2023 HOUSE HUMAN SERVICES

HB 1249

2023 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Pioneer Room, State Capitol

HB 1249
1/24/2023

Relating to requiring schools to designate their 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 9:02 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:

- Sport competition
- Definitions of gender and sex
- Male and female athletic statistics
- Gender identity
- Biological differences of males and females
- Fair competition in sports
- Athletics at publicly funded schools
- Effectiveness of policy and implementation
- Human genetics
- Gender transitioning treatment

Rep. B. Koppelman introduced HB 1249 with supportive testimony (#16228).

Sen. Mrydal spoke in favor of bill.

Mark Jorritsma, Executive Director of the North Dakota Family Alliance Legislative Action, offered testimony in support of bill (#16091).

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

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

James Pursley, Executive Director of the North Dakota Travel Alliance Partnership, offered testimony in opposition to bill (#15641).

Gabriela Balf, psychiatrist in Bismarck, ND and associate professor at the University of North Dakota, offered testimony in opposition to bill (#16049).

Christina Sambor, Legislative Coordinator for the North Dakota Human Rights Coalition, offered testimony in opposition to bill (#16170)(#16171).

Mia Halvorson, North Dakota citizen and student, offered testimony in opposition to bill (#16074).

Additional written testimony:

Alison Bertolini, North Dakota citizen (#14830).

Jane Hirst, North Dakota citizen (#14868).

Rory Low, North Dakota citizen (#14875).

Angie Moser, North Dakota parent and citizen (#14890).

Debra Hoffarth, North Dakota citizen (#14905).

Denise Ann Dykeman, North Dakota lawyer, parent, and citizen (#14915).

Elia Jay Scott, North Dakota citizen (#14940).

Linda Thorson, State Director for Concerned Women of America (#14985).

Emily Hanson Coler, North Dakota citizen (#14987).

Megan Degenstein, Licensed Professional Clinical Counselor from North Dakota (#15025).

Susan Draper, North Dakota citizen from Williston (#15063).

Tim Baumann, North Dakota citizen from Minot (#15099).

Sydney Glende, Licensed Professional Clinical Counselor and North Dakota citizen (#15155).

Faye Seidler, North Dakota citizen (#15276).

Taylor Lavoi, North Dakota citizen (#15327).

Mariah Bates, North Dakota citizen (#15369).

Caius Harris, North Dakota citizen (#15466).

Charley Johnson, President and CEO of Fargo-Moorhead Convention and Visitors Bureau (#15487).

Kaitlyn Kelly, North Dakota citizen (#15560).

Naomi Tabassum, Licensed Professional Clinical Counselor and North Dakota citizen (#15596).

Becky Craigo, President of Beach Pride Family, House of Safe Spaces (#15609).

Sylvia Bull, North Dakota citizen, (#15693).

Amalia Dillin, North Dakota citizen, (#15703).

Gregory Demme, Pastor of Grace Baptist Church in Minot, (#15726).

Luis Casas, board certified physician in Pediatric and Adult Endocrinology, (#15755).

Molly Haagenson, North Dakota citizen, (#15760).

Christopher Brown, North Dakota citizen, (#15775).

Kayla Johnson, North Dakota citizen, (#15792).

Cody Schuler, Advocacy Manager for the ACLU of North Dakota, (#15820).

Rebekah Oliver, North Dakota citizen, (#15827).

Maura Ferguson, North Dakota citizen, (#15839).

Charles Allen, Practicing emergency physician, (#15846).

Janet Mathistad, citizen from Minot, ND, (#15859).

Jamie Teeples, North Dakota citizen, (#15869).

Joy Ankenbauer, North Dakota citizen, (#15886).

Joseph Larson, North Dakota citizen and pastor, (#15893).

Rody Hoover Schultz, North Dakota citizen, (#15902).

Seth Flamm, North Dakota citizen, (#15919).

Gretchen Deeg, North Dakota citizen from Bismarck, (#15922).

Cambry Ankebauer, North Dakota citizen, (#15929).

Olivia Data, Youth Action Council Coordinator for the North Dakota Women's Network, (#15939).

Sarah Galbraith, North Dakota citizen, (#15942).

Jeff Miller, North Dakota citizen, (#15959).

Kristie Miller, North Dakota parent, (#15976).

Tammy Owens, North Dakota citizen, (#15977).

Lisa Pulkrabek, North Dakota citizen, (#15980).

Wade Pulkrabek, North Dakota citizen, (#15986).

Shawn Nixon, North Dakota citizen, (#15993).

Nate Brown, North Dakota citizen, (#16010).

Brian Murphy, citizen from Grand Forks, North Dakota, (#16015).

Doug Sharbono, North Dakota citizen from Fargo, (#16023).

Amber Vibeto, North Dakota citizen, (#16046).

Daniel Scrimshaw, North Dakota State Director of the American Academy of Medical Ethics and Emergency Medicine Physician from Minot, ND, (#16051).

Lovita Scrimshaw, North Dakota State Director of the American Academy of Medical Ethics and Emergency Medicine Physician from Minot, ND, (#16065).

Danial Sturgill, Clinical psychologist and North Dakota citizen, (#16088).

Curtis Kadrmas, North Dakota citizen, (#16107).

Shannon Full, President and CEO of the Fargo Moorhead West Fargo Chamber of Commerce, (#16108).

Christopher Dodson, Executive Director of the North Dakota Catholic Conference, (#16111).

Kayla Schmidt, Interim Executive Director of the North Dakota Women's Network, (#16113).

Cionda N. Holter, North Dakota citizen, (#16117).

Jacob R. Holter, North Dakota citizen, (#16118).

Gordon Greenstein, North Dakota citizen and veteran, (#16119).

Reed Eliot Rahrich, North Dakota citizen, (#16134).

Erin J. McSparron, North Dakota citizen, (#16152).

Katie Fitzsimmons, Director of Student Affairs at North Dakota State University, (#16178).

Thea Holter, North Dakota citizen and parent, (#16182).

Jodi Plecity, North Dakota citizen, (#16185).

Charles J. Vondal, North Dakota citizen, (#16187)(#16188).

Chairman Weisz adjourned the meeting at 9:59 AM.

Phillip Jacobs, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Pioneer Room, State Capitol

HB 1249
1/31/2023

Relating to requiring schools to designate their 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 3:44 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
- Amendments

Chairman Weisz Called for a discussion on HB 1249 and the proposed amendments.

Rep. Prichard Moved to amend HB 1249 with 23.0569.02002 (Testimony #19589)

Rep. Anderson- Seconds the motion.

Motion carries by voice vote.

Rep. Weisz- Gives language to further amend: "Remove from page 3 lines 1 – 9"

Rep. Porter Moved to further amend HB 1249.

Rep. Dobervich- Seconds the motion.

Roll Call Vote

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

Representative Dwight Kiefert	N
Representative Carrie McLeod	N
Representative Todd Porter	Y
Representative Brandon Prichard	N
Representative Karen M. Rohr	N

Motion fails 6-6-2.

Rep. Prichard- Move for a Do Pass as Amended

Rep. Kiefert- Seconds the motion.

Roll Call Vote:

Representatives	Vote
Representative Robin Weisz	Y
Representative Matthew Ruby	A
Representative Karen A. Anderson	Y
Representative Mike Beltz	N
Representative Jayme Davis	A
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. Representative Prichard will carry the bill.

Chairman Weisz adjourned the meeting at 3:57 PM

Phillip Jacobs, Committee Clerk by Risa Berube

HB 1249 was reconsidered on Feb. 7th

Prepared by the Legislative Council staff for
Representative Koppelman
January 30, 2023

1-31-23

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1249

Page 1, line 16, replace "an institution" with "a school"

Page 1, line 17, remove "biological"

Renumber accordingly

2023 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Pioneer Room, State Capitol

HB 1249
2/7/2023

Relating to requiring schools to designate their 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 10:16 AM

All 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, Gretchen Dobervich. Rep. Jayme Davis and Vice Chairman Matthew Ruby

Discussion Topics:

- **Reconsider the Action on the bill**

Rep. Rep. Rohr Moves for a Reconsideration of HB 1249

Rep. Anderson- Seconds the motion.

Voice Vote- Motion Carries

Rep. Ruby- Moves to further amend by removing lines 28 &29 on page 2 and lines 1-9 on page 3

Rep. Anderson- Seconds the motion.

Representatives	Vote
Representative Robin Weisz	Y
Representative Matthew Ruby	Y
Representative Karen A. Anderson	Y
Representative Mike Beltz	Y
Representative Jayme Davis	Y
Representative Gretchen Dobervich	Y
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 Carries 9-5-0

Rep. Anderson Moves for a Do Pass as Amended

Rep. Fegley- Seconds the Motion

Roll Call vote was taken:

Representatives	Vote
Representative Robin Weisz	Y
Representative Matthew Ruby	Y
Representative Karen A. Anderson	Y
Representative Mike Beltz	N
Representative Jayme Davis	N
Representative Gretchen Dobervich	N
Representative Clayton Fegley	Y
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 11-3-0 Rep. Prichard will carry the bill.

Chairman Weisz- Closes the meeting for HB 1249 at 10:23 AM

Phillip Jacobs, Committee Clerk by Risa Berube

Adopted by the House Human Services Committee

February 7, 2023

2-7-23

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1249

Page 1, line 1, remove "and a new section to chapter 44-08"

Page 1, line 16, replace "an institution" with "a school"

Page 1, line 17, remove "biological"

Page 2, remove lines 28 and 29

Page 3, overstrike lines 1 through 9

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1249: Human Services Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1249 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "and a new section to chapter 44-08"

Page 1, line 16, replace "an institution" with "a school"

Page 1, line 17, remove "biological"

Page 2, remove lines 28 and 29

Page 3, overstrike lines 1 through 9

Renumber accordingly

2023 SENATE JUDICIARY

HB 1249

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1249
3/27/2023

A bill relating to requiring schools to designate their athletic teams and sports for male, female, or coed participation and limitations on use of governmental property for athletic events.

3:49 PM Chairman Larson opened the meeting.
Chairman Larson and Senators Myrdal, Luick, Estenson, Sickler, Paulson and Braunberger were present.

Discussion Topics:

- Fair competition
- Athletes
- Definition of sex
- Sports scholarships

3:49 PM Representative Koppelman introduced the bill and provided written testimony #26751.

3:58 PM Cambree Eckenbauer spoke in favor of the bill.

4:02 PM Linda Thorson, State Director, Concerned Women for America, testified in favor of the bill #26527.

4:07 PM Patricia Leno testified in favor of the bill #26843.

4:12 PM Mark Jorritsma, Executive Director, North Dakota Family Alliance Legislative Action, testified opposed to the bill #26724.

4:15 PM Christopher Dodson, North Dakota Catholic Conference, testified in favor of the bill #26718.

4:16 PM Caedmon Marx, Outreach Coordinator, Dakota Outright, testified opposed to the bill #26744.

4:19 PM Willow Davis spoke opposed to the bill.

4:20 PM Christiana Sambor, North Dakota Human Rights Campaign, and North Dakota Human Right Coalition, and Youthworks testified opposed to the bill #26729, 26728.

4:35 PM Kelsey Davis testified opposed to the bill #26695.

4:37 PM Andrew Alexis Varvel testified neutral on the bill #26613, 26612.

Additional written testimony:

Faye Seidler #26641

Doug Sharbono #26639

Elizabeth Loos #26630

Bryon Herbel #26627

Kristie Miller #26626

Callie Smith #26614

Whitney Oxendahl #26609

Patricia Burckhard #26591

Mariah Deragon Ralston #26587

Rebecca Zimmerman #26580

Alannah Valenta #26569

Cody Schuler #26777, 26707

Karen Van Fossan #26721

Charlton Stanley #26717

Cionda and Jacob Holter #26712

Thea Holter #26709

Gina Sandgren #26702

Shaunna Upgren #26686

Shannon Full #26683

Gordon Greenstein #26594

Margo Knorr #26583

4:40 PM Chairman Larson closed the public hearing.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1249
3/28/2023

A bill relating to requiring schools to designate their athletic teams and sports for male, female, or coed participation and limitations on use of governmental property for athletic events.

9:38 AM Chairman Larson opened the meeting.

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

Discussion Topics:

- Committee action

9:39 AM Senator Myrdal moved to Do Pass the bill. Motion is seconded by Senator Luick.

9:39 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 Luick will carry the bill.

This bill does not affect workforce development.

9:40 AM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1249, as engrossed: Judiciary Committee (Sen. Larson, Chairman) recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1249 was placed on the Fourteenth order on the calendar. This bill does not affect workforce development.

TESTIMONY

HB 1249

1/20/23

Dear Members of the North Dakota Legislature,

I have researched and taught gender studies in a higher education setting for almost ten years. In this testimony, I am speaking for myself in response to HB 1249, and not for the institution by which I am employed.

Trans kids exist. Trying to ban the existence of certain people will not and cannot work. Regarding whether trans girls should be allowed to play on girls' sports teams, the answer is yes. First, school sports are intended for children to engage in meaningful competition, and bodies vary. While it is true that many men are stronger than many women, that is not always the case, and there are, of course, many other factors involved in what gives athletes advantages—speed, skill, flexibility, and even what hand is dominant. Significant natural physiological variations exist within each sex, so trans women athletes do not have a guaranteed advantage over cis women athletes Second, forcing transgender girls to play on the boys' teams (or vice versa) would be incredibly damaging to their mental health and self-esteem, especially because they might already feel marginalized and different. To conclude, scientific evidence demonstrates that the "fear" of trans girls having an unfair advantage is an unfounded nonfactor that would cause real and tangible harm to transgender children in our state. Please, let's be better than this, North Dakota.

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 1249, which bans transgender students from competing on the team that aligns with their gender identity. 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 NDHSAA has a policy in place to address transgender athletes who wish to compete on a team that they identify with. I have not been aware of any problems with transgender female or male athletes competing against and unfairly beating cisgender athletes in our state. In fact, I am not aware of any transgender athletes competing in any sport in our state. The cisgender female athletes as well as the coaches that I know personally do not have a problem with the NDHSAA policy and do not see the need for this bill. I am tired of our state legislators wasting time and taxpayers' money to make a law to address a non-existent problem.

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 an adult athlete who did not transition until they were past puberty, but there is no documented evidence that young transgender female athletes have an unfair advantage with cisgender athletes. The research I have seen that showed an advantage for transgender athletes was done on adult elite, highly trained athletes who didn't start hormone suppressing therapy until they had already achieved their maximum testosterone levels, muscle mass and red blood cells. Studies have also shown that there is a dramatic decrease in these when the athlete starts using estrogen. A young middle school or high school athlete would not have the same level of male hormone in their body when they start puberty blocking therapy at a younger age.

