Dakota and play sports but have transgender athletes? What about the backlash of this bill? This could keep North Dakota sports teams from playing teams they really want to play. Teams who would come to North Dakota to play and compete will not come and engage with the colleges of North Dakota because of the anti-transgender climate that this bill and all the other bills give the state. This bill doesn't do anything but hurt everyone. Is that your vision for the colleges in North Dakota and their athletes?

HB #1489

None of you are doctors so you know nothing of the process of which a transgender person must take. Had you learned and talked to doctors who treat transgender people you would see that there is no edge that the transgender person has on the CIS athlete. Also, what about the sports that are co-ed?

I can't stress enough that knowledge is power. I encourage all of you to reach out and talk to the doctors and transgender community. Take interest in the transgender community and that is then when you see that there is nothing to fear. You will realize that we all are children of God and that this is not the way to treat a group of Gods children. Also, you shouldn't judge transgender people. Judgement is to be left to God and God only. Your hunt to seek out and destroy transgender people reminds me of what Hitler did to the Jews. In Hitler's eyes, the Jews were the ruin of the world. Everything that was wrong was done or caused by Jews. Jews must be controlled, kept marginalized as much as possible and then he tried to erased Jews. Is that your vision for North Dakota? To become a state that is Aryan?

Learn the facts before you vote. That is the responsible thing to do and you owe it to all the citizens of North Dakota, especially those who are transgender.

Kristie Miller
Parent of a transgender

January 23, 2023

Opposition to House Bill 1489

Dear House Members, My testimony is in opposition to HB 1489. I urge you to give this bill a **DO NOT PASS**.

Gender dysphoria (previously gender identity disorder), according to Diagnostic and Statistical Manual of Mental Disorders are defined as a "marked incongruence between their experienced or expressed gender and the one they were assigned at birth." People who experience this turmoil cannot correlate to their gender expression when identifying themselves within the traditional, rigid societal binary male or female roles, which may cause cultural stigmatization. This can further result in relationship difficulties with family, peers, friends and lead to interpersonal conflicts, rejection from society, symptoms of depression and anxiety, substance use disorders, a negative sense of well-being and poor self-esteem, and an increased risk of self-harm and suicidality. Patients with this condition should be provided with psychiatric support. Hormonal therapy and surgical therapy are also available depending on the individual case and patient needs. (Garg G, Elshimy G, Marwaha R. Gender Dysphoria. [Updated 2022 Oct 16]. In: StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2022 Jan.)

Transgender people (including non-binary and third gender individuals) have existed in cultures worldwide since ancient times. The modern terms and meanings of "transgender", "gender", "gender identity", and "gender role" only emerged in the 1950s and 1960s. Many people in western societies, particularly the United States, have been unaware or ignorant of the existence of people we call transgender today. **Western societies have had an unfortunate history of dismissing or persecuting groups of people who were outside what the majority of the population considered "normal".**

I cannot understand how so many people in this state fail to take the time to understand transgender people or the LGBT community as a whole. The disturbing rhetoric, largely rooted both in bigotry and ignorance, that I hear on an almost daily basis make me sick to my stomach. Homosexuality was considered a mental disorder for decades by the western medical community. Homosexuals are still executed in many parts of the world today. Homosexuality is no longer considered a mental disorder because it is not a mental disorder. It is a natural variation of human sexuality. The fight for the rights of transgender people today is no different than the gay liberation movement of the late 1960s through the mid 1980s. Transgender people are not going away and deserve to be fully embraced by our society. The confused, hurtful, vile and dehumanizing language that a concerning amount of people use, particularly when discussing transgender members of our community, is absolutely disgusting and needs to stop. Trans people should not be referred to with language such as: anomalies, exceptions, deformities, mentally ill, etc. Similar language has been used throughout history to ostracize groups of people who are different from the majority of the population in an attempt to dismiss them as freaks and perverts for simply trying to exist in the world. **Trans people are not a threat to society.**

People need to understand that being transgender, albeit rare, is also a natural variation among humans. Transgender people deserve respect and access to healthcare just like everyone else. I frequently hear unkind language used by my fellow North Dakotan's regarding trans people, gay people, lesbians, etc. The recent rise in, what I call, anti-trans-panic is largely driven by political right-wing media outlets such as FOX News; far-right outlets such as Newsmax and One America News Network; and other outright hateful organizations such as The Daily Wire (founded in 2015 by religious fundamentalists Ben Shapiro and Jeremy Boreing). The latter organization recently produced a disgusting, misinformed, hateful, and dishonest film titled "What is a Woman". Anyone who has had any exposure to this film should have been able to easily recognize the intentionally dishonest jump-cut editing tactics and the film's overtly cartoonish condescending tone. It was

one of the worst pieces of “journalism” ever produced in the modern era. Anyone with a basic level of critical thinking and media literacy would have been able to identify this film for what it was. Unfortunately, too many people are unwilling to think critically and question any of their preconceived notions of what people are, how people interact in society or how the world actually works. **The existence of transgender people is not a political issue. It is a medical and human rights issue.**

I have heard many people express concerns about irreversible side effects about medical treatments for transgender youth. What people are ignoring is the extensive diagnostic testing and specialized counseling that occurs when determining whether or not a child is transgender in the first place. Children who are suspected of being transgender begin by transitioning socially. This can include letting the child wear clothes typical of the opposite gender, referring to the child by their preferred pronouns, referring to them a different name, etc. Children during this stage of “social transition” are monitored closely by their family, community and their health care specialist. These children are not coerced in any way to maintain their behavior. Evaluation continues until the child reaches a particular stage of puberty and at that time medical intervention can become necessary. The effect of puberty blockers, within the first few years of taking the medication, is indeed reversible and would be stopped if there was evidence that is in the best interest of the child to continue through the puberty that aligned with their assigned gender (sex) at birth. If this is not the case then the child could proceed with further medical intervention which would allow their body to develop in a manner consistent with their gender identity. By contrast, allowing a transgender child to physically develop in a manner consistent with their assigned gender (sex) would indeed cause many irreversible physical characteristics. In adulthood, a transgender person, whose body was developed by their natural puberty, could have a very difficult time transitioning into a body consistent their preferred gender identity. Certain characteristics such as their voice, bone structure, etc., can make it difficult, if not impossible, for them to blend into society and live as the gender they identify as. **The diagnostic and treatment processes need to be left to medical professionals.**

Suicide is the second leading cause of death among people from the ages of ten to twenty-four. Lots of young people think about it. LGBT people, in that age group, are almost five times as likely to have attempted suicide than their heterosexual peers. What is worse is that LGBT youth who report coming from non-accepting and non-supporting families are eight times more likely than the other LGBT youth to have attempted suicide. So, we’re talking about people who are eight times more likely than the people who are already five times more likely than the rest of the population in that age range who may attempt to kill themselves. This is exacerbated even further by people on TV who attribute the suicidal ideation of LGBT people to a mental disorder that these children, and young adults, don’t even have. Everyone in this country deserves access to healthcare. Transgender youth and adults are no exception. HB 1301 seeks to further reduce the limited Healthcare that American’s have access to in the first place. Decisions concerning the health of all American’s need to be kept between the patients, their loved ones and their doctors. **The government has no business intervening in the medical care that people receive from their doctors and any attempt to do so is a massive authoritarian overreach of the government.** Medical care needs to be handled by medical experts who are trained to follow the scientific evidence wherever it leads.

Please be kind, open minded and understand that the children being targeted by this bill do not need your help. They are already loved and in good hands. There is no need to intervene in their medical care. This bill will cause far more pain and suffering in the lives of people who don’t deserve it.

I strongly urge you to oppose HB 1489.

Shawn Nixon

“My name is Wade Pulkrabek and I reside in District 31. I am asking that you please render a DO PASS on HB 1489.

Think of your daughters, sisters, wife, or your mother - did they or do they play sports in college? I bet they enjoy it! They get to compete and try to be their best, they engage in fun girl talk in the locker room, get exercise and try to stay healthy. Then think of their disgust, confusion and frustration when John, the college student they knew from last year who played sports with the boys all of a sudden announced that this year he is a woman and wants to be called Jane. Now John - who is still a male and will always be a male is granted permission by the school to use the women's restroom, play sports with the ladies and change clothes in the women's locker room before and after practice and games. John is taller, stronger, faster and better at the sport than all the girls on the team. So he wins the competitions. He makes the ladies uncomfortable in the locker room - a place that they previously considered a safe zone, a no guys allowed place !

Individuals who have gender dysphoria need a psychologist and therapy just like a person suffering from anorexia does. They don't need for the world to bow to their every whim and accommodate their confused state of mind by allowing them to play sports with the opposite sex.

I urge you to support the passing of House Bill 1489.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Wade Pulkrabek

"My name is Lisa Pulkrabek and I reside in District 31. I am asking that you please render a DO PASS on HB 1489.

Women are women and men are men. A man can take 100 hormone shots, grow his hair out, wear a dress, put on lipstick and change his name but he will always be a man. This is a fact of biology. Allowing men to compete with women in sports in college gives an unfair advantage to the male and puts the women at risk of injury.

Individuals who have gender dysphoria need a psychologist and therapy just like a person suffering from anorexia does. They don't need for the world to bow to their every whim and accommodate their confused state of mind by allowing them to play sports with the opposite sex.

I urge you to support the passing of House Bill 1489.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Lisa Pulkrabek

To The Legislators of North Dakota,

This letter encompasses the historic number of LGBTQ+ bills and measures being brought among the committee. As a member of the community, I have seen firsthand the hatred and bigotry that misguided policies like these can not only permit, but encourage.

To have so much legislature brought forward under the guise of religion in a nation that was founded on the basis of separation of church and state appalls me. I will let the medical and psychological experts speak out instead of me on the misguided pseudoscience quoted in the legislature. However, as someone that was born into the Catholic church, baptized into the church, and gone through the sacraments of First Communion and Confirmation, the primary tenet of the church should be love.

Love thy neighbor: Your gay neighbor, your trans neighbor, whoever your neighbor may be.

Please, choose love; do not pass these bills rooted in fear and hatred.

Brian Murphy
Grand Forks

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1489. I urge that you give this bill a Do Not Pass. It is just more of the same hate but targeting older individuals. Transitioning individuals are given hormones that affect how their body develops and these bills seek to exclude them from playing in categories that better fit them and their peers. There is little more than bias and hate going into these bills with half researched pseudo science as proven by another bill up for today.

-Nate Brown

**Do Pass Testimony
of Doug Sharbono, citizen of North Dakota
on HB1489
in the Sixty-eighth Legislative Assembly of North Dakota**

Dear Chairman Weisz and members of the House Human services Committee,

I am writing as a citizen and believe HB1489 is great legislation.

I have a little knowledge of this issue. I am involved as a USA Swimming swim meet official, judging stroke and turns, starting, and deck reffing. Our family is a swimming family. Three of our daughters and our one son have been involved in USA Swimming. We know a little bit about diversity, equality, and inclusion. House Bill 1489 is rightly all of that. In my opinion, it truly balances diversity, equality, and inclusion.

My position on House Bill 1489 is simple. For equality, I believe females should be timed only against other females for rankings and records. Females should not be timed and competed against biological males in exclusively female swimming competitions. It is patently unfair and does not acknowledge the differences between females and males. I have included in the following link the current USA Swimming time records for both males and females in North Dakota. With some notable exceptions, there are generally significant time differences between males and females. The obvious advantage to faster times is natural testosterone. [Team Manager Record Report \(teamunify.com\)](http://teamunify.com)

We have been told by opponents to HB1489 there will be no USA Swimming in ND with HB1489. That is a statement that is rather draconian and rings hollow. USA Swimming has recommended guidelines for gender diverse swimming (meaning a biological male swims as a declared female). These are NOT requirements and do not prevent the North Dakota Local Swimming Committee's (NDLSC) from conforming to state requirements that HB1489 will require. This will NOT shut down swimming as we are told. It will preserve the conditions for which we are currently accustomed. The following link includes USA Swimming recommended practices for gender diverse athletes. Notice the language "should" and not "shall". This does not expressly prohibit a difference in local rules from the USA Swimming recommendations. [recommended-practices-for-gender-diverse-minors.pdf \(usaswimming.org\)](http://usaswimming.org)

Competing female athletes against biological males in an exclusively female event is patently unequal even after the required 12 months of hormone treatment. Nationally, there are numerous cases of the biological female records

being shattered by the new entrance of biological males within the female class. This is more prominently seen in track and field right now. I believe it is coming to all sports including swimming, and that belief is well founded based on the data. The following link provides information on a recent Gallup Poll which studied the percentage of the population which identified as non-heterosexual. [Poll: Stunning Percentage of Generation Z Identifies as LGBT \(westernjournal.com\)](http://westernjournal.com) The percentage of population currently identifying as non-heterosexual is: 1.3% of Age 74+, 2% of Ages 56-74, 3.8% of Ages 40-55, 9.1% of Ages 24-39, and **16%** of Ages 18-23. What was no apparent issue in previous generations due to low numbers of transgenders is now very much an issue that needs to be carefully balanced. There is a conflict between equality and diversity. Equality should not take a backseat in a sport where hundredths of a second do matter. Ignoring this conflict with inaction does not resolve the issue. The time to act is now before the traditional competitions of female sports are adversely affected. If legislative action is delayed, there will be much difficulty in properly balancing equality interests with diversity interests. HB1489 is in the right time, and done in the right place, the ND legislature.

You will hear opponents to House Bill 1489 say revenue matters to them, while expressing little to no concern about the equality considerations. I do get that. I acknowledge our striving for equality for female athletes may deter some of the national competitions from occurring in North Dakota. However, we do not know that, and that argument is speculative. I believe it is better that principle is placed over the risk of losing a large national meet held every few years in North Dakota.

The real world on equality for female athletes and preventing males competing as females is that it will only be stopped with the assistance of the ND legislature. The vehicle rendering this assistance is HB1489. HB1489 is great legislation. I believe this is THE only way to maintain true equality for female athletes in North Dakota.

I am not opposed to amendments that DO NOT alter the original intent of the bill. However, after studying (the opponent's material too), and learning about HB1489, I want it just the way it is.

Thank you,

Doug Sharbono
1708 9th St S
Fargo, ND 58103

Chairman Weisz and Members of the House Human Services Committee

My name is Amber Vibeto and I reside in District 3. I ask for a do pass recommendation for House Bill 1489 and its related bill 1249.

There is no such thing as a transgender woman or a transgender man. Yes, there are people who identify as such, and they should be treated with compassion and respect, but to believe that one can be born with a brain that doesn't match his/her body is a subjective ideological belief that has no grounding in reality or science. You no doubt will hear a lot of testimony based on emotion and deeply personal stories. There will be scolding attempts to shame you into rejecting the attempt to preserve women's rights and women's sports. However, policy should not be based on subjective feelings and emotional manipulation. It should be based on logic, facts, and our unalienable rights. Here's what we know.

- Barring genetic disorders, females contain XX chromosomes and males possess XY chromosomes in every nucleated cell.
- Drugs can change appearance & physiology to some degree, but do not change genetics.
- No drug or surgical intervention can change sex.
- Long-term evidence indicates that males have numerous physical advantages in sport compared with females.
- A report released by the United Kingdom's Sports Councils Equality Group found that "transgender athletes have an unfair advantage in female sports" and that that advantage remains even when "testosterone levels have been reduced".

Women and girls across the country are being told that they must allow men to invade their spaces and their sports and watch quietly while their privacy, safety, and opportunities are stolen. Let's not let

that happen here in North Dakota. Let's not allow established biological facts and logic to be swept away by a social contagion that will inevitably run its course.

Thank you for your time.

Resources

[Sports should create 'universal' categories because transgender women DO have an advantage over female athletes, says major review](#)

[The Bone-Muscle Relationship in Men and Women](#)

[Males Have Larger Skeletal Size and Bone Mass Than Females, Despite Comparable Body Size](#)

[Comparison of injury during cadet basic training by gender](#)

[A Comparative Study on Strength between American College Male and Female Students in Caucasian and Asian Populations](#)

[Skeletal muscle mass and distribution in 468 men and women aged 18–88 yr](#)

[Elite Strength Sports \(IPF and IWF\) a Comparison of Sex and Performance](#)

[Gender Differences in Spatial Ability](#)

[Comparing Athletic Differences Between Women and Men](#)

[Effect of gender affirming hormones on athletic performance in trans-women and trans-men: implications for sporting organizations and legislators](#)

[Alliance Defending Freedom](#)

[How Do Gender Identity Policies Affect Me and My Community?](#)

Testimony in Support of HB 1489

Dr. Daniel Scrimshaw, DO, Emergency Medicine Physician
American Academy of Medical Ethics, North Dakota State Director
January 23, 2023

Good morning Chairman Weisz and honorable members of the House Human Services Committee. My name is Daniel Scrimshaw and I serve as an Emergency Physician in Minot, ND and as the North Dakota State Director of the American Academy of Medical Ethics. I am testifying in regard to House Bill 1489 and I respectfully request that you render a “DO PASS” on this bill.

There are known scientific genetic differences between the male and female sexes in regards to sports performance^{1,2,3}. Genetic males are noted in the medical literature to perform better in swimming, jumping, skating, weightlifting, and cycling (among other athletic events) and in one particular study men were found to perform between 5.5% to 36.8% better than females². It is unethical to allow genetic males to participate in female sports. HB 1489 shows true respect for athletes who are genetically female. HB 1489 is correct medically and scientifically and I support this bill. Again, I recommend a “Do Pass” on this bill.

Thank you for the opportunity to testify on this matter.

¹ Joyner MJ. Physiological limits to endurance exercise performance: influence of sex. *J Physiol*. 2017 May 1;595(9):2949-2954. doi: 10.1113/JP272268. Epub 2017 Feb 9. PMID: 28028816; PMCID: PMC5407964.

² Thibault V, Guillaume M, Berthelot G, Helou NE, Schaal K, Quinquis L, Nassif H, Tafflet M, Escolano S, Hermine O, Toussaint JF. Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983. *J Sports Sci Med*. 2010 Jun 1;9(2):214-23. PMID: 24149688; PMCID: PMC3761733.

³ Hallam LC, Amorim FT. Expanding the Gap: An Updated Look Into Sex Differences in Running Performance. *Front Physiol*. 2022 Jan 4;12:804149. doi: 10.3389/fphys.2021.804149. PMID: 35058806; PMCID: PMC8764368.



NORTH DAKOTA
PSYCHIATRIC
SOCIETY

A District Branch of the
American Psychiatric Association

January 24th, 2023
From: ND Psychiatric Society
Re: In Opposition to HB 1489

Esteemed Chairman Weisz and Committee Members,

My name is Gabriela Balf, I am a psychiatrist in Bismarck and a Clinical Associate Professor at UND, and I speak on behalf of my psychiatric society, as well as on my behalf.

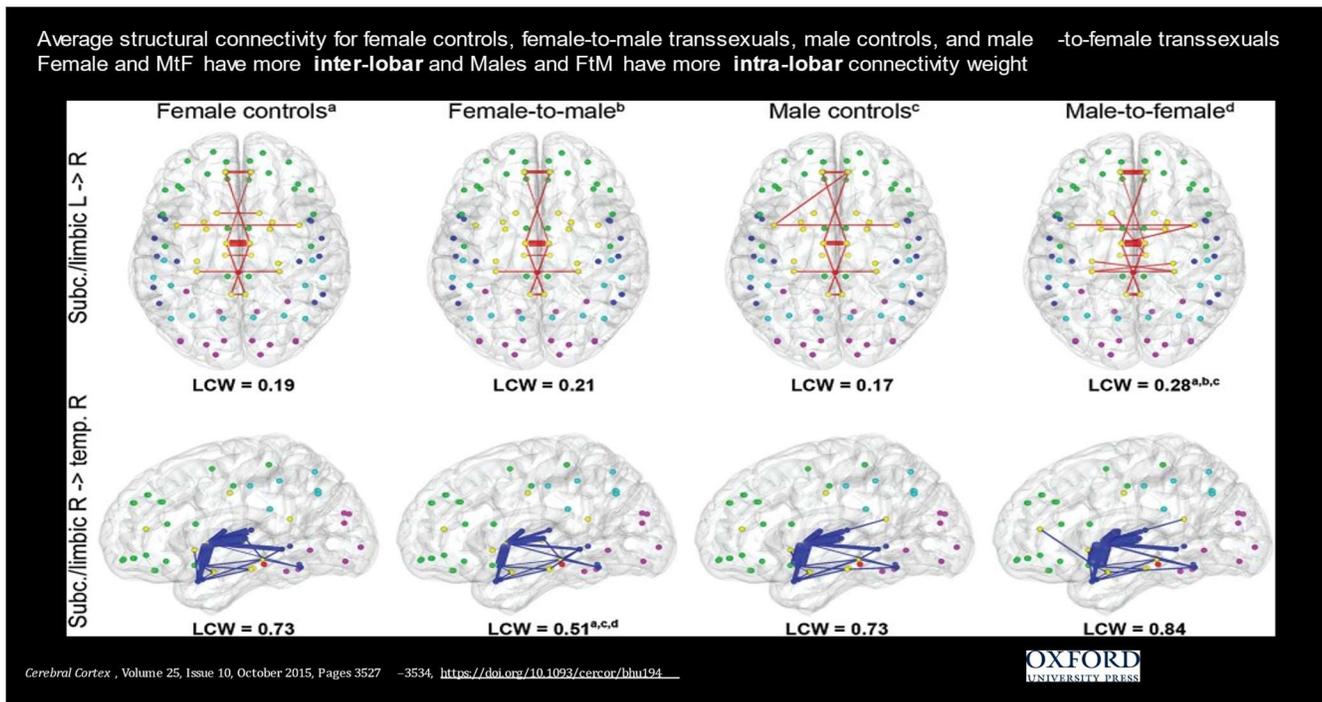
Of note, in national statistics, the youth category comprises the 15-24 year olds.

We had this discussion two years ago. Since, there have been no problems with trans girls athletes taking trophies in sports in our state.

Why persist in increasing minority stress for a small number of our youth? When we face so many urgent issues related to the mental health of youth in our state, why don't we spend your valuable time thinking about productive ways to address those, instead of wasting your days of selfless volunteering on **bills that are proven to kill some of our youth**, bills that will stain your legacy?

Allow me to underline the **main points of the transgender physiology and health**, that have not changed since two years ago, and **I urge you to be thoughtful when you vote for all the transgender bills that are coming your way, and listen to science.**

Transgender brains are demonstrated to be different than cis brains. They are congruent with their gender identity.



This 2015 image¹, as well as the sayings I hear all the time from my patients, can be translated as: “I am born in the wrong body”. This is one of numerous scientific answers to uninformed, simplistic statements like:” Boys are boys and girls are girls” (ID Gov. NY Times 4/1/2020). Except for when they are not. A known example is that of **Intersex** conditions, (medical term Disorders of Sex Development) which affect around 200 people in our state.

Science evolves. It is our moral obligation to stay informed (*Summa Theologiae*. Thomas Aquinas.) There is no excuse (sin by omission) for choosing to not examine the scientific evidence that may change long-held paradigms. Examples of **how our understanding of the universe and society has evolved?** One of our Founding Fathers, Thomas Jefferson, said at some point: “Some truths are self-

evident.” Well, he also thought Black people count as 3 /5 of white people, and that Blacks and women have no right to vote. He also benefited from his thoughts on slavery. When we say, “I want the situation (I am benefitting from) to not change”, it is a shorthand for: “I don’t want to spend time educating myself about these people.”

The stats are sobering: this inner despair translates into feeling inadequate, less than everybody else, unable to enjoy many activities in our binary world (very similar to the definition of depression), worrying about their future and how they will ever play by the society’s rules, and being the subject of bullying. Several sources summarized in 2020²:

- Lifetime prevalence of depression in transwomen at 51%, 48% for transmen.
- Anxiety lifetime prevalence at 40% for transwomen, 48% transmen.
- PTSD up to 42% in trans adults.
- Serious suicide ideation 87% and suicide attempts 41% (general population suicide attempts are 0.2%.)
- In LGBT Youth (15-24 years old), discrimination doubles the risk of suicide. Youth’s ideation about suicide is 3 times that of their peers (up to 65%) and attempted suicide rate is 4 times that of their peers (see attachment below).

Are these people intrinsically damaged in some way?! The answer is clearly **NO**: once they get gender-affirming treatment, be that surgery or just hormones, their mental health becomes actually better than that of the general population³!!

Furthermore, if they receive social affirmation, one adult in their environment respecting their preferred nouns, etc, their suicide likelihood rate goes down by 70%.

How can it be that, ideally, left to their own way of developing, trans people are doing so well? Because of the **minority stress** we inflict upon them. Fear of rejection.

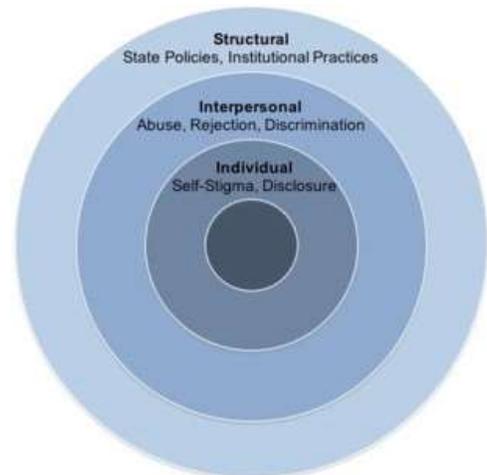
Not allowing trans youth to perform sports according to their gender identity, even after scientific evidence and federal policies indicate it appropriate, constitutes **structural discrimination in our state**. It inflicts harm upon an already disenfranchised population, who is looking up to you for leadership as part of your constituency.

On behalf of our patients, we thank the House Human Services Committee for listening to our presentation of scientific evidence.



Gabriela Balf-Soran, MD, MPH
Assoc Clin Prof – UND School of Medicine – Behavioral Sciences and Psychiatry Dept
ND Psychiatric Society Past-President
World Professional Association Transgender Health member

Stigma as a multi-level construct. ²



References:

Excerpts from the 2015 US Transgender Survey report (<http://www.ustranssurvey.org/reports>)

“Experiencing discrimination or mistreatment in education, employment, housing, health care, in places of public accommodations, or from law enforcement is associated with higher prevalence of suicide thoughts and attempts. For example, the prevalence of past-year suicide attempts by those who reported that they had been denied equal treatment in the past year because they are transgender was more than double that of those who had not experienced such treatment (13.4% compared to 6.3%).

Those who reported that their spouses, partners, or children rejected them because they are transgender reported higher prevalence of lifetime and past-year suicide attempts. Those who reported rejection by their family of origin, for example, reported twice the prevalence of past-year suicide attempts compared to those who had not experienced such rejection (10.5% compared to 5.1 %).

People who are not viewed by others as transgender and those who do not disclose to others that they are transgender reported lower prevalence of suicide thoughts and attempts. For instance, 6.3 percent of those who reported that others can never tell they are transgender attempted suicide in the past year compared to 12.2 percent of those who reported that others can always tell they are transgender.

The cumulative effect of minority stress is associated with higher prevalence of suicidality. For instance, 97.7 percent of those who had experienced four discriminatory or violence experiences in the past year (being fired or forced to resign from a job, eviction, experiencing homelessness, and physical attack) reported seriously thinking about suicide in the past year and 51.2 percent made a suicide attempt in the past year.”

1. Hahn A, Kranz GS, Küblböck M, et al. Structural Connectivity Networks of Transgender People. *Cereb Cortex* [Internet] 2015 [cited 2021 Jan 25];25(10):3527–34. Available from: <https://doi.org/10.1093/cercor/bhu194>
 2. Price-Feeney M, Green AE, Dorison S. Understanding the Mental Health of Transgender and Nonbinary Youth. *J Adolesc Health Off Publ Soc Adolesc Med* 2020;66(6):684–90.
 3. de Vries ALC, McGuire JK, Steensma TD, Wagenaar ECF, Doreleijers TAH, Cohen-Kettenis PT. Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment. *Pediatrics* [Internet] 2014;134(4):696. Available from: <http://pediatrics.aappublications.org/content/134/4/696.abstract>
- WPATH.org – the World Professional Association for Transgender Health
 - <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html>
 - <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=38&compare=percentage#comparison>
 - National Center for Health Statistics: https://www.cdc.gov/nchs/data/series/sr_02/sr02_175.pdf
 - Human Rights Campaign: <http://www.hrc.org/resources> (Resources for the LGBT focused on: adoption, young adult, coming out, federal advocacy, hate crimes, health and aging, HIV/AIDS, interracial marriage, parenting, and transgender)

Testimony in Support of HB 1489

Dr. Lovita Scrimshaw, DO, Emergency Medicine Physician
American Academy of Medical Ethics, North Dakota State Director
January 23, 2023

Good morning Chairman Weisz and honorable members of the House Human Services Committee. My name is Lovita Scrimshaw and I am a physician in Minot, ND and also serve as the North Dakota State Director of the American Academy of Medical Ethics. I am testifying in regard to House Bill 1489 and I respectfully request that you render a “DO PASS” on this bill.

It is scientific fact that there are genetic differences between the male and female sexes in regards to sports performance. The differences relate to how male and female sexes were designed- males are noted to have greater muscle mass, oxidative capacities and lower fat mass¹ and thus males have an advantage at sports. Genetic males as defined in this bill do perform better than females in swimming, jumping, skating, weightlifting, and cycling (among other athletic events) and in this particular study men were found to perform between 5.5% and 36.8% better than females². Elite female runners are 10-12% slower than their male counterparts¹. It is unwise and unfair to genetic females to allow genetic males to participate in female sports.

Another recent journal article states “Males consistently outperform females in athletic endeavors, including running events of standard Olympic distances...It is apparent that females are the disadvantaged sex in sport...The best male athletes consistently outperform their female peers.”³

This is a good and common sense bill. HB 1489 is correct physiologically and I support this bill. If this bill does not pass then genetic females will be discriminated against simply for being designed differently. Again, I recommend a “Do Pass” on this bill.

Thank you for the opportunity to testify on this important matter.

¹ Joyner MJ. Physiological limits to endurance exercise performance: influence of sex. *J Physiol*. 2017 May 1;595(9):2949-2954. doi: 10.1113/JP272268. Epub 2017 Feb 9. PMID: 28028816; PMCID: PMC5407964.

² Thibault V, Guillaume M, Berthelot G, Helou NE, Schaal K, Quinquis L, Nassif H, Tafflet M, Escolano S, Hermine O, Toussaint JF. Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983. *J Sports Sci Med*. 2010 Jun 1;9(2):214-23. PMID: 24149688; PMCID: PMC3761733.

³ Hallam LC, Amorim FT. Expanding the Gap: An Updated Look Into Sex Differences in Running Performance. *Front Physiol*. 2022 Jan 4;12:804149. doi: 10.3389/fphys.2021.804149. PMID: 35058806; PMCID: PMC8764368.

Testimony of Mia Halvorson

In Opposition of HB 1489: “Relating to requiring institutions of higher education designating athletic teams and sports for male, female, or coed participation and limitations on use of governmental property for athletic events.”

January 24th, 2023

Dear Committee Members,

My name is Mia Halvorson, and I am currently a North Dakota resident and undergraduate student taking classes at both North Dakota State University and Minot State University. I am double majoring in Human Development Family Science, and Social Work, with an emphasis on women and gender studies, our youth, and marginalized communities.

This bill is quite similar to what HB 1298 was in 2021 and what HB 1249 is now, an attempt to ban transgender women from women's athletics. This bill, however, directly targets the collegiate level. Legislatures stated this was an up-and-coming "trend" coming to North Dakota. It has been two years, and we have not seen trans athletes making top headlines in women's sports within our state. Why? Because even if we had trans women participating in women's athletics here in North Dakota, trans women do not have an advantage per NCAA requirements.

NCAA policy is currently changing to require not only the calendar year of hormone replacement therapy, but the NCAA now requires testing regarding testosterone levels to ensure they are within the cisfemale range. I recognize the adjustments the NCAA is making, but the outright ban is unnecessary. If this dangerous bill becomes law, this law is likely to be blocked by courts. This blockage means taxpayer money gets spent attempting to defend something that does not exist. This passage potentially entails major sporting events and tournaments to divert to other states. Overall, this becomes a waste of money for our state residents. That is taxpayer money we can spend working on actual issues within our state, including combating inflation, as many see as an issue within our state and our country.

The closest example I can think to compare is former University of Penn swimmer Lia Thomas, a swimmer that many considered a hot topic last year. For anyone who wants to argue that the transgender swimmer Lia Thomas has an advantage, I would love for you to look at her stats before and after starting HRT (hormone replacement therapy).

Lia Thomas began taking HRT in May 2019, and her times started to drop with it. During transition (NCAA required one calendar year of HRT before allowance to participate in women's athletics. That forced Lia Thomas to continue participating in the men's division as her times dropped. Below are her times in events pre-transition, while transitioning, and post-transition.

Her 500 FR swim time:

- First Season: 4:20.97 (minutes: seconds) (Ranked #97)
- Pre-transition: 4:18.72 (Ranked #65)

- During transition: 4:36.57 (Ranked #568)
- Post-transition: 4:33.82 (Ranked #1) (by 1.63 seconds)

Her 1000 FR swim time:

- First season: 8:57.55 (Ranked #24)
- Pre-transition: 8:55.75 (Ranked #18)
- During transition: 9:46.67 (Ranked #302)
- Post-transition: 9:35.96 (Ranked #10)

Her 1650 FR swim time:

- First season: 14:59.19 (Ranked #48)
- Pre-transition: 14:54.76 (Ranked #32)
- During transition: DID NOT COMPETE (would have been #304 w/ post-transition time)
- Post-transition: 15:59.71 (Ranked #13)

As you can see, her rankings took a massive blow once starting her transition during the initial phase. She was required to continue participating in the men's division, causing her to drop from a top 35 swimmer in multiple categories to outside the top 300 in all those events. Once she met NCAA qualifications, her rankings started to rebound in correlation to individuals ahead of her graduating, a continuation of training, and the overall competitive nature the NCAA brings.

I could continue for hours regarding why I do not support HB 1489, but this would turn into reading a book. This is blatant discrimination against a minority population within the state of North Dakota, one that statistically has the lowest rate of trans people regarding all fifty states. We don't see this as an issue within our state, as trans people aren't "dominating," especially if they aren't participating. This isn't an issue within our state and will continue to waste our time and money.

I ask that you vote NO on HB 1489 for the reasons listed above, the reasons other individuals testifying provide, and the hundreds of additional reasons I could provide.

Thank you for your time and the opportunity to share this testimony.

-Mia Halvorson



NORTH DAKOTA

Family Alliance LEGISLATIVE ACTION

Testimony in Support of House Bill 1489

Mark Jorritsma, Executive Director
 North Dakota Family Alliance Legislative Action
 January 24, 2023

Chairman Weisz and honorable members of the House Human Services Committee. My name is Mark Jorritsma and I am the Executive Director of North Dakota Family Alliance Legislative Action. We are submitting testimony in support of House Bill 1489 and respectfully request that you issue a “DO PASS” on this bill.

Context

It may seem like an obvious statement, but boys and girls are biologically different from birth. Whether one agrees or disagrees that this is how it should be, science and common sense tell us that males are almost always stronger than females. That difference shows up in size, strength, bone density, and even hearts and lungs. These areas of biological advantage for boys are often directly associated with athletic performance. Over and again, the courts have ruled that boys have a biological advantage over girls in most sports (Appendix A).

In contrast to this, some are lobbying to allow boys born biologically male but who identify as female to compete in girls’ sports. What is the supposed basis for this position? Title IX of the 1964 Civil Rights Act is often used to justify it. However, Title IX was designed to *eliminate* discrimination against women in education and athletics, but the current trend exploits Title IX to do just the opposite – let biological males steal opportunities reserved for girls. This is undoubtedly why 18 states now have some form of law protecting girls’ sports (Appendix B).

So, what is the result when biological boys compete in girls’ sports? Not surprisingly, they nearly always win.

- Biological young men presenting as females are using their physical advantages to win girls’ wrestling championships in Texas.
- Transgender males have easily won track championships and shut out girls in Alaska.
- The world record for the men’s 100-meter dash, set by Usain Bolt, is 9.58 seconds. The world record for women, set by Florence Griffith-Joyner, is 10.49 seconds. Females have never broken what is referred to as the 10-second barrier, while Olympic male finalists consistently break the barrier.



NORTH DAKOTA

Family Alliance LEGISLATIVE ACTION

- Transgender competitor Mary Gregory from the UK participated in a women's weightlifting event, winning the masters world squat record, open world bench record, masters world deadlift record, and masters world total record in one day, beating every other competing woman.
- Just in the single year 2017, Olympic, World, and U.S. Champion Tori Bowie's 100 meters lifetime best of 10.78 was beaten 15,000 times by men and boys.
- And then we come to perhaps the most infamous transgender competitor to date, swimmer Lia Thomas. Her advantages are undeniable. As Swimming World Magazine pointed out, “ The fact that the University of Pennsylvania swimmer soared from a mid-500s ranking (554th in the 200 freestyle; all divisions) in men's competition to one of the top-ranked swimmers in women's competition tells the story of the unfairness which unfolded at the NCAA level.”
- These girls are not losing just the opportunity to win, but to also earn college scholarships and launch their own careers in athletics, coaching, and more. In a sense, it is the girls who are truly being excluded. They have been excluded from the sports that were designed to provide them with the space they need to reach their highest potential.

North Dakota Status

There is currently no law in the Century Code that directly addresses boys competing in girls' sports, including higher-education sports. But is this really an issue that North Dakotans need to address? Yes it is, particularly with the Biden Administration's aggressive transgender policies. North Dakota is getting increasing pressure from the federal government and special interest groups on a daily basis to discriminate against our female athletes.

The Bill Itself

The proposed bill, HB 1489, limits participation in girls' sports to biological girls, making clear that women's sports are for women only. It is straightforward and has already been explained by others. It is a fair, consistent, and documentable way of handling the issue.



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Family Alliance LEGISLATIVE ACTION

However, this bill really comes down to two things. First, let's keep the playing field level for girls' sports. Let's not set back the clock 50 years and use federal antidiscrimination law against girls to actually discriminate against them in the name of social expediency.

Second, let's keep North Dakota a state where common sense rules. As North Dakotans, we need to tell DC that we will not yield to their social agenda being imposed on us because it directly conflicts with our values.

For these reasons, I ask you to please vote a "DO PASS" out of committee on HB 1489. Thank you for your time and I would be happy to stand for any questions.

Appendix A

FEDERAL PROTECTIONS

For reasons of fundamental fairness and safety, girls have the right to play on a sex -segregated team that does not include biological boys. Courts have recognized there are fundamental physical differences between boys and girls that give boys a biological advantage in most sports. This is why we have sex-segregated teams in public schools and professional sports.



**45 CFR § 86.41 –
THE DEPARTMENT OF HEALTH & HUMAN SERVICES**

This is a federal regulation supporting Title IX. It prohibits discrimination on the basis of sex but specifies that educational institutions may have separate teams for members of each sex if selection is based upon competitive skill or if teams are competing in a contact sport

**34 CFR § 106.41(A)
THE DEPARTMENT OF EDUCATION**

This federal regulation explicitly prohibits discrimination on the basis of sex. But if the sport is a competitive or contact sport, this law permits sex -segregated teams in sports.

**O'CONNOR V. BD. OF ED., 449 U.S. 1301,
1307 (1980):**

If certain sports teams do not have “gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls’ program and deny them an equal opportunity to compete in interscholastic events.”

HB 1489

I have had the pleasure of working with a number of transgender young people who are looking forward to or already are participating in collegiate sports. They are generally well-informed of the current regulations related to their participation and have shown respect for applicable governing bodies. The ability for transgender individuals to have a safe route for physical activity is both a health and mental health issue. Those individuals who are afforded this have a better opportunity of a happy and healthy college experience on their way to becoming the future of our communities. However, if this legislation should be passed, I fear that many of our best and brightest will choose to leave the state for more welcoming communities.

I would very much encourage that members of the committee review Faye Seidler's testimony [Document 15276](#), as it is an excellent review of what we know about transgender sports participation:

- there is no emerging crisis related to transgender sports participation
- transgender women, for a variety of reasons, do not pose a threat to fairness of competitions

I also very much appreciate Charlie Johnson's recognition of the economic impact on this state should such a bill become law - [Document 15488](#)

In a spirit of caring for our young adults in college, as well as with an understanding of the economic impacts, I encourage a DO NOT PASS on HB 1489.



FMWF Chamber Opposition – HB 1249 & HB 1489

01/24/2023

Chair Weisz and members of the House Human Services Committee,

For the record, my name is Shannon Full and I have the pleasure of serving as the President/ CEO of the Fargo Moorhead West Fargo (FMWF) Chamber of Commerce. The Chamber's mission is to be a catalyst for economic growth and prosperity for businesses, members, and the greater community. On behalf of our over 1,900 members, I respectfully offer testimony in opposition to House Bill 1249 and House Bill 1489.

These pieces of legislation are potentially detrimental to our state, possessing a plethora of adverse effects, including a loss of economic stimulation in the hospitality and tourism industry, and impeding our state's ability to create a robust business friendly climate. The state of North Dakota is competing on a global scale for tourism, economic development, and workforce attraction. If enacted, policies such as these not only impact our state's brand but also hinders our ability to attract and retain companies and individuals.

The more than 100 sporting events that take place throughout our region fill hotels, restaurants, and stores, generating millions of dollars in economic impact. This bill would put these events in jeopardy as large sporting events may cease to host their tournaments in North Dakota, due to the constraints of this legislation or their overall opposition to discriminatory policies such as this. Additionally, we may lose current or future employers, which also generate millions of dollars in economic impact. We recognize the various philosophical and ideological arguments that surround this topic, but the FMWF Chamber stands in opposition due to the negative economic impacts these bills may have on our state and region.

On behalf of our members, I would like to thank you for your time and consideration this morning.

Respectfully,



Shannon Full
President/CEO
FMWF Chamber of Commerce
sfull@fmwfcchamber.com



**Kayla Schmidt – Interim Executive Director, North Dakota Women’s Network
Opposition – HB1489
North Dakota House Human Services Committee**

January 24, 2023

Dear Chair Weisz and members of the House Human Services Committee,

My name is Kayla Schmidt and I am the Interim Executive Director of the North Dakota Women’s Network. We are a statewide organization with members and advocates located across North Dakota. I am providing testimony in opposition to HB 1489.

Within our mission to improve the lives of women, we have three areas of focus: leadership, opportunity, and equality. HB 1489 is a direct conflict to the positive outcomes we work to create through those areas of focus.

HB 1489 removes opportunities, including leadership opportunities from transgender students in our state in relationship to sports participation.

These bills use the guise of women’s rights to create an environment of discrimination and exclusion in North Dakota sports and athletic teams.

Similar attempts to pass discriminatory legislation in North Dakota has strongly been opposed by community leaders, athletic organizations, medical experts, social workers, parents, educators, students, faith leaders, representatives of local Chambers of Commerce and tourism organizations, and the LGBTQ+ community.

The North Dakota Women’s Network stands with these groups and asks that HB1489 receives a Do Not Pass Recommendation.

Thank you.

Kayla Schmidt
director@ndwomen.org

Bill 1489

Members of the House Human Services Committee,

My name is Curtis Kadrmas, District 8. I support this bill and ask the committee for a Do Pass on bill 1489. It is with deep sadness that this is upon us to consider such matters but it would seem that there is an agenda to make the majority comply with a minority. While those opposed to this bill have sons they want to protect, I have daughters I want to protect as well. And forward looking, my Granddaughters. What an unfair advantage a male has in a women's sport and what kind of an effect on young women who are required to be in the same locker room with them. What kind of a society will we North Dakotans have in the future. A society that it would seem, has drunk the kool aid of all inclusiveness, what harm is being done to our young women? What impact will there be to future relationships and families? Please support a do Pass on 1489.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

As a trans person who grew up in the state of North Dakota, I experienced a large amount of discrimination and bullying in school there. I spent time in a psychiatric ward for my suicidal ideation when I was just 18, and that was long before any legislators chose to make it their life mission to craft laws specifically targeting me and people like me. Many trans students don't come out as transgender when they are in the public school system, but the lasting impact of your bigotry will harm them the rest of their lives. Suicidality in trans youth massively increases in states with youth sports bans, even if the bans only apply to four or five individual students.

The sponsors of this bill lack compassion and moral integrity, and if this bill passes, they should be made to watch the funerals of every trans child who commits suicide as a result of the intentional targeting of the trans community in North Dakota.

Thank you for your time,
Reed Eliot Rahrlich

In support of 1489

District 18

This bill is obviously necessary to protect girl's sports. Boys are causing girls severe injuries, taking over their records, stealing their opportunities for scholarships, and demanding the right to be naked in the same locker room. We need to protect our college girls and girl's sports by passing this bill.

Erin J McSparron

Testimony in Opposition to HB 1249, HB 1489, HB 1473

Christina Sambor, Lobbyist No. 312 – Legislative Coordinator, North Dakota Human Rights Coalition, Youthworks

North Dakota House Human Services Committee

January 24, 2023

Chairman Weisz and Members of the Committee:

My name is Christina Sambor, I am submitting testimony on behalf of the North Dakota Human Rights Coalition and Youthworks to oppose the various bills set for hearing this morning that seek to exclude transgender students from participation in sports.

The attached law review article, Joseph Brucker, *Beyond Bostock: Title IX Protections for Transgender Athletes*, 29 Jeffrey S. Moorad Sports L.J. 327 (2022), sets forth a comprehensive analysis of the history of civil rights law and trans athletes. In sum, the United States Department of Education has held, since 2010, that Title IX protects LGBT students from sex discrimination. It has further interpreted that bathrooms and locker room facilities should be applied to transgender students consistent with their gender identity, rather than their sex assigned at birth. Since May 13, 2016, departments have been directed to treat a student's gender identity the same as a person's sex for purposes of Title IX. The same guidance clarified that while a school may operate sex-segregated athletic teams when based on competitive skill or in contact sports, schools may not rely on overly broad generalizations or stereotypes about the differences between transgender students and students of the same gender identity or others' discomfort with transgender students. While this guidance was reversed under the Trump Administration, it has since been re-established by the Biden Administration.

The U.S. Supreme Court decided three consolidated cases collectively known as "Bostock" on June 15, 2020. The Bostock Decision held that Title VII of the Civil Rights Act prohibits discrimination in the workplace based on sexual orientation or gender identity. That holding is enforced by North Dakota's Department of Labor and Human Rights, which now accepts complaints of discrimination based on sexual orientation or gender identity. Federal courts have recognized that cases interpreting Title VII's provisions are relevant to and can be useful in analysis of claims of Title IX discrimination. On June 16, 2021, the US Department of Education released a Notice of Interpretation applying the Bostock prohibition on discrimination on the basis of sexual orientation or gender identity to Title IX claims. Based upon all of this information, laws, such as those proposed by HB 1249, HB 1489, are susceptible to legal challenges and will likely be held to violate Title IX. In addition, the Equal Protection Clause of the Fourteenth Amendment

has also provided a basis upon which courts have struck down bans on transgender athletes and students, notably striking down the assignment of bathroom usage by sex listed on a birth certificate. Recently, Idaho's law banning transgender women and girls from sports teams was enjoined citing the legal arguments that I previously discussed.

The arguments that often support this type of legislation assume that inclusion of trans women and girls in sports teams will have a negative effect on girls and women generally. These arguments are unfounded. Twenty-four (24) states and the District of Columbia have had trans-inclusive athletic laws or policies for more than a decade. Many of these states actually saw higher participation rates in athletics among cisgender women after the policies were implemented. Trans athletes are in general quite rare, and transgender athletes dominating elite women's sports has not materialized. The Olympics have had trans-inclusive policies since 2004 and no transgender athletes have qualified. California has had a law on the books since 2013 allowing trans athletes to compete on the team that matches their gender identity without issue.

The idea that trans girls have an unfair advantage is rooted in the idea that testosterone causes physical changes that increase muscle mass. But other conditions, such as polycystic ovarian syndrome similarly elevate testosterone levels. Should we block those individuals from competition based on an unfair biological advantage? In addition, claiming that trans girls uniformly have a competitive advantage ignores the fact that they suffer from higher rates of bullying, anxiety and depression, making training more difficult, and experience higher levels of homelessness and poverty because of family and societal rejection.

The impact of these laws is to deny trans students access to exercise, companionship, team building, social support and the myriad other benefits of competitive sports in the name of unsubstantiated fears. In the vast majority of cases, the only result of trans athletes participating in sports would be the avoidance of the rejection and psychological harm that comes from exclusion. Please recommend a do not pass on HB 1249, HB 1489, HB 1473.



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Beyond Bostock: Title IX Protections for Transgender Athletes

Joseph Brucker

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BEYOND BOSTOCK: TITLE IX PROTECTIONS FOR TRANSGENDER ATHLETES

I. INTRODUCTION: WHAT IT MEANS TO BE A TRANSGENDER ATHLETE

“Gender” and “sex” are sometimes erroneously conflated and used interchangeably, but in fact, the terms embody two distinct concepts.¹ Much of western society now distinguishes “sex,” referring to the physiological distinctions between male and female individuals based on anatomical and biological factors, from “gender,” the socially constructed amalgam of behaviors, identities, and expressions of identity.² While some individuals’ gender identities

1. See, e.g., *Sex & Gender*, NIH OFF. OF RSCH. ON WOMEN’S HEALTH, <https://orwh.od.nih.gov/sex-gender> [<https://perma.cc/V9X5-U49D>] (last visited Nov. 6, 2021) (“‘Sex’ refers to biological differences between females and males, including chromosomes, sex organs, and endogenous hormonal profiles. ‘Gender’ refers to socially constructed and enacted roles and behaviors which occur in a historical and cultural context and vary across societies and over time.”); see also Virginia Prince, *Sex vs. Gender*, 8:4 INT’L J. OF TRANSGENDERISM 29, 29 (2005) (“Sex and gender are not the same thing. We are born into a society that is highly polarized and highly stereotyped, not only into male and female, but into man and woman. Man and male, female and woman are considered synonymous pairs of words for the same thing . . . But it is not so. Sex and gender are not the same thing.”); Krista Conger, *Of Mice, Men and Women*, STAN. MED. (Spring 2017), <https://stanmed.stanford.edu/2017spring/how-sex-and-gender-which-are-not-the-same-thing-influence-our-health.html> [<https://perma.cc/2LS4-2NE7>] (explaining how “gender” is often erroneously used by medical researchers instead of “sex”); Tim Newman, *Sex and Gender: What’s the Difference?*, MED. NEWS TODAY (May 11, 2021), www.medicalnewstoday.com/articles/232363.php [<https://perma.cc/5XEE-FT5N>] (describing shifting public perception of sex and perception of gender over time while distinguishing between those terms).

2. See generally *Gender and Health*, WORLD HEALTH ORG., www.who.int/gender-equity-rights/understanding/gender-definition/en/ [<https://perma.cc/HKC4-W37Z>] (last visited Sep. 22, 2021) (elaborating on differences between sex versus gender). See also *What is Gender? What is Sex?*, CANADIAN INST. OF HEALTH RSCH., <https://cihr-irsc.gc.ca/e/48642.html> [<https://perma.cc/A8UR-YZ6E>] (last visited Nov. 4, 2021) (“Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people Gender identity is not confined to a binary (girl/woman, boy/man) nor is it static; it exists along a continuum and can change over time. There is considerable diversity in how individuals and groups understand, experience and express gender through the roles they take on, the expectations placed on them, relations with others and the complex ways that gender is institutionalized in society.”); *What is the Difference Between Sex and Gender?*, OFF. FOR NAT’L STAT. (Feb. 21, 2019), <https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21> [<https://perma.cc/S3SX-7NJT>] (providing UK government’s definition of sex as referring to biological aspects of individuals determined by anatomy and gender as social construction relating to behaviors, and attributes based on masculinity or femininity).

correspond with their biological sex, this is not always the case.³ Moreover, there is no commonly accepted definition of “sex” or method for distinguishing between sexes, and not every definition or method of sex determination consistently produces a clear, male-female binary.⁴ In response to historical practices among various international sporting organizations that adopted so-called “objective” methods for rooting out “impostors” or intersex athletes, some experts and activists have argued instead for more fluid definitions of sex determined not by any one set of physical features but by a confluence of genetic, hormonal, and physiological factors.⁵ Ultimately, these experts assert that any purportedly objective test or guideline claiming to accurately distinguish between male and female athletes is inevitably flawed due to the inherently amorphous borders between sexes.⁶

3. See, e.g., *Gender Identity, Gender-Based Violence and Human Rights*, COUNCIL OF EUR., <https://rm.coe.int/chapter-1-gender-identity-gender-based-violence-and-human-rights-gende/16809e1595> [<https://perma.cc/R3SQ-RQ3H>] (last visited Nov. 4, 2021) (“Gender is not necessarily defined by biological sex: a person’s gender may or may not correspond to their biological sex. Gender is more about identity and how we feel about ourselves. People may self-identify as male, female, transgender, other or none (indeterminate/unspecified). People that do not identify as male or female are often grouped under the umbrella terms ‘non-binary’ or ‘genderqueer’, but the range of gender identifications is in reality unlimited.”).

4. See J. Brad Reich, *A (Not So) Simple Question: Does Title IX Encompass “Gender”?*, 51 J. MARSHALL L. REV. 225, 227 (2018) (finding gonadic criteria based on reproductive glands is not only factor upon which definition of biological gender rests). Other definitions of sex include genetic sex based on X and Y chromosome combinations, anatomical sex based on the appearance of the genitalia, and hormonal sex based on predominant hormones. See *id.* at 228 (providing overview of various ways of defining “sex”). These commonly accepted methods of defining sex do not lend themselves to neat categorizations of sex along a male-female binary. See *id.* at 227 (explaining chromosomal criteria make definition of sex more nuanced). See generally Claire Ainsworth, *Sex Redefined*, 518 NATURE 288, 288–291 (Feb. 19, 2015) (“[I]f biologists continue to show that sex is a spectrum, then society and state will have to grapple with the consequences, and work out where and how to draw the line . . . [I]f the law requires that a person is male or female, should that sex be assigned by anatomy, hormones, cells or chromosomes, and what should be done if they clash? . . . If you want to know whether someone is male or female, it may be best just to ask.”).

5. See Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> [<https://perma.cc/E7RE-82E4>] (explaining various factors forming basis for one’s sex, ways in which international sports organizations have attempted to define or distinguish sex over time, various experts’ finding of criteria to be inadequate, unfair, not founded in science); see also Christie Aschwanden, *The Olympics Are Still Struggling to Define Gender*, FIVETHIRTYEIGHT (June 28, 2016), <https://fivethirtyeight.com/features/the-olympics-are-still-struggling-to-define-gender/> [<https://perma.cc/VM95-GNE3>] (describing debate over testosterone limits versus chromosomal tests for determining sex or use of gender identity, and tradeoffs of various approaches).

6. See Padawer, *supra* note 5 (“Relying on science to arbitrate the male-female divide in sports is fruitless . . . because science could not draw a line that nature

The increased visibility of transgender athletes and state laws meant to curb their participation in athletics have placed issues of sex and gender at the center of the larger legal, political, and cultural debate.⁷ Transgender (or “trans”) individuals are those whose gender identity differs from the gender they were thought to be at birth.⁸ An increasing number of high school and college-aged individuals are identifying as transgender, and these students and activists are challenging educators and lawmakers to rethink gender as universally fixed at birth.⁹ While transgender individuals generally have enjoyed increased visibility and acceptance in recent years, the transgender community still faces obstacles in gaining access to competitive sports.¹⁰ On July 14, 2021, for example, Texas passed SB 2, a bill that would ban transgender women and girls from par-

itself refused to draw.”); *see also* Melonyce McAfee, *Am I Not a Woman?*, SLATE (Aug. 19, 2009), <https://slate.com/news-and-politics/2009/08/how-to-perform-a-gender-test.html> [<https://perma.cc/5WGW-2Z73>] (describing some experts’ view of futility of sex determination tests based on genetics or appearance of genitalia as well as sordid history of tests employed by International Olympic Committee).

7. *See generally* Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women’s Sports? There are Two Almost Irreconcilable Positions*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html> [<https://perma.cc/6T72-F4QJ>] (describing increased acceptance of transgender athletes amid increased resistance from some competitors, some lawmakers).

8. *See Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 19, 2016), <http://www.transequality.org/issues/resources/transgender-terminology> [<https://perma.cc/7L6A-2CU2>] (defining basic terminology, commonly used acronyms); *see also* Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, SOC. SCI. & MED. 147, 222–231 (2015) (finding transgender is umbrella term used to define individuals whose gender identity or expression differs from culturally-bound gender associated with one’s assigned birth sex, is defined by transgender individuals, is expressed in variety of ways); Megan Davidson, *Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organizing Within the Category Transgender*, 4 SEXUALITY RSCH. & SOC. POL’Y. 60, 60 (Dec. 2007) (finding “transgender” has no singular, fixed meaning but is largely held as inclusive of identities or experiences of some or all gender-variant, gender or sex-changing, gender-blending, gender-bending people).

9. *See NCAA Inclusion of Transgender Student-Athletes*, OFF. OF INCLUSION OF THE NAT’L COLLEGIATE ATHLETIC ASS’N, Aug. 2011, at 1, 2 (providing guidance to NCAA athletic programs on how to ensure transgender student-athletes fair, respectful, legal access to collegiate sports teams based on current medical, legal knowledge); *see also Model School District Policy on Transgender and Gender Nonconforming Students*, NAT’L CENT. FOR TRANSGENDER EQUAL. (GLSEN), (Sept. 2018), at 1, 2 (providing education lobbying group’s model policy in which individuals determine gender identity for themselves, rejecting medical, legal, or other proof of gender identity).

10. *See* Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 272 (2013) (providing background on struggles faced by transgender athletes).

ticipating in sports consistent with their gender identity.¹¹ In the 2020–21 legislative session alone, more than seventy-five bills were introduced throughout the country that would bar transgender students from playing school sports on teams that conform with their gender identity.¹² Some proposals go so far as to suggest criminal penalties if transgender athletes participate on teams consistent with their gender identity.¹³ Notably, sixteen states have passed legislation banning transgender women and girls from participating on teams that conform to their gender identity.¹⁴ Those in favor of these laws often express fears that allowing transgender women and girls to participate in high school and collegiate athletics will jeopardize the existence of women’s sports generally.¹⁵ Others believe transgender participation in athletics does not spell an end to women’s sports but will actually enhance access to it.¹⁶

Moreover, the requisite gender “policing” procedures suggested by some state bills have been described by various international human rights organizations as both discriminatory and a

11. See Wyatt Ronan, *Texas Senate Passes Anti-Transgender Sports Ban Bill*, HUM. RTS. CAMPAIGN (July 15, 2021), <https://www.hrc.org/press-releases/texas-senate-passes-anti-transgender-sports-ban-bill-2> [<https://perma.cc/4BLG-QS9E>] (detailing recent state action both within Texas, within other states, barring transgender girls, women from participating on sports teams in conformity with their gender identity).

12. See Dan Avery, *Biden Administration Sends Trans Students a Back-to-School Message*, NBC NEWS (Aug. 19, 2021), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/biden-administration-sends-trans-students-back-school-message-rca1724> [<https://perma.cc/R6Q7-EER2>] (describing largely positive response to Biden Administration’s executive order by transgender activists).

13. See Elizabeth Sharrow et al., *States Are Still Trying to Ban Trans Youths from Sports. Here’s What You Need to Know*, WASH. POST (Jul. 26, 2021), <https://www.washingtonpost.com/politics/2021/07/26/states-are-still-trying-ban-trans-youths-sports-heres-what-you-need-know/> [<https://perma.cc/BF8Q-AVB5>] (highlighting number of state legislators with proposed bills targeting trans youths).

14. See *K-12 Policies*, TRANSATHLETE.COM, <https://www.transathlete.com/k-12> [<https://perma.cc/5VFG-J24C>] (last visited Sep. 6, 2021) (listing states with laws banning transgender students from participating in sports consistent with their gender identity with temporary injunctions blocking enforcement in Idaho, West Virginia).

15. See Abigail Shrier, *Joe Biden’s First Day Began the End of Girls’ Sports*, WALL STREET J. (Jan. 22, 2021), <https://www.wsj.com/articles/joe-bidens-first-day-began-the-end-of-girls-sports-11611341066> [<https://perma.cc/F6MF-HKU4>] (arguing President Biden’s January 20, 2021 Executive Order will result in stripping all Title IX benefits away from women, girls).

16. See *Statement from Women’s Rights and Gender Justice Organizations in Support of the Equality Act*, NOW (Mar. 17, 2021), <https://now.org/media-center/press-release/statement-of-womens-rights-and-gender-justice-organizations-in-support-of-the-equality-act/> [<https://perma.cc/TS4J-U5N9>] (“Girls and women who are transgender should have the same opportunities as girls and women who are cisgender to enjoy the educational benefits of sports, such as higher grades, higher graduation rates, and greater psychological well-being.”).

violation of basic human rights.¹⁷ The National Collegiate Athletic Association (“NCAA”) recognizes all stakeholders involved in collegiate sports benefit from fair and inclusive participation practices enabling transgender student-athletes to participate on teams that align with their gender identity.¹⁸ Yet, despite the strides transgender athletes have made in representation throughout the past few decades, statutory protections under Title IX and the Department of Education’s policies have not always provided adequate protections.¹⁹

The Supreme Court’s recent decision in *Bostock v. Clayton County*²⁰ appears to have set the stage to change this dynamic.²¹ This Comment reviews the legislative history and application of civil rights legislation barring discrimination on the basis of sex, includ-

17. See *They’re Chasing Us Away from Sport*, HUM. RTS. WATCH (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#> [<https://perma.cc/5KRA-KZUA>] (stating nearly century-long history of sex testing of women athletes at international level represents human rights issue); see also *Intersection of Race and Gender Discrimination in Sport*, UNITED NATIONS HUM. RTS. COUNCIL (June 15, 2020), <https://undocs.org/en/A/HRC/44/26> [<https://perma.cc/374U-NAJ3>] (“The implementation of female eligibility regulations denies athletes with variations in sex characteristics an equal right to participate in sports and violates the right to non-discrimination more broadly.”).

18. See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 9, at 8 (“All stakeholders in NCAA athletics programs will benefit from adopting fair and inclusive practices enabling transgender student-athletes to participate on school sports teams. School-based sports, even at the most competitive levels, remain an integral part of the process of education and development of young people, especially emerging leaders in our society.”).

19. See, e.g., Anagha Srikanth, *Taylor Small Becomes Vermont’s First Transgender Legislator*, HILL (Nov. 4, 2020), <https://thehill.com/changing-america/respect/diversity-inclusion/524512-taylor-small-becomes-vermonts-first-transgender> [<https://perma.cc/LUR8-JR9Q>] (discussing Vermont’s first transgender legislator and implications of groundbreaking victory for future LGBTQ legislators); see also *Laurel Hubbard: First Transgender Athlete to Compete at Olympics*, BBC (June 21, 2021), <https://www.bbc.com/news/world-asia-57549653> [<https://perma.cc/AB22-VWM5>] (discussing first transgender athlete to compete at Olympics, including public’s reaction); Caitlin O’Kane, *Chris Mosier, First Openly Transgender Athlete on Team USA, Hopes Sharing His Story Inspires Others*, CBS NEWS (Jan. 4, 2021), <https://www.cbsnews.com/news/chris-mosier-transgender-olympic-athlete-team-usa-sharing-story/> [<https://perma.cc/6BAB-LH8X>] (interviewing first transgender male athlete to represent United States in international competition, prompting International Olympic Committee to change policy on transgender athletes). See generally Maya Satya Reddy, *The Weaponization of Title IX in Sports*, REGULATORY REV. (June 29, 2021), <https://www.theregview.org/2021/06/29/reddy-weaponization-of-title-ix-sports/> [<https://perma.cc/G9DW-4DRV>] (describing ways in which Title IX enforcement can reinforce prevailing views of masculinity and gender stereotypes).

20. 140 S. Ct. 1731, 1734, (2020).

21. For further discussion of *Bostock*’s future impact on Title IX legislation, see *infra* notes 70–156 and accompanying text.

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ing Title IX and its corollary in the employment realm, Title VII.²² Moreover, this Comment shows that recent legislation at the state level is destined to fail given recent Title IX challenges bolstered by the *Bostock* decision as well as potential constitutional arguments against these laws.²³ This Comment also discusses what the *Bostock* decision implies for women's sports generally going forward and shows that, despite the pessimistic predictions of some commentators, the future of women's sports is not being threatened by transgender athletes.²⁴ Section II discusses Title IX and guidance provided by the Department of Education relating to the law's application to transgender students.²⁵ The Comment then examines the approach taken by various federal courts to Title IX and competing legal theories for its application.²⁶ Finally, the Comment explores recent state legislation regarding transgender athletes that have brought this issue to the fore.²⁷ Section III shows that this state level legislation is ultimately destined to be overturned on challenge under Title IX, bolstered by equal protection challenges, and what the inevitable inclusion of transgender athletes means for women's athletics going forward.²⁸

II. BACKGROUND: CIVIL RIGHTS LEGISLATION AND TRANSGENDER ATHLETES

Title IX of the Education Amendments of 1972 was signed into law on June 23, 1972 by President Richard Nixon.²⁹ The statute itself provides that “[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education pro-

22. For further discussion of how Title IX and Title IV relate, see *infra* notes 70–156 and accompanying text.

23. For further discussion of implications for recent legislation at the state level, see *infra* notes 158–170 and accompanying text.

