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“SAVE WOMEN’S SPORTS” LAWS AREN’T SAVING ANYONE:
AN ARGUMENT FOR APPLICATION OF *BOSTOCK* TO TITLE IX AND A
PLAYBOOK FOR TRANSGENDER ATHLETE INCLUSION MOVING
FORWARD

*Katie E. Butler**

I. INTRODUCTION

Becky Pepper-Jackson is an eleven-year-old from Harrison County, West Virginia.¹ A lover of sports, she hoped to try out for and compete on her middle school cross-country team with her classmates.² However, due to West Virginia’s new statute, Becky can’t join the girls’ track team because she is a transgender person. House Bill 3293, referred to as a “Save Women’s Sports” bill, requires that athletes compete only on teams matching their sex assigned at birth.³ Under this bill, Becky, who knew from a young age that she was a girl and had lived as such since the third grade, is required to compete in school sports only on the boys’ team.⁴ “It hurt that the state of West Virginia would try to block me from pursuing my dreams,” stated Becky during an interview; “I just want to play.”⁵

LGBTQ persons have had their Constitutional rights denied, restricted, or eliminated for nearly 245 years. They have been declared criminals for having sex with their partners,⁶ denied the fundamental right to marry those with whom they shared their lives,⁷ and have been afforded no legal route to an identity reflective of their authentic selves.⁸ More recently, the rights of gays, lesbians, and bisexual

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¹ *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 351 (S.D. W. Va. 2021).

² *Id.*

³ H.B. 3293, 85th Leg., Reg. Sess. (W. Va. 2021).

⁴ *B.P.J.*, 550 F. Supp. 3d at 351.

⁵ Mark Walsh, ‘I Just Want to Play.’ *Judge Halts W. Va. Law Barring Transgender Girls from Girls’ Sports*, EDUCATIONWEEK (July 22, 2021), <https://www.edweek.org/policy-politics/i-just-want-to-play-judge-halts-w-va-law-barring-transgender-girls-from-girls-sports/2021/07>.

⁶ *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that a Georgia law which criminalized same-sex “sodomy,” was constitutional).

⁷ *See, e.g., Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (holding that a gay couple could not be given the right to marry because “what they proposed is not a marriage.”).

⁸ *See, e.g., K. v. Health Div., Dep’t of Human Res.*, 560 P.2d 1070, 1073 (Or. 1977) (denying transgender persons, even those who had undergone gender confirmation surgery, the ability to change their legal name).

persons have expanded⁹ and remain mostly safeguarded by the American majority. However, the rights of persons who are transgender have begun to face intense scrutiny. In 2021 alone, persons who are transgender had their right to use the restroom matching their gender identity questioned,¹⁰ their ability to change the gender marker on their identification without undergoing surgical sex-change procedures revoked,¹¹ and their access to elective gender-affirming surgical procedures restricted or eliminated entirely.¹²

These targeted attacks often attempt to exclude persons who are transgender from a specific activity, as is the case with women’s sports. Recently, the Supreme Court, in the landmark case *Bostock v. Clayton County*,¹³ held that discrimination on the basis of sex under Title VII¹⁴ includes discrimination against persons who are transgender. Under *Bostock*, this trans-inclusive definition of sex lays the groundwork for a parallel application to Title IX,¹⁵ a law intended to prevent discrimination in federally funded programs, including sports teams. Organizations such as Save Women’s Sports¹⁶ and the Alliance Defending Freedom¹⁷ aim to eliminate this correlation by enacting anti-trans sports bills, which deny transgender athletes access to teams that do not match their sex assigned at birth.¹⁸ In addition to outing athletes as transgender by regularly uploading their names and other identifying information to their website, Save Women’s Sports argues that these “males who have competed in female sports”¹⁹ “demand we accept their feelings

⁹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (decriminalizing homosexual sexual activity); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (legalizing gay marriage in all states).

¹⁰ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020).

¹¹ S.B. 280, 67th Leg., Reg. Sess. (Mont. 2021).

¹² H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

¹³ 140 S. Ct 1731, 1737 (2020).

¹⁴ 42 U.S.C. § 2000e *et seq.*

¹⁵ 20 U.S.C. § 1681 *et seq.*

¹⁶ *About Save Women’s Sports*, SAVE WOMEN’S SPORTS, <https://savewomenssports.com/about-us-1> (last visited Jan. 8, 2022).

¹⁷ *About Us: Who We Are*, ALLIANCE DEFENDING FREEDOM, <https://adflegal.org/about-us/who-we-are> (last visited Nov. 14, 2022) (“Alliance Defending Freedom is the world’s largest legal organization committed to protecting religious freedom, free speech, the sanctity of life, parental rights, and God’s design for marriage and family. . . ADF believes that marriage is the union of one man and one woman . . . and that sex is binary and biologically determined.”).

¹⁸ See, e.g., H.B. 25, 87th Leg., 3d Spec. Sess. (Tex. 2021) (stating that students may not compete on a sports team designated for the biological sex opposite the students’ and that biological sex is proven by “the student’s official birth certificate . . . only if the statement was . . . entered at or near the time of the student’s birth”).

¹⁹ *Males in Female Sports*, SAVE WOMEN’S SPORTS <https://savewomenssports.com/males-in-female-sports-1#e895445b-28a0-4fcc-a484-1c55bd2f785f> (last visited Feb. 10, 2022).

as science and attack basic biology at its core.”²⁰ The Alliance Defending Freedom similarly states that “[a] male’s belief about his gender doesn’t erase his physical advantages over female athletes”²¹ and argues against the “radical plan to change the meaning of ‘sex’ in federal law” as “common sense should not be sacrificed for the sake of an ideological agenda.”²²

Although these organizations argue that their goal is to preserve sports equality, a dive into their actual purpose reveals that prejudice-motivated exclusion is truly the motivating factor.²³ Akin to their historical arguments against the enactment of rights for LGBTQ persons surrounding the *Lawrence v. Texas*²⁴ and *Obergefell v. Hodges*²⁵ decisions, these organizations present no reliable scientific basis for their proposal. Moreover, their insistence that equality is at the forefront of their arguments is clouded by the relentless use of transphobic language,²⁶ blatant misgendering,²⁷ and a looming insinuation that persons who are transgender are constantly on a mission to cheat the system.²⁸ Denying transgender athletes protection from sex discrimination under Title IX evades the legislation’s very intent.²⁹

²⁰ Beth Stelzer, *Why I’m Fighting to Save Women’s Sport*, FEMINIST CURRENT (Apr. 25, 2019), <https://www.feministcurrent.com/2019/04/25/why-im-fighting-to-save-womens-sport/> (Beth Stelzer is the founder of Save Women’s Sports).

²¹ Neal Hardin, *It’s Hard to Celebrate Women’s Sports When Men Keep Winning Them*, ALLIANCE DEFENDING FREEDOM (Feb. 1, 2022), <https://adflegal.org/blog/its-hard-celebrate-womens-sports-when-men-keep-winning-them>.

²² Sarah Kramer, *20 States, A Christian School Association, and 3 Athletes Taking a Stand to Save Women’s Sports*, ALLIANCE DEFENDING FREEDOM: MINISTRY ALLIANCE (Oct. 15, 2021), <https://www.adfministryalliance.org/post/20-states-a-christian-school-association-and-3-athletes-taking-a-stand-to-save-womens-sports>.

²³ See *Hecox v. Little*, 479 F. Supp. 3d 930, 976 (D. Idaho 2020) (citing *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014)).

²⁴ 539 U.S. 558, 578 (2003) (decriminalizing homosexual sexual activity).

²⁵ 576 U.S. 641, 688 (2015) (legalizing gay marriage in all states).

²⁶ Natalie Allen, *As the Biden Administration Attacks Conscience Rights, It’s Time for States to Take a Stand*, ALLIANCE DEFENDING FREEDOM (Sept. 2, 2021), <https://adflegal.org/blog/biden-administration-attacks-conscience-rights-its-time-states-take-stand> (stating that gender-transition procedures are “controversial and morally questionable”).

²⁷ Hardin, *supra* note 21 (referring to Lia Thomas, a swimmer at the University of Pennsylvania, as a “male swimmer . . . competing in women’s events”).

²⁸ *Jessica’s Story*, SAVE WOMEN’S SPORTS, <https://savewomenssports.com/our-stories> (last visited Mar. 9, 2022) (“I no longer argue with transactivists about whether transwomen are real women because you can’t argue with someone whose thinking is not based in reality. I do, however, argue that they are not real athletes. A true athlete always wants to compete with people who are better so he or she can keep striving to beat his or her personal best. A real woman who could compete with men would compete with men.”).

²⁹ U.S. Dep’t of Just., *Title IX: Synopsis of Purpose of Title IX, Legislative History, and Regulations* (Aug. 12, 2021), <https://www.justice.gov/crt/title-ix>.

This Article contends that, under *Bostock*, Save Women’s Sports laws violate Title IX because they discriminate against transgender athletes on the basis of their sex. In addition, this Article argues that anti-trans sports legislation is unconstitutional under the Fourteenth Amendment. Section II of this Article introduces *Bostock* and argues that a historical interplay between Title VII and Title IX, evidenced by the statutes’ similar reasons for enactment, structural resemblance, and Court precedent, existed even prior to *Bostock*.³⁰ Section III of this Article proposes that application of *Bostock* to Title IX is legally appropriate because of the relationship between Title VII and Title IX, as supported by the administrative agencies that govern the statutes as well as judicial precedent and statutory interpretation.³¹ Section IV argues that Save Women’s Sports bills are violative of Title IX and the Fourteenth Amendment³² to the Constitution because they injuriously discriminate against transgender athletes on the basis of their sex and fail to adopt well-established processes for the inclusion of transgender athletes in sports.³³ Section V proposes that it is imperative that transgender-focused policies and laws be drafted from a foundation of inclusion and encourages Pennsylvania, as well as other states, to follow the NCAA’s playbook when creating policies and laws affecting persons who are transgender.³⁴

II. THE INTERPLAY OF *BOSTOCK*, TITLE VII, AND TITLE IX

A. *Bostock v. Clayton County*

For more than a decade, Gerald Bostock worked as a child welfare services coordinator in Clayton County, Georgia.³⁵ A model employee, he earned numerous accolades during his tenure.³⁶ Upon finishing treatment for prostate cancer, Bostock joined a gay recreational softball league to prove to himself that he was physically and mentally capable.³⁷ Shortly after county administrators learned of Bostock’s association with the “Hotlanta Softball League,” Bostock was fired.³⁸ Gerald

³⁰ See *infra* pp. 7–15.

³¹ See *infra* pp. 15–19.

³² U.S. CONST. amend. XIV.

³³ See *infra* pp. 19–34.

³⁴ See *infra* pp. 35–42.