Contrary to some legislator's views, this bill does go against Title IX, is discriminatory and will make our state open to lawsuits. 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. I know young people and their families who are ready to leave our state because of the perception that everyone here is homophobic and transphobic. Please note that 30% of transgender youth in our state have contemplated suicide. With all of the bills attacking sexual and gender identity this session, it will make these young people more vulnerable to depression and suicidal thoughts. National businesses are aware of this and will not want to consider setting up shop in our state.

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 a chance to meet other children and form lifelong friends. 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 educators and coaches, 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

The requirement to designate teams by sex is an invasion of privacy for children. In high school, we are all awkward and bumbling, trying to find our place, and explore independence. Adding and enforcing teams by sex makes little to no sense because teens are participating either for fun or to beef up a college application. Any measures that make it difficult for teens to be themselves and have fun like this proposed ban harms not only teenagers who are trans and gender nonconforming, it hurts cisgender teens as well. That type of scrutiny placed on young girls, both trans and cisgender, is violating. It makes little to no sense to enforce measures that harm all teen girls in schools. This piece of legislation is a violation of privacy, and has no place in this country in 2023. Protect all the teen girls in sports by voting no on this bill.

1-22-2022

Dear legislators,

I am writing in opposition to the proposed bill to limit transgender participation in sports. My son did not transition until after high school, however while in school was out as a lesbian and was involved in sports and in our school. Sports were immensely helpful in keeping our son in school. The sports arena provided a family-type atmosphere which also aided in relieving some of the depression my son struggled with.

My wonder is if you limit transgender humans, what is next? And why is this necessary? For those of you with children, go home and ask them their feelings towards everyone, regardless of who they are or how they identify, should play sports. Listen to their answer. I am willing to bet they will say, “Sure, why not? They are humans too.” And they would be right.

Please end this legislation now.

Thank you,

Angie Moser
Mother

WRITTEN TESTIMONY IN OPPOSITION TO HB 1249

House Human Services Committee on House Bill 1249
Date of Hearing: January 24, 2023 9:00 a.m.
Debra L. Hoffarth, 1320 11th Street SW, Minot, ND 58701

This written testimony is presented in opposition to HB 1249, which effectively prevents participation of transgender 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 1249 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]

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.

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 1249.

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

---

[1] 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"

WRITTEN TESTIMONY IN OPPOSITION TO HB 1249

Date of Hearing: January 24, 2023

Denise Ann Dykeman 1840 12th Street SW, Minot, ND 58701

My name is Denise Ann Dykeman. I am a parent, a lawyer, and a Lutheran. I have had the great privilege to befriend trans adults and kids – some of the most wonderful and brave people I could ever be blessed to encounter. This written testimony is presented in opposition to HB 1249, which appears to be part of a concerted, nationwide effort to target transgender youth for unequal treatment. Further it appears that this bill is targeted at, and intended only to affect, girls who are transgender. How very sad for North Dakota.

I am close to several transgender adults, parents of transgender children, and trans kids. A transgender child is already experiencing exclusion and feeling "different" than their peers. All parents want the best for their kids- to have a childhood full of fun, love, laughter, supportive friends, and all of the experiences and opportunities that any other kid can have. This includes participating in sports. I think that the people of North Dakota and this legislature really have to ask: are youth sports about learning teamwork, confidence, leadership, valuing different skills and abilities, and staying healthy, or it is all about winning? Because it seems to me like the reason for this rule is to eliminate any possible advantage a transgender girl might have or be perceived to have.

While it might seem unfair for a transgender girl to compete against a biological girl, I can only imagine how unfair it must feel for that same transgender girl to be forced to play on a boys' team and be subjected to teasing and cruelty that they might well endure here in North Dakota. Likely they would choose not to participate at all- and isn't that the real goal of this bill?

There are other ways to ensure that young people have equal opportunities to compete in sports that aren't discriminatory. For example, we could create teams based on skill level – this would level the playing field for everyone, as there are certainly variations in athletic ability between biological girls and between biological boys, yet the legislature doesn't seem particularly concerned about that. This bill seems to be a solution looking for a problem.

The Supreme Court of the United States has long "viewed with suspicion laws that rely on 'overbroad generalizations about the different talents, capacities, or preferences of males and females.'" *Sessions v. Morales-Santana,* 137 S. Ct. 1678, 1692 (2017) (quoting *Virginia*, 518 U.S. at 533). Therefore, laws that discriminate based on sex must be backed by an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 513. That is to say, the law's proponents must show that it "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Even if the law's objective is to protect the members of one sex, that "objective itself is illegitimate" if it relies on "fixed notions concerning [that sex's] roles and abilities." *Morales-Santana,* 137 S. Ct. at 1692.

Both North Dakota law and federal law prohibit discrimination based upon sex. The North Dakota Human Rights Act prohibits discrimination based upon sex.[1] Title VII of the Civil Rights Act prohibits discrimination based upon sex, and this includes gender identity.[2] 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."[3]

In addition, the North Dakota High School Activities Association (NDHSAA), the National Collegiate Athletic Association (NCAA), and the International Olympic Committee (IOC) have rules in place on this very 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 1249 seeks to ignore the work done by these organizations and instead enact a law that is plainly discriminatory.

---

[1] NDCC 14-02.4-01.

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

[3] 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/

This very same legislature is now considering passing a bill to recognize “Right-to-Life-Day” which would “celebrate the right-to-life, reaffirm the dignity and value of every human being, and to give thanks for the gift of life.” How wonderful. I would ask the legislature to remember that “every human being” includes transgender people. Please reaffirm their dignity and value as beloved members of our communities here in North Dakota. They need to know that they are loved, not feared or hated.

All young people, and especially transgender youth, need compassion and inclusion, not hatred and exclusion. All people within the State of North Dakota deserve dignity and respect and to be valued as part of the community.

Let them play.
Please oppose HB 1249.

Denise Ann Dykeman
1840 12th St. SW
Minot, ND 58701

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 1249, 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.***

†

CONCERNED WOMEN for AMERICA
LEGISLATIVE ACTION COMMITTEE

January 24, 2023
House Human Service Committee
Testimony in Support of HB 1249

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. Today, I am testifying for Concerned Women for America Legislative Action Committee in support of HB 1249.

Fair competition and equality in girls' sports for all school-aged female athletes is protected with the passage of pro-woman legislation, which prohibits male-born athletes from entering girls' 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 girls who train and work hard to excel in their chosen sport. Girls 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 female 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 *girls'* 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.

While HB 1249 deals with non-collegiate female athletes, Concerned Women for America of North Dakota strongly supports the protection of all women's sports, including female athletes at our institutions of higher education. We urge a "Do Pass" on HB 1249.

CONCERNED WOMEN FOR AMERICA OF NORTH DAKOTA
P.O. BOX 213 | PARK RIVER, ND 58270 | DIRECTOR@NORTHDAKOTA.CWFA.ORG | 701-331-9792
FACEBOOK: CONCERNED WOMEN FOR AMERICA OF NORTH DAKOTA

I urge you to oppose HB 1249.

This bill is directly aimed at removing transgender youth from participating in athletics.

LGBTQ Youth are more than 4 times as likely to attempt suicide than their peers (Johns et al., 2019; Johns et al., 2020). This isn't a result of the label, it's a direct outcome of being marginalized and discriminated against. This bill, and others that seek to further limit the LGBTQ+ community directly contribute to the increased risk of suicide. Do not create more spaces where transgender youth are not welcome.

The benefits of being included in a team and participating in athletics are well documented. The trans population should be able to benefit from these opportunities equally.

There are not currently many trans athletes competing. This is a bill that is incorrectly solving a problem that doesn't currently exist in North Dakota.

The ND High School Activities Association already has policies in place for these situations and creating laws on a state level for this is excessive and unnecessary.

I strongly urge you to oppose HB 1249.

I strongly oppose this bill. Banning trans children from playing sports is harmful and could potentially increase mental health problems in trans children. All children should be able to have the opportunity play sports with peers who are their same gender. 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

1/22/23

My name is Susan Draper and I reside in District 1, of Williston, ND I am asking that you please render a DO PASS on House Bill 1249." I am speaking on behalf of myself and my two student athletes that participate in both wrestling and swimming, where there are currently both men and women divisions. What is stopping a young man from deciding that the men division is too hard so now he wants to dominate the women division. School sports are meant to engage in meaningful competition, which grows leadership and team bonding. Transgender athletes participating the opposite sex sports could create a mass exodus of student athletes.

Allowing transgender women to change the meaning of the women's category makes as much sense as allowing 195-pound athletes into the 120-pound weight category for wrestling, because larger athletes were subject to awful bullying and harassment. Or allowing adults to compete against children, or only permitting impoverished nations compete in the Olympics. Sport has been set up as binary with males and females, and sport needs to adapt by adding new events and classifications, rather than throwing out the meaning of the 'girls' and women's' categories. Rather than trying to squeeze transgender athletes into one-of-two categories, male or female, sport needs to adapt.

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.

Susan Draper

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 1249. I believe this legislation is poorly written and would insert an unnecessary level of government interference into the daily lives of student athletes and schools.

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 #1249.

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 kid.

There are many people who identify with various genders, and some girls who even want to play some of the "boys" sports too, or vice versa. In supporting this bill, you would not only be punishing people who are trans, but also cis-gender people who want to play sports outside of their stereotyped gender biased activity.

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

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 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.

Since the time of 2021's House Bill 1298, the North Dakota High School Activity Association has passed even stronger restrictions for transgender athletes. While it is virtually impossible for transgender youth to compete in sports, this legislation seeks to make it even harder. While it flat out bans trans athletes by creative definitions, if a school dares go against this piece of legislation, it gives to students or parents the right to sue on the basis of perceived damages.

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.

The worst part about this is our trans youth just keep suffering. Sports in middle school and highschool are so much more than just playing to win or get a scholarship. They're about building teams and friendships. They're about giving kids the chance to get out of their shell and blossom into their own people. If there is a compromise to be made here, just remove trans people from competitive placement, but let them compete. Allow them to at least have a team, friends, and develop at a sport they can play in some college out of North Dakota.

This would still be horribly discriminatory and socially othering and damaging in many capacities, however…it remains less horribly discriminatory and socially othering and damaging in many capacities than the current plan. It's already a nightmare for trans athletes to compete. It's already basically impossible. This isn't even the nail in the coffin, this is pouring cement over the grave.

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.

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

Committee members,

I oppose bill 1249 because of the fact that when youth are in high school, they are in their most formative years in life. Youth are molded each day by interactions with others and highly influenced by those they are surrounded by. We know these people to be role models, many of which I would anticipate you to identify as. For transyouth recognizing their internal identity, to be met with restrictions of being included as part of a team because of that recognized internal identity, will foster ostrification. For youth to thrive, they need to feel a sense of belonging and security with those they are surrounded by. If transyouth are being restricted access to opportunities to foster team skills, as a society, we will be molding isolative withdrawn citizens.

Allowing transyouth to be a part of a team will provide opportunities to promote skill development with communication, socialization, and building self-efficacy. Each of those skills are required to be a productive member of society. Removing opportunities to participate in sports to learn these skills, will guide transyouth towards other social engagement activities (drinking, drugs, sexual engagements) where they do feel welcomed and included. These types of social activities will not promote skill development in transyouth. Let’s choose to create opportunities for all youth to develop skills versus a pre-determined future.

Thank you for your time and consideration of how formative this time in life is for all youth.

Mariah Bates
Williston, North Dakota
House Bill 1249

Members of the House Human Services Committee,

My name is Mariah Bates and I reside in District 1. I am asking that you please render a DO PASS on House Bill 1249.

With my experience of being an avid every season athlete throughout my school years and into adulthood, I can't imagine being placed in a situation where I had to go up against a male athlete in the athletics I participated in when I was a student. I would be horrified and worried for my health and safety due to the strength differences among males and females. As an adult, I have played in summer coed league athletics and know how scary it is to be standing infield when a male comes up to bat, or to be on the net when a male is spiking a volleyball, along with many other similar situations.

The participation in athletics by school age kids, from elementary to college, has a significant impact on their growth as an individual, as a team member, as a leader, and as a healthy growing member of our country. Allowing transgender athletes to participate in male and female athletic teams would deter athletes from participating, cause a mass exodus of student athletes, and ultimately have a huge impact on the future of our students and their success as an individual.

As a parent to a young daughter with another on the way, I know that I will not allow my children to participate in athletics if they will be up against male athletes who could potentially be a threat to my children's safety and health. With that, I can't even begin to fathom the thought of my daughters being in the same locker room with a male athlete and pray they never have to experience that.

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

Mariah Bates

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.

NORTH OF NORMAL
FARGO
MOORHEAD | WEST FARGO

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

Fargo-Moorhead
Convention & Visitors Bureau

2001 44th St S
Fargo ND 58103

800 • 235 • 7654
701 • 282 • 3653
(fax) 701 • 282 • 4366

info@fargomoorhead.org
www.fargomoorhead.org

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

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.

First and foremost, it is transphobic and ignorant. The basis of this bill is to target transgender girls and women from participating in and accessing basic athletic opportunities in the state. Statistically, transgender women do not have advantage in outplaying their cisgender counterparts. Please consult the data worldwide.

Secondly, consider the harm that this will cause school districts, to be open to lawsuits and attacks. Consider the state that public school districts are already in since the COVID-19 pandemic. Morale is already suffering, resources are suffering, and we already are seeing a decline in interest from working in and supporting public education in North Dakota. Do we want to further disincentivize coaches from coaching by bringing this divisive bill into law? The reality is, we do not have a problem with transgender youth participating in sports in North Dakota. We simply have members of the public and some legislators who would seek to drive transgender youth further out of opportunities for engagement in our communities. However, this bill does not just affect transgender youth, it also creates fear, stress, and more potential for legal ramifications among our public servants who work in school districts and government agencies. Half of this bill is simply outlying who has a right to sue whom over a problem that really doesn't exist in our state.

For these reasons and the many others listed in the majority of testimonies opposing HB 1249, I ask you for a DO NOT PASS.

Thank you for your time and consideration,

Naomi Tabassum, LPCC

Dear Members of the Senate Judiciary Committee,

My testimony is in opposition

to Senate Bill 1249. I ask that you give this bill a **Do Not Pass.**

Banning transgender athletes from sports is absolutely ridiculous. No person wakes up one day and decides to transition to a different gender just to dominate the junior high girls volleyball team.