24. For further discussion of the impact of *Bostock* on women's sports generally, see *infra* notes 188–200 and accompanying text.

25. For further discussion of the Department of Education's guidance on Title IX application, see *infra* notes 44–69 and accompanying text.

26. For further discussion of the competing legal theories of Title IX's application, see *infra* notes 81–118 and accompanying text.

27. For further discussion of the recent state legislation either banning transgender athletes or enabling their participation, see *infra* notes 120–132 and accompanying text.

28. For further discussion of the implication of recent court developments on women's sports generally, see *infra* notes 188–200 and accompanying text.

29. See generally Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 Del. L. Rev. 83, 83 (2013) (providing overview of history and future of Title IX).

gram or activity receiving Federal financial assistance.”³⁰ Title IX was modeled after Title VI of the Civil Rights Act of 1964.³¹ Where Title VI protects against race discrimination in all programs receiving federal funds, Title IX protects against sex discrimination and applies only to educational programs.³² The U.S. Department of Education’s Office of Civil Rights (OCR) has since provided additional direction in the form of memorandums, “Dear Colleague” letters, clarifications, and other various guidance extending Title IX protections to athletics at educational institutions.³³

A. Title IX and Competing Guidance from the Department of Education

On October 26, 2010, under the Obama administration, the OCR released a “Dear Colleague” letter stating that “Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”³⁴ In an opinion letter dated January 7, 2015, the OCR elaborated further by stating that the portion of Title IX providing for separate bathroom and locker room facilities on the basis of sex should be applied to transgender students consistent with their gender identity.³⁵ In July

30. 20 U.S.C. § 1681(a) (LexisNexis 2021) (emphasis added).

31. See *Overview of Title IX: Interplay with Title VI, Section 504, Title VII, and the Fourteenth Amendment*, JUSTIA (last visited Sept. 23, 2021), <https://www.justia.com/education/docs/title-ix-legal-manual/overview-of-title-ix/> [<https://perma.cc/ZHN8-2D8V>] (describing Congress’s conscious effort to model Title IX on Title VI of Civil Rights Act of 1964).

32. See generally Ann K. Wooster, *Sex discrimination in Public Education Under Title IX — Supreme Court Cases*, 158 A.L.R. Fed. 563 (1999) (describing how Title IX was designed, and how school receiving federal funds remain in compliance).

33. See 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, 333 (2012) (describing mechanisms through which Title IX has been enforced including its application to athletic programs).

34. See Ruslynn Ali, Asst. Secretary for Civil Rts., U.S. Dep’t of Educ., *Dear Colleague Letter* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> [<https://perma.cc/YU87-JLFQ>] [hereinafter *2010 Dear Colleague Letter*] (providing Obama administration policy toward LGBT students).

35. See 34 C.F.R. § 106.33 (2022) (providing in part “a recipient [of federal funds] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex”); see also Letter from James A. Ferg-Cadima, Acting Deputy to Asst. Secretary for Policy, Office for Civil Rights, to Emily Prince, Esq. (Jan. 7, 2015) available at: http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [<https://perma.cc/S2XG-UNUZ>] (“When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”); *G.G. ex rel. Grimm v. Gloucester Cty. Sch.*

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of that same year, the Department of Justice and OCR approved the nondiscrimination policy of Arcadia Unified School District, created in response to a Title IX complaint filed by a transgender student in that district.³⁶ Finally, on May 13, 2016, OCR released an additional “Dear Colleague” letter stating that departments should treat a student’s gender identity the same as a student’s sex for purposes of Title IX and its implementing regulations.³⁷ Regarding athletics, this letter stated that while a school may operate sex-segregated athletic teams when such selection is based on competitive skill or when the activity involved is a contact sport, schools may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.”³⁸

On February 22, 2017, following the election of President Donald J. Trump, the U.S. Departments of Education and Justice issued a joint letter withdrawing the guidance of the 2016 “Dear Colleague” letter.³⁹ In an internal memo, the OCR was advised to rely

Bd., 822 F.3d 709, 715 (4th Cir. 2016) [hereinafter *Grimm I*] (finding U.S. Department of Education entitled to Auer deference in interpreting 34 C.F.R. § 106.33).

36. See KAREN J. LANGSLEY & SHELLY L. SKEEN, *TRANSSEXUAL ISSUES* (TX. C.L.E. ADVANCED FAM. L. 12.2, 2016) (providing background on nondiscrimination policy for transgender students adopted by Arcadia Unified School District); see also David Vannasdall, *Arcadia Unified Sch. Dist., Transgender Students — Ensuring Equity and Nondiscrimination*, ARCADIA UNIFIED SCH. DIST. (Apr. 16, 2015), <http://www.nclrights.org/wp-content/uploads/2015/07/Transgender-Policy-Bulletin-Approved-w-corrections-April-2015.pdf> [<https://perma.cc/HW8T-FU6X>] (providing Arcadia Unified School District policy regarding issues relating to transgender students).

37. See *U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students*, U.S. DEP’T OF JUST. (May 13, 2016), <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights> [<https://perma.cc/TUR3-3F8C>] (“The guidance makes clear that both federal agencies treat a student’s gender identity as the student’s sex for purposes of enforcing Title IX.”); see also Catherine E. Lhamon, Asst. Secretary for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Asst. Attorney General for Civil Rights, U.S. Dep’t of Justice, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/3N2A-VF2J>] [hereinafter *2016 Dear Colleague Letter*] (“This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”).

38. See *id.* at 3 (finding under Title IX, schools must treat students consistent with gender identity despite contrary education records, identification documents).

39. See Sandra Battle, Acting Asst. Secretary for Civil Rights, U.S. Dep’t of Educ. & T.E. Wheeler, II, Acting Asst. Atty. Gen. for Civil Rights, U.S. Dep’t of Justice, *Dear Colleague Letter* (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<https://perma.cc/7CKJ-T8SP>] [hereinafter *2017 Dear Colleague Letter*] (noting withdrawal of guidance documents

solely on Title IX and its implementing regulations as interpreted by federal courts and remaining OCR guidance documents in evaluating complaints of sex discrimination against individuals.⁴⁰ Department enforcement of Title IX protections for transgender athletes once again shifted following the election of President Joseph Biden.⁴¹ The Civil Rights Division of the Department of Justice issued a memo to federal agencies reestablishing protections for gay and transgender students under Title IX.⁴² This memo returned to the Department of Education policies followed under President Obama, bolstered by legal arguments following *Bostock*.⁴³

B. Recent Federal Court Cases and Regulatory Developments:

Circuit courts currently appear on the brink of a split over the rights of transgender students, and the Supreme Court has thus far refused to take up the issue.⁴⁴ Understandably, the unresolved le-

did not leave students without protections from discrimination, bullying or harassment as OCR would continue to hear all claims of discrimination).

40. See Candice Jackson, Acting Asst. Secretary for Civil Rights, Office for Civil Rights, Dep't of Educ., *OCR Instruction to the Field re Complaints Involving Transgender Students* (June 6, 2017), <https://s3.documentcloud.org/documents/3866816/OCR-Instructions-to-the-Field-Re-Transgender.pdf> [<https://perma.cc/SJN6-H5SH>] [hereinafter *OCR Instruction*] (reiterating withdrawal from Obama Administration guidance documents does not leave students without protections, OCR should rely on Title IX, Department regulations, in evaluating complaints of sex discrimination against individuals whether or not individual is transgender).

41. See Avery, *supra* note 12 (describing new approach taken by Biden Administration in enforcing Title IX).

42. See *Marking the One-Year Anniversary of Bostock With Pride*, OFF. FOR CIV. RTS. (June 16, 2021), <https://www2.ed.gov/about/offices/list/ocr/blog/20210616.html> [<https://perma.cc/AQ94-8J3F>] (“In *Bostock*, the Supreme Court recognized that ‘it is impossible to discriminate against a person’ because of their sexual orientation or gender identity ‘without discriminating against that individual based on sex.’ That reasoning should—and does—apply regardless of whether the individual is an adult in a workplace or a student in school . . . [O]CR affirms our commitment to guaranteeing all students—including those who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+)—an educational environment free from discrimination.”).

43. See *id.* (issuing Notice of Interpretation enforcing Title IX’s prohibition on sex discrimination to include discrimination based on gender identity consistent with reasoning in *Bostock*).

44. See *Gloucester Cty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021) (mem.) (denying writ of certiorari, leaving in place Fourth Circuit ruling that Gloucester County School Board acted unlawfully by preventing transgender boy from using boy’s bathroom); see also *Parents for Priv. v. Barr*, 141 S. Ct. 894, 894 (mem.) (2020) (denying writ of certiorari, leaving in place Ninth Circuit ruling that policy allowing transgender students to use bathrooms, locker rooms, showers matching gender identity rather than biological sex assigned at birth does not violate Fourteenth Amendment right to privacy or create hostile environment or discrimination claim actionable via Title IX); *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636, (mem.) (2019) (denying writ of certiorari, leaving in place Third Circuit decision to uphold Pennsylvania school district policy allowing transgender stu-

gal questions surrounding transgender students' rights have resulted in myriad school policies and state laws throughout the country.⁴⁵ Idaho was the first state to pass a law preventing transgender women from participating in women's sports.⁴⁶ The law never went into effect as there was an injunction followed by a Ninth Circuit appeal.⁴⁷ In *Grimm v. Gloucester County School Board*,⁴⁸ the U.S. Court of Appeals for the Fourth Circuit became the first federal court to rule in favor of the right of transgender students to use bathrooms corresponding with their gender identity.⁴⁹ In this case, a transgender student claimed that the use of "alternative pri-

dents to use bathrooms that conform to gender identity); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017) (holding transgender students protected from discrimination under Title IX, Equal Protection Clause of Fourteenth Amendment). *But see Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369, 1372 (11th Cir. 2021) (ordering panel's previous opinion that district's policy barring transgender student from using boys' restroom violated Fourteenth Amendment guarantee of equal protection will be reheard en banc, then vacating panel's opinion); *see also* Jo Yurcaba, *Supreme Court Could Hear Transgender Student Bathroom Case, Experts Say*, NBC NEWS (Aug. 27, 2021), <https://www.nbcnews.com/nbc-out/out-news/supreme-court-hear-transgender-student-bathroom-case-experts-say-rcna1797> [<https://perma.cc/HGH5-LK9P>] (citing experts stating Eleventh Circuit likely to find in favor of school district creating split in circuit courts over transgender bathroom access); *see also* Soule by Stanescu v. Connecticut Ass'n of Sch., Inc., No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (rejecting potential challenge to Connecticut trans-inclusive laws).

45. *See, e.g.*, Sonali Kohli, *How California Protects Transgender Students*, L.A. TIMES (May 17, 2016), <https://www.latimes.com/local/education/la-me-edu-transgender-student-rights-20160516-snap-htmstory.html> [<https://perma.cc/D7WD-LGA6>] (describing various pro-transgender student policies throughout State of California); *see also, e.g.*, 2012–13 Case Studies, ALA. HIGH SCH. ATHLETIC ASS'N, http://media.wix.com/ugd/2bc3fc_87536da66cad4d6195ae056a573e67da.pdf [<https://perma.cc/U8S3-J853>] (last visited Sept. 6, 2021) ("[P]articipation in athletics should be determined by the gender indicated on the student-athlete's certified certificate of birth."). *See generally K-12 Policies*, supra note 14 (providing overview of disparate state, school district policies toward transgender student athletes).

46. *See* Talya Minsberg, *Boys Are Boys and Girls Are Girls: Idaho Is First State to Bar Some Transgender Athletes*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html> [<https://perma.cc/V3WZ-EJFA>] (describing Idaho as first state in United States to bar transgender girls from participating in girls' or women's sports, first to legalize practice of sex testing in order to compete).

47. *See All Women and Girls Can Now Try Out For Fall Teams*, AM. C. L. UNION (Aug. 17, 2020), <https://www.aclu.org/press-releases/judge-blocks-first-law-targeting-transgender-athletes-case-continues> [<https://perma.cc/4R3F-SKG5>] (describing ACLU's successful efforts to block Idaho's law targeting transgender student athletes).

48. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) [hereinafter *Grimm II*].

49. *See id.* (holding Board's application of its restroom policy against Grimm violated Title IX).

vate” restroom facilities rather than communal restrooms violated Title IX and equal protection guaranteed under the Fourteenth Amendment.⁵⁰ The case was initially granted certiorari by the U.S. Supreme Court but was later remanded back to the Fourth Circuit when federal guidelines were withdrawn by the Trump administration in 2017.⁵¹

The Third and Ninth Circuits have rejected invasion of privacy claims filed on behalf of non-transgender students that intended to challenge policies that explicitly permit transgender students to use bathrooms that correspond with their gender identity.⁵² In *Doe v. Boyertown Area School District*,⁵³ the Third Circuit affirmed the district court’s decision to deny a preliminary injunction against the school district’s policy allowing transgender students to use locker rooms that conform to their gender identity.⁵⁴ The court based its decision on the state’s “compelling interest in not discriminating against transgender students.”⁵⁵ Likewise, students in this case brought a Title IX claim, which the Third Circuit rejected because the school district’s policy allowed all students to use bathrooms and locker rooms that aligned with their gender identity, and thus “[did] not discriminate based on sex.”⁵⁶ Therefore the court found

50. *See id.* at 709 (holding Board’s policy does not satisfy heightened scrutiny because it is not substantially related to its important interest in protecting students’ privacy).

51. *See Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017) (mem.) (holding Fourth Circuit’s “[j]udgment [is] vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of guidance document issued by Department of Education and Department of Justice on February 22, 2017”).

52. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020) (“Plaintiffs fail to show that the contours of the privacy right protected by the Fourteenth Amendment are so broad as to protect against the District’s implementation of the Student Safety Plan. This conclusion is supported by the fact that the Student Safety Plan provides alternative options and privacy protections to those who do not want to share facilities with a transgender student, even though those alternative options admittedly appear inferior and less convenient.”); *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018) (noting “a person has a constitutionally protected privacy interest in his or her partially clothed body,” but rejecting appellant argument privacy rights violated by school district policy allowing transgender students access to “bathrooms and locker rooms that aligned with their gender identities”).

53. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

54. *See id.* at 538 (denying preliminary injunction against Pennsylvania school districts policy allowing transgender athletes to play on teams in conformity with gender identity).

55. *See id.* at 526 (“The District Court correctly concluded that the appellants’ constitutional right to privacy claim was unlikely to succeed on the merits.”).

56. *See id.* at 533 (“The District Court correctly concluded that the appellants’ Title IX claim was unlikely to succeed on the merits.”).

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that school policy allowing transgender students to use facilities that conform with their gender identity did not violate Title IX.⁵⁷ In *Soule v. Connecticut Ass'n of Schools*,⁵⁸ non-transgender student athletes challenged a Connecticut state policy allowing transgender students to compete in girls' high school sports.⁵⁹ This case was ultimately dismissed for mootness since the plaintiffs had graduated and were no longer eligible to compete, but the case is currently on appeal before the Second Circuit.⁶⁰ Finally, in *Adams v. School Board of St. Johns County*⁶¹ a three-judge panel for the Eleventh Circuit held that barring a transgender student from using the restroom that conforms with their gender identity violates the Constitution's guarantee of equal protection.⁶² The Eleventh Circuit ultimately vacated this ruling and will now review the case en banc.⁶³ Some have speculated that the Eleventh Circuit will likely split with other circuits who have unanimously upheld trans-inclusive school policies against challenge and protected transgender student's access to facilities that conform with their gender identity.⁶⁴

While circuit courts have been addressing the applicability of Title IX and gender identity at school, on June 15, 2020, the U.S. Supreme Court issued its watershed *Bostock* decision holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on sexual orientation or gender identity.⁶⁵ In

57. See *id.* at 535 (holding school district's policy allowing transgender students to compete on teams conforming to gender identity does not discriminate based on sex or violate Title IX).

58. *Soule v. Conn. Ass'n of Schools, Inc.*, No. 3:20-cv-00201(RNC), 2021 WL 1617206 (D Conn., Apr. 25, 2021).

59. See *id.* at *1 ("This case involves a challenge to the transgender participation policy of the Connecticut Interscholastic Athletic Conference ("CIAC"), the governing body for interscholastic athletics in Connecticut, which permits high school students to participate in sex-segregated sports consistent with their gender identity.").

60. See *id.* at *4 ("Plaintiffs correctly argue that the issue is one of mootness rather than standing."); see also *Soule by Stanescu v. Conn. Ass'n of Sch., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (providing appellants opening brief requesting reversal of district court's order, accusing district judge of bias).

61. *Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369 (11th Cir. 2021) (mem.).

62. See *Soule by Stanescu*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *15 (stating arbitrariness of school's policy does not pass heightened scrutiny as it targets transgender students for restrictions but not other students, including district failure to demonstrate substantial, accurate relationship between sex classification with policy's stated purpose).

63. See *Adams*, 9 F.4th at 1372 (ordering case be reheard en banc).

64. See Yurcaba, *supra* note 44 (describing potential student rights under Title IX on treatment of transgender student rights under Title IX).

65. See Lawrence Hurley, *In Landmark Ruling, Supreme Court Bars Discrimination Against LGBT Workers*, REUTERS (June 15, 2020), <https://www.reuters.com/article/>

Bostock, the U.S. Supreme Court heard three consolidated cases involving LGBTQ employees who had been dismissed because of their LGBTQ status: (1) *Bostock v. Clayton County II*,⁶⁶ (2) *Zarda v. Altitude Express, Inc.*,⁶⁷ and (3) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*⁶⁸ The same week this case was decided, President Biden issued an Executive Order asserting that “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.”⁶⁹

C. Bostock’s Impact on the LGBTQ Community Generally

The majority in *Bostock* referred to Title VII’s protections against discrimination on the basis of sex as “simple but momentous.”⁷⁰ *Bostock* settled the major legal questions regarding LGBTQ employees and Title VII protections, but questions regarding exactly how far the *Bostock* decision extends still remain to be determined.⁷¹ In addition to Title VII and Title IX, sex discrimination is prohibited by several other federal statutes including the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act.⁷² Questions remain about *Bostock*’s implication for these statutes.⁷³ Regardless, the Supreme Court’s decision in *Bostock* will certainly have a wide-ranging impact on the LGBTQ community generally.⁷⁴ The

us-usa-court-lgbt/in-landmark-ruling-supreme-court-bars-discrimination-against-lgbt-workers-idUSKBN23M20N [https://perma.cc/KK55-BCGF] (summarizing *Bostock* decision including implications for transgender people).

66. No. 1:16-CV-001460-ODE-WEJ, 2016 WL 9753356 (N.D. Ga. Nov. 3, 2016).

67. 883 F.3d 100 (2d Cir. 2018).

68. Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018); see also *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1731 (2020) (discussing consolidated cases as part of *Bostock* decision).

69. Exec. Order No. 13,988, 86 C.F.R. § 7023 (Jan. 20, 2021) (“Under *Bostock*’s reasoning, laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation so long as the laws do not contain sufficient indications to the contrary.”).

70. See *Bostock*, 140 S. Ct. at 1741 (“The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

71. See *id.* at 1753 (“Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases.”).

72. See 15 U.S.C. § 1691(a) (2012) (prohibiting creditors from discriminating against applicant on the basis of sex); see also 42 U.S.C. § 3604 (2012) (prohibiting sex discrimination in “the sale or rental of housing”).

73. For further discussion of *Bostock*’s impact on other civil rights laws, see *infra* note 74 and accompanying text.

74. See generally Amanda Hainsworth, *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731 (2020), Bos. B.J. 3, 22, 23 (2020) (describing anticipated

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most immediate impact will likely be within states without preexisting employment discrimination protections for members of the LGBTQ community.⁷⁵ The decision appears to provide an immediate remedy for discrimination within the realm of employment.⁷⁶

Justice Alito in his *Bostock* dissent stated that the problem with the Court's majority decision is most acute in its implication for schools and religious institutions.⁷⁷ Moreover, Justice Alito argued that *Bostock* could infringe on free speech rights if employers refused to use transgender employees' chosen names and pronouns.⁷⁸ In his dissent, Justice Kavanaugh states that he disagrees with the majority regarding the original meaning of the statutory language of Title VII, but recognized the important victory the majority's decision represents for "gay and lesbian Americans."⁷⁹ The Majority asserted that, while those who originally adopted the Civil Rights Act might not have anticipated their work leading to this particular result, "the limits of the drafters' imagination supply no reason to ignore the law's demands."⁸⁰

litigation related to interplay between federal civil rights laws, employers religious beliefs, additional protections for LGBTQ individuals beyond state nondiscrimination laws, federal equal protection claims involving discrimination against LGBTQ individuals).

75. See generally *id.* (describing *Bostock's* effects on federal law).

76. For further discussion of *Bostock's* impact in the employment realm, see *infra* note 83 and accompanying text.

77. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1781 (2020) (Alito, J., dissenting) ("This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty 'communicate a particular way of life to its students,' and a 'violation by the faculty of those precepts' may undermine the school's 'moral teaching.' Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment." (footnote omitted)).

78. See *id.* at 1782 ("The position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety.").

79. See *id.* at 1837 ("Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans.").

80. See *id.* at 1737 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

D. Title IX's Purpose and Theories on Application to Transgender Individuals

The original intent of Title IX was to “remedy to some extent sex discrimination in education.”⁸¹ The Supreme Court has held that Title IX broadly prohibits a funding recipient from subjecting any person to disparate treatment “on the basis of sex” including sexual harassment or retaliating against one who complains about sexual discrimination.⁸² During the drafting of Title IX, some feared that the Act would mandate gender-mixed sports teams or would otherwise negatively impact men’s access to collegiate sports.⁸³ In response, Senator Bayh stated that the intent of the law was to “provide equal access for women and men students to the educational process and extracurricular activities in school” and not to “desegregate” the men’s locker room.⁸⁴ Moreover, subsequent implementing regulations allow schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”⁸⁵ While no language within the law provides a direct connection between Title IX and athletics, the legislative history and early case law demonstrate that athletics is a vital and

81. Trustees of Univ. of Del. V. Gebelein, 420 A.2d 1191, 1196 (Del. Ch. 1980).

82. See Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005) (“We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.”).

83. See 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, 333 (2012) (describing fears of some during drafting of Title IX that it would mandate gender-mixed athletic teams); see also Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. OF GENDER L. & POL'Y 69, 72-73 (2020) (describing aftermath of bill's passage including efforts by those who feared Title IX would hinder men's revenue-producing sports such as football).

84. See 117 Cong. Rec. 30407 (Sep. 8, 1971) (statement of Sen. Birch Bayh) (“I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men’s locker room be desegregated.”); see also Lambelet Coleman, *supra* note 83, 77–78 no. 40 (describing Senator Bayh’s assurances Title IX would not require women play on football teams, elaborating on origins of “sports exception” of Title IX).

85. 34 C.F.R. § 106.41(b) (2020).

important part of the educational experience for high school and college students.⁸⁶

To establish a prima facie case of discrimination under Title IX, a student must allege that: (1) he or she was “subjected to discrimination in an educational program”; (2) “the program receives federal assistance”; and (3) the discrimination “was *on the basis of sex*.”⁸⁷ While Title IX’s implementing regulations bar discrimination on the basis of sex, they also permit schools to operate separate teams for members of each sex in certain circumstances.⁸⁸ Various federal courts have recognized that cases interpreting Title VII’s provisions are relevant to and can be useful in analysis of claims of Title IX discrimination.⁸⁹

In early employment discrimination decisions involving the “because of sex” provisions of Title VII, courts have held that Congress intended “sex” to mean biological sex as traditionally understood, denying Title VII protections for transgender individuals and individuals on the basis of their sexual orientation, and even denying Title VII protections for pregnant women.⁹⁰ Beginning in the

86. See Anderson, *supra* note 83 (explaining importance of athletics in Title IX legislative history); see also Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973) (“Discrimination in high school interscholastic athletics constitutes discrimination in education.”). See generally *History of Title IX*, WOMEN’S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/> [<https://perma.cc/G9U3-RWHZ>] (providing comprehensive overview of legislative history, including subsequent regulatory developments of Title IX).

87. See Bougher v. Univ. of Pitt., 713 F. Supp. 139, 144 (W.D. Pa. 1989) (establishing prima facie case of discrimination under Title IX).

88. 34 C.F.R. § 106.41(a) (1980) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis.”); see also *id.* § 106.41(b) (implementing regulations also permit schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport”).

89. See, e.g., Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 283 (2013) (“Title VII, which prohibits sex discrimination in employment, has been applied regularly to claims of discrimination brought by transgender plaintiffs. Courts generally recognize that cases interpreting Title VII’s provisions are relevant to and can be imported into analysis of Title IX.”); see also Miles v. N.Y. Univ., 979 F. Supp. 248, 250 n. 4 (S.D.N.Y. 1997) (holding “it is now established that the Title IX term ‘on the basis of sex’ is interpreted in the same manner as similar language in Title VII”).

90. See, e.g., Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (holding Title VII, including its legislative history subsequent to passage, indicates Congress intended “sex” to be understood traditionally to “place women on an equal footing with men” while denying protection to “transsexual” woman alleging she was terminated on basis of sex); see also De Santis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (“Giving [Title VII] its plain meaning, this

1970s and 1980s, a series of Supreme Court cases expanded the meaning of “because of sex” to encompass protections against sexual harassment, discrimination against men, and discrimination based on women’s familial status.⁹¹ In 1984, the plaintiffs in *Ulane v. Eastern Airlines*⁹² again tried to expand Title VII’s protections against discrimination “because of sex” to transgender individuals, but the Seventh Circuit Court of Appeals rejected their argument, holding that the plaintiff’s transition did not change their biological sex and therefore, their employer did not discriminate “because of sex.”⁹³ Five years later, the Supreme Court did expand the meaning of “because of sex” in *Price Waterhouse v. Hopkins*⁹⁴ by holding that that Title VII prohibited discrimination against individuals based on “sex stereotyping” or non-conformance with perceived gender expectations.⁹⁵ Courts have since typically considered discrimination against transgender individuals under two legal theories: (1) sex or gender stereotyping via *Price Waterhouse* or (2) discrimination on the basis of gender identity constituting per se discrimination “on the basis of sex.”⁹⁶ Courts have therefore found

court concludes that Congress had only the traditional notions of ‘sex’ in mind.” (quoting *Holloway*, 566 F.2d at 662–63)); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (affirming dismissal of employee’s Title VII claim alleging he was fired because of sexual orientation); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding employer’s disability benefits plan that fails to cover pregnancy-related disabilities does not violate Title VII). *See generally* Erin Buzuvis, “On the Basis of Sex”: Using Title IX to Protect Transgender Students from Discrimination in Education, 28 Wis. J.L. GENDER & SOC’Y 219, 229 (2013) (providing early history of Title VII cases including Title VII’s influence on Title IX cases).

91. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”); *see also* *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp’t Opportunity Comm’n*, 462 U.S. 669, 685 (1983) (holding health benefits plan providing greater pregnancy-related coverage to female employees than spouses of male employees constitutes discrimination against male employees on basis of sex under Title VII); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (“Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men — each having pre-school-age children.”).

92. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984).

93. *See id.* (finding *Ulane*’s transition did not change her biological sex, therefore airline did not fire her “because of sex”).

94. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

95. *See id.* at 231–32 (finding in favor of female employee who sued employer for discrimination on basis of sex under Title VII after coworkers said her chances of making partner would be greater if she acted more feminine).

96. *See* Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 Penn St. L. Rev. 187, 193 (2016) (“Under Title VII, most courts have found that transgender peo-

that discrimination “because of sex” potentially includes not just discrimination based on one’s “biological” sex, but also discrimination on the basis of how one presents one’s gender relative to “biological” sex and the stereotypes associated with that sex.⁹⁷ Prior to *Bostock*, the Sixth and Eleventh Circuits had held that discrimination based on sex stereotypes and *per se* discrimination based on expressed gender identity were actionable under Title VII.⁹⁸ The Equal Employment Opportunity Commission (“EEOC”) similarly found prior to *Bostock* in 2012 that sex, as used in Title VII, encompassed both sex and gender.⁹⁹

ple are protected only on the basis of sex stereotyping, not because they are a protected class *per se*.”).

97. See Buzuvis, *supra* note 90 (describing evolution of interpretations of Title VII’s “because of sex” provision throughout lower courts, including Title VII’s influence on Title IX).

98. See *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity”). *But see* *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ‘[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.’” (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007))); *see also* Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562 (2007) (explaining *Smith v. City of Salem, Ohio* is first time federal court extended Price Waterhouse sex-stereotyping theory to transgender individuals, explaining Eleventh Circuit in *Brumby* found discrimination based on expressed gender identity to be *per se* discrimination under Title VII).

99. See *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012) (“[W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”). The court explained that a transgender person who experiences discrimination based on their gender identity may establish a *prima facie* case of sex discrimination through a number of different formulas. *See id.* at *15 (explaining different formulas by which transgender person may prove *prima facie* case of sex discrimination). A complainant may, for example establish a case of sex discrimination under a theory of gender stereotyping wherein, for example, an employer believing that biological men must present as men and wear male clothing fires an employee for being insufficiently masculine. *See id.* (providing *prima facie* case of sex discrimination established by sex stereotyping). Alternatively, a complainant could prove they were discriminated against if an employer was willing to hire them when they thought they were one gender but is unwilling to hire them when they find out they are another gender. *See id.* at *32. (providing *prima facie* case of sex discrimination established by *per se* discrimination). The commissioner compares gender to religion in this respect; for purposes of establishing a *prima facie* case that Title VII has been violated, employees must demonstrate only that an employer impermissibly used religion (or gender) in making employment decisions. *See id.* at *31–33 (comparing gender-based and religion-based discrimination in hiring).

1. *Sex Stereotyping and Title IX*

The *Price Waterhouse* gender stereotyping interpretation has proven influential in Title IX cases.¹⁰⁰ Cases involving plaintiffs targeted for their perceived gender presentation and sexual orientation have applied Title VII sex-stereotype precedents in analyzing Title IX claims.¹⁰¹ A “Dear Colleague” letter released in 2010 stated that Title IX does not expressly cover discrimination on the basis of sexual orientation or gender identity, but it does protect students who experience sex- or gender-based harassment.¹⁰² Before and after *Bostock*, Circuit Courts have applied Title VII reasoning to Title IX cases involving gender identity discrimination in schools.¹⁰³ Some courts have held that protections against discrimination based on gender stereotypes may provide the most straight-forward route to protecting transgender students facing similar harassment in the future.¹⁰⁴ The Eleventh Circuit suggested in *Glenn v. Brumby*¹⁰⁵ that considerations of gender stereotypes will inevitably

100. For further discussion of sex stereotyping as applied in the context of Title IX, see *supra* note 103 and accompanying text.

101. See e.g., *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090–91 (D. Minn. 2000) (“Although no court has addressed this issue in the context of a Title IX claim, several courts have considered whether same-sex harassment targeting the claimant’s failure to meet expected gender stereotypes is actionable under Title VII. The Court looks to these precedents in analyzing plaintiff’s Title IX claim, noting that Title VII similarly requires that the discrimination resulting in the plaintiff’s claims be based on his or her sex . . . The Court for these reasons concludes that by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes, plaintiff has stated a cognizable claim under Title IX.” (citation omitted)); see also *Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997) (holding harassment because Plaintiff did not conform to stereotypical expectations of masculinity was actionable discrimination “because of sex”).

102. See *2010 Dear Colleague Letter*, *supra* note 34 (“Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”).

103. See *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“Under settled law in this Circuit, gender nonconformity, as defined in *Smith v. City of Salem*, is an individual’s ‘fail[ure] to act and/or identify with his or her gender. . . . Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.’” (quoting 378 F.3d 566, 575 (6th Cir. 2004))); see also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (finding policy requiring individual to use bathroom that does not conform with his or her gender identity punishes that individual for their gender non-conformance, so it violates Title IX); *Grimm II*, 972 F. Supp. 3d 586, 616 (4th Cir. 2020) (finding after *Bostock* its Title VII interpretation guides court’s Title IX evaluation, so sex stereotyping constitutes sex-based discrimination under Equal Protection clause).

104. For further discussion of sex-stereotyping and its application to Title IX, see *supra* note 103 and accompanying text.

105. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)

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be part of what drives discrimination against a transgender individual.¹⁰⁶ Moreover, some commentators have argued that sex stereotyping may allow plaintiffs to take advantage of widely recognized legal doctrine throughout various circuit courts, but it is potentially problematic in that it forces transgender individuals to focus on their gender nonconformity.¹⁰⁷ “To recover for discrimination claims based on supposed gender-nonconforming conduct, as set forth in *Price Waterhouse*, transsexual plaintiffs must identify themselves as their their biological sex . . .” rather than the gender to which they currently identify.¹⁰⁸ Moreover, this approach counterproductively seeks to reject discrimination on the basis of harmful gender stereotypes by highlighting those same gender stereotypes.¹⁰⁹ Inherent problems in the sex stereotyping approach for protecting transgender students from discrimination and harassment have led some to favor an approach which equates discrimination on the basis of gender identity with per se discrimination on the basis of sex.¹¹⁰

2. *Gender Identity Equates to Basis of Sex*

In *Macy v. Holder*,¹¹¹ the EEOC ruled that in the employment context, “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex’ . . .” under Title VII.¹¹² The EEOC went on

106. See *id.* at 1317 (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. . . . We conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”).

107. See Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 Harv. J. L. & Gender 423, 437 (2012) (arguing sex stereotyping reinforces negative stereotypes forcing transgender plaintiffs to identify with biological sex).

108. See Jackie Barber, *Glenn v. Brumby: Extending Protection from Sex-Based Discrimination to Transsexuals in the Eleventh Circuit*, 21 Tul. J.L. & Sexuality 169, 176 (2012) (highlighting paradoxical nature of applying gender-stereotyping approach to proving discrimination on basis of sex).

109. See Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 Wis. J.L. Gender & Soc’y 245, 257 (2013) (discussing how sex-stereotyping approach may reinforce harmful stereotypes).

110. See *id.* (highlighting counterproductive nature of sex-stereotyping approach).

111. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012).

112. *Id.* at *6, *11 (holding discrimination against employee for transgender status is per se discrimination on basis of sex).

to state that the term “sex” as contemplated in Title VII “encompasses both sex – that is, the biological differences between men and women – and gender.”¹¹³ Title VII’s treatment of gender and sex as synonymous is logical because if the only proscribed discrimination actionable via Title VII was discrimination on the basis of biological sex, then the only recognized, prohibited treatment would involve an employer’s preference for one sex over the other.¹¹⁴ The statute’s protections against sexual harassment, for example, clearly extend beyond what is encompassed merely by a person’s biological sex and into the realm of cultural and social conceptions of masculinity and femininity.¹¹⁵ Finally, prior to *Bostock*, the Eleventh Circuit in *Glenn v. Brumby* set out a case for why discriminating against a person because of their status as a transgender person is per se discrimination on the basis of sex.¹¹⁶ In that case, the court held that “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”¹¹⁷ Therefore, any discrimination against a transgender person because of their gender-nonconformity is tautologically sex discrimination whether it is on the basis of sex or gender.¹¹⁸

E. Recent State Legislation Barring Transgender Athletes

As discussed above, Idaho became the first state to ban trans women and girls from women’s sports leagues in schools and col-

113. *See id.* at *5 (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)) (holding under Title VII sex discrimination includes discrimination on basis of gender as well); *see also* *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”).

114. For further discussion of how Title VII has been extended beyond a narrow reading of the text limited to overt sex discrimination in hiring, *see supra* note 91 and accompanying text.

115. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding discrimination for failing to conform to gender-based expectations such as wearing make-up, jewelry violates Title VII).

116. *See* *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007))).

117. *See id.* (finding discrimination against employee due to transgender status is per se discrimination on basis of sex because transgender status implies disconnect between one’s biological sex, gender presentation, including stereotypes of how one presents their gender given their biological sex).

118. *See* *Lee*, *supra* note 107, at 437 (providing additional information on per se approach taken by minority of courts, most notably by Eleventh Circuit in *Glenn v. Brumby*).

leges in March of 2020.¹¹⁹ H.B. 500, or the “Fairness in Women’s Sports Act,” cites “inherent differences” between men and women and promoting sex equality as part of its reasoning for barring students of the male sex from athletic teams or sports designated for females, women, or girls.¹²⁰ The legislation further states that, if disputed, a student may establish sex by presenting a signed physician’s statement that shall indicate a student’s sex based solely on their internal and external reproductive anatomy, the student’s normal endogenously produced levels of testosterone, and an analysis of the student’s genetic makeup.¹²¹ Mississippi followed suit by passing Senate Bill 2536.¹²² The Mississippi Fairness Act shares identical language to the law passed in Idaho.¹²³ Tennessee and Arkansas legislatures passed laws that require student athletes to participate in sports teams corresponding with the sex listed on a student’s birth certificate.¹²⁴ The laws in Mississippi and Arkansas apply specifically to “transgender girls, while Tennessee’s bill applies to all transgender youth.”¹²⁵ In 2021, seventeen states passed similar legislation, joined by South Dakota in early 2022.¹²⁶ At the

119. See Minsburg, *supra* note 46 (describing legislative history surrounding passage of Idaho law banning trans-women, girls from playing on teams which conform with gender identity).

120. See *Hecox v. Little*, AM. C. L. UNION (Jan. 14, 2022), <https://www.aclu.org/cases/hecox-v-little> [<https://perma.cc/M85N-NXUW>] (describing transgender athletes challenge to Idaho law).

121. See IDAHO CODE ANN. § 33-6203(3) (West 2021) (describing methods for determining student athlete’s gender).

122. See *Senate Bill 2536* § 1–7, MISS. LEGISLATURE (2021), <http://bill-status.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm> [<https://perma.cc/2CGF-MBW4>] (providing official text of bill).

123. See *id.* § 3(2) (“Athletic teams or sports designated for ‘females,’ ‘women’ or ‘girls’ shall not be open to students of the male sex.”).

124. See Joe Yurcaba, *Arkansas Passes Bill to Ban Gender-Affirming Care for Trans Youth*, NBC NEWS (Mar. 29, 2021), <https://www.nbcnews.com/feature/nbc-out/arkansas-passes-bill-ban-gender-affirming-care-trans-youth-n1262412> [<https://perma.cc/AN3D-WE4V>] (“The bill is one of two types of legislation being considered in more than two dozen states: measures that ban or restrict access to gender-affirming care for trans minors, and those that ban trans young people from competing in school sports teams of their gender identity.”).

125. See Autumn Rivera, *A Look at Shifting Trends in Transgender Athlete Policies*, NAT’L CONF. OF ST. LEGISLATURES (May 11, 2021), <https://www.ncsl.org/research/education/a-look-at-shifting-trends-in-transgender-athlete-policies-magazine2021.aspx> [<https://perma.cc/6ZU2-EGK5>] (explaining wave of states implementing bans on transgender athletes after Idaho became first state to pass such legislation preventing transgender women, girls from participating in high school or college women’s sports).

126. See Katie Barnes, *Young Transgender Athletes Caught in Middle of States’ Debates*, ESPN (Sept. 1, 2021), https://www.espn.com/espn/story/_/id/32115820/young-transgender-athletes-caught-middle-states-debates [<https://perma.cc/PA6R-YPRG>] (providing review of state level legislation restricting transgender athletes’ participation and high school association policies); see also Kiara Alfonseca, *South*

federal level, The Protect Women’s Sports Act, H.R. 8932 (116), was introduced by former Rep. Tulsi Gabbard (D-Hawaii) and Rep. Markwayne Mullin (R-Okla.) and would prevent students who are assigned male at birth from participating on girls’ sports teams.¹²⁷ Schools that don’t comply would be ineligible for federal funding.¹²⁸

Athletic eligibility for transgender youth is typically determined not by the state legislature but by states’ high school associations.¹²⁹ In Louisiana, a student-athlete must compete on teams consistent with the gender on their birth certificate unless they have undergone sex reassignment surgery.¹³⁰ A “hardship committee” then considers cases of those who have undergone sex reassignment surgery, taking into account, among other considerations, whether the surgical anatomical changes have been completed.¹³¹ While some state laws restrict transgender athletes’ participation,

Dakota Signs 1st Anti-Transgender Sports Law of 2022, ABC NEWS (Feb. 4, 2022) (providing background on state laws restricting transgender women, girls from playing on sports teams conforming with gender identity).

127. See Madeleine Carlisle, *Tulsi Gabbard Introduces Bill That Would Ban Trans Women and Girls from Female Sports*, TIME (Dec. 11, 2021), <https://time.com/5920758/tulsi-gabbard-bill-transgender-women-sports/> [<https://perma.cc/9HAV-X87B>] (providing background on Protect Women’s Sports Act including its legislative history).

128. See H.R. 8932, 116th Cong. (2020) (explaining purpose of bill is “to provide that for purposes of determining compliance with title IX of the Education Amendments of 1972 in athletics, sex shall be determined on the basis of biological sex as determined at birth by a physician”).

129. For further discussion of individual states’ athletic eligibility criteria, see *supra* note 112 and accompanying text.

130. See LA. HIGH SCH. ATHLETIC ASS’N, POSITION STATEMENT, 164 (n.d.), available at: https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_c4403a24e71d4732b89d7162b6e017c7.pdf [<https://perma.cc/U6VD-GCMS>] (providing LHSAA adopts position on Gender Identity Participation as guideline to help direct member schools, including stating student-athletes should compete in gender on birth certificate unless they have undergone sex reassignment).

131. See *id.* (“A student-athlete who has undergone sex reassignment must go through the hardship appeal process to become eligible for interscholastic competition. The Hardship Committee shall consider all of the facts of the situation and shall rule the student-athlete eligible to compete in the reassigned gender when:

1. The student-athlete has undergone sex reassignment before puberty, OR
2. The student-athlete has undergone sex reassignment after puberty under all of the following conditions: a. Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy. b. All legal recognition of the sex reassignment has been conferred with all the proper governmental agencies (Driver’s license, voter registration, etc.) c. Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for sufficient length of time to minimize gender-related advantages in sports competition. d. Athletic eligibility in the reassigned gender can begin no sooner than two years after all surgical and anatomical changes have been completed.”).

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others, as in Connecticut, specifically allow transgender students to compete in accordance with their gender identity without requiring gender affirming surgical interventions prior to participating.¹³²

III. ASSESSING THE LIKELIHOOD THAT BANS WILL SUCCEED POST-BOSTOCK

The Supreme Court's *Bostock* decision was widely celebrated by civil rights activists as an expansion of workplace and hiring protections for vulnerable members of the LGBTQ community.¹³³ The president of the Human Rights Campaign, Alphonso David, referred to it as a "landmark moment in the on-going fight for LGBTQ equality."¹³⁴ Other commentators openly worried that the decision would undermine religious freedom, freedom of speech, parents' right to educate their children in line with their values, women's athletics generally, and privacy in bathrooms and locker rooms.¹³⁵ Justice Alito in his *Bostock* dissent raised pointed questions about the decision's applicability to the world of student ath-

132. See Kathleen Megan, *A Federal Agency Says Connecticut Must Keep Trans Students from Girls' Sports. The State Disagrees.*, CT MIRROR (June 15, 2020), <https://ctmirror.org/2020/06/15/a-federal-agency-says-connecticut-must-keep-trans-students-from-girls-sports-the-state-disagrees/> [<https://perma.cc/6HTE-FFCG>] (describing actions taken by Connecticut's Attorney General to halt efforts to deny or cut funding to state for enforcing policy allowing transgender girls, women to participate on athletic teams that conform to gender identity).

133. See, e.g., Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020), <http://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html> [<https://perma.cc/FW4L-C4JE>] ("Supporters of L.G.B.T. rights were elated by the ruling, which they said was long overdue. 'This is a simple and profound victory for L.G.B.T. civil rights,' said Suzanne B. Goldberg, a law professor at Columbia.").

134. See Aryn Fields, *Human Rights Campaign President Celebrates One-Year Anniversary of Supreme Court Bostock Decision*, HUM. RTS. CAMPAIGN (June 15, 2021), <https://www.hrc.org/press-releases/human-rights-campaign-president-celebrates-one-year-anniversary-of-supreme-court-bostock-decision> [<https://perma.cc/3MSG-8JTH>] (citing *Bostock* ruling as victory for LGBTQ equality, calling for passage of further protections).

135. See, e.g., Melissa Moschella, *The Supreme Court Has Imperiled Parents' Right to Pass Their Values on to Children*, HERITAGE FOUND. (July 29, 2020), <https://www.heritage.org/gender/commentary/the-supreme-court-has-imperiled-parents-right-pass-their-values-children> [<https://perma.cc/NP76-C9WM>] ("Justice Neil Gorsuch's majority opinion explicitly declines to address questions about bathrooms, locker rooms, women's sports, and so on. But the logic of *Bostock* [sic] implies that it would violate Title IX, for example, to prevent a student with male anatomy who identifies as female from changing and showering in the girls' locker room or competing on the girls' track team. . . . [A] growing number of parents will have no choice but to send their children to an educational environment that may sow profound confusion about the basic truths of human identity.").

letics and whether the *Bostock* definition of “sex” extends to youth and college athletics.¹³⁶

A. Extending Title VII to Title IX

The Court’s decision in *Bostock* resolved the issue of whether Title VII protections against sex-based employment discrimination extend to LGBTQ+ employees.¹³⁷ The Supreme Court in *Bostock* announced that the plain language of the 1964 civil rights legislation prohibiting discrimination based on “race, color, religion, sex, or national origin” also prohibited discrimination based on homosexual or transgender status.¹³⁸ Perhaps most illuminating, the majority in *Bostock* concluded that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹³⁹

The statutory prohibitions against sex discrimination in Title VII and Title IX are similar, and the Supreme Court and other federal courts have often looked to interpretations of Title VII to inform Title IX analysis.¹⁴⁰ Following President Biden’s January 25, 2021 Executive Order, the Civil Rights Division of the U.S. Department of Justice issued an additional application of *Bostock* on March 26, 2021.¹⁴¹ In this application, the Department of Justice asserts

136. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1779 (2020) (“Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.”).

137. See *id.* at 1731, 1737 (holding Title VII protections extend to LGBTQ employees).

138. See *id.* (holding legislative intent may differ from express terms of statute but written word of statute is controlling); see also 42 U.S.C. § 2000e-2(a)(1)–(2) (2012) (“The Civil Rights Act of 1964, Title VII, reads in relevant part:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

139. *Bostock*, 140 S. Ct. at 1741 (adopting per se discrimination approach).

140. See, e.g., *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090–91 (D. Minn. 2000) (discussing application of Title VII precedent). But see *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643–45 (1999) (distinguishing between Title IX versus Title VII with respect to agency).

141. See Memorandum from Principal Deputy Assistant Atty. Gen. Pamela S. Karlan, Civil Rights Division to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), available at: <https://www.justice.gov/crt/page/file/1383026/download> [<https://perma.cc/7DCB-369C>] (asserting *Bostock* applies to Title IX).

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that Title IX's "on the basis of sex" language has historically been seen as sufficiently similar to the "because of" sex language in Title VII such that the two are "interchangeable."¹⁴² Therefore, because Title VII's prohibition of discrimination "because of" sex includes discrimination because of sexual orientation and transgender status, the same reasoning supports the notion that Title IX's prohibition of discrimination "on the basis of" sex also prohibits discrimination against individuals based on sexual orientation or transgender status.¹⁴³ This is consistent with the Supreme Court's directive to "give Title IX . . . a sweep as broad as its language."¹⁴⁴ Similarly, the Department of Education released a Federal Register Notice of Interpretation on the enforcement of Title IX with respect to discrimination based on sexual orientation and gender identity in light of *Bostock* on June 16, 2021.¹⁴⁵ The Notice of Interpretation laid out several reasons why Title IX prohibits discrimination based on sexual orientation and gender identity.¹⁴⁶ First, it points to the textual similarity between Title VII and Title IX.¹⁴⁷ The Department of Education asserts that, as in *Bostock*, no ambiguity exists about how to apply the title's terms to the facts before it.¹⁴⁸ The Department also asserts that subsequent case law supports ap-

142. *See id.* (citing holdings from *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992), *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007), *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001) as evidence of interchangeable nature of "because of sex" versus "on the basis of sex").

143. *See id.* (describing how Title IX protections apply to those whose status is of transgender student analogous to Title VII's application to transgender employee).

144. *See N. Haven Bd. Of Ed. V. Bell*, 456 U.S. 512, 521 (1982) (holding broad language of Title IX encompasses employment discrimination in federally financed education programs).

145. *See Making the Roster: Conflicting Title IX Interpretations Present Challenges for Transgendered Athlete Participation*, NAT'L L. REV. (Jun. 25, 2021), <https://www.natlawreview.com/article/making-roster-conflicting-title-ix-interpretations-present-challenges-transgendered> [<https://perma.cc/3DQP-LW2Z>] (explaining executive actions taken by President Biden on first day in office).

146. *See Notice of Interpretation: 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. 32640 (Jun. 22, 2021) (citing textual similarity between Title VII versus Title IX, including additional case law).

147. *See id.* at 32638 ("Both statutes prohibit sex discrimination, with Title IX using the phrase 'on the basis of sex' and Title VII using the phrase 'because of' sex. The Supreme Court has used these two phrases interchangeably.").

148. *See id.* at 32639 ("Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity.").

plying the reasoning of *Bostock* to Title IX.¹⁴⁹ Finally, the Department concludes that this interpretation is most consistent with Title IX's purpose of ensuring equal opportunity and protecting individuals from the harms of sex discrimination.¹⁵⁰

It seems clear – given the arguments put forward by the majority in *Bostock* and the Biden Administration's apparent willingness to extend this decision beyond merely the employment realm – that Title VII protections are likely to extend beyond employment law and impact interpretations of Title IX.¹⁵¹ In fact, the Eleventh Circuit already adopted *Bostock*'s reasoning in *Adams v. School Board of St. Johns County*,¹⁵² decided only a few weeks after the *Bostock* decision.¹⁵³ In that case, the court held that Title IX protects students from discrimination based on their transgender status and not simply against harassment or discrimination for gender nonconformity.¹⁵⁴ Moreover, the court held that the public school board's policy prohibiting a transgender boy from accessing the bathroom consistent with their gender identity "singled him out for different treatment because of his transgender status" and caused him harm in violation of Title IX.¹⁵⁵ *Bostock* represented more than a major legal victory for transgender employees; it sent a symbolic message of equal treatment and respect moving courts away from the out-

149. For further discussion of the subsequent case law applying *Bostock* in the Title IX setting, see *supra* note 148 and accompanying text.

150. For further discussion of the Department of Education's arguments for applying *Bostock* to Title IX, see *supra* note 146 and accompanying text.

151. See John Dayton & Micah Barry, *LGBTQ+ Employment Protections: The U.S. Supreme Court's Decision in Bostock v. Clayton County, Georgia and the Implications for Public Schools*, 35 WIS. J.L. GENDER & SOC'Y 115, 137 (2020) (noting "public educational institutions are commonly a key battleground in legal/culture wars battles, and the Court's decisions on these issues generally have significant implications for public educational institutions" (citations omitted)).

152. *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020). For further discussion of the pending Eleventh Circuit appeal, see *supra* note 90 and accompanying text.

153. See *Adams*, 968 F.3d at 1286 (holding school board's policy violates Title IX while applying lessons from *Bostock*). For further discussion of recent circuit court developments, see also *supra* note 98 and accompanying text.

154. See *Adams*, 968 F.3d at 1304 ("We conclude that this policy of exclusion constitutes discrimination. First, Title IX protects students from discrimination based on their transgender status. And second, the School District treated Mr. Adams differently because he was transgender, and this different treatment caused him harm. Finally, nothing in Title IX's regulations or any administrative guidance on Title IX excuses the School Board's discriminatory policy.").

155. See *id.* at 1307 ("The record leaves no doubt that Mr. Adams suffered harm from this differential treatment. Mr. Adams introduced expert testimony that many transgender people experience the 'debilitating distress and anxiety' of gender dysphoria, which is alleviated by using restrooms consistent with their gender identity, among other measures.").

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dated model which bars discrimination on the basis of sex stereotypes and toward one which recognizes and protects transgender individuals by labeling discrimination against transgender individuals as per se discrimination on the basis of sex.¹⁵⁶ While a victory for transgender activists and allies, the decision has caused a great deal of anxiety among those who feel that allowing transgender women and girls to compete with cisgendered women undermines the initial purpose of Title IX.¹⁵⁷

B. How Courts and Legislatures Will Likely Respond to *Bostock*

With the possible exception of the Eleventh Circuit, circuit courts throughout the country have thus far consistently held that Title IX requires schools to treat transgender students consistent with their gender identity.¹⁵⁸ Already we are seeing the effects of *Bostock*, with its Title VII reasoning applied in a Title IX context, and likewise, claims that educational settings are somehow different than employment settings making Title VII arguments inapplicable in a Title IX context have also been widely rejected.¹⁵⁹

Drafters of legislation barring transgender athletes from participating on teams that conform to their gender identity often point to the Department of Education's implementing regulations, which emphasize the importance of sex-segregated teams and express fears that transgender athletes jeopardize the very existence of separate teams for men and women.¹⁶⁰ This focus misconstrues transgender students' argument.¹⁶¹ Transgender plaintiffs have not

156. See generally Devon Sherrell, "A Fresh Look": Title VII's New Promise for LGBT Discrimination Protection Post-Hively, 68 Emory L.J. 1101, 1129 (2019) (discussing strong social signal transmitted by national antidiscrimination legislation).

157. See Abigail Shrier, *supra* note 15 (arguing transgender athletes may undermine women and girls sports generally).

158. See *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 552 (M.D. Pa. 2019) (discussing recent circuit court decisions finding Title IX protections extend to transgender students). For further discussion of the current holdings of circuit courts on treatment of transgender students under Title IX, see *supra* note 44 and accompanying text.

159. See *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *opinion vacated and superseded*, *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021) ("*Bostock* has great import for Mr. Adams's Title IX claim. Although Title VII and Title IX are separate substantive provisions of the Civil Rights Act of 1964, both titles prohibit discrimination against individuals on the basis of sex.").

160. For further discussion of the potential negative consequences of actions allowing transgender women and girls to participate on teams that conform to their gender identity, see *supra* note 15 and accompanying text.

161. See Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls->

challenged sex-segregated teams, but rather have challenged laws that bar them from accessing teams that conform with their gender identity.¹⁶² Moreover, the implementing regulations do not override the statutory prohibition against discrimination on the basis of sex.¹⁶³ The regulation is a broad statement that sex-segregated sports teams are not unlawful, and not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-segregated teams.¹⁶⁴

Courts have variously held that a transgender student’s “psychological and dignitary harm” caused by a school bathroom policy is legally cognizable under Title IX.¹⁶⁵ This harm provides transgender students who have been barred from participating on teams that conform to their gender identity with sufficient standing to bring a Title IX case for discrimination under the act.¹⁶⁶ In the Title IX context, discrimination “mean[s] treating that individual

sports-teams/ [https://perma.cc/592D-ZEHU] (finding there is no scientific or moral basis for treating transgender girls differently from cisgender girls—therefore policies excluding transgender girls from sports are harmful to girls generally).

162. See *Gloucester County School Board v. G.G - School Administrators from 31 States and the District of Columbia Brief for Amici Curiae*, AM. C.L. UNION <https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-school-administrators-31-states-and-district> [https://perma.cc/ZT4S-R984] (last visited Sept. 23, 2021) (“Amici have also addressed the lurking hypothetical concern that permitting individuals to use facilities consistent with their gender identity will lead to the abolition of gender-specific facilities. Contrary to that ‘slippery slope’ argument, however, all amici continue to maintain gender-segregated facilities in their schools. In fact, respecting the gender identity of transgender students reinforces the concept of separate facilities for girls and boys; requiring a transgender girl to use the boys’ restroom or a transgender boy to use the girls’ restroom undermines the notion of gender-specific spaces.”).

163. See e.g., *Grimm II*, 972 F.3d 586, 618 (4th Cir. 2020) *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (June 28, 2021) (“[T]he implementing regulation cannot override the statutory prohibition against discrimination on the basis of sex.”).

164. See, e.g., *Grimm II*, 972 F.3d at 619 n.16 (stating 20 U.S.C. § 1686 is “broad statement that sex-separated living facilities are not unlawful – not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities”).

165. See *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1306–07, 1310–11 (11th Cir. 2020) (holding transgender student’s “psychological and dignitary harm” caused by school bathroom policy was legally cognizable under Title IX).

166. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045–47 (7th Cir. 2017) (affirming finding of irreparable harm because excluding transgender student from boys’ restroom “stigmatized” student, caused him “significant psychological distress”); *see also Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (affirming finding of irreparable harm because excluding young transgender student “from the girls’ restrooms has already had substantial and immediate adverse effects on [her] daily life[,] . . . health[,] and well-being”).

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worse than others who are similarly situated.”¹⁶⁷ Laws which prevent transgender individuals from playing on teams that conform to their gender identity treat these athletes worse than students with whom they are similarly situated because they do not allow transgender athletes to play on teams that correspond with their gender identity, unlike their non-transgender peers.¹⁶⁸ Recent state level legislation that bars transgender athletes from playing on the teams consistent with their gender identity is therefore susceptible to challenge and will likely be held to violate Title IX.¹⁶⁹ While the Biden Administration has so far been vocal about its support of transgender students’ access to facilities that conform to their gender identity, it has been silent on enforcement actions it would take against noncompliant institutions.¹⁷⁰ As in all issues involving federal statutory interpretation, Congress may also resolve the ambiguity of the meaning of “sex” in Title IX by amending the statute or providing additional legal protections.¹⁷¹

C. Other Avenues to Challenge Anti-Trans State Legislation (Equal Protection)

While Title IX challenges are the most likely grounds upon which state legislation banning transgender women and girls from participating in high school and collegiate sports in accordance with their gender identity will be overturned, the Fourteenth Amendment offers a second avenue by which such laws mayulti-

167. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1740 (2020) (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)) (finding disparate treatment based on sex must also be intentional).

168. For further discussion of the benefits of “trans-inclusive” school policies, see *supra* note 162 and accompanying text.

169. See Katie Rogers, *Title IX Protections Extend to Transgender Students, Education Dept. Says*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/16/us/politics/title-ix-transgender-students.html> [<https://perma.cc/DLB4-2NCD>] (citing Education Department officials who claim Title IX protections extend to transgender students, so will likely impact recent state legislation to ban transgender students from playing sports that correspond with their gender identity).

170. See *id.* (providing opinions of some commentators explaining Biden Administration may be reluctant to enforce Executive Order); see also Nikki Hatza et al., *Biden Executive Order Expands Title IX Protections*, JDSUPRA (Mar. 10, 2021), <https://www.jdsupra.com/legalnews/biden-executive-order-expands-title-ix-3384512/> [<https://perma.cc/ASQ9-BVGX>] (providing summary of Biden Administration’s Executive Order on “[g]uaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity” including its implications for Title IX enforcement).

171. See, e.g., S. 2584, 115th Congress (2018) (providing text of proposed bill barring identity-based discriminations against students in program or activities receiving federal financial assistance).

mately be challenged.¹⁷² The Fourteenth Amendment guarantees “equal protection of the laws.”¹⁷³ Sex or gender “generally provide . . . no sensible ground for differential treatment.”¹⁷⁴ Therefore, the Equal Protection Clause allows only “exceedingly persuasive” classifications based on sex or gender.¹⁷⁵

The Supreme Court has applied heightened scrutiny to sex-based classifications in order to eliminate discrimination on the basis of gender stereotypes.¹⁷⁶ Policies that bar transgender girls and women from participating in sports broadly discriminate on the basis of sex and thus could be subjected to heightened scrutiny.¹⁷⁷ Ostensibly, laws that ban transgender athletes from participating in high school and collegiate sports are done to promote an important government interest.¹⁷⁸ However, there is not a substantial relationship between banning transgender athletes from teams that conform to their gender identity and promoting sex equality.¹⁷⁹ Governmental gender classifications must be “reasonable, not arbi-

172. See generally Krista D. Brown, *The Transgender Student-Athlete: Is There A Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?*, 25 MARQ. SPORTS L. REV. 311, 314–16 (2014) (discussing due process arguments, equal protection arguments against state laws banning transgender athletes from participating on teams in conformity to gender identity).

173. U.S. CONST. amend. XIV, § 1.

174. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating general rule classifications based on gender or sex bear no relation to ability, gender or sex classifications fail equal protection scrutiny unless substantially related to sufficiently important government interest).

175. See *United States v. Virginia*, 518 U.S. 515, 534 (1996) (finding State must at least show challenged classification serves important governmental objectives, must show discriminatory means employed are substantially related to achievement of those objectives).

176. See *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (“The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.”).

177. See, e.g., *Adams ex. Rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (applying heightened scrutiny because school board’s bathroom policy singles out transgender students for differential treatment because they are transgender).

178. For further discussion of justifications used by states that adopted laws banning transgender athletes, see *supra* notes 121, 123 and accompanying text.

179. See Krista D. Brown, *supra* note 172, at 325 (“Under Equal Protection jurisprudence regarding gender equity in high school athletics, courts have found that categorically denying underrepresented sexes the opportunity to play on an athletic team because of health and safety concerns is not substantially related to that objective.”).

trary.”¹⁸⁰ For example, policies often are administered arbitrarily by relying on student’s enrollment documents to determine sex assigned at birth and thus do not treat all transgender students alike.¹⁸¹ Already, various circuit courts have appeared eager to apply equal protection arguments in addition to sex-stereotyping and *per se* discrimination arguments post-*Bostock* to strike down bans on transgender athletes.¹⁸² In *Grimm v. Gloucester County School Board*, for example, the Fourth Circuit agreed with the Seventh and Eleventh Circuits that when a school district decides which bathroom a student may use based upon sex listed on a birth certificate, this is sex-based discrimination and is subject to intermediate scrutiny.¹⁸³ Moreover, the court rejected the school board’s argument that privacy interests constitute an “exceedingly persuasive” justification of the policy.¹⁸⁴ Given the trend among circuit courts, including recent decisions of the Eleventh Circuit – seen by many as least likely to apply *Bostock* to a Title IX setting – it appears highly unlikely that state laws restricting the rights of transgender individuals will survive challenges on both Equal Protection and Title IX grounds.¹⁸⁵

180. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” (quoting *Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920))).

181. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (finding students’ sex on school enrollment documents not “legitimate, accurate proxy” for sex assigned at birth).

182. See, e.g., *Grimm II*, 972 F.3d 586, 620 (4th Cir. 2020) (“The 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. . . . How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.”).

183. See *id.* at 608 (“We agree with the Seventh and now Eleventh Circuits that when a ‘School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate, ‘the policy necessarily rests on a sex classification.’” (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017))); see also *Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (“Mr. Adams and the School Board are in agreement that our Court is required to review the School District’s bathroom policy with heightened scrutiny. Although this standard of review is not in dispute, we first review why heightened scrutiny is warranted in order to chart a course for our analysis.”).

184. See *Grimm II*, 972 F.3d at 623 (Wynn, J. concurring) (“Put simply, Grimm’s entire outward physical appearance was male. As such, there can be no dispute that had he used the girls’ restroom, female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students. The Board’s stated privacy interests thus cannot be said to be an ‘exceedingly persuasive’ justification of the policy.”).

185. See generally *id.* (holding school board policy banning transgender students from using bathroom conforming to gender identity violates Title IX, Equal Protection Clause protections). See also *Glenn v. Brumby*, 663 F.3d 1312, 1321

D. What this Signifies for Women's Sports Going Forward

Recently, a federal judge issued a preliminary injunction on the Idaho law banning transgender women and girls from sports teams citing *Bostock's* reasoning that discrimination against an individual for being transgender necessarily discriminates on the basis of sex.¹⁸⁶ This ruling and others could imply that laws which discriminate on the basis of sexual orientation or gender identity may be increasingly subjected to heightened scrutiny analysis going forward.¹⁸⁷ Following the *Bostock* decision, Olympic track-and-field coach Linda Blade stated that she feared that “all the benefits society gets from letting girls have their protected category so that competition can be fair, all the advances in women's rights . . . [will] be diminished.”¹⁸⁸ Similar concerns have been echoed in state legislation banning transgender girls and women from school athletics.¹⁸⁹ Several bills specifically point out that sex-specific teams promote sex equality by providing opportunities to female athletes to “demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain . . . the numerous other long-term benefits that flow from success in athletic endeavors.”¹⁹⁰ Following President Biden's executive order calling on agencies across the federal government to review regulations and policies that prohibit sex discrimination to include sexual orienta-

(11th Cir. 2011) (“Brumby has advanced no other reason that could qualify as a governmental purpose, much less an ‘important’ governmental purpose, and even less than that, a ‘sufficiently important governmental purpose’ that was achieved by firing Glenn because of her gender non-conformity.”). In applying equal protection logic to striking down a claim of sex-based discrimination in the employment setting, the Eleventh Circuit has indicated its willingness to apply heightened scrutiny in future cases within the school setting as well. *See id.* (implying termination of employment due to gender non-conformity would likely not serve sufficiently important governmental purpose).