³⁵ *Bostock v. Clayton Cnty.*, No. 1:16-CV-001460-ODE-WEJ, 2016 U.S. Dist. LEXIS 192989, at *2–3 (N.D. Ga. Atl. Div. Nov. 3, 2016).

³⁶ *Id.* at *2–3.

³⁷ Kate Santich, *Sole Surviving Plaintiff in Supreme Court’s LGBTQ Ruling: The Fight Isn’t Over*, ORLANDO SENTINEL (July 3, 2020), <https://www.orlandosentinel.com/news/os-ne-gerald-bostock-after-lgbtq-supreme-court-ruling-whats-next-20200703-rildjvhw2bfmxxpw45yj34pjbm-story.html>.

³⁸ *Bostock*, 2016 U.S. Dist. LEXIS 192989, at *3.

Bostock's story is not unique. Donald Zarda, described by his sister as a tall and athletic man who was "gentle, kind and eager to help," worked as a skydiving instructor in Long Island, New York.³⁹ During tandem dives, Zarda often told women he was skydiving with that he was gay to ease their potential discomfort from being strapped together.⁴⁰ In 2010, after Zarda disclosed his sexuality to a customer, she complained, and he was fired for failure to "provide an enjoyable experience."⁴¹ Employment discrimination based on sexual orientation and gender identity routinely impacts transgender individuals as well.⁴² After working at R.G. & G.R. Harris Funeral Homes in Detroit, Michigan for 6 years, Aimee Stephens, a transgender woman, informed her employer that she was initiating gender affirming treatment to affirm her female gender and would now follow the dress code for female employees.⁴³ Outside of work, Aimee had already been living as a woman for years.⁴⁴ She hoped notifying her employer of her transition would reconcile who she was outside of work with who she was on the job.⁴⁵ Two weeks later, she was fired by her employer who stated "what she was 'proposing to do' was unacceptable."⁴⁶

In 2020, Bostock, Zarda, and Stephens' petitions were consolidated and heard by the United States Supreme Court in *Bostock v. Clayton County*.⁴⁷ Petitioners alleged that their employers had violated Title VII⁴⁸ of the Civil Rights Act of 1964 by discriminating against them on the basis of sex and proposed that both sexual orientation and transgender status fell within the statutory definition of

³⁹ Melissa Zarda, *My Brother Was Fired After Revealing He Was Gay. Now I'm Continuing His Fight at the Supreme Court*, TIME (July 1, 2019), https://time.com/5617310/zarda-supreme-court-lgbtq/?xid=tcoshare#0e3bc275-fd0c-4675-9a341d012af032c3?utm_source=twitter.com&utm_medium=social&utm_

⁴⁰ *Zarda v. Altitude Express*, 855 F.3d 76, 80 (2d Cir. 2017).

⁴¹ *Id.*

⁴² See Nat'l Ctr. for Transgender Equality, *2015 U.S. Transgender Survey* 1, 13 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (reporting that 30% of survey respondents who are transgender that had a job in the past year reported being fired, denied a promotion, or experienced mistreatment at work due to their gender identity or expression).

⁴³ *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 596 (E.D. Mich. 2015).

⁴⁴ Vanessa Romo, *Aimee Stephens, Transgender Woman at Center of Major Civil Rights Case, Dies at 59*, NPR (May 12, 2020), <https://www.npr.org/2020/05/12/854946825/aimee-stephens-transgender-woman-at-center-of-major-civil-rights-case-dies-at-59>.

⁴⁵ Melissa Nann Burke, *'I Chose to Stand Up': Mich. Transgender Woman Takes Firing Fight to High Court*, DETROIT NEWS (Sept. 15, 2019), <https://www.detroitnews.com/story/news/politics/2019/09/16/michigan-transgender-rights-case-supreme-court/2231329001/>.

⁴⁶ *E.E.O.C.*, 100 F. Supp. 3d at 596.

⁴⁷ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

⁴⁸ 42 U.S.C. § 2000e.

sex under Title VII.⁴⁹ Defendant employers did not dispute that they had fired petitioners because they were gay or transgender; rather, they argued that doing so, even intentionally, did not violate the protections afforded under Title VII because “homosexual or transgender status is not a basis for Title VII liability.”⁵⁰ To resolve the issue, the majority decision of the Court analyzed the definition of “sex” under Title VII.⁵¹ Looking at the plain meaning of the statute’s language for guidance, the Court concluded that “[i]f the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee” or “if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred.”⁵² The Court further held that it is impossible to discriminate against a person for being gay or transgender without discriminating against them based on sex as “homosexuality and transgender status are inextricably bound up with sex.”⁵³ Writing for a six-to-three majority, Justice Gorsuch, a historically conservative appointee,⁵⁴ held that the issue in *Bostock* involved “no more than the straightforward application of legal terms with plain and settled meanings[,]”⁵⁵ finding that discrimination based on sex “has always been prohibited by Title VII’s plain terms—and that ‘should be the end of the analysis’.”⁵⁶

B. Title VII

Bostock’s holding consequently brings into question the reach of Title VII’s judicially clarified definition of sex to other realms of the law. Title VII and Title IX⁵⁷ were created with a common goal—to eliminate discrimination.⁵⁸ Title VII applies this structure to the workplace,⁵⁹ whereas Title IX focuses on preventing discrimination based on sex for those participating in federally-funded educational programs.⁶⁰ However, the relationship between the two statutes extends beyond a

⁴⁹ *Bostock*, 140 S. Ct. at 1738.

⁵⁰ *Id.* at 1735–36.

⁵¹ *Id.* at 1739.

⁵² *Id.* at 1741.

⁵³ *Id.* at 1742.

⁵⁴ Ballotpedia, *Neil Gorsuch*, https://ballotpedia.org/Neil_Gorsuch (last visited Feb. 9, 2022).

⁵⁵ *Bostock*, 140 S. Ct. at 1743. See generally Marc Spindelman, *Bostock’s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553 (2021).

⁵⁶ *Bostock*, 140 S. Ct. at 1743 (quoting *Zarda v. Altitude Express*, 883 F.3d 100, 135 (2d Cir. 2018) (Cabranes, J., concurring in judgement)).

⁵⁷ Title IX of Education Amendments of 1972, 20 U.S.C. § 1681.

⁵⁸ U.S. Dep’t Lab., Off. Asst. Sec’y for Admin & Mgmt., *Legal Highlight: The Civil Rights Act of 1964*, <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964> (last visited Oct. 20, 2021).

⁵⁹ 42 U.S.C. § 2000 et seq.

⁶⁰ 20 U.S.C. § 1681.

mutual objective. Substantive legal precedent and established rules of statutory interpretation support an interpretive relationship between Title VII and Title IX, thus paving the way for an application of *Bostock* beyond the bounds of Title VII.⁶¹

Title VII is a product of sacrifices made by Rosa Parks,⁶² Dr. Martin Luther King Jr.,⁶³ and resilient American citizens⁶⁴ within the Civil Rights Movement who worked tirelessly “to eliminate from this Nation every trace of discrimination and oppression.”⁶⁵ The result of their dedication, the Civil Rights Act of 1964 (and particularly Title VII), was heavily debated by Congress prior to its enactment.⁶⁶ After enactment, another debate ensued when female congressional lawmakers vehemently supported amending the law to include the word “sex.”⁶⁷ Because of Title VII’s ambiguous legislative history,⁶⁸ the definition of “sex” within the statute has evolved as a result of judicial interpretation.⁶⁹

Early in Title VII’s history, “sex” was equated with biological sex; in order to prove disparate treatment, courts required a showing that a person “was subjected to disadvantageous terms or conditions of employment that the other sex was not,

⁶¹ See, e.g., *Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251, 273 (4th Cir. 2021); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look at case law interpreting Title VII . . . for guidance in evaluating a claim brought under Title IX.”); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832–33 (10th Cir. 1993) (quoting *Mabry v. State Bd. of Cmty. Coll. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987)); *Lipsett v. Univ. of Puerto Rico*, 964 F.2d 881, 896 (1st Cir. 1988).

⁶² *An Act of Courage, The Arrest Records of Rosa Parks*, NAT’L ARCHIVES (Dec. 21, 2016), <https://www.archives.gov/education/lessons/rosa-parks>.

⁶³ Martin Luther King, Jr., *Address to Highlander Folk School* (Sept. 2, 1957) (“Organized labor has proved to be one of the most powerful forces in removing the blight of segregation and discrimination from our nation.”).

⁶⁴ *Social Protests*, CONST. RTS. FOUND., <https://www.crf-usa.org/black-history-month/social-protests> (last visited Oct. 21, 2021).

⁶⁵ President Lyndon B. Johnson, *Address Before a Joint Session of Congress* (Nov. 27, 1963).

⁶⁶ Louis Menand, *How Women Got in on the Civil Rights Act*, NEW YORKER, July 14, 2014.

⁶⁷ 110 CONG. REC. H2581 (daily ed. Feb. 8, 1964) (quoting Rep. Katharine St. George, “We outlast you. We outlive you. We nag you to death . . . We are entitled to this little crumb of equality. The addition of that little, terrifying word ‘s-e-x’ will not hurt this legislation in any way. In fact, it will improve it . . . It will make it right.”); see also Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 MINN. J. L. & INEQ. 163 (1991).

⁶⁸ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986) (holding that Title VII’s amendment was added “at the last minute” and leaves “little legislative history to guide” interpretation of the “Act’s prohibition against discrimination based on ‘sex.’”); Devon Sherrell, *“A Fresh Look”: Title VII’s New Promise for LGBT Discrimination Protection Post-Hively*, 68 EMORY L.J. 1101, 1111–12 (2019) (citing Robert C. Bird, *More Than a Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. OF WOMEN & L. 137 (1997)).

⁶⁹ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (holding that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”).

such as being denied a promotion or terminated[.]”⁷⁰ In 1989, the Court held that “sex” under Title VII included protection from discrimination based upon sexual stereotyping.⁷¹ Although opposite-sex harassment claims were held early-on to be within Title VII’s intended coverage,⁷² same-sex harassment claims were consistently barred until 1997.⁷³ After years of rejection, the Supreme Court held, in *Oncale v. Sundowner Offshore Services, Inc.*, that, although same-sex harassment was “not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils[.]”⁷⁴ The Court’s oft-cited language from *Oncale* had significant influence⁷⁵ on *Bostock*’s holding that Title VII makes it “illegal for an employer to rely on an employee’s sex when deciding to fire that employee” and thus “[a]n employer who fires an individual merely for being gay or transgender defies the law.”⁷⁶

C. Title IX

Like Title VII, Title IX protects against sex discrimination but instead focuses on educational programs in lieu of employment.⁷⁷ Title IX was signed into law under the Education Amendments of 1972, an act whose principal objective was to protect citizens from sex discrimination within federally-funded education programs.⁷⁸ Three elements are required to establish jurisdiction under Title IX: “(1) allegations of discrimination based on sex, (2) within an education program,

⁷⁰ Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. OF WOMEN & L. 67, 72 (2000) (citing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)); see e.g., *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 103 S. Ct. 2622 (1983); *Cnty. of Wash. v. Gunther*, 101 S. Ct. 2242 (1981).