This is a non-issue created just to take away more rights from the most vulnerable of the LGBT+ community, the trans youth.

Tell trans youth that you support them by please, voting no on Bill 1249.

Please,

consider not passing this dangerous piece of legislation; our children are counting on you.

Thank you for your time,

consideration, and service to our state

Best regards,

Becky Craigo

President of Beach Pride Family; House of Safe Spaces

Beach North Dakota

North Dakota
Travel Alliance Partnership

P.O. Box 2599
Bismarck, ND 58502
(701) 355-4458
FAX (701) 223-4645

Testimony of James Pursley
Executive Director, ND Travel Alliance Partnership
In Opposition to HB 1249
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 1249, particularly Section 2, which would forbid the use of publicly funded facilities for athletic events that do not restrict participation of transgender athletes under the age of 18 or those enrolled in high school.

Under HB 1249, 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.”

While TAP understands the purpose of this bill is to ensure competitive balance and equitable opportunities for all, it is our belief that this action would have unintended negative impacts on our state and its athletes. For instance, would high school wrestlers or swimmers who also are members of national sanctioning bodies be allowed to train in publicly funded facilities?

We believe competitive balance should be left to sanctioning bodies with expertise in such matters. HB 1249 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 USA Wrestling, USA Swimming and the NCAA.

In Fargo alone, USA Wrestling results in $7.7 million in direct visitor spending. A single USA Swimming event results in $250,000 to $400,000 in direct visitor spending. The potential economic harm that may be caused by Section 2 of HB 1249 outweighs the benefit. TAP asks the House Human Resources committee to consider a do not pass for HB 1249.

Thank you.

January 23, 2023

Chairperson Lee and Committee Members,

I strongly urge a Do NOT Pass on BH 1249. 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, who is most likely a minor, 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 1249.

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

Bill HB1249 excludes and discriminates against kids 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 children 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!! 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 kids and their ability to participate in their communities. WHY are our state legislators so obsessed with regulating and controlling the bodies of children? NO ONE is asking for this bill, and NO ONE needs this bill, because the number of trans kids participating in school 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."

What this bill WILL do, in addition to driving transgirls out of sports altogether and socially and lawfully punish them for existing, is allow bullying, abuse, and harassment of any girl on a girl's team who doesn't LOOK feminine enough. Just as the last bill would have done. These kids are already under so much pressure to perform their gender in JUST THE RIGHT WAY and engagement with sports is often the ONE PLACE where girls can let go of the fear they won't be girly enough to please their peers. Now you're trying to enact a law which would allow people to pursue damages and injunctive relief for letting them participate in sports?

Sure, these kids will likely have documentation of their "sex"--I'd imagine the result of this bill will require that everyone provide said documention in order to participate in school sports at all (and its convenient that the bill ignores the existence of intersex children, 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 child whose gender has been called into question, the way that accusation will follow them through the rest of their schooldays won't be so quickly cleared up. You cannot attack and target transgirls without allowing and encouraging the attack and targeting, the bullying and harassment, of ALL girls.

Just let the kids live! Let them play! Let them be part of teams and enjoy their childhoods 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 1249.”

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

January 23, 2023

Regarding: House Bill 1249

Dear Chair Larson and members of the Senate Judiciary Committee.

My name is Luis Casas. I am a physician, and I am board certified in Pediatric and Adult Endocrinology.

My testimony is in **opposition** to House Bill 1249. I ask that you give this bill a **DO NOT PASS**

The reasons for my opposition to this bill includes:

1) As a pediatric and adult endocrinologist, I feel that this bill directly discriminates against transgender children.
    a. I treat adolescents with disorders that affect puberty hormones including biological males who are born with or develop primary testicular failure and biological females who are born with or develop primary ovarian failure. I treat adolescents born with disorders of sex determination (DSD) where their genetics based on DNA may not be consistent with the appearance of their external genitalia. I also take care of adolescents who are transgender who do not identify with the gender assigned at birth. In all cases, the appropriate pubertal hormones are replaced consistent with their gender identification. Yet, transgender adolescents are indiscriminately targeted in this bill even though they receive the same treatment as CIS adolescents requiring hormone replacement.
    b. The data is very clear that treatment during early adolescence before native hormones can fully masculinize or feminize the adolescent does not advantage trans adolescents compared to CIS adolescents going through natural puberty. For those adolescents who transition hormonally after the completion of their biological puberty, studies show that among transwomen competitive advantages from the effects of prior testosterone exposure significantly declines by 12 months of hormone treatment.
    c. Children and adolescents are often treated with growth hormones to enhance their growth, often to final heights beyond their genetic potential which one could argue would advantage that adolescent in sports compared to others less tall. Yet, I see no legislative attempts to limit their participation in school sports.
2) As a citizen of the state of North Dakota, I have not yet heard of any circumstances where this has become an issue in high school sports.
3) Trans-adolescents already face surmountable challenges, discrimination and bullying by those who may not understand or agree with their need to transition to the gender they identify with. Studies have consistently shown that those who are supported are less likely to commit suicide or self-harm than those who are not supported by their peers or others. This bill is yet another attempt to bully and discriminate against an already vulnerable group.

PLEASE VOTE: DO NOT PASS for this bill.

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

Sincerely,

Luis Casas
Pediatric Endocrinologist

Dear Representatives and members of the House Judiciary Committee,

I am writing in opposition House Bill 1249. This bill is erasing all students who identify as non-binary, or transgender. The definitions of sex is limiting and outdated. Students should be allowed the opportunity to play on a team with the gender they identify with. Sports can be a positive in a youths life. We know that sports have many benefits, from team building skills, exercise, and a place to belong. Playing sports can and does improve mental health, which we know is a major concern among our youth, especially LGBT+ youth. This bill takes that opportunity away for trans students, and continues to push them to the outside calling them other. Lets work to make our schools inclusive as our culture changes rather than exclusive.

Respectfully,
Molly Haagenson

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.

I am a public school educator and a 29 year resident of North Dakota. HB 1249 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 1249."

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:

ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota
P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

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.

ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota
P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

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.

ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota
P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

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

DO PASS – HB 1249

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 1249.

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

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 1249 is a proposed bill that is rooted in fear. We need not be afraid of trans children, 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 kids. Why would we do anything to get in the way of that? There is no legitimate reason for the ND Legislature to get involved in sports at this level. This bill is wrong 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 1249

Charles Allen, DO, FACOEP, Emergency Medicine Physician

January 23, 2023

Good morning Chair Weisz and honorable members of the House Human Services Committee. 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 mass[1] 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 females[2]. Elite female runners are 10-12% slower than their male counterparts[1]. 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.

Opposition to HB 1249

I stand in opposition to HB 1249, and urge a Do Not Pass.

The North Dakota High School Activities Association (NDHSAA), after much deliberation and careful consideration, has created guidance governing the participation of trans athletes in high school sports. Why does the legislature feel a need to meddle in a process that has been carefully thought out by those actually involved in athletic programs.

The value of team sports is the sense of belonging, of working together, of celebrating victories and defeats together. North Dakota High School Athletics are not a professional million-dollar industry. The presence of a trans female athlete is not going to ruin someone else's chance at a career. It is a way to teach youth growth and maturity for all participants. Why should trans athletes be denied the ability to participate and belong to such an important formative team experience?

This proposed bill is terribly discriminatory against a group that is already prone to higher rates of depression and suicide, as they struggle to find their way in life. This bill needs to be defeated, especially in a state that claims to be pro-freedom, and pro right-to-life. Trans people deserve the same freedoms and right to a healthy living environment.

Therefore I stand in opposition and urge a Do Not Pass to HB 1249.

Janet Mathistad
Minot ND

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 is 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

House Bill 1249

Members of the committee,

I have two daughters who play sports in the North Dakota, and I would like to see HB1249 pass for several reasons:

1) **Fairness:** Males are on average biologically larger, faster, and stronger than females, and to keep the playing field level, females need their own sports. Please keep things fair and make sure females compete only with females.
2) **Physical Safety:** As stated above, males are biologically larger and stronger on average, which would likely result in more injuries for females, especially in contact sports. There are recent examples in the news of females being seriously injured (by males) in volleyball, boxing, and rugby. Please protect our female athletes.
3) **Locker Room Safety:** Allowing biological males in female sports opens the door to all kinds of locker room issues. The females on the swim team with biological male Lia Thomas were silenced when they complained about having to share a locker room with Thomas, who has full male parts. Don't let this happen in North Dakota. Please protect our daughters.

I urge you to pass House Bill 1249.

Thank you,

Joy Ankenbauer

Bowbells, ND

District 2

My name is Joseph Larson, and I serve pastor with St. Mark's Lutheran Church in Fargo, ND. I one of a few openly gay ELCA pastors called by Lutheran congregations in North Dakota. My congregation voted to become welcoming towards LGBTQ individuals and their families over 30 years ago—which was a big deal then and still is today.

I am writing to voice my opposition to HB 1249, which would effectively ban transgender youth from participating in sports teams that align with their gender identity in North Dakota.

My congregation currently has three families with transgender children, and other members with transgender grandchildren and relatives. I know each of the parents supports their transgender child in every way they can. They love and care for their children just as much as parents of "cisgender" (not transgender) children support theirs. Sports are an important part of a young person's school and social development. Transgender youth do not pose a risk to other children or adults.

Transgender youth simply want to sincerely, participate in sports activities that they enjoy and they should not be prohibited from participating on sports teams.

I believe that we as Christians are called by Christ to love one another and not pass judgment on one another. This bill continues to promote fear and bullying that many transgender youth already face. School bullying statistics are frightening: 78% of respondents to the National Transgender Discrimination Survey (NTDS) reported being harassed, 35% physically attacked, and 12% sexually assaulted.

If we want to retain young people to live and work in our state, we need to create communities that welcome and embrace people from diverse backgrounds and experiences.

It's time for those of us who call ourselves Christians to live out our faith by supporting policies that support the dignity, humanity and needs of all people. As the prophet, Micah once said: "What does the LORD require of you, but to do justice, to love kindness, and to walk humbly with your God?" (Micah 6:8). And as our Lord Jesus Christ commands us: "Love your neighbor as yourself" (Matthew 22:9), and "Do unto others as you would have them do unto you" (Luke 6:31).

I pray that you would vote to not pass HB 1249 and also support other legislation that creates a welcoming and caring environment for our young people in our schools and communities and state.

Sincerely,

Rev. Joe A. Larson
St. Mark's Lutheran Church
417 Main Avenue, Suite 401, Fargo, ND 58103
pastorjoe@stmarkslutheranfargo.com
Cell: 612-750-5079

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 1249.

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 Flam

January 23, 2023

Chairperson Lee and Committee Members,

I strongly urge a Do NOT Pass on HB 1249. This proposed bill is a step backwards in school 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 a school is providing subpar interscholastic or intramural athletic teams or sports for women. This section could be used to shut down conversations in school boards 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 minors to prove the status of their sexual organs or chromosomal makeup to schools, which would be a violation of an individual's privacy and against federal law which gives minors the legal right to health information privacy at age 12.

Do NOT Pass HB 1249.

Sincerely,
Gretchen Deeg
Bismarck, ND

My name is Cambry Ankebauer and I am a junior in high school at Bowbells, North Dakota. I participate in Speech. I wrote a persuasive speech explaining why biological males should not be allowed to participate in women's sports. I have researched this topic and would like to share my findings with you.

Men are physically more athletic than women. Dr. Gregory Brown, a professor of exercise science at the University of Nebraska prepared a report highlighting the physical differences between men and women. His report points out the various physical aspects of males as compared to females, "...from greater height and weight and larger, longer, and stronger bones to larger muscles and higher rates of metabolizing and releasing energy. These innate physiological traits result in greater muscle strength; stronger throwing, hitting, and kicking; higher jumping; and faster running speeds for males, all of which create an athletic edge over female athletes." Men also have higher lung capacity than women.

Have you ever wondered why we have separate sports for males and females? It's because it wouldn't be fair to the females if we made them compete against males. We have men's sports for men, and women's sports for women. According to the NDHSAA, the state qualifying time for the men's 400 meter dash is 52.24 seconds and the women's is 61.74 seconds. The class A state qualifying javelin throw for men is 160 feet; 50 feet more than the women's class A state qualifying javelin throw which is 110 feet. We have these numbers for a reason. We have separate sports for a reason. Mashae Miller, who is on my school's cross country team, placed 4th in state this year. Had she been competing against males, she would have placed 114th. Men are physically more athletic than girls. It is unfair to let males compete against women regardless of what gender they think they are.

It is also unsafe for the women involved when a biological male competes. A male Mixed Martial Arts fighter competed against a woman and broke her eye socket, giving her a concussion. A male played with women in volleyball and spiked the ball so hard that it gave a girl on the opposing team a severe concussion. It took weeks for her to recover. A male athlete who participated in rugby has been celebrated for injuring female opponents. When males compete against females, not only is it unfair for the girls, but it is unsafe for them as well.

Every time a male is put onto a women's team, a woman is denied that position. Every time a male makes the podium for excelling on a female team, heads are turned away from a girl, who would have taken that place if athletic rules had not allowed males to unfairly compete in the first place. Every time a girl goes up to compete, and there is a biological male there competing, the odds are stacked against her. It is outrageous that this has even been allowed to happen. Trying to cater to a relatively few gender-confused biological males by allowing them to compete on girls sports teams is a "smack in the face" to the many female athletes who want to compete fairly without undue safety concerns. We want to compete fairly; please protect that right.

Cambry Ankenbauer
District 2
House Bill 1249

Olivia Data
Testimony on HB 1249
January 24, 2023

RE: Testimony in Opposition of HB 1249

Good afternoon, 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 1249.

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 children. HB 1249 poses a serious threat not only to transgender children, but to any child 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 1249 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 girl[1].

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 unappreciated[2]. A study in 2019, for example, showed that women athletes were covered on highlight shows and televised news only 5.4% of the time[3]. 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 1249 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 suicide[4]. 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 respected[5]. 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 children who will be pushed further into the arms of hatred, ostracization, and shame if HB 1249 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.

Olivia Data
Testimony on HB 1249
January 24, 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, transgender *children* already face high levels of discrimination. We should be protecting them, not alienating them from our sports, our schools, our state. HB 1249 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 1249. 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

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. 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.

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 #1249

68th Legislative Session

Senators: Boehm, Estenson, Larson, Myrdal, and Paulson
Representatives: Koppelman, Cory, Kasper, Louser, Meier, Novak, VanWinkle

I am writing in opposition to HB #1249. I am a parent of a transgender person and I believe my voice should be heard.