186. *See Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020) (ordering preliminary injunction on Idaho law).

187. *See Sharita Gruberg, Beyond Bostock: The Future of LGBTQ Civil Rights*, CAP ACTION (Aug. 26, 2020), <https://www.americanprogress.org/article/beyond-bostock-future-lgbtq-civil-rights/> [<https://perma.cc/366U-6BAS>] (describing *Bostock's* impact on Equal Protection Clause as well as impacts on access to housing under Fair Housing Act, and access to healthcare under Affordable Care Act).

188. For further discussion of critics of Biden Administration's Executive Action directing all federal agencies to reevaluate treatment of transgender individuals in light of the *Bostock* decision, see *supra* note 15 and accompanying text.

189. For further discussion of justifications used by states that adopted laws banning transgender athletes, see *supra* notes 121, 123 and accompanying text.

190. *See, e.g., Senate Bill 2536* § 1–7, MISS. LEGISLATURE (2021), <http://bill-status.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm> [<https://perma.cc/5JDZ-SG8X>] (citing benefits to male, female students of sex-segregated teams barring transgender individuals from participating on teams conforming with gender identity).

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tion and gender identity per *Bostock*, the hashtag #BidenErasedWomen trended on Twitter.¹⁹¹ Inherent in this argument, however, is the idea that what is good for transgender girls and women is not also good for girls and women generally and that transgender girls and women are somehow not part of this larger group.¹⁹²

On the other hand, in a joint statement, twenty-three women's rights and gender justice organizations voiced their support of the full inclusion of transgender people in athletics.¹⁹³ While Linda Blade's concerns are by no means unusual, they are likely unfounded.¹⁹⁴ Twenty-four states and the District of Columbia have had trans-inclusive athletic laws or policies for more than a decade.¹⁹⁵ It has also been found that many of these states actually saw higher participation rates in athletics among cisgender women after such policies were implemented.¹⁹⁶ University of Pennsylvania swimmer Lia Thomas became a central figure in the debate over transgender inclusion in competitive women's sports after setting the fastest women's time in the nation for the 200 meter free swim.¹⁹⁷ All else being equal, it does appear that transgender women may have a competitive advantage over cisgender female ath-

191. See Samantha Schmidt et al., *Biden Calls for LGBTQ Protection in Day 1 Executive Order, Angering Conservatives*, WASH. POST (Jan. 21, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/> [<https://perma.cc/EP5G-JYFC>] (describing backlash to Biden Administrations Executive Order).

192. For further discussion of how arguments in favor of excluding transgender women or girls from school sports are unscientific and unjust, see *supra* note 161 and accompanying text.

193. See *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People*, AM. C.L. UNION, <https://www.aclu.org/letter/statement-womens-rights-and-gender-justice-organizations-support-full-and-equal-access> [<https://perma.cc/U2CU-6FC6>] (last visited Sept. 23, 2021) ("We speak from experience and expertise when we say that nondiscrimination protections for transgender people — including women and girls who are transgender — are not at odds with women's equality or well-being, but advance them.").

194. See *id.* (stating equal participation in athletics for transgender people does not mean end to women's sports generally).

195. See *K-12 Policies*, *supra* note 16 (downplaying recent fears about transgender athletes, citing prior "trans-inclusive" laws).

196. See *Statement of Women's Rights and Gender Justice Organizations*, *supra* note 193 (indicating participation in women's sports generally increased when trans-inclusionary laws or policies were adopted).

197. See David Rieder, *Controversy of the Year: Transgender Swimmer Lia Thomas Swims Fastest Times in the Nation*, SWIMMING WORLD (Dec. 31, 2021), <https://www.swimmingworldmagazine.com/news/controversy-of-the-year-transgender-swimmer-lia-thomas-swims-fastest-times-in-the-nation/> [<https://perma.cc/VJ5L-NJMB>] (providing background on Lia Thomas, including her college swimming records).

letes, and conceivably could lead many women's sports competitions if a small percentage of elite athletes transition after puberty.¹⁹⁸ However, competitors like Lia Thomas are extremely rare and a world in which transgender athletes dominate the upper echelons of female athletics has not yet materialized—and transgender athletes in general remain quite rare.¹⁹⁹ The likeliest result of the *Bostock* case is that transgender girls and women who are currently barred or discouraged from high school and collegiate athletics will be able to participate, thus avoiding the potential psychological harms that come about from denying such participation.²⁰⁰

IV. CONCLUSION: BEYOND BOSTOCK AND INTO THE FUTURE

The *Bostock* decision will inevitably be an incredibly important development in protections for LGBTQ individuals in the employment sphere.²⁰¹ Moreover, as federal courts continue to expand the *Bostock* decision into other realms, it will continue to afford transgender individuals additional protections.²⁰² One such protection will likely include transgender athletes' ability to play on

198. See Megan McArdle, *We Need To Be Able To Talk About Trans Athletes and Women's Sports*, WASH. POST (Jan. 13, 2022), <https://www.washingtonpost.com/opinions/2022/01/13/trans-women-sports-uncomfortable-questions/> [https://perma.cc/Z483-S4QP] (discussing Lia Thomas, other transgender athletes', potential competitive edge over cisgender athletes).

199. See David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, AP NEWS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [https://perma.cc/Y6H3-KRYL] (highlighting inability of legislators advocating bans on transgender girls competing on girls' sports teams to cite examples of transgender athletes compromising ability of cisgender girls to participate); see also Jo Yurcaba, *Amid Trans Athlete Debate, Penn's Lia Thomas Loses to Trans Yale Swimmer*, ABC NEWS (Jan. 10, 2022), <https://www.nbcnews.com/nbc-out/out-news/trans-athlete-debate-penns-lia-thomas-loses-trans-yale-swimmer-rcna11622> [https://perma.cc/UE7R-WNAC] (citing underrepresentation of transgender athletes in NCAA compared to general population while reporting Lia Thomas recently lost to male transgender athlete who competes on women's team because he has not begun gender-affirming hormone treatment).

200. See, e.g., Grimm I, 822 F.3d 709, 727–28 (4th Cir. 2016) (Davis, J., concurring) (citing expert declaration by psychologist specializing in working with children, adolescents, with gender dysphoria, who stated treating transgender boy as male in some situations but not in others is “inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child”).

201. For further discussion of the impact of the *Bostock* decision in the employment field, see *supra* note 128 and accompanying text.

202. For further discussion of the impact of *Bostock* beyond employment, see *supra* notes 128–140 and accompanying text.

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sports teams that conform to their gender identity in high school and collegiate athletics.²⁰³

At the same time, as transgender athletes increasingly compete on teams that conform to their gender identity, there will be those who oppose the change and claim that this represents a violation of Title IX protections of cisgendered women.²⁰⁴ Ultimately, it will fall upon either the courts, federal agencies, and Congress to further clarify the meaning of sex in Title IX.²⁰⁵ While there are some who fear that these new rights will come at the expense of rights enjoyed by cisgender female athletes, these fears are likely unfounded.²⁰⁶

*Joe Brucker**

203. For further discussion of why *Bostock* may eventually extend to school athletics, see *supra* notes 150–164 and accompanying text.

204. See, e.g., *Soule v. Conn. Assn. of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn., Apr. 17, 2020) (challenging Connecticut’s law allowing transgender athletes to compete on teams corresponding with gender identity as violating Title IX protections for cisgender female athletes).

205. See *Title IX: Who Determines the Legal Meaning of “Sex”?*, CONG. RSCH. SERV. (Dec. 12, 2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10229> [<https://perma.cc/7LV7-4SKC>] (delineating roles played by courts, Congress, federal agencies in interpreting Title IX).

206. For further discussion of the impact of *Bostock*’s protection expanding to Title IX on women’s sports, see *supra* notes 188–200 and accompanying text.

* J.D. Candidate, May 2023, Villanova University Charles Widger School of Law; I would like to thank my family and friends for all their encouragement and support throughout my academic and professional endeavors.

RE: Testimony in Opposition of HB 1489

Greetings, Chairman Weisz and Members of the Committee. My name is Olivia Data, I am the Youth Action Council Coordinator for the North Dakota Women's Network, and I urge you to vote "Do Not Pass" on HB 1489.

The Youth Action Council is an organization that works to empower the youth of North Dakota and involve high school and college kids in civic engagement. We believe that all youth should be able to be true to themselves without living in fear or shame, and we believe in building a community that respects and celebrates all of its members. HB 1489 poses a serious threat not only to transgender students, but to any student who wants to participate in sports.

I was born and raised in North Dakota, and growing up, I remember hearing all the jokes and sayings about how nice North Dakotans and midwesterners are. It always made me so proud to live here. Yet, as I've been learning more and more about the prejudice and discrimination that we struggle with, I've also been reflecting more on the challenges that I have faced in my life as a girl and a woman. The earliest example of this that I can remember is playing tag in elementary school, overhearing the boys in my class deliver the classic yet devastating insult to each other: *you run like a girl*. Growing up, I have noticed countless jokes, insults, stereotypes, and rules that enforce the sexist notion that girls are weak. That girls can't play sports, can't be assertive, can't be strong. HB 1489 is saying the same thing. This bill would prohibit transgender students from playing on the sports teams of their correct gender – the gender they identify with. I understand that there are often natural biological differences between cisgender boys and

cisgender girls, but saying that transgender girls, even after hormone therapy, are automatically going to win any event in any sport because they were assigned male at birth portrays cis girls as inherently weak and feeble, and it depicts trans girls as inherently predatory. Both of those ideas are harmful, and neither of them are true.

If you are truly concerned about allowing boys to play on girl's sports teams, I am baffled as to why you consider supporting a bill that would force transgender boys to play on exclusively girl's teams. If a trans boy is taking testosterone and dressing and acting in a typically masculine manner, I imagine many people would feel uncomfortable having him on an all-girls team.

Not only does this bill fail to protect girls, but it would actively harm us. Invalidating the gender of a trans girl because of something written on her birth certificate sets the stage for other forms of gender policing. If a girl is too masculine, if a girl performs too well in her sport, if a girl does not conform to traditional feminine expectations, the validity of her gender could be questioned as well. This isn't just a hypothetical, either. We've all heard the term "tom-boy." Just because a girl is strong, or has muscles, or is good at running, that does not make her a boy. Just because a girl was assigned male at birth, that does not make her a boy. It is 2023; surely we know by now that there is not one singular definition of femininity, that there is not one way to be a girl¹.

The truth is, there are many threats to women's sports. Female athletes are often sexualized,

¹ "Gender and health." *World Health Organization (WHO)*, https://www.who.int/health-topics/gender#tab=tab_1. Accessed 23 January 2023.

underfunded, and unappreciated². A study in 2019, for example, showed that women athletes were covered on highlight shows and televised news only 5.4% of the time³. Anyone who has attended sporting events in high schools will notice a similar difference in the sizes of the student sections between many male and female sports.

HB 1489 ignores the real and prevalent struggles that female student athletes face in favor of pushing a harmful, discriminatory narrative. I know there are many fears and prejudices surrounding the transgender community. But I ask you not to succumb to this fear mongering and instead to open your mind and your heart to an already vulnerable community. According to the National Library of Medicine, 82% of transgender people have contemplated killing themselves, and 40% of transgender people have actually attempted suicide⁴. Among LGBTQ+ youth, those whose identities are not respected by the adults in their life are almost twice as likely to attempt suicide as those whose identities are respected⁵. Even if you do not fully understand a trans person's identity, even if you are concerned about gender identity in sports, I ask you to consider the countless people who will be pushed further into the arms of hatred, ostracization, and shame if HB 1489 passes. I ask you to consider the students who will be denied the chance to live their authentic lives and the parents who will even lose their children.

² Pruitt, Sharon. "The Sexualization Of Women In Sports Extends Even To What They Wear." *NPR*, 23 July 2021, <https://www.npr.org/2021/07/23/1019343453/women-sports-sexualization-uniforms-problem>. Accessed 23 January 2023.

³ "Overlooking her shot: Women's sports need an assist as coverage remains the same as 30 years ago." *Purdue University*, 24 March 2021, <https://www.purdue.edu/newsroom/releases/2021/Q1/overlooking-her-shot-womens-sports-need-an-assist-as-coverage-remains-the-same-as-30-years-ago.html>. Accessed 23 January 2023.

⁴ "Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors." *PubMed*, <https://pubmed.ncbi.nlm.nih.gov/32345113/>. Accessed 23 January 2023.

⁵ "Pronouns Usage Among LGBTQ Youth." *The Trevor Project*, 29 July 2020, <https://www.thetrevorproject.org/research-briefs/pronouns-usage-among-lgbtq-youth/>. Accessed 23 January 2023.

As a cisgender woman myself, I am sick and tired of the challenges that I face being used as a shield to deflect prejudice onto other vulnerable people. Transgender students already face high levels of discrimination. We should be protecting them, not alienating them from our sports, our schools, our state. HB 1489 is incredibly harmful to transgender students, cisgender girls, and all those who want to build a world in which our youth are empowered, healthy, and safe. We as North Dakotans can do so much better in terms of creating a positive environment for *all* of our athletes.

For these reasons, I urge the committee to vote “Do Not Pass” on HB 1489. Thank you for your time, and I am happy to answer any questions you may have about my testimony.

Olivia Data
Youth Action Council Coordinator
District 35
Bismarck, North Dakota

**HB 1489**

House Human Services Committee

January 24, 2023

Katie Fitzsimmons, Director of Student Affairs, NDUS

701.328.4109 | katie.fitzsimmons@ndus.edu

Chair Weisz and House Human Services Committee Members: My name is Katie Fitzsimmons and I serve as the Director of Student Affairs at the North Dakota University System. I am representing the North Dakota University System and its eleven institutions in opposition to HB 1489. The bill would open campuses to an unlimited liability to litigation by aggrieved parties; require our campuses to contradict Title VII and Title IX federal regulations which could result in a loss of federal funding and financial aid; align incongruently with NCAA, NAIA, and NJCAA guidelines; create an unenforceable step of vetting for all intramural and club sports on our campuses; and lose significant revenues earned through summer camps and conferences.

Title IX was enacted as a follow-up to the Civil Rights Act of 1964 and its original text, as written and signed into law by President Nixon in 1972 stated: “No person in the United States shall, based on 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.” Title IX regulations have evolved over the last 50+ years, sustained a major shift in May 2020, and will see a new update in May of 2023. However, the most recent change occurred in January of 2021.

On January 20, 2021, President Joe Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.¹ The Order cites the 2020 Supreme Court case of *Bostock v. Clayton County*, which held that Title VII’s prohibition on discrimination “because of sex” covers discrimination on the basis of gender identity and sexual orientation. Under this case’s reasoning, all laws that prohibit sex discrimination, including Title IX, prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary. The NDUS and its institutions are bound by this Executive Order, as it will guide federal regulators in their interpretation of Title IX.

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

In short, if a campus were to require an athlete to participate on an athletic team that corresponds with the athlete's sex assigned at birth if that differed from the gender with which they identify, the athlete would have solid footing for a complaint with the Office of Civil Rights (OCR) and further litigation – a proposition that has been backed up by a number of court decisions from the last few years. The possible costs of time and money from OCR fines and litigation fees and settlements, could span years and could amount to a substantial cost to the University System and North Dakota's taxpayers.

Litigation could be the least of the University System's concerns. If campuses do not comply with Title IX regulations as this bill directs, the campuses are in violation of federal law. As such, all financial aid, scholarships, research grants, and other federal support could be wholly jeopardized. The spirit of this bill aims to remove athletic competition from a population that currently does not exist on our collegiate teams, but if this bill were to pass, the North Dakota State Legislature could be responsible for stripping profound financial support to all students and institutions.

At a glance, annually, the North Dakota University System receives 20% of its funding from the state; 31% from tuition; 17% from grants and contracts (federal money); and 32% is covered through auxiliary funds, for a total of \$1.4 billion dollars. More acutely, according to the numbers from 2021-2022, over 20,600 North Dakota University System students received \$196.1 million in federal grants and loans. Statewide, if you count the private and tribal institutions, that figure increases to \$227.8 million. The North Dakota University System respectfully requests the committee consider the wide-reaching impacts this bill could have on the finances of our students, if financial aid programs were compromised.

I would like to refer you to the guidelines and policies that direct current practices. Bismarck State College, Dakota College at Bottineau, Lake Region State College, and Williston State College are members of the National Junior College Athletic Association (NJCAA). Dickinson State University, Mayville State University, and Valley City State University are members of the National Association of Intercollegiate Athletics (NAIA). Minot State University, North Dakota State University, and the University of North Dakota are members of the National Collegiate Athletic Association (NCAA). Each of these three athletic associations have guidelines in place regarding participation of transgender student athletes. The NJCAA outlines their policies in Section 5 of their constitution and by-laws, which all member schools endorse. The NAIA and NCAA outline guidelines for their member schools to consider adopting. Each group requires transgender student athletes to obtain a medical exception from the corresponding association. The policies and guidelines established by these three athletic associations are currently working well and provide clear guidance to our athletic programs. The NCAA released a new set of guidelines on transgender students' participation in January that borrowed many of the rules from the United States Olympic and Paralympic

Committees. The organization adopted its first set of guidelines around transgender students' involvement in sports in 2011, a time when virtually no colleges had adopted policies on the matter. Under the new guidance, which will be fully implemented by August 2023, transgender athletes at NCAA member colleges will have to regularly report their testosterone levels and provide additional documentation that they meet specific standards depending on their competitive sport.

Additionally, the language in the bill does not specify the extent of the activities that would need to have monitored participation, but it does specify that any use of “an athletic facility, stadium, field, structure, or other property owned by or under the control of the state, political subdivision, or entity” would apply to this bill. Therefore, it stands to reason that all intramural sporting activities, or any wide range of athletic activities that are divided by sex, would apply to the intentions of this bill. For any campus to make these determinations would be a legal and logistical nightmare – one which the bill does not explain how to resolve.

Finally, the language in section two of the bill places the campuses in an unusual predicament. All NDUS campuses host camps and athletic groups during the summer months and throughout the year. Some of these camps are sponsored by the NDUS institution and for others, the outside groups rent the space from the campuses. Would NDUS campuses have to verify the sex assigned at birth for all participants of all camps, conferences, and workshops that use NDUS facilities on a short-term contract? What about camps that are not institution-sponsored? Placing this herculean task onto our limited summer conference staff would make managing a camp schedule with thousands of participants, some from out of state, nearly impossible.

The North Dakota State Board of Higher Education has not yet reviewed this bill and does not have a position at this time. That standing, the simple reason that this bill puts all federal funding for our students at risk, creates mandatory tracking of individuals that we do not have the capacity to perform, and this bill addresses a concern already handled by the athletic conferences that the campuses maintain membership, the North Dakota University System Office respectfully requests a Do Not Pass on HB 1489. I thank you for your consideration and I stand for your questions.

I am Jodi Plecity and I am in favor of this bill. Let's get back to the ROOT issue here. I would hope that you look at that when deciding on whether to pass this bill. What is a person when they are born? Male or Female. No number of medications, surgeries or procedures will ever change your biological makeup. You are what you are when you come out of the womb. I struggle and feel MY rights as a natural, biological born female are being stomped on when you allow a male born human to compete right next to me. Let's get back to common sense when it comes to (sexes and separation of sports) and pass this bill. I have worked years and years at weightlifting and when you allow a male (who thinks they are female now) and has had testosterone pumping through their body for 20 years or more of their life and not to mention men in general have a completely different pelvic structure you are stripping away my rights, as a natural born woman. You are what your birth certificate says. Period. Thank you

Jodi Plecity

Dear Chair Klemin and members of the House Judiciary Committee,

My testimony is in opposition to House Bill 1489. I ask that you give this bill a Do Not Pass.

The reason for this is that this bill affects individuals I care about, and I know that some of them do play sports, but now are wary to play in college. This bill will affect them greatly due to the restrictions of labeling in this bill along with the terms for biological sex instead of gender. It also prevents them from playing on the team they identify with.

Additionally, it states in line 22 and 23 this, "An athletic team or sport designated for "females", "women", or "girls" may not be open to students of the male sex." This not the only part that feels like it restricts it, but pretty much saying that transgender and nonbinary students don't exist. Pretty much the bill is stating transwomen are not women. Yet, it goes against the National Collegiate Athletic Association policy on transgender athletes.

Which brings me to my next point of the reason some believe this bill will protect women's sports. The issue is there are already guidelines set forth by National Collegiate Athletic Association that a transwoman must follow to be allowed to participate in women's sport. Accord to the the National Collegiate Athletic Association, which is attached, talks about any transgender student who is not taking hormone treatment and those who are. It states, "A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment... A trans female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women's team."

Even if one does not believe a transwoman is a female, there are already policy that prevent man transition into a woman from participating in women's sports if they have yet to start hormones or have yet been on hormones for over a year. Some might argue that trans athletes have an unfair advantage especially when it comes to trans woman. Yet, there are some studies that have been done and there is yet a firm answer to if trans athletes have an unfair advantage. To be honest, in my own mind, it should be up to the higher education on designating athletic teams and sports for male, female, or coed participation and limitations on use of governmental property for athletic. That is all

I once again ask that you give House Bill 1489 a DO Not Pass.

Thank you for your time, consideration, and service to our state.

Best Regards,

A handwritten signature in black ink that reads "Charles J Vondal". The signature is written in a cursive, flowing style with large loops and a prominent "V" at the end.

Signed

Charles J Vondal

2010 NCAA Policy on Transgender Student-Athlete Participation

The following policies clarify participation of trans student-athletes* undergoing hormonal treatment for gender transition:

1. A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed gender dysphoria for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.
2. A trans female (MTF) student-athlete being treated with testosterone suppression medication for gender dysphoria for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.

Trans student-athletes who are not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with their sex assigned at birth.

- A trans male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men's or women's team.
- A trans female (MTF) student-athlete who is not taking hormone treatments related to gender transition may not compete on a women's team.

*This policy may also apply to student-athletes who identify as non-binary. The same policy requirements apply to student-athletes who identify as non-binary and wish to compete on a men's or women's team.

Note: The 2010 policy language was updated in 2022 to remove outdated language through recommendations provided by the NCAA Board of Governors Committee to Promote Cultural Diversity and Equity and NCAA Committee on Competitive Safeguards and Medical Aspects of Sports. In January 2022, the Board of Governors updated the transgender participation policy. More information on the updated policy is available on ncaa.org.

NCAA Inclusion of Transgender Student-Athletes



Office of Inclusion

AUGUST 2011



Office of Inclusion

As a core value, the NCAA believes in and is committed to diversity, inclusion and gender equity among its student-athletes, coaches and administrators. We seek to establish and maintain an inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds. Diversity and inclusion improve the learning environment for all student-athletes and enhance excellence within the Association.

The Office of Inclusion will provide or enable programming and education, which sustains foundations of a diverse and inclusive culture across dimensions of diversity including, but not limited to age, race, sex, national origin, class, creed, educational background, disability, gender expression, geographical location, income, marital status, parental status, sexual orientation and work experiences.

Adopted by the NCAA Executive Committee, April 2010

PRIMARY CONTACTS

Bernard Franklin – bfranklin@ncaa.org (Executive Vice President,
Chief Inclusion Officer)

Kimberly Ford - kford@ncaa.org (Minority Inclusion)

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NCAA Inclusion of Transgender Student-Athletes

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The purpose of this resource is to provide guidance to NCAA athletic programs about how to ensure transgender student-athletes fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge. It provides best practice and policy recommendations for intercollegiate athletic programs to provide transgender student-athletes with fair and equal opportunities to participate. In addition to specific policy recommendations for college athletics, the resource provides guidance for implementing these policies to ensure the safety, privacy, and dignity of transgender student-athletes as well as their teammates. Specific best practice recommendations are provided for athletic administrators, coaches, student-athletes and the media.

Authors:

Dr. Pat Griffin, Director of Changing the Game: The Gay, Lesbian, Straight Education Network (GLSEN) Sports Project www.sports.glesn.org, Professor Emerita in the Social Justice Education program at the University of Mass. Amherst, former athlete and collegiate coach.

Helen Carroll, Director of the National Center for Lesbian Rights (NCLR) Sports Project www.nclrights.org, former NCAA/NAIA basketball coach and collegiate athletic director at University of North Carolina Asheville and Mills College of Oakland, Ca.

Providing medical advice and understanding of the complexities of the transitioning student-athlete are: **Eric Vilain, M.D., Ph.D.**, Professor of Human Genetics, Pediatrics and Urology, Director of the Center for Gender-Based Biology and Chief of Medical Genetics in the UCLA Department of Pediatrics, member of the International Olympic Committee medical advisory board; **R. Nick Gorton, M.D.**, Emergency Medicine Physician, Sutter Davis Hospital, Primary Care Provider, Lyon- Martin Women's Health Services–San Francisco, Medical-Legal Consultant for transgender health care for Lambda Legal, the Transgender Law Center, the Northwest Justice Project, the New York Legal Aid Society, National Center for Lesbian Rights Sports Project and the Sylvia Rivera Law Project; **Lori Kohler, M.D.**, Medical Director of the Family Health Center at San Francisco General Hospital.

Providing review related to the legal rights of transgender student-athletes in the context of the broader legal status of transgender rights in the United States: Lambda Legal; American Civil Liberties Union; Transgender Law Center; National Center for Transgender Equality; Gay and Lesbian Advocates and Defenders; National Center for Lesbian Rights.

Providing expertise regarding National Collegiate Athletic Association rules, regulations and procedures related to drug testing, eligibility requirements, and gender equity: Karen Morrison, Director for Gender Inclusion Initiatives; Mary Wilfert, Associate Director, Health and Safety.

Providing a voice and sharing the experience of being a transgender student-athlete: Keelin Godsey, Track and Field, Rugby, Bates College, 2006, Northeastern College, 2010; Morgan Dickens, Basketball and Rugby, Cornell University, 2008, Ithaca College, 2009; Kye Allums, Women's Basketball, George Washington University, Class of 2012.



INTRODUCTION

What Does Transgender Mean?

“Transgender” describes an individual whose gender identity (one’s internal psychological identification as a boy/man or girl/woman) does not match the person’s sex at birth. For example, a male-to-female (MTF) transgender person is someone who was born with a male body, but who identifies as a girl or a woman. A female-to-male (FTM) transgender person is someone who was born with a female body, but who identifies as a boy or a man.¹

It is important that all people recognize and respect the transgender person’s identification as a man or a woman. In order to feel comfortable and to express their gender identity, transgender people may take a variety of steps: changing their names and self-referencing pronouns to better match their gender identity; choosing clothes, hairstyles, or other aspects of self-presentation that reflect their gender identity; and generally living, and presenting themselves to others, consistently with their gender identity. Some, but not all, transgender people take hormones or undergo surgical procedures to change their bodies to better reflect their gender identity.

Some people are confused by the difference between transgender people and people who have intersex conditions. The key feature of being transgender is having a psychological identification as a man or a woman that differs from the person’s sex at birth. Apart from having a gender identity that is different than their bodies, transgender people are not born with physical characteristics that distinguish them from others. In contrast, people with intersex conditions (which may also be called a “Disorders of Sex Development”), are born with physically mixed or atypical bodies with respect to sexual characteristics such as chromosomes, internal reproductive organs and genitalia, and external genitalia.²

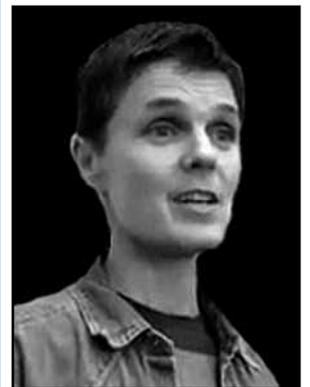
An increasing number of high school- and college-aged young people are identifying as transgender (or trans), meaning that their internal sense of their gender identity is different from the gender they were assigned at birth. These students challenge educators to rethink an understanding of gender as universally fixed at birth. Educators must be open to this challenge to create educational institutions that value and meet the needs of all students. Once we recognize that transgender young people are part of school communities across the United States, educational leaders have a responsibility to ensure that these students have access to equal opportunities in all academic and extracurricular activities in a safe and respectful school environment.

For a more complete list of definitions and terms related to transgender people, refer to Appendix A.

STEPHANIE BRILL

Executive Director, Gender Spectrum

“There are more and more transgender children today who, even at young ages, are allowed to live their lives in alignment with who they are. As it becomes common medical procedure to allow these children to transition in childhood, athletic policies need to reflect this change in the landscape of student-athletes.”



Athletics programs are widely accepted as integral parts of the college experience. The benefits of athletics participation include many positive effects on physical, social, and emotional well-being. Playing sports can provide student-athletes with important lessons about self-discipline, teamwork, success, and failure—as well as the joy and shared excitement that being a member of a sports team can bring.

For some students, playing on collegiate sports teams leads to future careers in athletics as competitors, coaches, administrators, and athletic trainers. All students, including those who are transgender, deserve access to these benefits.

Though the needs of transgender college students have received some attention in recent years, this issue has not been adequately addressed in the context of athletics. Few collegiate athletics programs, administrators, or coaches have been prepared to fairly, systematically, and effectively address a transgender student's interest in participating in athletics. The majority of intercollegiate athletics programs have no policy governing the inclusion of transgender student-athletes, and most coaches have not received any direction for accommodating a transgender student who wants to play on a sports team. In fact, most intercollegiate athletics programs have not received the information to address even basic accommodations such as knowing what pronouns or names to use when referring to a transgender student, where a transgender student should change clothes for practice or competition, or what bathroom or shower that student should use.

The best practices and recommended policies within this resource will provide athletics administrators and others involved in intercollegiate athletics with the information and tools to support participation of transgender student-athletes and create environments that respect students from all backgrounds.

PART ONE

Overview

This section provides an overview of issues related to providing participation opportunities for transgender student-athletes by addressing the following questions:

- Why must we address transgender issues in athletics?
- Why focus on college athletics?
- Should the participation of transgender student-athletes raise concerns about competitive equity?
- What are the benefits of adopting fair and inclusive policies?

Why Must We Address Transgender Issues in Collegiate Athletics Programs?

Educators must address transgender issues in athletics for several reasons. First and foremost, core values of equal opportunity and inclusion demand that educational leaders adopt thoughtful and effective policies that enable all students to participate fully in intercollegiate athletics programs. Over the course of many years, schools have learned and continue to appreciate the value and necessity of accommodating the sport participation interests of students of color, women, students with disabilities, and lesbian, gay, and bisexual students. These are all issues of basic fairness and equity that demand the expansion of our thinking about equal opportunity in sports. The right of transgender students to participate in sports calls for similar considerations of fairness and equal access.

Additionally, as more states, localities, and schools add gender identity and expression to their non-discrimination policies, and as more courts hold that sex discrimination laws protect transgender people, transgender students and their parents are increasingly empowered to insist that athletics programs accommodate transgender students (see Part Four: Appendix C for a compilation of state and federal laws, regulations, and legal decisions prohibiting discrimination based on gender identity/expression). To avoid decision-making that perpetuates discrimination, school leaders must be proactive in adopting policies that are consistent with school non-discrimination policies and state and federal laws prohibiting discrimination based on gender identity or expression (see Appendix A for definitions of gender identity and gender expression).

Though the number of transgender students is small, research indicates that their number is growing.³ As the number of people who come out as transgender as teenagers and children increases, so too do the numbers of parents who support their transgender children and advocate for their rights to safety and fair treatment. In response to these demands, college leaders must be prepared to accommodate the educational needs and protect the rights of transgender students.

To respond to these realities, athletics conferences and individual universities/colleges are well advised to proactively adopt policies and best practices that provide equal opportunities for transgender students to participate on sports teams. Moreover, in the spirit of encouraging sports participation for all, it is the right thing to do.

In order to design effective policies, educators must understand that gender is a core part of everyone's identity and that gender is more complex than our society generally acknowledges. Learning about the experience of transgender people can help us to see more clearly how gender affects all of our lives, and to put that knowledge into practice in order to better serve all students.

Addressing the needs of transgender students is an important emerging equal opportunity issue that must be taken seriously by school leaders. Because a more complex understanding of gender may be new and

challenging for some people, there is a danger that misinformation and stereotypes rather than accurate and up-to-date information will guide policy decisions. Campus and athletics administrators who are charged with policy development need guidance to avoid including misconceptions and misinformation in policies that, ultimately, create more problems than they solve.

Lea Robinson

Associate Director, Office of Multicultural Affairs, Columbia University

American Association of University Women (AAUW)

(former coach and athlete)

“During my coaching career, there was little discussion of the existence of transgender student-athletes and few resources for those student-athletes that did identify as transgender.

In my own experience, the few students that I did suspect may have identified as transgender weren’t really able to come out in those settings because of a lack of support within their athletic communities as well as a real lack of resources, education, and safe spaces.

I believe that the implementation of supportive policies would signify a commitment to the support and acceptance of transgender-identified student-athletes and coaches, and aid in creating more spaces for dialogue and education within the culture of athletics regarding issues and challenges facing transgender student-athletes.

Those policies will also give transgender student-athletes and coaches the guidance, support, encouragement, and sense of safety they need to pursue what can sometimes be a very difficult journey.”



Why Focus on College Athletics?

Providing equal opportunities in all aspects of school programming is a core value in education. As an integral part of higher educational institutions, college athletics programs are responsible and accountable for reflecting the goals and values of the educational institutions of which they are a part. It follows that athletics programs must reflect the value of equal opportunity in all policies and practices.

A core purpose of college is to teach students how to participate and be good citizens in an increasingly diverse society and how to interact respectfully with others. In addition, college athletics programs impose limits on how many years a student-athlete can compete that do not exist in adult sporting competitions, where athletes can compete as long as their performances are viable or, in the case of most amateur sports, as long as they wish to. Intercollegiate athletics provides a unique opportunity to provide participation opportunities for all students regardless of race, religion, sexual orientation or gender expression.

As a core value, the NCAA believes in and is committed to diversity, inclusion and gender equity among its student-athletes, coaches and administrators. The NCAA seeks to establish and maintain an inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds. Diversity and inclusion improve the learning environment for all student-athletes and enhance excellence within the Association.

The NCAA Office of Inclusion provides or enables programming and education, which sustains foundations of a diverse and inclusive culture across dimensions of diversity including, but not limited to age, race, sex, class, national origin, creed, educational background, disability, gender expression, geographical location,

income, marital status, parental status, sexual orientation and work experiences. In keeping with those values of inclusion, the NCAA encourages thoughtful development of policies and practices that provide fair participation opportunities for all student-athletes, including transgender individuals.

Should the Participation of Transgender Student-Athletes Raise Concerns About Competitive Equity ?

Concern about creating an “unfair competitive advantage” on sex-separated teams is one of the most often cited reasons for resistance to the participation of transgender student-athletes. This concern is cited most often in discussions about transgender women competing on a women’s team. Some advocates for gender equality in college sports are concerned that allowing transgender women—that is, male-to-female transgender athletes who were born male, but who identify as female—to compete on women’s teams will take away opportunities for women, or that transgender women will have a competitive advantage over other women competitors.

These concerns are based on three assumptions: one, that transgender women are not “real” women and therefore not deserving of an equal competitive opportunity; two, that being born with a male body automatically gives a transgender woman an unfair advantage when competing against non-transgender women; and three, that men might be tempted to pretend to be transgender in order to compete in competition with women.

These assumptions are not well founded. First, the decision to transition from one gender to the other—to align one’s external gender presentation with one’s internal sense of gender identity—is a deeply significant and difficult choice that is made only after careful consideration and for the most compelling of reasons. Gender identity is a core aspect of a person’s identity, and it is just as deep seated, authentic, and real for a transgender person as for others. Male-to-female transgender women fully identify and live their lives as women, and female-to-male transgender men fully identify and live their lives as men.

Second, some people fear that transgender women will have an unfair advantage over non-transgender women. It is important to place that fear in context.

Transgender girls who medically transition at an early age do not go through a male puberty, and therefore their participation in athletics as girls does not raise the same equity concerns that arise when transgender women transition after puberty.

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. Many people may have a stereotype that all transgender women are unusually tall and have large bones and muscles. But that is not true. A male-to-female transgender woman may be small and slight, even if she is not on hormone blockers or taking estrogen. It is important not to overgeneralize. 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.⁴

DR. NICK GORTON

***American Board of Emergency Medicine, Medical Legal Consultant,
Trans Health Care***

“Transgender student-athletes fall within the spectrum of physical traits found in athletes of their transitioned gender, allowing them to compete fairly and equitably.”



It is also important to know that any strength and endurance advantages a transgender woman arguably may have as a result of her prior testosterone levels dissipate after about one year of estrogen or testosterone-suppression therapy. According to medical experts on this issue, the assumption that a transgender woman competing on a women's team would have a competitive advantage outside the range of performance and competitive advantage or disadvantage that already exists among female athletes is not supported by evidence.

Finally, fears that men will pretend to be female to compete on a women's team are unwarranted given that in the entire 40 year history of "sex verification" procedures in international sport competitions, no instances of such "fraud" have been revealed.⁵ Instead, rather than identifying men who are trying to fraudulently compete as women, "sex verification" tests have been misused to humiliate and unfairly exclude women with intersex conditions.⁶ The apparent failure of such tests to serve their stated purpose of deterring fraud—and the terrible damage they have caused to individual women athletes—should be taken into account when developing policies for the inclusion of transgender athletes.

Educators in collegiate athletics programs must develop thoughtful and informed practices that provide opportunities for all students, including transgender students, to participate in sports. These practices must be based on sound medical science, which shows that male-to-female transgender athletes do not have any automatic advantage over other women. These practices must also be based on the educational values of sport and the reasons why sport is included as a vital component of the educational environment: promoting the physical and psychological well-being of all students, and teaching students the values of equal opportunity, participation, inclusion, teamwork, discipline, and respect for diversity.

What Are the Benefits of Adopting Inclusive Practices Regarding Transgender Student-Athletes?

All stakeholders in NCAA athletics programs will benefit from adopting fair and inclusive practices enabling transgender student-athletes to participate on school sports teams. School-based sports, even at the most competitive levels, remain an integral part of the process of education and development of young people, especially emerging leaders in our society. Adopting fair and inclusive participation practices will allow school and athletics leaders to fulfill their commitment to create an environment in which all students can thrive, develop their full potential, and learn how to interact with persons from diverse groups.

JILL PILGRIM

***Precise Advisory Group, Principal Counsel
Former General Counsel & Drug Testing Program Administrator
Ladies Professional Golf Association***

"Colleges need to adopt transgender student-athlete accommodation policies to remedy the silent suffering of young people who have the right to participate and enjoy the same activities that all other students have access to, without being discriminated against."



Many schools and athletics departments identify diversity as a strength and have included sexual orientation and gender identity/expression in their non-discrimination policies. Athletics departments and personnel are responsible for creating and maintaining an inclusive and non-discriminatory climate in the areas they oversee. Adopting inclusive participation practices provides school athletics administrators with a concrete opportunity to fulfill that mandate and demonstrate their commitment to fair play and inclusion.

Moreover, when all participants in athletics are committed to fair play, inclusion, and respect, student-athletes are free to focus on performing their best in athletic competition and in the classroom. This climate promotes the well-being and achievement potential of all student-athletes. Every student-athlete and coach will benefit from meeting the challenge of overcoming fear and prejudice about social groups of which they are not members. This respect for difference will be invaluable to all student-athletes as they graduate and enter an increasingly diverse workforce in which knowing how to work effectively across differences is a professional and personal asset.

The benefits of school sports participation include many positive effects on physical, social, and emotional well-being. All students, including those who are transgender, deserve access to these benefits.⁷ *When athletics departments adopt inclusive policies, they are living up to the educational values of equality that join them with the broad institutional and societal ideal of inclusion and respect for differences.*

PART TWO

Recommendations for Including Transgender Student-Athletes

This section of the resource includes:

- Guiding Principles
- Recommended Policy for College Athletics
- Additional Guidelines for Transgender Student-Athlete Inclusion

Guiding Principles

Policies governing the participation of transgender student-athletes should be informed by the following principles, and be included in the institution's transgender student-athlete policy statement:

1. Participation in intercollegiate athletics is a valuable part of the education experience for all students.
2. Transgender student-athletes should have equal opportunity to participate in sports.
3. The integrity of women's sports should be preserved.
4. Policies governing sports should be based on sound medical knowledge and scientific validity.
5. Policies governing sports should be objective, workable, and practicable; they should also be written, available and equitably enforced.
6. Policies governing the participation of transgender students in sports should be fair in light of the tremendous variation among individuals in strength, size, musculature, and ability.
7. The legitimate privacy interests of all student-athletes should be protected.
8. The medical privacy of transgender students should be preserved.
9. Athletics administrators, staff, parents of athletes, and student-athletes should have access to sound and effective educational resources and training related to the participation of transgender and gender-variant students in athletics.
10. Policies governing the participation of transgender students in athletics should comply with state and federal laws protecting students from discrimination based on sex, disability, and gender identity and expression.

Policy Recommendations for Collegiate Athletics

Policy development governing the inclusion of transgender student-athletes is an emerging endeavor. As new research on the participation of transgender athletes and the physiological effects of gender transition on athletic performance becomes available, policies may need to be re-evaluated to ensure that they reflect the most current research-based information.

KEELIN GODSEY

Former Student-Athlete, Bates College 2006, Northeastern College, 2010



I was 18 when I started to figure out I was transgender, but the thought of telling anyone was absolutely frightening. I didn't have the support system I needed and I didn't know how it would impact my track and field career.

I started researching rules and regulations for transgender athletes, and while I was able to find a policy from the International Olympic Committee, I couldn't find anything that would apply to me at the collegiate level. I later found out it was because they didn't have any policies.

I also tried to find information about transgender athletes, which, at the time, was like trying to find a needle in a haystack. I became very fearful that you couldn't be transgender and a champion collegiate athlete at the same time. This fear, the lack of policies and information about successful transgender athletes, and the fact that I was the track team's biggest scorer and a national contender each year, caused me to hold off on coming out as transgender for almost three years. I was so afraid of losing everything I had worked so hard to accomplish in track and field and that I would no longer be able to compete in something that defined me as much as being transgender does.

But by the end of my junior year I couldn't hide who I was anymore. I felt I had no choice but to face the consequences head on and come out as FTM. I was afraid if I didn't, I wouldn't make it through my senior year. I started by coming out to a professor/mentor. This wasn't too hard, but I knew that I had to come out to the athletic director, and that getting his/ her support was imperative in order for my "transition" of names and pronouns to work and my continued participation on the women's track and field team to go smoothly.

At the time, my track team had a new head coach, and I was really nervous about how she was going to respond. But after having a long talk with her it was clear that she understood and that she was there to help. Together, we were able to think through how my coming out might affect the team, and come up with the best plan for telling my teammates. When I came out to the team, I wasn't met with the fear and hate that I was expecting. In fact, it was the complete opposite. My team was awesome. The only thing that was said was, "Please forgive us if we slip on the pronouns while we adjust." And, to tell the truth, I don't think I ever once heard them slip up on pronouns.

Everyone's biggest concern was how my transition was going to be received outside of Bates, as, at that time, the NCAA didn't have any rules or guidelines about transgender athletes. Since I was already a national champion in the Women's Hammer Throw, as well as holding the DIII national record as an 11-time all-American, we knew my coming out was very much going to be a public event. Unfortunately, things went less smoothly off-campus than on. I was extremely lucky though to have the support of my teammates and my coach, who helped me succeed despite all of the outside stresses I experienced as an FTM competing at the national level on a women's team. My teammates were the first to defend me when people were being hateful, when the media was stalking me or when I was repetitively accused of cheating despite all of my clean drug (testosterone) tests. I had chosen to forego any medical transitioning to remain on my women's team. My team was also there to share in the positive things that happened as a result of my coming out.

NCAA Bylaws related to hormonal treatment and mixed teams.

Two areas of NCAA regulations can be impacted by transgender student-athlete participation: use of banned substances and mixed team status.

A mixed team is a varsity intercollegiate sports team on which at least one individual of each gender competes. (*Revised: 5/8/06*). NCAA Bylaw 18.02.2 for purposes of meeting the required minimums set forth in Bylaws 18.2.3 and 18.2.4, a mixed team shall be counted as one team. A mixed team shall count toward the minimum sponsorship percentage for men's championships.

- NCAA rules state that a male participating in competition on a female team makes the team a "mixed team." The mixed team can be used for sports sponsorship numbers (provided other conditions, such as being an acceptable NCAA sport, outlined in Bylaw 20.9 (Division I), 20.10 (Division II) and 20.11 (Division III) are met) and counts toward the mixed/men's team minimums within the membership sports-sponsorship requirements. Such a team is ineligible for a women's NCAA championship but is eligible for a men's NCAA championship.
- A female on a men's team does not impact sports sponsorship in the application of the rule—the team still counts toward the mixed/men's numbers. Such a team is eligible for a men's NCAA championship.
- Once a team is classified as a mixed team, it retains that status through the remainder of the academic year without exception.

NCAA Bylaw 31.2.3 identifies testosterone as a banned substance, and provides for a medical exception review for demonstrated need for use of a banned medication. It is the responsibility of the NCAA institution to submit the request for a medical exception (see www.ncaa.org/drugtesting) for testosterone treatment prior to the student-athlete competing while undergoing treatment. In the case of testosterone suppression, the institution must submit written documentation to the NCAA of the year of treatment and ongoing monitoring of testosterone suppression.

NCAA Policy on Transgender Student-Athlete Participation

The following policies clarify participation of transgender student-athletes undergoing hormonal treatment for gender transition:

1. A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.
2. A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.⁸

ERIC VILAIN

M.D., Ph.D., Professor, Director of the Center for Gender-Based Biology and Chief Medical Genetics Department of Pediatrics, UCLA

“Research suggests that androgen deprivation and cross sex hormone treatment in male-to-female transsexuals reduces muscle mass; accordingly, one year of hormone therapy is an appropriate transitional time before a male-to-female student-athlete competes on a women's team.”



Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.

- A trans male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men's or women's team.
- A trans female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women's team.

Additional considerations

The student's responsibilities

1. In order to avoid challenges to a transgender student's participation during a sport season, a student-athlete who has completed, plans to initiate, or is in the process of taking hormones as part of a gender transition should submit the request to participate on a sports team in writing to the director of athletics upon matriculation or when the decision to undergo hormonal treatment is made.
2. The request should include a letter from the student's physician documenting the student-athlete's intention to transition or the student's transition status if the process has already been initiated. This letter should identify the prescribed hormonal treatment for the student's gender transition and documentation of the student's testosterone levels, if relevant.

The school's responsibilities

1. The director of athletics should meet with the student to review eligibility requirements and procedure for approval of transgender participation.
2. If hormone treatment is involved in the student-athlete's transition, the director of athletics should notify the NCAA of the student's request to participate with a medical exception request.
3. To assist in educating and in development of institutional policy and practice, a Transgender Participation Committee should be established. Members of the committee should represent a cross section of the institutional staff with student well-being interests, and include representation from the following departments: office of general counsel, health and counseling, faculty/academic affairs, and athletics.
4. All discussions among involved parties and required written supporting documentation should be kept confidential, unless the student-athlete makes a specific request otherwise. All information about an individual student's transgender identity and medical information, including physician's information provided pursuant to this policy, shall be maintained confidentially.

PART THREE

Best Practices and Guidelines for Inclusion of Transgender Student-Athletes

Part Three describes best practices — the actions that coaches, administrators and student-athletes can take to assure the inclusion of transgender student-athletes. Although these practices specifically address transgender student-athletes, they can be used to address discrimination based on other factors as well, such as race, religion, class, and sexual orientation.

The first part of this section describes general best practices for everyone. The next sections identify best practices recommended specifically to athletics administrators, coaches, student-athletes, and athletics staff who interact with the media.

MORGAN DICKENS

***Former Basketball, Rugby Student-Athlete,
Cornell University 2008, Ithaca College 2009***

“There are differences between being male and female, but being gender fluid doesn’t mean I reject these differences, it just means I’m rejecting the idea that I have to be defined one way or another. The clear delineation between male and female in the sporting world doesn’t leave room for someone like me. When I started presenting in a more masculine way, I was ostracized in girls’ locker rooms, told I was in the wrong bathroom, and even once had my gender questioned during a co-ed intramural football game. Because athletics are such an important part of my life, I deal with these and other inequalities and misunderstandings. While I’m prepared to handle it, my concern is there aren’t many other people out there who are prepared and willing to engage in a dialogue about the presence of gender fluid athletes in sport.”



Overall Best Practices

1. **Provide Equal Opportunity** — Colleges and universities often have legal obligations to provide equal opportunity to student-athletes and to personnel, including coaches. All those involved in athletics should be aware of these obligations, and treat them as core values, guiding policies and practices. Transgender discrimination may be a part of a systemic problem where the broader environment is unfriendly or discriminatory toward lesbian, gay, bisexual, and transgender people. This can negatively affect all men and women who participate in athletic competition. If discrimination is accepted as part of the common practices of an athletics department, this will undermine the core principle of equal opportunity.
2. **Value Diversity** — In creating guidelines or best practices for including transgender student-athletes, it is important to place this conversation in the context of the athletics department’s broad commitments to safety, fairness, and respect for all participants. It helps when athletics department leadership, including coaches, value all aspects of diversity. Collegiate athletics provides an opportunity for students to compete with and against others who come from different races, cultures, religions, sexual

orientations, gender identities and expressions, and social classes, but all of whom share the common goal of achieving athletic excellence. Valuing this common ground enhances the social and competitive experience for all. Athletics administrators should make their commitment to valuing diversity explicit in media interviews and other public speaking opportunities as well as in meetings with athletics department staff. That diversity-valuing approach then shapes and informs activities throughout the athletics department and is conveyed to coaches and student-athletes. Everyone should also understand how these core values are important to team success and to individual team member development. Teams that value each member's contribution to the unit, while respecting individual differences, provide a foundation for the whole team and each member of the team to focus on achieving their athletic and academic goals.

3. **Establish policy** — When diversity values are explicit, athletics departments, institutions, state, and national governing organizations are in a position to develop specific policy statements that reflect a commitment to these values. These policy statements, if followed, protect schools, administrators, student-athletes, and coaches from litigation and other negative consequences. Coaches should know that they may have a transgender student-athlete on their teams and should be equipped to make that experience a positive one for the athlete and teammates. Parents should communicate the importance of these values in meetings with prospective coaches and athletics administrators. Student-athletes can discuss these values with new team members and in public speaking opportunities.

LAURIE PRIEST

*Chair of Physical Education and Director of Athletics,
Mt. Holyoke College*

“It is imperative that administrators and coaches provide a safe and inclusive environment so that all student-athletes can participate and achieve success. Being aware of appropriate laws can help us to develop policies and implement practices to assure that all of our students are treated with respect.”



Best Practices for Athletics Administrators

Best practices for athletics administrators focus on policy development, discrimination prevention, education, enforcement procedures, and consequences. These best practices will be helpful to a wide range of athletics administrators in organizations including colleges and universities, collegiate sport-governing organizations, coaches associations, and athletics conferences.

1. If the school does not have an inclusive non-discrimination and harassment policy, work with other school administrators to adopt a policy that includes gender identity and expression.
2. Respect the right to privacy of all student-athletes with respect to personal information (including whether a student is transgender) when discussing gender identity and expression and understand that all medical information must be kept confidential in accordance with applicable state, local, and federal privacy laws.
3. Become knowledgeable about collegiate non-discrimination and harassment policies that include gender identity and expression.
4. Include gender identity and expression in departmental non-discrimination statements on all official department documents and web sites.
5. Become aware of state and federal non-discrimination laws that prohibit discrimination based on gender identity and expression (see Part 4 Appendix C for a list of relevant federal and state laws).
6. Adopt an effective and fair athletics departmental policy addressing the participation of transgender

- student-athletes that is consistent with school policy and state or federal non-discrimination laws.
7. Educate all members of the athletics department community (including staff, student-athletes, and parents) about departmental and school policy regarding the participation of transgender student-athletes in athletics.
 8. Educate yourself about transgender identity, preferred terminology, and current scientific perspectives on the participation of transgender student-athletes on men's and women's sports teams.
 9. Work with athletics conferences of which your school is a member to adopt fair and effective policies governing the participation of transgender student-athletes.
 10. Recommend that your athletics conference sponsor educational programs for coaches and student-athletes on the inclusion of transgender student-athletes, preferred terminology, and understanding transgender identity.
 11. Recommend that professional associations for athletics administrators sponsor educational programs on the inclusion of transgender student-athletes, preferred terminology, understanding transgender identity, and adopting fair and effective policies.
 12. Educate all members of the sports information department about transgender identity, preferred terminology, department policies governing the participation of transgender student-athletes, and confidentiality requirements when discussing transgender student-athlete participation with the media.

Best Practices for Coaches

Best practices for coaches focus on acquiring knowledge about transgender student-athletes, understanding legal and ethical obligations, maintaining professional conduct, and ensuring that those with whom coaches work are also educated and aware of these issues.

1. Become knowledgeable about school non-discrimination and harassment policies that include gender identity and expression.
2. Become knowledgeable about departmental and school policy regarding the participation of transgender student-athletes in athletics.
3. If your department does not have a policy addressing the participation of transgender student-athletes, ask your athletic director to adopt one.
4. Educate student-athletes on your team about transgender identity, preferred terminology, and departmental/school policies regarding the participation of transgender student-athletes on sports teams.
5. Be prepared to talk with parents of student-athletes about transgender student-athletes' participation on school teams.
6. Use respectful and preferred language and terminology when discussing transgender student-athlete participation or interacting with a transgender student-athlete.
7. Anticipate and address transgender student-athlete access issues proactively and in accordance with departmental policy regarding locker room use, toilet and shower availability, hotel room assignment, uniforms and dress codes.
8. Recommend that coaches associations to which you belong adopt fair and effective policy statements addressing the participation of transgender student-athletes.
9. Recommend that coaches associations to which you belong sponsor educational programs addressing the participation of transgender student-athletes.
10. If you are aware of discriminatory or harassing behavior from opposing teams or spectators based on the perceived or actual gender identity or expression of a student-athlete, talk to the opposing coach and ask your director of athletics to talk with the opposing school's athletic director.
11. Respect the right to privacy of all student-athletes with respect to personal information (including whether a student is transgender) when discussing gender identity and expression and understand that all medical information must be kept confidential in accordance with applicable state, local, and federal privacy laws.

JENNIFER 'JAY' HARTSHORN

Track and Field Coach, Bates College

"I think it's important for us to be aware there are transgender student-athletes who want to compete, and with a little preparation, including transgender athletes isn't a big deal."



Best Practices for Student-Athletes

Best practices for student-athletes who have transgender teammates focus on respectful behavior, safety, and valuing diversity.

1. Use respectful and preferred language and terminology when discussing transgender student-athlete participation or interacting with a transgender teammate.
2. Become familiar with departmental and school policy governing the participation of transgender student-athletes in athletics.
3. Learn about school non-discrimination and harassment policies that include gender identity and expression.
4. Encourage other student-athletes to use respectful language when discussing transgender issues in sports or interacting with a transgender student-athlete.
5. Respect the right to privacy of all student-athletes with respect to personal information (including whether a student is transgender) when discussing gender identity and expression.
6. Ask your coach and director of athletics for team and departmental educational training concerning transgender student-athlete participation.
7. If taunting or harassment from spectators or opponents occurs during competition, take the approach that these actions are never acceptable for any reason including taunting or harassment based on gender identity or expression. Make your coaches aware of discriminatory or harassing behavior and ask them to arrange a meeting with the opposing school's director of athletics to address this behavior.
8. Ask your student-athlete advisory committee to plan an activity that focuses on the participation of transgender athletes in sports and frame the issue as one of equal opportunity in sports and fair treatment for all.

KYE ALLUMS, 2008-11, CLASS OF 2012

Women's NCAA Division I Basketball Student-Athlete

George Washington University

Coming to the realization that I am a transgender man has been an incredible and mind-blowing experience. I had to overcome a lot of mental blocks to get there, but when I got to college and had my first taste of independence, I was finally able to come to terms with how I truly felt and what I needed.

Growing up, I felt that I had to hide a part of my self from my family because of my mother's strong beliefs against homosexuality. That was really stressful for me. After I graduated from high school, I moved away from my family. That gave me the space to figure out who I am, which turned out to be the best thing that ever happened to me.

When I first had the feeling of being uncomfortable when someone would call me a "lady," I did some research to try to figure out what that feeling could possibly mean. The first thing that I came across was the term "transsexual," which is when a person's sex doesn't match their gender identity and they have taken the steps possible, like surgery and hormones, so that their sex and gender will match. I read about many different terms and definitions and the one that I could relate to the most was "transgender," which just means that your gender and your body don't match.

After I had a word to describe what I was feeling, I started getting extremely distressed when other people would refer to me as "she," or hearing people refer to me and a group of women as "ladies," or seeing the label "women's" outside my locker room. The feeling of having someone call you something that you know you are not is the most frustrating, uncomfortable feeling ever. During my first and second year of college, I kept hearing those terms applied to me and feeling worse and worse about it. A pain built up in my stomach and chest as if there were a ton of bricks weighing on me and my emotions. I felt trapped and miserable—I learned that the medical term is "dysphoric"—because I could not escape the way people saw me, because the body that I was born in did not match my gender.

Even though I was feeling so bad, it was very hard for me to build up enough courage to say anything, because I was afraid that other people wouldn't accept me. After freshmen year I told my closest teammates that I identify as a guy. At first they laughed and thought it was a joke, and I couldn't bring myself to correct them. But over time, it got to the point where it was unbearable to keep living like this. For a while I felt like I had to choose between playing basketball or quitting to transition into the person I want to become. But I didn't want to walk out on playing a game that I love, and that has afforded me a full scholarship to pay for my education. So I finally began correcting my friends and teammates every time they would refer to me as "she" or "her."

When my friends and close teammates saw the pain and sadness it caused me when people referred to me using female pronouns, they began to use male pronouns and to correct others for me. Their respect for what I wanted to be called meant the world to me and still does. Without their support I would not be playing basketball right now.

My teammates' support made a huge difference, but of course they could not be with me all the time to correct everyone. I didn't feel comfortable correcting people on my own all the time, because I would have to explain the entire story of why I wanted to be called a guy. I felt depressed by the constant reminders that I was "Ms. Allums" every time I had to show my identification: at the doctor's office, the gym, the bank, restaurants, stores, and pretty much anywhere I went.

So I decided to take the steps needed to get my name changed so I could have some kind of tangible proof that I was becoming the man I knew I was. That process took four months, and it was very difficult and time-consuming, but the day it was done I was the happiest guy alive.

The happiness wore off the next day, though, when I heard my coaches still using female pronouns. I knew then that it wasn't enough to only tell my closest friends—I had to tell everyone that I talked to on a daily basis. Once I made the difficult decision to tell my coaches, the rest of my teammates, and my family, I received nothing but support from them, which has been irreplaceable. With the love and respect of the people around me, I no longer feel like I have to choose between being true to myself and staying in school playing the sport I love.

Best Practices for Athletics Staff Interacting With Media About Transgender Student-Athlete Issues

Best practices for interacting with the media focus on the importance of understanding basic information about transgender identity, preferred terminology, and respecting confidentiality of student-athletes.

1. The school or athletics department should provide training to all athletics staff who may interact with the media.
2. Respect the confidentiality of all student-athletes when discussing transgender issues with the media and understand that all medical information must be kept confidential in accordance with applicable state, local, and federal privacy laws.
3. Use appropriate language in media interviews or presentations and insist that this terminology be used in media reports on transgender issues in athletics.
4. Focus on the importance of providing equal opportunities for all students to participate in athletics.
5. Describe how departmental policies provide equal opportunities for all students to participate in athletics.

Additional Guidelines for Transgender Student-Athlete Inclusion

The following additional guidelines will assist colleges, athletics departments, coaches, teams, and student-athletes in creating an environment in which all student-athletes are safe and fairly treated.

Facilities Access

1. **Changing Areas, Toilets, Showers** — Transgender student-athletes should be able to use the locker room, shower, and toilet facilities in accordance with the student's gender identity. Every locker room should have some private, enclosed changing areas, showers, and toilets for use by any athlete who desires them. When requested by a transgender student-athlete, schools should provide private, separate changing, showering, and toilet facilities for the student's use, but transgender students should not be required to use separate facilities.
2. **Competition at Another School** — If a transgender student-athlete requires a particular accommodation to ensure access to appropriate changing, showering, or bathroom facilities, school leaders, athletic directors, and coaches, in consultation with the transgender student-athlete, should notify their counterparts at other schools prior to competitions to ensure that the student has access to facilities that are comfortable and safe. This notification should maintain the student's confidentiality. Under no circumstances should a student-athlete's identity as a transgender person be disclosed without the student's express permission.
3. **Hotel Rooms** — Transgender student-athletes generally should be assigned to share hotel rooms based on their gender identity, with a recognition that any student who needs extra privacy should be accommodated whenever possible.

Language

1. **Preferred Names** — In all cases, teammates, coaches and all others in the school should refer to transgender student-athletes by a student's preferred name.
2. **Pronouns** — Similarly, in all cases, pronoun references to transgender student-athletes should reflect the student's gender and pronoun preferences.

Dress Codes and Team Uniforms

1. **Dress Codes**—Transgender student-athletes should be permitted to dress consistently with their gender identities. That is, a female-to-male transgender athlete should be permitted to dress as a male. A male-to-female should be permitted to dress as a female.
For reasons unrelated to trans-inclusion, schools should evaluate the necessity of gendered dress codes

and recognize that they tend to marginalize a range of students who may not feel comfortable with them. Dress codes for athletic teams when traveling or during a game day at school should be gender-neutral. Instead of requiring a girls' or women's team to wear dresses or skirts, for example, ask that team members wear dresses or slacks that are clean, neat, well cared for and appropriately "dressy" for representing their school and team.

2. Uniforms — All team members should have access to uniforms that are appropriate for their sport and that they feel comfortable wearing. No student should be required to wear a gendered uniform that conflicts with the student's gender identity.

Education

1. Institutions — All members of the university community should receive information and education about transgender identities, institutional and conference non-discrimination policies, the use of preferred names and pronouns, and expectations for creating a respectful team and school climate for all students, including transgender and gender-variant students.
2. Athletics Conference Personnel — Athletics conference leaders should be educated about the need for policies governing the participation of transgender student-athletes, develop such policies, and ensure that all schools in the conference understand and adopt the policies.
3. Opposing Teams/Universities — Without violating a transgender student's confidentiality or privacy, school leaders, athletic directors, and coaches should communicate with their counterparts at other schools prior to competitions in which a transgender athlete is participating about expectations for treatment of transgender student-athletes on and off the field. This does not require "outing" or otherwise identifying a particular student-athlete as transgender, but rather establishing general expectations for the treatment of all student-athletes, including those who may be transgender.

Media

1. Training — All school or athletics representatives (conference leaders, sports information departments and personnel, school leaders, athletics administrators, team members, and coaches) who are authorized to speak with the media should receive information about appropriate terminology, use of names and pronouns, and school and athletics conference policies regarding the participation of transgender student-athletes on school sports teams.
2. Confidentiality — Protecting the privacy of transgender student-athletes must be a top priority for all athletics department and affiliated school personnel, particularly when in the presence of the media. All medical information shall be kept confidential in accordance with applicable state, local, and federal privacy laws.

Enforcement and non-Retaliation

1. Enforcement — Any member of an athletics department who has been found to have violated this policy by threatening to withhold athletic opportunity or harassing any student on the basis of their gender identity or expression, or by breaching medical confidentiality, will be subject to disciplinary action, up to and including discharge or expulsion from the school. The athletics department should take appropriate remedial action to correct the situation. Any member of the athletics department who becomes aware of conduct that violates this policy should report the conduct to the appropriate official such as the director of athletics.
2. Retaliation — Retaliation is specifically forbidden against anyone who complains about discrimination based on gender identity or expression, even if the person was in error. Athletics departments should take steps to prevent any retaliation against any person who makes such a complaint.

APPENDIX A

Definitions and Terminology: A Word About Words

Language has immense power to shape our perceptions of other people. Using accurate language can help to overcome many of the misperceptions associated with gender and transgender people. Although the vocabulary related to transgender people continues to evolve, here are some working definitions and examples of frequently used (and misused) terms.

Biological/Anatomical Sex — The physical characteristics typically used to assign a person’s gender at birth, such as chromosomes, hormones, internal and external genitalia and reproductive organs. Given the potential variation in all of these, biological sex must be seen as a spectrum or range of possibilities rather than a binary set of two options.