⁷¹ *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1988).

⁷² *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 n.2 (1977) (quoting *Griggs v. Duke Power Co.*, 91 S. Ct. 849, 853 (1971)); *Tomkins*, 568 F.2d at 1047.

⁷³ See e.g., *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (1984) (holding that Ulane, a transgender woman who was fired from her job as a pilot, was not entitled to protection under Title VII as the discrimination incurred was from a male colleague and Ulane was, despite having gender-affirming surgery and living as a woman, still biologically male).

⁷⁴ *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998) (emphasis added).

⁷⁵ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (using *Oncale* as a basis for the Court’s statutory interpretation).

⁷⁶ *Id.* at 1754.

⁷⁷ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. See generally U.S. Dep’t of Educ., *Title IX and Sex Discrimination* (Aug. 20, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

⁷⁸ U.S. Dep’t of Just., *Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 Et Seq.*, <https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination> (last visited Jan. 8, 2022).

(3) which ‘receiv[ed] Federal financial assistance’.”⁷⁹ Title IX is comparable to a contract in which federal agencies promise to fund an educational institution so long as they follow the parameters within the statute.⁸⁰ If an institution violates Title IX, its federal funding may be revoked entirely.⁸¹

The relationship between Title VII and Title IX stems from their very creations and can be demonstrated by examining their language. Most of the verbiage in Title IX is unoriginal to the statute, having been derived from Title VI⁸² and Title VII.⁸³ Recently, the Fourth Circuit Court of Appeals recognized this likeness between the statutes, stating that “Title IX’s language closely resembles Title VII’s.”⁸⁴ Most notably, Title IX borrows from Title VII, and similarly fails to define, the term “sex.”⁸⁵ Federal courts, both before and after *Bostock*, have looked to Title VII for guidance in interpreting Title IX, especially in circumstances regarding the definition of “sex” under the statute.⁸⁶

⁷⁹ Linda Jean Carpenter & R. Vivian Acosta, *Title IX – Two for One: A Starter Kit of the Law and a Snapshot of Title IX’s Impact*, 55 CLEV. ST. L. REV. 503, 503 (2007).

⁸⁰ *Davis v. Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390, 1398 (1997) (quoting *Guardians Ass’n v. Civil Serv. Comm’n*, 103 S. Ct. 3221, 3231 (1983)).

⁸¹ *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 790 (2009).

⁸² 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin in any federally funded program); see *Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th Cong, 409 (1975) (remarks of Rep. O’Hara) (arguing that Title IX was a “cut and paste job” using “a Xerox” of Title VI); *Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984) (holding that “Title IX was patterned after Title VI” and “since [Congress] approved identical language” the same meaning should be interpreted for each).

⁸³ U.S. Dep’t of Just., *Section IV-Interplay of Title VI with Title IX, Section 504, the Fourteenth Amendment, and Title VII* (Feb. 3, 2021), <https://www.justice.gov/crt/fcs/T6manual4> (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982)).

⁸⁴ *Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251, 274 (4th Cir. 2021). Compare 20 U.S.C. § 1681, with 42 U.S.C. § 2000e-2, and 42 U.S.C. § 2000d.

⁸⁵ See generally Equality Act, H.R. 5, 117th Cong. (2021) (awaiting Senate vote) (promoting further definition of the term sex as “sex (including sexual orientation and gender identity)”).

⁸⁶ See e.g., *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1160 (2015) (using Title VII in holding that “to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.”); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 694 (4th Cir. 2018) (citing *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 207 (4th Cir. 1994) (holding that “Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX.”)); *Emeldi v. Univ. of Or.*, 698 F.3d 715 (2011); *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. (2013); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (2016); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2021 U.S. Dist. LEXIS 230010, at *1 (S.D. W. Va. 2021); *Koenke v. St. Joseph’s Univ.*, No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *1 (E.D. Pa. 2021); *Doe v. Univ. of Scranton*, No. 3:19-CV-01486, 2020 U.S. Dist. LEXIS 187526, at *11 n.61 (M.D. Pa. 2020) (finding Plaintiff’s argument that Title IX contemplates peer-on-peer harassment on the basis of sexual orientation persuasive).

D. Pre-Bostock Interpretation of Title IX Through Title VII

Prior to *Bostock*, the Ninth Circuit Court of Appeals, in *Emeldi v. University of Oregon*, stressed three reasons for its adoption of the Title VII framework to Title IX claims.⁸⁷ “First, the legislative history of Title IX ‘strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII’[.]”⁸⁸ an application corroborated by House Reports discussing the two statutes in tandem.⁸⁹ Second, Title VII’s framework has proven useful in assessing other claims of discrimination outside of Title VII’s reach, such as age discrimination or equal protection, and should offer similar support for Title IX.⁹⁰ “Third, the Supreme Court has often ‘looked to its Title VII interpretations of discrimination in illuminating Title IX.’”⁹¹ When a court follows the statutory context approach to statutory interpretation, the court considers similar legislation to interpret an ambiguous or undefined term within a statute.⁹² Under this approach, an interpretive relationship between Title VII and Title IX can be demonstrated as the statutes both were created with the shared purpose of combatting discrimination,⁹³ and their treatment of the word “sex” is similarly vague.⁹⁴

III. POST-BOSTOCK INTERPRETATION OF TITLE IX THROUGH TITLE VII

Bostock provides courts and administrative agencies with support to interpret Title IX through the lens of Title VII. Some courts have relied on *Bostock*’s holding that “‘it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex’” to find that discrimination against transgender students within federally

⁸⁷ *Emeldi*, 698 F.3d at 724.

⁸⁸ *Id.* (quoting *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988)).

⁸⁹ *Id.* (citing H.R. Rep. No. 92-554, at 46 (1972)) (stating that although Title VII excludes educational institutions, “[Title IX] would remove that exemption and bring those in education under the equal employment provision.”).

⁹⁰ *Emeldi*, 698 F.3d at 724–25.

⁹¹ *Id.* (quoting *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 616 n.1 (1999)).

⁹² *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (looking at the “sense in which” a term “is used elsewhere in federal legislation and treaty” for guidance in its meaning). *See generally* *U.S. v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (comparing and interpreting a statute in accordance with other similar statutes).

⁹³ *See Sullivan v. Stroop*, 496 U.S. 478, 483–84 (1990) (holding that child support programs intended to work in tandem with one another should be considered together during interpretation).

⁹⁴ *See Babbitt*, 515 U.S. at 717–19.

funded schools violates Title IX.⁹⁵ Since June 2020, courts in the Third,⁹⁶ Fourth,⁹⁷ and Eleventh⁹⁸ Circuits have used *Bostock* to find that transgender students are protected from discrimination under Title IX.

A. Administrative Agency Interpretation

The administrative agencies who enforce the statute provide further interpretation of the relationship between Title IX and Title VII. Administration of Title IX is controlled by the Department of Education’s Office of Civil Rights⁹⁹ and the Department of Justice’s Civil Rights Division.¹⁰⁰ Both agencies have published notices supporting the application of *Bostock* to Title IX.¹⁰¹ The Department of Education stated in a notice of interpretation that “the Department finds no persuasive or well-founded basis for declining to apply *Bostock*’s reasoning . . . to Title IX’s parallel prohibition on sex discrimination[.]”¹⁰² Similarly, the Department of Justice reports that, after a review of Title IX, Supreme Court precedent, and developing jurisprudence in this area of law, “the best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes

⁹⁵ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct 1731, 1741 (2020)).

⁹⁶ *Koenke v. St. Joseph’s Univ.*, 2021 U.S. Dist. LEXIS 3576 *1, *4–5 (E.D. Pa. 2021) (holding that under *Bostock* “Title IX’s prohibition on sex discrimination constitutes a prohibition on sexual orientation discrimination.”); *Doe*, 2020 U.S. Dist. LEXIS 187526 at *11 n.61.

⁹⁷ *Grimm*, 972 F.3d at 616 (holding that “[a]lthough *Bostock* interprets [Title VII], it guides our evaluation of claims under Title IX.”), *cert denied*, 141 S. Ct. 2878 (2021); *B.P.J. v. W. Va. State Bd. of Educ.*, 2021 U.S. Dist. LEXIS 135943 *1, *18–19 (S.D. W. Va. 2021).

⁹⁸ *Adams v. Sch. Bd.*, 968 F.3d 1286, 1310 (11th Cir. 2020).

⁹⁹ U.S. Dep’t of Educ., *About OCR* (Jan. 5, 2022), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

¹⁰⁰ U.S. Dep’t of Just., *About the Division* (Dec. 15, 2021), <https://www.justice.gov/crt/about-division>.

¹⁰¹ *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637, 32637–40 (June 22, 2021) (interpreting that Title IX prohibits discrimination based on sexual orientation and gender identity consistent with the holding in *Bostock*); U.S. Dep’t of Just., C.R. Div., *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download> (finding that “Executive Order [13988] directs agencies to review other laws that prohibit sex discrimination, including Title IX, to determine whether they prohibit discrimination on the basis of gender identity and sexual orientation. We conclude that Title IX does.”); U.S. Dep’t of Just., *Title IX Legal Manual: Title IX Cover Addendum Post-Bostock* (Aug. 12, 2021), <https://www.justice.gov/file/1423496/download>.

¹⁰² 86 Fed. Reg. at 32638–39.

discrimination on the basis of gender identity and sexual orientation.”¹⁰³ Application of *Bostock* to Title IX is also heavily favored by the current Biden administration¹⁰⁴ and promoted by the congressionally-approved Equality Act,¹⁰⁵ although a wildcard Supreme Court conservative supermajority could disrupt the future course of law in unanticipated ways.¹⁰⁶

B. Supreme Court Precedent and Interpretation

In June 2021, a year after *Bostock*, the Supreme Court denied certiorari¹⁰⁷ to hear *Grimm v. Gloucester*, a case concerning the constitutional rights of transgender students to use bathrooms matching their gender identity.¹⁰⁸ In *Grimm*, the Fourth Circuit Court applied *Bostock* to Title IX in holding that a school board had discriminated against a transgender student by prohibiting him from using the restroom matching his gender identity—in violation of Title IX.¹⁰⁹ By denying certiorari, the Supreme Court allowed the holding of *Grimm* to stand, solidifying that under *Bostock*, Title IX protects transgender students from discrimination “on the basis of sex” within the Fourth Circuit¹¹⁰ and possibly beyond.¹¹¹

Although the Supreme Court has presently declined to rule on *Bostock*’s national application to Title IX, the Court’s rules of statutory interpretation may be adequate to fill the argument’s outstanding gaps. The Court has held that “[b]ecause ‘a full understanding of the force of the statutory policy . . . depend[s] upon more than ordinary knowledge’ of the situation, the *administering agency’s construction is to be accorded ‘controlling weight unless . . . arbitrary, capricious, or manifestly*

¹⁰³ U.S. Dep’t of Just., C.R. Div., *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021),

<https://www.justice.gov/crt/page/file/1383026/download>.