Many of you if not all of you have no first-hand experience interacting with a transgender person or a parent of a transgender person. Your lack of knowledge and callousness toward the transgender community shows in this bill and other bills that are all designed to erase the transgender community in North Dakota. Where knowledge and compassion should be used, your using fear and false narrative which social media and fake news channels such as FOX News continues to spew.

Raising a transgender child in North Dakota, I have much more insight than a lot of people in North Dakota other than other transgender parents and the medical professionals that treat and help them I know first-hand the struggles that the transgender child faces every day.

First, let me say this loud and clear, transgender kids are born this way. Transgender is not a choice, not a phase or fad. Being transgender is absolutely not a way to gain an edge over girls in sports. That is one of many false statements that the group who choose to hate transgender people like to state.

My child never played sports. My child never wanted to play sports. However, if my child wanted to play sports, why should she be kept out of the sport of her choice? My child looks just like any other girl her age. Her body isn't that of a male, her mannerisms and characteristics are all of female her age.

Keeping kids from playing sports with their peers is cruel and uncalled for. There is no reason to fear a transgender child playing any sports, using a locker room or bathroom with the same sex they identify as. Transgender kids just want to belong and be a part of their schools activities. These fears and concerns are all unfounded. There has been no incidents in the State of North Dakota in which a transgender person has assaulted or accosted a CIS peer. There have been instances where the CIS peer has been the aggressor and has done criminal acts on school grounds.

To judge a person whom you don't know or have any contact with because of a medical condition, that is not only cruel but it is plainly being a bully. Transgender athletes DO NOT dominate sports that they participate in. That also is another false story spread by those whose agenda is to rage war against the transgender community.

Transgender kids shouldn't be ostracized because of the ignorance of adults who say they are acting in the best interest of girls because the transgender person is a girl. Her brain, under MRI imaging, is the same brain as her female peers. Doctors know this, parents know this, and the transgender person knows this, but the legislative body here clearly does not know this.

HB #1249

Keeping transgender kids from playing sports with their CIS peers is bigotry and unfair. The transgender person didn't ask to be born this way. The transgender person contributing to a team sport just like any other student in their school.

What are you teaching the CIS students in the schools by even drafting a bill like this? You are teaching students that they can discriminate against someone who is different from them. You are NOT teaching tolerance, acceptance and empathy. You're encouraging the CIS students to look at a classmate as less than. Is that how you want our children in North Dakota to see others? Would you allow this to happen to children who have Downs Syndrome? That is something a person is born with. Would you think it is ok for the CIS peers to bully and pick on the person with Downs Syndrome? There's no difference, the Downs Syndrome person is different than the CIS students. No that wouldn't be tolerated but it's open season on transgender students at school and here at the Capitol.

Schools are supposed to be a place where knowledge and tolerance is fostered. This bill allows schools to tell their transgender students they must ignore how they feel and see themselves. This bill neglects to see how this harms the self esteem and mental health of the transgender student. No one likes to be ignored let alone told to be something they aren't. Would you all want to go through life as the opposite gender just because you being who you are makes them uncomfortable? Would you willingly wear clothing and make yourself up as the opposite gender just to make me happy? No, you wouldn't do it so then why impose this on our youth?

Suicide is so high in our schools and the suicide rate is twice the rate of those who are CIS. This is unacceptable and instead of making these transgender kids feel worse and all alone, this bill just adds to the suffering of transgender kids.

Where is the compassion and acceptance that those of you who say you are Christian? This bill is anything but what Christ taught. Our Lord and Savior would not go out of His way to make the life of an innocent person worse.

This issue has been addressed two years ago with HB #1298. The State already has a guideline on transgender students who play sports. This bill is coming around again to try to keep the transgender students from playing sports. In those two years since HB #1298, has any incidents that arose from a transgender athlete has dominated a high school sport? No.

I encourage you to meet a parent of a transgender person. I know that parents of transgender kids want to be heard and would gladly sit down and talk with you, enlighten you as to what their family has gone through and what this bill would do to the student.

I ask you to vote Do Not Pass on HB #1249

Kristie Miller
Parent of transgender

Chairman Weisz and members of the Human Services Committee

My name is Tammy Owens. I reside in district 41 from Fargo. I am writing in support of HB1249. I believe that it is best to have separate male and female teams unless it is specified that it is coed. My reasoning for this is the physical strength and abilities between the sexes. In junior and senior high the males are much more muscular and the safety of females can be in jeopardy. This is just a plain matter of biology. I also believe that if males are allowed to participate on female teams this will limit the ability for females to succeed in their sport. If we allow males to play on female teams this will undermine all the progress that has been made over the years for female athletes.

These are just my opinions but thank you for taking time to consider this important issue for our children.

Tammy Owens

“My name is Lisa Pulkrabek and I reside in District 31. I am asking that you please render a DO PASS on HB 1249.

Boys are boys and girls are girls. We all know this to be a fact of human nature. Our girls deserve the respect due to them in regards to playing sports safely with individuals of the same sex. Females and males are clearly made physically differently. Just think of muscle mass, speed and endurance. It is dangerous for girls to compete in certain sports with males who are much stronger than they are. A confused male who thinks he is a female needs counseling and psychological help not access to dominating girls on the field and viewing them in the locker room.

I urge you to support the passing of House Bill 1249.

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

Lisa Pulkrabek

“My name is Wade Pulkrabek and I reside in District 31. I am asking that you please render a DO PASS on HB 1249.

Think of your daughters, sisters, wife, or your mother - did they or do they play sports? 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 Johnny, the kid they always knew who played sports with the boys all of a sudden announced that this year he is a girl and wants to be called Jane. Now Johnny - who is still a male and will always be a male is granted permission by the school to use the girls restroom, play sports with the girls and change clothes in the girls locker room before and after practice and games. Johnny is taller, stronger, faster and better at the sport than all the girls on the team. So he wins the competitions. He makes the girls uncomfortable in the locker room - a place that they previously considered a safe zone, a no boys 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 1249.

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

Wade Pulkrabek

January 23, 2023

Opposition to House Bill 1249

Dear House Members, My testimony is in opposition to HB 1249. 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 are 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 1249.

Shawn Nixon

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. It does nothing to advance any laws and only seeks to punish kids just wanting to be kids. It targets trans individuals and people who wish to just play sports with their friends. As I read more and more of these bills written in this LGBTQ witch hunt I have to ask about the mental state of those trying to pass these. Because all they are doing is excluding, targeting, and punishing already marginalized children.

-Nate Brown

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

Do Pass Testimony
of Doug Sharbono, citizen of North Dakota
on HB1249
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 HB1249 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 1249 is rightly all of that. In my opinion, it truly balances diversity, equality, and inclusion.

My position on House Bill 1249 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)

We have been told by opponents to HB1249 there will be no USA Swimming in ND with HB1249. 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 HB1249 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)

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. HB1249 is in the right time, and done in the right place, the ND legislature.

You will hear opponents to House Bill 1249 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 HB1249. HB1249 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 HB1249, 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 1249 and its related bill 1489.

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 Spacial 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?

NORTH DAKOTA PSYCHIATRIC SOCIETY

A District Branch of the American Psychiatric Association

January 24th, 2023
From: ND Psychiatric Society
Re: In Opposition to HB 1298

Esteemed Chairman Weisz and Committee Members,

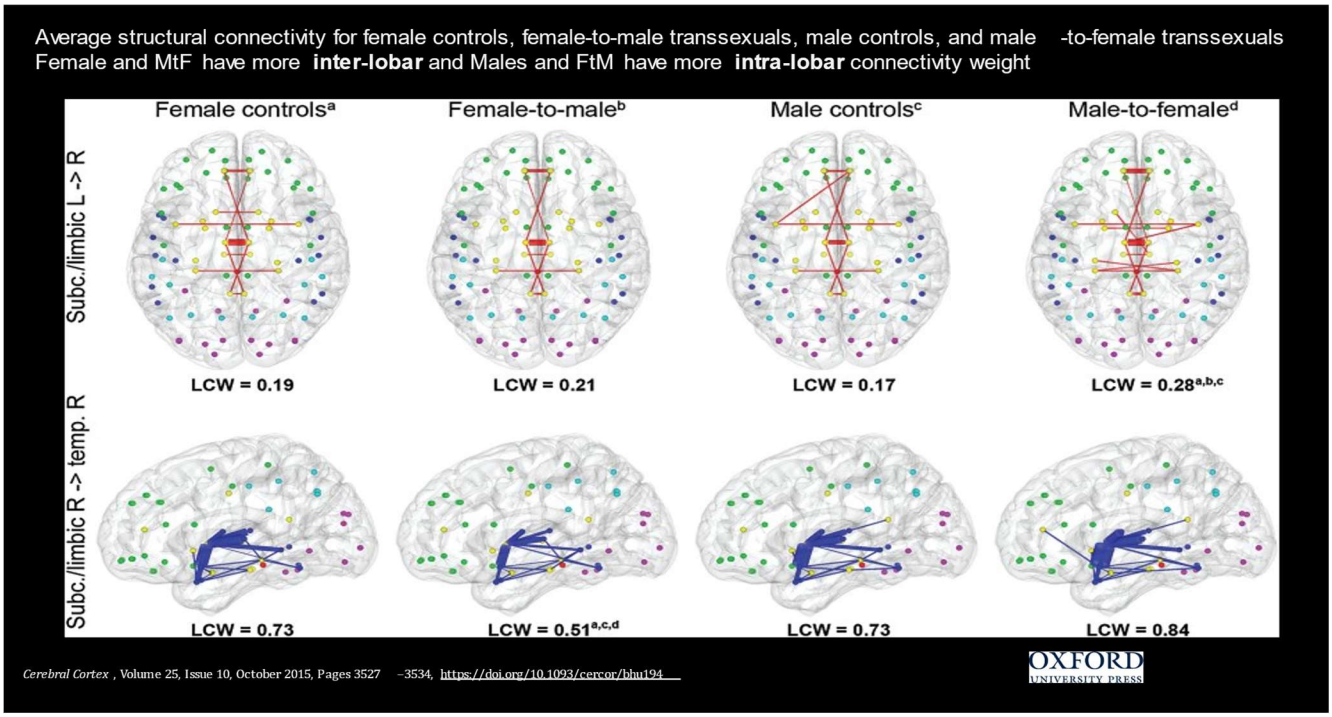
My name is Gabriela Balf, I am a psychiatrist in Bismarck and a Clinical Associate Professor at UND, and I speak on behalf of my psychiatric society, as well as on my behalf.

We had this discussion two years ago. Since, there have been no problems with trans girls athletes taking trophies in sports in our state. Tragically, the toll of the pandemic and of increased transphobia translated into increased rates of depression and completed suicides for our North Dakotan children. Data speaks for itself. Our state's data. We have also experienced a hemorrhage of bright trans kids and their families leaving the state due to the increased bullying at all levels.

Why persist in increasing minority stress for a small number of our children? When we face so many urgent issues related to the mental health of children 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 children**, 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 image[1], 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 thorough bullying like only kids (or insensitive adults) can provide. Several sources summarized in 2020[2]:

- 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, 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).

Our own youth data - North Dakota LGBTQ+ School Climate Report (2021) Faye Seidler.

Suicide:

- 61.6% Seriously considered attempting suicide
- 48.5% Made a plan to attempt suicide
- 33.3% Attempted suicide

Mental Health

- 84.6% Do not turn to adult when feeling sad, empty, hopeless, angry, or anxious
- 26.7% Have no idea who to talk to when experiencing distress
- 51.7% Can identify one adult to talk to if they have a problem
- 61.1 % Reported bad mental health for one week or more each month.

Bullying

- 45.6% Experience electronic bullying
- 59.6% Experience bullying on school property
- 8.7% Straight students bullied due to perception they were LGBTQ+

Sexual health

- 21.3% Have had sexual thing done to them they did not want
- 9.8% Texted, e-mailed, or posted electronically a revealing or sexual photo
- 13.4% Have had sex

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 population[3]!!

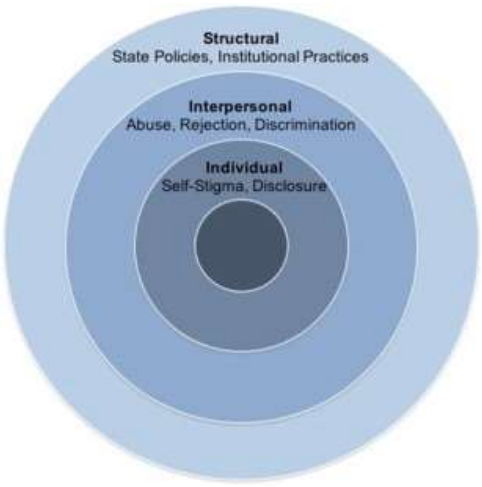
Furthermore, if they receive social affirmation, one adult in their environment respecting their preferred nouns, etc, their suicide likelihood rate goes down by 70%.

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 kids 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.

Stigma as a multi-level construct. [2]



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

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 1249

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 1249 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 females[2]. It is unethical to allow genetic males to participate in female sports. HB 1249 shows true respect for athletes who are genetically female. HB 1249 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.

.

Testimony in Support of HB 1249

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

Good morning Chair 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 1249 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 mass[1] 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 females[2]. Elite female runners are 10-12% slower than their male counterparts[1]. 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 1249 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

I stand in **Opposition** of HB 1249: "Relating to requiring schools to designate their 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 – groups of people that certainly include transgender kids.

This bill is a carbon copy of what HB 1298 was in 2021, an attempt to ban transgender women from women's athletics. 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 our state and NCAA requirements.

Per the NDHSAA, for trans women to participate in women's athletics, they must meet the following requirements. "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." Along with that, the NDHSAA requires: "updated medical treatment and/or hormone therapy verification is required annually."

This ruling has changed from the prior requirements that trans women had to be on hormone replacement therapy (HRT) for one calendar year.

I do not believe we have any trans women participating in women's athletics within our high schools. We are again attempting to create a solution to a nonexistent problem. 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)

Some of you may view this and state, "well, she is getting better. Look at her rank while competing in the women's division." For Lia, her rank improvement includes upperclassmen graduating, a continuation of training, and overall competition. These individuals don't just start swimming or partaking in athletics for fun at the NCAA D1 level; they are working hard.