Gender — The complex relationship between physical traits and one’s internal sense of self as male, female, both or neither as well as one’s outward presentations and behaviors related to that perception. Biological sex and gender are different; gender is not inherently connected to one’s physical anatomy

Gender Identity — One’s inner concept of self as male or female or both or neither. One’s gender identity can be the same or different than the gender assigned at birth. Most people become conscious of their gender identity between the ages 18 months and 3 years. Most people have a gender identity that matches their assigned gender at birth. For some, however, their gender identity is different from their assigned gender. Some of these individuals choose to live socially as the other gender and may also hormonally and/or surgically change their bodies to more fully express their gender identity. All people have gender identity, not just transgender people.

Gender Expression — Refers to the ways in which people externally communicate their gender identity to others through behavior, clothing, haircut, voice, and other forms of presentation. Gender expression also works the other way as people assign gender to others based on their appearance, mannerisms, and other gendered characteristics. Many transgender people seek to make their external appearance—their gender expression—congruent with their internal gender identity through clothing, pronouns, names, and, in some cases, hormones and surgical procedures. All people have gender expression, not just transgender people.

Transgender — Sometimes used as an ‘umbrella term’ to describe anyone whose identity or behavior falls outside of stereotypical gender norms. More narrowly defined, it refers to an individual whose gender identity does not match their assigned birth gender. Being transgender does not imply any specific sexual orientation (attraction to people of a specific gender.) Therefore, transgender people may additionally identify as straight, gay, lesbian, or bisexual.

Sexual Orientation — Term that refers to being romantically or sexually attracted to people of a specific gender. Our sexual orientation and our gender identity are separate, distinct parts of our overall identity. Although a child may not yet be aware of their sexual orientation, they usually have a strong sense of their gender identity.

Genderqueer — This term represents a blurring of the lines around gender identity and sexual orientation. Genderqueer individuals typically reject notions of static categories of gender and embrace a fluidity of gender identity and sexual orientation. This term is typically assigned an adult identifier and not used in reference to preadolescent children.

Gender Nonconforming/Gender Variant — Refers to individuals whose behaviors and/or interests fall outside what is considered typical for their assigned gender at birth. Someone who identifies as “gender nonconforming” is not necessarily transgender. To the contrary, many people who are not transgender do not conform to gender stereotypes in their appearance, clothing, physical characteristics, interests, or activities.

Gender Fluidity — Gender fluidity conveys a wider, more flexible range of gender expression, with interests and behaviors that may even change from day to day. Gender fluid individuals do not feel confined by restrictive boundaries of stereotypical expectations of girls or boys.

Intersex — An estimated one in 2,000 babies is born with an “intersex” condition or Disorders of Sex Development (DSD). People with intersex conditions (DSD) are born with physically mixed or atypical bodies with respect to sexual characteristics, i.e. chromosomes, internal reproductive organs, and genitalia. These characteristics may not be visible and individuals may not be aware of the condition. Having an intersex condition does not necessarily affect a person’s gender identity.

FTM (Female-to-Male)/Affirmed male/transboy — A child or adult who was assigned to the female gender at birth but has a male gender identity.

MTF (Male-to-Female)/Affirmed female/transgirl — A child or adult who was assigned to the male gender at birth but has a female gender identity.

Transition — The process by which a transgender individual lives consistently with his or her gender identity, and which may (but does not necessarily) include changing the person’s body through hormones and/or surgical procedures. Transition can occur in three ways: social transition through changes in clothing, hair-style, name and/or pronouns; hormonal transition through the use of medicines such as hormone “blockers” or cross hormones to promote gender-based body changes; and/or surgical transition in which an individual’s body is modified through the addition or removal of gender-related physical traits. Based on current medical knowledge and practice, genital reconstructive surgery is not required in order to transition. Most transgender people in the United States do not have genital reconstructive surgery.

Transsexual — An individual whose gender identity does not match the person’s sex at birth. This individual usually desires to physically alter their bodies surgically and/or hormonally. This physical transition is a complicated, multi-step process that may take years and may include, but is not limited to, cross-gender hormone therapy and a variety of surgical procedures. The precise treatments required vary from person to person.

Transphobia — Fear or hatred of transgender people. Transphobia is manifested in a number of ways, including violence, harassment, and discrimination.

PART FOUR

APPENDIX B

Resources On Transgender Issues

Print Resources (Books, Articles, Reports)

AthletesCAN, the Canadian Centre for Ethics in Sport, and the Canadian Association for the Advancement of Women and Sport and Physical Activity, Promising Practices: *Working With Transitioned/Transitioning Athletes in Sport* (2009).

Including Transitioning and Transitioned Athletes in Sport — Issues, Facts and Perspectives - Summary. Brenda Wagman (February 12, 2009). Available online at [http://www.caaws.ca/e/resources/pdfs/Summary_Transition_Discussion_Paper_FINAL1%20\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Summary_Transition_Discussion_Paper_FINAL1%20(2).pdf).

Including Transitioning and Transitioned Athletes in Sport - Issues, Facts and Perspectives — DISCUSSION PAPER. Brenda Wagman (February 12, 2009). Available online at http://www.caaws.ca/e/resources/pdfs/Wagman_discussion_paper_THE_FINAL.pdf.

Working with Transitioning or Transitioned Athletes in Sport - Emerging Themes. Rachel Corbett (May 26, 2009). Available online at [http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review(2).pdf).

Social Science Literature on Sport and Transitioning/Transitioned Athletes - LITERATURE REVIEW. Kevin B. Wamsley (February 2008). Available online at [http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review(2).pdf).

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Brill, Stephanie, and Rachel Pepper, *The Transgender Child: a Handbook for Families and Professionals* (San Francisco: Cleis Press, 2008).

California Safe Schools Coalition, *Model School District Policy regarding Transgender and Gender Nonconforming Students* (2009). Available online at <http://www.casafeschools.org/csscmodelpolicy1209.pdf>.

Currah, Paisley, Richard M. Juang and Shannon Price Minter, *Transgender Rights* (Minneapolis, MN: University of Minnesota Press, 2006).

Gay Straight Alliance Network, the Transgender Law Center and the National Center for Lesbian Rights, *Beyond the Binary: A Tool Kit for Gender Activism in Schools* (2004). Available online at http://transgenderlawcenter.org/pdf/beyond_the_binary.pdf.

Goorin, Louis, and Mathijs Bunck, "Transsexuals and Competitive Sports," *European Journal of Endocrinology* 151 (2004): 425-429. Available online at <http://www.eje.org/cgi/reprint/151/4/425.pdf>.

Griffin, Pat, "Inclusion of Transgender Athletes on Sports Teams," Women's Sports Foundation (2007). Available online at <http://www.womenssportsfoundation.org/Content/Articles/Issues/Homophobia/I/Inclusion-of-Transgender-Athletes-on-Sports-Teams.aspx>.

Greytak, Emily A., Joseph G. Kosciw, and Elizabeth M. Diaz, Gay Lesbian Straight Education Network, *Harsh Realities: The Experiences of Transgender Youth in our Nation's Schools* (2009).

Lambda Legal, *Bending the Mold: An Action Kit for Transgender Students* (2009). Available online at <http://www.lambdalegal.org/publications/bending-the-mold/order-bending-the-mold.html>.

Movement Advancement Project, *Advancing Transgender Equality: A Guide for LGBT Organizations and Funders* (2009). Available online at <http://www.lgbtmap.org/advancing-transgender-equality.html>.

National Center for Transgender Equality, *Understanding Transgender: Frequently Asked Questions about Transgender People* (2009).

Available online at http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf.

Steinbach, Paul, "Change Candidates," *Athletic Business* (August 2008).

Available online at <http://www.athleticbusiness.com/articles/article.aspx?articleid=1817&zoneid=3>.

Sykes, Heather, "Transsexual and Transgender Policies in Sport." *Women in Sport and Physical Activity Journal* 15:1 (2006): 3-13.

Transgender Law and Policy Institute, *Guidelines for Creating Policies for Transgender Children in Recreational Sports* (2009). Available online at http://www.transgenderlaw.org/resources/TLPI_GuidelinesforCreatingPoliciesforTransChildreninRecSports.pdf.

Washington Interscholastic Activities Association Gender Identity Policy

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Women's Sports Foundation, *Participation of Transgender Athletes in Women's Sports: A Women's Sports Foundation Position Paper* (2008). Available online at <http://www.womenssportsfoundation.org/Content/Articles/Issues/Homophobia/T/Participation-of-Transgender-Athletes.aspx>.

Organizations/Websites

American Bar Association (ABA) — The ABA opposes discrimination against those who are transgender or gender non-conforming. In 2006, the ABA House of Delegates adopted a recommendation that all federal, state, local and territorial governments enact legislation prohibiting discrimination on the basis of actual or perceived gender identity or expression, in employment, housing and public accommodations. For more information visit www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentywob.doc.

Advocates for Informed Choice — Legal advocacy organization dedicated to promoting the civil rights of children with intersex conditions or disorders of sex development. www.aiclegal.org

American Civil Liberties Union (ACLU) — The ACLU Lesbian, Gay, Bisexual, Transgender Project fights discrimination and moves public opinion through the courts, legislatures and public education across five issue areas: Relationships, Youth & Schools, Parenting, Gender Identity and Expression and Discrimination in Employment, Housing and other areas. www.aclu.org/lgbt-rights

American Medical Association (AMA) — The AMA is a medical professional association whose mission is to promote the art and science of medicine and the betterment of public health. The AMA has adopted a number of policies supporting the right of transgender and gender-non-conforming persons to be free from discrimination on the basis of their gender identity or expression. www.ama-assn.org

American Psychological Association (APA) — In 2008, the APA Council of Representatives adopted a policy statement supporting “the passage of laws and policies protecting the rights, legal benefits, and privileges of people of all gender identities and expressions;” and as well as supporting “efforts to provide safe and secure educational environments, at all levels of education.” www.apa.org/about/governance/council/policy/transgender.aspx

Gay and Lesbian Advocates and Defenders Transgender Rights Project — Through the Transgender Rights Project (TRP), Gay and Lesbian Advocates and Defenders puts litigation, legislative, and educational assets to work in a focused way to establish clear legal protections for the transgender community. www.glad.org

Gay, Lesbian and Straight Education Network — The Gay, Lesbian and Straight Education Network strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity/expression. www.glsen.org

Gender Spectrum — Gender Spectrum provides education, training and support to help create a gender sensitive and inclusive environment for all children and teens. www.genderspectrum.org

It Takes A Team! Education Campaign for LGBT Issues in Sport — A Women’s Sports Foundation initiative, It Takes A Team! Education Campaign for Lesbian, Gay, Bisexual, and Transgender Issues in Sport is an education project focused on eliminating homophobia as a barrier to all women and men participating in sport. www.ittakesateam.org

Lambda Legal — Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. www.lambdalegal.org

National Center for Lesbian Rights — NCLR is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. www.nclrights.org

National Center for Transgender Equality — The National Center for Transgender Equality is a social justice organization dedicated to advancing the equality of transgender people through advocacy, collaboration and empowerment. www.transequality.org

NCAA Office of Inclusion — www.ncaa.org/lgbt

National Gay and Lesbian Task Force — The mission of the National Gay and Lesbian Task Force is to build the grassroots power of the LGBT community by training activists, equipping state and local organizations with the skills needed to organize broad-based campaigns to defeat anti-LGBT referenda and advance pro-LGBT legislation, and building the organizational capacity of the movement. www.thetaskforce.org

Parents and Friends of Lesbians and Gays-TNET — The purpose of this special affiliate of PFLAG is to promote the health and well-being of transgender persons, their families and friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights. PFLAG TNET focuses on support for transgender people and their parents,

families, and friends; education on transgender facts and issues; and advocacy for equal rights for the transgender community at local and national levels. www.pflag.org/tnet

Transgender Law Center — Transgender Law Center (TLC) connects transgender people and their families to culturally competent legal services, increases acceptance and enforcement of laws and policies that support California’s transgender communities, and works to change laws and systems that fail to incorporate the needs and experiences of transgender people. www.transgenderlawcenter.org

Transgender Law and Policy Institute — Transgender Law and Policy Institute (TLPI) is a non-profit organization dedicated to engaging in effective advocacy for transgender people in our society. The TLPI brings experts and advocates together to work on law and policy initiatives designed to advance transgender equality. www.transgenderlaw.org

World Professional Association for Transgender Health (WPATH) — WPATH is an international, interdisciplinary organization of professionals from fields of psychiatry, endocrinology, surgery, law, psychology, sociology, and counseling. WPATH publishes the internationally recognized Standards of Care for Gender Identity Disorders, an evolving consensus on best practice in the provision of medical treatments for individuals with Gender Identity Disorder. www.wpath.org

VIDEOS

Straightlaced: How Gender’s Got Us All Tied Up

Straightlaced: How Gender’s Got Us All Tied Up takes a powerful and intimate look at how popular pressures around gender and sexuality are shaping the lives of American teens. The film proudly showcases the diverse and unscripted voices of more than 50 high school students from a variety of different communities, all of whom speak with breathtaking honesty, insight, and humor about gender roles and their struggles to be who they really are. More information on the film is available at www.groundspark.org/our-films-and-campaigns/straightlaced

Transgender Student-Athlete

A 30-minute video presentation sponsored by the NCAA and conducted by Dr. Betsy Crane, Widener University, http://s3.amazonaws.com/ncaa/web_video/diversity_inclusion/transgenderSA.html. Dr. Crane presents a sex educator’s expertise on gender awareness and diversity, and provides definition to assist the viewer in understanding best practices for including transgender students in athletics participation.

PART FOUR:

APPENDIX C

Legal Status of Transgender People

Federal, state, and local laws prohibit discrimination on the basis of gender identity/expression. In addition, many K-12 and collegiate educational institutions have adopted non-discrimination policies that include gender identity/expression. Each school or school district should be knowledgeable about specific legal requirements that apply and make sure that all school athletic staff understand their responsibilities to abide by and enforce these laws.

Federal Protections

Title IX of the Education Amendments of 1972 — The purpose of Title IX is to address sex discrimination in schools. This federal law also addresses discrimination or harassment in schools based on gender stereotypes.⁹ As described by the Department of Education’s Office for Civil Rights guidance in 2010, when gender non-conforming or transgender students are targeted on the basis of their gender expression, Title IX may provide the basis for legal recourse.¹⁰ Schools are responsible for developing educational programs, preventative policy and grievance procedures to address sexual harassment, bullying and assault.

EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION — The Equal Protection clause states that “no state shall ... deny to any person within its jurisdiction the equal protection of the laws.”¹¹ Several successful cases involving allegations of harassment and discrimination against lesbian, gay, bisexual, and transgender students and staff in public schools have been based on the Equal Protection clause.¹²

The Employment Non-Discrimination Act (ENDA) — ENDA is a bill that was introduced in the 111th U.S. Congress in 2009.¹³ If passed into law, ENDA would provide basic protections against workplace discrimination on the basis of sexual orientation or gender identity. The bill is closely modeled on existing civil rights laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. ENDA prohibits public and private employers from using an individual’s sexual orientation or gender identity as the basis for employment decisions, such as hiring, firing, promotion or compensation. ENDA also applies to federal, state, and local government employees.

The Matthew Shepard and James byrd, Jr. Hate Crimes Prevention Act (HCPA) — The HCPA gives the Department of Justice (DOJ) the power to investigate and prosecute bias-motivated violence by providing the DOJ with jurisdiction over crimes of violence where a perpetrator has selected a victim because of the person’s actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability.¹⁴ Furthermore, the HCPA requires the Federal Bureau of Investigation to track statistics on hate crimes.¹⁵

State of Non-Discrimination Law

As of July 2010, 13 states and the District of Columbia¹⁶ have enacted non-discrimination laws prohibiting discrimination on the basis of sexual orientation and gender identity or expression: California,¹⁷ Colorado,¹⁸ Hawaii,¹⁹ Illinois,²⁰ Iowa,²¹ Maine²², Minnesota,²³ New Jersey,²⁴ New Mexico,²⁵ Oregon,²⁶ Rhode Island,²⁷ Vermont,²⁸ and Washington.²⁹

Eight additional states have enacted laws prohibiting discrimination based on sexual orientation only: Connecticut, Delaware, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.³⁰

Additionally, courts and administrative bodies in seven states have interpreted state laws against sex discrimination to prohibit discrimination against transgender and gender nonconforming people: California, Connecticut, Florida, Massachusetts, New Jersey, New York, and Pennsylvania. Courts and administrative bodies in seven states have also held that transgender people are protected by state laws prohibiting discrimina-

tion based on disability or medical condition: Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Washington.³¹

State Student Rights Laws

In addition to these federal protections, as of July 2010, twelve states and the District of Columbia³² have enacted laws protecting students in schools from discrimination or harassment on the basis of sexual orientation or gender identity: California, Colorado, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, North Carolina, Oregon, Vermont, and Washington.³³ Four additional states offer protections on the basis of sexual orientation only: Connecticut, Massachusetts, New York, and Wisconsin.³⁴

Individual School or School District Non-Discrimination Policies

For a list of colleges and universities that have enacted non-discrimination policies that include gender identity/expression, refer to the following list created by the Transgender Law and Policy Institute: www.transgenderlaw.org/college/index.htm#policies

For a list of K-12 school districts that have enacted non-discrimination policies that include gender identity/expression, refer to the following list created by the Transgender Law and Policy Institute: www.transgenderlaw.org/college/index.htm#schools **American Bar Association**

The American Bar Association (ABA) opposes discrimination against those who are transgender or gender non-conforming. The ABA is a national organization of lawyers, law students and judges, and is the largest voluntary professional association in the world, with more than 400,000 members. The control and administration of the ABA is vested in the House of Delegates, which is the policy-making body of the Association. In 2006, the ABA House of Delegates adopted a recommendation that all federal, state, local, and territorial governments enact legislation prohibiting discrimination on the basis of actual or perceived gender identity or expression, in employment, housing, and public accommodations.³⁵

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The NCAA resource accepted input from the report, *“On the Team: Equal Opportunity for Transgender Student Athletes”* published in October, 2010. In October 2009 the National Center for Lesbian Rights and It Takes A Team!, an Initiative of the Women’s Sports Foundation, co-sponsored a national think tank entitled *“Equal Opportunities for Transgender Student-Athletes.”* Think Tank participants included leaders from the NCAA, the National High School Federation, transgender student-athletes, and experts on transgender issues from a range of disciplines—law, medicine, advocacy, and athletics. The NCAA also would like to acknowledge and thank George Washington University and Kyle Allums for their efforts in educating and raising awareness of transgender student-athlete participation.

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Mike Colbrese

Executive Director

Washington Interscholastic Activities Association
Renton, Washington

Joni Comstock

Senior Vice-President for Championships

NCAA Senior Woman Administrator

Indianapolis, Indiana

Morgan N. Dickens

Student Athlete

Basketball, Rugby Cornell University 2008

Ithaca College, M.S. 2009

Ithaca, New York

Sarah Dunne, Esq.

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ACLU of Washington Foundation
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Keelin Godsey

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Former Rugby
Bates College 2006
Northeastern College 2010

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FOOTNOTES

- ¹ Gender Spectrum, “A Word About Words,” available online at http://www.genderspectrum.org/images/stories/Resources/Family/A_Word_About_Words.pdf.
- ² Intersex Society of North America, “What’s the difference between being transgender or transsexual and having an intersex condition?”
- Available online at <http://www.isna.org/faq/transgender>.
- ³ Advocates for Informed Choice, General Brochure, available online at <http://aiclegal.files.wordpress.com/2010/02/aic-brochure.pdf>.
- ⁴ In addition, what counts as a competitive advantage may shift dramatically depending on the sport. What is an advantage in one context may be a disadvantage in another. For example, factors such as height, weight, reaction time, and proportion of fast twitch muscle fibers all affect competitive advantage depending on the sport. A female volleyball player may be very tall, and yet few people would consider that to be an unfair competitive advantage in her sport. Similarly, a male swimmer may have a naturally high hemoglobin count enabling him to take in more oxygen, but he is not barred from swimming for that reason. Sarah Teetzel, “On Transgendered Athletes, Fairness and Doping: An International Challenge,” *Sport in Society: cultures, commerce, media, Politics*, 1743-0445, Volume 9, Issue 2 (2006) Pages 227 – 251.
- ⁵ Erin Buzuvis, “Caster Semenya and the myth of the Level Playing Field.” Social Science research network (2009). Available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521674.
- ⁶ Joe Leigh Simpson et al, “Gender Verification in the Olympics,” *JAMA* (2000); 284: 1568-1569; see also Sex Typing for Sport, *supra* note 8.
- ⁷ Kirk Mango, “The Benefits of Competitive Athletic Sports Participation in Today’s Sports Climate,” *Chicago Now* (February 16, 2010). Available online at <http://www.chicagonow.com/blogs/athletes-sports-experience/2010/02/the-benefits-of-competitive-athletic-sports-participation-in-todays-sports-climate.html>.
- ⁸ Recent research indicates that most salient physical changes likely to affect athletic performance occur during the first year of hormone treatment making a longer waiting period unnecessary. Goorin, Louis, and Mathijs Bunck, “Transsexuals and Competitive Sports,” *European Journal of Endocrinology* 151 (2004): 425-429. Available online at <http://www.eje.org/cgi/reprint/151/4/425.pdf>.
- ⁹ See *Snelling v. Fall Mt. Regional Sch. Dist.*, 2001 D.N.H. 057, 2001 WL 276975 (D.N.H. 2001); *Ricco v. New Haven Bd. of Educ.*, 467 F.Supp.2d 219 (D. Conn. 2006); *Doe v. Southeastern Greene Sch. Dist.*, 2006 U.S. Dist LEXIS 12790 (W.D. Pa. 2006).
- ¹⁰ See 20 U.S.C.A. § 1681 et seq.; Office of Civil Rights, Revised Sexual Harassment Guidance, § III (Jan. 2001) (“Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond[.]”).
- ¹¹ U.S. Const. amend. XIV, § 1.
- ¹² See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Dist. 2003) (equal protection required school district to enforce policies “in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in cases of peer harassment of heterosexual students”).
- ¹³ H.R. 3017, 110th Cong. (2010).
- ¹⁴ 18 U.S.C.A. § 249.
- ¹⁵ 28 U.S.C.A. § 534.

- ¹⁶ D.C. Code §§ 2-1401.01 et seq. (employment, housing, public accommodation, education, motor vehicle insurance, access to government facilities and programs), 4-754.21(10) (access to services for homeless persons), 16-914 (custody proceedings), 31-2231-11(c) & 31-2231.13(d) (insurance), 31-1603 (determination by insurance companies of likelihood of developing AIDS), 43-1507 (companies providing electricity).
- ¹⁷ Cal. Penal Code § 422.56, Cal. Gov't Code § 12926 et seq. (non-discrimination in employment and housing), Cal. Civ. Code § 51 (public accommodations).
- ¹⁸ Colo. Rev. Stat. Ann. §§ 24-34-401 et seq. (non-discrimination in public accommodation, housing and employment), 22-32-109 (non-discrimination in education).
- ¹⁹ Haw. Rev. Stat. §§ 489-2 (non-discrimination in public accommodations), 515-3 (real property transactions).
- ²⁰ 775 Ill. Comp. Stat. 5/2-102 (non-discrimination in employment, public accommodations, real estate transactions, and access to financial credit).
- ²¹ Iowa Code Ann. § 216.1 et seq. (non-discrimination in public accommodation, employment, housing, credit, and education).
- ²² Me. Rev. Stat. Ann. tit. 5, § 4552 et seq. (non-discrimination in employment, housing, public accommodation, credit and education).
- ²³ Minn. Stat. Ann. § 363A.03 et seq. (non-discrimination in public accommodation, housing, employment, credit, and education).
- ²⁴ N.J. Stat. Ann. §§ 10:5-4 (non-discrimination in employment, housing, and public accommodation), 18A:37-14 (education).
- ²⁵ N.M. Stat. Ann. § 28-1-2 et seq., (non-discrimination in public accommodation, employment, housing and credit).
- ²⁶ Or. Rev. Stat § 174.100(6), Or. Rev. Stat. §§ 659A.003 et seq. (non-discrimination in public accommodation, employment, and housing), 101.115(3) (non-discrimination in retirement communities), 179.750(2) (state institutions), 240.306(1) (state employees), 418.648(10) (selection of foster parents), , 430.550 (drug abuse diversion programs), 443.739(19) (adult foster care), 458.505(4)(h) (community service programs hosted by a community action agency), 659.850(2) (education), 744.382(4) (making life settlement contracts), 10.030(1) (jury service).
- ²⁷ R.I. Gen. Laws § 11-24-2 (public accommodation), R.I. Gen. Laws 1956 §§ 28-5-7 (employment), 28-5.1-4(a) (state employees), 34-37-4 (housing), 34-37-5.4 (residential real estate transactions).
- ²⁸ Vt. Stat. Ann. tit. 3, §§ 961(6) (state employees), 963 (state employee organizations), 1026(6) (judiciary employees), 1028 (judiciary employee organizations), 1621 (union membership); Vt. Stat. Ann. tit. 8, §§ 4724(7) (B) &(C) (insurance), 10403 (credit cards, loans, mortgages, and commercial loans); Vt. Stat. Ann. tit. 9, §§ 2362 (motor vehicle retail installment contracts), 2410 (retail installment contracts), 2488 (agricultural finance leases), 4502 (public accommodations), 4503 (housing); Vt. Stat. Ann. tit. 16, §§ 11, 565 (education); Vt. Stat. Ann. tit. 21, §§ 495(a) (employment), 1726 (municipal employees).
- ²⁹ Wash. Rev. Code §§ 48.30-300 (insurance), 49.60.175 (credit), 49.60.180 (employment), 49.60.190 (labor unions), 49.60.215 (public accommodation), 49.60.222 (housing).
- ³⁰ See Conn. Gen. Stat. § 46a-81a et seq. (employment, public accommodations, housing, credit); Del Code Ann. tit. 6, §§ 4500 et seq. (public accommodation), 4601 et seq. (housing), Del. Code Ann. tit. 19, § 710 (employment); Md. Code Ann., State Gov't §§ 20-304 (public accommodation), 20-705 (housing), 20-606 (employment); Mass. Gen. Laws Ch. 151B §1 et seq. (generally), Mass. Gen. Laws Ch. 272 §§92A, 98 (public accommodation); Nev. Rev. Stat. §§ 613.330 (employment), 651.070 (public accommodation); N.H. Rev. Stat. Ann. §§ 354-A:7 (employment), 354A-10 (housing), 354-A:17 (public accommodations); N.Y. Exec. Law § 296 (employment, public accommodations, housing, credit), N.Y. Civ. Rights § 40-c (public accommodations); Wis. Stat. §§ 106.50 (housing), 106.52 (public accommodation).

³¹ For a comprehensive discussion of state court and administrative decisions applying sex and disability discrimination to transgender plaintiffs, see www.nclrights.org/site/DocServer/state_cases091004.pdf?docID=1203.

³² D.C. Code 1981 §§ 2-1401.02 & 2-1402.41.

³³ See Cal. Educ. Code §§ 220, 210.7, 212.6, & 51500; Colo. Rev. Stat. §§ 2-4-401(13.5), 22-32-109(II)(I), 12-59-106(1)(s), 22-30.5-104(3), 22-30.5-507(3), & 22-38-104(1)(d); 775 Ill. Comp. Stat. Ann. 5/1-102(A), 775 Ill. Comp. Stat. Ann. 5/1-103(O-1), (Q), & 775 Ill. Comp. Stat. Ann. 5/5-101(A)(11); Iowa Code §§ 216.9, 280.28; Me. Rev. Stat. Ann. tit. 5, §§ 4552, 4553(9-C), 4601, & 4602(4); Md. Code Ann. Educ. §§ 7-424; Minn. Stat. §§ 363A.03 subd. 44, 363A.13; N.J. Stat. Ann. §§ 10:5-5, 10:5-12(f)(1), & 18A:37-14; N.C. Gen. Stat. §§ 115C-407.15, 115C-407.16; Or. Rev. Stat. §§ 659.850, 174.100, 339.351(d)(3), & 338.125; Vt. Stat. Ann. tit. 16, §§ 1, 11 & 565; Wash. Rev. Code §§ 49.60.030 & 49.60.040(2), (26).

³⁴ Conn. Gen. Stat. § 10-15c; Mass. Gen. Laws. Ch. 76, § 5; N.Y. Exec. Law §§ 291(2), 292(9) & (27) & 296(2); Wis. Stat. § 118.13.

³⁵ See A.B.A. Recommendation 122B (adopted August 7-8, 2006) available online at <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwob.doc> (recognizing that “[t]ransgender people are disproportionately likely to face discrimination” and that “many individuals who are not transgender continue to suffer discrimination . . . because they do not comply with gendered stereotypes.”).





Office of Inclusion

HB 1489

Rep. Ben Koppelman- Testimony

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to introduce HB 1489 to you today.

This bill is the sister bill to HB1249. In the same way as HB1249 protects opportunities in female sports in K-12, this bill does the same in higher education.

Each year we spend a lot of money as a state supporting our state schools of higher education. Part of this college experience is the athletic opportunities that allow students to chase their athletic dreams.

I introduced this bill to ensure that all students have the opportunity to participate on a level playing field with their peers without having to compete with a member of the opposite sex that is likely to have physical and physiological advantages.

Title IX of the federal education code says:

“No Person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

In sports, Title IX requires that boys and girls, men and women, have an equal opportunity to participate, but does not require institutions to offer identical sports. It also requires that scholarships and other resources be applied equitably.

Now, in order to understand what the intent was of this law, and how it applies, we need to first look at the definition of sex and how it differed from the definition of gender and what both terms meant in 1972. In order to put it in context, I have provided you the definition of both words in the Webster’s New World Dictionary-- Second College Edition published in 1970, in which ***Sex is defined as: “either of the two divisions, male or female, into which persons, animals, or plants are divided with reference to their reproductive functions”***, and ***Gender is simply defined as: “sex”***. In Webster’s New Twentieth Century Dictionary—Second Edition published in 1979, the definitions are nearly identical.

Now that we have a context of what the term ‘sex’ meant when the Title IX law was written, let’s explore why that term was used. It is commonly understood that there

are physical and physiological traits that differ between the sexes, and in order to provide equal opportunity in activities, it was necessary to determine how to ensure fair competition. In activities that do not involve athletic or physical competition, there is probably little reason to separate boys and girls, however in sports, the differences become obvious.

Women are smaller in stature than men, the average 18-year-old woman is 64.4 inches tall and weighs 126.6 pounds compared to men at 70.2 inches tall and a weight of 144.8 pounds. Women's hearts are 25% smaller than men's and they also have less red blood cell percentage which doesn't allow their blood to carry as much oxygen. Their lung capacity is 30% less. They have 50% less upper body strength and 30% less lower body strength. A woman who is the same size as her male counterpart is only 80% as strong on average. Women have less bone mass and have less-durable ligaments than men. These differences consistently show up in the data.

According to a white-paper titled *"Comparing Athletic Performances—the Best Elite Women to Boys and Men"* (by Doriane Lambelet-Coleman and Wickliff Shreve), Males consistently outperform females of the same age and training by about 10-12% however it varies slightly by sport. In fact, boys under the age of 18 are even able to outperform elite adult women. For example, in 2017, the lifetime-best time record of 10.78 seconds for US Champion Tori Bowie in the 100-meter was beaten 15,000 times by men and boys. Elite runner, Allyson Felix's 400-meter lifetime-best time record of 49.26 seconds was outperformed by more than 15,000 times by males also in 2017. The authors of the paper go on to say: **"This differential isn't the result of boys and men having a male identity, more resources, better training, or superior discipline."** These statistical comparisons play out in a similar way in all the track and field events. Other sports also show the differentials.

As you can see, there was a scientific reason to use sex (as defined at the time as biological sex) as the delineating factor to ensure opportunity for girls and women. This has provided exponential opportunity for young women to shatter the glass ceiling that had previously been holding back their potential. Since Title IX was implemented in 1972, the participation in High School sports has gone from 295,000 girls compared with 3.7 million boys to 3.4 million girls compared to 4.6 million boys. The statistical trend is similar in college sports.

President Biden has issued guidance through an executive order suggesting that his administration should treat 'gender identity' as a way of defining 'sex'. Although presidential executive orders cannot change the law, they can cause pressure on states and schools to follow suit. If we were to define 'sex' in this way in North Dakota, it would have massive consequences on women of all ages in our state.

For consistency throughout the state, it needs to be the Legislature that defines this policy. Let's be clear, HB 1489 does not prohibit any student from participating in sports, but rather to the contrary. Just as has been the case for the past 50 years, this bill will ensure that ALL students have equal opportunity to participate in safe and fair environment with members of the same sex. High school, college, amateur and professional female athletes all over the world, in many sports, are being dominated by biological males who compete as females. We must find a solution where women are not denied their rightful place on the podium. I believe that HB1249 and HB1489 are those solutions.

If we choose to do nothing, we will by default be allowing those opportunities of our women to be lost or greatly reduced as society attempts to remove any reference to biological sex and replace it with the social construct of self-identification. As a husband, a father of a former female athlete, and soon a grandfather of a granddaughter that might someday choose to be a female athlete; I cannot sit back and let society strip away opportunity from women in our state.

Mr. Chairman and members of the committee, **I request that you give this bill a Do-Pass recommendation.** I would be happy to answer any questions that you may have.

23.0967.01003
Title.

Prepared by the Legislative Council staff for
Representative Koppelman
January 30, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1489

Page 1, line 14, replace "reproductive anatomy" with "nonambiguous sex organs"

Page 1, line 17, replace "a school" with "an institution"

Renumber accordingly

CONCERNED
WOMEN *for* **AMERICA**
 LEGISLATIVE ACTION COMMITTEE

March 27, 2023
 Senate Education Committee
 Testimony in Support of HB 1489

Chairwoman Diane Larson and members of the Senate Judiciary Committee, my name is Linda Thorson. I am a former educator of 26 years and am the State Director of Concerned Women for America (CWA) of North Dakota. I am testifying for Concerned Women for America Legislative Action Committee. We are the largest public policy women's organization in our state and in the country.

Fair competition and equality in women's sports for all North Dakota female athletes competing at institutions of higher education are protected with the passage of this pro-woman legislation which prohibits male-born athletes from entering women's sports as transwomen.

Female athletics are a pathway to development, opportunity, and success for girls and women in America. So, when male-born athletes are permitted in women's sports as transwomen, female-born athletes lose hard-fought opportunities, which came through the feminist movement in the implementation of Title IX.

Allowing individuals who are the opposite sex (male) at birth to participate on an athletic team designated for females directly violates [Title IX](#) and is discriminatory against women. Title IX states in part: *"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under education program or activity receiving Federal financial assistance..."*

Five years before President Richard Nixon signed Title IX into law, [Kathrine Switzer](#) ran the Boston Marathon. She was allowed to run due to a clerical error that allowed her to register under her initials, K.V. Switzer; as such, race officials did not know she was a woman and let her sign up. During the marathon, she was assaulted by race manager Jock Semple who entered the field of runners and tried to physically pull her out of the race! Kathrine Switzer's boyfriend punched Jock Semple, and she completed the race.

Five years later, on April 17, 1972, the [first Boston Marathon in which females](#) were officially acknowledged was held. Leaders in the women's movement who fought for the opportunities for females to compete in marathons succeeded, and [female marathon runners](#) were, at last, officially acknowledged. Women had to fight – literally – for their right to compete, in contrast with men who enjoyed much more liberal sports opportunities.

Concerned Women for America (CWA) of North Dakota urges you to protect biological females who train and work hard to excel in their chosen sport and compete at the collegiate level when their athletic skills are at their zenith. Females should not suffer the loss of opportunity because a biological male who claims transgender status as a woman receives her spot.

- Support basic civil rights and victories of the women's movement, which opened doors for women to compete on a level playing field
- Preserve women's sports for collegiate athletes in North Dakota
- Ensure fairness in women's sports in North Dakota

Male athletes should not be competing in women's sports, regardless of how they identify. Forcing female athletes to stand down so men can steal their scholarships and their trophies, invade their locker rooms, and their events have been the ultimate act of discrimination against women. I invite you to read Concerned Women for America's position paper, [How Gender Identity Policies Hurt the Progress of Women and Girls](#), and [the letter from a female athlete](#) describing her experiences as a woman seeking to compete on a level playing field at the collegiate level.

Concerned Women for America of North Dakota strongly supports the protection of all women's sports at our high schools and at our institutions of higher education and urges a "Do Pass" on HB 1489.



NORTH DAKOTA ASSOCIATION OF SCHOOL PSYCHOLOGISTS

The North Dakota Association of School Psychologists (NDASP) asks lawmakers to oppose the harmful policies outlined in the table below that target LGBTQ+ youth. These policies disallow students from using school facilities consistent with a student’s gender identity; require parental consent to have a student’s gender identity affirmed and acknowledged in school; mandatory parental notification when a student discloses they may be questioning their sexuality or gender identity; prohibition of classroom instruction on nonheteronormative sexual orientations and gender identities; removal of classroom materials that are inclusive of LGBTQ+ students and families; and afford protections for individuals who refuse to affirm a student’s identity and punitive measures for individuals who do. The following bills are discriminatory, against best practices, and do not reflect the peace and tranquility North Dakota is known for.

Vote NAY on House Bills			Vote NAY on Senate Bills
HB1205	HB1301	HB1474	SB2199
HB1249	HB1332	HB1488	SB2231
HB1254	HB1333	HB1489	SB2260
HB1256	HB1403	HB1522	
HB1297	HB1473	HB1526	

These proposed bills are in direct conflict with NDASP’s adopted position statement from the National Association of School Psychologists (NASP) which states that:

Positive educational and social outcomes for all children and youth are possible only in a society—and schools within it—that guarantees **equitable treatment to all people**, regardless of race, class, culture, language, gender, gender identity, religion, sexual orientation, nationality, citizenship, ability, and other dimensions of difference (NASP, 2019).

Additionally, school psychologists are guided by an ethical code that calls for beneficence, through which they respect the rights and dignity of all persons, and nonmaleficence, which requires that they do no harm. NASP’s ethical standards require school psychologists to validate and affirm a young person’s authentic lived experience, value their integrity, ensure their safety, and promote their well-being (NASP, 2020b). The proposed laws would prohibit school psychologists from practicing ethically.

Our LGBTQ+ youth need our support now more than ever. Some alarming statistics from The Trevor Project 2022 Survey include:

- 45% of LGBTQ youth seriously considered attempting suicide in the past year.
- 60% of LGBTQ youth who wanted mental health care in the past year were not able to get it.
- 73% of LGBTQ youth reported experiencing symptoms of anxiety
- 58% of LGBTQ youth reported experiencing symptoms of depression

NDASP also vehemently supports the use of evidence-based practice through an ethical lens. Conversion 'therapy' is not evidence based and has been determined to be fraudulent by several states. In fact, "The present-day scientific consensus is that such practices are not only ineffective, but highly harmful and fundamentally unethical." (Conine, Campau, Petronelli, 2022). Examples of historical unethical practices used in conversion therapy include corporal punishments such as spanking and electroshock therapy, among other questionable practices. The United Nations Human Rights Council (2020) goes as far to say that these practices are not only a public health problem, but also "violate the prohibition of torture and ill-treatment." 17% of LGBTQ youth reported being threatened with or subjected to conversion therapy (The Trevor Project, 2022), which can have life-threatening effects.

Support for LGBTQ+ youth leads to better outcomes for them and society as a whole. LGBTQ+ youth report that when adults talk to them respectfully about their LGBTQ+ identity and use their names and pronouns correctly, they feel supported. Research indicates that LGBTQ+ youth are more resilient when they have supportive people in their lives. Further, LGBTQ+ youth with higher resilience are 59% less likely to attempt suicide and 69% less likely to consider suicide (The Trevor Project, 2022). NDASP supports legislative actions to increase access to mental health for all individuals, including LGBTQ+ youth.

Please join NDASP in supporting our LGBTQ+ youth by voting "nay" on the house and senate bills listed above.

Sincerely,



Alannah Valenta, PsyS, NCSP

NDASP President, on behalf of North Dakota Association of School Psychologists

References:

Conine, D. E., Campau, S. C., & Petronelli, A. K. (2022). LGBTQ+ conversion therapy and applied behavior analysis: A call to action. *Journal of Applied Behavior Analysis* (55, 6-18).

National Association of School Psychologists. (2022). Safe and Supportive Schools for Transgender and Gender Diverse Students. [Position Statement].

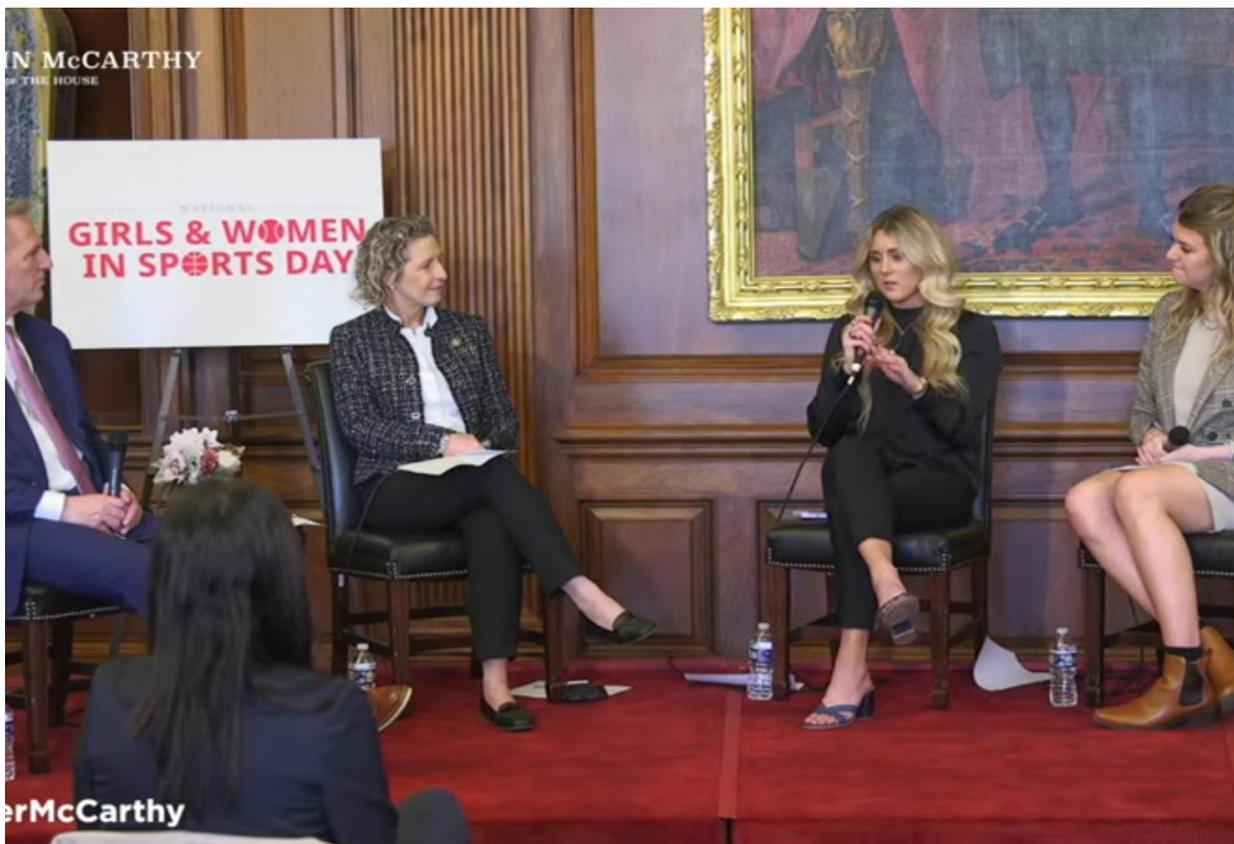
National Association of School Psychologists. (2020b). The Professional Standards of the National Association of School Psychologists.

National Association of School Psychologists. (2019). Prejudice, Discrimination, and Racism. [Position Statement].

The Trevor Project. (2022). 2022 National Survey on LGBTQ Youth Mental Health. www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf

United Nations Human Rights Council. 2020, Report on Conversion Therapy, <https://www.ohchr.org/en/calls-for-input/report-conversion-therapy>. Accessed 27 Jan. 2023.

Dear Chairman and Committee Members,
My name is Margo Knorr and I am writing in support of 1489.
If you Click on an image there is a link to a video of a panel with Speaker McCarthy addressing the importance of the Protection of Girls and Women in Sports.



Thank you Representative Koppelman for working on 1489 to protect young women and their athletic goals and dreams from being stolen in the future.

As a 4 time All-American High Jumper, Inductee into the ND High School Track and Field Hall of Fame, ND overall record holder in the 100 meter hurdles in 1997, Seven-Time HS State Champion, and an athlete who was recruited to universities all over the nation: Doors were opened for me that were formerly reserved for only males.

All of the above records I stated to you would not exist if I had been placed in a category with males. That is why it is so important for all of us as female athletes who pursued athletics that laws be enacted.

"Women are being erased from law and devalued in our culture. Biological men are dominating female athletic competitions; taking women's educational opportunities; infiltrating women's clubs and sororities; invading women's prisons (where they abuse female prisoners), and even undressing in front of young girls in women's locker rooms. Schools and the media are encouraging young people to believe they are born in the wrong body. This is having devastating effects on our society, and especially on young women and girls." Independent Women Forum

As a North Dakota lifetime resident and mother of 2 daughters, I ask for you to continue the legacy of **valuing female athletes** through setting **necessary protections** in place to secure opportunities for collegiate females by giving 1489 a do pass.

Please give 1489 a "do pass"

Dear Chair Larson and the members of the Senate Judiciary Committee,

My name is Mariah Ralston Deragon. I urge a "Do Not Pass" on HB1489.

This bill is discriminatory, and is being brought to the legislature as part of a larger anti-LGBTQIA+ agenda. This bill will harm transgender students and is deeply misguided. It protects no one, and rather will hurt us all.

I strongly urge you to vote "DO NOT PASS."

Sincerely,
Mariah Ralston Deragon

I am sending testimony in support of HB 1489

Gordon Greenstein

District 35

Chairman Larson and the Judiciary Committee, I strongly urge a do pass on HB 1489.

This is the intention of HB 1489,

- Requires an intercollegiate or intramural athletic team or sport sponsored by a school to be expressly designated as one of the following based on the sex of the intended participants:
 - "Males", "men", or "boys";
 - "Females", "women", or "girls"; or
 - "Coed" or "mixed".
- Prohibits an athletic team or sport designated for "females", "women", or "girls" from being open to students of the male sex.
- Prohibits a government entity, a licensing or accrediting organization, or an athletic association or organization from entertaining a complaint, opening an investigation, or taking any other adverse action against an institution for maintaining separate intercollegiate or intramural athletic teams or sports for students of the female sex.
- Prohibits the state, a political subdivision, or an entity that receives public funding from the state or from a political subdivision from using an athletic facility, stadium, field, structure, or other property owned by or under the control of the state, political subdivision, or entity for an athletic event conducted exclusively for males or exclusively for females in which an individual of the opposite sex who is under eighteen years of age or who is enrolled in high school is allowed to participate.

Thank You, Gordon Greenstein

US Navy (Veteran)

US Army (NDNG Retired)



North Dakota House Bill 1489
Written Testimony of Matt Sharp
Senior Counsel, Alliance Defending Freedom

Alliance Defending Freedom is the nation's leading nonprofit legal organization that advocates for religious liberty, free speech, life, and marriage and the family. We regularly analyze proposed laws and their effect on constitutional freedoms. ADF also currently represents female athletes in West Virginia, Connecticut, Idaho, and other states in federal court who have personally lost out on championships and other athletic opportunities to biological males who were permitted to compete in female sports.

Women deserve to compete on a level playing field. Allowing males to compete in women's sports destroys fair competition and women's athletic opportunities.

HB 1489 protects opportunities for young women in athletics by ensuring they are not forced to compete against men playing on women's sports teams. The bill simply requires that all collegiate sports teams be designated as either male, female, or co-ed based on biological sex and makes clear that males are not eligible to compete on female teams. It also protects a college that follows the law from any adverse action by a government entity, accrediting or licensing organization, or any athletic association.

Biological sex is indisputably the single biggest driver of athletic advantage. Males have a 10-50% performance advantage (depending on the sport) over females. Having separate teams for men and women is the time-tested way to ensure that women have the opportunity to showcase their talents and become champions. The science shows that comparably fit and trained males will always have physical advantages over women. Even the world's best female Olympic athletes would lose to thousands of boys and men on any given day. That's the reason we have women's sports as a separate category.

Unfortunately, across the country, we are seeing more and more instances in which biological males have taken away championships, records, and countless athletic opportunities from female athletes. For example:

- In 2019, CeCe Telfer, a biological male who identifies as female, dominated the NCAA Division II National Championship in the 400m Hurdles. Telfer

actually *improved* in several track and field events after a year of testosterone suppression.

- In Connecticut, two biological males captured 15 girls' high school state championship titles, set 17 new individual meet records, and took over 80 opportunities to advance in competition in the 2017-19 seasons alone that rightfully belonged to females. One of the males competed for three seasons in the male category and never qualified for a championship, and then switched just a couple of weeks later to begin competing in the girls' category and dominated girls' track events. That hurt female athletes like Chelsea Mitchell and Alanna Smith that my firm represents in a challenge to Connecticut's policy.
- June Eastwood, who competed on the University of Montana men's track team before switching to the female team, easily beat the female competitors to win the women's mile at the Big Sky Indoor Track & Field Championship in 2019. It was one of several times when female athletes in the Big Sky Conference lost opportunities because of Eastwood.
- University of Pennsylvania swimmer Lia Thomas, a male who identifies as female, won several women's titles and broke several records, including three new records at the Ivy League Championship and an NCAA Championship last spring. Thomas jumped from #462 in the male division to #1 in the female rankings. In a letter, sixteen of Thomas's teammates spoke out about the unfairness of Thomas competing on the women's team. "Lia's inclusion with unfair biological advantages means that we have lost competitive opportunities. Some of us have lost records.... To be sidelined or beaten by someone competing with the strength, height, and lung capacity advantages that can only come with male puberty has been exceedingly difficult."

Women are already losing out. We shouldn't make them pay the price while we wait to protect their opportunities to compete on a fair playing field.

Scientific research continues to point to the necessity of policies that protect women's athletic opportunities by ensuring girls and women are not forced to compete against men. Evidence confirms that suppression of testosterone in a male after puberty does not substantially eliminate the male athletic advantage. One recent scientific study found that "superior anthropometric, muscle mass and strength parameters achieved by males at puberty, and underpinning a considerable portion of the male performance advantage over females, are not removed by the current regimen of testosterone suppression" permitted by the International Olympic Committee and other sports organizations. See <https://doi.org/10.1007/s40279-020-01389-3>.

Another study of the physical fitness of Air Force personnel reached a similar conclusion: “[T]he pretreatment differences between transgender and [biological] women persist beyond the 12 month time requirement currently being proposed for athletic competition by the World Athletics and the IOC.” See <https://bjsm.bmj.com/content/early/2020/11/06/bjsports-2020-102329>.

HB 1489 has become more urgent than ever—especially for collegiate athletes—after the NCAA declined to adopt a policy that ensures fairness for women. Instead, the NCAA punted to a patchwork of unaccountable national and international organizations—some of which allow male-bodied athletes to compete on women’s teams with no preconditions, and others of which have no policy at all. It is vital for states to step up and set a clear, fair, and scientifically based policy to guide schools and colleges throughout the state and to guarantee equal opportunities for our daughters and granddaughters to participate and win.

Indeed, 18 states have already acted to protect fairness in women’s sports. These states want to attract and retain the best women athletes to their colleges and universities with a guarantee that they will never lose their spot on a team to a male competitor. And none of them has experienced any economic consequences for doing so: no lost NCAA tournaments or events; no boycotts; and no businesses pulling out of their states. This should be unsurprising because poll after poll shows that Americans believe that women and girls should not lose medals or opportunities to male athletes.

But this isn’t just about losing medals or championships. Allowing males on girls’ teams means that a young woman will also lose the many benefits that flow from participating in sports—learning teamwork, how to overcome adversity, and leadership skills. In fact, a recent survey of women business leaders from Inc.com found that 94% of these leaders participated in sports. They described how vital those athletic experiences were to their professional development. Every girl in North Dakota—many of whom will grow up one day to be business and community leaders—should have to the same athletic opportunities available to her.

Finally, HB 1489 is consistent with both the U.S. Constitution and federal law, including Title IX. Federal courts have long recognized that it is constitutional to provide separate programs based on biological sex—including sports teams, locker rooms, or even single-sex schools. Indeed, as Justice Stevens of the U.S. Supreme Court explained, without separate athletic teams for males and females, “there would be a substantial risk that boys would dominate the girls’ programs and deny them an equal opportunity to compete in interscholastic events.” *O’Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers)

The 9th Circuit Court of Appeals upheld an Arizona policy that, like HB 1489, merely said that males are not eligible to compete on female team. The court

found that it is a “physiological fact” that “males would have an undue advantage competing against women,” and the evidence was clear that “due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions” on the women’s team. *Clark v. Ariz. Interscholastic Ass’n.*, 695 F.2d 1126, 1131 (9th Cir. 1982). The result would be that “athletic opportunities for women would be diminished.” *Id.*

Or as Judge Lagoa explained in a recent decision out of the 11th Circuit Court of Appeals, “commingling of the biological sexes in the female athletics arena would significantly undermine the benefits” that separate sports teams “afford[] to female student athletes.” *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., specially concurring).

In sports, biology is what matters. When we ignore science and biological reality, women pay the price. Allowing males to compete in girls’ sports reverses nearly 50 years of advances for women. That’s neither fair nor equal. The solution is HB 1489, which ensures that all female athletes have a level playing field to compete and win.

PROPOSED AMENDMENT TO HOUSE BILL NO. 1489

Page 1, after line 14, insert:

4. "Coed" means including both males and females, and may apply to an athletic team or sport intended for people who identify as a gender not corresponding to their biological sex.

Renumber accordingly

Senate Judiciary Committee

House Bill 1489

Andrew Alexis Varvel

Written Testimony

North Dakota State Capitol

Peace Garden Room

Monday

March 27, 2023

2:30PM

Madame Chairman Larson and Members of the Committee:

My name is Andrew Alexis Varvel. I live in Bismarck.

I am registering this written testimony on House Bill 1249 as NEUTRAL because, while I care about this legislation, I am agnostic about what key terms mean.

I think the chance of some form of this legislation not passing is somewhere less than zero. I think most members of this committee regard keeping cross dressing men out of women's sports to be a no brainer. This includes men who have endured a harsh medical regimen which assures them that drugs and surgery will turn them into women. The question then becomes how best to proceed.

I am also appalled by the effect that Lia Thomas is having on women's swimming.

The question is what we should do about it.

The key question is what language can get us to where we want to go.

If the "coed" or "mixed" category could be interpreted to mean a sports league for transgender and nonbinary youth, I think I could support it. If.

There is something hideous about Alana McLaughlin, a veteran of special forces while still an intact man, beating up Celine Provost in MMA fighting. We should be able to understand Lia Thomas's demoralizing effect on women's swimming.

If we had a policy which could satisfy old fashioned feminists while also allowing transgender and nonbinary individuals to play sports in their own league, Lia Thomas could compete in a division other than one for men or one for women.

This is already happening for marathons. Marathons in Chicago, Boston, New York, London, Tokyo, and now Miami are taking this course.

<https://www.miamiherald.com/sports/article271631887.html>

Although I could have done without the National Hockey League's rhetorical pieties on Twitter, the NHL is providing a good example by sponsoring a sports league for transgender and nonbinary youth.

<https://www.foxnews.com/sports/nhl-showcases-transgender-nonbinary-hockey-tournament-responds-criticism-twitter>

Permitting nonbinary divisions would be an effective way to defend sports for biological women while providing athletic opportunities for transgender and nonbinary youth. North Dakota would not look like a sore thumb by doing this.

I think the following language would greatly improve this bill:

Page 1, after line 14, insert:

4. "Coed" means including both males and females, and may apply to an athletic team or sport intended for people who identify as a gender not corresponding to their biological sex.

Renumber accordingly

If there is even better language to accomplish the same goal, that would be great.

Permitting nonbinary divisions in sport would make it difficult for people such as Lia Thomas to claim that they are getting discriminated against. If the National Collegiate Athletic Association decides to sue North Dakota, let's make sure our state is in the strongest position possible to collect court costs from the NCAA.

One major reason why I am testifying here is to defend the legislative intent behind HB 1254, which would criminalize a form of child abuse consisting of chemically and surgically sterilizing children in the name of transgender ideology.

It is precisely because I oppose systemic child abuse by a sterilization industry which profits from the misery of children that I oppose any legislation which would compound that misery through punitive red tape against them.

Although I am a non-attorney with only a lay person's perspective on the legal system, it seems to me that legislative intent is important. To defend the legislative intent behind HB 1254, we must not only avoid increasing the misery of transgender individuals, but also to maintain the appearance of avoiding it.

If any legislation appears to be designed to turn the life of a transgender individual into a living hell, of course I will oppose it. And I hope you will too.

House Bill 1489 would be strongest if it achieves its goal in a manner which respects the rights of both traditional women and gender nonconformists.

Biological women have every right to object to the presence of biological men in their bathrooms, locker rooms, and sports. Not every women objects, but many women do. Let's provide a social space for transgender and nonbinary people too. This might not be a perfect solution, but it should be workable.

So, please give this bill a DO PASS so long as it either (a) gets amended as I am recommending or (b) if this bill's sponsors express the view that "coed" can include a nonbinary division for collegiate sports.

Thank you.

March 26, 2023

HB #1489

Judiciary Committee

HB #1489 68th Legislative Session

Chairperson Larson and Committee

I am writing in opposition to HB #1489. This bill is lacking knowledge and true understanding of what transgender is. The authors of this bill not only don't know the science of what transgender is but also the process that a transgender person goes through to become whole.

How many transgender people do you know? How many parents have you sat down with and listened to their story? Very few if any. Have any of you taken time to listen to the struggles and what life is like for a transgender person and their family in North Dakota?

What this bill is doing is discriminating against a protected class of people that you do not understand and let us be honest, you don't want to understand because if you truly were working in the best interest of North Dakotans, due diligence would have been exercised here and ALL of the people sitting on this committee would have made time to talk to a transgender person or their family. I know that's not the case because no one has sat down with me although I have reached out to legislators such as Jenna Myrdal and asked to speak with her. Myrdal only told me she read my testimony and I should speak to my representative. Does that sound like a person who is wanting to have a dialogue and is in the spirit of wanting to understand this very HOT TOPIC issue? Not in my book. I called Koppelman and others too. Very few called me back. That fact alone speaks volumes of our legislators which is this body lacks empathy, compassion and the willingness to hear people. Testimonies either written or given orally in committee are restrictive and there isn't the ability to really discuss a person's story when there usually are many people standing behind you to testify and there is a time limit for the entire group.

People should NEVER stop wanting to learn and evolve. Only those who want to live in fear will not take the necessary steps to become enlightened and even entertain the fact that their beliefs could possibly be wrong.

College is a time to learn to explore your new phase in life, to learn about yourself and others who you study with, share a dorm with or even as a teammate. In ND colleges, the demographics are very diverse and different than those who live in your little home town. When I went to college, for a second time later in life, I was the OTA student (older than average) and usually the professor and I were in the same age range. Colleges also provide students the opportunity to learn and interact with people from different states and even different countries.

What an opportunity to learn about people! Many of North Dakota youth come from a small town in North Dakota and their exposure is limited to say the least. I, myself, had a very limited exposure to diversity. I did have the weird anomaly of being 1 of 3 kids in my high school who was Catholic. That fact, inevitably, proved to be a problem because I had a classmate whose parents refused to let him attend a movie with me, as friends, because of me being Catholic. This bigotry happened to me in the 1980's. Not that long ago and yet hate existed then as it does now. Why, because of ignorance and the lack of understanding.

This bill is cruel because it takes away the opportunity to play at a higher level in sports. There has not been any incident in which a transgender college athlete has dominated a sport. **Not one instance in North Dakota!**

The authors of this bill are making an issue where there isn't an issue. The governing body which handles college sports already has guidelines in place for transgender college athletes. So why are you trying to remove sports from transgender athletes? Fear, fake news and an agenda from those who fear equality and speak behind the pulpit.

Laws should be made concerning facts not myths, rumors and from people who are not experts spew all because of their ideology which is based on gossip. HB #1489 hurt and discriminates transgender people. If the authors of HB #1489 had even looked into the steps of transitioning, the authors would have discovered medical facts that prove this bill is unnecessary and just another attempt to eliminate and hopefully "eliminate queer" (**quote from Rep. Kasper on his Facebook page**) from North Dakota. In the aspect of a male to female transgender person, the blockers prevent testosterone and then when the endocrinologist sees that testosterone is to the point of hardly being detected OR isn't detected is when estrogen is started. These are "BEST PRACTICES" procedures which the medical professionals follow. Following this procedure, the **muscle mass**, body hair, facial hair and other male attributes do not form because the best time for this part of transitioning is right at the start of PUBERTY; well before the transgender person enters college. My daughter, who was born male, doesn't have an Adams apple, the body or facial hair as a male would at her age NOR THE MUSCLES of a MALE HER AGE. **As the old saying goes there is a time and place for everything and that includes medical intervention.**

The college coaches know more about this issue than yourselves, so let the college coaches do their job. What will this bill do to those teams who want to come into North Dakota and play sports but have transgender athletes? What about the backlash of this bill? This could keep North Dakota sports teams from playing teams they really want to play. Teams who would come to North Dakota to play and compete will not come and engage with the colleges of North Dakota because of the anti-transgender climate that this bill and all the other bills give the state. This bill doesn't do anything but hurt college athletes in North Dakota.

None of you are doctors so you know nothing of the process of which a transgender person must take. Had you learned and spoken to doctors who treat transgender people you would see that there is no edge that the transgender person has on the CIS athlete. Also, what about the sports that are co-ed?

I can't stress enough that knowledge is power. I encourage all of you to reach out and talk to the doctors and transgender community. Take interest in the transgender community and that is then when you see that there is nothing to fear. You will realize that we all are children of God and that this is not the way to treat a group of God's children. Also, you shouldn't judge transgender people. Judgment is to be left to God and God only. Your hunt to seek out and destroy transgender people reminds me of what Hitler did to the Jews. In Hitler's eyes, the Jews were the ruin of the world. Everything that was wrong was done or caused by Jews. Jews must be controlled, kept marginalized as much as possible and then he tried to erase Jews. Is that your vision for North Dakota? To become a state that is Aryan? Learn the facts before you vote.

Most of you were born and raised in North Dakota. This isn't the North Dakota that I grew up in nor did my mother foster in us kids to judge people who we didn't know, talk to or understand. Is that your

vision for the youth of North Dakota, to grow up judging, hating and yes discriminating others who do not look like themselves? Remember, my classmate who couldn't go the movies with me just because I was Catholic. How ridiculous! Don't we know better now in the 21st Century or are we still repeating history and refusing to learn that all people deserve equality and that fear and bigotry has no part in law making.

Respectfully,

Kristie Miller Parent of a transgender



**TESTIMONY on HB 1489
from the
NATIONAL ASSOCIATION OF SOCIAL WORKERS—NORTH DAKOTA CHAPTER
to the
ND Senate Judiciary Committee
March 27, 2023**

Chairperson Larson and Members of the Senate Judiciary Committee:

The North Dakota Chapter of the National Association of Social Workers requests a **Do Not Pass vote on HB 1489**.

NASW-ND opposes HB 1489 due to its intent to discriminate against North Dakota citizens.

The NASW Ethical Standards state that “[s]ocial workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical ability.”

HB 1489 discriminates against transgender college students by preventing them from participating in and enjoying the benefits of their chosen sports activities. The bill also serves to further isolate and ostracize transgender individuals and sends the message that they are not welcome or tolerated at North Dakota universities – a message that is far from the truth.

The NASW Code of Ethics asserts the inherent dignity and worth of every person and requires social workers to promote self-determination and to support an individual’s capacity and opportunity to change and address their own needs. HB 1489 denies individual self-determination and opportunity.

NASW-ND strongly opposes HB 1489 in its entirety and requests that the Senate Judiciary Committee give this bill a Do Not Pass.

Submitted by:

Elizabeth Loos
Lobbyist
North Dakota Chapter – National Association of Social Workers

**Do Pass Testimony
of Doug Sharbono, citizen of North Dakota
on HB1489
in the Sixty-eighth Legislative Assembly of North Dakota**

Dear Madam Chair Larson and members of the Senate Judiciary Committee,

I am writing as a citizen and believe HB1489 is great legislation.

I have a little knowledge of this issue. I am involved as a USA Swimming swim meet official, judging stroke and turns, starting, and deck reffing. Our family is a swimming family. Three of our daughters and our one son have been involved in USA Swimming. We know a little bit about diversity, equality, and inclusion. House Bill 1489 is rightly all of that. In my opinion, it truly balances diversity, equality, and inclusion.