¹⁰⁴ Exec. Order No. 13988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021).

¹⁰⁵ Equality Act, H.R. 5, 117th Cong. (2021) (awaiting Senate vote); *see also* Sarah W. Keller, *Battle of the Sexes: Disagreement About the Definition of Sex in Title IX and the Need for Judicial Review*, 28 VA. J. SOC. POL’Y & L. 135, 140 (2021) (stating that “The Equality Act is a congressional attempt to apply EO 13988 and resolve the meaning of sex in Title IX.”).

¹⁰⁶ *See generally* Vincent Martin Bonventre, *Supreme Shift II: A Conservative Super-Majority Delivers a Decidedly Conservative Term*, NYSBA (Aug. 3, 2021), <https://nysba.org/supreme-shift-ii-a-conservative-super-majority-delivers-a-decidedly-conservative-term/> (stating that the impact of a conservative super-majority “on the court’s decisional leaning should not be underestimated.”).

¹⁰⁷ *See* Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021).

¹⁰⁸ Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020).

¹⁰⁹ *Id.* at 616–18.

¹¹⁰ *Id.* at 619–20.

¹¹¹ *See* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1302–05 (1979) (asserting that denials of certiorari can sometimes be indicative of the Court’s views

contrary to the statute.”¹¹² Here, statutory interpretation should be left to the administrative agencies that govern Title IX: the Department of Justice and the Department of Education. Currently, both agencies support application of *Bostock* to Title IX.¹¹³ Thus, the combination of administrative agency guidance combined with recent judicial rulings indicate that “[i]t is time to move forward”¹¹⁴ in providing protections to members of the transgender community largely ignored under Title IX.¹¹⁵

IV. SAVE WOMEN’S SPORTS LEGISLATION AND TITLE IX

Because of Title IX’s emphasis on sex discrimination, the regulation of school sports, particularly women’s sports,¹¹⁶ has been a topic of contentious debate since the statute’s inception. Title IX has had a substantial impact on women’s access to sports. Prior to Title IX, fewer than 32,000 women competed in college sports compared to more than 170,000 male participants.¹¹⁷ Women that competed collegiately at this time received no athletic scholarships, and their programs subsisted on crumbs, receiving an average of only 2% of their schools’ athletic budgets.¹¹⁸ Although women’s sports still lack equality to men’s sports,¹¹⁹ the number of female college athletes today exceeds 200,000, with more than 3.3 million female high school athletes vying for a spot on a coveted NCAA team each

¹¹² *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 513 (2014) (emphasis added) (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984)).

¹¹³ See *supra* note 101.

¹¹⁴ *Grimm*, 972 F.3d at 620 (quoting Floyd, J.).

¹¹⁵ See Chan Tov McNamarah, *On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School with Title IX*, 104 CORNELL L. REV. 745, 780–790 (2019) (presenting three vignettes illustrating ways in which queer students are denied benefits based on their sex in violation of Title IX).

¹¹⁶ See generally Jacquelyn Gillen, *Striking the Balance of Fairness and Inclusion: The Future of Women’s Sports After the Supreme Court’s Landmark Decision in Bostock v. Clayton County, GA*, 28 JEFFREY. S. MOORAD SPORTS. L. J. 415 (2021); Melody Harris, *Hitting ‘Em Where It Hurts: Using Title IX Litigation to Bring Gender Equality to Athletics*, 72 DENV. U. L. REV. 57 (1994).

¹¹⁷ Nat’l Women’s L. Ctr., *The Battle for Gender Equity in Athletics in Colleges and Universities* 1 (2012) (citing Nat’l Coll. Athletic Assoc., *1981-82 NCAA Sports Sponsorship and Participation Rates Report* 66 (Feb. 2010)), https://nwlc.org/wp-content/uploads/2015/08/battle_in_college_athletics_final_6.14.12_231.pdf.

¹¹⁸ *Id.* (citing 130 Cong. Rec. S4601 (daily ed. Apr. 12, 1984) (remarks of Sen. Stevens)).

¹¹⁹ Andrew Zimbalist, *Title IX Is Turning 50, But More Work Remains to Level the Playing Field for Female Athletes*, FORBES, (Sept. 9, 2021, 2:04 PM), <https://www.forbes.com/sites/andrewzimbalist/2021/09/09/title-ix-is-turning-fifty/?sh=24a1b34410b3>.

year.¹²⁰ With recent cases holding that Title IX protects the rights of transgender students to participate in functions matching their gender identity,¹²¹ opposition groups have begun to lobby for stricter guidelines in sports.¹²²

A. “Saving” Women’s Sports Through Exclusion

The Save Women’s Sports coalition, a group of women who claim to have been wronged by transgender athletes,¹²³ “seeks to preserve biology-based eligibility standards for participation in female sports.”¹²⁴ Save Women’s Sports, and other like-minded organizations,¹²⁵ demand that transgender athletes participate only on teams matching their sex assigned at birth, regardless of any gender-affirming procedures or hormone therapy.¹²⁶ One particular organization, the Alliance Defending Freedom (“ADF”),¹²⁷ campaigned aggressively against

¹²⁰ Amy S. Wilson, *45 Years of Title IX: The Status of Women in Intercollegiate Athletics*, NAT’L COLL. ATHLETIC ASSOC. 17 (2017), <https://www.ncaapublications.com/productdownloads/TitleIX-45.pdf>.

¹²¹ See e.g., *Adams v. Sch. Bd.*, 968 F.3d 1286 (11th Cir. 2020) (holding that a school board policy which barred transgender students from using the bathroom matching their gender identity violated Title IX); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1046-50 (7th Cir. 2017); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *Washington v. U. S. Dep’t of Health & Hum. Servs.*, 482 F. Supp. 3d 1104, 1114-15 (W.D. Wash. 2020).

¹²² See Elizabeth A. Sharrow, *Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy*, 10 LAWS 1, 2 (2021) (stating that “Republican lawmakers now aim to reframe sex non-discrimination policies as a means of gendered *exclusion*.”).

¹²³ See Save Women’s Sports, *Our Stories: Emily’s Story*, <https://savewomenssports.com/our-stories> (last visited Jan. 8, 2022) (stating that “[a] male can never be a woman, regardless of how he identifies, what medical procedures he undergoes . . . [or] whether he was incorrectly sexed at birth because of a disorder of sexual development” and describing her breaking point was during a track meet in which “two males” set records that “no actual girl has any hope of beating.”).

¹²⁴ Save Women’s Sports, *About Save Women’s Sports*, <https://savewomenssports.com/about> (last visited Jan. 8, 2022).

¹²⁵ See e.g., Alliance Defending Freedom, *Protect Women’s Sports*, <https://adflegal.org/help-protect-womens-sports/donate> (last visited Jan. 8, 2022); Women’s Liberation Front, *Protecting Women’s and Girls’ Sports*, <https://www.womensliberationfront.org/womens-sports> (last visited Jan. 8, 2022); Emilie Kao, *Congress is Set to Pass an “Equality Act” That Will Devastate Women’s Sports*, HERITAGE FOUND. (May 16, 2019), <https://www.heritage.org/gender/commentary/congress-set-pass-equality-act-will-devastate-womens-sports>.

¹²⁶ See, e.g., H.B. 25, 87th Leg., 3rd Spec. Sess. (Tex. 2021) (stating that students may not compete on a sports team designated for the biological sex opposite the students’ and that biological sex is proven by “the student’s official birth certificate . . . only if the statement was . . . entered at or near the time of the student’s birth”).

¹²⁷ Alliance Defending Freedom, *About Us*, <https://adflegal.org/> (last visited Jan. 8, 2022) (“Alliance Defending Freedom is the world’s largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life” . . .

transgender rights in 2021,¹²⁸ arguing against participation of transgender athletes in sports,¹²⁹ the use of chosen pronouns and names for transgender students in schools,¹³⁰ and the elimination of conversion therapy¹³¹ for persons who are transgender.¹³² Historically, ADF has also argued in favor of the sterilization of transgender individuals in France¹³³ and for the criminalization of gay sex both domestically¹³⁴ and internationally.¹³⁵

Organizations like Save Women’s Sports and ADF claim to further equality by offering protection to female athletes, but, like the debates surrounding access to restrooms for transgender persons,¹³⁶ their argument that women’s sports need

“Marriage and Family are Protected: Ensuring the law respects God’s creative order for marriage, the family, and human sexuality.”)

¹²⁸ Nico Lang, *A Hate Group is Reportedly Behind 2021’s Dangerous Wave of Anti-Trans Bills*, THEM (Feb. 19, 2021), <https://www.them.us/story/hate-group-reportedly-behind-2021-anti-trans-bills> (“ADF did not deny playing a role in authority 2021’s spate of anti-trans bills, which now numbers over 31 pieces of legislation.”).

¹²⁹ Natalie Allen, *Together, We Can Save Women’s Sports*, ALLIANCE DEFENDING FREEDOM (Feb. 3, 2021), <https://adflegal.org/blog/together-we-can-save-womens-sports>; see *Soule v. Conn. Ass’n of Schs.*, 2021 U.S. Dist. LEXIS 78919 (D. Conn. Apr. 25, 2021) *appeal filed*; *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020).

¹³⁰ *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300 (4th Cir. 2021); *Doe v. Madison Metro. Sch. Dist.* 963 N.W.2d 823 (Wis. Ct. App. 2021).

¹³¹ *Tingley v. Ferguson*, 2021 U.S. Dist. LEXIS 164063 (W.D. Wash. 2021).

¹³² See also *Downtown Soup Kitchen v. Mun. of Anchorage*, 2021 U.S. Dist. LEXIS 242085 (Alaska Dist. Ct. 2021) (ADF arguing that a homeless shelter should be able to exclude a transgender woman admission based on her sex and gender identity).

¹³³ *A.P. Garçon Nicot v. France*, App. No. 79885/12, 52471/13, 52596/13, § 5 (Apr. 6, 2017), <https://hudoc.echr.coe.int/spa?i=001-172913> (referencing *Written Observations of Third Party Intervener*, ADF INTERNATIONAL (July 1, 2015)), <https://www.splcenter.org/sites/default/files/adf-ap-and-others-v-france-echr-brief.pdf> (stating that “equal dignity does not mean that every sexual orientation warrants equal respect.”).