Others may state, "well, you cannot go from #65 to #1 that quickly." Her journey was not quick, as the times between her pre-transition best and post-transition best occurred roughly three years apart. That, in it itself, is plenty of time to jump in rankings. A personal example was when I competed in track in high school. I had never run the 800 Meter run, except for occasional relays during my sophomore and junior year. After failing to qualify for state my junior year (when I qualified my sophomore year in the 3200 M run), I recognized my times were not improving in the 3200. I talked to my coach that day, and we decided to switch me off the 3200 and onto running the open 800. Going into my senior year, I was not a runner on people's radars when it came to placing in state in the 800. However, I worked through it, rose my rankings daily, and finished the season placing in three events at the state meet. That included the open 800.

I do not know Lia Thomas personally, but this is one of many examples of how individual rankings can shoot up out of nowhere. Students can come from out of state, transfer, they can start a new sport and come from no historical ranking, can come back from injury, etc.

I could continue for hours regarding why I do not support HB 1249, 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 1249 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

HB 1249

As a clinical psychologist, I have had the opportunity to provide treatment to many transgender adolescents. Although there certainly are exceptions, many of these individuals have challenges connecting socially and finding comfortable spaces for physical activity. All students deserve access to participation in sports during their development. Transgender students can experience significant discomfort in being forced to compete with students of a different gender experience. This discomfort frequently leads to nonparticipation. The tendency for transgender youth to have disproportionately more health concerns is partially related to a lack of safe physical activities.

Those young transgender people who I have seen participating in school sports have thrived. They have gained confidence, reported improved relationships, and experienced fewer mental health symptoms. When you watch them play, they are just one of the kids, loving the experience - even with no state titles.

No one in this state has put more time and energy into observing the status of our gender diverse youth than Faye Seidler. I would strongly recommend review of her testimony - Document 15276 . In summary, nowhere is there a crisis related to transgender sports participation. The assumption that transgender women will dominate school sports has not panned out. However, lack of opportunities for our youth to play and learn together will damage our youth. Please vote DO NOT PASS on HB 1249.

NORTH DAKOTA Family Alliance LEGISLATIVE ACTION

Faith · Family · Freedom

Testimony in Support of House Bill 1249

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 1249 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.

- 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." However, now we're getting ahead of ourselves and discussing HB 1489.
- 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. The closest we have is a policy from the North Dakota High School Activities Association (Appendix C).

While we applaud the Association for seeking to set out guidelines, there are two significant problems. First, their regulations do not have the weight of law embodied in our Century Code and could be changed for innumerable reasons, as can the regulations of any other association.

Second, in August of 2022 the NDHSAA added language that states, "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". It will then be reviewed and an opinion rendered, which can be appealed to the NDHSAA Board.

While we appreciate the NDHSAA's attempt to tighten this up, this has actually just made matters worse. The new text uses completely undefined language and wildly subjective terms such as "medical perspective" and "competitive advantage". As a result, it effectively does nothing to further protect girls' sports in North Dakota. In fact, it actually provides evidence of the first problem we noted – that this regulation can be changed to whatever NDHSAA chooses at any time. By contrast, fuzzy definitions and changing requirements on a whim are not characteristics of the North Dakota legislative process or laws found in the Century Code.

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 1249, 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 in detail by Mr. Dodson. It is a 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 1249. 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

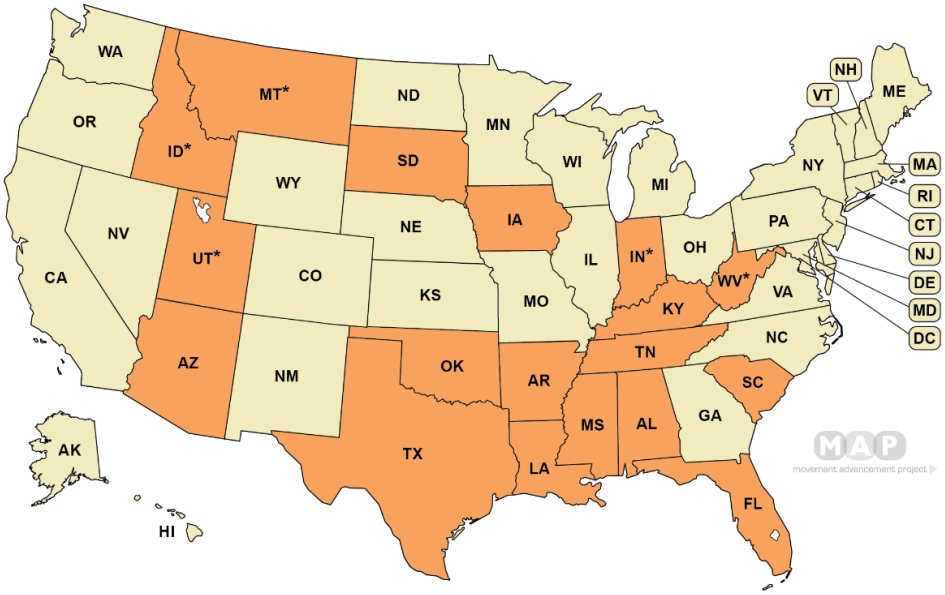
This federal regulation explicitly prohibits discrimination on the basis of sex. But if the sport is a competitive or contact sport, this law permits sex -segregated teams in sports.

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."

Appendix B

States with Protections for Girls' Sports



Source: Movement Advancement Project. [Link]

Appendix C

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

Note: Highlighted text was added in August 2022 revision.

Bill 1249

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 1249. It is with deep sadness that this is upon us to consider such matters. While those opposed to this bill have sons or daughters they want to protect, I do as well. And forward looking, my Grandchildren. What child at such an early impressionable age will not be influenced by your decisions without this bill? A young boy with raging hormones and a society that it would seem has drunk the kool aid of all inclusiveness, what harm is being done to both our girls and boys? What impact will there be to future relationships and families? Please support a do Pass on 1249.

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

THE CHAMBER
FARGO MOORHEAD WEST FARGO

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

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

North Dakota Catholic Conference

Representing the Diocese of Fargo and the Diocese of Bismarck

103 South Third Street
Suite 10
Bismarck ND 58501
701-223-2519
ndcatholic.org
ndcatholic@ndcatholic.org

To: House Human Services Committee
From: Christopher Dodson, Executive Director
Subject: House Bill 1249 - Fairness and Dignity in Sports
Date: January 24, 2023

True education aims at the formation of the human person as a unity of body, soul, and spirit, while pursuing the common good. It includes the social and physical aspects of athletics. As Pope Francis has said, "The Church is interested in sport because the person is at her heart, the whole person, and she recognizes that sports activity affects the formation, relations, and spirituality of a person."[1] In education and in sports, we must seek to avoid unequal treatment between men and women, and anything that debases human dignity, including the rejection of a person's body. With these principles in mind, the North Dakota Catholic Conference supports HB 1249 for several reasons.

First, it assures fundamental fairness. We have made great strides not only in respecting the unique dignity of women and girls but also in fostering a fair and equal environment that provides them opportunities to grow and succeed according to their created uniqueness. That environment is being threatened and HB 1249 protects it.

Second, youth have a right to safely participate in student athletics. Male competition in activities designated for females can be both unfair and, especially in high-contact sports, unsafe. Neither of these concerns is remediated by cross-sex hormone procedures, as they do not fully address disparities in average muscle mass, bone characteristics, and lung capacity once puberty is underway.[2]

Third, HB 1249 conforms to human dignity and proper pedagogy. We often hear, in support of allowing biological boys to compete against girls, that gender is a construct. In truth, gender ideology is a construct, untethered from biological and ontological reality. Allowing biological males to compete against biological females cooperates with and advances this false ideology, contrary to the proper purpose of both sports and education.

Fourth, HB 1249 prevents potential conflicts. Some schools, parents, or students might have philosophical or religious reasons preventing girls from competing against biological males, especially in contact sports. HB 1249 would prevent penalizing those schools and students.

Finally, and perhaps the most important reason HB 1249 is needed is that without it an organization consisting of non-elected, non-accountable individuals is imposing its view of this issue on the whole state. We were told during the last session that NDHSAA had a policy on this issue and that legislation was not needed. NDHSAA then changed its policy and could change it again.

Such an important issue belongs to the elected officials of the Legislative Assembly.

For these reasons, we support HB 1249 and ask for a **Do Pass** recommendation.

---

[1] Pope Francis, Address to the Italian Tennis Federation, Rome, May 8, 2015.

[2] Tommy Lundberg and Emma Hilton, “Transgender women in the female category of sport: is the male performance advantage removed by testosterone suppression?” (May 13, 2020) (available at https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931- 258260a4e77f/downloads/preprints202005.0226.v1%20(1).pdf, as pre-printed update of Lundberg 2019 study, infra); Expert Declaration of Gregory A. Brown, Ph.D., Filed in support of the U.S. Department of Education Complaint Nos. 01-19-4025 & 01-19-1252. (Jan. 7, 2020) (available at https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/2020.01.07%20G%20Brown%20 Report%20Executed.pdf?ver=1580495895886); T. Lundberg, Ph.D. et.al., “Muscle strength, size and composition following 12 months of gender- affirming treatment in transgender individuals: retained advantage for the transwomen,” Karolinska Institutet, Department of Laboratory Medicine/ANA Futura, Division of Clinical Physiology. Huddinge, Sweden (Sep. 26, 2019) (available via bioRxiv, Cold Spring Harbor Laboratory, at https://www.biorxiv.org/content/10.1101/782557v1).

Furthermore, the safety of the students who undergo hormone treatments themselves is at risk when such procedures have unproven long-term results in developing bodies. See D. Getahun et al., "Cross-Sex Hormones and Acute Cardiovascular Events in Transgender Persons: A Cohort Study," Ann Intern Med 169, no. 4 (2018); M.S. Irwig, "Cardiovascular Health in Transgender People," Rev Endocr Metab Disord 19, no. 3 (2018); P.W. Hruz, L.S. Mayer, and P.R. McHugh, "Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria," The New Atlantis, 52 (2017); S. Maraka et al., "Sex Steroids and Cardiovascular Outcomes in Transgender Individuals: A Systematic Review and Meta- Analysis," J Clin Endocrinol Metab 102, no. 11 (2017); J. Feldman, G.R. Brown, M.B. Deutsch, et al., “Priorities for Transgender Medical and Healthcare Research,” Curr Opin Endocrinol Diabetes Obes 23 (2016):180-87; D. Macut, I.B. Antić, and J. Bjekić-Macut, "Cardiovascular Risk Factors and Events in Women with Androgen Excess," Journal of Endocrinological Investigation 38, no. 3 (2015); E. Moore, A. Wisniewski, A. Dobs, “Endocrine Treatment of Transsexual People: A Review of Treatment Regimens, Outcomes, and Adverse Effects,” J Clin Endocrinol Metab 88 (2003): 3467-73.

Kayla Schmidt – Interim Executive Director, North Dakota Women's Network
Opposition – HB1249
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 1249.

Within our mission to improve the lives of women, we have three areas of focus: leadership, opportunity, and equality. HB 1249 is a direct conflict to the positive outcomes we work to create through those areas of focus.

HB 1249 removes opportunities, including leadership opportunities from transgender youth in our state in relationship to sports participation.

HB 1249 uses 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 HB1249 receives a Do Not Pass Recommendation.

Thank you.

Kayla Schmidt
director@ndwomen.org

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 1249."

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.

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 1249.

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.

Jacob R Holter

701-580-7800

SB 2260 Do Pass

Gordon Greenstein

Bismarck, ND District 35

Chairwoman Larson and the Judiciary Committee, I urge a DO Pass on SB 2260.

I believe it is the fundamental right and responsibility of parents to e the administrator of the upbringing, education, and care of their children without the unwelcome influence from activist educators and government overreach.

Thank You

Gordon Greenstein

US Navy (Veteran)

US Army (NDNG Retired)

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 Rahrich

In support of 1249

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 high school 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 operated 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 VIIs 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 stuck 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 team 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.

Volume 29 | Issue 2 Article 4

8-18-2022

Beyond Bostock: Title IX Protections for Transgender Athletes

Joseph Brucker

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-rcna1724 [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.

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, Esqu. (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.

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 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 Trangender Students*, L.A. TIMES (May 17, 2016), https://www.latimes.com/local/education/la-me-edu-transgender-student-rights-20160516-snap-htmlstory.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.").

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 split among circuit courts 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

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)

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 Remedying 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://billstatus.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.").

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.").

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 XI 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").

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 may ulti-

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://billstatus.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).

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.

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.

NORTH DAKOTA
UNIVERSITY SYSTEM
ACCESS. INNOVATION. EXCELLENCE.

HB 1249

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 1249. The bill could open campuses to an unlimited liability to litigation by aggrieved parties and lose significant revenues earned through summer camps and conferences.

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. It is an unenforceable stipulation. If this bill moves forward, the North Dakota University System and its campuses request an amendment to address our concerns in section two.

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 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 HB 1249. I thank you for your consideration and I stand for your questions.

Members of the House Human Service Committee,

Hello, my name is Thea Holter, I live in District 1 and I am a mother to three children ages 14, 11, and 5. I strongly support HB 1249. I have two daughters and I can't imagine my daughters having to compete sports against a biological male. They are proven to be much larger and stronger. It is simply unfair and dangerous to the girls. Please do not take away women's rights from our girls by making them compete against biological males.
I urge you to vote in favor of HB1249. Thank you for your service to our state and your consideration of this important matter.

Thea Holter

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 1249. 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 plays sports in high school, 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.

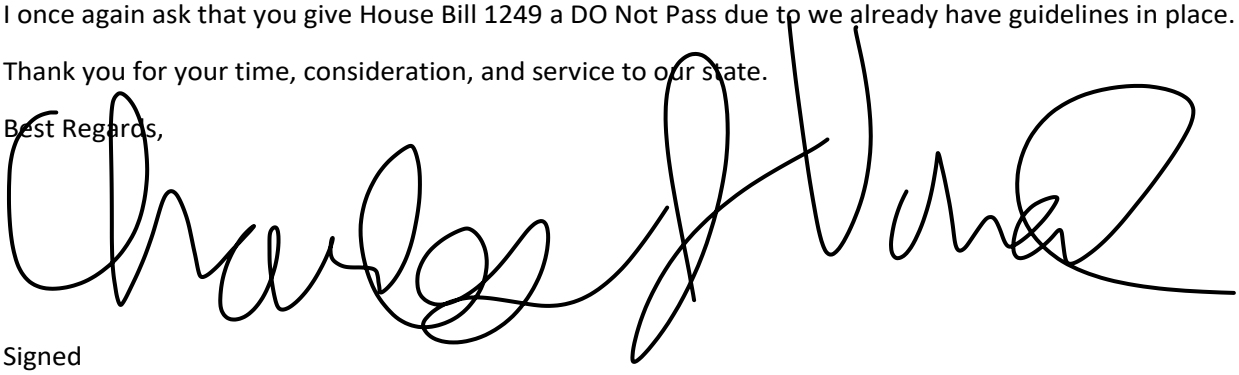
Additionally, it states in line 22 and 23 this," An athletic team or sport designated for "females", "women", or "girls" may not be open to students of the male sex." This not the only part that feels like it restricts saying that transgender and nonbinary students don't exist. That there are only two sexes, and yet it not only excludes trans youth, but what about intersex students?