My position on House Bill 1489 is simple. For equality, I believe females should be timed only against other females for rankings and records. Females should not be timed and competed against biological males in exclusively female swimming competitions. It is patently unfair and does not acknowledge the differences between females and males. I have included in the following link the current USA Swimming time records for both males and females in North Dakota. With some notable exceptions, there are generally significant time differences between males and females. The obvious advantage to faster times is natural testosterone. [Team Manager Record Report \(teamunify.com\)](http://teamunify.com)

We have been told by opponents to HB1489 there will be no USA Swimming in ND with HB1489. That is a statement that is rather draconian and rings hollow. USA Swimming has recommended guidelines for gender diverse swimming (meaning a biological male swims as a declared female). These are NOT requirements and do not prevent the North Dakota Local Swimming Committee's (NDLSC) from conforming to state requirements that HB1489 will require. This will NOT shut down swimming as we are told. It will preserve the conditions for which we are currently accustomed. The following link includes USA Swimming recommended practices for gender diverse athletes. Notice the language "should" and not "shall". This does not expressly prohibit a difference in local rules from the USA Swimming recommendations. [recommended-practices-for-gender-diverse-minors.pdf \(usaswimming.org\)](http://usaswimming.org)

Competing female athletes against biological males in an exclusively female event is patently unequal even after the required 12 months of hormone treatment. Nationally, there are numerous cases of the biological female records

being shattered by the new entrance of biological males within the female class. This is more prominently seen in track and field right now. I believe it is coming to all sports including swimming, and that belief is well founded based on the data. The following link provides information on a recent Gallup Poll which studied the percentage of the population which identified as non-heterosexual.

[Poll: Stunning Percentage of Generation Z Identifies as LGBT](#)

[\(westernjournal.com\)](#) The percentage of population currently identifying as non-heterosexual is: 1.3% of Age 74+, 2% of Ages 56-74, 3.8% of Ages 40-55, 9.1% of Ages 24-39, and **16%** of Ages 18-23. What was no apparent issue in previous generations due to low numbers of transgenders is now very much an issue that needs to be carefully balanced. There is a conflict between equality and diversity. Equality should not take a backseat in a sport where hundredths of a second do matter. Ignoring this conflict with inaction does not resolve the issue. The time to act is now before the traditional competitions of female sports are adversely affected. If legislative action is delayed, there will be much difficulty in properly balancing equality interests with diversity interests. HB1489 is in the right time, and done in the right place, the ND legislature.

You will hear opponents to House Bill 1489 say revenue matters to them, while expressing little to no concern about the equality considerations. I do get that. I acknowledge our striving for equality for female athletes may deter some of the national competitions from occurring in North Dakota. However, we do not know that, and that argument is speculative. I believe it is better that principle is placed over the risk of losing a large national meet held every few years in North Dakota.

The real world on equality for female athletes and preventing males competing as females is that it will only be stopped with the assistance of the ND legislature. The vehicle rendering this assistance is HB1489. HB1489 is great legislation. I believe this is THE only way to maintain true equality for female athletes in North Dakota.

I am not opposed to amendments that DO NOT alter the original intent of the bill. However, after studying (the opponent's material too), and learning about HB1489, I want it just the way it is.

Thank you,

Doug Sharbono
1708 9th St S
Fargo, ND 58103

**HB 1489**March 26th, 2023

Celeste McCash, North Dakota Student Association

701-270-2419 | Konrad.mccash@ndus.edu

Chairwoman Larson and Members of the Committee: My name is Celeste McCash, and I am the Head Delegate for Lake Region State College with the North Dakota Student Association. I am here today in opposition to HB 1333.

The North Dakota Student Association is dedicated to ensuring that students have a voice at the table in policy that affects higher education. We consist of delegates from each of the 11 public North Dakota University System (NDUS) institutions, meeting monthly to engage students in discussions about North Dakota higher education policy. Since 1969, our mission has been to empower students, create collaboration between the North Dakota public universities' student bodies, and provide a student perspective on higher education policy.

The NDSA has historically supported protecting LGBTQIA2S+ students across the NDUS, and this bill erodes the culture of acceptance within the state. In 2022, the NDSA passed resolution [NDSA-09-2223](https://ndsa.ndus.edu/wp-content/uploads/sites/5/2022/11/NDSA-09-2223-.pdf)¹, which looked at the NDSA's legislative priorities going into the 23-25 biennium. One of the six legislative priorities passed with this resolution was protecting the rights of NDUS LGBTQIA2S+ students. In addition, NDSA passed resolution [NDSA-14-2223](https://ndsa.ndus.edu/wp-content/uploads/sites/5/2023/01/NDSA-14-2223.pdf),² which expressed our support for gender-diverse students in higher education, and [NDSA-23-2021](https://ndsa.ndus.edu/wp-content/uploads/sites/5/2021/03/NDSA-23-2021.pdf),³ which explicitly opposes excluding gender-diverse people from participating amongst their preferred gender. The documents mentioned above are why NDSA is seeking a **Do Not Pass** recommendation on HB 1489.

¹ <https://ndsa.ndus.edu/wp-content/uploads/sites/5/2022/11/NDSA-09-2223-.pdf>

² <https://ndsa.ndus.edu/wp-content/uploads/sites/5/2023/01/NDSA-14-2223.pdf>

³ <https://ndsa.ndus.edu/wp-content/uploads/sites/5/2021/03/NDSA-23-2021.pdf>

This bill seeks to alienate gender-diverse individuals in higher education by restricting which athletic activities and teams they can participate in. The presence of gender-diverse individuals in collegiate athletic events has not been an issue for any of the NDUS institutions. The standard policies for collegiate athletic events already mitigate potential problems arising from gender-diverse people. During their 2021 summit, The International Olympic Committee updated its guidelines for [gender-diverse participation policies](#).⁴ The new policies seek to reduce the harm caused by their prior testosterone-based policies that disqualified many women with naturally high testosterone. The 2021 policies encourage individual sports institutions to determine eligibility for gender-diverse individuals providing them with a suggested framework to operate under that encourages the inclusion of gender-diverse people.

Despite broad-sweeping implications, HB 1489 does not provide any prerequisites to who can seek action against institutional violations of the bill. As per the bill's text, in 15-19.6-04, subsection 1, line 10, "A student who is deprived of an athletic opportunity or who suffers direct or indirect harm as a result of an institution knowingly violating this chapter has a private cause of action for injunctive relief, damages, and any other relief available under the law against the institution." Can a student seek action if they suspect another student of being gender-diverse and participating with their preferred gender? Can a student pursue action against another student from a separate institution? Are institutions mandated to medically validate the sex of all students participating in a non-coed sport?

HB 1489 only has one outcome for North Dakota: economic losses. Individuals that are in the gender-diverse community, and their families, will not consider moving to or continuing to live in our state. The bill will exacerbate the issue of retaining students after completing their higher education, with many seeking a welcoming environment elsewhere. Many athletes will not want to be subjected to invasive medical evaluation for their sex and the possibility of being disqualified from financial aid if they are removed from their sport.

This bill attempts to solve a non-existent problem; it creates countless more, including, but not limited to, defying common standards for gender-diverse people, denying equal access for gender-diverse individuals, unpractical enforcement of HB 1489, violation of medical privacy,

⁴<https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>

and furthering retention of students in-state. This is why NDSA seeks a **Do Not Pass** recommendation on HB 1489.

Senate Judiciary Committee
March 27, 2023 HB 1489
Testimony in Opposition

Dear Chair Larson and the members of the Senate Judiciary Committee,

I urge a “Do Not Pass” on HB 1489.

1. North Dakota’s State Sport is Curling, which follows [USA Curling Guidelines](#) and allows trans athletes to play as how they identify.
 - a. This policy would forfeit the ability for trans people to play as their truest self in our state’s greatest sport.
2. The World Athletic Council allows female participants (who are trans) that have not gone through androgenized puberty in a [policy update](#).
3. There is strong legal protection within schools to prevent discrimination according to [previously submitted testimony](#).
4. Conflicts with [NCAA Policy](#).

This bill is another bill that seeks to beat a dead horse. The thought that a trans person would come to North Dakota for college? At this point? We’re going to vote “6-1” do pass right? It doesn’t matter what is said here, right? I mean, in 2021, I put together a 20 page comprehensive report on current sports policy and research. I spent a hundred hours looking into and studying everything I could about it in the hopes of elucidating the issues around fairness.

However, that large chunk of my life didn’t even become a comment of the Judicial Committee work back in 2021. It only took them about five minutes to pass that bill. That time was spent largely with Sen. Mydral assuring everyone the NCAA wouldn’t boycott North Dakota no matter how we restrict trans athletes and honestly I think she’s right.

I wish we spent more time looking at how the world worked, rather than trying to dictate how we think it should. I wish we could explore these topics with an open mind and honest curiosity, rather than with great urgency, little time, and a lot of fear. That science is fascinating. Biology is fascinating. Women’s sports is incredible and important and struggling from so many issues not solved in this bill.

In my HB 1249 testimony I ask you to give a million dollars to improve women’s sports in North Dakota. I don’t know what women college athletes need. So, before you definitely give this bill a “Do Pass 6 to 1”, please add a study into women’s athletics to determine what support they can use for funding, legislation, or anything else. You’re not hurting trans athletes with this, we don’t have any. So do something to help our cisgender women at least!

Thank you for your time, consideration, and service to our state,
Faye Seidler



FMWF Chamber Opposition – HB 1249 & HB 1489

March 27th, 2023

Chair Larson and members of the Senate Judiciary Committee,

For the record, my name is Shannon Full and I have the pleasure of serving as the President/ CEO of the Fargo Moorhead West Fargo (FMWF) Chamber of Commerce. The Chamber's mission is to be a catalyst for economic growth and prosperity for businesses, members, and the greater community. On behalf of our over 1,900 members, I respectfully offer testimony in opposition to House Bill 1249 and House Bill 1489.

These pieces of legislation are potentially detrimental to our state, possessing a plethora of adverse effects, including a loss of economic stimulation in the hospitality and tourism industry, and impeding our state's ability to create a robust business friendly climate. The state of North Dakota is competing on a global scale for tourism, economic development, and workforce attraction. If enacted, policies such as these not only impact our state's brand but also hinders our ability to attract and retain companies and individuals.

The more than 100 sporting events that take place throughout our region fill hotels, restaurants, and stores, generating millions of dollars in economic impact. This bill would put these events in jeopardy as large sporting events may cease to host their tournaments in North Dakota, due to the constraints of this legislation or their overall opposition to discriminatory policies such as this. Additionally, we may lose current or future employers, which also generate millions of dollars in economic impact. We recognize the various philosophical and ideological arguments that surround this topic, but the FMWF Chamber stands in opposition due to the negative economic impacts these bills may have on our state and region.

On behalf of our members, I would like to thank you for your time and consideration.

Respectfully,



Shannon Full
President/CEO
FMWF Chamber of Commerce
sfull@fmwfcchamber.com

Members of the Senate Judiciary Committee,

My name is Shaunna Upgren and I reside in District 8. I am asking that you please render a DO PASS on HB 1489.

I am the mother of two female athletes. I fear that females will lose their drive to compete in sports if they know their sport can be dominated by a biological male. Even after gender-affirming hormone therapy, biological males still have the physical advantage. Hormones don't change a person's size or height. In an interview with WebMD, sports physicist Joanna Harper, who has advised the International Olympic Committee (IOC) and other sporting bodies on gender and sports said, "There's absolutely no question in my mind that trans women will maintain strength advantages over cis women, even after hormone therapy. That's based on my clinical experience, rather than published data, but I would say there's zero doubt in my mind."

In addition to the obvious problem of physical advantage that biological males have over biological females in sports, there is another major issue of locker room usage and dressing and undressing in the locker rooms. A female made to undress in a locker room in front of a biological male teammate is incomprehensible and humiliating. A biological male undressing in front of a female teammate is inappropriate and unwanted exposure for the young ladies. Locker rooms are not made for private dressing and undressing. More and more testimonies of girls feeling uncomfortable in dressing rooms where this is happening are coming to the forefront.

We cannot let this happen in North Dakota. Please protect girls sports. Please protect our girls drive to succeed. Please protect our girls and their right to privacy.

Sincerely,
Shaunna Upgren

<https://www.webmd.com/fitness-exercise/news/20210715/do-trans-women-athletes-have-advantages>

March 27, 2023

Dear Chair Larson and the members of the Senate Judiciary Committee, I urge a "Do Not Pass" on HB 1489. I wholeheartedly agree that denying that our transgender friends, family and community members live with us in ND, not only brings harm to them, but also furthers the divide among North Dakotans. In "othering" one another we dehumanize. I am appalled at these egregious bills and if passed how they will "normalize" the ease of disenfranchising anyone that doesn't mirror your image.

Gina Sandgren, Fargo resident

Senate Judiciary Committee
 HB1249 and HB 1489
 March 27, 2023

Chair Larson, Vice Chair Paulson, and Committee members:

The ACLU of North Dakota opposes both HB 1249 and HB 1489. There is virtually no difference between these bills other than applying the first applying to high school and the second to college and universities thus we enter joint testimony of opposition. This legislation is deeply harmful to transgender students in our state and violates both the Constitution and federal law. If passed, HB 1249 and HB 1489 will likely entrench North Dakota in a drawn out, costly legal battles. We urge you to vote **do not pass** on this legislation for the following reasons:

HB 1249 and HB 1489 will harm transgender students.

Trans youth, just like all youth, simply want to participate in the activities they love, including athletics. This is no different for college age transgender students. Trans students participate in sports for the same reasons other young people do: to challenge themselves, improve fitness, and be part of a team. This bill would deprive a subset of students and young people of the opportunities available to their peers and, if passed, would send a message to vulnerable transgender youth that they are not welcome or accepted in their communities.

HB 1249 and HB 1489 Violates the Constitution and Title IX of the Civil Rights Act

By singling out transgender young people and enacting a sweeping ban on participation in athletics, HB 1249 violates both the United States Constitution and Title IX of the Civil Rights Act.

Where a law singles out people based on the fact that they have a gender identity that does not match the sex assigned to them at birth, it necessarily discriminates on the basis of sex and trans status, thus triggering heightened equal protection scrutiny under the Constitution. “[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.”¹ As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”² There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.³ The bill, if passed, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status.

In 2020 an Idaho court enjoined a similar ban on transgender women and girls participating in women’s athletics and reached the “inescapable conclusion that the Act discriminates on the basis of transgender status” and thus triggered heightened scrutiny.⁴ The court reasoned, “the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity.”⁵ The federal court’s order granting the motion for preliminary injunction (which is still in effect today) is attached to this document in full for your review.

¹ See, e.g., *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at *31 (D. Idaho Aug. 17, 2020)(finding that “there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all”).

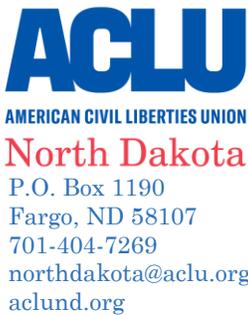
² *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020).

³ *United States v. Virginia*, 518 U.S. 515, 555 (1996).

⁴ See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

⁵ *Hecox*, 2021 WL 4760138 at *27.





Parties who seek to defend gender-based and trans-status based government action must demonstrate an “exceedingly persuasive justification” for that action.” Under this standard, “the burden of justification is demanding and it rests entirely on the State.”⁶ The bill sponsors have so far offered no justification for 1249 and HB 1489 except for hypothetical future problems that have not arisen. But under heightened scrutiny, justifications “must be genuine, not hypothesized or invented post hoc in response to litigation.”⁷ This demanding standard leaves no room for a state to hypothesize harm and impose a categorical exclusion far exceeding anything utilized even at the most elite levels of competition. Applying this standard, the *Hecox* court enjoined Idaho’s ban on women and girls participating in women’s sports solely because they are transgender, finding the state’s proffered justifications wholly insufficient.⁸ Idaho, like North Dakota, already had regulations in place governing the participation of transgender athletes in student athletics and could not justify the additional ban.

Likewise, if passed, HB 1249 and HB 1489 would violate Title IX of the Civil Rights Act of 1964. Title IX protects all students—including students who are transgender—from discrimination based on sex. Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁹ The overwhelming majority of courts to consider the issue have held that discrimination against transgender students in schools is prohibited sex discrimination under Title IX.¹⁰ Since the Supreme Court’s decision in *Bostock*, two federal appeals courts have affirmed that Title IX’s prohibition on sex discrimination likewise prohibits discrimination against transgender students when accessing single-sex spaces and activities.¹¹

HB 1249 and HB 1489 Risks the Loss of Significant Amounts of Education Funding and Will Result in High Litigation Costs

The current presidential administration has made clear that it intends to enforce federal civil rights statutes, including Title IX, consistent with the Supreme Court’s holding in *Bostock*.¹² This means that should North Dakota pass 1249 and HB 1489 or bills like it that target transgender students for discrimination, it will not only likely face litigation by private parties but also by the federal government. And such a violation of Title IX will not only cost the state substantially in litigation costs but will also put the state’s federal education funding at risk. For North Dakota in FY 2021, the estimated federal funding for primary and secondary education was over \$132 million and total funding for education, over \$407 million.¹³

⁶ *Id.*

⁷ *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021).

⁸ *Virginia*, 518 U.S. at 531.

⁹ *Id.* at 533.

¹⁰ *Hecox*, 2020 WL 4760138, at *31-*35.

¹¹ 20 U.S.C. § 1681(a).

¹² *See, e.g., Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 719-722(D. Md. 2018).

¹³ *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020)(applying *Bostock* and holding that school policy of excluding boy from restroom solely because he was transgender violated Title IX).

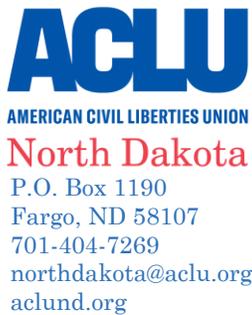
Additionally, litigation costs that would arise out of the passage of 1249 and HB 1489 are likely to be extremely high. As a chapter of ACLU National, the ACLU of North Dakota has consulted with litigators on the Idaho case to get a sense of the costs North Dakota can anticipate should 1249 and HB 1489 pass and end up in court and will result in high costs that will be carried by North Dakota taxpayers.

In conclusion, extreme policies such as HB 1249 and HB 1489 are out-of-step with prevailing international and national norms of athletic competition, violate the United States Constitution and federal civil rights law, and put North Dakota at risk of losing hundreds of millions of dollars in federal funding. This bill will harm transgender youth and do so in an attempt to solve a problem that plainly does not exist.

Transgender students already live and go to school in North Dakota, they play sports and enjoy time with their friends, and they deserve the chance to succeed and thrive like any other student.

For these reasons, we strongly urge your do not pass vote on HB 1249 and HB 1489.

Cody J. Schuler
Advocacy Manager
ACLU of North Dakota
cschuler@aclu.org





Engrossed HB 1489

Senate Judiciary Committee

March 27, 2023

Katie Fitzsimmons, Director of Student Affairs, NDUS

701-328-4109 | katie.fitzsimmons@ndus.edu

Chair Larson and Senate Judiciary Committee Members: My name is Katie Fitzsimmons and I serve as the Director of Student Affairs at the North Dakota University System. I am representing the North Dakota University System and its eleven institutions in opposition to Engrossed HB 1489. The bill would open campuses to an unlimited liability to litigation by aggrieved parties; require our campuses to contradict Title VII and Title IX federal regulations which could result in a loss of federal funding and financial aid; align incongruently with NCAA, NAIA, and NJCAA guidelines; and create an unenforceable step of vetting for all intramural and club sports on our campuses which would lead to unintended consequences, for which, we respectfully request an amendment.

Title IX was enacted as a follow-up to the Civil Rights Act of 1964 and its original text, as written and signed into law by President Nixon in 1972 stated: “No person in the United States shall, based on 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.” Title IX regulations have evolved over the last 50+ years, sustained a major shift in May 2020, and will see a new update in May of 2023. However, the most recent change occurred in January of 2021.

On January 20, 2021, President Joe Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.¹ The Order cites the 2020 Supreme Court case of *Bostock v. Clayton County*, which held that Title VII’s prohibition on discrimination “because of sex” covers discrimination on the basis of gender identity and sexual orientation. Under this case’s reasoning, all laws that prohibit sex discrimination, including Title IX, prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary. The NDUS and its institutions are bound by this Executive Order, as it will guide federal regulators in their interpretation of Title IX.

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

In short, if a campus were to require an athlete to participate on an athletic team that corresponds with the athlete's sex assigned at birth if that differed from the gender with which they identify, the athlete would have solid footing for a complaint with the Office of Civil Rights (OCR) and further litigation – a proposition that has been backed up by a number of court decisions from the last few years. The possible costs of time and money from OCR fines and litigation fees and settlements, could span years and amount to a substantial cost to the University System and North Dakota's taxpayers.

Litigation could be the least of the University System's concerns. If campuses do not comply with Title IX regulations as this bill directs, the campuses are in violation of federal law. As such, all financial aid, scholarships, research grants, and other federal support could be wholly jeopardized. The spirit of this bill aims to remove athletic competition from a population that currently does not exist on our collegiate teams, but if this bill were to pass, the North Dakota State Legislature could be responsible for stripping profound financial support to all students and institutions. Further, things get tricky when the state legislature intervenes on federal regulation that is a moving target. The Department of Education will release updates to Title IX regulations in May of this, after this body gavel out sine die. If the implications of this bill put us in further conflict with Title IX regulation, what are the campuses to do?

At a glance, annually, the North Dakota University System receives 20% of its funding from the state; 31% from tuition; 17% from grants and contracts (federal money); and 32% is covered through auxiliary funds, for a total of \$1.4 billion dollars. More acutely, according to the numbers from 2021-2022, over 20,600 North Dakota University System students received \$196.1 million in federal grants and loans. Statewide, if you count the private and tribal institutions, that figure increases to \$227.8 million. The North Dakota University System respectfully requests the committee consider the wide-reaching impacts this bill could have on the finances of our students, if financial aid programs were compromised.

I would like to refer you to the guidelines and polices that direct current practices. Bismarck State College, Dakota College at Bottineau, Lake Region State College, and Williston State College are members of the National Junior College Athletic Association (NJCAA). Dickinson State University, Mayville State University, and Valley City State University are members of the National Association of Intercollegiate Athletics (NAIA). Minot State University, North Dakota State University, and the University of North Dakota are members of the National Collegiate Athletic Association (NCAA). Each of these three athletic associations have guidelines in place regarding participation of transgender student athletes. The NJCAA outlines their policies in Section 5 of their constitution and by-laws, which all member schools endorse. The NAIA and NCAA outline guidelines for their member schools to consider adopting. Each group requires transgender student athletes to obtain a medical exception

from the corresponding association. The policies and guidelines established by these three athletic associations are currently working well and provide clear guidance to our athletic programs. The NCAA released a new set of guidelines on transgender students' participation in January that borrowed many of the rules from the United States Olympic and Paralympic Committees. The organization adopted its first set of guidelines around transgender students' involvement in sports in 2011, a time when virtually no colleges had adopted policies on the matter. Under the new guidance, which will be fully implemented by August 2023, transgender athletes at NCAA member colleges will have to regularly report their testosterone levels and provide additional documentation that they meet specific standards depending on their competitive sport.

In the current language, all intramural sporting activities, or any wide range of athletic activities that are divided by sex, would apply to the intentions of this bill. For any campus to make these determinations would be a legal and logistical nightmare – one which the bill does not explain how to resolve. The sponsors of this bill stand on the platform that they want to maintain open access to athletics for women. If this bill were to pass with the current language encompassing intramurals, unintentionally, this bill would restrict access to athletics to women on our campuses. I'll walk you through it:

Intramural programs are handled differently on each of our campuses, but many of them operate very casually, as they are just that- casual, easy ways to have fun with your peers. This provision would require all campuses to verify the sex-assigned at birth for all participants. Since that is not logistically possible under our current operations, many campuses would have to designate all intramural teams as “open”, meaning anyone can sign up for any team to err on the side of caution in order to remain compliant with the language in the bill. This would guarantee that women would be forced to compete against men and we would definitely see a decline in participation from women in intramural activities. The leagues from basketball to rugby would be dominated with male enrollment; edging out female competitors and eventually, discouraging women from signing up for participation.

To make this a bit more real, here are some numbers. In the Fall of 2022, one of our institutions had 2361 students participate in 18 different intramural activities. 1700 men; 661 women. The four activities with the most students (1974 students or 84%; 1403 men and 571 women) were divided into men's, women's, Greek, and Coed leagues. The other 14 activities were open, meaning anyone could sign up and participate and no particular quotas or ratios needed to be met. The combined participation of those 14 activities was 387 students, and dominated by a male presence (297 men and 90 women). If this bill passes, campuses such as these would be forced to make all intramurals open. If the sponsors of this bill do not want women to be forced to compete against men, the unintended consequence of the bill's current language would actually force women to compete with men in intramural recreational leagues. Because of privacy limitations, record keeping, staffing, and simple

logistics, there would be no way for an institution to maintain separate leagues and guarantee that all participants are enrolled on teams that match their sex assigned at birth. If the intention of the bill is to expand female participation and access, the North Dakota University System Office strongly recommends the committee consider amending out any reference or inclusion to intramural athletic activities in order to allow men and women to compete in intramurals as they currently are. We have fielded no complaints from how intramurals are currently run and we ask that the committee take that to heart.

The simple reasons that this bill puts all federal funding for our students at risk, addresses a concern already handled by the athletic conferences that the campuses maintain membership, and creates mandatory tracking of individuals that we do not have the capacity to perform, the North Dakota University System Office respectfully requests a Do Not Pass on Engrossed HB 1489. The University System fully understands that other states have enacted similar legislation and have not felt negative consequences, but we ask this governing body to think critically about asking one of your state entities to knowingly violate federal regulation for a threat that does not exist and does not have a negative effect on our players, teams, or institutions. If you choose to pass the bill, we respectfully ask for your consideration of amending the language around intramurals and other sporting activities. I thank you for your consideration and your service to the state and I stand for your questions.

Members of the Senate Judiciary Committee,

My name is Thea Holter and I reside in District 1. I am asking that you please render a DO PASS on HB 1489.

Please protect our women and girls from being forced to compete in sports against biological males.

Thank you for your consideration of the issue at hand and your service to the state of North Dakota.

Dear friends,

I stand before you today to talk about an issue that is very important to me: the human rights of transgender people. Every day, transgender individuals face discrimination, persecution, and hate simply for being who we are. It's time for us to acknowledge that the people in the transgender community are just as human as non-LGBTQ members and deserve the same dignity, respect, and rights as everyone else.

We have been around throughout history, yet we have been marginalized and oppressed for far too long. We are your friends, family members, colleagues, and neighbors. We are just like you, and we deserve to be treated with the same respect and dignity as anyone else.

Unfortunately, many people still view transgender individuals as "other," as if we are somehow less than human. This has led to countless acts of violence, discrimination, and oppression against us. We must stand up and say that this is not acceptable. Us among the trans community are no different from anyone else, and we deserve to be treated with the same respect and dignity as everyone else.

The fight for transgender rights is not just an issue of justice and equality; it's an issue of basic human rights. Every person, regardless of their gender identity, deserves to live a life free from discrimination, violence, and oppression. This is not just a matter of opinion; it is a fundamental human right that must be protected.

So today, I challenge each and every one of

you to look beyond your preconceptions and prejudices and see transgender people for who we truly are: human beings with the same hopes, dreams, and fears as everyone else. I ask that you embrace diversity and celebrate our differences. Let us stand together in solidarity and fight for the human rights of all people, regardless of their gender identity.

In closing, I urge you to join me in this fight for justice and equality. Let us work together to create a world where the transgender community are treated with the same respect and dignity as everyone else.

Thank you

Members of the House Human Services Committee,

My name is Cionda N Holter and I reside in District 3. I am asking that you please render a DO PASS on House Bill 1489.

There is a mountain of evidence that shows that, in general, male athletes are bigger, stronger, faster, possess better hand-eye coordination, and are more spatially aware than their female counterparts, all of which clearly give men the advantage. Males even have the advantage after one year of gender-affirming hormone therapy. Trans women are not women. They are males no matter how much estrogen they swallow or body parts they alter. Please do not allow subjective ideology to trump established biological facts. Please protect the hard-won sex-based rights of women and the opportunities that come from being an athlete.

One thing I would like to state for those who would oppose this bill is this; "Are you willing to take on the responsibility of the female athletes that would be injured, assaulted, and would lose the opportunity of titles and championships due to being forced to compete against biological men?" If you are unable to take on that responsibility, then you should not be opposing this bill.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Cionda Holter

701-580-4746

Members of the House Human Services Committee,

My name is Jacob R Holter and I reside in District 3. I am asking that you please render a DO PASS on House Bill 1489.

There is a mountain of evidence that shows that, in general, male athletes are bigger, stronger, faster, possess better hand-eye coordination, and are more spatially aware than their female counterparts, all of which clearly give men the advantage. Males even have the advantage after one year of gender-affirming hormone therapy. Trans women are not women. They are males no matter how much estrogen they swallow or body parts they alter. Please do not allow subjective ideology to trump established biological facts. Please protect the hard-won sex-based rights of women and the opportunities that come from being an athlete.

One thing I would like to state for those who would oppose this bill is this; "Are you willing to take on the responsibility of the female athletes that would be injured, assaulted, and would lose the opportunity of titles and championships due to being forced to compete against biological men?" If you are unable to take on that responsibility, then you should not be opposing this bill.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Jacob R Holter

701-580-7800

We support protecting female athletes from being forced to compete with males in female-only collegiate sports, therefore we stand in support of HB 1489. Please do pass it!

Sincerely,

Charlton & Tia Stanley

March 27, 2023

Dear Chair Larson and Members of the Senate Judiciary Committee:

My name is Rev. Karen Van Fossan. I am an ordained minister and licensed professional counselor, serving as a pastoral counselor in the state of North Dakota. **I ask that you give both HB 1489 and HB 1249 a Do Not Pass recommendation.**

These bills would bar transgender young people, whether in higher or lower educational settings, from participating in sports in ways that affirm not just their identity—but their being. Transgender people comprise approximately 2% of the population, and these bills place undue strain on an already severely marginalized group.

As other testimony will indicate, the risks of transgender girls out-performing cisgender girls, by virtue of their transgender status, are next to nothing. Considering the efficacy of hormone blockers, transgender girls are not significantly hormonally different from cisgender girls. When transgender girls win, we should celebrate their athleticism rather than disparage their identity.

A few years ago, I was adopted by a young mother and her beautiful transgender child. Having been rejected by their family of origin, they asked me to become their mom and grandma. Due to a fundamental misunderstanding about what it means to be transgender, their family had become unable to love them. As painful as this breach has been for my chosen daughter and grandchild, I believe the real losers in this scenario are the family members who don't get to experience the Halloween costumes, the spontaneous dances, and the joyful utterances (like "I love you, Grandma!") that I now enjoy as a matter of course. I do indeed love my transgender grandchild from the deepest place in my soul.

These bills would have devastating effects on my grandchild, our family, and our larger community. The American Counseling Association, my own ministerial association, and numerous respected bodies advocate for gender-affirming opportunities in schools, families, and social activities for people like my grandchild.

Please vote on the side of my family and vote Do Not Pass on HB 1489 and HB 1249.

Thank you.



NORTH DAKOTA

Family Alliance LEGISLATIVE ACTION

Testimony in Support of House Bill 1489

Mark Jorritsma, Executive Director
North Dakota Family Alliance Legislative Action
March 27, 2023

Madam Chair Larson and honorable members of the Senate Judiciary Committee. My name is Mark Jorritsma and I am the Executive Director of North Dakota Family Alliance Legislative Action. We are submitting testimony in support of House Bill 1489 and respectfully request that you issue a “DO PASS” on this bill.

Context

It may seem like an obvious statement, but boys and girls are biologically different from birth. Whether one agrees or disagrees that this is how it should be, science and common sense tell us that males are almost always stronger than females. That difference shows up in size, strength, bone density, and even hearts and lungs. These areas of biological advantage for boys are often directly associated with athletic performance. Over and again, the courts and federal law have ruled that boys have a biological advantage over girls in most sports (Appendix A).

In contrast to this, some are lobbying to allow boys born biologically male but who identify as female to compete in girls’ sports. What is the supposed basis for this position? Title IX of the 1964 Civil Rights Act is often used to justify it. However, Title IX was designed to *eliminate* discrimination against women in education and athletics, but the current trend exploits Title IX to do just the opposite – let biological males steal opportunities reserved for girls. This is undoubtedly why 19 states now have some form of law protecting girls’ sports (Appendix B).

So, what is the result when biological boys compete in girls’ sports? Not surprisingly, they nearly always win.

- Biological young men presenting as females were using their physical advantages to win girls’ wrestling championships in Texas.
- Transgender males have easily won track championships and shut out girls in Alaska.



NORTH DAKOTA

Family Alliance LEGISLATIVE ACTION

- The world record for the men’s 100-meter dash, set by Usain Bolt, is 9.58 seconds. The world record for women, set by Florence Griffith-Joyner, is 10.49 seconds. Females have never broken what is referred to as the 10-second barrier, while Olympic male finalists consistently break the barrier.
- Transgender competitor Mary Gregory from the UK participated in a women’s weightlifting event, winning the masters world squat record, open world bench record, masters world deadlift record, and masters world total record in one day, beating every other competing woman.
- Just in the single year 2017, Olympic, World, and U.S. Champion Tori Bowie's 100 meters lifetime best of 10.78 was beaten 15,000 times by men and boys.
- And then we come to perhaps the most infamous transgender competitor to date, swimmer Lia Thomas. Her advantages are undeniable. As Swimming World Magazine pointed out, “ The fact that the University of Pennsylvania swimmer soared from a mid-500s ranking (554th in the 200 freestyle; all divisions) in men’s competition to one of the top-ranked swimmers in women’s competition tells the story of the unfairness which unfolded at the NCAA level.”
- These girls are not losing just the opportunity to win, but to also earn college scholarships and launch their own careers in athletics, coaching, and more. In a sense, it is the girls who are truly being excluded. They have been excluded from the sports that were designed to provide them with the space they need to reach their highest potential.

North Dakota Status

There is currently no law in the Century Code that directly addresses boys competing in girls’ sports, including higher-education sports. But is this really an issue that North Dakotans need to address? Yes it is, particularly with the Biden Administration’s aggressive transgender policies. North Dakota is getting increasing pressure from the federal government and special interest groups on a daily basis to discriminate against our female athletes.



NORTH DAKOTA

Family Alliance LEGISLATIVE ACTION

The Bill Itself

The proposed bill, HB 1489, limits participation in girls' higher education sports to biological girls, making clear that women's sports are for women only. It is a straightforward, fair, consistent, and documentable way of handling the issue.

However, this bill really comes down to two things. First, let's keep the playing field level for girls' sports. Let's not set back the clock 50 years and use federal antidiscrimination law against girls to actually discriminate against them in the name of social expediency.

Second, let's keep North Dakota a state where common sense rules. As North Dakotans, we need to tell DC that we will not yield to their social agenda being imposed on us because it directly conflicts with our values.

For these reasons, I ask you to please vote a "DO PASS" out of committee on HB 1489. Thank you for your time and I would be happy to stand for any questions.

Appendix A

FEDERAL PROTECTIONS

For reasons of fundamental fairness and safety, girls have the right to play on a sex -segregated team that does not include biological boys. Courts have recognized there are fundamental physical differences between boys and girls that give boys a biological advantage in most sports. This is why we have sex-segregated teams in public schools and professional sports.



**45 CFR § 86.41 –
THE DEPARTMENT OF HEALTH & HUMAN SERVICES**

This is a federal regulation supporting Title IX. It prohibits discrimination on the basis of sex but specifies that educational institutions may have separate teams for members of each sex if selection is based upon competitive skill or if teams are competing in a contact sport

**34 CFR § 106.41(A)
THE DEPARTMENT OF EDUCATION**

This federal regulation explicitly prohibits discrimination on the basis of sex. But if the sport is a competitive or contact sport, this law permits sex -segregated teams in sports.

**O'CONNOR V. BD. OF ED., 449 U.S. 1301,
1307 (1980):**

If certain sports teams do not have “gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls’ program and deny them an equal opportunity to compete in interscholastic events.”



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8-18-2022

Beyond Bostock: Title IX Protections for Transgender Athletes

Joseph Brucker

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BEYOND BOSTOCK: TITLE IX PROTECTIONS FOR TRANSGENDER ATHLETES

I. INTRODUCTION: WHAT IT MEANS TO BE A TRANSGENDER ATHLETE

“Gender” and “sex” are sometimes erroneously conflated and used interchangeably, but in fact, the terms embody two distinct concepts.¹ Much of western society now distinguishes “sex,” referring to the physiological distinctions between male and female individuals based on anatomical and biological factors, from “gender,” the socially constructed amalgam of behaviors, identities, and expressions of identity.² While some individuals’ gender identities

1. See, e.g., *Sex & Gender*, NIH OFF. OF RSCH. ON WOMEN’S HEALTH, <https://orwh.od.nih.gov/sex-gender> [<https://perma.cc/V9X5-U49D>] (last visited Nov. 6, 2021) (“‘Sex’ refers to biological differences between females and males, including chromosomes, sex organs, and endogenous hormonal profiles. ‘Gender’ refers to socially constructed and enacted roles and behaviors which occur in a historical and cultural context and vary across societies and over time.”); see also Virginia Prince, *Sex vs. Gender*, 8:4 INT’L J. OF TRANSGENDERISM 29, 29 (2005) (“Sex and gender are not the same thing. We are born into a society that is highly polarized and highly stereotyped, not only into male and female, but into man and woman. Man and male, female and woman are considered synonymous pairs of words for the same thing . . . But it is not so. Sex and gender are not the same thing.”); Krista Conger, *Of Mice, Men and Women*, STAN. MED. (Spring 2017), <https://stanmed.stanford.edu/2017spring/how-sex-and-gender-which-are-not-the-same-thing-influence-our-health.html> [<https://perma.cc/2LS4-2NE7>] (explaining how “gender” is often erroneously used by medical researchers instead of “sex”); Tim Newman, *Sex and Gender: What’s the Difference?*, MED. NEWS TODAY (May 11, 2021), www.medicalnewstoday.com/articles/232363.php [<https://perma.cc/5XEE-FT5N>] (describing shifting public perception of sex and perception of gender over time while distinguishing between those terms).

2. See generally *Gender and Health*, WORLD HEALTH ORG., www.who.int/gender-equity-rights/understanding/gender-definition/en/ [<https://perma.cc/HKC4-W37Z>] (last visited Sep. 22, 2021) (elaborating on differences between sex versus gender). See also *What is Gender? What is Sex?*, CANADIAN INST. OF HEALTH RSCH., <https://cihr-irsc.gc.ca/e/48642.html> [<https://perma.cc/A8UR-YZ6E>] (last visited Nov. 4, 2021) (“Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people Gender identity is not confined to a binary (girl/woman, boy/man) nor is it static; it exists along a continuum and can change over time. There is considerable diversity in how individuals and groups understand, experience and express gender through the roles they take on, the expectations placed on them, relations with others and the complex ways that gender is institutionalized in society.”); *What is the Difference Between Sex and Gender?*, OFF. FOR NAT’L STAT. (Feb. 21, 2019), <https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21> [<https://perma.cc/S3SX-7NJT>] (providing UK government’s definition of sex as referring to biological aspects of individuals determined by anatomy and gender as social construction relating to behaviors, and attributes based on masculinity or femininity).

correspond with their biological sex, this is not always the case.³ Moreover, there is no commonly accepted definition of “sex” or method for distinguishing between sexes, and not every definition or method of sex determination consistently produces a clear, male-female binary.⁴ In response to historical practices among various international sporting organizations that adopted so-called “objective” methods for rooting out “impostors” or intersex athletes, some experts and activists have argued instead for more fluid definitions of sex determined not by any one set of physical features but by a confluence of genetic, hormonal, and physiological factors.⁵ Ultimately, these experts assert that any purportedly objective test or guideline claiming to accurately distinguish between male and female athletes is inevitably flawed due to the inherently amorphous borders between sexes.⁶

3. See, e.g., *Gender Identity, Gender-Based Violence and Human Rights*, COUNCIL OF EUR., <https://rm.coe.int/chapter-1-gender-identity-gender-based-violence-and-human-rights-gende/16809e1595> [<https://perma.cc/R3SQ-RQ3H>] (last visited Nov. 4, 2021) (“Gender is not necessarily defined by biological sex: a person’s gender may or may not correspond to their biological sex. Gender is more about identity and how we feel about ourselves. People may self-identify as male, female, transgender, other or none (indeterminate/unspecified). People that do not identify as male or female are often grouped under the umbrella terms ‘non-binary’ or ‘genderqueer’, but the range of gender identifications is in reality unlimited.”).

4. See J. Brad Reich, *A (Not So) Simple Question: Does Title IX Encompass “Gender”?*, 51 J. MARSHALL L. REV. 225, 227 (2018) (finding gonadic criteria based on reproductive glands is not only factor upon which definition of biological gender rests). Other definitions of sex include genetic sex based on X and Y chromosome combinations, anatomical sex based on the appearance of the genitalia, and hormonal sex based on predominant hormones. See *id.* at 228 (providing overview of various ways of defining “sex”). These commonly accepted methods of defining sex do not lend themselves to neat categorizations of sex along a male-female binary. See *id.* at 227 (explaining chromosomal criteria make definition of sex more nuanced). See generally Claire Ainsworth, *Sex Redefined*, 518 NATURE 288, 288–291 (Feb. 19, 2015) (“[I]f biologists continue to show that sex is a spectrum, then society and state will have to grapple with the consequences, and work out where and how to draw the line . . . [I]f the law requires that a person is male or female, should that sex be assigned by anatomy, hormones, cells or chromosomes, and what should be done if they clash? . . . If you want to know whether someone is male or female, it may be best just to ask.”).

5. See Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> [<https://perma.cc/E7RE-82E4>] (explaining various factors forming basis for one’s sex, ways in which international sports organizations have attempted to define or distinguish sex over time, various experts’ finding of criteria to be inadequate, unfair, not founded in science); see also Christie Aschwanden, *The Olympics Are Still Struggling to Define Gender*, FIVETHIRTYEIGHT (June 28, 2016), <https://fivethirtyeight.com/features/the-olympics-are-still-struggling-to-define-gender/> [<https://perma.cc/VM95-GNE3>] (describing debate over testosterone limits versus chromosomal tests for determining sex or use of gender identity, and tradeoffs of various approaches).

6. See Padawer, *supra* note 5 (“Relying on science to arbitrate the male-female divide in sports is fruitless . . . because science could not draw a line that nature

The increased visibility of transgender athletes and state laws meant to curb their participation in athletics have placed issues of sex and gender at the center of the larger legal, political, and cultural debate.⁷ Transgender (or “trans”) individuals are those whose gender identity differs from the gender they were thought to be at birth.⁸ An increasing number of high school and college-aged individuals are identifying as transgender, and these students and activists are challenging educators and lawmakers to rethink gender as universally fixed at birth.⁹ While transgender individuals generally have enjoyed increased visibility and acceptance in recent years, the transgender community still faces obstacles in gaining access to competitive sports.¹⁰ On July 14, 2021, for example, Texas passed SB 2, a bill that would ban transgender women and girls from par-

itself refused to draw.”); *see also* Melonyce McAfee, *Am I Not a Woman?*, SLATE (Aug. 19, 2009), <https://slate.com/news-and-politics/2009/08/how-to-perform-a-gender-test.html> [<https://perma.cc/5WGW-2Z73>] (describing some experts’ view of futility of sex determination tests based on genetics or appearance of genitalia as well as sordid history of tests employed by International Olympic Committee).

7. *See generally* Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women’s Sports? There are Two Almost Irreconcilable Positions*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html> [<https://perma.cc/6T72-F4QJ>] (describing increased acceptance of transgender athletes amid increased resistance from some competitors, some lawmakers).

8. *See Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 19, 2016), <http://www.transequality.org/issues/resources/transgender-terminology> [<https://perma.cc/7L6A-2CU2>] (defining basic terminology, commonly used acronyms); *see also* Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, SOC. SCI. & MED. 147, 222–231 (2015) (finding transgender is umbrella term used to define individuals whose gender identity or expression differs from culturally-bound gender associated with one’s assigned birth sex, is defined by transgender individuals, is expressed in variety of ways); Megan Davidson, *Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organizing Within the Category Transgender*, 4 SEXUALITY RSCH. & SOC. POL’Y. 60, 60 (Dec. 2007) (finding “transgender” has no singular, fixed meaning but is largely held as inclusive of identities or experiences of some or all gender-variant, gender or sex-changing, gender-blending, gender-bending people).

9. *See NCAA Inclusion of Transgender Student-Athletes*, OFF. OF INCLUSION OF THE NAT’L COLLEGIATE ATHLETIC ASS’N, Aug. 2011, at 1, 2 (providing guidance to NCAA athletic programs on how to ensure transgender student-athletes fair, respectful, legal access to collegiate sports teams based on current medical, legal knowledge); *see also Model School District Policy on Transgender and Gender Nonconforming Students*, NAT’L CENT. FOR TRANSGENDER EQUAL. (GLSEN), (Sept. 2018), at 1, 2 (providing education lobbying group’s model policy in which individuals determine gender identity for themselves, rejecting medical, legal, or other proof of gender identity).

10. *See* Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 272 (2013) (providing background on struggles faced by transgender athletes).

ticipating in sports consistent with their gender identity.¹¹ In the 2020–21 legislative session alone, more than seventy-five bills were introduced throughout the country that would bar transgender students from playing school sports on teams that conform with their gender identity.¹² Some proposals go so far as to suggest criminal penalties if transgender athletes participate on teams consistent with their gender identity.¹³ Notably, sixteen states have passed legislation banning transgender women and girls from participating on teams that conform to their gender identity.¹⁴ Those in favor of these laws often express fears that allowing transgender women and girls to participate in high school and collegiate athletics will jeopardize the existence of women’s sports generally.¹⁵ Others believe transgender participation in athletics does not spell an end to women’s sports but will actually enhance access to it.¹⁶

Moreover, the requisite gender “policing” procedures suggested by some state bills have been described by various international human rights organizations as both discriminatory and a

11. See Wyatt Ronan, *Texas Senate Passes Anti-Transgender Sports Ban Bill*, HUM. RTS. CAMPAIGN (July 15, 2021), <https://www.hrc.org/press-releases/texas-senate-passes-anti-transgender-sports-ban-bill-2> [<https://perma.cc/4BLG-QS9E>] (detailing recent state action both within Texas, within other states, barring transgender girls, women from participating on sports teams in conformity with their gender identity).

12. See Dan Avery, *Biden Administration Sends Trans Students a Back-to-School Message*, NBC NEWS (Aug. 19, 2021), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/biden-administration-sends-trans-students-back-school-message-rca1724> [<https://perma.cc/R6Q7-EER2>] (describing largely positive response to Biden Administration’s executive order by transgender activists).

13. See Elizabeth Sharrow et al., *States Are Still Trying to Ban Trans Youths from Sports. Here’s What You Need to Know*, WASH. POST (Jul. 26, 2021), <https://www.washingtonpost.com/politics/2021/07/26/states-are-still-trying-ban-trans-youths-sports-heres-what-you-need-know/> [<https://perma.cc/BF8Q-AVB5>] (highlighting number of state legislators with proposed bills targeting trans youths).

14. See *K-12 Policies*, TRANSATHLETE.COM, <https://www.transathlete.com/k-12> [<https://perma.cc/5VFG-J24C>] (last visited Sep. 6, 2021) (listing states with laws banning transgender students from participating in sports consistent with their gender identity with temporary injunctions blocking enforcement in Idaho, West Virginia).

15. See Abigail Shrier, *Joe Biden’s First Day Began the End of Girls’ Sports*, WALL STREET J. (Jan. 22, 2021), <https://www.wsj.com/articles/joe-bidens-first-day-began-the-end-of-girls-sports-11611341066> [<https://perma.cc/F6MF-HKU4>] (arguing President Biden’s January 20, 2021 Executive Order will result in stripping all Title IX benefits away from women, girls).

16. See *Statement from Women’s Rights and Gender Justice Organizations in Support of the Equality Act*, NOW (Mar. 17, 2021), <https://now.org/media-center/press-release/statement-of-womens-rights-and-gender-justice-organizations-in-support-of-the-equality-act/> [<https://perma.cc/TS4J-U5N9>] (“Girls and women who are transgender should have the same opportunities as girls and women who are cisgender to enjoy the educational benefits of sports, such as higher grades, higher graduation rates, and greater psychological well-being.”).

violation of basic human rights.¹⁷ The National Collegiate Athletic Association (“NCAA”) recognizes all stakeholders involved in collegiate sports benefit from fair and inclusive participation practices enabling transgender student-athletes to participate on teams that align with their gender identity.¹⁸ Yet, despite the strides transgender athletes have made in representation throughout the past few decades, statutory protections under Title IX and the Department of Education’s policies have not always provided adequate protections.¹⁹

The Supreme Court’s recent decision in *Bostock v. Clayton County*²⁰ appears to have set the stage to change this dynamic.²¹ This Comment reviews the legislative history and application of civil rights legislation barring discrimination on the basis of sex, includ-

17. See *They’re Chasing Us Away from Sport*, HUM. RTS. WATCH (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#> [<https://perma.cc/5KRA-KZUA>] (stating nearly century-long history of sex testing of women athletes at international level represents human rights issue); see also *Intersection of Race and Gender Discrimination in Sport*, UNITED NATIONS HUM. RTS. COUNCIL (June 15, 2020), <https://undocs.org/en/A/HRC/44/26> [<https://perma.cc/374U-NAJ3>] (“The implementation of female eligibility regulations denies athletes with variations in sex characteristics an equal right to participate in sports and violates the right to non-discrimination more broadly.”).

18. See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 9, at 8 (“All stakeholders in NCAA athletics programs will benefit from adopting fair and inclusive practices enabling transgender student-athletes to participate on school sports teams. School-based sports, even at the most competitive levels, remain an integral part of the process of education and development of young people, especially emerging leaders in our society.”).

19. See, e.g., Anagha Srikanth, *Taylor Small Becomes Vermont’s First Transgender Legislator*, HILL (Nov. 4, 2020), <https://thehill.com/changing-america/respect/diversity-inclusion/524512-taylor-small-becomes-vermonts-first-transgender> [<https://perma.cc/LUR8-JR9Q>] (discussing Vermont’s first transgender legislator and implications of groundbreaking victory for future LGBTQ legislators); see also *Laurel Hubbard: First Transgender Athlete to Compete at Olympics*, BBC (June 21, 2021), <https://www.bbc.com/news/world-asia-57549653> [<https://perma.cc/AB22-VWM5>] (discussing first transgender athlete to compete at Olympics, including public’s reaction); Caitlin O’Kane, *Chris Mosier, First Openly Transgender Athlete on Team USA, Hopes Sharing His Story Inspires Others*, CBS NEWS (Jan. 4, 2021), <https://www.cbsnews.com/news/chris-mosier-transgender-olympic-athlete-team-usa-sharing-story/> [<https://perma.cc/6BAB-LH8X>] (interviewing first transgender male athlete to represent United States in international competition, prompting International Olympic Committee to change policy on transgender athletes). See generally Maya Satya Reddy, *The Weaponization of Title IX in Sports*, REGULATORY REV. (June 29, 2021), <https://www.theregreview.org/2021/06/29/reddy-weaponization-of-title-ix-sports/> [<https://perma.cc/G9DW-4DRV>] (describing ways in which Title IX enforcement can reinforce prevailing views of masculinity and gender stereotypes).

20. 140 S. Ct. 1731, 1734, (2020).

21. For further discussion of *Bostock*’s future impact on Title IX legislation, see *infra* notes 70–156 and accompanying text.

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ing Title IX and its corollary in the employment realm, Title VII.²² Moreover, this Comment shows that recent legislation at the state level is destined to fail given recent Title IX challenges bolstered by the *Bostock* decision as well as potential constitutional arguments against these laws.²³ This Comment also discusses what the *Bostock* decision implies for women's sports generally going forward and shows that, despite the pessimistic predictions of some commentators, the future of women's sports is not being threatened by transgender athletes.²⁴ Section II discusses Title IX and guidance provided by the Department of Education relating to the law's application to transgender students.²⁵ The Comment then examines the approach taken by various federal courts to Title IX and competing legal theories for its application.²⁶ Finally, the Comment explores recent state legislation regarding transgender athletes that have brought this issue to the fore.²⁷ Section III shows that this state level legislation is ultimately destined to be overturned on challenge under Title IX, bolstered by equal protection challenges, and what the inevitable inclusion of transgender athletes means for women's athletics going forward.²⁸

II. BACKGROUND: CIVIL RIGHTS LEGISLATION AND TRANSGENDER ATHLETES

Title IX of the Education Amendments of 1972 was signed into law on June 23, 1972 by President Richard Nixon.²⁹ The statute itself provides that “[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education pro-

22. For further discussion of how Title IX and Title IV relate, see *infra* notes 70–156 and accompanying text.

23. For further discussion of implications for recent legislation at the state level, see *infra* notes 158–170 and accompanying text.

24. For further discussion of the impact of *Bostock* on women's sports generally, see *infra* notes 188–200 and accompanying text.

25. For further discussion of the Department of Education's guidance on Title IX application, see *infra* notes 44–69 and accompanying text.

26. For further discussion of the competing legal theories of Title IX's application, see *infra* notes 81–118 and accompanying text.

27. For further discussion of the recent state legislation either banning transgender athletes or enabling their participation, see *infra* notes 120–132 and accompanying text.

28. For further discussion of the implication of recent court developments on women's sports generally, see *infra* notes 188–200 and accompanying text.

29. See generally Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 Del. L. Rev. 83, 83 (2013) (providing overview of history and future of Title IX).

gram or activity receiving Federal financial assistance.”³⁰ Title IX was modeled after Title VI of the Civil Rights Act of 1964.³¹ Where Title VI protects against race discrimination in all programs receiving federal funds, Title IX protects against sex discrimination and applies only to educational programs.³² The U.S. Department of Education’s Office of Civil Rights (OCR) has since provided additional direction in the form of memorandums, “Dear Colleague” letters, clarifications, and other various guidance extending Title IX protections to athletics at educational institutions.³³

A. Title IX and Competing Guidance from the Department of Education

On October 26, 2010, under the Obama administration, the OCR released a “Dear Colleague” letter stating that “Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”³⁴ In an opinion letter dated January 7, 2015, the OCR elaborated further by stating that the portion of Title IX providing for separate bathroom and locker room facilities on the basis of sex should be applied to transgender students consistent with their gender identity.³⁵ In July

30. 20 U.S.C. § 1681(a) (LexisNexis 2021) (emphasis added).

31. See *Overview of Title IX: Interplay with Title VI, Section 504, Title VII, and the Fourteenth Amendment*, JUSTIA (last visited Sept. 23, 2021), <https://www.justia.com/education/docs/title-ix-legal-manual/overview-of-title-ix/> [<https://perma.cc/ZHN8-2D8V>] (describing Congress’s conscious effort to model Title IX on Title VI of Civil Rights Act of 1964).

32. See generally Ann K. Wooster, *Sex discrimination in Public Education Under Title IX — Supreme Court Cases*, 158 A.L.R. Fed. 563 (1999) (describing how Title IX was designed, and how school receiving federal funds remain in compliance).

33. See 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, 333 (2012) (describing mechanisms through which Title IX has been enforced including its application to athletic programs).

34. See Ruslynn Ali, Asst. Secretary for Civil Rts., U.S. Dep’t of Educ., *Dear Colleague Letter* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> [<https://perma.cc/YU87-JLFQ>] [hereinafter *2010 Dear Colleague Letter*] (providing Obama administration policy toward LGBT students).

35. See 34 C.F.R. § 106.33 (2022) (providing in part “a recipient [of federal funds] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex”); see also Letter from James A. Ferg-Cadima, Acting Deputy to Asst. Secretary for Policy, Office for Civil Rights, to Emily Prince, Esq. (Jan. 7, 2015) available at: http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [<https://perma.cc/S2XG-UNUZ>] (“When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”); *G.G. ex rel. Grimm v. Gloucester Cty. Sch.*

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of that same year, the Department of Justice and OCR approved the nondiscrimination policy of Arcadia Unified School District, created in response to a Title IX complaint filed by a transgender student in that district.³⁶ Finally, on May 13, 2016, OCR released an additional “Dear Colleague” letter stating that departments should treat a student’s gender identity the same as a student’s sex for purposes of Title IX and its implementing regulations.³⁷ Regarding athletics, this letter stated that while a school may operate sex-segregated athletic teams when such selection is based on competitive skill or when the activity involved is a contact sport, schools may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.”³⁸

On February 22, 2017, following the election of President Donald J. Trump, the U.S. Departments of Education and Justice issued a joint letter withdrawing the guidance of the 2016 “Dear Colleague” letter.³⁹ In an internal memo, the OCR was advised to rely

Bd., 822 F.3d 709, 715 (4th Cir. 2016) [hereinafter *Grimm I*] (finding U.S. Department of Education entitled to Auer deference in interpreting 34 C.F.R. § 106.33).

36. See KAREN J. LANGSLEY & SHELLY L. SKEEN, *TRANSGENDER ISSUES* (TX. C.L.E. ADVANCED FAM. L. 12.2, 2016) (providing background on nondiscrimination policy for transgender students adopted by Arcadia Unified School District); see also David Vannasdall, *Arcadia Unified Sch. Dist., Transgender Students — Ensuring Equity and Nondiscrimination*, ARCADIA UNIFIED SCH. DIST. (Apr. 16, 2015), <http://www.nclrights.org/wp-content/uploads/2015/07/Transgender-Policy-Bulletin-Approved-w-corrections-April-2015.pdf> [<https://perma.cc/HW8T-FU6X>] (providing Arcadia Unified School District policy regarding issues relating to transgender students).

37. See *U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students*, U.S. DEP’T OF JUST. (May 13, 2016), <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights> [<https://perma.cc/TUR3-3F8C>] (“The guidance makes clear that both federal agencies treat a student’s gender identity as the student’s sex for purposes of enforcing Title IX.”); see also Catherine E. Lhamon, Asst. Secretary for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Asst. Attorney General for Civil Rights, U.S. Dep’t of Justice, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/3N2A-VF2J>] [hereinafter *2016 Dear Colleague Letter*] (“This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”).

38. See *id.* at 3 (finding under Title IX, schools must treat students consistent with gender identity despite contrary education records, identification documents).

39. See Sandra Battle, Acting Asst. Secretary for Civil Rights, U.S. Dep’t of Educ. & T.E. Wheeler, II, Acting Asst. Atty. Gen. for Civil Rights, U.S. Dep’t of Justice, *Dear Colleague Letter* (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<https://perma.cc/7CKJ-T8SP>] [hereinafter *2017 Dear Colleague Letter*] (noting withdrawal of guidance documents

solely on Title IX and its implementing regulations as interpreted by federal courts and remaining OCR guidance documents in evaluating complaints of sex discrimination against individuals.⁴⁰ Department enforcement of Title IX protections for transgender athletes once again shifted following the election of President Joseph Biden.⁴¹ The Civil Rights Division of the Department of Justice issued a memo to federal agencies reestablishing protections for gay and transgender students under Title IX.⁴² This memo returned to the Department of Education policies followed under President Obama, bolstered by legal arguments following *Bostock*.⁴³

B. Recent Federal Court Cases and Regulatory Developments:

Circuit courts currently appear on the brink of a split over the rights of transgender students, and the Supreme Court has thus far refused to take up the issue.⁴⁴ Understandably, the unresolved le-

did not leave students without protections from discrimination, bullying or harassment as OCR would continue to hear all claims of discrimination).

40. See Candice Jackson, Acting Asst. Secretary for Civil Rights, Office for Civil Rights, Dep't of Educ., *OCR Instruction to the Field re Complaints Involving Transgender Students* (June 6, 2017), <https://s3.documentcloud.org/documents/3866816/OCR-Instructions-to-the-Field-Re-Transgender.pdf> [<https://perma.cc/SJN6-H5SH>] [hereinafter *OCR Instruction*] (reiterating withdrawal from Obama Administration guidance documents does not leave students without protections, OCR should rely on Title IX, Department regulations, in evaluating complaints of sex discrimination against individuals whether or not individual is transgender).

41. See Avery, *supra* note 12 (describing new approach taken by Biden Administration in enforcing Title IX).

42. See *Marking the One-Year Anniversary of Bostock With Pride*, OFF. FOR CIV. RTS. (June 16, 2021), <https://www2.ed.gov/about/offices/list/ocr/blog/20210616.html> [<https://perma.cc/AQ94-8J3F>] (“In *Bostock*, the Supreme Court recognized that ‘it is impossible to discriminate against a person’ because of their sexual orientation or gender identity ‘without discriminating against that individual based on sex.’ That reasoning should—and does—apply regardless of whether the individual is an adult in a workplace or a student in school . . . [O]CR affirms our commitment to guaranteeing all students—including those who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+)—an educational environment free from discrimination.”).

43. See *id.* (issuing Notice of Interpretation enforcing Title IX’s prohibition on sex discrimination to include discrimination based on gender identity consistent with reasoning in *Bostock*).

44. See *Gloucester Cty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021) (mem.) (denying writ of certiorari, leaving in place Fourth Circuit ruling that Gloucester County School Board acted unlawfully by preventing transgender boy from using boy’s bathroom); see also *Parents for Priv. v. Barr*, 141 S. Ct. 894, 894 (mem.) (2020) (denying writ of certiorari, leaving in place Ninth Circuit ruling that policy allowing transgender students to use bathrooms, locker rooms, showers matching gender identity rather than biological sex assigned at birth does not violate Fourteenth Amendment right to privacy or create hostile environment or discrimination claim actionable via Title IX); *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636, (mem.) (2019) (denying writ of certiorari, leaving in place Third Circuit decision to uphold Pennsylvania school district policy allowing transgender stu-

gal questions surrounding transgender students' rights have resulted in myriad school policies and state laws throughout the country.⁴⁵ Idaho was the first state to pass a law preventing transgender women from participating in women's sports.⁴⁶ The law never went into effect as there was an injunction followed by a Ninth Circuit appeal.⁴⁷ In *Grimm v. Gloucester County School Board*,⁴⁸ the U.S. Court of Appeals for the Fourth Circuit became the first federal court to rule in favor of the right of transgender students to use bathrooms corresponding with their gender identity.⁴⁹ In this case, a transgender student claimed that the use of "alternative pri-

dents to use bathrooms that conform to gender identity); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017) (holding transgender students protected from discrimination under Title IX, Equal Protection Clause of Fourteenth Amendment). *But see Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369, 1372 (11th Cir. 2021) (ordering panel's previous opinion that district's policy barring transgender student from using boys' restroom violated Fourteenth Amendment guarantee of equal protection will be reheard en banc, then vacating panel's opinion); *see also* Jo Yurcaba, *Supreme Court Could Hear Transgender Student Bathroom Case, Experts Say*, NBC NEWS (Aug. 27, 2021), <https://www.nbcnews.com/nbc-out/out-news/supreme-court-hear-transgender-student-bathroom-case-experts-say-rcna1797> [<https://perma.cc/HGH5-LK9P>] (citing experts stating Eleventh Circuit likely to find in favor of school district creating split in circuit courts over transgender bathroom access); *see also* Soule by Stanesco v. Connecticut Ass'n of Sch., Inc., No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (rejecting potential challenge to Connecticut trans-inclusive laws).

45. *See, e.g.*, Sonali Kohli, *How California Protects Transgender Students*, L.A. TIMES (May 17, 2016), <https://www.latimes.com/local/education/la-me-edu-transgender-student-rights-20160516-snap-htmstory.html> [<https://perma.cc/D7WD-LGA6>] (describing various pro-transgender student policies throughout State of California); *see also, e.g.*, 2012–13 Case Studies, ALA. HIGH SCH. ATHLETIC ASS'N, http://media.wix.com/ugd/2bc3fc_87536da66cad4d6195ae056a573e67da.pdf [<https://perma.cc/U8S3-J853>] (last visited Sept. 6, 2021) ("[P]articipation in athletics should be determined by the gender indicated on the student-athlete's certified certificate of birth."). *See generally K-12 Policies*, supra note 14 (providing overview of disparate state, school district policies toward transgender student athletes).

46. *See* Talya Minsberg, *Boys Are Boys and Girls Are Girls: Idaho Is First State to Bar Some Transgender Athletes*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html> [<https://perma.cc/V3WZ-EJFA>] (describing Idaho as first state in United States to bar transgender girls from participating in girls' or women's sports, first to legalize practice of sex testing in order to compete).

47. *See All Women and Girls Can Now Try Out For Fall Teams*, AM. C. L. UNION (Aug. 17, 2020), <https://www.aclu.org/press-releases/judge-blocks-first-law-targeting-transgender-athletes-case-continues> [<https://perma.cc/4R3F-SKG5>] (describing ACLU's successful efforts to block Idaho's law targeting transgender student athletes).

48. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) [hereinafter *Grimm II*].

49. *See id.* (holding Board's application of its restroom policy against Grimm violated Title IX).

vate” restroom facilities rather than communal restrooms violated Title IX and equal protection guaranteed under the Fourteenth Amendment.⁵⁰ The case was initially granted certiorari by the U.S. Supreme Court but was later remanded back to the Fourth Circuit when federal guidelines were withdrawn by the Trump administration in 2017.⁵¹

The Third and Ninth Circuits have rejected invasion of privacy claims filed on behalf of non-transgender students that intended to challenge policies that explicitly permit transgender students to use bathrooms that correspond with their gender identity.⁵² In *Doe v. Boyertown Area School District*,⁵³ the Third Circuit affirmed the district court’s decision to deny a preliminary injunction against the school district’s policy allowing transgender students to use locker rooms that conform to their gender identity.⁵⁴ The court based its decision on the state’s “compelling interest in not discriminating against transgender students.”⁵⁵ Likewise, students in this case brought a Title IX claim, which the Third Circuit rejected because the school district’s policy allowed all students to use bathrooms and locker rooms that aligned with their gender identity, and thus “[did] not discriminate based on sex.”⁵⁶ Therefore the court found

50. *See id.* at 709 (holding Board’s policy does not satisfy heightened scrutiny because it is not substantially related to its important interest in protecting students’ privacy).

51. *See Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017) (mem.) (holding Fourth Circuit’s “[j]udgment [is] vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of guidance document issued by Department of Education and Department of Justice on February 22, 2017”).

52. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020) (“Plaintiffs fail to show that the contours of the privacy right protected by the Fourteenth Amendment are so broad as to protect against the District’s implementation of the Student Safety Plan. This conclusion is supported by the fact that the Student Safety Plan provides alternative options and privacy protections to those who do not want to share facilities with a transgender student, even though those alternative options admittedly appear inferior and less convenient.”); *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018) (noting “a person has a constitutionally protected privacy interest in his or her partially clothed body,” but rejecting appellant argument privacy rights violated by school district policy allowing transgender students access to “bathrooms and locker rooms that aligned with their gender identities”).

53. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

54. *See id.* at 538 (denying preliminary injunction against Pennsylvania school districts policy allowing transgender athletes to play on teams in conformity with gender identity).

55. *See id.* at 526 (“The District Court correctly concluded that the appellants’ constitutional right to privacy claim was unlikely to succeed on the merits.”).

56. *See id.* at 533 (“The District Court correctly concluded that the appellants’ Title IX claim was unlikely to succeed on the merits.”).

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that school policy allowing transgender students to use facilities that conform with their gender identity did not violate Title IX.⁵⁷ In *Soule v. Connecticut Ass'n of Schools*,⁵⁸ non-transgender student athletes challenged a Connecticut state policy allowing transgender students to compete in girls' high school sports.⁵⁹ This case was ultimately dismissed for mootness since the plaintiffs had graduated and were no longer eligible to compete, but the case is currently on appeal before the Second Circuit.⁶⁰ Finally, in *Adams v. School Board of St. Johns County*⁶¹ a three-judge panel for the Eleventh Circuit held that barring a transgender student from using the restroom that conforms with their gender identity violates the Constitution's guarantee of equal protection.⁶² The Eleventh Circuit ultimately vacated this ruling and will now review the case en banc.⁶³ Some have speculated that the Eleventh Circuit will likely split with other circuits who have unanimously upheld trans-inclusive school policies against challenge and protected transgender student's access to facilities that conform with their gender identity.⁶⁴

While circuit courts have been addressing the applicability of Title IX and gender identity at school, on June 15, 2020, the U.S. Supreme Court issued its watershed *Bostock* decision holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on sexual orientation or gender identity.⁶⁵ In

57. See *id.* at 535 (holding school district's policy allowing transgender students to compete on teams conforming to gender identity does not discriminate based on sex or violate Title IX).

58. *Soule v. Conn. Ass'n of Schools, Inc.*, No. 3:20-cv-00201(RNC), 2021 WL 1617206 (D Conn., Apr. 25, 2021).

59. See *id.* at *1 ("This case involves a challenge to the transgender participation policy of the Connecticut Interscholastic Athletic Conference ("CIAC"), the governing body for interscholastic athletics in Connecticut, which permits high school students to participate in sex-segregated sports consistent with their gender identity.").

60. See *id.* at *4 ("Plaintiffs correctly argue that the issue is one of mootness rather than standing."); see also *Soule by Stanescu v. Conn. Ass'n of Sch., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (providing appellants opening brief requesting reversal of district court's order, accusing district judge of bias).

61. *Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369 (11th Cir. 2021) (mem.).

62. See *Soule by Stanescu*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *15 (stating arbitrariness of school's policy does not pass heightened scrutiny as it targets transgender students for restrictions but not other students, including district failure to demonstrate substantial, accurate relationship between sex classification with policy's stated purpose).

63. See *Adams*, 9 F.4th at 1372 (ordering case be reheard en banc).

64. See Yurcaba, *supra* note 44 (describing potential student rights under Title IX on treatment of transgender student rights under Title IX).

65. See Lawrence Hurley, *In Landmark Ruling, Supreme Court Bars Discrimination Against LGBT Workers*, REUTERS (June 15, 2020), <https://www.reuters.com/article/>

Bostock, the U.S. Supreme Court heard three consolidated cases involving LGBTQ employees who had been dismissed because of their LGBTQ status: (1) *Bostock v. Clayton County II*,⁶⁶ (2) *Zarda v. Altitude Express, Inc.*,⁶⁷ and (3) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*⁶⁸ The same week this case was decided, President Biden issued an Executive Order asserting that “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.”⁶⁹

C. Bostock’s Impact on the LGBTQ Community Generally

The majority in *Bostock* referred to Title VII’s protections against discrimination on the basis of sex as “simple but momentous.”⁷⁰ *Bostock* settled the major legal questions regarding LGBTQ employees and Title VII protections, but questions regarding exactly how far the *Bostock* decision extends still remain to be determined.⁷¹ In addition to Title VII and Title IX, sex discrimination is prohibited by several other federal statutes including the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act.⁷² Questions remain about *Bostock*’s implication for these statutes.⁷³ Regardless, the Supreme Court’s decision in *Bostock* will certainly have a wide-ranging impact on the LGBTQ community generally.⁷⁴ The

us-usa-court-lgbt/in-landmark-ruling-supreme-court-bars-discrimination-against-lgbt-workers-idUSKBN23M20N [https://perma.cc/KK55-BCGF] (summarizing *Bostock* decision including implications for transgender people).

66. No. 1:16-CV-001460-ODE-WEJ, 2016 WL 9753356 (N.D. Ga. Nov. 3, 2016).

67. 883 F.3d 100 (2d Cir. 2018).

68. Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018); see also *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1731 (2020) (discussing consolidated cases as part of *Bostock* decision).

69. Exec. Order No. 13,988, 86 C.F.R. § 7023 (Jan. 20, 2021) (“Under *Bostock*’s reasoning, laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation so long as the laws do not contain sufficient indications to the contrary.”).

70. See *Bostock*, 140 S. Ct. at 1741 (“The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

71. See *id.* at 1753 (“Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases.”).

72. See 15 U.S.C. § 1691(a) (2012) (prohibiting creditors from discriminating against applicant on the basis of sex); see also 42 U.S.C. § 3604 (2012) (prohibiting sex discrimination in “the sale or rental of housing”).

73. For further discussion of *Bostock*’s impact on other civil rights laws, see *infra* note 74 and accompanying text.

74. See generally Amanda Hainsworth, *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731 (2020), Bos. B.J. 3, 22, 23 (2020) (describing anticipated

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most immediate impact will likely be within states without preexisting employment discrimination protections for members of the LGBTQ community.⁷⁵ The decision appears to provide an immediate remedy for discrimination within the realm of employment.⁷⁶

Justice Alito in his *Bostock* dissent stated that the problem with the Court's majority decision is most acute in its implication for schools and religious institutions.⁷⁷ Moreover, Justice Alito argued that *Bostock* could infringe on free speech rights if employers refused to use transgender employees' chosen names and pronouns.⁷⁸ In his dissent, Justice Kavanaugh states that he disagrees with the majority regarding the original meaning of the statutory language of Title VII, but recognized the important victory the majority's decision represents for "gay and lesbian Americans."⁷⁹ The Majority asserted that, while those who originally adopted the Civil Rights Act might not have anticipated their work leading to this particular result, "the limits of the drafters' imagination supply no reason to ignore the law's demands."⁸⁰

litigation related to interplay between federal civil rights laws, employers religious beliefs, additional protections for LGBTQ individuals beyond state nondiscrimination laws, federal equal protection claims involving discrimination against LGBTQ individuals).

75. See generally *id.* (describing *Bostock's* effects on federal law).

76. For further discussion of *Bostock's* impact in the employment realm, see *infra* note 83 and accompanying text.

77. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1781 (2020) (Alito, J., dissenting) ("This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty 'communicate a particular way of life to its students,' and a 'violation by the faculty of those precepts' may undermine the school's 'moral teaching.' Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment." (footnote omitted)).

78. See *id.* at 1782 ("The position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety.").

79. See *id.* at 1837 ("Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans.").

80. See *id.* at 1737 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

D. Title IX's Purpose and Theories on Application to Transgender Individuals

The original intent of Title IX was to “remedy to some extent sex discrimination in education.”⁸¹ The Supreme Court has held that Title IX broadly prohibits a funding recipient from subjecting any person to disparate treatment “on the basis of sex” including sexual harassment or retaliating against one who complains about sexual discrimination.⁸² During the drafting of Title IX, some feared that the Act would mandate gender-mixed sports teams or would otherwise negatively impact men’s access to collegiate sports.⁸³ In response, Senator Bayh stated that the intent of the law was to “provide equal access for women and men students to the educational process and extracurricular activities in school” and not to “desegregate” the men’s locker room.⁸⁴ Moreover, subsequent implementing regulations allow schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”⁸⁵ While no language within the law provides a direct connection between Title IX and athletics, the legislative history and early case law demonstrate that athletics is a vital and

81. Trustees of Univ. of Del. V. Gebelein, 420 A.2d 1191, 1196 (Del. Ch. 1980).

82. See Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005) (“We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.”).

83. See 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, 333 (2012) (describing fears of some during drafting of Title IX that it would mandate gender-mixed athletic teams); see also Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. OF GENDER L. & POL'Y 69, 72-73 (2020) (describing aftermath of bill's passage including efforts by those who feared Title IX would hinder men's revenue-producing sports such as football).

84. See 117 Cong. Rec. 30407 (Sep. 8, 1971) (statement of Sen. Birch Bayh) (“I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men’s locker room be desegregated.”); see also Lambelet Coleman, *supra* note 83, 77–78 no. 40 (describing Senator Bayh’s assurances Title IX would not require women play on football teams, elaborating on origins of “sports exception” of Title IX).

85. 34 C.F.R. § 106.41(b) (2020).

important part of the educational experience for high school and college students.⁸⁶

To establish a prima facie case of discrimination under Title IX, a student must allege that: (1) he or she was “subjected to discrimination in an educational program”; (2) “the program receives federal assistance”; and (3) the discrimination “was *on the basis of sex*.”⁸⁷ While Title IX’s implementing regulations bar discrimination on the basis of sex, they also permit schools to operate separate teams for members of each sex in certain circumstances.⁸⁸ Various federal courts have recognized that cases interpreting Title VII’s provisions are relevant to and can be useful in analysis of claims of Title IX discrimination.⁸⁹

In early employment discrimination decisions involving the “because of sex” provisions of Title VII, courts have held that Congress intended “sex” to mean biological sex as traditionally understood, denying Title VII protections for transgender individuals and individuals on the basis of their sexual orientation, and even denying Title VII protections for pregnant women.⁹⁰ Beginning in the

86. See Anderson, *supra* note 83 (explaining importance of athletics in Title IX legislative history); see also Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973) (“Discrimination in high school interscholastic athletics constitutes discrimination in education.”). See generally *History of Title IX*, WOMEN’S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/> [<https://perma.cc/G9U3-RWHZ>] (providing comprehensive overview of legislative history, including subsequent regulatory developments of Title IX).

87. See Bougher v. Univ. of Pitt., 713 F. Supp. 139, 144 (W.D. Pa. 1989) (establishing prima facie case of discrimination under Title IX).

88. 34 C.F.R. § 106.41(a) (1980) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis.”); see also *id.* § 106.41(b) (implementing regulations also permit schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport”).

89. See, e.g., Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 283 (2013) (“Title VII, which prohibits sex discrimination in employment, has been applied regularly to claims of discrimination brought by transgender plaintiffs. Courts generally recognize that cases interpreting Title VII’s provisions are relevant to and can be imported into analysis of Title IX.”); see also Miles v. N.Y. Univ., 979 F. Supp. 248, 250 n. 4 (S.D.N.Y. 1997) (holding “it is now established that the Title IX term ‘on the basis of sex’ is interpreted in the same manner as similar language in Title VII”).

90. See, e.g., Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (holding Title VII, including its legislative history subsequent to passage, indicates Congress intended “sex” to be understood traditionally to “place women on an equal footing with men” while denying protection to “transsexual” woman alleging she was terminated on basis of sex); see also De Santis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (“Giving [Title VII] its plain meaning, this

1970s and 1980s, a series of Supreme Court cases expanded the meaning of “because of sex” to encompass protections against sexual harassment, discrimination against men, and discrimination based on women’s familial status.⁹¹ In 1984, the plaintiffs in *Ulane v. Eastern Airlines*⁹² again tried to expand Title VII’s protections against discrimination “because of sex” to transgender individuals, but the Seventh Circuit Court of Appeals rejected their argument, holding that the plaintiff’s transition did not change their biological sex and therefore, their employer did not discriminate “because of sex.”⁹³ Five years later, the Supreme Court did expand the meaning of “because of sex” in *Price Waterhouse v. Hopkins*⁹⁴ by holding that that Title VII prohibited discrimination against individuals based on “sex stereotyping” or non-conformance with perceived gender expectations.⁹⁵ Courts have since typically considered discrimination against transgender individuals under two legal theories: (1) sex or gender stereotyping via *Price Waterhouse* or (2) discrimination on the basis of gender identity constituting per se discrimination “on the basis of sex.”⁹⁶ Courts have therefore found

court concludes that Congress had only the traditional notions of ‘sex’ in mind.” (quoting *Holloway*, 566 F.2d at 662–63)); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (affirming dismissal of employee’s Title VII claim alleging he was fired because of sexual orientation); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding employer’s disability benefits plan that fails to cover pregnancy-related disabilities does not violate Title VII). See generally Erin Buzuvis, “*On the Basis of Sex*”: Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WIS. J.L. GENDER & SOC’Y 219, 229 (2013) (providing early history of Title VII cases including Title VII’s influence on Title IX cases).

91. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”); see also *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp’t Opportunity Comm’n*, 462 U.S. 669, 685 (1983) (holding health benefits plan providing greater pregnancy-related coverage to female employees than spouses of male employees constitutes discrimination against male employees on basis of sex under Title VII); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (“Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men — each having pre-school-age children.”).

92. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984).

93. See *id.* (finding *Ulane*’s transition did not change her biological sex, therefore airline did not fire her “because of sex”).

94. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

95. See *id.* at 231–32 (finding in favor of female employee who sued employer for discrimination on basis of sex under Title VII after coworkers said her chances of making partner would be greater if she acted more feminine).

96. See Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 Penn St. L. Rev. 187, 193 (2016) (“Under Title VII, most courts have found that transgender peo-

that discrimination “because of sex” potentially includes not just discrimination based on one’s “biological” sex, but also discrimination on the basis of how one presents one’s gender relative to “biological” sex and the stereotypes associated with that sex.⁹⁷ Prior to *Bostock*, the Sixth and Eleventh Circuits had held that discrimination based on sex stereotypes and *per se* discrimination based on expressed gender identity were actionable under Title VII.⁹⁸ The Equal Employment Opportunity Commission (“EEOC”) similarly found prior to *Bostock* in 2012 that sex, as used in Title VII, encompassed both sex and gender.⁹⁹

ple are protected only on the basis of sex stereotyping, not because they are a protected class *per se*.”).

97. See Buzuvis, *supra* note 90 (describing evolution of interpretations of Title VII’s “because of sex” provision throughout lower courts, including Title VII’s influence on Title IX).

98. See *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity”). *But see* *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ‘[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.’” (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007))); *see also* Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562 (2007) (explaining *Smith v. City of Salem, Ohio* is first time federal court extended Price Waterhouse sex-stereotyping theory to transgender individuals, explaining Eleventh Circuit in *Brumby* found discrimination based on expressed gender identity to be *per se* discrimination under Title VII).

99. See *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012) (“[W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”). The court explained that a transgender person who experiences discrimination based on their gender identity may establish a *prima facie* case of sex discrimination through a number of different formulas. *See id.* at *15 (explaining different formulas by which transgender person may prove *prima facie* case of sex discrimination). A complainant may, for example establish a case of sex discrimination under a theory of gender stereotyping wherein, for example, an employer believing that biological men must present as men and wear male clothing fires an employee for being insufficiently masculine. *See id.* (providing *prima facie* case of sex discrimination established by sex stereotyping). Alternatively, a complainant could prove they were discriminated against if an employer was willing to hire them when they thought they were one gender but is unwilling to hire them when they find out they are another gender. *See id.* at *32. (providing *prima facie* case of sex discrimination established by *per se* discrimination). The commissioner compares gender to religion in this respect; for purposes of establishing a *prima facie* case that Title VII has been violated, employees must demonstrate only that an employer impermissibly used religion (or gender) in making employment decisions. *See id.* at *31–33 (comparing gender-based and religion-based discrimination in hiring).

1. *Sex Stereotyping and Title IX*

The *Price Waterhouse* gender stereotyping interpretation has proven influential in Title IX cases.¹⁰⁰ Cases involving plaintiffs targeted for their perceived gender presentation and sexual orientation have applied Title VII sex-stereotype precedents in analyzing Title IX claims.¹⁰¹ A “Dear Colleague” letter released in 2010 stated that Title IX does not expressly cover discrimination on the basis of sexual orientation or gender identity, but it does protect students who experience sex- or gender-based harassment.¹⁰² Before and after *Bostock*, Circuit Courts have applied Title VII reasoning to Title IX cases involving gender identity discrimination in schools.¹⁰³ Some courts have held that protections against discrimination based on gender stereotypes may provide the most straight-forward route to protecting transgender students facing similar harassment in the future.¹⁰⁴ The Eleventh Circuit suggested in *Glenn v. Brumby*¹⁰⁵ that considerations of gender stereotypes will inevitably

100. For further discussion of sex stereotyping as applied in the context of Title IX, see *supra* note 103 and accompanying text.

101. See e.g., *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090–91 (D. Minn. 2000) (“Although no court has addressed this issue in the context of a Title IX claim, several courts have considered whether same-sex harassment targeting the claimant’s failure to meet expected gender stereotypes is actionable under Title VII. The Court looks to these precedents in analyzing plaintiff’s Title IX claim, noting that Title VII similarly requires that the discrimination resulting in the plaintiff’s claims be based on his or her sex . . . The Court for these reasons concludes that by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes, plaintiff has stated a cognizable claim under Title IX.” (citation omitted)); see also *Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997) (holding harassment because Plaintiff did not conform to stereotypical expectations of masculinity was actionable discrimination “because of sex”).

102. See *2010 Dear Colleague Letter*, *supra* note 34 (“Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”).

103. See *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“Under settled law in this Circuit, gender nonconformity, as defined in *Smith v. City of Salem*, is an individual’s ‘fail[ure] to act and/or identify with his or her gender. . . . Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.’” (quoting 378 F.3d 566, 575 (6th Cir. 2004))); see also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (finding policy requiring individual to use bathroom that does not conform with his or her gender identity punishes that individual for their gender non-conformance, so it violates Title IX); *Grimm II*, 972 F. Supp. 3d 586, 616 (4th Cir. 2020) (finding after *Bostock* its Title VII interpretation guides court’s Title IX evaluation, so sex stereotyping constitutes sex-based discrimination under Equal Protection clause).

104. For further discussion of sex-stereotyping and its application to Title IX, see *supra* note 103 and accompanying text.

105. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)

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be part of what drives discrimination against a transgender individual.¹⁰⁶ Moreover, some commentators have argued that sex stereotyping may allow plaintiffs to take advantage of widely recognized legal doctrine throughout various circuit courts, but it is potentially problematic in that it forces transgender individuals to focus on their gender nonconformity.¹⁰⁷ “To recover for discrimination claims based on supposed gender-nonconforming conduct, as set forth in *Price Waterhouse*, transsexual plaintiffs must identify themselves as their their biological sex . . .” rather than the gender to which they currently identify.¹⁰⁸ Moreover, this approach counterproductively seeks to reject discrimination on the basis of harmful gender stereotypes by highlighting those same gender stereotypes.¹⁰⁹ Inherent problems in the sex stereotyping approach for protecting transgender students from discrimination and harassment have led some to favor an approach which equates discrimination on the basis of gender identity with per se discrimination on the basis of sex.¹¹⁰

2. *Gender Identity Equates to Basis of Sex*

In *Macy v. Holder*,¹¹¹ the EEOC ruled that in the employment context, “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex’ . . .” under Title VII.¹¹² The EEOC went on

106. See *id.* at 1317 (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. . . . We conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”).

107. See Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 Harv. J. L. & Gender 423, 437 (2012) (arguing sex stereotyping reinforces negative stereotypes forcing transgender plaintiffs to identify with biological sex).

108. See Jackie Barber, *Glenn v. Brumby: Extending Protection from Sex-Based Discrimination to Transsexuals in the Eleventh Circuit*, 21 Tul. J.L. & Sexuality 169, 176 (2012) (highlighting paradoxical nature of applying gender-stereotyping approach to proving discrimination on basis of sex).

109. See Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 Wis. J.L. Gender & Soc’y 245, 257 (2013) (discussing how sex-stereotyping approach may reinforce harmful stereotypes).

110. See *id.* (highlighting counterproductive nature of sex-stereotyping approach).

111. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012).

112. *Id.* at *6, *11 (holding discrimination against employee for transgender status is per se discrimination on basis of sex).

to state that the term “sex” as contemplated in Title VII “encompasses both sex – that is, the biological differences between men and women – and gender.”¹¹³ Title VII’s treatment of gender and sex as synonymous is logical because if the only proscribed discrimination actionable via Title VII was discrimination on the basis of biological sex, then the only recognized, prohibited treatment would involve an employer’s preference for one sex over the other.¹¹⁴ The statute’s protections against sexual harassment, for example, clearly extend beyond what is encompassed merely by a person’s biological sex and into the realm of cultural and social conceptions of masculinity and femininity.¹¹⁵ Finally, prior to *Bostock*, the Eleventh Circuit in *Glenn v. Brumby* set out a case for why discriminating against a person because of their status as a transgender person is per se discrimination on the basis of sex.¹¹⁶ In that case, the court held that “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”¹¹⁷ Therefore, any discrimination against a transgender person because of their gender-nonconformity is tautologically sex discrimination whether it is on the basis of sex or gender.¹¹⁸

E. Recent State Legislation Barring Transgender Athletes

As discussed above, Idaho became the first state to ban trans women and girls from women’s sports leagues in schools and col-

113. *See id.* at *5 (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)) (holding under Title VII sex discrimination includes discrimination on basis of gender as well); *see also* *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”).

114. For further discussion of how Title VII has been extended beyond a narrow reading of the text limited to overt sex discrimination in hiring, *see supra* note 91 and accompanying text.

115. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding discrimination for failing to conform to gender-based expectations such as wearing make-up, jewelry violates Title VII).

116. *See* *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007))).

117. *See id.* (finding discrimination against employee due to transgender status is per se discrimination on basis of sex because transgender status implies disconnect between one’s biological sex, gender presentation, including stereotypes of how one presents their gender given their biological sex).

118. *See* *Lee*, *supra* note 107, at 437 (providing additional information on per se approach taken by minority of courts, most notably by Eleventh Circuit in *Glenn v. Brumby*).

leges in March of 2020.¹¹⁹ H.B. 500, or the “Fairness in Women’s Sports Act,” cites “inherent differences” between men and women and promoting sex equality as part of its reasoning for barring students of the male sex from athletic teams or sports designated for females, women, or girls.¹²⁰ The legislation further states that, if disputed, a student may establish sex by presenting a signed physician’s statement that shall indicate a student’s sex based solely on their internal and external reproductive anatomy, the student’s normal endogenously produced levels of testosterone, and an analysis of the student’s genetic makeup.¹²¹ Mississippi followed suit by passing Senate Bill 2536.¹²² The Mississippi Fairness Act shares identical language to the law passed in Idaho.¹²³ Tennessee and Arkansas legislatures passed laws that require student athletes to participate in sports teams corresponding with the sex listed on a student’s birth certificate.¹²⁴ The laws in Mississippi and Arkansas apply specifically to “transgender girls, while Tennessee’s bill applies to all transgender youth.”¹²⁵ In 2021, seventeen states passed similar legislation, joined by South Dakota in early 2022.¹²⁶ At the

119. See Minsburg, *supra* note 46 (describing legislative history surrounding passage of Idaho law banning trans-women, girls from playing on teams which conform with gender identity).

120. See *Hecox v. Little*, AM. C. L. UNION (Jan. 14, 2022), <https://www.aclu.org/cases/hecox-v-little> [<https://perma.cc/M85N-NXUW>] (describing transgender athletes challenge to Idaho law).

121. See IDAHO CODE ANN. § 33-6203(3) (West 2021) (describing methods for determining student athlete’s gender).

122. See *Senate Bill 2536* § 1–7, MISS. LEGISLATURE (2021), <http://bill-status.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm> [<https://perma.cc/2CGF-MBW4>] (providing official text of bill).

123. See *id.* § 3(2) (“Athletic teams or sports designated for ‘females,’ ‘women’ or ‘girls’ shall not be open to students of the male sex.”).

124. See Joe Yurcaba, *Arkansas Passes Bill to Ban Gender-Affirming Care for Trans Youth*, NBC NEWS (Mar. 29, 2021), <https://www.nbcnews.com/feature/nbc-out/arkansas-passes-bill-ban-gender-affirming-care-trans-youth-n1262412> [<https://perma.cc/AN3D-WE4V>] (“The bill is one of two types of legislation being considered in more than two dozen states: measures that ban or restrict access to gender-affirming care for trans minors, and those that ban trans young people from competing in school sports teams of their gender identity.”).

125. See Autumn Rivera, *A Look at Shifting Trends in Transgender Athlete Policies*, NAT’L CONF. OF ST. LEGISLATURES (May 11, 2021), <https://www.ncsl.org/research/education/a-look-at-shifting-trends-in-transgender-athlete-policies-magazine2021.aspx> [<https://perma.cc/6ZU2-EGK5>] (explaining wave of states implementing bans on transgender athletes after Idaho became first state to pass such legislation preventing transgender women, girls from participating in high school or college women’s sports).

126. See Katie Barnes, *Young Transgender Athletes Caught in Middle of States’ Debates*, ESPN (Sept. 1, 2021), https://www.espn.com/espn/story/_/id/32115820/young-transgender-athletes-caught-middle-states-debates [<https://perma.cc/PA6R-YPRG>] (providing review of state level legislation restricting transgender athletes’ participation and high school association policies); see also Kiara Alfonseca, *South*

federal level, The Protect Women’s Sports Act, H.R. 8932 (116), was introduced by former Rep. Tulsi Gabbard (D-Hawaii) and Rep. Markwayne Mullin (R-Okla.) and would prevent students who are assigned male at birth from participating on girls’ sports teams.¹²⁷ Schools that don’t comply would be ineligible for federal funding.¹²⁸

Athletic eligibility for transgender youth is typically determined not by the state legislature but by states’ high school associations.¹²⁹ In Louisiana, a student-athlete must compete on teams consistent with the gender on their birth certificate unless they have undergone sex reassignment surgery.¹³⁰ A “hardship committee” then considers cases of those who have undergone sex reassignment surgery, taking into account, among other considerations, whether the surgical anatomical changes have been completed.¹³¹ While some state laws restrict transgender athletes’ participation,

Dakota Signs 1st Anti-Transgender Sports Law of 2022, ABC NEWS (Feb. 4, 2022) (providing background on state laws restricting transgender women, girls from playing on sports teams conforming with gender identity).

127. See Madeleine Carlisle, *Tulsi Gabbard Introduces Bill That Would Ban Trans Women and Girls from Female Sports*, TIME (Dec. 11, 2021), <https://time.com/5920758/tulsi-gabbard-bill-transgender-women-sports/> [<https://perma.cc/9HAV-X87B>] (providing background on Protect Women’s Sports Act including its legislative history).

128. See H.R. 8932, 116th Cong. (2020) (explaining purpose of bill is “to provide that for purposes of determining compliance with title IX of the Education Amendments of 1972 in athletics, sex shall be determined on the basis of biological sex as determined at birth by a physician”).

129. For further discussion of individual states’ athletic eligibility criteria, see *supra* note 112 and accompanying text.

130. See LA. HIGH SCH. ATHLETIC ASS’N, POSITION STATEMENT, 164 (n.d.), available at: https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_c4403a24e71d4732b89d7162b6e017c7.pdf [<https://perma.cc/U6VD-GCMS>] (providing LHSAA adopts position on Gender Identity Participation as guideline to help direct member schools, including stating student-athletes should compete in gender on birth certificate unless they have undergone sex reassignment).

131. See *id.* (“A student-athlete who has undergone sex reassignment must go through the hardship appeal process to become eligible for interscholastic competition. The Hardship Committee shall consider all of the facts of the situation and shall rule the student-athlete eligible to compete in the reassigned gender when:

1. The student-athlete has undergone sex reassignment before puberty, OR
2. The student-athlete has undergone sex reassignment after puberty under all of the following conditions: a. Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy. b. All legal recognition of the sex reassignment has been conferred with all the proper governmental agencies (Driver’s license, voter registration, etc.) c. Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for sufficient length of time to minimize gender-related advantages in sports competition. d. Athletic eligibility in the reassigned gender can begin no sooner than two years after all surgical and anatomical changes have been completed.”).

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others, as in Connecticut, specifically allow transgender students to compete in accordance with their gender identity without requiring gender affirming surgical interventions prior to participating.¹³²

III. ASSESSING THE LIKELIHOOD THAT BANS WILL SUCCEED POST-BOSTOCK

The Supreme Court's *Bostock* decision was widely celebrated by civil rights activists as an expansion of workplace and hiring protections for vulnerable members of the LGBTQ community.¹³³ The president of the Human Rights Campaign, Alphonso David, referred to it as a "landmark moment in the on-going fight for LGBTQ equality."¹³⁴ Other commentators openly worried that the decision would undermine religious freedom, freedom of speech, parents' right to educate their children in line with their values, women's athletics generally, and privacy in bathrooms and locker rooms.¹³⁵ Justice Alito in his *Bostock* dissent raised pointed questions about the decision's applicability to the world of student ath-

132. See Kathleen Megan, *A Federal Agency Says Connecticut Must Keep Trans Students from Girls' Sports. The State Disagrees.*, CT MIRROR (June 15, 2020), <https://ctmirror.org/2020/06/15/a-federal-agency-says-connecticut-must-keep-trans-students-from-girls-sports-the-state-disagrees/> [<https://perma.cc/6HTE-FFCG>] (describing actions taken by Connecticut's Attorney General to halt efforts to deny or cut funding to state for enforcing policy allowing transgender girls, women to participate on athletic teams that conform to gender identity).

133. See, e.g., Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020), <http://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html> [<https://perma.cc/FW4L-C4JE>] ("Supporters of L.G.B.T. rights were elated by the ruling, which they said was long overdue. 'This is a simple and profound victory for L.G.B.T. civil rights,' said Suzanne B. Goldberg, a law professor at Columbia.").

134. See Aryn Fields, *Human Rights Campaign President Celebrates One-Year Anniversary of Supreme Court Bostock Decision*, HUM. RTS. CAMPAIGN (June 15, 2021), <https://www.hrc.org/press-releases/human-rights-campaign-president-celebrates-one-year-anniversary-of-supreme-court-bostock-decision> [<https://perma.cc/3MSG-8JTH>] (citing *Bostock* ruling as victory for LGBTQ equality, calling for passage of further protections).

135. See, e.g., Melissa Moschella, *The Supreme Court Has Imperiled Parents' Right to Pass Their Values on to Children*, HERITAGE FOUND. (July 29, 2020), <https://www.heritage.org/gender/commentary/the-supreme-court-has-imperiled-parents-right-pass-their-values-children> [<https://perma.cc/NP76-C9WM>] ("Justice Neil Gorsuch's majority opinion explicitly declines to address questions about bathrooms, locker rooms, women's sports, and so on. But the logic of *Bostock* [sic] implies that it would violate Title IX, for example, to prevent a student with male anatomy who identifies as female from changing and showering in the girls' locker room or competing on the girls' track team. . . . [A] growing number of parents will have no choice but to send their children to an educational environment that may sow profound confusion about the basic truths of human identity.").

letics and whether the *Bostock* definition of “sex” extends to youth and college athletics.¹³⁶

A. Extending Title VII to Title IX

The Court’s decision in *Bostock* resolved the issue of whether Title VII protections against sex-based employment discrimination extend to LGBTQ+ employees.¹³⁷ The Supreme Court in *Bostock* announced that the plain language of the 1964 civil rights legislation prohibiting discrimination based on “race, color, religion, sex, or national origin” also prohibited discrimination based on homosexual or transgender status.¹³⁸ Perhaps most illuminating, the majority in *Bostock* concluded that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹³⁹

The statutory prohibitions against sex discrimination in Title VII and Title IX are similar, and the Supreme Court and other federal courts have often looked to interpretations of Title VII to inform Title IX analysis.¹⁴⁰ Following President Biden’s January 25, 2021 Executive Order, the Civil Rights Division of the U.S. Department of Justice issued an additional application of *Bostock* on March 26, 2021.¹⁴¹ In this application, the Department of Justice asserts

136. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1779 (2020) (“Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.”).

137. See *id.* at 1731, 1737 (holding Title VII protections extend to LGBTQ employees).

138. See *id.* (holding legislative intent may differ from express terms of statute but written word of statute is controlling); see also 42 U.S.C. § 2000e-2(a)(1)–(2) (2012) (“The Civil Rights Act of 1964, Title VII, reads in relevant part:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

139. *Bostock*, 140 S. Ct. at 1741 (adopting per se discrimination approach).

140. See, e.g., *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090–91 (D. Minn. 2000) (discussing application of Title VII precedent). But see *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643–45 (1999) (distinguishing between Title IX versus Title VII with respect to agency).

141. See Memorandum from Principal Deputy Assistant Atty. Gen. Pamela S. Karlan, Civil Rights Division to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), available at: <https://www.justice.gov/crt/page/file/1383026/download> [<https://perma.cc/7DCB-369C>] (asserting *Bostock* applies to Title IX).

that Title IX's "on the basis of sex" language has historically been seen as sufficiently similar to the "because of" sex language in Title VII such that the two are "interchangeable."¹⁴² Therefore, because Title VII's prohibition of discrimination "because of" sex includes discrimination because of sexual orientation and transgender status, the same reasoning supports the notion that Title IX's prohibition of discrimination "on the basis of" sex also prohibits discrimination against individuals based on sexual orientation or transgender status.¹⁴³ This is consistent with the Supreme Court's directive to "give Title IX . . . a sweep as broad as its language."¹⁴⁴ Similarly, the Department of Education released a Federal Register Notice of Interpretation on the enforcement of Title IX with respect to discrimination based on sexual orientation and gender identity in light of *Bostock* on June 16, 2021.¹⁴⁵ The Notice of Interpretation laid out several reasons why Title IX prohibits discrimination based on sexual orientation and gender identity.¹⁴⁶ First, it points to the textual similarity between Title VII and Title IX.¹⁴⁷ The Department of Education asserts that, as in *Bostock*, no ambiguity exists about how to apply the title's terms to the facts before it.¹⁴⁸ The Department also asserts that subsequent case law supports ap-

142. *See id.* (citing holdings from *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992), *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007), *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001) as evidence of interchangeable nature of "because of sex" versus "on the basis of sex").

143. *See id.* (describing how Title IX protections apply to those whose status is of transgender student analogous to Title VII's application to transgender employee).

144. *See* *N. Haven Bd. Of Ed. V. Bell*, 456 U.S. 512, 521 (1982) (holding broad language of Title IX encompasses employment discrimination in federally financed education programs).

145. *See Making the Roster: Conflicting Title IX Interpretations Present Challenges for Transgendered Athlete Participation*, NAT'L L. REV. (Jun. 25, 2021), <https://www.natlawreview.com/article/making-roster-conflicting-title-ix-interpretations-present-challenges-transgendered> [<https://perma.cc/3DQP-LW2Z>] (explaining executive actions taken by President Biden on first day in office).

146. *See Notice of Interpretation: 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. 32640 (Jun. 22, 2021) (citing textual similarity between Title VII versus Title IX, including additional case law).

147. *See id.* at 32638 ("Both statutes prohibit sex discrimination, with Title IX using the phrase 'on the basis of sex' and Title VII using the phrase 'because of' sex. The Supreme Court has used these two phrases interchangeably.").

148. *See id.* at 32639 ("Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity.").

plying the reasoning of *Bostock* to Title IX.¹⁴⁹ Finally, the Department concludes that this interpretation is most consistent with Title IX's purpose of ensuring equal opportunity and protecting individuals from the harms of sex discrimination.¹⁵⁰

It seems clear – given the arguments put forward by the majority in *Bostock* and the Biden Administration's apparent willingness to extend this decision beyond merely the employment realm – that Title VII protections are likely to extend beyond employment law and impact interpretations of Title IX.¹⁵¹ In fact, the Eleventh Circuit already adopted *Bostock*'s reasoning in *Adams v. School Board of St. Johns County*,¹⁵² decided only a few weeks after the *Bostock* decision.¹⁵³ In that case, the court held that Title IX protects students from discrimination based on their transgender status and not simply against harassment or discrimination for gender nonconformity.¹⁵⁴ Moreover, the court held that the public school board's policy prohibiting a transgender boy from accessing the bathroom consistent with their gender identity "singled him out for different treatment because of his transgender status" and caused him harm in violation of Title IX.¹⁵⁵ *Bostock* represented more than a major legal victory for transgender employees; it sent a symbolic message of equal treatment and respect moving courts away from the out-

149. For further discussion of the subsequent case law applying *Bostock* in the Title IX setting, see *supra* note 148 and accompanying text.

150. For further discussion of the Department of Education's arguments for applying *Bostock* to Title IX, see *supra* note 146 and accompanying text.

151. See John Dayton & Micah Barry, *LGBTQ+ Employment Protections: The U.S. Supreme Court's Decision in Bostock v. Clayton County, Georgia and the Implications for Public Schools*, 35 WIS. J.L. GENDER & SOC'Y 115, 137 (2020) (noting "public educational institutions are commonly a key battleground in legal/culture wars battles, and the Court's decisions on these issues generally have significant implications for public educational institutions" (citations omitted)).

152. *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020). For further discussion of the pending Eleventh Circuit appeal, see *supra* note 90 and accompanying text.

153. See *Adams*, 968 F.3d at 1286 (holding school board's policy violates Title IX while applying lessons from *Bostock*). For further discussion of recent circuit court developments, see also *supra* note 98 and accompanying text.

154. See *Adams*, 968 F.3d at 1304 ("We conclude that this policy of exclusion constitutes discrimination. First, Title IX protects students from discrimination based on their transgender status. And second, the School District treated Mr. Adams differently because he was transgender, and this different treatment caused him harm. Finally, nothing in Title IX's regulations or any administrative guidance on Title IX excuses the School Board's discriminatory policy.").

155. See *id.* at 1307 ("The record leaves no doubt that Mr. Adams suffered harm from this differential treatment. Mr. Adams introduced expert testimony that many transgender people experience the 'debilitating distress and anxiety' of gender dysphoria, which is alleviated by using restrooms consistent with their gender identity, among other measures.").

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dated model which bars discrimination on the basis of sex stereotypes and toward one which recognizes and protects transgender individuals by labeling discrimination against transgender individuals as per se discrimination on the basis of sex.¹⁵⁶ While a victory for transgender activists and allies, the decision has caused a great deal of anxiety among those who feel that allowing transgender women and girls to compete with cisgendered women undermines the initial purpose of Title IX.¹⁵⁷

B. How Courts and Legislatures Will Likely Respond to *Bostock*

With the possible exception of the Eleventh Circuit, circuit courts throughout the country have thus far consistently held that Title IX requires schools to treat transgender students consistent with their gender identity.¹⁵⁸ Already we are seeing the effects of *Bostock*, with its Title VII reasoning applied in a Title IX context, and likewise, claims that educational settings are somehow different than employment settings making Title VII arguments inapplicable in a Title IX context have also been widely rejected.¹⁵⁹

Drafters of legislation barring transgender athletes from participating on teams that conform to their gender identity often point to the Department of Education's implementing regulations, which emphasize the importance of sex-segregated teams and express fears that transgender athletes jeopardize the very existence of separate teams for men and women.¹⁶⁰ This focus misconstrues transgender students' argument.¹⁶¹ Transgender plaintiffs have not

156. See generally Devon Sherrell, "A Fresh Look": Title VII's New Promise for LGBT Discrimination Protection Post-Hively, 68 Emory L.J. 1101, 1129 (2019) (discussing strong social signal transmitted by national antidiscrimination legislation).

157. See Abigail Shrier, *supra* note 15 (arguing transgender athletes may undermine women and girls sports generally).

158. See *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 552 (M.D. Pa. 2019) (discussing recent circuit court decisions finding Title IX protections extend to transgender students). For further discussion of the current holdings of circuit courts on treatment of transgender students under Title IX, see *supra* note 44 and accompanying text.

159. See *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *opinion vacated and superseded*, *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021) ("*Bostock* has great import for Mr. Adams's Title IX claim. Although Title VII and Title IX are separate substantive provisions of the Civil Rights Act of 1964, both titles prohibit discrimination against individuals on the basis of sex.").

160. For further discussion of the potential negative consequences of actions allowing transgender women and girls to participate on teams that conform to their gender identity, see *supra* note 15 and accompanying text.

161. See Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls->

challenged sex-segregated teams, but rather have challenged laws that bar them from accessing teams that conform with their gender identity.¹⁶² Moreover, the implementing regulations do not override the statutory prohibition against discrimination on the basis of sex.¹⁶³ The regulation is a broad statement that sex-segregated sports teams are not unlawful, and not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-segregated teams.¹⁶⁴

Courts have variously held that a transgender student's "psychological and dignitary harm" caused by a school bathroom policy is legally cognizable under Title IX.¹⁶⁵ This harm provides transgender students who have been barred from participating on teams that conform to their gender identity with sufficient standing to bring a Title IX case for discrimination under the act.¹⁶⁶ In the Title IX context, discrimination "mean[s] treating that individual

sports-teams/ [https://perma.cc/592D-ZEHU] (finding there is no scientific or moral basis for treating transgender girls differently from cisgender girls—therefore policies excluding transgender girls from sports are harmful to girls generally).

162. See *Gloucester County School Board v. G.G - School Administrators from 31 States and the District of Columbia Brief for Amici Curiae*, AM. C.L. UNION <https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-school-administrators-31-states-and-district> [https://perma.cc/ZT4S-R984] (last visited Sept. 23, 2021) ("Amici have also addressed the lurking hypothetical concern that permitting individuals to use facilities consistent with their gender identity will lead to the abolition of gender-specific facilities. Contrary to that 'slippery slope' argument, however, all amici continue to maintain gender-segregated facilities in their schools. In fact, respecting the gender identity of transgender students reinforces the concept of separate facilities for girls and boys; requiring a transgender girl to use the boys' restroom or a transgender boy to use the girls' restroom undermines the notion of gender-specific spaces.").

163. See e.g., *Grimm II*, 972 F.3d 586, 618 (4th Cir. 2020) *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (June 28, 2021) ("[T]he implementing regulation cannot override the statutory prohibition against discrimination on the basis of sex.").

164. See, e.g., *Grimm II*, 972 F.3d at 619 n.16 (stating 20 U.S.C. § 1686 is "broad statement that sex-separated living facilities are not unlawful – not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities").

165. See *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1306–07, 1310–11 (11th Cir. 2020) (holding transgender student's "psychological and dignitary harm" caused by school bathroom policy was legally cognizable under Title IX).

166. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045–47 (7th Cir. 2017) (affirming finding of irreparable harm because excluding transgender student from boys' restroom "stigmatized" student, caused him "significant psychological distress"); see also *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (affirming finding of irreparable harm because excluding young transgender student "from the girls' restrooms has already had substantial and immediate adverse effects on [her] daily life[,] . . . health[,] and well-being").

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worse than others who are similarly situated.”¹⁶⁷ Laws which prevent transgender individuals from playing on teams that conform to their gender identity treat these athletes worse than students with whom they are similarly situated because they do not allow transgender athletes to play on teams that correspond with their gender identity, unlike their non-transgender peers.¹⁶⁸ Recent state level legislation that bars transgender athletes from playing on the teams consistent with their gender identity is therefore susceptible to challenge and will likely be held to violate Title IX.¹⁶⁹ While the Biden Administration has so far been vocal about its support of transgender students’ access to facilities that conform to their gender identity, it has been silent on enforcement actions it would take against noncompliant institutions.¹⁷⁰ As in all issues involving federal statutory interpretation, Congress may also resolve the ambiguity of the meaning of “sex” in Title IX by amending the statute or providing additional legal protections.¹⁷¹

C. Other Avenues to Challenge Anti-Trans State Legislation (Equal Protection)

While Title IX challenges are the most likely grounds upon which state legislation banning transgender women and girls from participating in high school and collegiate sports in accordance with their gender identity will be overturned, the Fourteenth Amendment offers a second avenue by which such laws mayulti-

167. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1740 (2020) (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)) (finding disparate treatment based on sex must also be intentional).

168. For further discussion of the benefits of “trans-inclusive” school policies, see *supra* note 162 and accompanying text.

169. See Katie Rogers, *Title IX Protections Extend to Transgender Students, Education Dept. Says*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/16/us/politics/title-ix-transgender-students.html> [<https://perma.cc/DLB4-2NCD>] (citing Education Department officials who claim Title IX protections extend to transgender students, so will likely impact recent state legislation to ban transgender students from playing sports that correspond with their gender identity).

170. See *id.* (providing opinions of some commentators explaining Biden Administration may be reluctant to enforce Executive Order); see also Nikki Hatza et al., *Biden Executive Order Expands Title IX Protections*, JDSUPRA (Mar. 10, 2021), <https://www.jdsupra.com/legalnews/biden-executive-order-expands-title-ix-3384512/> [<https://perma.cc/ASQ9-BVGX>] (providing summary of Biden Administration’s Executive Order on “[g]uaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity” including its implications for Title IX enforcement).

171. See, e.g., S. 2584, 115th Congress (2018) (providing text of proposed bill barring identity-based discriminations against students in program or activities receiving federal financial assistance).

mately be challenged.¹⁷² The Fourteenth Amendment guarantees “equal protection of the laws.”¹⁷³ Sex or gender “generally provide . . . no sensible ground for differential treatment.”¹⁷⁴ Therefore, the Equal Protection Clause allows only “exceedingly persuasive” classifications based on sex or gender.¹⁷⁵

The Supreme Court has applied heightened scrutiny to sex-based classifications in order to eliminate discrimination on the basis of gender stereotypes.¹⁷⁶ Policies that bar transgender girls and women from participating in sports broadly discriminate on the basis of sex and thus could be subjected to heightened scrutiny.¹⁷⁷ Ostensibly, laws that ban transgender athletes from participating in high school and collegiate sports are done to promote an important government interest.¹⁷⁸ However, there is not a substantial relationship between banning transgender athletes from teams that conform to their gender identity and promoting sex equality.¹⁷⁹ Governmental gender classifications must be “reasonable, not arbi-

172. See generally Krista D. Brown, *The Transgender Student-Athlete: Is There A Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?*, 25 MARQ. SPORTS L. REV. 311, 314–16 (2014) (discussing due process arguments, equal protection arguments against state laws banning transgender athletes from participating on teams in conformity to gender identity).

173. U.S. CONST. amend. XIV, § 1.

174. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating general rule classifications based on gender or sex bear no relation to ability, gender or sex classifications fail equal protection scrutiny unless substantially related to sufficiently important government interest).

175. See *United States v. Virginia*, 518 U.S. 515, 534 (1996) (finding State must at least show challenged classification serves important governmental objectives, must show discriminatory means employed are substantially related to achievement of those objectives).

176. See *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (“The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.”).

177. See, e.g., *Adams ex. Rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (applying heightened scrutiny because school board’s bathroom policy singles out transgender students for differential treatment because they are transgender).

178. For further discussion of justifications used by states that adopted laws banning transgender athletes, see *supra* notes 121, 123 and accompanying text.

179. See Krista D. Brown, *supra* note 172, at 325 (“Under Equal Protection jurisprudence regarding gender equity in high school athletics, courts have found that categorically denying underrepresented sexes the opportunity to play on an athletic team because of health and safety concerns is not substantially related to that objective.”).

trary.”¹⁸⁰ For example, policies often are administered arbitrarily by relying on student’s enrollment documents to determine sex assigned at birth and thus do not treat all transgender students alike.¹⁸¹ Already, various circuit courts have appeared eager to apply equal protection arguments in addition to sex-stereotyping and *per se* discrimination arguments post-*Bostock* to strike down bans on transgender athletes.¹⁸² In *Grimm v. Gloucester County School Board*, for example, the Fourth Circuit agreed with the Seventh and Eleventh Circuits that when a school district decides which bathroom a student may use based upon sex listed on a birth certificate, this is sex-based discrimination and is subject to intermediate scrutiny.¹⁸³ Moreover, the court rejected the school board’s argument that privacy interests constitute an “exceedingly persuasive” justification of the policy.¹⁸⁴ Given the trend among circuit courts, including recent decisions of the Eleventh Circuit – seen by many as least likely to apply *Bostock* to a Title IX setting – it appears highly unlikely that state laws restricting the rights of transgender individuals will survive challenges on both Equal Protection and Title IX grounds.¹⁸⁵

180. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” (quoting *Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920))).

181. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (finding students’ sex on school enrollment documents not “legitimate, accurate proxy” for sex assigned at birth).

182. See, e.g., *Grimm II*, 972 F.3d 586, 620 (4th Cir. 2020) (“The 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. . . . How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.”).

183. See *id.* at 608 (“We agree with the Seventh and now Eleventh Circuits that when a ‘School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate, ‘the policy necessarily rests on a sex classification.’” (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017))); see also *Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (“Mr. Adams and the School Board are in agreement that our Court is required to review the School District’s bathroom policy with heightened scrutiny. Although this standard of review is not in dispute, we first review why heightened scrutiny is warranted in order to chart a course for our analysis.”).

184. See *Grimm II*, 972 F.3d at 623 (Wynn, J. concurring) (“Put simply, Grimm’s entire outward physical appearance was male. As such, there can be no dispute that had he used the girls’ restroom, female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students. The Board’s stated privacy interests thus cannot be said to be an ‘exceedingly persuasive’ justification of the policy.”).

185. See generally *id.* (holding school board policy banning transgender students from using bathroom conforming to gender identity violates Title IX, Equal Protection Clause protections). See also *Glenn v. Brumby*, 663 F.3d 1312, 1321

D. What this Signifies for Women's Sports Going Forward

Recently, a federal judge issued a preliminary injunction on the Idaho law banning transgender women and girls from sports teams citing *Bostock's* reasoning that discrimination against an individual for being transgender necessarily discriminates on the basis of sex.¹⁸⁶ This ruling and others could imply that laws which discriminate on the basis of sexual orientation or gender identity may be increasingly subjected to heightened scrutiny analysis going forward.¹⁸⁷ Following the *Bostock* decision, Olympic track-and-field coach Linda Blade stated that she feared that “all the benefits society gets from letting girls have their protected category so that competition can be fair, all the advances in women's rights . . . [will] be diminished.”¹⁸⁸ Similar concerns have been echoed in state legislation banning transgender girls and women from school athletics.¹⁸⁹ Several bills specifically point out that sex-specific teams promote sex equality by providing opportunities to female athletes to “demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain . . . the numerous other long-term benefits that flow from success in athletic endeavors.”¹⁹⁰ Following President Biden's executive order calling on agencies across the federal government to review regulations and policies that prohibit sex discrimination to include sexual orienta-

(11th Cir. 2011) (“Brumby has advanced no other reason that could qualify as a governmental purpose, much less an ‘important’ governmental purpose, and even less than that, a ‘sufficiently important governmental purpose’ that was achieved by firing Glenn because of her gender non-conformity.”). In applying equal protection logic to striking down a claim of sex-based discrimination in the employment setting, the Eleventh Circuit has indicated its willingness to apply heightened scrutiny in future cases within the school setting as well. *See id.* (implying termination of employment due to gender non-conformity would likely not serve sufficiently important governmental purpose).

186. *See Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020) (ordering preliminary injunction on Idaho law).

187. *See Sharita Gruberg, Beyond Bostock: The Future of LGBTQ Civil Rights*, CAP ACTION (Aug. 26, 2020), <https://www.americanprogress.org/article/beyond-bostock-future-lgbtq-civil-rights/> [<https://perma.cc/366U-6BAS>] (describing *Bostock's* impact on Equal Protection Clause as well as impacts on access to housing under Fair Housing Act, and access to healthcare under Affordable Care Act).

188. For further discussion of critics of Biden Administration's Executive Action directing all federal agencies to reevaluate treatment of transgender individuals in light of the *Bostock* decision, see *supra* note 15 and accompanying text.

189. For further discussion of justifications used by states that adopted laws banning transgender athletes, see *supra* notes 121, 123 and accompanying text.

190. *See, e.g., Senate Bill 2536* § 1–7, MISS. LEGISLATURE (2021), <http://bill-status.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm> [<https://perma.cc/5JDZ-SG8X>] (citing benefits to male, female students of sex-segregated teams barring transgender individuals from participating on teams conforming with gender identity).

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tion and gender identity per *Bostock*, the hashtag #BidenErasedWomen trended on Twitter.¹⁹¹ Inherent in this argument, however, is the idea that what is good for transgender girls and women is not also good for girls and women generally and that transgender girls and women are somehow not part of this larger group.¹⁹²

On the other hand, in a joint statement, twenty-three women's rights and gender justice organizations voiced their support of the full inclusion of transgender people in athletics.¹⁹³ While Linda Blade's concerns are by no means unusual, they are likely unfounded.¹⁹⁴ Twenty-four states and the District of Columbia have had trans-inclusive athletic laws or policies for more than a decade.¹⁹⁵ It has also been found that many of these states actually saw higher participation rates in athletics among cisgender women after such policies were implemented.¹⁹⁶ University of Pennsylvania swimmer Lia Thomas became a central figure in the debate over transgender inclusion in competitive women's sports after setting the fastest women's time in the nation for the 200 meter free swim.¹⁹⁷ All else being equal, it does appear that transgender women may have a competitive advantage over cisgender female ath-

191. See Samantha Schmidt et al., *Biden Calls for LGBTQ Protection in Day 1 Executive Order, Angering Conservatives*, WASH. POST (Jan. 21, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/> [<https://perma.cc/EP5G-JYFC>] (describing backlash to Biden Administrations Executive Order).

192. For further discussion of how arguments in favor of excluding transgender women or girls from school sports are unscientific and unjust, see *supra* note 161 and accompanying text.

193. See *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People*, AM. C.L. UNION, <https://www.aclu.org/letter/statement-womens-rights-and-gender-justice-organizations-support-full-and-equal-access> [<https://perma.cc/U2CU-6FC6>] (last visited Sept. 23, 2021) ("We speak from experience and expertise when we say that nondiscrimination protections for transgender people — including women and girls who are transgender — are not at odds with women's equality or well-being, but advance them.").

194. See *id.* (stating equal participation in athletics for transgender people does not mean end to women's sports generally).

195. See *K-12 Policies*, *supra* note 16 (downplaying recent fears about transgender athletes, citing prior "trans-inclusive" laws).

196. See *Statement of Women's Rights and Gender Justice Organizations*, *supra* note 193 (indicating participation in women's sports generally increased when trans-inclusionary laws or policies were adopted).

197. See David Rieder, *Controversy of the Year: Transgender Swimmer Lia Thomas Swims Fastest Times in the Nation*, SWIMMING WORLD (Dec. 31, 2021), <https://www.swimmingworldmagazine.com/news/controversy-of-the-year-transgender-swimmer-lia-thomas-swims-fastest-times-in-the-nation/> [<https://perma.cc/VJ5L-NJMB>] (providing background on Lia Thomas, including her college swimming records).

letes, and conceivably could lead many women's sports competitions if a small percentage of elite athletes transition after puberty.¹⁹⁸ However, competitors like Lia Thomas are extremely rare and a world in which transgender athletes dominate the upper echelons of female athletics has not yet materialized—and transgender athletes in general remain quite rare.¹⁹⁹ The likeliest result of the *Bostock* case is that transgender girls and women who are currently barred or discouraged from high school and collegiate athletics will be able to participate, thus avoiding the potential psychological harms that come about from denying such participation.²⁰⁰

IV. CONCLUSION: BEYOND BOSTOCK AND INTO THE FUTURE

The *Bostock* decision will inevitably be an incredibly important development in protections for LGBTQ individuals in the employment sphere.²⁰¹ Moreover, as federal courts continue to expand the *Bostock* decision into other realms, it will continue to afford transgender individuals additional protections.²⁰² One such protection will likely include transgender athletes' ability to play on

198. See Megan McArdle, *We Need To Be Able To Talk About Trans Athletes and Women's Sports*, WASH. POST (Jan. 13, 2022), <https://www.washingtonpost.com/opinions/2022/01/13/trans-women-sports-uncomfortable-questions/> [https://perma.cc/Z483-S4QP] (discussing Lia Thomas, other transgender athletes', potential competitive edge over cisgender athletes).

199. See David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, AP NEWS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [https://perma.cc/Y6H3-KRYL] (highlighting inability of legislators advocating bans on transgender girls competing on girls' sports teams to cite examples of transgender athletes compromising ability of cisgender girls to participate); see also Jo Yurcaba, *Amid Trans Athlete Debate, Penn's Lia Thomas Loses to Trans Yale Swimmer*, ABC NEWS (Jan. 10, 2022), <https://www.nbcnews.com/nbc-out/out-news/trans-athlete-debate-penns-lia-thomas-loses-trans-yale-swimmer-rcna11622> [https://perma.cc/UE7R-WNAC] (citing underrepresentation of transgender athletes in NCAA compared to general population while reporting Lia Thomas recently lost to male transgender athlete who competes on women's team because he has not begun gender-affirming hormone treatment).

200. See, e.g., Grimm I, 822 F.3d 709, 727–28 (4th Cir. 2016) (Davis, J., concurring) (citing expert declaration by psychologist specializing in working with children, adolescents, with gender dysphoria, who stated treating transgender boy as male in some situations but not in others is “inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child”).

201. For further discussion of the impact of the *Bostock* decision in the employment field, see *supra* note 128 and accompanying text.

202. For further discussion of the impact of *Bostock* beyond employment, see *supra* notes 128–140 and accompanying text.

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sports teams that conform to their gender identity in high school and collegiate athletics.²⁰³

At the same time, as transgender athletes increasingly compete on teams that conform to their gender identity, there will be those who oppose the change and claim that this represents a violation of Title IX protections of cisgendered women.²⁰⁴ Ultimately, it will fall upon either the courts, federal agencies, and Congress to further clarify the meaning of sex in Title IX.²⁰⁵ While there are some who fear that these new rights will come at the expense of rights enjoyed by cisgender female athletes, these fears are likely unfounded.²⁰⁶

*Joe Brucker**

203. For further discussion of why *Bostock* may eventually extend to school athletics, see *supra* notes 150–164 and accompanying text.

204. See, e.g., *Soule v. Conn. Assn. of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn., Apr. 17, 2020) (challenging Connecticut’s law allowing transgender athletes to compete on teams corresponding with gender identity as violating Title IX protections for cisgender female athletes).

205. See *Title IX: Who Determines the Legal Meaning of “Sex”?*, CONG. RSCH. SERV. (Dec. 12, 2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10229> [<https://perma.cc/7LV7-4SKC>] (delineating roles played by courts, Congress, federal agencies in interpreting Title IX).

206. For further discussion of the impact of *Bostock*’s protection expanding to Title IX on women’s sports, see *supra* notes 188–200 and accompanying text.

* J.D. Candidate, May 2023, Villanova University Charles Widger School of Law; I would like to thank my family and friends for all their encouragement and support throughout my academic and professional endeavors.

Testimony in Opposition to HB 1489, HB 1249

Christina Sambor, Lobbyist No. 312 – Legislative Coordinator, North Dakota Human Rights Coalition, Human Rights Campaign, Youthworks

North Dakota Senate Judiciary Committee

March 27, 2023

Chairwoman Larson and Members of the Committee:

My name is Christina Sambor, I am submitting testimony on behalf of the North Dakota Human Rights Coalition, Human Rights Campaign and Youthworks to oppose the bills set for hearing this afternoon that seek to exclude transgender students from participation in sports.

The attached law review article, Joseph Brucker, Beyond Bostock: Title IX Protections for Transgender Athletes, 29 Jeffrey S. Moorad Sports L.J. 327 (2022), sets forth a comprehensive analysis of the history of civil rights law and trans athletes. In sum, the United States Department of Education has held, since 2010, that Title IX protects LGBT students from sex discrimination. It has further interpreted that bathrooms and locker room facilities should be applied to transgender students consistent with their gender identity, rather than their sex assigned at birth. Since May 13, 2016, departments have been directed to treat a student's gender identity the same as a person's sex for purposes of Title IX. The same guidance clarified that while a school may operate sex-segregated athletic teams when based on competitive skill or in contact sports, schools may not rely on overly broad generalizations or stereotypes about the differences between transgender students and students of the same gender identity or others' discomfort with transgender students. While this guidance was reversed under the Trump Administration, it has since been re-established by the Biden Administration.

The U.S. Supreme Court decided three consolidated cases collectively known as "Bostock" on June 15, 2020. The Bostock Decision held that Title VII of the Civil Rights Act prohibits discrimination in the workplace based on sexual orientation or gender identity. That holding is enforced by North Dakota's Department of Labor and Human Rights, which now accepts complaints of discrimination based on sexual orientation or gender identity. Federal courts have recognized that cases interpreting Title VII's provisions are relevant to and can be useful in analysis of claims of Title IX discrimination. On June 16, 2021, the US Department of Education released a Notice of Interpretation applying the Bostock prohibition on discrimination on the basis of sexual orientation or gender identity to Title IX claims. Based upon all of this information, laws, such as those proposed by HB 1249 and HB 1489 are susceptible to legal challenges and will likely be held to violate Title IX. In addition, the Equal Protection Clause of the Fourteenth

Amendment has also provided a basis upon which courts have struck down bans on transgender athletes and students, notably striking down the assignment of bathroom usage by sex listed on a birth certificate. Recently, Idaho's law banning transgender women and girls from sports teams was enjoined citing the legal arguments that I previously discussed.

The arguments that often support this type of legislation assume that inclusion of trans women and girls in sports teams will have a negative effect on girls and women generally. These arguments are unfounded. Twenty-four (24) states and the District of Columbia have had trans-inclusive athletic laws or policies for more than a decade. Many of these states actually saw higher participation rates in athletics among cisgender women after the policies were implemented. Trans athletes are in general quite rare, and transgender athletes dominating elite women's sports has not materialized. The Olympics have had trans-inclusive policies since 2004. California has had a law on the books since 2013 allowing trans athletes to compete on the team that matches their gender identity without issue.

The idea that trans girls have an unfair advantage is rooted in the idea that testosterone causes physical changes that increase muscle mass. But other conditions, such as polycystic ovarian syndrome similarly elevate testosterone levels. Should we block those individuals from competition based on an unfair biological advantage? In addition, claiming that trans girls uniformly have a competitive advantage ignores the fact that they suffer from higher rates of bullying, anxiety and depression, making training more difficult, and experience higher levels of homelessness and poverty because of family and societal rejection.

The impact of these laws is to deny trans students access to exercise, companionship, team building, social support and the myriad other benefits of competitive sports in the name of unsubstantiated fears. In the vast majority of cases, the only result of trans athletes participating in sports would be the avoidance of the rejection and psychological harm that comes from exclusion. Please recommend a do not pass on HB 1249 and HB 1489.