¹³⁴ Brief *Amicus Curiae* of the Center for the Original Intent of the Constitution in Support of Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), https://www.splcenter.org/sites/default/files/adf-lawrence_v_texas_brief-farris-2003.pdf (urging the court to “radically rewrite the criminal laws of this nation” to include “sodomy,” “a crime so unspeakable” that it “caused . . . moral revulsion”). See generally Alan Sears, *The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today* (1st ed. 2003) (Alan Sears was the founder and president of ADF until 2017).

¹³⁵ S. Poverty L. Ctr., *Dangerous Liaisons: The American Religious Right & the Criminalization of Homosexuality in Belize* (July 2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/splc-report-dangerous-liaisons.pdf.

¹³⁶ See Sharrow, *supra* note 122, at 18 (citing Kristen Schilt & Laurel Westbrook, *Bathroom Battlegrounds and Penis Panics*, 14 CONTEXTS 1, 26–31 (2015)), (stating that “[m]uch like how anti-trans bathroom bills relied on baseless, concocted threats of phantom sexual predators in women’s restrooms, the need for women’s sports to be ‘protected’ from transgender athletes is a dubious claim.”).

to be saved stems more from a place of exclusion than from a desire for fairness.¹³⁷ In 2021,¹³⁸ in response to lobbying by ADF and other groups, a record number¹³⁹ of anti-transgender bills were introduced,¹⁴⁰ lending a hand to making 2021 the deadliest year for transgender Americans in recorded history.¹⁴¹ Many of these bills have died in state legislatures, but a concerning amount have been enacted.¹⁴²

¹³⁷ *Id.* at 17–18 (proposing in § 4.5, Theme 4: Emphasis on “Protecting” Girl’s and Women’s Sport, that lawmakers aim to “establish and enshrine cisgender, heterosexual orientation as the presumptive gendered order” by framing anti-transgender sports bills as “protect[ive]” of women from “baseless, concocted threats” by the transgender community); *see also* Mark Joseph Stern, *It Wasn’t About Bathrooms, and It’s Not About Women’s Sports*, SLATE (Apr. 7, 2021), <https://slate.com/news-and-politics/2021/04/transgender-rights-bathrooms-sports-alliance-defending-freedom.html> (proposing that the “putative problem” that “transgender women are dominating student sports and denying cisgender women the benefits that come with athletic excellence” has “simply no evidence” and “does not exist.”).

¹³⁸ *See Legislative Tracker: Anti-Transgender Legislation*, FREEDOM FOR ALL AMERICANS, <https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/> (updated daily) (as of October 28, 2021, over 130 anti-transgender bills had been introduced).

¹³⁹ Wyatt Ronan, *Breaking: Human Rights Campaign Slams Texas Governor Greg Abbott For Signing Discriminatory Anti-Transgender Sports Ban Into Law*, HUMAN RIGHTS CAMPAIGN (Oct. 25, 2021), <https://www.hrc.org/press-releases/breaking-human-rights-campaign-slams-texas-governor-greg-abbott-for-signing-discriminatory-anti-transgender-sports-ban-into-law> (finding that 2021 has “set a new record for anti-equality legislation being introduced and enacted in a single state legislative session since the Human Rights Campaign began tracking legislation.”).

¹⁴⁰ *See e.g.*, H.B. 195, 2021–22 Leg. (Wis. 2021); H.B. 972, 2021–22 Leg., Reg. Sess. (Pa. 2021); S.B. 1637, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 4153, 124th Gen. Assemb. (S.C. 2021) (proposing exclusion of transgender athletes in sports); S.B. 1311, 87th Leg. Sess. (Tex. 2021) (proposing health care providers deny specified gender reassignment procedures to youth who are transgender); H.B. 1027, 112th Gen. Assemb. (Tenn. 2021) (specifying that medical practice does not involve prescribing hormone treatment for youth who are transgender); H.B. 1182, 112th Gen. Assemb. (Tenn. 2021) (requiring businesses use an 8”x 6” yellow sign to inform patrons that they allow persons who are transgender to use a restroom that matches their gender identity).

¹⁴¹ Orion Rummel, *2021 Set to Become Deadliest Year on Record for Trans Americans*, AXIOS (June 12, 2021), <https://www.axios.com/trans-killings-america-deadliest-01b10dd4-b7e7-467f-8b8a-36adcf321b57.html> (citing Human Rights Campaign, *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> (last visited Jan. 8, 2022)) (finding that more people who are transgender were killed in 2021 than in all of 2013, 2014, 2015, 2016, 2018, and 2019 combined, and arguing that chronic unemployment, poverty, and homelessness caused by discrimination fuel this violence); Kate Sosin, *Against Backdrop of Anti-Trans Bills, Transgender Homicides Double*, 19TH NEWS (Apr. 16, 2021), <https://19thnews.org/2021/04/against-backdrop-anti-trans-bills-transgender-homicides-double/>.

¹⁴² *See e.g.*, H.B. 391, 2021 Reg. Sess. (Ala. 2021); S.B. 354, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 2536, 2021 Reg. Sess. (Miss. 2021); H.B. 112, 67th Leg. (Mont. 2021); H.B. 0003, 112th Gen. Assemb. (Tenn. 2021); H.B. 25, 87th Leg. Sess. (Tex. 2021); H.B. 3293, 2021 Reg. Sess. (W. Va. 2021) (requiring athletes to play on sports teams matching their at-birth biological

Although some states have decided not to adopt or enforce such discriminatory provisions,¹⁴³ the fact that these bills are not completely failing en masse indicates that anti-trans bills are likely to continue to be proposed and enacted. On a larger scale, the underlying politics of judicial appointees in the federal system cannot be understated. Should a conservative president with values akin to states enacting anti-trans legislation be elected, courts with conservative appointees could refuse to hear challenges to these anti-trans laws, leaving them indefinitely binding.

In some ways, this influx of exclusionary anti-trans legislation mirrors the early 2000's—a time of peak legal advancement for gay rights culminating after decades of tireless judicial and legislative proposals, denials, and, eventually, acceptance.¹⁴⁴ The adoption of protections and rights for gay persons, relationships, and families during this time seems to reflect a shift in American sentiments toward gay relationships.¹⁴⁵ Both prior to and after the adoption of these protections and rights, anti-LGBTQ organizations, including the ADF,¹⁴⁶ flooded courts and legislatures with anti-gay proposals, attempting to deny homosexual persons access to equal housing,¹⁴⁷ equal employment,¹⁴⁸ marriage,¹⁴⁹ and healthcare coverage.¹⁵⁰ Although the majority of these proposals did not withstand judicial scrutiny, they

sex); H.B. 1570, 93rd Gen. Assemb., 2021 Reg. Sess. (Ark. 2021) (prohibiting minors from receiving gender transition procedures).

¹⁴³ See e.g., S.B. 1046, 55th Leg., 2nd Reg. Sess. (Ariz. 2022) (failing to enact a law requiring biological sex designations on athletic teams); H.B. 2210, 2021-22 Reg. Sess. (Kan. 2022) (failing to enact a law making it a crime for a doctor to provide gender reassignment surgery or hormone therapy to minors).

¹⁴⁴ See e.g., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (decriminalizing homosexual sexual activity); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (making Massachusetts the first state to legalize same-sex marriage); Don't Ask Don't Tell Repeal Act of 2010, 124 Stat. 3515 (2010) (allowing openly LGBTQ persons to serve in the armed forces); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (legalizing gay marriage in all states).

¹⁴⁵ See Tina Fetner, *U.S. Attitudes Toward Lesbian and Gay People are Better than Ever*, CONTEXTS (2016), <https://journals.sagepub.com/doi/10.1177/1536504216648147> (citing *LGBT Rights*, GALLUP, <https://news.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx> (reporting poll data which shows a consistently increasing favorability towards gay rights, with a majority of poll-takers approving of rights for gays around 2011) (last visited Jan. 8, 2022)); see also *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1882 (2021) (citing *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018)) (holding that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”).

¹⁴⁶ See Alliance Defending Freedom, *History of Alliance Defending Freedom*, <https://adflegal.org/about-us/who-we-are/history> (last visited Jan. 8, 2022). The Alliance Defending Freedom was known as the “Alliance Defense Fund” until 2012.

¹⁴⁷ See, e.g., *Sch. of the Ozarks, Inc. v. Biden*, 2021 U.S. Dist. LEXIS 105775 (W.D. Mo. 2021).

¹⁴⁸ See, e.g., *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968 (7th Cir. 2021).

¹⁴⁹ See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015).

¹⁵⁰ See, e.g., *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004).

were not all failures.¹⁵¹ Over the past ten years, American approval of rights for persons who are transgender,¹⁵² along with the acceptance of gender diversity,¹⁵³ has steadily increased—a fact frightening to those opposed. Under *Bostock*,¹⁵⁴ the many anti-trans sports bills proposed by Save Women’s Sports, ADF, and others,¹⁵⁵ are likely to violate Title IX¹⁵⁶ and be deemed unconstitutional under the Fourteenth Amendment.¹⁵⁷ Like gay individuals over the past several decades, persons who are transgender have judicially claimed their rights bit-by-bit.¹⁵⁸ *Bostock*¹⁵⁹ represents

¹⁵¹ See *Demkovich*, 3 F.4th at 968 (dismissing all claims brought by a music director who was fired from his job in the Catholic church after marrying his same-sex partner).

¹⁵² Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS (Apr. 16, 2021), <https://www.pbs.org/newshour/politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws>.

¹⁵³ Compare Rachel Minkin & Anna Brown, *Rising Shares of U.S. Adults Know Someone Who is Transgender or Goes by Gender-Neutral Pronouns*, PEW RESEARCH CENTER. (July 27, 2021), <https://www.pewresearch.org/fact-tank/2021/07/27/rising-shares-of-u-s-adults-know-someone-who-is-transgender-or-goes-by-gender-neutral-pronouns/>, with Justin McCarthy, *Gallup First Polled on Gay Issues in '77. What Has Changed?*, GALLUP (June 6, 2019), <https://news.gallup.com/poll/258065/gallup-first-polled-gay-issues-changed.aspx>.

¹⁵⁴ See e.g. *Soule v. Conn. Ass’n of Schs.*, 2021 U.S. Dist. LEXIS 78919 *1, *29–30 (D. Conn. Apr. 25, 2021) (holding that plaintiff’s claims for damages against transgender athletes are barred because “[c]ourts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity.”); *Hecox v. Little*, 479 F. Supp. 3d 930, 985 (D. Idaho 2020) (granting a preliminary injunction against enforcement of Idaho law precluding transgender female athletes from playing in women’s sports); *B.P.J. v. W. Va. State Bd. of Educ.*, 2021 U.S. Dist. LEXIS 135943 *1, *20 (S.D. W. Va. 2021) (granting a preliminary injunction against enforcement of West Virginia law that precludes transgender females from participating in women’s sports).