Which brings me to my next point of the reason some believe this bill will protect girls' sports. The issue is there are already guidelines set forth by North Dakota High School Activities Association that a trans girl must follow to be allowed to participate in girl's sport. Accord to the North Dakota High School Activities Association, which is attached, talks about any transgender student who is not taking hormone treatment and those who are. It states, "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… 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." North Dakota has guidelines set in place for this.

I once again ask that you give House Bill 1249 a DO Not Pass due to we already have guidelines in place.

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

Best Regards,



Signed

Charles J Vondal

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

HB 1249

Rep. Ben Koppelman- Testimony

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to introduce HB 1298 to you today.

I introduced this bill to ensure that all students continue to 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.

Many of you may have enjoyed watching your sisters, daughters or granddaughters participate in a sport like basketball, volleyball, track, softball, or dance. Many of you may also have watched them participate in other competitive events such as music, speech, debate, or chess league. They may have even been fortunate enough to receive a college scholarship based on that activity.

How many of you are aware that that opportunity may have been thanks to a change in education policy in 1972? 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 sperate 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 also outperformed by more than 15,000 times by males 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, when the participation in High School sports was 295,000 girls compared to 3.7 million boys or 1 girl for every 12.5 boys the ratio has significantly

tightened to 3.4 million girls compared to 4.6 million boys, or 1 girl for every 1.35 boys. The statistical trend is similar in college sports.

Across the nation—states, schools, and athletic organizations have been trying to grapple with individuals who want to participate in a sport that is intended for the opposite sex. In some instances, they have been allowing play solely on the stated 'gender-identity' of the individual, to disastrous results. In Connecticut, a biological male, who reportedly has not 'transitioned' using female hormones at all, has consistently beat female opponents, and is one of two biological males to win multiple female events and shatter state female records in track. In other instances, there have been policies set in place that limit this sort of crossover play to individuals taking hormone therapies with some subjective medical finding such as the policy of the North Dakota High School Activities Association, which says:

> 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: Nov. 2015, Revised Aug. 2022.)

However, these types of policies can not contemplate the full effects of puberty and stature, and there is no agreed upon science or medical research that shows with certainty that all male advantages could be neutralized with hormone treatment or what harm the long-term effects of such treatment might cause.

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. **In addition to reduced opportunity and competitiveness for women in sports this change could reduce the number of women receiving scholarships intended for women in sports, STEM, music, and other career targeted scholarships.**

For consistency throughout the state, it needs to be the Legislature that defines this policy. Let's be clear, HB 1248 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. 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 replaces it with the social construct of self-identification. We will in essence be allowing the panels in the glass ceiling to be reconstructed and reinstalled over the heads of women in the name of feelings rather than science. 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.

23.0569.02002
Title.

Prepared by the Legislative Council staff for
Representative Koppelman
January 30, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1249

Page 1, line 16, replace "an institution" with "a school"

Page 1, line 17, remove "biological"

Renumber accordingly

CONCERNED WOMEN for AMERICA
LEGISLATIVE ACTION COMMITTEE

March 27, 2023
Senate Education Committee
Testimony in Support of HB 1249

Chairman Diane Larson and members of the Senate Judiciary Committee, I am Linda Thorson, State Director for Concerned Women for America (CWA) of North Dakota. Today, I am testifying for Concerned Women for America Legislative Action Committee in support of HB 1249.

Fair competition and equality in girls' sports for all school-aged female athletes are protected with the passage of pro-woman legislation, which prohibits male-born athletes from entering girls' 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 girls who train and work hard to excel in their chosen sport. Girls 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 female 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 girls' 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.

While HB 1249 deals with non-collegiate female athletes, Concerned Women for America of North Dakota strongly supports the protection of all women's sports, including female athletes at our institutions of higher education. We urge a "Do Pass" on HB 1249.

CONCERNED WOMEN FOR AMERICA OF NORTH DAKOTA
P.O. BOX 213 | PARK RIVER, ND 58270 | DIRECTOR@NORTHDAKOTA.CWFA.ORG | 701-331-9792
FACEBOOK: CONCERNED WOMEN FOR AMERICA OF NORTH DAKOTA

NORTH DAKOTA ASSOCIATION OF SCHOOL PSYCHOLOGISTS
NDASP

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 HB1249 HB1254 HB1256 HB1297	HB1301 HB1332 HB1333 HB1403 HB1473	HB1474 HB1488 HB1489 HB1522 HB1526	SB2199 SB2231 SB2260

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:

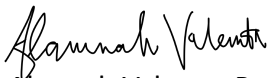
- 45% of LGBTQ youth seriously considered attempting suicide in the past year.
- 60% of LGBTQ youth who wanted mental health care in the past year were not able to get it.
- 73% of LGBTQ youth reported experiencing symptoms of anxiety
- 58% of LGBTQ youth reported experiencing symptoms of depression

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.

To the legislators of North Dakota:

My name is Becky Zimmerman. I am a member of the Grand Forks community and the LGBTQ+ community. I am writing to encourage you to vote in opposition to HB 1249, which uses thinly veiled language to discriminate against transgender youth who wish to play sports at school. Transgender youth are already at high risk for mental health issues, with over three-quarters contemplating suicide and over half attempting it. Active discrimination only raises that risk and sends the message that their existence is unacceptable in our communities.

As a non-binary person, I already feel unwelcome in this state. Bills like this only make it seem even less open and accepting. Even though this bill specifically discriminates against youth, it makes it clear that diversity is unwelcome at any age and that unfettered bigotry is alive and well in North Dakota. Not only is it alive and well, but it is state-sanctioned.

Please, vote on the right side of history. Say NO to HB 1249.

Thank you for your time,
Becky Zimmerman, concerned citizen

Dear Chairman and Committee Members,
My name is Margo Knorr and I am writing in support of 1489 and 1249. If you Click on image there is link of a panel with Speaker McCarthy addressing the importance of Protection of Girls and Women in Sports.

Thank you Representative Koppelman for working on 1249 and 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.

"*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 life time resident and mother of 2 daughters who like sports, I ask for you to continue the legacy of **valuing female athletes** through setting **necessary protections** in place to secure opportunities for girls by giving 1249 and 1489 a do pass.

Please give both bills a "do pass"

Dear Chair Larson and the members of the Senate Judiciary Committee,

My name is Mariah Ralston Deragon and I urge a “Do Not Pass” on HB1249. I think this bill is discriminatory, and is being brought to the legislature as part of a larger anti- LGBTQIA+ agenda. This bill will harm transgender and gender non-conforming students.
This bill 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

Senate Judiciary Committee Members,

“My name is Patricia Burckhard and I reside in District 15.. I am asking that you please render a DO PASS on HB 1249.”

Gordon Greenstein

District 35, Bismarck, ND

Chairman Larson and the Senate Judiciary, I am the grandfather of a teenage female athlete, so my wife and I strongly urge a Do Pass on HB 1249.

Why this bill is needed:

- 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. Women are put in a considerably vulnerable position when made to compete against males, especially in a contact sport as women are more likely to be injured when colliding with a man verses another woman. Males even have the advantage after one year of gender-affirming hormone therapy. A study by the British Journal of Medicine showed that trans-women (males) still had a 9% faster average run speed after the one year period of testosterone suppression that is recommended by World Athletics for inclusion in women's events.
- Trans athletes are currently in the minority, but as transgenderism ideology becomes more mainstream, there will be more and more males who will want to compete in women's sports. If we do not pass legislation to protect women's sports, the scholarships, awards, and opportunities that sports provide will once again be dominated by men and boys. Female athletes across the country are losing medals, records, and opportunities to males who are pretending to be women. It's time to protect women and girls in North Dakota from being forced to compete against males.

Thank You, Gordon Greenstein

US Navy (Veteran)

US Army(NDNG Retired)

Senate Judiciary Committee
March 27th, 2023
HB 1249 - Testimony in Opposition

Chair Larson and members of the Senate Judiciary Committee, my name is Whitney Oxendahl, and I am writing in opposition to House Bill 1249.

I grew up in western North Dakota playing any sport I could. You name it, I played it at one time or another. For Class B volleyball, my high school team made it to regionals and then state. I played because it was fun and there was not much else to do where I lived. I enjoyed meeting players from other teams, being a part of something, and exercising my body.

Transgender high school girls should be able to play high school sports with their friends. It's supposed to be fun and team-building. If my daughter grows up and one of her friends is transgender, I want them to be able to play on teams together. We should not exclude them.

Discussion around this bill has focused on women's sports, and as a former female high school athlete in North Dakota, I don't understand why this is being made an issue in the North Dakota Legislature. In 2021, a similar bill was passed by both chambers and we have not seen a rise in trans athletes trying to play sports. This is not an issue here.

I ask that you give this bill a Do Not Pass. Thank you for the opportunity to share my testimony.

PROPOSED AMENDMENT TO HOUSE BILL NO. 1249

Page 1, after line 13, 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 1249
Andrew Alexis Varvel
Written Testimony
North Dakota State Capitol Peace Garden Room
Monday March 27, 2023 3:30PM

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 uncertain about its finer points.

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. And 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.

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.

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 13, 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.

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 those children.

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 children, but also to maintain the appearance of avoiding it.

If any legislation appears to be designed to turn the lives of transgender children into a living hell, of course I will oppose it. And I hope you will too.

We're part of the same community. There has been apocalyptic catastrophizing from both sides the transgender debate, with each side imagining that a victory for the other side would mean triumph for fascist depravity. I'm getting sick of it.

We need solutions. Let's give this bill a DO PASS so long as it either (a) gets amended as I am recommending or (b) this bill's sponsors express their opinion that the word “coed” can include a nonbinary division for school sports.

Thank you.

APPENDIX: Suicidal ideation

One frequent argument that committee members will probably hear during this session is that members of the LGBTQ+ community, particularly transgender children, will feel rejected by their society if legislation gets passed which they feel targets them. And by extension, this would lead to a greater risk of suicide.

I am not disputing the prevalence of suicidal ideation among transgender youth. People, including scientists, have differing ideas on how to address this problem.

Suicide is a serious topic which needs to be addressed seriously.

For anybody who is feeling blue right now, remember – don't give your enemies the satisfaction. You are not alone in feeling a deep blue funk out of a sense of being utterly rejected. Chances are that your enemies would smirk upon hearing of your death. Don't give them the opportunity to gloat over your departure. Don't be so nice to your enemies by giving them the death that they want.

If you feel as though other people are actively trying to erase your very existence, welcome to the club. That is what I endured very publicly on the floor of the Democratic-NPL convention last spring. On top of that, Rob Port printed a pack of lies about me and spread a skewed version of those events across North Dakota.

It did not exactly help matters that Tyler Hogan, the thankfully former executive director of the Democratic-NPL, tied my hands on my ability to fight back.

Have you ever had someone look at you with a predatory stare? I know what predatory stares look like because I play with my cats every day. A cat will stare at a toy when it is ready to pounce. A cat will stare at a shoestring as it is chasing it down. This is the classic stare of psychopaths and serial killers. Serial killer Ted Bundy has known for that stare. To tell the prey that their predator was “visibly and vocally bothered” by the prey, and then tell the prey to “reach out to those who were offended and try to have a constructive dialogue” – that is what Tyler Hogan wrote to me. I would rather drop dead than bend the knee to predators. There is hardly a worse example of hateful contempt than what he wrote to me.

I think the worst word that one can call anybody is “ally”. Whenever I hear “ally”, I think of Taliban having fun hunting down Afghan allies of the United States through the streets of Kabul, Kandahar, Herat, and Mazar-i-Sharif. I think of allies of the United States discovering that the rest of the world has shut their doors to refuge from getting tortured to death by the Taliban. To me, the word “ally” means cannon fodder – meat to be thrown at guns, and treated with contempt.

What Rob Port did to the Young Republicans last summer was a cheap dirty trick. It was downright mean. Whatever else you think of them, their Telegram channel was their safe space. Think of it as a Stonewall Inn for Republican activists. You may not like what Young Republicans have been saying. I don't either. But that's beside the point. It was not as though Young Republicans were posting their opinions on TikTok for everyone to see! And then, Rob Pot defiled their sense of privacy when he aired their dirty linen in his Forum column and on his blog.

Then, other news media piled on.

I learned as a little boy, “Never say anything that you wouldn't want to have repeated in the newspaper.” Young Republicans have learned that the hard way.

And then, Tyler Hogan piled on.

Not only had he become the second-most prominent face of LGBTQ+ in North Dakota after Josh Boshee, but his intervention as the executive director of the Democratic-NPL turned the whole sordid affair into an openly partisan issue.

Tyler Hogan had provided me with the unsolicited advice within his nasty email to me, “I am going to ask you to be introspective here and try to be mindful. My honest and sincere advice is to let this one go.”

Tyler Hogan did not take his own advice. The petty Young Republican name calling was not personally addressed against him, and it was a provocation far less intense than what I had endured right in front of him during the spring before.

He decided to escalate the situation and provoke the Young Republicans further.

Tyler Hogan, the second-most prominent face of the LGBTQ+ community in North Dakota at the time, had told me to reach out to someone who hates my very existence, and who looked at me with a stare that cats use for rodents and serial killers use for their victims. Interestingly, it had never occurred to him to reach out to Young Republicans once he had offended them. I wouldn't recommend it.

I think it is difficult to overstate the reputational damage that such actions can cause to a marginalized community. Tyler Hogan may be gone from his position of power within the Democratic-NPL, but it will probably take years for both the Democratic-NPL and the LGBTQ+ community to repair the damage he caused.

From last summer through to this legislative session, I was wondering when the other shoe was going to drop.

And there is something else that needs to be said.

When I say that there are adults who pressure children under their care into changing their expressed gender, I know exactly what I am talking about. When I think about these social pressures, I feel so thankful to God that I have escaped from authoritarian pressures from trendy adults that others must now endure.