Caedmon Marx Outreach coordinator Dakota outright in opposition HB1249 & HB1489

Hi, my name is Caedmon Marx I am the outreach coordinator for Dakota Outright and I recommend A DO not pass on HB 1249 and HB 1489. One of the biggest miss conceptions on these bills is that there is no Guidelines in place at both the High school and collage level for transgender athletes. In the North Dakota High School athlete's association's Regulations (NDHSAA) regarding trans athletes is that for a female to male (FTM, Trans man) individual they must be undergoing testosterone treatments and must have medical treatment and hormone therapy verified annually. For Male to female (MTF, Trans Female) may not be on a female's team unless on testosterone suppressants and an ability to show that from a medical perspective that there is no competitive advantage on top of appealing to the NDHSAA board of directors to decide. For transgender Collage athletes the northern sun intercollegiate conference (NSIC) has an established policy that complies with the NCAA with mandatory hormone checks over the season regarding their transition. The other thing that is a miss conception is that trans women who would fit into these guidelines for being able to patriate in their sports will be having the full strength of a man within 3–6 months on HRT (hormone replacement therapy) Trans women have a decrease in muscle mass and strength. I also want to address the fact that we could lose certain events in our state if one of these two bills pass one these events bring money to our state economy one of these events is USA wrestling Free style and Greco-Roman National tournament which takes place in Fargo ND. This tournament brings state teams from all 50 states on top of multiple individuals this tournament brings revenue to the city of Fargo and the state of ND. With this I encourage a do not pass on HB 1249 and HB 1489 and leave the decision to the local sports association that have policies in place already.

HB 1489

Rep. Ben Koppelman- Testimony

Madame Chairman and Members of the Committee,

Thank you for the opportunity to introduce HB 1489 to you today.

This bill is the sister bill to HB1249. In the same way as HB1249 protects opportunities in female sports in K-12, this bill does the same in higher education.

Each year we spend a lot of money as a state supporting our state schools of higher education. Part of this college experience is the athletic opportunities that allow students to chase their athletic dreams.

I introduced this bill to ensure that all students have the opportunity to participate on a level playing field with their peers without having to compete with a member of the opposite sex that is likely to have physical and physiological advantages.

Title IX of the federal education code says:

“No Person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

In sports, Title IX requires that boys and girls, men and women, have an equal opportunity to participate, but does not require institutions to offer identical sports. It also requires that scholarships and other resources be applied equitably.

Now, in order to understand what the intent was of this law, and how it applies, we need to first look at the definition of sex and how it differed from the definition of gender and what both terms meant in 1972. In order to put it in context, I have provided you the definition of both words in the Webster’s New World Dictionary--Second College Edition published in 1970, in which *Sex is defined as: “either of the two divisions, male or female, into which persons, animals, or plants are divided with reference to their reproductive functions”*, and *Gender is simply defined as: “sex”*. In Webster’s New Twentieth Century Dictionary—Second Edition published in 1979, the definitions are nearly identical.

Now that we have a context of what the term ‘sex’ meant when the Title IX law was written, let’s explore why that term was used. It is commonly understood that there

are physical and physiological traits that differ between the sexes, and in order to provide equal opportunity in activities, it was necessary to determine how to ensure fair competition. In activities that do not involve athletic or physical competition, there is probably little reason to separate boys and girls, however in sports, the differences become obvious.

Women are smaller in stature than men, the average 18-year-old woman is 64.4 inches tall and weighs 126.6 pounds compared to men at 70.2 inches tall and a weight of 144.8 pounds. Women's hearts are 25% smaller than men's and they also have less red blood cell percentage which doesn't allow their blood to carry as much oxygen. Their lung capacity is 30% less. They have 50% less upper body strength and 30% less lower body strength. A woman who is the same size as her male counterpart is only 80% as strong on average. Women have less bone mass and have less-durable ligaments than men. These differences consistently show up in the data.

According to a white-paper titled *"Comparing Athletic Performances—the Best Elite Women to Boys and Men"* (by Doriane Lambelet-Coleman and Wickliff Shreve), Males consistently outperform females of the same age and training by about 10-12% however it varies slightly by sport. In fact, boys under the age of 18 are even able to outperform elite adult women. For example, in 2017, the lifetime-best time record of 10.78 seconds for US Champion Tori Bowie in the 100-meter was beaten 15,000 times by men and boys. Elite runner, Allyson Felix's 400-meter lifetime-best time record of 49.26 seconds was outperformed by more than 15,000 times by males also in 2017. The authors of the paper go on to say: **"This differential isn't the result of boys and men having a male identity, more resources, better training, or superior discipline."** These statistical comparisons play out in a similar way in all the track and field events. Other sports also show the differentials.

As you can see, there was a scientific reason to use sex (as defined at the time as biological sex) as the delineating factor to ensure opportunity for girls and women. This has provided exponential opportunity for young women to shatter the glass ceiling that had previously been holding back their potential. Since Title IX was implemented in 1972, the participation in High School sports has gone from 295,000 girls compared with 3.7 million boys, and is now 3.4 million girls compared to 4.6 million boys. The statistical trend is similar in college sports.

President Biden has issued guidance through an executive order suggesting that his administration should treat 'gender identity' as a way of defining 'sex'. Although presidential executive orders cannot change the law, they can cause pressure on states and schools to follow suit. If we were to define 'sex' in this way in North Dakota, it would have massive consequences on women of all ages in our state.

For consistency throughout the state, it needs to be the Legislature that defines this policy. Let's be clear, HB 1489 does not prohibit any student from participating in sports, but rather to the contrary. Just as has been the case for the past 50 years, this bill will ensure that ALL students have equal opportunity to participate in safe and fair environment with members of the same sex. High school, college, amateur and professional female athletes all over the world, in many sports, are being dominated by biological males who compete as females. We must find a solution where women are not denied their rightful place on the podium. I believe that HB1249 and HB1489 are those solutions.

If we choose to do nothing, we will by default be allowing those opportunities of our women to be lost or greatly reduced as society attempts to remove any reference to biological sex and replace it with the social construct of self-identification. As a husband, a father of a former female athlete, and a grandfather of a granddaughter that might someday choose to be a female athlete; I cannot sit back and let society strip away opportunity from women in our state.

Madame Chairman and members of the committee, **I request that you give this bill a Do-Pass recommendation.** I would be happy to answer any questions that you may have.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LINDSAY HECOX, *et al.*,

Plaintiffs,

v.

BRADLEY LITTLE, *et al.*;

Defendants.

Case No. 1:20-cv-00184-DCN

MEMORANDUM DECISION AND ORDER

This matter is before the Court on Plaintiffs’ Motion for Preliminary Injunction, proposed intervenors’ Motion to Intervene, and Defendants’ Motion to Dismiss. The Court held oral argument on July 22, 2020 and took the matters under advisement.

Upon review, and for the reasons stated below, the Court GRANTS the Motion for Preliminary Injunction (Dkt. 22); GRANTS the Motion to Intervene (Dkt. 30); and GRANTS in PART and DENIES in PART the Motion to Dismiss (Dkt. 40).

I. OVERVIEW

Plaintiffs in this case challenge the constitutionality of a new Idaho law which excludes transgender women from participating on women’s sports teams. Defendants assert Plaintiffs lack standing, that their claims are not ripe for review, that certain of their claims fail as a matter of law, and that they are not entitled to injunctive relief. The proposed intervenors seek to intervene to advocate for their interests as female athletes and

to defend the law Plaintiffs challenge. The United States has also filed a Statement of Interest in support of Idaho's law. Dkt. 53.

The primary question before the Court—whether the Court should enjoin the State of Idaho from enforcing a newly enacted law which precludes transgender female athletes from participating on women's sports—involves complex issues relating to the rights of student athletes, physiological differences between the sexes, an individual's ability to challenge the gender of other student athletes, female athlete's rights to medical privacy and to be free from potentially invasive sex identification procedures, and the rights of all students to have complete access to educational opportunities, programs, and activities available at school. The debate regarding transgender females' access to competing on women's sports teams has received nationwide attention and is currently being litigated in both traditional courts and the court of public opinion.

Despite the national focus on the issue, Idaho is the first and only state to categorically bar the participation of transgender women in women's student athletics. This categorical bar to girls and women who are transgender stands in stark contrast to the policies of elite athletic bodies that regulate sports both nationally and globally—including the National Collegiate Athletic Association (“NCAA”) and the International Olympic Committee (“IOC”)—which allow transgender women to participate on female sports teams once certain specific criteria are met.

In addition to precluding women and girls who are transgender and many who are intersex from participating in women's sports, Idaho's law establishes a “dispute” process that allows a currently undefined class of individuals to challenge a student's sex. Idaho

Code § 33-6203(3). If the sex of any female student athlete—whether transgender or not—is disputed, the student must undergo a potentially invasive sex verification process. This provision burdens all female athletes with the risk and embarrassment of having to “verify” their “biological sex” in order to play women’s sports. *Id.* Similarly situated men and boys—whether transgender or not—are not subject to the dispute process because Idaho’s law does not restrict individuals who wish to participate on men’s teams.

Finally, as an enforcement mechanism, Idaho’s law creates a private cause of action against a “school or institution of higher education” for any student “who is deprived of an athletic opportunity” or suffers any harm, whether direct or indirect, due to the participation of a woman who is transgender on a women’s team. *Id.* § 33-6205(1). Idaho schools are also precluded from taking any “retaliation or other adverse action” against those who report an alleged violation of the law, regardless of whether the report was made in good faith or simply to harass a competitor. *Id.* at § 33-6205(2).

Plaintiffs seek a preliminary injunction which would enjoin enforcement of Idaho’s law pending trial on the merits. The Court will ultimately be required to decide whether Idaho’s law violates Title IX and/or is unconstitutional, but that is not the question before the Court today. The question currently before the Court is whether Plaintiffs have met the criteria for enjoining enforcement of Idaho’s law *for the present time* until a trial on the merits can be held. To issue an injunction preserving the status quo by enjoining the law’s enforcement, the Court must primarily decide whether Plaintiffs have constitutional and prudential standing to challenge the law, whether they state facial or only as-applied constitutional challenges, and whether they are likely to succeed on their claim, based upon

the current record, that the law violates the Equal Protection Clause of the Fourteenth Amendment.

II. BACKGROUND

On March 30, 2020, Idaho Governor Bradley Little (“Governor Little”) signed the Fairness in Women’s Sports Act (the “Act”) into law. Idaho Code Ann. § 33-6201–6206.¹ Plaintiffs’ Complaint challenges the constitutionality of the Act. Among other things, Plaintiffs contend that the Act violates their constitutional rights to equal protection, due process, and the right to be free from unconstitutional searches and seizures. Plaintiffs seek preliminary relief solely on their equal protection claim, arguing the Act discriminates on the basis of transgender status by categorically barring transgender women from participating in women’s sports, and also discriminates on the basis of sex by subjecting all women student-athletes to the risk of having to undergo invasive, unnecessary tests to “verify” their sex, while permitting all men student-athletes to participate in men’s sports without such risk. Plaintiffs seek a preliminary injunction to enjoin enforcement of the Act pending trial on the merits.

A. Definitions

As the Third Circuit recently explained, in the context of issues such as those raised in the instant case, “such seemingly familiar terms as ‘sex’ and ‘gender’ can be misleading.” *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018). The Court accordingly begins by defining relevant terms utilized in this decision.

¹ The Act went into effect on July 1, 2020. Idaho Code § 33-6201.

“Sex” is defined as the “anatomical and physiological processes that lead to or denote male or female. Typically, sex is determined at birth based on the appearance of external genitalia.” *Id.*

A person’s “gender identity” is his or her “deep-core sense of self as being a particular gender.” *Id.* “Although the detailed mechanisms are unknown, there is a medical consensus that there is a significant biologic component underlying gender identity.” Dkt. 22-9, ¶ 18.²

The term “cisgender” refers to a person who identifies with the sex that person was determined to have at birth. *Boyertown*, 897 F.3d at 522.

“Transgender” refers to “a person whose gender identity does not align with the sex that person was determined to have at birth.” *Id.* A transgender woman “is therefore a person who has a lasting, persistent female gender identity, though the person’s sex was determined to be male at birth.” *Id.*

Transgender individuals may experience “gender dysphoria,” which is “characterized by significant and substantial distress as result of their birth-determined sex being different from their gender identity.” *Id.* “In order to be diagnosed with gender

² The Court relies on various declarations filed in support of the Motion for Preliminary Injunction and Motion to Intervene for medical definitions of the terms used herein, and to identify the proposed intervenors and their arguments. The Court also considers extra-pleading materials when assessing Plaintiffs’ Motion for Preliminary Injunction. The Court does not, however, rely on extra-pleading materials (other than those of which it takes judicial notice) in its assessment of Defendants’ Motion to Dismiss, and accordingly does not treat the Motion to Dismiss as a Motion for Summary Judgment. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 921–22 (9th Cir. 2004) (finding a represented party’s submission of extra-pleading materials justified treating the motion to dismiss as a motion for summary judgment). Pursuant to Federal Rule of Evidence 201(c), the Court has discretionary authority to take judicial notice, regardless of whether it is requested to do so by a party, and does in fact do so in this case as it relates to certain materials identified below. Fed. R. Evid. 201.

dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning.” Dkt. 22-2, ¶ 19. If left untreated, symptoms of gender dysphoria can include severe anxiety and depression, suicidality, and other serious mental health issues. *Id.* at ¶ 20. Attempted suicide rates in the transgender community are over 40%. Dkt. 1, at ¶ 103.

The term “intersex” is an umbrella term for a person “born with unique variations in certain physiological characteristics associated with sex, “such as chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, or hormone production or response.” Dkt. 22-1, at 2 (citing Dkt. 22-2, ¶ 41). Some intersex traits are identified at birth, while others may not be discovered until puberty or later in life, if ever. *See generally* Dkt. 22-2, at 11–16.

B. The Parties

1. Plaintiffs

Plaintiffs in this action include Lindsay Hecox, and Jean and John Doe on behalf of their minor daughter, Jane Doe (collectively “Plaintiffs”).³ Lindsay is a transgender woman athlete who lives in Idaho and attends Boise State University (“BSU”). As part of her treatment for gender dysphoria, Lindsay has undergone hormone therapy by being treated with testosterone suppression and estrogen, which lower her circulating testosterone levels and affect her bodily systems and secondary sex characteristics. Dkt. 1, ¶ 29. Lindsay is a

³ Plaintiffs Jean, John, and Jane Doe have been granted permission to proceed under pseudonyms. Dkt. 48.

life-long runner who intends to try out for the BSU women's cross-country team in fall 2020, and for the women's track team in spring 2021. *Id.* at ¶ 33. Under current NCAA rules, Lindsay could compete at NCAA events in September—when she has completed one year of hormone treatment.⁴ *Id.* at ¶ 32.

Jane is a 17-year old girl and athlete who is cisgender. Dkt. 1, ¶¶ 39, 42. Jane has played sports since she was four and competes on the soccer and track teams at Boise High School, where she is a rising senior. *Id.* at ¶¶ 40, 45. After tryouts in August, Jane intends to play on Boise High's soccer team again in fall 2020.⁵ *Id.* Because most of her closest friends are boys, she has an athletic build, rarely wears skirts or dresses, and has at times been thought of as “masculine,” Jane worries that one of her competitors may dispute her sex pursuant to section 33-6203(3) of the Act. *Id.* at ¶ 47.

2. *Defendants*

The defendants named in this action (collectively “Defendants”) include Governor Little; Idaho Superintendent of Public Instruction Sherri Ybarra; the individual members of the Idaho State Board of Education (Debbie Critchfield, David Hill, Emma Atchley, Linda Clark, Shawn Keough, Kurt Liebich, and Andrew Scoggin); Idaho state educational institutions BSU and Independent School District of Boise City #1 (“Boise School

⁴ Due to the COVID-19 pandemic, the Mountain West conference in which BSU participates recently postponed sports competitions for fall sports. However, as of the date of this decision, BSU has not announced whether it will alter the training programs or tryouts for the cross-country team, and the Court has been advised by Plaintiffs' counsel that Lindsay is continuing her individual training program in preparation for tryouts.

⁵ Although try-outs for the Boise High soccer team have recently been postponed, the Court has been advised that small group training for the girls' soccer team may begin as early as August 17, 2020.

District”); BSU’s President, Dr. Marlene Tromp; Superintendent of the Boise School District, Coby Dennis; the individual members of the Boise School District’s Board of Trustees (Nancy Gregory, Maria Greeley, Dennis Doan, Alicia Estey, Dave Wagers, Troy Rohn, and Beth Oppenheimer); and the individual members of the Idaho Code Commission (Daniel Bowen, Andrew Doman, and Jill Holinka).

3. Proposed Intervenors

Proposed intervenors Madison (“Madi”) Kenyon and Mary (“MK”) Marshall (collectively “Madi and MK” or the “Proposed Intervenors”) are Idaho cisgender female athletes. Like Lindsay and Jane, Madi and MK are “female athletes for whom sports is a passion and life-defining pursuit.” Dkt. 30-1, at 2. Madi and MK both run track and cross-country on scholarship at Idaho State University (“ISU”) in Pocatello, Idaho. *Id.* Both competed against a transgender woman athlete last year at the University of Montana and had “deflating experiences” of running against and losing to that athlete. *Id.*, at 3; Dkt. 30-2, ¶¶ 12, 14–15; Dkt. 30-3, ¶ 11. The Proposed Intervenors support the Act and wish to have their personal concerns fully set forth and represented in this case.

C. The Act

1. Overview

Idaho passed House Bill 500 (“H.B. 500”), the genesis for the Act, on March 16, 2020. Dkt. 1, ¶ 90. In the United States, high school interscholastic athletics are generally governed by state interscholastic athletic associations, such as the Idaho High School Activities Association (“IHSAA”). *Id.* at ¶ 66. The NCAA sets policies for member colleges and universities, including BSU. *Id.* at ¶ 67. Prior to the passage of H.B. 500, the

IHSAA policy allowed transgender girls in K-12 athletics in Idaho to compete on girls' teams after completing one year of hormone therapy suppressing testosterone under the care of a physician for purposes of gender transition. *Id.* at ¶ 71. Similarly, the NCAA policy allows transgender women attending member colleges and universities in Idaho to compete on women's teams after one year of hormone therapy suppressing testosterone. *Id.* at ¶ 75.

2. *Legislative History*

On February 13, 2020, H.B. 500 was introduced in the Idaho House by Representative Barbara Ehardt ("Rep. Ehardt"). On February 19, 2020, the House State Affairs Committee heard testimony on H.B. 500. *Id.* at ¶ 80. Ty Jones, Executive Director of the IHSAA, answered questions at that hearing and noted that no Idaho student had ever complained of participation by transgender athletes, and no transgender athlete had ever competed under the IHSAA policy regulating inclusion of transgender athletes. *Id.* at ¶ 81. In addition, millions of student-athletes have competed in the NCAA since it adopted its policy in 2011 of allowing transgender women to compete on women's teams after one year of hormone therapy suppressing testosterone, with no reported examples of any disturbance to women's sports as a result of transgender inclusion. *Id.* at ¶ 76. Rep. Ehardt admitted during the hearing that she had no evidence any person in Idaho had ever challenged an athlete's eligibility based on gender. *Id.* at ¶ 80.

On February 21, 2020, H.B. 500 was passed out of the House committee. *Id.* at ¶ 82. On February 25, 2020, Idaho Attorney General Lawrence Wasden ("Attorney General Wasden") warned in a written opinion letter that H.B. 500 raised serious constitutional and

other legal concerns due to the disparate treatment and impact it would have on both transgender and intersex athletes, as well as its potential privacy intrusion on all female student athletes. *Id.* at ¶ 83. On February 26, 2020, the House debated the bill. Rep. Ehardt referred to two high school athletes in Connecticut and one woman in college who are transgender and who participated on teams for women and girls. *Id.* at ¶ 84. Rep. Ehardt argued that the mere fact of these athletes' participation exemplified the "threat" the bill sought to address. *Id.* The bill passed the House floor after the debate. *Id.*

After passage in the House, H.B. 500 was heard in the Senate State Affairs Committee and was passed out of Committee on March 9, 2020. *Id.* at ¶ 85. The next day, the bill was sent to the Committee of the Whole Senate for amendment, and minor amendments were made. *Id.* at ¶ 86. One day later, on March 11, 2020, the World Health Organization declared COVID-19 a pandemic and many states adjourned state legislative sessions indefinitely. *Id.* at ¶ 89. By contrast, the Idaho Senate remained in session and passed H.B. 500 as amended on March 16, 2020. *Id.* at ¶ 90. After the House concurred in the Senate amendments, the bill was delivered to Governor Little on March 19, 2020. *Id.*

Professor Dorianne Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining her research was misused and that "there is no legitimate reason to seek to bar all trans girls and women from girls' and women's sport, or to require students whose sex is challenged to prove their eligibility in such intrusive detail." *Id.* at ¶ 91. Professor Coleman endorsed the existing NCAA rule, which mirrors the IHSAA policy, and stated: "No other state has enacted such a flat prohibition against transgender athletes, and Idaho shouldn't either." *Id.*

Five former Idaho Attorneys General likewise urged Governor Little to veto the bill “to keep a legally infirm statute off the books.” *Id.* at ¶ 92. They urged Governor Little to “heed the sound advice” of Attorney General Wasden, who had “raised serious concerns about the legal viability and timing of this legislation.” *Id.* Nevertheless, based on legislative findings that, *inter alia*, “inherent, physiological differences between males and females result in different athletic capabilities,” Governor Little signed H.B. 500 into law on March 30, 2020.⁶ Idaho Code § 33-6202(8); Dkt. 1, ¶ 93.

For purpose of the instant motions, the Act contains three key provisions. First, the Act provides that “interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education” shall be “expressly designated as one (1) of the following based on biological sex: (a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed.” Idaho Code § 33-6203(1). The Act mandates, “[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.” *Id.* at § 33-6203(2). The Act does not contain comparable limitation for any individuals—whether transgender or cisgender—who wish to participate on a team designated for males.

⁶ On the same day, Governor Little also signed another bill into law, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. *Id.* at ¶ 93–94. Enforcement of H.B. 509 is currently being litigated in *F.V. and Dani Martin v. Jeppesen et al.*, 1:17-cv-00170-CWD, because another judge of this Court previously permanently enjoined Idaho from enforcing a prior law that restricted transgender individuals from altering the sex designation on their birth certificates. *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1146 (D. Idaho 2018).

Second, the Act creates a dispute process for an undefined class of individuals who may wish to “dispute” any transgender or cisgender female athlete’s sex. This provision provides:

A dispute regarding a student’s sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student’s personal health care provider that shall verify the student’s biological sex. The health care provider may verify the student’s biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. The state board of education shall promulgate rules for schools and institutions to follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

Id. at § 33-6203(3).

Third, the Act creates an enforcement mechanism to ensure compliance with its provisions. Specifically, the Act creates a private cause of action for any student negatively impacted by violation of the Act, stating:

- (1) Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school or institution of higher education.
- (2) Any student who is subject to retaliation or other adverse action by a school, institution of higher education, or athletic association or organization as a result of reporting a violation of this chapter to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency with oversight of schools or institutions of higher education in the state, shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school, institution, or athletic association or organization.
- (3) Any school or institution of higher education that suffers any direct or

indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the government entity, licensing or accrediting organization, or athletic association or organization.

- (4) All civil actions must be initiated within two (2) years after the harm occurred. Persons or organizations who prevail on a claim brought pursuant to this section shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief.

Id. at § 33-6205.

D. Procedural Background

Plaintiffs filed the instant suit on April 15, 2020. The lawsuit primarily seeks: (1) a judgment declaring that the Act violates the United States Constitution and Title IX, and also violates such rights as applied to Plaintiffs; (2) preliminary and permanent injunctive relief enjoining the Act's enforcement; and (3) an award of costs, expenses, and reasonable attorneys' fees. *Id.* at 53–54. On April 30, 2020, Plaintiffs filed the instant Motion for Preliminary Injunction, seeking preliminary relief on their Equal Protection Claim. Dkt. 22. The Proposed Intervenors filed a Motion to Intervene on May 26, 2020 (Dkt. 30), and Defendants filed a Motion to Dismiss on June 1, 2020. Dkt. 40. After each was fully briefed, the Court held oral argument on all three motions on July 22, 2020.

III. ANALYSIS

Since there are three pending motions with different applicable legal standards, the Court will set forth the appropriate legal standard when addressing each motion. Because the Court's decision on the Motion to Intervene will determine the parties in this action, and its decision on the Motion to Dismiss will determine whether Plaintiffs may bring their

Motion for a Preliminary Injunction, the Court begins with the Motion to Intervene, follows with Defendants' Motion to Dismiss, and, since the Court finds the Motion to Dismiss is appropriately denied in part and granted in part, concludes with consideration of the Motion for Preliminary Injunction.

A. Motion to Intervene (Dkt. 30)

The Proposed Intervenors seek to intervene to advocate for their interests and to defend the Act, arguing they “face losses to male athletes” and “stand opposed to any legally sanctioned interference with the opportunities that they have enjoyed as female competitors, and that would deprive them and other young women of viable avenues of competitive enjoyment and success within a context that acknowledges and honors them as females.” Dkt. 30-1, at 4. The Proposed Intervenors request intervention as a matter of right, or, alternatively, permissive intervention, under Federal Rule of Civil Procedure 24. Plaintiffs oppose the Motion to Intervene. Dkt. 45; Dkt. 51-1. Defendants are in favor of intervention and suggest the Proposed Intervenors' perspectives “can help inform the Court when it balances hardships and determines the public consequences of the relief Plaintiffs seek.” Dkt. 44, at 2.

1. Legal Standard

Where, as here, an unconditional right to intervene is not conferred by federal statute,⁷ Federal Rule of Civil Procedure 24 authorizes intervention as of right or permissive intervention.

⁷ While a federal statute does not authorize intervention by the Proposed Intervenors, the United States is statutorily authorized to intervene in cases of general public importance involving alleged denials of equal

Rule 24(a) contains the standards for intervention as of right, and provides that a court must permit anyone to intervene who, on timely motion: “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2).

The Ninth Circuit has distilled the aforementioned provision into a four-part test for intervention as of right: (1) the application for intervention must be timely; (2) the applicant must have a “significantly protectable” interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by existing parties in the lawsuit. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001) (“*Berg*”) (citation omitted).

The Court must construe Rule 24(a)(2) liberally in favor of intervention. *Id.* at 818. In assessing interventions, courts are “guided primarily by practical and equitable considerations.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). However, it is the movant’s burden to show that it satisfies each of the four criteria for intervention as of right. *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)

protection on the basis of sex. 28 U.S.C. § 517; *see also United States v. Virginia*, 518 U.S. 515, 523 (1996). The United States filed its Statement of Interest in support of the Act pursuant to 28 U.S.C. § 517. Dkt. 53.

In general, Rule 24(b) also gives the court discretion to allow permissive intervention to anyone who has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B). In addition, in exercising its discretion under Rule 24(b), the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3).

2. Analysis

a. Intervention as of Right

Plaintiffs argue intervention as of right should be denied because the Proposed Intervenors claim interests that are neither cognizable under the law nor potentially impaired by the disposition of the present lawsuit. Plaintiffs also argue intervention as of right is unavailable because Defendants adequately represent the Proposed Intervenors' interests.

i. Timeliness of Application

In support of their arguments against permissive intervention, Plaintiffs suggest the Proposed Intervenors' participation will likely delay and prejudice the adjudication of Plaintiffs' claims. Dkt. 45, at 17. Plaintiffs do not, however, contest the timeliness of the application to intervene with respect to intervention as of right. To the extent necessary, the Court will accordingly address the timeliness of the application when assessing permissive intervention.

ii. Protectable Interest

To warrant intervention as of right, a movant must show both "an interest that is

protected under some law” and “a ‘relationship’ between its legally protected interest and the plaintiff’s claims.” *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (“*Lockyer*”) (quoting *Donnelly*, 159 F.3d at 409). “Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established.” *Berg*, 268 F.3d at 818 (citing *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)).

The Proposed Intervenors claim a significant and protected interest in having and maintaining “female-only competitions and a competitive environment shielded from physiologically advantaged male participants to whom they stand to lose.” Dkt. 30-1, at 7; *see also* Dkt. 52, at 4 n. 1. Plaintiffs characterize this interest as a mere desire to exclude transgender students from single-sex sports, which is not significantly protectable. Dkt. 45, at 10–11. As Plaintiffs note, the Ninth Circuit has held cisgender students do not have a legally protectable interest in excluding transgender students from single-sex spaces. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020) (rejecting Title IX and constitutional claims of cisgender students based on having to share single sex restrooms and locker facilities with transgender students).

However, the Ninth Circuit has also held that redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is unquestionably a legitimate and important interest, which is served by precluding males from playing on teams devoted to female athletes. *Clark, ex rel. Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (“*Clark*”). Regardless of how the Proposed Intervenors’ interest is characterized—either as a right to a level playing field

or as a more invidious desire to exclude transgender athletes—they do claim a protectable interest in ensuring equality of athletic opportunity. The importance of this interest is the basic premise of almost fifty years of Title IX law as it applies to athletics, and, as recognized by the Ninth Circuit, is unquestionably a legitimate and important interest. *Clark*, 695 F.2d at 1131. The Proposed Intervenors argue the only way to protect equality in sports is through sex segregation without regard to gender identity. Whether this argument is accurate or constitutional is not dispositive of the issue of whether the Proposed Intervenors have an interest in this suit.

Just as Plaintiffs have an interest in seeking equal opportunity for transgender female student athletes, the Proposed Intervenors have an interest in seeking equal opportunity for cisgender female student athletes. As such, to find the Proposed Intervenors are without a protectable interest in the subject matter of this litigation would be to hold that no party has an interest in this litigation. *See, e.g., Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 353 (9th Cir. 1974) (explaining all students and parents have an interest in a sound educational system, and that interest is surely no less significant where it is entangled with the constitutional claims of a racially defined class).

Further, Defendants acknowledged at oral argument what seems beyond dispute—Idaho passed the Act to protect cisgender female student athletes like Madi and MK. Because the Proposed Intervenors are the “intended beneficiaries” of the Act, their interest is neither “undifferentiated” nor “generalized.” *Lockyer*, 450 F.3d at 441 (citation omitted); *see also Cty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (finding small farmers had a protectable interest in action seeking to enjoin a federal statute passed regarding lands

receiving federally subsidized water where the small farmers were “precisely those Congress intended to protect” with the statute). If the Act is declared unconstitutional or substantially narrowed as result of this litigation, Madi and MK may be more likely to have to choose between competing against transgender athletes or not competing at all. Such an interest is sufficiently “direct, non-contingent, [and] substantial” to constitute a significant protectible interest in this action. *Lockyer*, 450 F.3d at 441 (alteration in original) (quoting *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981)).⁸

iii. Impairment of Interest

The “significantly protectable interest” requirement is closely linked with the requirement that the outcome of the litigation may impair the proposed intervenors’ interests. *Lockyer*, 450 F.3d at 442 (“Having found that [intervenors] have a significant protectable interest, we have little difficulty concluding that disposition of this case, may, as a practical matter, affect [them].”). If a proposed intervenor ““would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.”” *Berg*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee note to 1966 amendment).

The relief requested by Plaintiffs may affect the Proposed Intervenors’ interests. Should Plaintiffs prevail in this lawsuit, the Proposed Intervenors will not have the

⁸ Plaintiffs also argue the outcome of this lawsuit will not advance the Proposed Intervenors’ claimed interests because Madi and MK, as collegiate athletes, will still be required to compete against non-Idaho teams and athletes who are subject to the rules of the NCAA, which allow participation of women who are transgender after one year of testosterone suppression. Yet, the fact that a challenged law may only partially protect an intervenor from harm does not mean that the intervenor does not have an interest in preserving that partial protection, and Plaintiffs do not cite any authority to the contrary.

protection of the law they claim is vital to ensure their right to equality in athletics. Further, they “will have no legal means to challenge [any] injunction” that may be granted by this Court. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) (abrogated by further broadening of intervention as of right for claims brought under the National Environmental Policy Act in *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)); *see also Lockyer*, 450 F.3d at 443 (finding impairment where proposed intervenors would have no alternative forum to contest the interpretation of a law that was “struck down” or had its “sweep substantially narrowed”). Under such circumstances, the Proposed Intervenors satisfy the impairment requirement for intervention as of right.

iv. Adequacy of Representation

The “most important factor” to determine whether a proposed intervenor is adequately represented by an existing party to the action is “how the [proposed intervenor’s] interest compares with the interests of existing parties.” *Arakaki*, 324 F.3d at 1086 (citations omitted). When an existing party and a proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies. *Id.* There is also an assumption of adequacy where, as here, the government is acting on behalf of a constituency that it represents. *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002). In the absence of a “very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest.” *Arakaki*, 324 F.3d at 1086 (internal quotation marks and citation omitted).

Despite their individual interests in the instant litigation, even “interpret[ing] the requirements broadly in favor of intervention,” it is clear that the ultimate objective of both the Proposed Intervenors and Defendants is to defend the constitutionality of the Act. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009) (alteration in original) (quoting *Donnelly*, 159 F.3d at 409); *see also Prete*, 438 F.3d at 958–959 (holding that a public interest organization seeking intervention to defend a state constitutional ballot initiative failed to defeat the presumption of adequate representation when the ultimate objective of both the organization and the defendant government was to uphold the measure’s validity).⁹ Given this shared objective, the presumption of adequacy of representation applies, and the Proposed Intervenors must make “a very compelling showing” to defeat this presumption. *Arakaki*, 324 F.3d at 1086.

The Ninth Circuit has identified three factors for evaluating the adequacy of representation: (1) whether the interest of an existing party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2) whether the existing party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that existing parties would neglect. *Id.* “The prospective intervenor bears the burden of demonstrating that existing parties do not adequately represent its interests.” *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). However, this burden is satisfied if a proposed intervenor shows that

⁹ In *Prete*, the Court explained that while “it is unclear whether this ‘assumption’ rises to the level of a second presumption, or rather is a circumstance that strengthens the first presumption, it is clear that ‘in the absence of a very compelling showing to the contrary,’ it will be presumed that the Oregon government adequately represents the interests of the intervenor-defendants.” *Id.* at 957 (quoting *Arakaki*, 324 F.3d at 1086).

representation “may be” inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

The Proposed Intervenors argue that their participation in this lawsuit is necessary because Defendants include “multiple agencies and voices of the Idaho government that represent multiple constituencies including constituencies with views and interests more aligned with Plaintiffs than proposed intervenors.” Dkt. 30-1, at 10. The Proposed Intervenors also suggest they bring a unique perspective the government cannot adequately represent because the “personal distress and other negative effects suffered by female athletes from the inequity of authorized male competition against females is not felt by institutional administrators.” *Id.* Neither of these arguments is convincing.

First, regardless of the “multiple constituencies” represented, or beliefs of individual constituents voiced before H.B. 500 was passed,¹⁰ there is no reason to believe that Defendants cannot be “counted on to argue vehemently in favor of the constitutionality of [the Act].” *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir. 1997). Defendants’ retention of an expert witness, “proactive filing of a motion to dismiss and the arguments they have advanced in support of that motion,” and fervent opposition

¹⁰ As Plaintiffs note, although Attorney General Wasden issued an opinion letter explaining that H.B. 500 was likely unconstitutional at the request of a legislator, Attorney General Wasden is statutorily required to represent the State in all courts, Idaho Code section 67-1401(1), and his Deputy Attorney General vigorously defended the Act in both briefing on the pending motions and during oral argument. As such, there is no evidence to suggest that Attorney General Wasden will not fulfill his statutory duties. In addition, the Proposed Intervenors contend BSU will not adequately represent their interests because BSU has a Gender Equality Center that advances the interests of transgender students. Dkt. 30-1, at 11–13. However, as Plaintiffs highlighted during oral argument, BSU could have realigned itself as a party if it felt it could not support the Act, but instead gave over representation to the State and has accordingly adopted the positions of the State. Dkt. 62, at 28: 10–15. The Proposed Intervenors’ arguments regarding Attorney General Wasden and BSU are not a compelling showing of inadequate representation.

to Plaintiffs’ Motion for a Preliminary Injunction, “suggest precisely the opposite conclusion.” *Animal Legal Defense Fund v. Otter*, 300 F.R.D. 461, 465 (D. Idaho 2014). As even the Proposed Intervenors observe in their proposed opposition to Plaintiffs’ Motion for Preliminary Injunction, the “legal authorities, standards, and arguments” in opposing Plaintiffs’ motion for a preliminary injunction are “well covered” by Defendants. Dkt. 46, at 5.

Likewise, the Proposed Intervenors’ “particular expertise in the subject of the dispute” as cisgender female athletes who have competed against a transgender woman athlete does not amount to a compelling showing of inadequate representation by Defendants. *Prete*, 438 F.3d at 958–959. To the extent they lack personal experience, Defendants can “acquire additional specialized knowledge through discovery (*e.g.*, by calling upon intervenor-defendants to supply evidence) or through the use of experts.” *Id.* at 958. Defendants have also already referred to the experiences of both Madi and MK in opposing Plaintiffs’ Motion for a Preliminary Injunction. Dkt. 41, at 19–20. Thus, the Proposed Intervenors’ personal experience is insufficient to provide the showing necessary to overcome the presumption of adequate representation. *Prete*, 438 F.3d at 959.

However, the Court cannot find Defendants “will undoubtedly make” all of the Proposed’ Intervenors’ arguments. *Arakaki*, 324 F.3d at 1086. Specifically, there are two limiting constructions that Defendants could, and in fact have, advocated to support dismissal of Plaintiffs’ suit and/or assuage constitutional doubts clouding the Act: (1) the Act is not self-executing and requires another individual to invoke the “dispute process” before any transgender athlete will be precluded from playing on a women’s team; and (2)

to verify her sex, a transgender female athlete need only submit a form from her health care provider verifying that she is female. Defendants invoked such limiting constructions in their briefing on the Motion to Dismiss and reaffirmed them during oral argument. *See, e.g.*, Dkt. 40-1, at 3, 6–7; Dkt. 59, at 5–6; Dkt. 62, at 44:13–25, 66:21–25. Thus, that the “the government will offer . . . a limiting construction of [the Act] is not just a theoretical possibility; it has already done so.” *Lockyer*, 450 F.3d at 444.

In contrast to Defendants’ attempt to narrow the Act, the Proposed Intervenors suggest the Act must be read broadly to categorically preclude transgender women from ever playing on female sports teams, regardless of whether they become the target of a dispute or whether they can obtain a sex verification letter from a health care provider. These are far more than differences in litigation strategy between Defendants and the Proposed Intervenors. *City of Los Angeles*, 288 F.3d at 402–403 (“[M]ere differences in strategy . . . are not enough to justify intervention as of right.”). This conflicting construction goes to the heart of interpretation and enforcement of the Act.

The Court therefore concludes that the Proposed Intervenors have “more narrow, parochial interests” than the Defendants. *Lockyer*, 450 F.3d at 445 (finding proposed intervenors overcame the presumption of adequacy of representation where the government suggested a limiting construction of a law in its motion for summary judgment); *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 899 (9th Cir. 2011) (holding proposed intervenors overcame presumption of adequate representation where they sought to secure the broadest possible interpretation of the Forest Service’s Interim Order, while the Forest Service argued that a much narrower

interpretation would suffice to comply with the Interim Order). Through the presentation of direct evidence that Defendants “will take a position that actually compromises (and potentially eviscerates) the protections of [the Act],” the Proposed Intervenors have overcome the presumption that Defendants will act in their interests. *Lockyer*, 450 F.3d at 445.

Liberally construing Rule 24(a), the Court finds that the Proposed Intervenors have met the test for intervention as a matter of right. Alternatively, however, the Court finds permissive intervention is also appropriate.

b. Permissive Intervention

The Court’s discretion to grant or deny permissive intervention is broad. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (citation omitted). The Ninth Circuit has “often stated that permissive intervention requires: (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant’s claim or defense and the main action.” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (citations omitted). “In exercising its discretion,” the Court must also “consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). When a proposed intervenor has otherwise met the requirements, “[t]he court may also consider other factors in the exercise of its discretion, including the nature and extent of the intervenors’ interest and whether the intervenors’ interests are adequately represented by other parties.” *Perry*, 587 F.3d at 955 (quoting *Spangler*, 552 F.2d at 1329).

Plaintiffs do not dispute that the Proposed Intervenors have an independent ground for jurisdiction and share a common question of law and fact with the defense of the main action. Plaintiffs instead argue that permissive intervention should be denied because existing parties adequately represent the Proposed Intervenors' interests, and because intervention would unduly delay or prejudice the adjudication of the rights of the original parties. Dkt. 45, at 16–19. As explained above, the Proposed Intervenors have shown Defendants may not adequately represent their interests because Defendants have advanced a limiting construction of the Act and thus *undoubtedly will not* make all of the arguments Madi and MK will make. *Arakaki*, 324 F.3d at 1086. The Court accordingly rejects Plaintiffs' contention that permissive intervention should be denied because Defendants adequately represent the Proposed Intervenors' interests.

Plaintiffs also argue the Proposed Intervenors' participation will likely delay and prejudice the adjudication of Plaintiffs' claims because Madi and MK waited six weeks after Plaintiffs filed their Complaint to seek intervention. This argument fails because the Ninth Circuit has held an application to intervene is timely where, as here, it is filed less than three months after the complaint. *See, e.g., Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (finding motion to intervene filed four months after initiation of a lawsuit to be timely); *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (deeming motion to intervene timely when it was filed "less than three months after the complaint was filed and less than two weeks after [Defendant] filed its answer to the complaint.").

Plaintiffs next contend they will be prejudiced if they are unable to obtain a ruling from this Court before the fall sports season begins, and that the any disruption of the briefing schedule to accommodate the Motion to Intervene could delay resolution of Plaintiffs' request for emergency relief. This concern is moot because the Motion to Intervene was fully briefed prior to oral argument on July 22, 2020, and the Court is issuing the instant decision on all three pending motions before the fall sports season begins.

Finally, Plaintiffs argue intervention could prejudice the adjudication of their claims because counsel for the Proposed Intervenors have a history of utilizing misgendering tactics that will delay and impair efficient resolution of litigation. For instance, the Motion to Intervene is replete with references to Lindsay using masculine pronouns and refers to other transgender women by their former male names. The Court is concerned by this conduct, as other courts have denounced such misgendering as degrading, mean, and potentially mentally devastating to transgender individuals. *T.B., Jr. ex rel. T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 577 (4th Cir. 2018) (describing student's harassment of transgender female teacher by referring to her with male gender pronouns as "pure meanness."); *Hampton v. Baldwin*, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018) (referencing expert testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating.").

Counsel for the Proposed Intervenors responds that they have used such terms not to be discourteous, but to differentiate between "immutable" categories of sex versus "experiential" categories of gender identity, and that the terms they use simply reflect "necessary accuracy." Dkt. 52, at 8 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686

(1973)). Such “accuracy,” however, is not compromised by simply referring to Lindsay and other transgender females as “transgender women,” or by adopting Lindsay’s preferred gender pronouns.¹¹ *See, e.g., Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019) (consistently referring to transgender female prisoner using her chosen name and female gender pronouns); *Canada v. Hall*, 2019 WL 1294660, at *1 n. 1 (N.D. Ill. March 21, 2019) (“Although immaterial to this ruling, the Court would be derelict if it failed to note the defendants’ careless disrespect for the plaintiff’s transgender identity, as reflected through . . . the consistent use of male pronouns to identify the plaintiff. The Court cautions counsel against maintaining a similar tone in future filings.”); *Lynch v. Lewis*, 2014 WL 1813725, at *2 n. 2 (M.D. Ga. May 7, 2014) (“The Court and Defendants will use feminine pronouns to refer to the Plaintiff in filings with the Court. Such use is not to be taken as a factual or legal finding. The Court will grant Plaintiff’s request as a matter of courtesy, and because it is the Court’s practice to refer to litigants in the manner they prefer to be addressed when possible.”).¹²

Ultimately, however, that the Proposed Intervenors’ counsel used gratuitous language in their briefs is not a reason to deny Madi and MK the opportunity to intervene to support a law of which they are the intended beneficiaries. Moreover, during oral

¹¹ The Court does not take issue with identifying Lindsay (or any other transgender women) as a transgender woman or transgender female, a male-to-female transgender athlete or individual, or as a person whose sex assigned at birth (male) differs from her gender identity (female). *Edmo*, 935 F.3d at 772. Each of these descriptions makes counsel’s point without doing so in an inflammatory and potentially harmful manner.

¹² Personal preferences or beliefs and organizational perceptions or positions notwithstanding, the Court expects courtesy between all parties in this litigation. In an ever contentious social and political world, the Courts will remain a haven for fairness, civility, and respect—even in disagreement.

argument, counsel for the Proposed Intervenors was respectful in advocating for Madi and MK without needlessly attempting to shame Lindsay or other transgender women. That counsel did so illustrates there is no need to misgender Lindsay or others in order to “speak coherently about the goals, justifications, and validity of the Fairness in Women’s Sports Act.” Dkt. 52, at 8. Counsel should continue this practice in future filings and arguments before the Court.

In sum, the Court will allow Madi and MK to intervene as of right, and, alternatively, finds permissive intervention is also appropriate. The Court will accordingly collectively refer to Madi and MK hereinafter as the “Intervenors.”

B. Motion to Dismiss (Dkt. 40)

Defendants filed a Motion to Dismiss Plaintiffs’ action, contending Plaintiffs lack standing, that their claims are not ripe for review, and that their facial challenges fail as a matter of law.

1. Legal Standard

A motion to dismiss based on a lack of Article III standing arises under Federal Rule of Civil Procedure 12(b)(1). *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362–63 (1st Cir. 2001) (applying Rule 12(b)(1) to a motion to dismiss on grounds of ripeness or mootness). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may challenge jurisdiction either on the face of the pleadings or by presenting extrinsic evidence for the court’s consideration. *Safer Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (holding a jurisdictional attack may be facial or factual). “In a facial attack, the challenger asserts that the allegations

contained in the complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Id.* Where, as here, an attack is facial, the court confines its inquiry to allegations in the complaint. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

When ruling on a facial jurisdictional attack, courts must “accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.” *De La Cruz v. Tormey*, 582 F.2d 45, 62 (9th Cir. 1978) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). However, the plaintiff bears the burden of alleging facts that are legally sufficient to invoke the court’s jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

Rule 12(b)(6) permits a court to dismiss a case if the plaintiff has “fail[ed] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal may be based on either a ‘lack of a cognizable legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (citation omitted). In deciding whether to grant a motion to dismiss, the court must accept as true all well-pled factual allegations made in the pleading under attack. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court is not, however, “required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). However, a “complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in

support of the claim that would entitle the plaintiff to relief.” *Id.* (citing *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999)).

Dismissal without leave to amend is inappropriate unless it is beyond doubt that the complaint could not be saved by amendment. *See Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009) (citations omitted). The Ninth Circuit has held that “in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Cook, Perkiss and Liehe, Inc. v. N. California Collection Serv., Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

2. *Analysis*

a. Standing

The “irreducible constitutional minimum” of Article III standing consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant and not the result of the independent action of some third party not before the court; and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To survive a Rule 12(b)(1) motion at the pleading stage (a facial challenge to subject-matter jurisdiction), the complaint must clearly allege facts demonstrating each element of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Defendants suggest Plaintiffs lack standing because they have failed to allege that they have suffered an injury in fact.¹³ Dkt. 40-1, at 6. “To establish injury in fact, a plaintiff must show that he or she has suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). “A plaintiff threatened with future injury has standing to sue if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk that the harm will occur.’” *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). A plaintiff cannot establish standing by alleging a threat of future harm based on a chain of speculative contingencies. *Nelsen v. King Cty.*, 895 F.2d 1248, 1252 (9th Cir. 1990).

Defendants argue Plaintiffs have not alleged an injury in fact because all alleged harms are conjectural, hypothetical, or based on a chain of speculative contingencies. Specifically, Defendants suggest that Lindsay’s alleged harm of being subject to exclusion from participation on a women’s sport teams, and Jane’s alleged harm of being required to verify her sex, cannot occur unless each Plaintiff first makes a women’s athletic team, and a third party then disputes either Plaintiffs’ sex according to regulations that the State Board of Education has not yet promulgated.¹⁴ Dkt. 40-1, at 6. This argument fails with respect to both Plaintiffs.

¹³ Defendants do not challenge the causation and redressability elements of standing.

¹⁴ Defendants also maintain that “because HB 500 has not yet come into effect, all alleged harm is future harm—and Plaintiffs have not shown that the alleged injuries are certainly impending, or that there is

i. Lindsay

The Act categorically bars Lindsay from participating on BSU's women's cross-country and track teams. Idaho Code § 33-6203(2) ("Athletic teams or sports designated for females, women, or girls *shall* not be open to students of the male sex.") (emphasis added). Although Defendants contend Lindsay will not be harmed unless she first makes the BSU team and someone then seeks to exclude her through a sex verification challenge, the Act prevents BSU from allowing Lindsay to try out for the women's team at all.

The Act also subjects BSU to a risk of civil suit by any student "who is deprived of an athletic opportunity or suffers any direct or indirect harm," if BSU allows a transgender woman to participate on its athletic teams. Idaho Code § 33-6205(1). A student who prevails on a claim brought pursuant to this section "shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief." *Id.* at 6205(4). Defendants' claim that the Act's categorical bar against Lindsay's participation on BSU's women's teams is not "self-executing" because it "has no independent enforcement mechanism," is meritless in light of the risk of significant civil liability the Act imposes on any school that allows a transgender woman to participate in women's sports. Dkt. 59, at 5.

The harm Lindsay alleges—the inability to participate on women's teams—arose when the Act went into effect on July 1, 2020. That Lindsay has not yet tried out for BSU athletics or been subject to a dispute process is irrelevant because the Act bars her from

substantial risk of harm occurring." Dkt. 40-1, at 6. Since the Act went into effect July 1, 2020, this argument is moot.

trying out in the first place. The Supreme Court has long held that the “injury in fact” required for standing in equal protection cases is denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing”); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (finding political officers had standing to challenge provision of Texas Constitution requiring automatic resignation for some officeholders upon their announcement of candidacy for another office because injury was the “obstacle to [their] candidacy” for a new office, not the fact that they would have been elected to a new office but for the law’s prohibition); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 281 n. 14 (1978) (holding twice-rejected white male applicant had standing to challenge medical school’s admissions program which reserved 16 of 100 places in the entering class for minority applicants, because the requisite “injury” was plaintiff’s inability to *compete* for all 100 places in the class, simply because of his race, not that he would have been *admitted* in the absence of the special program). Lindsay has adequately alleged an injury because she cannot compete for a position on BSU’s women’s cross-country and track teams in the first place, regardless of whether or not she would ultimately make such

teams.¹⁵

In addition, even if BSU risked civil liability and allowed Lindsay to try out for, or join, a women's team, it is not speculative to suggest Lindsay's sex would be disputed. Lindsay is a nineteen-year-old transgender woman who has bravely become the public face of this litigation, and, in doing so, has captured the attention of local and national news. See, e.g., James Dawson, *Idaho Transgender Athlete Law To Be Challenged in Federal Court*, <https://www.boisestatepublicradio.org/post/idaho-transgender-athlete-law-be-challenged-federal-court#stream/0> (Apr. 15, 2020); Julie Kliegman, SPORTS ILLUSTRATED, *Idaho Banned Trans Athletes from Women's Sports. She's Fighting Back*, <https://www.si.com/sports-illustrated/2020/06/30/idaho-transgender-ban-fighting-back> (June 30, 2020); Roman Stubbs, THE WASHINGTON POST, *As transgender rights debate*

¹⁵ Citing *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1185 (9th Cir. 2012), Defendants argue that even where the government discriminates on the basis of a protected category, only those who are "personally denied equal treatment have a cognizable injury under Article III." Dkt. 59, at 3. In *Braunstein*, the Ninth Circuit considered a white male engineer's lawsuit alleging the Arizona Department of Transportation violated his right to equal protection by giving general contractors a financial incentive to hire minority-owned subcontractors. *Braunstein*, 683 F.3d at 1184. Braunstein alleged that these preferences prevented him, as a non-minority business owner, from competing for subcontracting work on an equal basis. *Id.* at 1185. However, Braunstein did not submit a quote or attempt to secure subcontract work from any of the prime contractors who bid on the government contract. *Id.* at 1185. The Ninth Circuit held that because Braunstein's surviving claim was for damages, rather than for declaratory and injunctive relief, Braunstein had to show more than that he was "able and ready" to seek subcontracting work. *Id.* at 1186. The Court determined Braunstein had not established an injury for purposes of his claim for damages because Braunstein had "done essentially nothing to demonstrate that he [was] in a position to compete equally with the other contractors." *Id.* By contrast, Lindsay seeks declaratory and injunctive relief, and has demonstrated she is "able and ready" to join the BSU cross-country and track teams. *Id.* at 1186 (citing *Gratz v. Bollinger*, 539 U.S. 244, 261–62 (2003) (holding plaintiff had standing to challenge university's race-conscious transfer admissions policy, even though he never applied as a transfer student, because he demonstrated that he was "able and ready to do so.") Lindsay has adequately alleged that she is ready and able to join BSU's women's cross-country and women's track teams and also that she is in a position to compete with other students who try out for BSU's women's track and cross-country teams. Specifically, Lindsay alleges she has been training hard to qualify for such teams, that she is a life-long runner who competed on track and cross-country teams in high school, and that she will try out for the cross-country team in fall 2020 and track team in spring 2020 if BSU allows her to do so. Dkt. 1, at ¶¶ 6, 25, 33. Such allegations are sufficient to establish standing for Lindsay's claims. *Braunstein*, 683 F.3d at 1185–86.

spills into sports, one runner finds herself at the center of a pivotal case

<https://www.washingtonpost.com/sports/2020/07/27/idaho-transgender-sports-lawsuit-hecox-v-little-hb-500/> (July 27, 2020).¹⁶

In addition to such headlines, prominent athletes, including Billie Jean King and Megan Rapinoe, have, due to the Act, called for the NCAA to move men’s basketball tournament games scheduled to be played in Idaho next March to another state. *Id.* On the other side of the coin, advocates in favor of the Act, including 300 high-profile female athletes, signed a letter asking the NCAA not to boycott Idaho over passing the Act. Ellie Reynolds, THE FEDERALIST, *More Than 300 Female Athletes, Olympians Urge NCAA to Protect Women’s Sports*, <https://thefederalist.com/2020/07/30/more-than-300-female-athletes-olympians-urge-ncaa-to-protect-womens-sports/> (July 30, 2020). In light of the extensive attention this case has already received, and widespread knowledge that Lindsay is transgender, it is untenable to suggest she would *not* be subject to a sex dispute if BSU allowed her the opportunity to try out for, or join, a women’s team.¹⁷

Defendants also argue Lindsay lacks standing because she has not alleged facts to

¹⁶ The Court takes judicial notice of such articles because they are matters in the public realm. “When a court takes judicial notice of publications like websites and newspaper article, the court merely notices what was in the public realm at the time, not whether the contents of those articles were in fact true.” *Prime Healthcare Services, Inc. v. Humana Ins. Co.*, 230 F. Supp. 3d 1194, 1201 (citing *Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 118 (9th Cir. 1999)). The Court references such articles solely to illustrate that this case has received local and national attention, and not for the truth of the contents of the articles. *Id.*

¹⁷ As mentioned, BSU cannot allow Lindsay this opportunity under section 33-6203(2) of the Act. Given BSU’s awareness that Lindsay is a transgender woman, the Act directs that BSU “shall not” permit her to join the women’s team, regardless of whether a third-party challenges Lindsay’s sex. Idaho Code § 33-6203(2).

show she could compete under the current NCAA rules, such as dates showing she has undergone hormone treatment for one calendar year prior to participation on women's sports teams. However, Lindsay alleged in the Complaint that she is being treated with both testosterone suppression and estrogen, and that she is eligible to compete in women's sports in fall 2020 under existing NCAA rules for inclusion of transgender athletes. Dkt. 1, at ¶¶ 29, 32. Because the Court must accept such allegations as true and construe them in Lindsay's favor, Lindsay has adequately alleged she is eligible to participate on women's teams under the NCAA's regulations despite the Complaint's omission of the exact dates of her treatment. *De la Cruz*, 582 F.2d at 62.

Nonetheless, Defendants claim Lindsay has not adequately alleged she is otherwise eligible to play on women's teams because the U.S. Department of Education Office of Civil Rights ("OCR") recently issued a Letter of Impending Enforcement Action ("OCR Letter") opining that allowing transgender high school athletes in Connecticut to participate in women's sports violated the rights of female athletes under Title IX.¹⁸ Dkt. 40-1, at 7 n. 1, 10 n. 2. However, the OCR Letter itself states that "it is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such." Dkt. 41, at 68. Because it is expressly not the OCR's formal policy and may not be cited or construed as such, the

¹⁸ The OCR Letter was filed by the OCR in Connecticut court cases involving claims by three high school student-athletes and their parents due to the Connecticut Interscholastic Athletic Conference's policy of permitting transgender women to compete on women's teams. Dkt. 41, at 25. Although the parties do not raise the issue, the Court takes judicial notice of the OCR Letter, filed by Defendants in support of their Opposition to the Motion for Preliminary Injunction, and cited by Defendants in their Motion to Dismiss, because the Court may take judicial notice of "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

OCR Letter does not render Lindsay ineligible from participating on women's teams. In addition, the OCR Letter is also of questionable validity given the Supreme Court's recent holding in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (clarifying that the prohibition on discrimination because of sex in Title VII includes discrimination based on an individual's transgender status); *see also Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012) (interpreting Title IX provisions in accordance with Title VII). The Court accordingly rejects Defendants' claim that Lindsay may not otherwise be eligible to play women's sports due to the OCR Letter.

Defendants also imply Lindsay cannot establish an injury in fact because the State Board of Education has not yet promulgated regulations governing third-party sex verification disputes. Dkt. 40-1, at 3, 6. Regardless of how they are written, any future regulations cannot alter the Act's categorical bar against transgender women participating on women's teams. Under the Act, women's teams "shall not be open to students of the male sex." *Id.* at § 33-6203(2). Future regulations could not alter this mandate without eliminating a key component of the Act by overriding specific language of the statute.

In essence, Defendants' argument regarding Lindsay's standing is essentially a claim that Lindsay has not suffered any injury because there is no guarantee the Act will be enforced. Defendants have not identified any "principal of standing," or "any case that stands for the proposition that [the Court] should deny standing on the assumption that the regulated entity under the statute will simply violate the law and not do what the law says." Dkt. 62, at 52:5-9. In fact, the Supreme Court rejected a similar argument by the State of Georgia in *Turner v. Fouche*, 396 U.S. 346, 361 (1970). In *Turner*, the Supreme Court held

a non-property owner had standing to raise an, equal protection claim against a state law requiring members of the board of education to be property owners. The Court addressed Georgia's contention that the non-property owner lacked standing to challenge the law in the absence of evidence that the law had been enforced, noting: "Georgia also argues the question is not properly before us because the record is devoid of evidence that [the property ownership requirement] has operated to exclude any [non-property owners] from the Taliaferro County board of education." *Id.* at 361 n. 23. The *Turner* Court neatly rejected this contention, stating, "Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law." *Id.* Moreover, given the civil liability and significant damages any regulated entity in Idaho now faces if they allow a transgender woman to participate on woman's sport teams, the Act's enforcement is essentially guaranteed. Idaho Code § 33-6205.

In addition to the injury of being barred from playing women's sports, Lindsay also claims an injury of being forced to turn over private medical information to the government if her sex was challenged. Dkt. 1, at ¶¶ 157, 168. Defendants argue this injury is "not based in [the Act's] text, which requires a 'health examination and consent form or other statement signed by the student's personal health provider' when there is a dispute, and does not require that the health care provider expound further or disclose any underlying health information." Dkt. 40-1, at 8. However, if BSU violates the Act by allowing Lindsay to participate in women's sports and another student challenges Lindsay's sex, the Act also provides a health care provider can verify Lindsay's sex relying *only* on one or more of the following: her reproductive anatomy, genetic makeup, or normal endogenously produced

testosterone levels. Idaho Code § 33-6203(3). Evaluating any of these criteria would require invasive examination and/or testing and would also necessarily reveal extremely personal health information such as Lindsay’s precise genetic makeup. Moreover, it would be impossible for Lindsay to demonstrate a “biological sex” permitting participation on a women’s team based on any of these three criteria. Dkt. 55, at 7–8.

Defendants counter that Plaintiffs’ concerns are overblown and that the verification process is not as invasive as Plaintiffs make it out to be. They suggest a health care provider may verify a student’s “biological sex” based on something other than the three expressly listed criteria due to the “health examination and consent form or other statement provision” language outlined in the Act. Dkt. 40-1, at 3 (claiming that the Act does not require the health care provider “to use the three specified factors in providing an ‘other statement’ verifying ‘the students biological sex.’”) During oral argument, defense counsel confirmed that Lindsay can play on female sport’s teams if her health care provider simply signs an “other statement” stating that Lindsay is female. Dkt. 62, at 66:21-25; 67:4–9.

It is “a cardinal principle of statutory construction” that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citations omitted); *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute.” (internal quotation marks omitted)); *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (it is a “longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous.”)

If the Court were to adopt Defendants' aforementioned construction of the statute, the entire legislative findings and purpose section of the Act would be rendered meaningless. Idaho Code § 33-6202 (explaining inherent physiological differences put males at an advantage in sports, requiring sex-specific women's teams to promote sex equality). So too would the Act's mandate that athletic teams or sports designated for females, women, or girls "shall not be open to students of the male sex." *Id.* at § 33-6203(2). Defendants' contention that Lindsay would not be subject to the invasive and potentially cost-prohibitive medical examination codified in Idaho Code section 33-6203(3) because her health care provider could simply verify that she is female is impossible to reconcile with the rest of the Act's provisions.¹⁹ As such, Lindsay has also alleged a non-speculative risk of suffering an invasion of privacy if BSU violated the law and allowed her to try out for the women's cross-country or track team.

ii. Jane

Jane has also alleged an injury in fact because, by virtue of the Act's passage, she is now subject to disparate, and less favorable, treatment based on sex. As a female student athlete, Jane risks being subject to the "dispute process," a potentially invasive and expensive medical exam, loss of privacy, and the embarrassment of having her sex challenged, while male student athletes who play on male teams do not face such risks. The Supreme Court has long recognized that unequal treatment because of gender like that

¹⁹ During oral argument, Plaintiffs' counsel stated that they would be happy to consider entering into a consent decree if Defendants were willing to agree that this interpretation of the statute was authoritative and binding in Idaho. Dkt. 62, at 70:16–21. Defendants did not respond to this suggestion, and the parties have not notified the Court of any subsequent talks regarding a potential consent decree.

codified by the Act “is an injury in fact” sufficient to convey standing. *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (finding plaintiff claimed a judicially cognizable injury where a statute subjected him to unequal treatment solely because of his gender); *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015) (“[Plaintiff’s] allegation—that Guam law provides a benefit to a class of persons that it denies him—is ‘a type of personal injury [the Supreme Court] has long recognized as judicially cognizable.’”) (quoting *Heckler*, 465 U.S. at 738).

The male appellee in *Heckler* challenged a provision of the Social Security Act that required certain male workers (but not female workers) to make a showing of dependency as a condition for receiving full spousal benefits. *Heckler*, 465 U.S. at 731–35. However, the statute also “prevent[ed] a court from redressing this inequality by increasing the benefits payable to” male workers. *Id.* at 739. Thus, the lawsuit couldn’t have resulted in any tangible benefit to plaintiff. The Supreme Court nevertheless held that appellee’s claimed injury of being subject to unequal treatment solely because of his gender was “a type of personal injury we have long recognized as judicially cognizable.” *Id.* at 738. The *Heckler* Court explained plaintiff had standing to challenge the provision because he sought to vindicate the “right to equal treatment,” which isn’t necessarily “coextensive with any substantive rights to the benefits denied the party discriminated against.” *Id.* at 739. In *Davis*, the Ninth Circuit read *Heckler* “as holding that equal treatment under law is a judicially cognizable inquiry that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it.” *Davis*, 785 F.3d at 1315.

As a cisgender girl who plays on the Boise High soccer team and who will run track on the girl’s team in the spring, Jane is subject to worse and differential treatment than are

similarly situated male students who play for boy’s teams in Idaho.²⁰ Jane has suffered an injury because she is subject to disparate rules for participation on girls’ teams, while boys can play on boys’ teams without such rules. *Id.* (holding Guam’s alleged denial of equal treatment on the basis of race through voter registration law was a judicially cognizable injury); *see also Melendres v. Arpaio*, 695 F.3d 990, 998 (9th Cir. 2012) (holding that Latino plaintiffs had standing to challenge policy targeting Latinos in connection with traffic stops based on their “[e]xposure to this policy while going about [their] daily li[ves],” even though “the likelihood of a future stop of a particular individual plaintiff may not be ‘high’”) (citation omitted).²¹ That Jane has not had her sex challenged does not change the fact that she is subject to different, and less favorable, rules for participation on girls’ teams that similarly situated boys are not.