¹⁵⁵ H.B. 25, 87th Leg., 3rd Spec. Sess. (Tex. 2021); S.B. 1028, 2021 Reg. Sess. (Fla. 2021); H.B. 3293, 2021 Reg. Sess. (W. Va. 2021).

¹⁵⁶ See 34 C.F.R. § 106.6 (2021).

¹⁵⁷ U.S. CONST. amend. XIV.

¹⁵⁸ See e.g. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. 1976) (holding that post-operative persons who are transgender may marry in their post-operative sex); Minnesota Human Rights Act, Minn. Stat. 363A (2021) (In 1993, Minnesota was the first state to protect persons who are transgender through human rights legislation); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (holding that discrimination on the basis of gender expression is disallowed under Title VII); *O’Donabhain v. Comm’r*, 134 T.C. 34 (2010) (holding that sex reassignment surgery for gender identity disorder could be deducted as a necessary medical expense under 26 U.S.C. § 213); Exec. Order No. 13672, 79 Fed. Reg. 72985, 72985-95 (Dec. 9, 2014), *revoked by* Memorandum on August 25, 2017, 82 Fed. Reg. 41319, 41319-20 (Aug. 30, 2017), *reinstated by* Exec. Order No. 14004, 86 Fed. Reg. 7471, 7471-73 (Jan. 28, 2021) (allowing persons who are transgender to serve in the military under their chosen gender); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (holding that students who are transgender have a right to use restrooms that match their gender identity).

¹⁵⁹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (holding that discrimination on the basis of sex includes transgender status under Title VII).

a monumental victory for the transgender community and is potentially indicative of a change in the tides for transgender protections as a whole.¹⁶⁰

B. Biology-Based Classifications as an Important Governmental Objective

When a judicial decision hinges on a sex-based classification, such as transgender status, heightened scrutiny is applied to determine the holding.¹⁶¹ Under heightened scrutiny, the Fourteenth Amendment requires that legislation which discriminates on the basis of sex serves “important governmental objectives” and be “substantially related to achievement of those objectives”.¹⁶² Employing these parameters, parties opposed to transgender inclusion in sports must prove that protecting women’s sports is an important governmental objective and that allowing only athletes assigned female at birth to play in women’s sports is substantially related to achieving that objective. Defendants supporting these anti-trans bills have so far been unsuccessful in their attempts to demonstrate that restricting women’s sports teams to only athletes assigned female at birth substantially protects those sports,¹⁶³ setting precedent consistent with administrative sentiments.¹⁶⁴ However, judges in other jurisdictions and courts

¹⁶⁰ See John T. Rice, *The Road to Bostock*, 15 FIU L. REV. 423, 455 (2021) (stating that “Bostock will long be recognized as a watershed moment in the movement for LGBT equality under the law. It both resolves and simplifies the law while drawing attending to what may be coming.”). See generally Mark Joseph Stern, *Federal Courts Keep Shooting Down Anti-Trans Laws. Will That Hold at SCOTUS?*, SLATE (July 22, 2021), <https://slate.com/news-and-politics/2021/07/transgender-discrimination-west-virginia-arkansas-supreme-court.html>.

¹⁶¹ See *Grimm*, 972 F.3d at 607 (stating that heightened scrutiny applies because the policy debated rests on sex-based classifications and persons who are transgender constitute at least a quasi-suspect class).

¹⁶² *Hecox*, 479 F. Supp. 3d at 973 (D. Idaho 2020) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

¹⁶³ See e.g., *Hecox*, 479 F. Supp. 3d at 983–85 (holding that the act proposed serves no identifiable legitimate interest other than an invalid interest of excluding transgender athletes and that plaintiffs are likely to succeed on their equal protection claims); *B.P.J. v. W. Va. State Bd. of Educ.*, 2021 U.S. Dist. LEXIS 135943 *1, *14–17 (S.D. W. Va. 2021) (holding that the anti-trans sports statute proposed is “not substantially related to providing equal athletic opportunities for girls” and plaintiffs are likely to succeed on their equal protection claim).

¹⁶⁴ See Statement by President Biden on Transgender Day of Remembrance, 2021 Daily Comp. Pres. Doc. 202100991 (Nov. 20, 2021) (“I continue to call on state leaders and lawmakers to combat the disturbing proliferation of discriminatory state legislation targeting transgender people, especially transgender children . . . these bills are nothing more than bullying disguised as legislation”); Chris Johnson, *White House Warns State Legislatures that Passing Anti-Trans Bills is Illegal*, WASHINGTON BLADE, Mar. 5, 2021.

certainly could hold differently, finding, as they have before, that biology-based sex classifications are an important governmental objective.¹⁶⁵

The uncertain nature of court holdings in cases focused on whether or not to deny transgender persons equal rights could be reflective of the data currently available about the relationship between gender affirmation and athletic performance. As with any new area of research,¹⁶⁶ emerging data is constantly being interpreted to either infer or deny a performance advantage of transgender athletes in sports. For example, a 2017 survey of medical research concerning participation of transgender persons in sports suggested there is “no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition[.]”¹⁶⁷ Comparatively, a 2021 systematic review of medical data found that transgender women who undergo gender affirming hormone therapy become equivalent to cisgender women in many ways, but may retain a higher level of muscle mass.¹⁶⁸ However, such reports do not specify whether retained muscle mass confers a specific performance advantage.¹⁶⁹ Medical experts have stated that “[t]o become the basis of regulation, a scientific finding should be accepted by a majority of experts and become an actual matter of consensus.”¹⁷⁰ Like the dangerous misinformation provided by

¹⁶⁵ See *Adams v. Sch. Bd.*, 3 F.4th 1299, 1328 (11th Cir. 2021) (Pryor, C.J., dissenting) (stating that school sex-separated bathrooms serve “the important objectives of protecting the interests of children in using the bathroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex.”). See generally Amy Littlefield, *The Christian Legal Army Behind the Ban on Abortion in Mississippi*, THE NATION (Nov. 30, 2021), <https://www.thenation.com/article/politics/alliance-defending-freedom-dobbs/> (stating that speakers at ADF’s “Blackstone Legal Fellowship for law students have included Supreme Court Justice Barrett and Fifth Circuit Judge Kyle Duncan” and that ADF’s representation extends far and wide to include “members of congress like Louisiana Representative Mike Johnson, a former ADF attorney” and “attorneys general offices nationwide, where . . . at least 18 ADF-affiliated attorneys” are currently employed).

¹⁶⁶ See generally Kelsey Piper, *How Bad Research Clouded Our Understanding of Covid-19*, VOX (Dec. 17, 2021), <https://www.vox.com/future-perfect/22776428/ivermectin-science-publication-research-fraud> (finding that as many as 200 Covid-19 papers have been retracted since the start of the pandemic, for reasons ranging from calculation errors to improperly completed studies and erroneous conclusions).

¹⁶⁷ Bethany Alice Jones et al., *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 SPORTS MED. 701, 701 (2017).

¹⁶⁸ Joanna Harper et al., *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin? Systematic Review with a Focus on the Implication for Sport Participation*, 55 BRIT. J. SPORTS MED. 865, 871 (2021).

¹⁶⁹ *Id.*

¹⁷⁰ Yehoshua Scocol et al., *Interests, Bias, and Consensus in Science and Regulation*, 17(2) DOSE RESPONSE 1, 1 (2019).

ADF on other legal topics,¹⁷¹ the data presented by state legislatures within these anti-trans sports bills,¹⁷² if any is presented at all,¹⁷³ is stated as fact. However, the variation of medical knowledge within the field of transgender athletics¹⁷⁴ makes any data suggesting transgender athletes have a performance advantage more hypothetical¹⁷⁵ than definitive. Applying heightened scrutiny, the inconclusive nature of this data does not provide a substantial basis to support the claim that allowing only persons assigned female at birth to compete in women’s sports keeps them protected.¹⁷⁶

With no scientific consensus to show that women’s sports would be placed at risk by the inclusion of transgender athletes, an evaluation of the legislation’s “actual purposes” also points towards a finding of unconstitutionality.¹⁷⁷ From their construction, it is apparent that the actual purpose of these anti-trans bills is to exclude persons who are transgender from athletic opportunities based upon their sex.¹⁷⁸ Inconclusive data from an evolving scientific field is insufficient¹⁷⁹ to “overcome the injury and indignity”¹⁸⁰ inflicted by laws which revoke the rights of an entire group of athletes to participate in activities that could substantially improve their quality of life.¹⁸¹ The Supreme Court has held that classifications on

¹⁷¹ *Compare* Alliance Defending Freedom, *Abortion Harms Women and Destroys Life*, <https://adfflegal.org/issues/sanctity-of-life/abortions/key-issues/women-deserve-better-than-abortion> (last visited Feb. 10, 2022), *with* Center for Disease Control, *Abortion Surveillance – United States, 2019*, 70(9) MMWR 1 (Nov. 26, 2021), *and* Center for Disease Control, *Reproductive Health – Pregnancy Mortality Surveillance System*, <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> (last visited Feb. 10, 2022).

¹⁷² *See e.g.*, H.B. 358, 2021-22 Reg. Sess. (N.C. 2021).

¹⁷³ *See e.g.*, S.B. 2, 2021 Reg. Sess. (Okla. 2021).

¹⁷⁴ *Compare* Jones et al., *supra* note 167, *with* Harper et al., *supra* note 168.

¹⁷⁵ *See* Hecox v. Little, 479 F. Supp. 3d 930, 976 (D. Idaho 2020). *See generally* Tinbete Ermyas & Kira Wakeam, *Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says*, NPR (Mar. 18, 2021), <https://www.npr.org/2021/03/18/978716732/wave-of-new-bills-say-trans-athletes-have-an-unfair-edge-what-does-the-science-s>.

¹⁷⁶ *See* Hecox, 479 F. Supp. 3d at 980–82 (finding that data used to support defendant’s argument that transgender athletes have an advantage over cisgender athletes was suspect).

¹⁷⁷ *Id.* at 976 (citing *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014)) (holding that in a heightened scrutiny equal protection analysis the court must look to the defendants to justify the act, must consider the act’s actual purposes, need not accept hypothetical justifications for the act, and must decide whether defendant’s proffered justifications overcome the injury and indignity inflicted on the plaintiffs and others like them).

¹⁷⁸ Hecox, 479 F. Supp. 3d at 983 (holding that “[t]he 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.”).

¹⁷⁹ *Id.* at 982.

¹⁸⁰ *Id.* at 976.