I do not particularly appreciate getting told that I don't know what I am talking about when I am talking about my own life. It should not be necessary to splatter less flattering aspects of my childhood in public in order to be believed. I do not particularly appreciate condescending lectures about the importance of lived experience, so central to both critical race theory and queer theory, from academics who like to imagine that they are experts on transgenderism yet fail to consider the role of social pressure from a parent or guardian to induce a child to reject his or her birth sex and the peer pressure that may be felt by various adults from the social prestige that comes from having a “trans kid” in the family.

There but for the grace of God go I.

My name is Callie Smith, and I am a licensed social worker in Grand Forks, ND. I am opposed to bill HB 124. It is designed to discriminate and harm our youth. All children should be able to participate in sports and benefit from community, teamwork and physical activity.

Thank you for your consideration,

Callie Smith

March 26, 2023 HB #1249 Judiciary Committee

68th Legislative Session

Chairperson Larson and Committee

I am writing in opposition to HB #1249. I am a parent of a transgender person and I believe my voice should be heard.

Many of you, if not all of you, have no first-hand experience interacting with a transgender person or a parent of a transgender person. Your lack of knowledge and callousness toward the transgender community shows in this bill, and other bills proposed this session, that are designed to erase the transgender community from North Dakota.

Where knowledge and compassion should be used in making laws that impact the citizens of North Dakota; fear, rumors, false narratives along with social media and fake news channels from such as FOX News continues to spew hate and resonates with most of those in the GOP party.

In raising a transgender child in North Dakota, I have much more insight than a lot of people in North Dakota, other than other transgender parents and the medical professionals. I know first-hand the struggles that the transgender child faces every day.

First, let me say this loud and clear, **transgender kids are born this way. Transgender is not a choice, not a phase or fad**. Being transgender is absolutely not a way to gain an edge over girls in sports. That is one of many false statements that the group who choose to hate transgender people like to state. My child never played sports. My child never wanted to play sports. However, if my child wanted to play sports, why should she be kept out of the sport of her choice?

My child looks just like any other girl her age. Her body isn't that of a male, her mannerisms and characteristics are all of female her age. Why is that? Because we followed all the **BEST PRACTICES** that are already in place for helping transgender people transition. This means the blockers and estrogen were given at the beginning of puberty which means the muscle mass, body hair and other body characteristics of a male did not develop for my daughter. My daughters muscle mass is that of other girls who are not athletic or use strength training to excel in their sport.

Keeping transgender kids from playing sports with their peers is cruel and uncalled for. There is no reason to fear a transgender child playing any sports, using a locker room or bathroom with the same sex they identify with.

Transgender kids just want to belong and be a part of their school's activities. There have been no incidents in the State of North Dakota in which a transgender person has assaulted or accosted a Cisgender peer. There have been instances where the Cisgender peer has been the aggressor and has done criminal acts on school grounds. My daughter is one who has a Cisgender female take video of my daughter who was in a stall going to the bathroom. That Cisgender peer committed a crime in the State of North Dakota. I am so tired of hearing parents feel they need to protect their girls. I feel the same way. The fact is that Cisgender people are the ones to assault or commit a hate crime and not the other way around. My daughter uses the bathroom or locker room for the same reason other girls her age use those rooms. However, some of these Cisgender peers are aggressive and do lash out physically or like in my daughters case, use their phones in places which are not allowed. Why is that, well kids hear the

talk at home and they think it's ok to act out because of what they hear at home. Now, these same hostile, unruly kids are getting the same message from our law makers.

To judge a person whom you don't know or have any contact with because that person has a medical condition is not only cruel but it is simply the act of being a bully.

Transgender athletes **DO NOT dominate sports that they participate in**. That also is another false story spread by those whose agenda is to rage war against the transgender community. Transgender kids shouldn't be ostracized because of ignorance of adults who say they are acting in the best interest of girls. If that was true then where does 21st century medical science come into play vs. 1970's medical science which does not even factor in transgender people?

The medical science of the 21st Century shows that a transgender person is a girl. Her brain, under MRI imaging, is the same brain as her female peers. Doctors know this, parents know this, and the transgender person knows this, but the legislative body here clearly does not know this.

Keeping transgender kids from playing sports with their Cisgender peers is bigotry and unfair. The transgender person didn't ask to be born this way. The transgender person contributing to a team sport just like any other student in their school.

What are you teaching the Cisgender students in the schools by even drafting a bill like this? You are teaching students that they can discriminate against someone who is different from them. You are **NOT** teaching tolerance, acceptance and empathy. You're encouraging the Cisgender students to look at a transgender classmate as less than. Is that how you want our children in North Dakota to see others who don't look or act like themselves? Would you allow this to happen to children who have Downs Syndrome? Downs Syndrome is something a person is born with. Would you think it is ok for the Cisgender peers to bully and pick on the person with Downs Syndrome? There's no difference, the Downs Syndrome student is different than the Cisgender students. No that wouldn't be tolerated but it's **open season** on transgender students at school and here at the Capitol.

Schools are supposed to be a place where knowledge and tolerance is fostered. This bill allows schools to tell their transgender students they must ignore how they feel and see themselves. This bill neglects to see how this harms the self-esteem and mental health of the transgender student.

No one likes to be ignored let alone told to be something they aren't. Would you all want to go through life as the opposite gender just because I say so? How many of you would have a problem being called a name and pronouns used towards you that done align with who you are? Would you willingly wear clothing and make yourself up as the opposite gender just to make me happy? No, you wouldn't do it. I asked legislators since this session started and I kept hearing that they wouldn't like to be called a name they didn't identify with or dress in a way that they didn't want to just to make me happy or comfortable. So then why impose this on our youth?

The suicide rate is so high in our schools and the suicide rate is twice as high for transgender kids' vs Cisgender kids. This fact is unacceptable and instead of making transgender kids feel accepted and welcomed in their schools these bills add to the stress and hopelessness of transgender youth in our schools.

Again, I ask you, where is the compassion and acceptance from those of you who say you are Christian?

This bill is anything but what Christ taught. Our Lord and Savior would not have gone out of His way to make the life of an innocent person worse.

This issue has been addressed two years ago with HB #1298. The agency regulating high school sports already has a guideline on transgender students who play sports in North Dakota.

In the two years since HB #1298, has any incidents that arose from a transgender athlete has dominated a high school sport? **No**.

I encourage you to meet a parent of a transgender person. I know that parents of transgender kids want to be heard and would gladly sit down and talk with any of you so they can enlighten you as to what their family has gone through and what this bill would do to their transgender child.

I ask you to vote Do Not Pass on HB #1249.

Kristie Miller Parent of Transgender

To: Senate Judiciary Committee

From: Bryon Herbel M.D.

Re: House Bills1249 and 1489

Date: 26 March 2023

I am a psychiatrist residing in Bismarck who is licensed in the state of North Dakota. I am providing testimony in support of House Bills 1249 and 1489 for the following reasons:

First is the reason of fundamental fairness. As described in other testimony supporting these bills, the significant biological differences between males and females place biological females at a competitive disadvantage in sports compared to biological males who have transitioned to females.

The second reason involves the need for concerned citizens to resist the false narratives about sex and gender which are being widely promoted in our culture by political and medical advocates of the transgender agenda.

Thank you for your attention to this matter.

701.557.1500 » info.naswnd@socialworkers.org » naswnd.socialworkers.org

NASW
National Association of Social Workers
NORTH DAKOTA CHAPTER

TESTIMONY on HB 1249
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 1249**.

NASW-ND opposes HB 1249 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 1249 discriminates against transgender 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 in North Dakota – 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 1249 denies individual self-determination and opportunity.

NASW-ND strongly opposes HB 1249 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 HB1249
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 HB1249 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 1249 is rightly all of that. In my opinion, it truly balances diversity, equality, and inclusion.

My position on House Bill 1249 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)

We have been told by opponents to HB1249 there will be no USA Swimming in ND with HB1249. 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 HB1249 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)

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. HB1249 is in the right time, and done in the right place, the ND legislature.

You will hear opponents to House Bill 1249 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 HB1249. HB1249 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 HB1249, I want it just the way it is.

Thank you,

Doug Sharbono
1708 9th St S
Fargo, ND 58103

Senate Judiciary Committee
March 27, 2023 HB 1249
Testimony in Opposition

Dear Chair Larson and the members of the Senate Judiciary Committee,

I urge a “Do Not Pass” on HB 1249.

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. There is already an incredibly restrictive policy making it virtually impossible for any trans girl to compete.

This bill may not matter in our state. If kids can’t access hormone therapy (HB 1254), they can’t play sports. If schools don’t have expressed policies on gender expression (SB 2231), they can’t play sports. If kids have no support in school or at home, they’re not playing sports. This bill is perhaps beating a dead horse.

If we lived in a better world, this bill would matter, because trans kids in middle school or highschool aren’t typically megastar athletes. Kids play sports to make friends or be with friends. Sports have a huge impact on a number of factors associated with mental health and school investment. Trans kids would lose out on all of this, if they ever had the opportunity for it in the first place!

Suggested Amendment to Help Cisgender Athletes
The only problem with this bill is it doesn’t do anything to help cisgender women’s sports right now. So, I’d like to propose an amendment to add a $1,000,000 expenditure. This would be used to give every single public school district a $5,000 scholarship fund to give to one cisgender female athlete, split how the school sees fit, or used for cisgender female sports teams.

I would recommend “Do Pass” on a bill with Fiscal Note added. Let’s support cisgender women in sports and mean it.

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

THE CHAMBER
FARGO MOORHEAD WEST FARGO

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@fmwfchamber.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 1249.

I am the mother of two female high school 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

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

March 27, 2023

Dear Chair Larson and the members of
the Senate Judiciary Committee, I urge a
“Do Not Pass” on HB 1249.
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:

ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota
P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

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.

ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota
P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

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.

ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota
P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

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

Senate Judiciary Committee Members,

My name is Thea Holter and I reside in District 1. I am asking that you please render a DO PASS on HB 1249.

Please protect our women and girls in North Dakota from being forced to compete against biological males in sports.

Thank you for your consideration to the issue at hand and for your service to the state of North Dakota.

Good day Members of the Senate Judiciary Committee,

Our names are Jacob and Cionda Holter and we reside in District 3.

We are asking that you please render a do pass on HB 1249. We need to protect our girls, boys, men, and women in the sports they are participating in. Males are naturally faster and stronger than women, that is an inarguable truth. Females should not be forced to compete against males. If we do not pass this law and girls are forced to compete against boys we will see the number of sports injuries spike to an all new high. It is also not fair for boys to be forced to compete against women, they also should not be placed in an uncomfortable position in having to get extremely physical with a female in the sport they are competing in.

We will also see men taking titles and championships away from women, we will see more instances of harassment and abuse in the locker rooms, and we will see less women going out and competing in sports that they love due to the unfairness that will bestow them if we do not protect them.

For any of you or all of you who disagree with the statements above, we would like ask you this; “Who is responsible for the injuries, the assaults, the harassment, the loss of opportunity, and the fall out of athletes?” If you cannot say I am responsible for these things if they come to pass, then you should not be voting against this bill. If you are in full confidence that none of these things will happen and that we do not need this law then you should have no problem taking on the full responsibility if/when these things do happen.

I urge you to render a do pass on HB 1249

Thank you,

Jacob and Cionda Holter

District 3

701-580-4746

701-580-7800

We support protecting female athletes from being forced to compete with males in high school sports, therefore we stand in support of HB 1249. Please do pass it!

Sincerely,

Charlton & Tia Stanley

North Dakota Catholic Conference

Representing the Diocese of Fargo and the Diocese of Bismarck

103 South Third Street
Suite 10
Bismarck ND 58501
701-223-2519
ndcatholic.org
ndcatholic@ndcatholic.org

To: Senate Judiciary Committee
From: Christopher Dodson, Executive Director
Subject: House Bill 1249 - Fairness and Dignity in Sports
Date: March 27, 2023

True education aims at the formation of the human person as a unity of body, soul, and spirit, while pursuing the common good. It includes the social and physical aspects of athletics. As Pope Francis has said, "The Church is interested in sport because the person is at her heart, the whole person, and she recognizes that sports activity affects the formation, relations, and spirituality of a person."[1] In education and in sports, we must seek to avoid unequal treatment between men and women, and anything that debases human dignity, including the rejection of a person's body. With these principles in mind, the North Dakota Catholic Conference supports HB 1249 for several reasons.

First, it assures fundamental fairness. We have made great strides not only in respecting the unique dignity of women and girls but also in fostering a fair and equal environment that provides them opportunities to grow and succeed according to their created uniqueness. That environment is being threatened and HB 1249 protects it.[2]

Second, youth have a right to safely participate in student athletics. Male competition in activities designated for females can be both unfair and, especially in high-contact sports, unsafe. Neither of these concerns is remediated by cross-sex hormone procedures, as they do not fully address disparities in average muscle mass, bone characteristics, and lung capacity once puberty is underway.[3]

Third, HB 1249 conforms to human dignity and proper pedagogy. Allowing biological males to compete against biological females or the reverse improperly imposes an ideology onto sports and education.

Finally, HB 1249 places the issue before the proper body. Contrary to claims by the proponents that no policy is needed and that any policy sends a message of hostility to transgender youth, NDHSAA's adoption of a policy demonstrates that a policy is, in fact, needed. The only question is who should make that policy. House Bill 1249 does not prevent a policy on this issue. Without it, an organization consisting of non-elected, non-accountable individuals will impose its view of this issue on the whole state. Such an important issue belongs to the elected officials of the Legislative Assembly.

For these reasons, we support HB 1249 and ask for a **Do Pass** recommendation.

[1] Pope Francis, Address to the Italian Tennis Federation, Rome, May 8, 2015.