In addition to being subject to disparate treatment on the basis of her sex, Jane reasonably fears that her sex will be disputed and that she will suffer the further injury of having to undergo the sex verification process. Dkt. 1, ¶¶ 46–50. In *Krottner v. Starbucks*

²⁰ The Court uses the specific terms “girl” and “girl’s teams” for Jane, and “transgender woman” and “woman’s teams” for Lindsay, due to their respective ages and year in school. The terms are generally interchangeable, however, since the Act applies to nearly all girls and women student athletes in Idaho. Idaho Code § 33-6203(1).

²¹ Defendants suggest *Melendres* is inapposite because each of the plaintiffs in *Melendres* had been subjected to targeted traffic stops, and because plaintiffs presented evidence that the defendants had an ongoing policy of targeting Latinos. Dkt. 59, at 2–3 n. 1. Defendants argue this case is distinguishable because no one has challenged either Plaintiff’s sex, and because Defendants have no policy or practice to mount such challenges in the future. *Id.* This argument ignores that regulated entities, such as BSU and Boise High, are statutorily required to ensure that transgender women or girls do not play on female sports’ teams, are also responsible for resolving sex disputes, and risk significant civil liability if they fail to comply with the statute. Idaho Code §§ 33-6203(3), 6205. The requirements the statute itself places on regulated entities is evidence that the policy will be enforced.

Corp., 628 F.3d 1139 (9th Cir. 2010), the Ninth Circuit addressed the Article III standing of victims of data theft where a thief stole a laptop containing “the unencrypted names, addresses, and social security numbers of approximately 97,000 Starbucks employees.” *Id.* at 1140. Some employees sued, and the only harm that most alleged was an “increased risk of future identity theft.” *Id.* at 1142. There was no evidence that the thief had actually used plaintiffs’ specific identities. The Ninth Circuit determined this was sufficient for Article III standing, holding that the plaintiffs had “alleged a credible threat of real and immediate harm” because the laptop and their personal information had been stolen. *Id.* at 1143.

Jane also alleges a credible threat of being forced to undergo a sex verification process. Jane has identified why she is more likely than other female athletes to be subjected to the dispute process. Specifically, Jane “worries that one of her competitors may decide to ‘dispute’ her sex” because she “does not commonly wear skirts or dresses,” “most of her closest friends are boys,” she has “an athletic build,” and because “people sometimes think of her as masculine.” Dkt. 1, at ¶¶ 46–47. Further, even in the absence of Jane’s specific characteristics, her general fear of being subjected to the dispute is credible because the Act currently provides that essentially anyone can challenge another female athlete’s sex and protects any challenger from adverse action regardless of whether the dispute is brought in good faith or simply to bully or harass. Although, as Defendants note, the State Board of Education may promulgate regulations that narrow the Act’s dispute process, Jane risks being subject to the currently unlimited process as soon as she tries out for Boise High’s soccer team on or around August 17, 2020.

Under the Act's dispute process, Jane may have to verify that she is female in order to play girls' sports, and, given the clear meaning of the statute, such verification must be based on her reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. Idaho Code § 33-6203(3). As discussed above, Defendants' claim that Jane can simply provide a health examination and consent form from her sports physical, or "other statement" from her personal health care provider, appears impossible to reconcile with the clear language of the Act. Dkt. 40-1, at 7. Jane's risk of being forced to undergo an invasion of privacy simply to play sports represents an "injury in fact" sufficient to confer standing. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But one does not have to await the consummation of threatened injury to obtain preventive relief.") (internal quotation marks, alterations, and citations omitted).

Because it finds both Lindsay and Jane have alleged an injury in fact, the Court turns to Defendants' ripeness argument.

b. Ripeness²²

Defendants also seek dismissal because this case is purportedly unripe. Ripeness is a question of timing. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). It is a doctrine "designed to prevent the courts, through avoidance of

²² Standing and ripeness are closely related. *Colwell v. Dep't of Health and Human Services*, 558 F.3d 1112, 1123 (9th Cir. 2009). "But whereas standing is primarily concerned with *who* is a proper party to litigate a particular matter, ripeness addresses *when* that litigation may occur." (emphasis in original) (internal quotation marks and citations omitted).

premature adjudication, from entangling themselves in abstract disagreements.” *Id.* (internal quotation marks and citation omitted).

The “ripeness inquiry contains both a constitutional and prudential component.” *Portman v. Cty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). As Defendants acknowledge, the constitutional component of the ripeness inquiry is generally coextensive with the injury element of standing analysis. Dkt. 40-1, at 9; *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n. 2 (9th Cir. 2003) (noting, “the constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry”); *see also Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978) (finding that an “injury in fact” satisfies the constitutional ripeness inquiry). Defendants’ constitutional ripeness arguments fail for the same reasons that their standing arguments fail.

The prudential component of ripeness “focuses on whether there is an adequate record upon which to base effective review.” *Portman*, 995 F.2d at 903. In evaluating prudential ripeness, the Court must consider “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Thomas*, 220 F.3d at 1141. Ultimately, prudential considerations of ripeness are discretionary. *Id.* at 1142.

i. Fitness for Judicial Review

The Supreme Court and Ninth Circuit have recognized the difficulty of deciding constitutional questions without the necessary factual context. *See, e.g., W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 313 (1967); *Thomas*, 220 F.3d at 1141. In *Thomas*, several landlords challenged an Alaska statute that banned discrimination on the basis of

marital status, arguing the statute violated their First Amendment rights. 220 F.3d at 1137. For instance, the landlords claimed, *inter alia*, that the City's prohibition on any advertising referencing a marital status preference violated their right to free speech. The Ninth Circuit found the free speech claim was not ripe because no "concrete factual scenario" demonstrated how the law, as applied, infringed the landlords' constitutional rights. *Id.* at 1141. Specifically, the landlords had never advertised or published a reference to marital status preference in the past in connection with their rental real estate activities, nor had expressed any intent of doing so in the future. *Id.* at 1140 n. 5. On this record, the Ninth Circuit held the alleged free speech violation did not rise to the level of a justiciable controversy. *Id.*

Here, unlike in *Thomas*, Plaintiffs' claims are concrete and Plaintiffs clearly delineate how the Act harms them in their specific circumstances. Specifically, Jane is a life-long student athlete who will try out for Boise High School's girls' soccer team in August 2020. Because of various identified traits that have led others to classify her as masculine, Jane reasonably fears she may be subject to a sex dispute challenge. That a specific individual has not threatened such challenge is immaterial because the Act has never been in effect during a school sport's season and the sex dispute challenge has thus never before been available, and, by virtue of being a female student athlete, Jane risks being subject to a sex dispute challenge as soon as she tries out for Boise High's girls' soccer team. Lindsay is also a life-long athlete who has alleged a desire and intent to try out for BSU's women's cross-country team this fall. If BSU permitted her to try out, Lindsay would meet the rules under the NCAA, and the rules in Idaho prior to the Act's

passage, to participate by the time BSU will have its first NCAA meet. However, Lindsay is now categorically barred from trying out for the cross-country team under the Act.

Defendants have not addressed such as-applied challenges and have not identified any factual questions that preclude consideration of such challenges at this juncture.²³

Further, legal questions that require little factual development are more likely to be ripe. *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 581 (1985). The issues Lindsay and Jane raise are primarily legal: whether the Act violates the Constitution and Title IX in light of its categorical exclusion of transgender women and girls from school sports and its sex-verification scheme for all female student athletes. As such, the Act's legality involves a "pure question of law" and Plaintiffs claims are fit for judicial review now. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1435 (9th Cir. 1996) (finding claims were ripe and issue was purely legal where organization which arranged trips to Cuba challenged regulation restraining right to travel to Cuba, even though organization had not applied for, and had not been denied, the specific license required under regulation).

ii. Hardship to the Parties should the Court Withhold Consideration

When a plaintiff challenges a statute or regulation, hardship is more likely if the

²³ Although Defendants again highlight that the Department of Education has not yet established the rules and regulations applicable to the sex verification process, Defendants do not articulate how the forthcoming rules and regulations could possibly change the Act's core prohibitions and requirements; could allow transgender women athletes to participate on women's teams; could exempt a girl or woman whose sex is disputed from the verification process; or could add to the narrow list of criteria that can be used to verify a girl's or woman's biological sex. Defendants are simply mistaken that impending regulations could possibly alleviate Plaintiffs' concerns, or that such rules must be established before Lindsay can be excluded from women's sports and before Jane can be subjected to a sex verification challenge.

statute has a direct effect on the plaintiff's daily life. *Texas v. United States*, 523 U.S.296, 301 (1998). Hardship is less likely if the statute's effect is abstract. *Id.* at 302 (rejecting argument that ongoing "threat to federalism" could constitute hardship).

Here, the Court is satisfied that the Plaintiffs stand to suffer a hardship should the Court withhold its decision. If the Court declines jurisdiction over this dispute, Lindsay will be categorically barred from participating on BSU's women's teams this fall and will also lose at least a season of NCAA eligibility, which she can never get back. Dkt. 1, at ¶ 34. Similarly, as soon as she tries out for fall soccer, Jane is subject to disparate rules and risks facing a sex verification challenge. If the Court withholds its decision, both Plaintiffs risk being forced to endure a humiliating dispute process and/or invasive medical examination simply to play sports.²⁴ Given the reasonable threat that the Act will be enforced within days of this decision, as well as the hardship such enforcement will impose on Lindsay and Jane, the Court exercises its discretion to accept jurisdiction over this dispute.

c. Facial Challenge²⁵

²⁴ Lindsay will not have even this choice unless BSU violates the Act, exposing itself to civil suit, and allows her to join the women's team.

²⁵ "Facial and as-applied challenges do not enjoy a neat demarcation, but conventional wisdom defines facial challenges as 'ones seeking to have a statute declared unconstitutional in all possible applications,' while as-applied challenges are 'treated as the residual, although ostensibly preferred and larger, category.'" *Standing--Facial Versus As Applied Challenges--City of Los Angeles v. Patel*, 129 HARV. L. REV. 241, 246 (2015) ("*Facial Versus As Applied Challenges*") (quoting Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 923 (2011)). However, as many scholars note, the distinction, if any, between a facial and an as-applied challenge is difficult to explain because there is a disconnect between what the Supreme Court has outlined and what happens in actual practice. *Facial Versus As Applied Challenges*, 129 HARV. L. REV. at 247; see also Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 882 (2005).

Finally, Defendants argue Plaintiffs’ facial challenges fail as a matter of law because the Act’s provisions can be constitutionally applied. Facial challenges are “disfavored” because they: (1) “raise the risk of premature interpretation of statutes on factually barebone records;” (2) run contrary “to the fundamental principle of judicial restraint”; and (3) “threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) (internal quotation marks and citations omitted). As such, the Supreme Court has held, a “facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances* exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). As previously discussed, the Ninth Circuit has held that an Arizona policy of excluding boys from playing on girls’ sports teams was constitutionally permissible. *Clark*, 659 F.2d at 1131. Thus, Defendants argue the Act can clearly be constitutionally applied to cisgender boys, and Plaintiffs’ facial challenges fail.

Plaintiffs counter that the *Salerno* language does not represent the Supreme Court’s standard for adjudicating facial challenges. Dkt. 55, at 17 (citing *City of Chicago v. Morales*, 527 U.S. 41, 51–52, 55 n. 22 (1999) (plurality) (finding an ordinance was facially invalid even though it also had constitutional applications and observing that, “[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself.”). As Plaintiffs point out, *Salerno*’s “no set of circumstances” test

was called into question by the Supreme Court in *Morales* and has been the subject of considerable debate. *Morales*, 527 U.S. at 55 n. 22; *see also Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (stating that the “dicta in *Salerno* does not accurately characterize the standard for deciding facial challenges[.]”); *Washington State Grange*, 552 U.S. at 449 (noting that some Members of the Supreme Court have criticized the *Salerno* formulation); *Almerico v. Denney*, 378 F. Supp. 3d 920, 924–926 (D. Idaho 2019) (outlining debate regarding viability of *Salerno*’s “no set of circumstances” test); *Does 1-134 v. Wasden*, 2018 WL 2275220, at *4 (D. Idaho May 17, 2018) (noting the ongoing debate regarding *Salerno* and “what types of constitutional claims would warrant a facial challenge, when a facial challenge becomes ripe, and the level of scrutiny that should be applied to the challenged statute”).

Notwithstanding such controversy, the Ninth Circuit has consistently held that *Salerno* is the appropriate test for most facial challenges.²⁶ *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (explaining that the Ninth Circuit will not reject *Salerno* in contexts other than the First Amendment or abortion “until the majority of the Supreme Court clearly directs us to do so.”); *Almerico*, 378 F. Supp. 3d at 925 (“Time and again, plaintiffs have attempted to escape the effect of the *Salerno* standard, only to see their path foreclosed by the Ninth Circuit.”). The Supreme Court also continues to apply *Salerno* to most facial challenges, albeit with some limited exceptions.

²⁶ Exceptions to *Salerno*’s “no set of circumstances” test have been developed but are not applicable here. For instance, *Salerno* does not apply to certain facial challenges to statutes under the First Amendment. *Planned Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022, 1026 (9th Cir. 1999). The Supreme Court also held *Salerno*’s “no set of circumstances” test does not apply to “undue burden” challenges to statutes regulating abortion in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

See, e.g., Washington State Grange, 552 U.S. at 449 (holding a plaintiff can succeed on a facial challenge only by establishing that no set of circumstances exists under which the law could be valid).

However, Plaintiffs suggest an exception to the *Salerno* test, recently applied by the Supreme Court in *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015), is applicable. In *Patel*, the Supreme Court cited *Salerno* with approval, but also explained that when assessing whether a statute meets the “no set of circumstances” standard, the Supreme Court “has considered only applications of the statute in which it actually authorizes or prohibits conduct.” *Id.* In addressing a facial challenge to a statute authorizing warrantless searches, the *Patel* Court held the “proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.” *Id.* (quoting *Casey*, 505 U.S. at 894). Plaintiffs argue a facial challenge is appropriate here because transgender and cisgender girls and women, are those for “whom the law is a restriction,” while the Act is “irrelevant” to cisgender boys. Dkt. 55, at 18 (quoting *Patel*, 576 U.S. at 418).

While the Court recognizes *Patel* implied that the “method for defining the relevant population” test may apply to all facial challenges, *Patel* unfortunately did not explain when such test is applicable, whether it is appropriate in contexts other than abortion or the Fourth Amendment, or how to distinguish those cases where the test is appropriately used for facial adjudication from others where it is not. Nothing in the *Patel* opinion “even explains why *Casey*’s method of defining the relevant population to which a statute applies should be transplanted to adjudicate Fourth Amendment unreasonableness claims,

especially when *Casey* was confined to the abortion context before *Patel*.” *Facial Versus As Applied Challenges*, 129 HARV. L. REV. at 250. Plaintiffs do not cite, and the Court has not located, any subsequent Ninth Circuit or Supreme Court case where *Patel*’s method for defining the relevant population has been used outside the abortion or Fourth Amendment context. Absent such guidance, the Court declines to extend *Patel* to create a new exception to *Salerno*’s “no set of circumstances test” here.

Plaintiffs also suggest that a motion to dismiss is not the proper vehicle for Defendants’ opposition to their facial challenge, as the distinction between facial and as-applied challenges “goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010). However, *Citizens United* involved a facial challenge to a federal statute which purportedly violated plaintiffs’ First Amendment rights. As noted *supra*, note 26, *Salerno* does not apply to facial challenges under the First Amendment. *Lawall*, 180 F.3d at 1026. As such, *Citizens United* appears inapplicable to cases where, as here, Plaintiffs facial challenges do not involve the First Amendment.

Further, the District of Idaho has frequently dismissed facial challenges at the Motion to Dismiss stage under *Salerno*, including facial challenges brought under the Fourteenth Amendment. *See, e.g., Almerico*, 378 F. Supp. 3d at 926 (dismissing facial due process and equal protection challenge to Idaho statute requiring any healthcare directive executed by women in Idaho to contain provision rendering directive without force during pregnancy); *Williams v. McKay*, 2020 WL 1105087, at *5 (D. Idaho March 6, 2020) (dismissing prisoner’s facial First Amendment challenge to prison’s grievance policy);

Wasden, 2018 WL 2275220 at *18 (dismissing all facial constitutional challenges to Idaho’s Sexual Offender Registration and Community Right-to-Know Act).

In sum, the Court is not convinced an exception to *Salerno* applies to Plaintiffs’ facial Fourteenth Amendment challenges and will dismiss such claims. The Court will not dismiss Plaintiffs’ as-applied Fourteenth Amendment challenges to the Act.²⁷

C. Motion for Preliminary Injunction (Dkt. 22)

1. Legal Standard

Injunctive relief “is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurack v. Armstrong*, 520 U.S. 968, 972 (1997)). A party seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) likely irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities weighs in favor of an injunction; and (4) that an injunction is in the public interest. *Id.* at 20. Where, as here, “the government is a party, these last two factors merge.” *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nkhen v. Holder*, 556 U.S. 418, 436 (2009)).

²⁷ Plaintiffs also bring facial challenges under the Fourth Amendment. Given the confusion created by *Patel* and uncertainty as to whether *Patel* applies here, the Court will deny dismissal of Plaintiffs’ facial Fourth Amendment challenges without prejudice. However, even if the Court later determines that all of Plaintiffs’ facial challenges fail, the Court rejects Defendants’ suggestion that if the Court dismisses all facial challenges, all of Plaintiffs’ other requests for relief, including all requests for injunctive relief, should be dismissed. Dkt. 59, at 8. Plaintiffs seek preliminary and permanent injunctive relief enjoining enforcement of the Act both facially and as applied. Dkt. 1, at 53 (Prayer for Relief, paragraph D, requesting injunctive relief “as discussed above” which includes reference to Plaintiffs’ as-applied challenges in paragraphs A and B). Dismissal of Plaintiffs’ facial challenges does not require dismissal of their requests for injunctive relief.

A preliminary injunction can take two forms. A prohibitory injunction prohibits a party from taking action and “preserve[s] the status quo pending a determination of the action on the merits.” *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988). A mandatory injunction “orders a responsible party to take action.” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). A mandatory injunction ““goes well beyond simply maintaining the status quo,”” requires a heightened burden of proof, and is ““particularly disfavored.”” *Marlyn Nutraceuticals, Inc. v. MucosPharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (quoting *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1980)). In general, mandatory injunctions ““are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.”” *Id.* (quoting *Anderson*, 612 F.2d at 111).

While the parties do not address the issue, the relevant “status quo” for purposes of an injunction “refers to the legally relevant relationship between the parties before the controversy arose.” *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (emphasis in original); *see also Regents of Univ. of California v. Am. Broad. Companies, Inc.*, 747 F.2d 511, 514 (9th Cir. 1984) (for purposes of injunctive relief, the status quo means “the last uncontested status which preceded the pending controversy”) (internal quotation marks and citation omitted). Here, Plaintiffs’ motion for preliminary injunction was filed to contest the enforceability of H.B. 500—Idaho’s new Act. The status quo, therefore, is the policy in Idaho prior to H.B.500’s enactment. Injunctions that prohibit enforcement of a new law or policy are prohibitory, not mandatory. *Arizona Dream Act*, 757 F.3d at 1061; *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179

F.3d 725, 732 n. 13 (9th Cir. 1999) (requested preliminary injunction against enforcement of new zoning ordinance was not subject to heightened burden of proof since relief sought was prohibitory injunction that preserved the status quo pending a decision on the merits). Thus, if the Court grants Plaintiffs' preliminary injunction, it will be issuing a prohibitory injunction to preserve the status quo pending trial on the merits, rather than forcing Defendants to take action.

2. *Analysis*

a. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated people be treated alike. *City of Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Equal protection requirements restrict state legislative action that is inconsistent with core constitutional guarantees, such as equality in treatment. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). However, the Fourteenth Amendment's "promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). The Supreme Court has attempted to reconcile this reality with the equal protection principle by developing tiers of judicial scrutiny. *Latta v. Otter*, 19 F. Supp. 3d 1054, 1073 (D. Idaho) ("*Latta I*"), *aff'd*, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) ("*Latta II*"). "The level of scrutiny depends on the characteristics of the disadvantaged group or the rights implicated by the classification." *Latta I*, 19 F. Supp. 3d at 1073.

When a state restricts an individual's access to a fundamental right, the policy must withstand strict scrutiny, which requires that the government action serves a compelling purpose and that it is the least restrictive means of doing so. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). The Supreme Court has recognized that the Constitution protects a number of fundamental rights, including the right to privacy concerning consensual sexual activity, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the right to marriage, *Obergefell*, 135 S. Ct. at 2599, and the right to reproductive autonomy, *Eisenstadt v. Baird*, 405 U.S. 438, 455 (1972). Access to interscholastic sports is not, however, a constitutionally recognized fundamental right. *See, e.g., Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 159–60 (5th Cir. 1980) (explaining that a student's interest in playing sports “amounts to a mere expectation rather than a constitutionally protected claim of entitlement[.]”).

When a fundamental right is not at stake, a court must analyze whether the government policy discriminates against a suspect class. *Cleburne*, 473 U.S. at 440 (identifying race, alienage, and national origin as suspect classifications vulnerable to pernicious discrimination). Because government policies that discriminate on the basis of race or national origin typically reflect prejudice, such policies will survive only if the law survives strict scrutiny. *Id.* Strict scrutiny review is so exacting that most laws subjected to this standard fail, leading one former Supreme Court Justice to quip that strict scrutiny review is “strict in theory, but fatal in fact.” *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980).

Statutes that discriminate on the basis of sex, a “quasi-suspect” classification, need

to withstand the slightly less stringent standard of “heightened” scrutiny.²⁸ *Craig v. Boren*, 429 U.S. 190, 197 (1976); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“*VMI*”). To withstand heightened scrutiny, classification by sex “must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig*, 429 U.S. at 197. “The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment.” *Latta I*, 19 F. Supp. 3d at 1073 (citing *VMI*, 518 U.S. at 533).

The District of Idaho determined transgender individuals qualify as a quasi-suspect class in *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143–1145 (2018) (“*Barron*”).²⁹ While not specifically stating that transgender individuals constitute a quasi-suspect class, the Ninth Circuit has also held that heightened scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. *Karnoski v. Trump*, 926 F.3d 1180, 1201 (2019). Further, although in the context of Title VII, the Supreme Court has, as mentioned, recently stated, “it is impossible to discriminate against a person for being . . . transgender

²⁸ Heightened scrutiny is also referred to as “intermediate scrutiny.” See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Court uses the term “heightened” scrutiny for consistency.

²⁹ As the *Barron* Court explained, the Supreme Court employs a four-factor test to determine whether a class qualifies as suspect or quasi-suspect: (1) when the class has been “historically subjected to discrimination;” (2) has a defining characteristic bearing no “relation to ability to perform or contribute to society;” (3) has “obvious, immutable, or distinguishing characteristics;” and (4) is “a minority or is politically powerless.” *Id.* at 1144 (quoting *United States v. Windsor*, 570 U.S. 744 (2003)). The *Barron* Court determined transgender individuals meet each of these criteria. *Id.* This test has also been employed by district courts in other states to find transgender people are a quasi-suspect class. For instance, in *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y.), the court determined: (1) transgender individuals have a history of persecution and discrimination and, moreover, “this history of persecution and discrimination is not yet history”; (2) transgender status bears no relation to ability to contribute to society; (3) transgender status is a sufficiently discernible characteristic to define a discrete minority class; and (4) transgender individuals are a politically powerless minority. *Id.* at 139.

without discriminating against that individual based on sex.” *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020).

Finally, the least stringent level of scrutiny is rational basis review. Rational basis review is applied to laws that impose a difference in treatment between groups but do not infringe upon a fundamental right or target a suspect or quasi-suspect class. *Heller v. Doe*, 509 U.S. 312, 319–321 (1993). “[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.” *Id.* at 319 (citations omitted). Rational-basis review in equal protection analysis “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Id.* (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). Under rationale basis review, a classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.* at 320 (quoting *Beach*, 508 U.S. at 313).³⁰

b. Appropriate level of scrutiny

Plaintiffs argue heightened scrutiny is appropriate in this case because the Act discriminates on the basis of both transgender status and sex. Dkt. 22-1, at 12 (citing *VMI*, 518 U.S. at 55). Defendants acknowledge that the Act may be subject to heightened

³⁰ Yet, even under rational basis review, if a court finds that a classification is “born of animosity toward the class of persons affected,” a law that implicates neither a suspect classification nor a fundamental right may be ruled constitutionally invalid. *Romer*, 517 U.S. at 634; *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down provision of Food Stamp Act that denied food stamps to households of unrelated individuals where the legislative history suggested Congress passed the provision in an effort to prevent “hippie communes” from receiving food stamps). Thus, even under rational basis review, a policy that is primarily motivated by animus will not pass constitutional muster. *Id.* at 534.

scrutiny but suggest the Act does not discriminate on the basis of transgender status or sex because it simply “treats all biological males the same and prohibits them from participating in female sports to protect athletic opportunities for biological females.” Dkt. 41, at 13 n. 8. While contending, “[n]either the Supreme Court nor the Ninth Circuit has recognized ‘gender identity’ as a suspect class,”³¹ the Intervenors argue the Act nonetheless passes heightened scrutiny. Dkt. 46, at 13–18. Finally, the United States contends that even assuming, *arguendo*, that the Act triggers heightened scrutiny, it “readily withstand[s] this form of review.” Dkt. 53, at 5.

Because all parties focus their arguments on the Act’s ability to withstand heightened scrutiny, and because the Court finds heightened scrutiny is appropriate pursuant to *Craig*, 429 U.S. at 197, *VMI*, 518 U.S. at 533, *Barron*, 286 F. Supp. 3d at 1144, and *Karnoski*, 926 F.3d at 1201, the Court applies this level of review.³²

c. Likelihood of Success on the Merits-Lindsay

i. Discrimination based on transgender status

Defendants and the United States suggest the Act does not discriminate against transgender individuals because it does not expressly use the term “transgender” and because the Act does not ban athletes on the basis of transgender status, but rather on the basis of the innate physiological advantages males generally have over females. Dkt. 41,

³¹ However, as noted *supra*, the Ninth Circuit has explicitly held heightened scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. *Karnoski*, 926 F.3d at 1201.

³² While maintaining heightened scrutiny is appropriate, Plaintiffs also argue the Act fails even rational basis review. Dkt. 22-1, at 12, 25–26. Because the Court finds provisions of the Act fail to withstand heightened scrutiny, it does not further address this argument.

at 13 n. 8; Dkt. 53, at 13. The Ninth Circuit rejected a similar argument in *Latta II*, 771 F.3d at 468. In *Latta II*, the Ninth Circuit considered defendants' claim that Idaho and Nevada's same-sex marriage bans did not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity. The Ninth Circuit rebuffed this contention, explaining:

Effectively if not explicitly, [defendants] assert that while these laws may disadvantage some same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists 'does not depend on why' a policy discriminates, 'but rather on the explicit terms of the discrimination.' Hence, while the procreative capacity distinction that defendants seek to draw could represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

Id. at 467–68 (emphasis in original) (quoting *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)).

Similarly, the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity. Hence, while 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. *Id.* at 468.

As mentioned, the Ninth Circuit has held that classifications based on transgender status are subject to heightened scrutiny. *Karnoski*, 926 F.3d at 1201. The Court accordingly applies heightened scrutiny to the Act. Under this level of scrutiny, four principles guide the Court’s equal protection analysis. The Court: (1) looks to the Defendants to justify the Act; (2) must consider the Act’s actual purposes; (3) need not accept hypothetical, *post hoc* justifications for the Act; and (4) must decide whether Defendants’ proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them. *Latta I*, 19 F. Supp. 3d at 1077. When applying heightened scrutiny, the Court does not adopt the strong presumption in favor of constitutionality or heavy deference to legislative judgments characteristic of rational basis review. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014). Further, under heightened scrutiny review, the Court must examine the Act’s “actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.” *Latta II*, 771 F.3d at 468 (quoting *SmithKline*, 740 F.3d at 483).

ii. The Ninth Circuit’s holding in *Clark*

At the outset, the Court recognizes that sex-discriminatory policies withstand heightened scrutiny when sex classification is “not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 462, 469 (1981) (upholding law that held only males criminally liable for statutory rape because the consequences of teenage pregnancy essentially fall only on girls, so applying statutory rape law solely to men was justified

since men suffer fewer consequences of their conduct). The Equal Protection Clause does not require courts to disregard the physiological differences between men and women. *Michael M.*, 450 U.S. at 481; *Clark*, 695 F.2d at 1131.

As repeatedly highlighted by Defendants, the Intervenors, and the United States (collectively hereinafter the Act's "Proponents"), the Ninth Circuit in *Clark* held that there "is no question" that "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" is "a legitimate and important governmental interest" justifying rules excluding males from participating on female teams. *Clark*, 695 F.2d at 1131. In *Clark*, the Ninth Circuit determined a policy in Arizona of excluding boys from girls' teams simply recognized "the physiological fact that males would have an undue advantage competing against women," and would diminish opportunity for females. *Id.* at 1131. The *Clark* Court also explained that "even wiser alternatives to the one chosen" did not invalidate Arizona's policy since it was "substantially related to the goal" of providing fair and equal opportunities for females to participate in athletics. *Id.* at 1132.

While the Court recognizes and accepts the principals outlined in *Clark*, *Clark's* holding regarding general sex separation in sport, as well as the justifications for such separation, do not appear to be implicated by allowing transgender women to participate on women's teams. In *Clark*, the Ninth Circuit held that it was lawful to exclude cisgender boys from playing on a girls' volleyball team because: (1) women had historically been deprived of athletic opportunities in favor of men; (2) as a general matter, men had equal athletic opportunities to women; and (3) according to stipulated facts, average

physiological differences meant that “males would displace females to a substantial extent” if permitted to play on women’s volleyball teams. *Clark*, 695 F.2d at 1131. These principals do not appear to hold true for women and girls who are transgender.

First, like women generally, women who are transgender have historically been discriminated against, not favored. *See, e.g., Barron*, 286 F. Supp. 3d at 1143–1145. In a large national study, 86% of those perceived as transgender in a K–12 school experienced some form of harassment, and for 12%, the harassment was severe enough for them to leave school. National Center for Transgender Equality, 2015 U.S. Transgender Survey: Idaho State Report 1–2, <https://www.transequality.org/sites/default/files/docs/usts/USTSIDStateReport%281017%29.pdf> (October 2017). According to the same study, 48% of transgender people in Idaho have experienced homelessness in their lifetime, and 25% were living in poverty. *Id.* Rather than a general separation between a historically advantaged group (cisgender males) and a historically disadvantaged group (cisgender women), the Act excludes a historically disadvantaged group (transgender women) from participation in sports, and further discriminates against a historically disadvantaged group (cisgender women) by subjecting them to the sex dispute process. The first justification for the Arizona policy at issue in *Clark* is not present here.

Second, under the Act, women and girls who are transgender will not be able to participate in any school sports, unlike the boys in *Clark*, who generally had equal athletic opportunities. *Clark*, 695 F.2d at 1131; Dkt. 58-3, at ¶¶ 24–28 (explaining that forcing a transgender woman to participate on a men’s team would be forcing her to be cisgender,

which is “associated with adverse mental health outcomes.”); *see also* Dkt. 22-6, ¶¶ 35–37. Participating in sports on teams that contradict one’s gender identity “is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.” Dkt. 58, at 11 (citing Dkt. 58-3, ¶¶ 24–28).³³ As such, the Act’s categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports—and also subjects all cisgender women to unequal treatment simply to play sports—while the men in *Clark* had generally equal athletic opportunities.

Third, it appears transgender women have not and could not “displace” cisgender women in athletics “to a substantial extent.” *Clark*, 695 F.2d at 1131. Although the ratio of males to females is roughly one to one, less than one percent of the population is transgender. Dkt. 22-1, at 22. Presumably, this means approximately one half of one percent of the population is made up of transgender females. It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women. It appears untenable that allowing transgender women to compete on women’s teams would substantially

³³ The Intervenor’s rely on an expert opinion from Dr. Stephen Levine claiming gender-affirming policies (such as allowing transgender individuals to play on sports teams consistent with their gender identity) are instead harmful to transgender individuals. *See generally*, Dkt. 46-2. However, another judge of this Court previously determined that Dr. Levine is an outlier in the field of gender dysphoria and placed “virtually no weight” on his opinion in a case involving a transgender prisoner’s medical care. *Edmo v. Idaho Dep’t of Corr.*, 258 F. Supp. 3d 1103, 1125 (D. Idaho 2018) (*vacated in part on other grounds in Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019)); *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188–89 (N.D. Cal. 2015) (noting Dr. Levine’s expert opinion overwhelmingly relied on generalizations about gender dysphoria, contained illogical inferences, and admittedly included references to a fabricated anecdote). At this stage of the proceedings, the Court accepts Plaintiffs’ evidence regarding the harm forcing transgender individuals to deny their gender identity can cause.

displace female athletes.³⁴

And fourth, it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women. The Court discusses the distinction between physical differences between men and women in general, and physical differences between transgender women who have suppressed their testosterone for one year and women below. However, the interests at issue in *Clark*—Defendants’ central authority—pertained to sex separation in sport generally and are not necessarily determinative here.³⁵

iii. The Act’s justifications

The legislative findings and purpose portion of the Act suggests it fulfills the interests of promoting sex equality, providing opportunities for female athletes to

³⁴ The United States suggests the Ninth Circuit held participation by just one cisgender boy on the girls’ volleyball team would “set back” the “goal of equal participation by females in interscholastic sports.” Dkt. 52, at 10 (citing *Clark by and through Clark v. Arizona Interscholastic Ass’n*, 886 F.2d 1191, 1193 (1989) (“*Clark II*”). The part of *Clark II* the United States references responded to plaintiff’s “mystifying” argument that the Arizona school association had been “wholly deficient in its efforts to overcome the effects of past discrimination against women in interscholastic athletics, and that this failure vitiate[d] its justification for a girls-only volleyball team.” *Id.* The Ninth Circuit noted that it was true that participation in Arizona interscholastic sports was still far from equal. *Id.* In light of this inequity, the *Clark II* Court could not see how plaintiff’s “remedy” of allowing him to play on the girl’s team would help. *Id.* Thus, the *Clark II* Court’s statement regarding participation by one male athlete was in the context of plaintiff’s argument that he should be permitted to play on the girl’s team because there was no justification for women’s teams. *Id.* The *Clark II* Court remained focused on the risk that a ruling in plaintiff’s favor would extend to all boys and would engender substantial displacement of girls in school sports. *Id.* (observing that the issue of “males . . . outnumber[ing] females in sports two to one” in school sports would “not be solved by opening the girls’ team to Clark and other boys.”) (emphasis added); *see also id.* (“Clark does not dispute our conclusion in *Clark I* that ‘due to physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team.’”) (quoting *Clark*, 695 F.2d at 1131) (emphasis added).

³⁵ As Attorney General Wasden advised the legislature before it passed the Act: “The issue of a transgender female wishing to participate on a team with other women requires considerations beyond those considered in *Clark* and presents issues that courts have not yet resolved.” Letter from Attorney General Wasden to Rep. Rubel (Feb. 25, 2020), <https://www.idahostatesman.com/latest-news/article240619742.ece/BINARY/HB%20500%20Idaho%20AG%20response.pdf>.

demonstrate their skill, strength, and athletic abilities, and by providing female athletes with opportunities to obtain college scholarship and other accolades. Idaho Code § 33-6202(12). Plaintiffs do not dispute that these are important governmental objectives. They instead argue that the Act is not substantially related to such important governmental interests. At this stage of the litigation, and without further development of the record, the Court is inclined to agree.

(1) Promoting Sex Equality and Providing Opportunities for Female Athletes

As discussed, *supra*, section II.C, the 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. Idaho Code § 33-6202(12); *see* Dkt. 1, at ¶¶ 80–83. Rather than presenting empirical evidence that transgender inclusion will hinder sex equality in sports or athletic opportunities for women, both the Act itself and Proponents' rely exclusively on three transgender athletes who have competed successfully in women's sports.

Specifically, during the entire legislative debate over the Act, the only transgender women athletes referenced were two high school runners who compete in Connecticut, and who were, notably, also defeated by cisgender girls in recent races.³⁶ Dkt. 22-3, Ex. B, at 8; *see also* Associated Press, *Cisgender female who sued beats transgender athlete in high*

³⁶ Rep. Ehardt also vaguely referenced a college transgender athlete, but it is not clear from the record who this athlete is or where she competed. Dkt. 22-3, Ex. B, at 8.

school race, <https://www.fox61.com/article/news/local/transgender-athlete-loses-track-race-lawsuit-ciac-high-school-sports/520-df66c6f5-5ca9-496b-a6ba-61c828655bc6> (Feb. 15, 2020). Notably, unlike the IHSA and NCAA rules in place in Idaho before the Act, Connecticut does not require a transgender woman athlete to suppress her testosterone for any time prior to competing on women’s teams. Dkt. 41, at 33; Dkt. 45, at 7.

The Intervenor identifies a third transgender athlete, June Eastwood, and argues that their athletic opportunities were limited by Eastwood’s participation in women’s sports. Dkt. 46, at 8. The State also highlights this example. Dkt. 41, at 18. However, Eastwood was not an Idaho athlete and the competition at issue took place at the University of Montana. Dkt. 45, at 10 n. 7. So, the Idaho statute would have no impact on Eastwood. More importantly, although the Intervenor lost to Eastwood, Eastwood was also ultimately defeated by her cisgender teammate. *Id.* And, losing to Eastwood at one race did not deprive the Intervenor from the opportunity to compete in Division I sports, as both continue to compete on the women’s cross-country and track teams with ISU. Dkt. 30-1, at 2.

The evidence cited during the House Debate on H.B. 500 and in the briefing by the Proponents regarding three transgender women athletes who have each lost to cisgender women athletes does not provide an “exceedingly persuasive” justification for the Act. *VMI*, 518 U.S. at 533 (“To summarize the Court’s current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’”). Heightened scrutiny requires that a

law solves an actual problem and that the “justification must be genuine, not hypothesized.” *VMI*, 518 U.S. at 533. In the absence of any empirical evidence that sex inequality or access to athletic opportunities are threatened by transgender women athletes in Idaho, the Act’s categorical bar against transgender women athletes’ participation appears unrelated to the interests the Act purportedly advances.

Plaintiffs have also presented compelling evidence that equality in sports is *not* jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women’s teams. Plaintiffs’ medical expert, Dr. Joshua Safer, suggests that physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression. Before puberty, boys and girls have the same levels of circulating testosterone. Dkt. 22-9, at ¶ 23. After puberty, the typical range of circulating testosterone for cisgender women is similar to before puberty, and the circulating testosterone for cisgender men is substantially higher. *Id.*

Dr. Safer contends there “is a medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes.” Dkt. 22-9, at ¶ 25. Dr. Safer highlights the only study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender athletes. *Id.* at ¶ 51. The small study showed that after undergoing gender affirming intervention, which included lowering their testosterone levels, the athletes’ performance was reduced so that relative to cisgender women, their performance was proportionally the same as it had been relative to cisgender men prior to any medical treatment. *Id.* In other words, a transgender woman who performed 80% as

well as the best performer among men of that age before transition would also perform at about 80% as well as the best performer among women of that age after transition. *Id.*

Defendants' medical expert, Dr. Gregory Brown, also confirms that male's performance advantages "result, in large part (but not exclusively), from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty." Dkt. 41-1, at ¶ 17. While Dr. Brown maintains that hormone and testosterone suppression cannot fully eliminate physiological advantages once an individual has passed through male puberty, the Court notes some of the studies Dr. Brown relies upon actually held the opposite. *Compare* Dkt. 41-1, at ¶ 81 *with* Dkt. 58-2, at ¶ 7 (highlighting that the Handelsman study upon which Dr. Brown relies states that "evidence makes it highly likely that the sex difference in circulating testosterone of adults explains most, if not all, of the sex differences in sporting performance."). Further, the majority of the evidence Dr. Brown cites, and most of his declaration, involve the differences between male and female athletes in general, and contain no reference to, or information about, the difference between cisgender women athletes and transgender women athletes who have suppressed their testosterone. Dkt. 41-1, at ¶¶ 12–112, 114–125.

Yet, the legislative findings for the Act contend that even after receiving hormone and testosterone suppression therapy, transgender women and girls have "an absolute advantage" over non-transgender girls. Idaho Code § 33-6202(11). In addition to the evidence cited above, several factors undermine this conclusion. For instance, there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty

at all. Dkt. 22-9, ¶ 47. These transgender girls never experience the high levels of testosterone and accompanying physical changes associated with male puberty, and instead go through puberty with the same levels of hormones as other girls. *Id.* As such, they develop typically female physiological characteristics, including muscle and bone structure, and do not have an ascertainable advantage over cisgender female athletes. *Id.* Defendants do not address how transgender girls who never undergo male puberty can have “an absolute advantage” over cisgender girls. Nor do Defendants address why transgender athletes who have never undergone puberty should be categorically excluded from playing women’s sports in order to protect sexual equality and access to opportunities in women’s sports.

The Act’s legislative findings do claim the “benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones.” Idaho Code § 33-6202(11). However, the study cited in support of this proposition was later altered after peer review, and the conclusions the legislature relied upon were removed. Dkt. 58, at 17; Dkt. 58-2, at ¶ 19; Dkt. 62 at 80:10–25; 81:1–10; 95:24–25, 96. Defendants provide no explanation as to why the Legislators relied on the pre-peer review version of the article or why Defendants did not correct this fact in their briefing after the peer reviewed version was published. In fact, the study did not involve transgender athletes at all, but instead considered the differences between transgender men who increased strength and muscle mass with testosterone treatment, and transgender women who lost some strength and muscle mass with testosterone suppression. Dkt. 58, at 17. The study also explicitly stated it “is important to recognize that we only assessed

proxies for athletic performance . . . it is still uncertain how the findings would translate to transgender athletes.” Anna Wiik et. al, *Muscle Strength, Size, and Composition Following 12 months of Gender-affirming Treatment in Transgender Individual*, J. CLIN. METAB., 105(3):e805-e813 (2020).³⁷

In addition, several of the Act’s legislative findings which purportedly demonstrate the “absolute advantage” of transgender women are based on a study by Doriane Lambelet Coleman. Idaho Code § 33-6202(5), (10). Professor Coleman herself urged Governor Little to veto H.B. 500 because her work was misused, and she also endorsed the NCAA’s rule of allowing transgender women to participate after one year of hormone and testosterone suppression. Betsy Russell, *Professor whose work is cited in HB500a, the transgender athletes bill, says bill misuses her research and urges veto*, IDAHO PRESS https://www.idahopress.com/eyeonboise/professor-whose-work-is-cited-in-hb-a-the-transgenderarticle_0e800202-cacl-5721-a7690328665316a8.html (Mar. 19, 2020).

The policies of elite athletic regulatory bodies across the world, and athletic policies of most every other state in the country, also undermine Defendants’ claim that transgender women have an “absolute advantage” over other female athletes. Specifically, the International Olympic Committee and the NCAA require transgender women to suppress their testosterone levels in order to compete in women’s athletics. *Id.* at ¶ 45. The NCAA

³⁷ The legislative findings and the citations in the Proponents’ briefs cite this study as Tommy Lundberg et al., *Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for transwomen*, Karolinska Institute (Sept. 26, 2019). The correct reference for the published study is Anna Wiik et al., *Muscle Strength, Size, and Composition following 12 Months of Gender-affirming Treatment in Transgender Individuals*, J. CLIN. METAB., 105(3):e805-e813 (2020).

policy was implemented in 2011 after consultation with medical, legal, and sports experts, and has been in effect since that time. Dkt. 1, ¶ 76. Millions of student-athletes have competed in the NCAA since 2011, with no reported examples of any disturbance to women's sports as a result of transgender inclusion.³⁸ *Id.* Similarly, every other state in the nation permits women and girls who are transgender to participate under varying rules, including some which require hormone suppression prior to participation. The Proponents' failure to identify any evidence of transgender women causing purported sexual inequality other than four athletes (at least three of whom who have notably lost to cisgender women) is striking in light of the international and national policy of transgender inclusion.

Finally, while general sex separation on athletic teams for men and women may promote sex equality and provide athletic opportunities for females, that separation preexisted the Act and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act. IHSAA Non-Discrimination Policy, <http://idhsaa.org/asset/RULE%2011.pdf> ("If a sport is offered for both boys and girls, girls must play on the girls team and boys must play on the boys team. . . If a school sponsors only a single team in a sport. . . Girls are eligible to participate on boys' teams. . . Boys are not eligible to participate on girls' teams."). However, the IHSAA policy also allows transgender girls to participate on girls' teams after one year of hormone

³⁸ In their Response to the Motion for Preliminary Injunction, Defendants highlight the circumstances of one transgender woman athlete who competed in women's sports after suppressing her hormones, Cece Telfer, to suggest testosterone suppression does not eliminate the physiological advantages of transgender women athletes. Dkt. 41, at 17–18. The Court finds, and Defendants concede, that such anecdotal evidence does not establish that hormone therapy is ineffective in reducing athletic performance advantages in transgender women athletes. *Id.* at 18.

suppression. Similarly, the existing NCAA rules also preclude men from playing on women's teams but allow transgender women to compete after one year of testosterone suppression. Because Proponents fail to show that participation by transgender women athletes threatened sexual equality in sports or opportunities for women under these pre-existing policies, the Act's proffered justifications do not appear to overcome the inequality it inflicts on transgender women athletes.

The Ninth Circuit in *Clark* ruled that sex classification can be upheld only if sex represents "a legitimate accurate proxy." *Clark*, 695 F.2d at 1129. The *Clark* Court further explained the Supreme Court has soundly disapproved of classifications that reflect "archaic and overbroad generalizations," and has struck down gender-based policies when the policy's proposed compensatory objective was without factual justification. *Id.* Given the evidence highlighted above, it appears the "absolute advantage" between transgender and cisgender women athletes is based on overbroad generalizations without factual justification.

Ultimately, the Court must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence. However, the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho.

(2) Ensuring Access to Athletic Scholarships

The Act also identifies an interest in advancing access to athletic scholarships for women. Idaho Code § 33-6202(12). Yet, there is no evidence in the record to suggest that the Act will increase scholarship opportunities for girls. Just as the head of the IHSAA testified during the legislative debate on H.B. 500 that he was not aware of any transgender girl ever playing high school girls' sports in Idaho, there is also no evidence of a transgender person ever receiving any athletic scholarship in Idaho. Idaho Education News, *Lawmakers hear emotional testimony but take no action on transgender bill*, Idaho News 6, <https://www.kivity.com/news/education/making-the-grade/lawmakers-hear-emotional-testimony-but-take-no-action-on-transgender> (Feb. 20, 2020). Nor have the scholarships of the Intervenor—the only identified Idaho athletes who have purportedly been harmed by competing against a transgender woman athlete—been jeopardized. Both Intervenor continue to run track and cross-country on scholarship with ISU, despite their loss to a transgender woman athlete at the University of Montana. Dkt. 30-1, at 2.

The Act's incredibly broad sweep also belies any genuine concern with an impact on athletic scholarships. The Act broadly applies to interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, or a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education. Idaho Code § 33-6203(1). Thus, any female athlete, from kindergarten through college, is generally subject to the Act's provisions. Clearly, the need for athletic scholarships is not implicated in primary school and intramural sports in the same way that it may be for high

school and college athletes. As such, “the breadth of the [law] is so far removed from [the] particular justifications” put forth in support of it, that it is “impossible to credit them.” *Romer*, 517 U.S. at 635.

Based on the dearth of evidence in the record to show excluding transgender women from women’s sports supports sex equality, provides opportunities for women, or increases access to college scholarships, Lindsay is likely to succeed in establishing the Act violates her right to equal protection. This likelihood is further enhanced by Defendants’ implausible argument that the Act does not actually ban transgender women, but instead only requires a health care provider’s verification stating that a transgender woman athlete is female. *See, e.g.*, Dkt. 40-1, at 3; Dkt. 41, at 4; Dkt. 62, at 66:21–25; 67:1–25; 68:1–17.

Defense counsel confirmed during oral argument that if Lindsay’s health care provider signs a health form stating that she is female, Lindsay can play women’s sports. Dkt. 62, at 66:21–25. In turn, Plaintiffs’ counsel affirmed that Lindsay’s health care provider will sign a form verifying Lindsay is female. *Id.* at 70:5–21. If this is indeed the case, then each of the Proponents’ arguments claiming that the Act ensures equality for female athletes by disallowing males on female teams falls away. Under this interpretation, the Act does not ensure sex-specific teams at all and is instead simply a means for the Idaho legislature to express its disapproval of transgender individuals. If “equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Moreno*, 413 U.S. at 534.

(3) The Act's Actual Purpose

The Act's legislative findings reinforce the idea that the law is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women. For instance, the Act's criteria for determining "biological sex" appear designed to exclude transgender women and girls and to reverse the prior IHSA and NCAA rules that implemented sex-separation in sports while permitting transgender women to compete. Idaho Code § 33-6203(3).

Specifically, an athlete subject to the Act's dispute process may "verify" their sex using three criteria: (1) reproductive anatomy, (2) genetic makeup, or (3) endogenous testosterone, i.e., the level of testosterone the body produces without medical intervention. *Id.* This excludes some girls with intersex traits because they cannot establish a "biological sex" of female based on these verification metrics. Dkt. 22-9, ¶ 41. It also completely excludes transgender girls.

Girls under eighteen generally cannot obtain gender-affirming genital surgery to treat gender dysphoria, and therefore will not have female reproductive anatomy. Dkt. 22-2, ¶ 13. Many transgender women over the age of eighteen also have not had genital surgery, either because it is not consistent with their individualized treatment plan for gender dysphoria or because they cannot afford it. *Id.* With respect to genetic makeup, the overwhelming majority of women who are transgender have XY chromosomes, so they cannot meet the second criteria. And, by focusing on "endogenous" testosterone levels, rather than actual testosterone levels after hormone suppression, the Act excludes transgender women whose circulating testosterone levels are within the range typical for

cisgender women.

Thus, the Act's definition of "biological sex" intentionally excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance. Dkt. 22-9, at ¶ 25. Significantly, the preexisting Idaho and current NCAA rules instead focus on that factor. That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.

In addition, it is difficult to ignore the circumstances under which the Act was passed. As COVID-19 was declared a pandemic and many states adjourned state legislative session indefinitely, the Idaho Legislature stayed in session to pass H.B. 500 and become the first and only state to bar all women and girls who are transgender from participating in school sports. *Id.* at ¶ 89. At the same time, the Legislature also passed another bill, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. Governor Little signed H.B. 500 and H.B. 509 into law on the same day. That the Idaho government stayed in session amidst an unprecedented national shut down to pass two laws which dramatically limit the rights of transgender individuals suggests the Act was motivated by a desire for transgender exclusion, rather than equality for women athletes, particularly when the national shutdown preempted school athletic events, making the rush to the pass the law unnecessary.

Finally, the Proponents turn the Act on its head by arguing that transgender people seek "special" treatment by challenging the Act. Dkt. 53, at 9–10; Dkt. 62, at 92:16–22.

This argument ignores that the Act excludes *only* transgender women and girls from participating in sports, and that Lindsay simply seeks the status quo prior to the Act's passage, rather than special treatment. Further, the Proponents' argument that Lindsay and other transgender women are not excluded from school sports because they can simply play on the men's team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex. The Ninth Circuit rejected such arguments in *Latta*, 771 F.3d at 467, as did the Supreme Court in *Bostock*, 140 S. Ct. at 1741–42.

In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics. As such, Lindsay is likely to succeed on the merits of her equal protection claim. Again, at this stage, the Court only discusses the "likelihood" of success based on the information currently in the record. Actual success—or failure—on the merits will be determined at a later stage.

d. Likelihood of Success-Jane

The Act additionally triggers heightened scrutiny by singling out members of girls' and women's teams for sex verification. *VMI*, 518 U.S. at 555 ([“A]ll gender-based classifications today warrant heightened scrutiny”) (internal quotation marks and citation omitted). Defendants argue that the Act does not treat females differently because “it requires any athlete subject to dispute, whether male or female, to verify his or her sex.” Dkt. 41, at 13 n. 8. Defendants suggest males are equally subject to the sex verification

process because they may try to participate on a woman's team. *Id.* This claim ignores that all cisgender women are subject to the verification process in order to play on the team matching their gender identity, while only a limited few (if any) cisgender men will be subject to the verification process if they try to play on a team contrary to their gender identity.

Defendants' argument also contradicts the express language of the Act, which mandates, "[a]thletic teams or sports designated for females, women, or girls *shall* not be open to students of the male sex." *Id.* at § 33-6203(2) (emphasis added). Males are not subject to the dispute process because female teams are not open to them under the Act.³⁹ By arguing that people of any sex who seek to play women's sports would be subject to sex verification, Defendants ignore that the Act creates a different, more onerous set of rules for women's sports when compared to men's sports. Where spaces and activities for women are "different in kind . . . and unequal in tangible and intangible ways from those for men, they are tested under heightened scrutiny." *VMI*, 518 U.S. at 540.

It is also clear that a sex verification examination is unequal to the physical sports exam a male must have in order to play sports. Being subject to a sex dispute is itself humiliating. The Act's dispute process also creates a means that could be used to bully girls perceived as less feminine or unpopular and prevent them from participating in sports. And if, as the Act states, sex must be verified through a physical examination relying "only

³⁹ Moreover, males were already excluded from female sports teams under the long-standing rules in Idaho prior to the Act's passage. Defendants do not explain why women must risk being subject to the onerous sex verification process in the name of equality in sports when women already had single sex teams without the risk of a sex dispute prior to the Act's passage.

on one (1) or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels,” girls like Jane may also have to endure invasive medical tests that could constitute an invasion of privacy in order to “verify” their sex. Idaho Code § 33-6302(3).

As Plaintiffs’ expert, Dr. Sara Swoboda, a pediatrician in Boise with approximately 1,500 patients across Idaho, explains, none of the aforementioned physiological characteristics are tested for in any routine sports’ physical examination. Dkt. 22-10, ¶ 21. If a health care provider was to verify a patient’s sex related to their reproductive anatomy, genes or hormones, none of that testing is straightforward or ethical without medical indication. *Id.* at ¶ 22. Nor would it actually “verify biological sex,” “either alone or in any combination,” as this “would not be consistent with medical science.” *Id.* at ¶ 21.

For example, “‘reproductive anatomy’ is not a medical term. That could include internal reproductive organs, external genitalia, or other body systems.” *Id.* at ¶ 28. Further, “medically unnecessary pelvic examination would be incredibly intrusive and traumatic for a patient” and would not be conducted. *Id.* at ¶ 29. Pelvic examinations in “pediatric patients are limited to patients with specific concerns such as acute trauma or infection,” and are not conducted as a general practice. *Id.* at ¶ 27. “In young patients, such an exam would often be done with sedation and appropriate comfort measures to limit psychological trauma.” *Id.* “Pediatric consensus recognizes that genitalia exams are always invasive and carry the risk of traumatizing patients if not done with careful consideration of medical utility, discussion about the purpose and subsequent findings of any exam with the patient and their family, and explicit consent of the patient.” *Id.* In addition, determining

whether an individual has ovaries or a uterus may also require more intrusive testing including “transvaginal ultrasounds and may require referral to pediatric gynecologists, endocrinologists, and geneticists. None of this testing would be a necessary part of a sports physical or any standard medical examination absent medical concerns and indications of underlying health conditions necessitating treatment.” *Id.* at ¶ 30.

Similarly, determining a patient’s “genetic makeup” would require genetic testing. Such testing is complicated and personal and reveals a significant amount of information. *Id.* at ¶ 23. It is done by a specialist and would require a pediatric endocrinologist if performed on a minor like Jane. *Id.* at ¶ 24. Where a patient presents with a constellation of medical concerns that indicate a need for genetic testing, they are referred to a pediatric endocrinologist for a chromosomal microarray:

This type of testing reveals a significant amount of very sensitive and private medical information. A chromosomal microarray looks at all 23 pairs of chromosomes that an individual has and would reveal things beyond just whether a person has 46-XX, 46-XY, or some combination of sex chromosomes. In ordering genetic testing of this kind, a range of genetic conditions could be revealed to a patient and a patient’s family. [Dr. Swoboda does] not do genetic testing as a routine part of any medical evaluation and [is] not aware of any pediatric practice that would (absent specific medical indications). Even in cases where a patient presents with possible medical or genetic conditions based off of medical or family history that would warrant genetic testing, such testing is complex and often requires insurance preauthorization.

Id. at ¶ 25.

Nor would hormone testing be conducted as a part of a normal physical examination, or without clear medical indication. *Id.* at ¶¶ 21–22. Hormone testing would also require a referral to a pediatric endocrinologist and could reveal sensitive information.

Id. at ¶¶ 24, 31. “Specific testing of genetics, internal or external reproductive anatomy, and hormones could reveal information that an individual was not looking to find out about themselves and then could result in having to disclose information to a school and community that could be deeply upsetting to pediatric patients.” *Id.*

Given the significant burden the Act’s dispute process places on all women athletes, the Court must decide whether Defendants’ proffered justifications overcome the injury and indignity inflicted on Jane and all other female athletes through the dispute process. *SmithKline*, 740 F.3d at 481–83. Instead of ensuring “long-term benefits that flow from success in athletic endeavors for women and girls,” it appears that the Act hinders those benefits by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations. Idaho Code § 33-6202(12). Because, as discussed above, Defendants have not offered evidence that the Act is substantially related to its purported goals of promoting sex equality, providing opportunities for female athletes, or increasing female athlete’s access to scholarship, Jane is also likely to succeed on her equal protection claim. Idaho Code § 33-6202(12).

e. Irreparable Harm

Lindsay and Jane both face irreparable harm due to violations of their rights under the Equal Protection Clause. “It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury.” *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (internal citations omitted); *Monterey Mech. Co. v. Wilson*, 125 F.3d

702, 715 (9th Cir. 1997) (holding that an equal protection violation constitutes irreparable harm).

Beyond this dispositive presumption, Lindsay and Jane will both suffer specific “harm for which there is no adequate legal remedy” in the absence of an injunction. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). If Lindsay is denied the opportunity to try out for and compete on BSU’s women’s teams, she will permanently lose a year of NCAA eligibility that she can never get back. Lindsay is also subject to an Act that communicates the State’s “moral disapproval” of her identity, which the Constitution prohibits. *Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003). When Jane tries out for Boise High’s women’s soccer team, she will be subject to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex. Such violations are irreparable. *Obergefell*, 135 S. Ct. at 2606 (“Dignitary wounds cannot always be healed with the stroke of a pen.”). Lindsay and Jane both also face the injuries detailed *supra*, section III.B.2, if the Act is not enjoined.⁴⁰

The Court accordingly finds Plaintiffs will likely suffer irreparable harm if the Act is not enjoined. *Alliance for the Wild Rockies*, 632 F.3d at 1131 (noting plaintiffs must establish irreparable harm is likely, not certain, in order to obtain an injunction).

f. Balance of the Equities and Public Interest

Where, as here, the government is a party, the “balance of the equities” and “public

⁴⁰ The Intervenor outrageously contend that Lindsay has not shown she will suffer irreparable harm because she has not alleged that she will commit suicide if she is not permitted to participate on BSU’s women’s sports teams. Dkt. 46, at 2. Clearly, a risk of suicide is not required to establish irreparable harm. The Intervenor’s attempt to twist the tragically high suicide rate of transgender individuals into a requirement that Lindsay must be suicidal to establish irreparable harm is distasteful.

interest” prongs of the preliminary injunction test merge. *Drakes Bay Oyster Co.*, 747 F.3d at 1092. In evaluating the balance of the equities, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24. As explained above, Plaintiffs’ harms weigh significantly in favor of injunctive relief.

In stark contrast to the deeply personal and irreparable harms Plaintiffs face, a preliminary injunction would not harm Defendants because it would merely maintain the status quo while Plaintiffs pursue their claims. If an injunction is issued, Defendants can continue to rely on the NCAA policy for college athletes and IHSAA policy for high school athletes, as they did for nearly a decade prior to the Act. In the absence of any evidence that transgender women threatened equality in sports, girls’ athletic opportunities, or girls’ access to scholarships in Idaho during the ten years such policies were in place, neither Defendants nor the Intervenors would be harmed by returning to this status quo.

Further, the Intervenors are themselves subject to disparate treatment under the Act. While the Intervenors have never competed against a transgender woman athlete from Idaho, or in Idaho, they risk being subject to the Act’s sex dispute process simply by playing sports. As Plaintiffs’ counsel noted during oral argument, the Act “isn’t a law that pits some group of women against another group of women. This is a law that harms all women in the state, all women who are subject to . . . the sex verification process, and, of course, particularly women and girls who are transgender and are now singled out for categorical exclusion.” Dkt. 62, at 89:23–25; 90:1–4.

Moreover, it is “always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres*, 695 F.3d at 1002. By establishing a likelihood that the Act violates the Constitution, Plaintiffs “have also established that both the public interest and the balance of the equities favor a preliminary injunction.” *Ariz. Dream Act*, 757 F.3d at 1069 (“[T]he public interest and the balance of the equities favor preven[ting] the violation of a party’s constitutional rights.”) (internal quotation marks and citation omitted).

g. Bond Requirement

Finally, Plaintiffs request that the Court waive the bond requirement under Federal Rule of Civil Procedure 65(c). The Ninth Circuit has held that requiring a bond “to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate because . . . protection of those rights should not be contingent upon an ability to pay.” *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). In any event, Defendants do not contest Plaintiffs’ request that the Court waive the bond. The Court will accordingly grant Plaintiff’s request.

IV.CONCLUSION

The Court recognizes that this decision is likely to be controversial. While the citizens of Idaho are likely to either vehemently oppose, or fervently support, the Act, the Constitution must always prevail. It is the Court’s role—as part of the third branch of government—to interpret the law. At this juncture, that means looking at the Act, as enacted by the Idaho Legislature, and determining if it may violate the Constitution. In making this determination, it is not just the constitutional rights of transgender girls and

women athletes at issue but, as explained above, the constitutional rights of every girl and woman athlete in Idaho. Because the Court finds Plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written, it must issue a preliminary injunction at this time pending trial on the merits.

V.ORDER

Now, therefore IT IS HEREBY ORDERED:

1. The Motion to Intervene (Dkt. 30) is GRANTED;
2. The Motion to Dismiss (Dkt. 40) is GRANTED IN PART and DENIED IN PART. It is GRANTED with respect to Plaintiffs' facial Fourteenth Amendment constitutional challenges, it is DENIED with respect to Plaintiffs' as-applied constitutional claims and in all other respects;
3. The Motion for Preliminary Injunction (Dkt. 22) is GRANTED.



DATED: August 17, 2020



David C. Nye
Chief U.S. District Court Judge

2022 NCAA Division 1 Track and Field Championships

100 Meter Dash

	Men	Women
Semifinals	1 st 10.03 seconds 24th 10.48	1 st 10.90 seconds 24 th 11.52
Finals	1 st 10.00 9 th 10.26	1st 11.02 9 th 11.29
Qualify	10.5-11.0	11.49-11.84
Record	9.82	10.78
Conclusion: The biological male in 24th place , with a time of 10.48 , would have taken 1 st place and set a new record in the biological females' 100 Meter Dash.		

200 Meter Dash

	Men	Women
Semifinals	1 st 20.10 seconds 23rd 20.86	1 st 22.02 seconds 23 rd 23.94
Finals	1 st 19.83 9 th 20.71	1st 21.80 9 th 22.90
Qualify	21.25-22.7	22.78-23.9
Record	19.87 (update 19.83)	21.77
Conclusion: The biological male in 23rd place , with a time of 20.86 , would have taken 1 st place and set a new record in the biological females' 200 Meter Dash.		

400 Meter Dash

	Men	Women
Semifinals	1 st 44.29 seconds 24th 47.67	1 st 50.08 seconds 24 th 54.25
Finals	1 st 44.13 8 th 45.83	1st 49.99 9 th 54.73
Qualify	47.5-51.0	52.23-57.89
Record	44.00	50.10
Conclusion: The biological male in 24th place , with a time of 47.67 , would have taken 1 st place and set a new record in the biological females' 400 Meter Dash.		

800 Meter Run

	Men	Women
Semifinals	1 st 1:45.94 minutes 23 rd 1:52.45	1 st 2:01.79 minutes 24 th 2:09.57
Finals	1 st 1:44.49 9 th 1:47.17	1 st 2:01.09 9 th 2:06.40
Qualify	1:52-1:58	2:07.54-2:15.30
Record	1:43.25	2:03.43
Conclusion: The biological male in 23rd place , with a time of 1:52.45 , would have taken 1 st place and set a new record in the biological females' 800 Meter Run.		

High Jump

	Men	Women
Finals	1 st 7' 5 1/4" 19 th 6' 10 3/4"	1 st 6' 4 3/4" 24 th 5' 7 3/4"
Qualify	7' 0"-6' 4"	5' 10"-5' 3"
Record	7' 9 3/4"	6' 6 1/4"
Conclusion: The biological male in 19th place , with a height of 6' 10 3/4" would have taken 1 st place and set a new record in the biological females' High Jump.		