¹⁸¹ *See* Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, AMERICAN PROGRESS (Feb. 8, 2021), <https://www.americanprogress.org/article/fair-play/>

the basis of sex can only be upheld if it they represent “a legitimate accurate proxy” and has, in the past, struck down classifications with objectives lacking factual justification.¹⁸² Because these bills do not provide factual justification to support the claim that excluding transgender athletes substantially supports the protection of women’s sports and the injury and indignity caused to transgender athletes by this exclusion is substantial,¹⁸³ the court is likely to find that the legislative materials are unconstitutional under a standard of heightened scrutiny as the actual purpose of these bills is to exclude, rather than protect.¹⁸⁴

On its face, the concern that women’s sports could be compromised by a new category of athletes is not an unreasonable contention. Women’s sports have long been the target of discrimination¹⁸⁵ and inequality,¹⁸⁶ and the current climate surrounding this topic is worsening.¹⁸⁷ However, real-world incorporation of transgender athletes has shown that it can be done successfully and without harming the vulnerable world of women’s sports. For decades, some of America’s largest athletic groups, including the National Collegiate Athletic Association

(presenting medical studies that show athletes have lower rates of obesity, anxiety, depression, suicide attempts, and drug use and increased levels of self-esteem, confidence, academic performance, and community connectedness).

¹⁸² *Hecox*, 479 F. Supp. 3d at 982 (quoting *Clark v. Ariz.*, 695 F.2d 1126, 1129–30 (9th Cir. 1982)).

¹⁸³ *See id.* at 982.

¹⁸⁴ *See id.* at 976.

¹⁸⁵ *See e.g.*, Nat’l Women’s L. Ctr., *Finishing Last: Girls of Color and School Sports Opportunities* (Apr. 20, 2015), http://www.prrac.org/pdf/GirlsFinishingLast_Report.pdf (showing that girls of color do not receive equal chances to play school sports); Keyleigh N. Wallick, *Underrepresentation of Women in Sports Leadership: Stereotypes, Discrimination, and Race*, STUDENT PUBLICATIONS 687 (2018) (finding that coaching positions for women’s athletics are increasingly being filled by men, excluding women, especially black women, from coaching their own sports); Rory Jiwani, *Moments Paving the Way for Gender Equality in Sport*, OLYMPICS (Mar. 2, 2021), <https://olympics.com/en/featured-news/top-10-moments-gender-equality-in-sport-intl-equal-pay-day> (recollecting the decades of challenges faced by women athletes due to their gender).

¹⁸⁶ *See e.g.*, Jenesse Miller, *News Media Still Pressing the Mute Button on Women’s Sports*, USC NEWS, Mar. 24, 2021 (citing Cheryl Cooky et al., *One and Done: The Long Eclipse of Women’s Televised Sports, 1989-2019*, 9 COMM. & SPORT 347 (2021)) (finding that 95% of total television and *SportsCenter* coverage focused on men’s sports in 2019); *Male vs. Female Professional Sports Salary Comparison*, ADELPHI UNIV. (May 20, 2021), <https://online.adelphi.edu/articles/male-female-sports-salary/> (finding that male athletes make anywhere from 15% to 100% more than female athletes in the same professional sports).

¹⁸⁷ *Discrimination Against Women in College Sports is Getting Worse*, CHAMPION WOMEN (June 23, 2020), <https://titleixschools.com/2020/06/23/gender-gap/> (citing data from U.S. Dep’t of Educ., *Equity in Athletics Disclosure Act*, <https://ope.ed.gov/athletics> (last visited Jan. 8, 2022)).

(“NCAA”)¹⁸⁸ and the International Olympic Committee (“IOC”),¹⁸⁹ have successfully calculated, tested,¹⁹⁰ and continuously revised¹⁹¹ their policies for transgender athletes with no reported negative consequences.¹⁹² By establishing strict rules and regulations,¹⁹³ many of which have been adopted and implemented by state high school athletic associations,¹⁹⁴ the NCAA and the IOC have provided an invaluable blueprint for other athletic organizations to follow as they include not only transgender, but also nonbinary athletes in their programs.¹⁹⁵

¹⁸⁸ *NCAA Board of Governors Statement on Transgender Participation*, NAT’L COLL. ATHLETIC ASSOC. (Apr. 12, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-board-of-governors-statement-on-transgender-participation> (citing *NCAA Inclusion of Transgender Student-Athletes*, NCAA EXEC. COMM. (Aug. 2011), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf).

¹⁸⁹ *IOC Approves Consensus with Regard to Athletes Who Have Changed Sex*, INT’L OLYMPIC COMM. (May 18, 2004), <https://olympics.com/ioc/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex-1>; *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, INT’L OLYMPIC COMM. (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf; *Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, INT’L OLYMPIC COMM. (Nov. 2021), https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf?_ga=2.195521836.1048075235.1637092563-834742310.1637092563.

¹⁹⁰ *See NCAA Inclusion of Transgender Student-Athletes*, NCAA EXEC. COMM. 1, 32 (Aug. 2011), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf (citing multiple scientific studies that helped form the rules created by the NCAA for transgender athlete participation).

¹⁹¹ *Id.* at 10 (stating that because participation by students who are transgender in sports is a developing endeavor, new research available will be considered and policies revised as needed to reflect the most current research-based information).

¹⁹² *Hecox v. Little*, 479 F. Supp. 3d 930, 981 (D. Idaho 2020) (holding that “[m]illions 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.”).

¹⁹³ *See* Matilda Edwards et. al., *Testing, Hormones, Hatred: What It’s Like to Compete as a Transgender Athlete*, ABC (July 28, 2016), <https://www.abc.net.au/triplej/programs/hack/transgender-athletes/7669902>.

¹⁹⁴ *See, e.g.*, Colo. High Sch. Athletic Assoc., *CHSAA Transgender Inclusion Bylaw & Policy* (2014), https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_242ba996c87a47d8b3a7301ff1c7443d.pdf; Conn. Interscholastic Athletic Conf., *Reference Guide for Transgender Policy* (2018), https://www.casciac.org/pdfs/Principal_Transgender_Discussion_Quick_Reference_Guide.pdf; Me. Principal’s Assoc., *2021-22 Handbook*, § 12 (2021), <https://mpaprof.org/wp-content/uploads/2020/07/handbook2021.pdf>.

¹⁹⁵ *See* Paul Krotz, *PHF Updates Transgender and Non-Binary Inclusion Policy*, PREMIER HOCKEY FEDERATION (Oct. 15, 2021), <https://www.premierhockeyfederation.com/news/phf-updates-transgender-and-non-binary-inclusion>.

Women’s equality and fairness in athletics are used as justifications to prevent transgender athletes from competing on gender-affirming sports teams, but the actual purpose of these arguments is exclusion.¹⁹⁶ This reality parallels discriminatory arguments made against other historically disadvantaged groups of athletes, such as the scientifically unsupportable “natural talent” myth used to discriminate against Black athletes by reasoning that natural superiority in sports corresponded to race.¹⁹⁷ Less than one percent of the U.S. population is transgender,¹⁹⁸ with transgender female athletes comprising a miniscule portion of this total.¹⁹⁹ Transgender women struggle with high rates of depression,²⁰⁰ suicide,²⁰¹ and homelessness²⁰² and are four times more likely than cisgender people to experience violent victimization, such as rape, sexual assault, and aggravated or simple assault.²⁰³ “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 government interest’.”²⁰⁴ Under

¹⁹⁶ *Hecox*, 479 F. Supp. 3d at 984.

¹⁹⁷ See Andrew Lawrence, *How the ‘Natural Talent’ Myth is Used as a Weapon Against Black Athletes*, GUARDIAN, <https://www.theguardian.com/sport/2018/oct/02/athletes-racism-language-sports-cam-newton> (Oct. 2, 2018, 5:02 AM).

¹⁹⁸ Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States*, WILLIAMS INST., 1, 3 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>.

¹⁹⁹ See Chris Mosier, *As Elite Sports Think Again About Trans Participation, Our Only Demand Is for Fairness*, GUARDIAN, <https://www.theguardian.com/commentisfree/2022/jun/29/sports-trans-participation-transgender-women-swimming> (July 5, 2022, 7:57 AM) (stating that the number of transgender female athletes in the NCAA is “negligible” and lower than should be statistically expected); Kyle 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 (“A CDC study published in 2019 estimated that 1.8 percent of high school students are transgender . . . [b]ut a report by the Human Rights Campaign found that only 14% of transgender boys and 12% of transgender girls play sports . . . which would mean 0.44% of high school athletes are transgender,” making transgender athletes “a fraction of the athlete population.”).

²⁰⁰ Beth Hoffman, *An Overview of Depression among Transgender Women*, DEPRESSION RSCH. AND TREATMENT (2014), <https://doi.org/10.1155/2014/394283> (“Rates of depression are higher in transgender women than in the general population”).

²⁰¹ Krishna Kiran Kota et al., *Psychosocial Mediators of Perceived Stigma and Suicidal Ideation Among Transgender Women*, 20 BMC PUB. HEALTH 125 (2020), <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-020-8177-z>.

²⁰² Brodie Fraser et al., *LGBTIQ+ Homelessness: A Review of the Literature*, 16 INT’L J ENV’T. RSCH. AND PUB. HEALTH 2677 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6695950/>.

²⁰³ *Transgender People Over Four Times More Likely Than Cisgender People to be Victims of Violent Crime*, WILLIAMS INST. (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/trans-transpress-release/>.

²⁰⁴ *Hecox*, 479 F. Supp. 3d at 983 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

Bostock,²⁰⁵ Title IX,²⁰⁶ and the Fourteenth Amendment,²⁰⁷ transgender athletes are safeguarded from discrimination on the basis of their sex. Although women’s sports need protections and reforms,²⁰⁸ to label transgender athletes as part of the problem is to give weight to private prejudices, a notion repugnant to the Constitution.²⁰⁹

V. PENNSYLVANIA AS A LEADER FOR TRANS RIGHTS UNDER *BOSTOCK*

A. Lia Thomas’ Story

Lia Thomas is a twenty-two-year-old student at the University of Pennsylvania, where she competes as an NCAA Division I swimmer.²¹⁰ Unironically, Lia has been swimming for most of her life.²¹¹ Originally from Austin, Texas, she broke numerous records during high school and still holds the Westlake High School team record for the 500-yard freestyle.²¹² Her older brother, Wes Thomas, was also a successful swimmer at the University of Pennsylvania.²¹³

In the summer of 2018, Lia came to the realization that she was transgender.²¹⁴ She continued competing on the men’s team during the 2018-19 season without coming out to her peers, a decision she recalls was fraught with “unease” and a feeling of being “trapped in [her] body;” She said the two just “didn’t align.”²¹⁵

²⁰⁵ *Bostock*, 140 S. Ct. at 1754. (2020).

²⁰⁶ 20 U.S.C. § 1681.

²⁰⁷ U.S. CONST. amend. XIV.