[2] See, e.g., Karleigh Webb, “Italy’s Valentina Petrillo takes a powerful step towards Tokyo,” MSN.com (Sep. 18, 2020) (available at https://www.msn.com/en-us/sports/more-sports/italys-valentina-petrillo-takes-a-powerful-step-towards-tokyo/ar-BB19b8zM); “Transgender weightlifter continues Tokyo Olympics bid,” NBCNews.com (Feb. 28, 2020) (available at https://www.nbcnews.com/feature/nbc- out/transgender-weightlifter-continues-tokyo-olympics-bid-n1145121); Victor Morton, “Transgender NCAA runner named conference's 'Women's Athlete of the Week,'” The Washington Times (Oct. 30, 2019) (available at https://www.washingtontimes.com/news/2019/oct/30/june- eastwood-montana-transgender-runner-named-big/); Rebecca Reza, “Transgender Cyclist Rachel McKinnon Wins Second-Straight World Masters Title,” Bicycling.com (Oct. 24, 2019) (available at https://www.bicycling.com/news/a29578581/rachel-mckinnon-world-championship- masters-win-transgender-sport-debate/); V. Morton, “Transgender hurdler easily wins NCAA women's national championship,” The Washington Times (Jun. 3, 2019) (available at https://www.washingtontimes.com/news/2019/jun/3/cece-telfer-franklin-pierce-transgender-hurdler-wi/); “'Actually a male': Transgender weightlifter stripped of world records,” Yahoo Sports (May 14, 2019) (available at https://sports.yahoo.com/transgender-weightlifter-mary-gregory-raw-powerlifting-federation-094109354.html); Pat Eaton-Robb, “Transgender sprinters finish 1st, 2nd at Connecticut girls indoor track championships,” The Washington Times (Feb. 24, 2019) (available at https://www.washingtontimes.com/news/2019/feb/24/terry-miller-andraya-yearwood-transgender-sprinter/); Stephanie Kim, “First transgender woman finishes Jacksonville Marathon,” First Coast News (Dec. 19, 2016) (available at https://www.firstcoastnews.com/article/news/first- transgender-woman-finishes-jacksonville-marathon/372266597); Jon Gold, “Transgender cyclist is top female finisher at El Tour de Tucson,” Tucson.com (Dec. 19, 2016) (available at https://tucson.com/sports/local/ transgender-cyclist-is-top-female-finisher-at-el-tour-de-tucson/article_2c7d291f-4376-57a6-9578-3831353032bc.html); Douglas Ernst, “Transgender student's all-state honors in girls' track and field ignites backlash,” The Washington Times (Jun. 6, 2016) (available at https://www.washingtontimes.com/news/2016/jun/6/nattaphon-wangyot-transgender-student-riles-critic/); Dustin Siggins, “Transgender ‘female’ MMA fighter gives female opponent concussion, broken eye socket,” Life Site News (Sep. 19, 2014) (available at https://www.lifesitenews.com/ news/transgender-female-boxer-gives-female-opponent-concussion-breaks-her-eye-so); Eric Prisbell, “Transsexual Gabrielle Ludwig returns to college court,” USA Today (Dec. 12, 2012) (available at https://www.usatoday.com/story/sports/ncaab/2012/12/04/college-basketball- transgender-player-gabrielle-ludwig-robert-ludwig-mission-college/1744703/) (Ludwig’s accomplishments in championship and rebounds available on biography page at https://www.missionsaints.com/sports/wbkb/coaches/Gabrielle_Ludwig?view=bio, accessed on Oct. 5, 2020).

[3] Tommy Lundberg and Emma Hilton, “Transgender women in the female category of sport: is the male performance advantage removed by testosterone suppression?” (May 13, 2020) (available at https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931- 258260a4e77f/downloads/preprints202005.0226.v1%20(1).pdf, as pre-printed update of Lundberg 2019 study, infra); Expert Declaration of Gregory A. Brown, Ph.D., Filed in support of the U.S. Department of Education Complaint Nos. 01-19-4025 & 01-19-1252. (Jan. 7, 2020) (available at https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/2020.01.07%20G%20Brown%20 Report%20Executed.pdf?ver=1580495895886); T. Lundberg, Ph.D. et.al., “Muscle strength, size and composition following 12 months of gender- affirming treatment in transgender individuals: retained advantage for the transwomen,” Karolinska Institutet, Department of Laboratory Medicine/ANA Futura, Division of Clinical Physiology. Huddinge, Sweden (Sep. 26, 2019) (available via bioRxiv, Cold Spring Harbor Laboratory, at https://www.biorxiv.org/content/10.1101/782557v1). Furthermore, the safety of the students who undergo hormone treatments themselves is at risk when such procedures have unproven long-term results in developing bodies. See D. Getahun et al., "Cross-Sex Hormones and Acute Cardiovascular Events in Transgender Persons: A Cohort Study," Ann Intern Med 169, no. 4 (2018); M.S. Irwig, "Cardiovascular Health in Transgender People," Rev Endocr Metab Disord 19, no. 3 (2018); P.W. Hruz, L.S. Mayer, and P.R. McHugh, "Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria," The New Atlantis, 52 (2017); S. Maraka et al., "Sex Steroids and Cardiovascular Outcomes in Transgender Individuals: A Systematic Review and Meta- Analysis," J Clin Endocrinol Metab 102, no. 11 (2017); J. Feldman, G.R. Brown, M.B. Deutsch, et al., “Priorities for Transgender Medical and Healthcare Research,” Curr Opin Endocrinol Diabetes Obes 23 (2016):180-87; D. Macut, I.B. Antić, and J. Bjekić-Macut, "Cardiovascular Risk Factors and Events in Women with Androgen Excess," Journal of Endocrinological Investigation 38, no. 3 (2015); E. Moore, A. Wisniewski, A. Dobs, “Endocrine Treatment of Transsexual People: A Review of Treatment Regimens, Outcomes, and Adverse Effects,” J Clin Endocrinol Metab 88 (2003): 3467-73.

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

Faith · Family · Freedom

Testimony in Support of House Bill 1249

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 1249 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.

- 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. The closest we have is a policy from the North Dakota High School Activities Association (Appendix C). When a very similar girls' fairness in sports bill was introduced last session, the policy at that time was cited as a key reason for veto of the bill.

While we applaud the Association for seeking to set out guidelines, there are two very significant problems. *First, their regulations do not have the weight of law embodied in our Century Code and can be changed for innumerable reasons, as can the regulations of any other association.* In fact, in August of 2022, the NDHSAA added language that sought to clarify their

policy. *However, changing their policy actually provided undeniable evidence of the problem: this regulation can be changed to whatever the organization chooses at any time.* By contrast, changing requirements on a whim are not characteristics of the North Dakota legislative process or laws found in the Century Code.

The second problem lies with the text change itself. It states, "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". It will then be reviewed and an opinion rendered, which can be appealed to its Board.

While we appreciate the NDHSAA's attempt to tighten this up, it has actually just made matters worse. The new text uses completely undefined language and wholly subjective terms such as "medical perspective" and "competitive advantage". As a result, it effectively does nothing to further protect girls' sports in North Dakota.

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 1249, limits participation in girls' 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 1249. 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

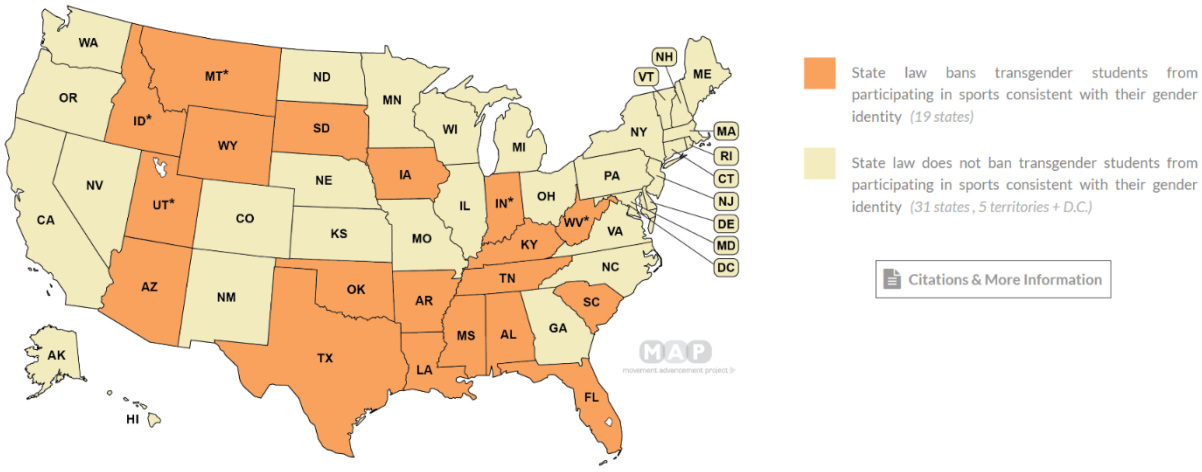
This federal regulation explicitly prohibits discrimination on the basis of sex. But if the sport is a competitive or contact sport, this law permits sex -segregated teams in sports.

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."

Appendix B

States with Protections for Girls' Sports



Source: Movement Advancement Project. link

Appendix C

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

Note: Highlighted text was added in August 2022 revision.

Volume 29 | Issue 2 Article 4

8-18-2022

Beyond Bostock: Title IX Protections for Transgender Athletes

Joseph Brucker

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-rcna1724 [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.

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, Esqu. (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.

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 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 Trangender Students*, L.A. TIMES (May 17, 2016), https://www.latimes.com/local/education/la-me-edu-transgender-student-rights-20160516-snap-htmlstory.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.").

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 split among circuit courts 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

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)

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 Remedying 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://billstatus.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.").

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.").

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 XI 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").

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 may ulti-

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://billstatus.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).

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.

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 operated 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 VIIs 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 stuck 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 team 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 collagen 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 1249

Rep. Ben Koppelman- Testimony

Madame Chairman and Members of the Committee,

Thank you for the opportunity to introduce HB 1298 to you today.

I introduced this bill to ensure that all students continue to 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.

Many of you may have enjoyed watching your sisters, daughters or granddaughters participate in a sport like basketball, volleyball, track, softball, or dance. Many of you may also have watched them participate in other competitive events such as music, speech, debate, or chess league. They may have even been fortunate enough to receive a college scholarship based on that activity.

How many of you are aware that that opportunity may have been thanks to a change in education policy in 1972? 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 sperate 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 also outperformed by more than 15,000 times by males 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, when the participation in High School sports was 295,000 girls compared to 3.7 million boys or 1 girl for every 12.5 boys the ratio has significantly

tightened to 3.4 million girls compared to 4.6 million boys, or 1 girl for every 1.35 boys. The statistical trend is similar in college sports.

Across the nation—states, schools, and athletic organizations have been trying to grapple with individuals who want to participate in a sport that is intended for the opposite sex. In some instances, they have been allowing play solely on the stated 'gender-identity' of the individual, to disastrous results. In Connecticut, a biological male, who reportedly has not 'transitioned' using female hormones at all, has consistently beat female opponents, and is one of two biological males to win multiple female events and shatter state female records in track. In other instances, there have been policies set in place that limit this sort of crossover play to individuals taking hormone therapies with some subjective medical finding such as the policy of the North Dakota High School Activities Association, which says:

> 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: Nov. 2015, Revised Aug. 2022.)

However, these types of policies can not contemplate the full effects of puberty and stature, and there is no agreed upon science or medical research that shows with certainty that all male advantages could be neutralized with hormone treatment or what harm the long-term effects of such treatment might cause.

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. **In addition to reduced opportunity and competitiveness for women in sports this change could reduce the number of women receiving scholarships intended for women in sports, STEM, music, and other career targeted scholarships.**

For consistency throughout the state, it needs to be the Legislature that defines this policy. Let's be clear, HB 1248 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. 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 replaces it with the social construct of self-identification. We will in essence be allowing the panels in the glass ceiling to be reconstructed and reinstalled over the heads of women in the name of feelings rather than science. 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.

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 in 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 an 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. Ripeness[22]

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 injury 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 Envtl. 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 Challenge[25]

[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 Intervenors 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 IHSAA 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 Intervenors identify a third transgender athlete, June Eastwood, and argue 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 Intervenors lost to Eastwood, Eastwood was also ultimately defeated by her cisgender teammate. *Id*. And, losing to Eastwood at one race did not deprive the Intervenors 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, Defendant's 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.kivitv.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 Intervenors—the only identified Idaho athletes who have purportedly been harmed by competing against a transgender woman athlete—been jeopardized. Both Intervenors 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 IHSAA 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 disproval" 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 Intervenors 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 Intervenors' 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

North Dakota 2022 State Class A Track and Field Results

100 Meter Dash (1/4 of 1 lap, straight away)

	BOYS	GIRLS
Qualifying time	11.34 seconds	13.04 seconds
Preliminaries	1st 10.65	1st 12.07
	37th 11.71	31st 13.31
Finals	1st 10.91 9th 11.48	1st 12.15 9th 12.87
State Record	10.44	11.97
Conclusion: The 37th place in the boys' 100 Meter Dash, is **11.71.** The biological boy with 37th place would have not only taken first place, but set a new state record in the biological girls' division of the 100 Meter Dash.		

200 Meter Dash (½ of 1 lap)

	BOYS	GIRLS
Qualifying time	23.24 seconds	26.94 seconds
Preliminaries	1st 21.51 **31st 23.70**	1st 24.85 20th 27.31
Finals	1st 21.61 9th 22.77	1st 24.41 9th 26.64
State Record	21.36	24.32
Conclusion: The 31st place for the boys' 200 Meter Dash, is **23.70.** The biological boy with 31st place would have not only taken first place, but set a new state record in the biological girls' division of the 200 Meter Dash.		

400 Meter Dash (1 lap around track)

	BOYS	GIRLS
Qualifying time	52.24 seconds	61.74 seconds
Preliminaries	1st 49.58 **24th 53.22**	1st 55.89 13th 1:02.87
Finals	1st 49.0 9th 51.71	1st 54.91 9th 1:02.00
State Record	47.84	53.25
Conclusion: The 24th place for the boys' 400 Meter Dash, is **53.22.** The biological boy with 24th place would have not only taken first place, but set a new state record in the biological girls' division of the 400 Meter Dash.		

800 Meter Run (2 laps around track)

	BOYS	**GIRLS**
Qualifying time	2:01.74 minutes	2:25.24 minutes
Finals	1st 1:54.09 **24th 2:03.52**	1st 2:15.87 20th 2:31.55
State Record	1:52.02	2:10.78
Conclusion: The 24th place for the boys' 800 Meter Run, is **2:03.52.** The biological boy with 24th place would have not only taken first place, but set a new state record in the biological girls' division of the 800 Meter Run.		

1600 Meter Run (4 laps around track)

	BOYS	**GIRLS**
Qualifying time	4:35.24 minutes	5:30.24 minutes
Finals	1st 4:14.77 **23rd 4:40.27**	1st 5:09.66 20th 5:33.43
State Record	4:12.16	4:44.44
Conclusion: The 23rd place for the boys 1600 Meter Run, is **4:40.27.** The biological boy with 23rd place would have not only taken first place, but set a new state record in the biological girls' division of the 1600 Meter Run.		

High Jump

	BOYS	**GIRLS**
Qualifying Height	6'2"	5'1"
Finals	1st 6-04.00 **9th 5-10.00**	1st 5-03.00 9th 4-09.00
State Record	6-10.25	5-09.00
Conclusion: The biological boy's 9th place of a height of 5-10 would have placed 1st and set a new record in the biological girls division of the High Jump.		