²⁰⁸ See generally Ellen J. Staurowsky, et al., *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women*, WOMEN’S SPORTS FOUND. 1, 6, 8–13 (Jan. 2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf>.

²⁰⁹ *Grimm*, 972 F.3d at 627 (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)) (Wynn, Cir. J., concurring).

²¹⁰ *2021-22 Women’s Swimming and Diving Roster – Lia Thomas*, UNIV. OF PA., <https://pennathletics.com/sports/womens-swimming-and-diving/roster/lia-thomas/19456> (last visited Feb. 10, 2022).

²¹¹ Eric Levinson, *How an Ivy League Swimmer Became the Face of the Debate on Transgender Women in Sports*, CNN, <https://www.cnn.com/2022/02/22/us/lia-thomas-transgender-swimmer-ivy-league/index.html> (Mar. 22, 2022, 1:10 PM).

²¹² *Westlake Swim Team Record Holders*, WESTLAKE NATION, <https://www.westlakenation.com/teams/boys-swim> (last visited Feb. 10, 2022).

²¹³ *2016-17 Men’s Swimming and Diving – Wes Thomas*, UNIV. OF PA., <https://pennathletics.com/sports/mens-swimming-and-diving/roster/wes-thomas/4545> (last visited Feb. 10, 2022).

²¹⁴ James Sutherland, *Penn’s Lia Thomas Opens Up on Journey, Transition to Women’s Swimming*, SWIM SWAM (Dec. 9, 2021), <https://swimswam.com/penns-lia-thomas-opens-up-on-journey-transition-to-womens-swimming/>.

²¹⁵ *Id.*

In May 2019, Lia decided to begin her medical transition.²¹⁶ She started hormone therapy and came out to her fellow UPenn swimmers as a woman.²¹⁷ NCAA guidelines at this time required a year of hormone replacement therapy prior to participation on sports teams matching an athlete's gender identity,²¹⁸ so Lia competed on the men's team once again in the 2019-20 season, an experience she described as "uncomfortable" and "awkward[.]"²¹⁹ The 2020-21 season was canceled due to the Covid-19 pandemic, so Lia's first opportunity to compete on UPenn's women's swim team came during the 2021-22 season, two and a half years into her use of hormone therapy.²²⁰ Lia followed all required protocols and submitted all of her medical information to the NCAA, which approved her application and gave her the greenlight to compete on the UPenn women's swim team.²²¹

With the support of those around her, including fellow Ivy League swimmer Schuyler Bailar of Harvard, the first openly transgender swimmer to compete at the NCAA Division I level,²²² Lia said she was finally "feeling confident and good in [her] swimming and all [her] personal relationships."²²³ This confidence shined through into her swimming, leading Lia to a record-breaking performance at the Zippy International in Akron in late 2021,²²⁴ a success that went viral and spurred a slew of anti-trans campaigns.²²⁵ Just weeks before the NCAA winter championships, USA Swimming adopted a new, immediately-effective policy for transgender athletes, requiring, among other things, that athletes complete thirty-six months of hormone therapy prior to competing on sports teams matching their

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Nat'l Collegiate Athletic Assoc., *NCAA Inclusion of Transgender Student-Athletes* 1, 13 (Aug. 2011), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf.

²¹⁹ Sutherland, *supra* note 214.

²²⁰ *Id.*

²²¹ *Id.*

²²² Liz Mineo, *Transgender Swimmer Finds Affirmation and Success at Harvard*, HARV. GAZETTE, May 15, 2019; *see also* SCHUYLERBAILAR @PINKMANTARAY, <https://pinkmantaray.com/> (last visited Feb. 11, 2022) (Schuyler Bailar "is an internationally-celebrated inspirational speaker and a respected advocate for inclusion, body acceptance, and mental health awareness.").

²²³ Sutherland, *supra* note 214.

²²⁴ *Women's Swimming and Diving Finishes Second at Zippy International* (Dec. 5, 2021), UNIV. OF PA., <https://pennathletics.com/news/2021/12/5/womens-swimming-and-diving-womens-swimming-diving-finishes-second-at-zippy-invitational.aspx>.

²²⁵ Mia Gingerich & Alex Paterson, *Fox News Leads Hate Campaign Against Trans College Swimmer Lia Thomas*, LA BLADE, Jan. 13, 2022.

gender identity.²²⁶ When the winter swim nationals begin, Lia Thomas will have completed only thirty-four months of hormone therapy.²²⁷

B. The NCAA's Response – A Model of Inclusion

In January 2022, shortly after Lia Thomas' success in Akron, the NCAA updated its transgender athlete participation policy to include a sport-by-sport approach to transgender participation that “preserves opportunit[ies] for transgender student-athletes while balancing fairness, inclusion and safety for all who compete.”²²⁸ This policy finally aligned the NCAA with both the United States Olympic and Paralympic Committees, as well as the International Olympic Committee's policies on transgender athletes. This decision allowed the national governing body of each sport, under review of the NCAA, to develop an appropriate policy for transgender athlete participation.²²⁹

Following the adoption of this new protocol, USA Swimming, on February 1st, 2022, submitted their transgender athlete policy, which increased the time requirement for hormone therapy from twelve months to thirty-six months and tightened the testosterone threshold to half that of the Olympic standard for transgender women.²³⁰ This thirty-six month hormone therapy requirement is an outlier for regulatory sports associations as no other national or international sport agency has required more than twenty-four months of hormone therapy or low testosterone levels before allowing transgender women to compete.²³¹ Joanna Harper, a researcher at Loughborough University²³² noted that there is no data which suggests thirty-six months of hormone therapy “will be any more effective

²²⁶ USA SWIMMING, *19.0 Athlete Inclusion Procedures* (Feb. 1, 2022), https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules_policies/usa-swimming-policy-19.pdf.

²²⁷ Jo Yurcaba, *USA Swimming Announces New Policy for Elite Transgender Athletes*, NBC NEWS (Feb. 2, 2022), <https://www.nbcnews.com/nbc-out/out-news/usa-swimming-announces-new-policy-elite-transgender-athletes-rcna14606>.

²²⁸ Nat'l Colleg. Athletic. Assoc., *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx>.

²²⁹ *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, INT'L OLYMPIC COMM., <https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf> (last visited Sept. 18, 2022).

²³⁰ USA Swimming, *supra* note 226.

²³¹ See TransAthlete, *Policies by Organization*, <https://www.transathlete.com/policies-by-organization> (last visited Mar. 23, 2022) (reporting the guidelines for transgender athletes across all major sports organizations).

²³² See generally Joanna Harper, *Joanna Marie Harper*, RESEARCHGATE <https://www.researchgate.net/profile/Joanna-Harper> (last visited Feb. 11, 2022).

in mitigating advantages than [twenty-four] months would be[,]” adding that she “doubt[s] that it is a coincidence that Lia will have had [thirty-four] months of hormone therapy by March 2022[.]”²³³ Three-hundred-and-ten NCAA swimmers shared similar sentiments, penning a letter to the NCAA in support of Lia Thomas which urged the NCAA “not to allow political pressure to compromise the safety and wellbeing of college athletes everywhere . . . sidelining them from sport does nothing to protect women athletes.”²³⁴ Further, the letter asked the NCAA not to adopt the USA Swimming policy mid-season and instead wait to develop “clear and consistent guidelines” by working with transgender and nonbinary athletes well in advance of next season.²³⁵ Although not all letters were supportive,²³⁶ many voiced their support for Lia by encouraging the NCAA to let her swim.²³⁷

On February 10th, 2022, after reviewing USA Swimming’s policy, the NCAA issued a statement that “[t]here will be no changes to the NCAA’s previously approved testosterone threshold for transgender women to compete at the 2022 women’s swimming and diving championships[.]”²³⁸ After reviewing USA Swimming’s new testosterone level threshold, the NCAA committee on Competitive Safeguards and Medical Aspects of Sports (“CSMAS”) decided that “implementing additional changes at this time *could have unfair and potentially detrimental impacts* on schools and student-athletes intending to compete in 2022 NCAA women’s swimming championships[.]” noting that USA Swimming’s policy will be used to analyze future updates to eligibility requirements in the 2022-23 academic year.²³⁹ Under these standards,²⁴⁰ Lia Thomas competed in the Ivy League swimming championship at Harvard in March 2022.²⁴¹ Following the

²³³ Yurcaba, *supra* note 227.

²³⁴ 300+ NCAA, *Team USA & Olympic Swimmers: We Support Lia and All Trans & Nonbinary Athletes*, ATHLETE ALLY (Feb. 10, 2022), <https://www.athleteally.org/300-swimmers-support-lia/>.

²³⁵ *Id.*

²³⁶ Ellie Rushing, *16 Penn Swimmers Send Letter Saying Teammate Lia Thomas has an Unfair Advantage*, PHILADELPHIA INQUIRER, Feb. 4, 2022.

²³⁷ Alex Reimer, *Ivy League and Penn Issue Statements Supporting Lia Thomas*, SBNATION (Jan. 6, 2022), <https://www.outsports.com/2022/1/6/22870762/lia-thomas-transgender-womens-swimming-penn-ivy-league>; Matthew De George, *Penn Teammates Express ‘Full Support’ for Lia Thomas*, SWIMMING WORLD, Feb. 2, 2022.

²³⁸ Nat’l Colleg. Athletic Assoc., *CSMAS Subcommittee Recommends No Additional Changes to Testosterone Threshold for Trans Women at 2022 Women’s Swimming and Diving Championships*, NCAA (Feb. 10, 2022), <https://www.ncaa.org/news/2022/2/10/media-center-csmas-subcommittee-recommends-no-additional-changes-to-testosterone-threshold-for-trans-women-at-2022-womens-swimming-and-diving-championships.aspx>.

²³⁹ *Id.* (emphasis added).

²⁴⁰ Katie Barnes, *NCAA Ruling Clears Path for Transgender Swimmer Lia Thomas to Compete at Nationals*, ESPN (Feb. 10, 2022), https://www.espn.com/college-sports/story/_/id/33261181/ncaa-ruling-clears-path-transgender-swimmer-lia-thomas-compete-nationals.

²⁴¹ Katie Barnes, *Amid Protests, Penn Swimmer Lia Thomas Becomes First Known Transgender Athlete to Win Division I National Championship*, ESPN (Mar. 17, 2022),

introduction of Lia Thomas for the 500-yard freestyle swim, Beth Stelzer²⁴² draped a “Save Women’s Sports” banner over the railing of the packed swimming hall.²⁴³ Lia Thomas placed first in the 500-yard freestyle, making her the first transgender athlete to win a NCAA Division I National Championship in known history.²⁴⁴

C. Pennsylvania (and Others) Should Follow Suit

By choosing to shape their protocols with a mindset of inclusion, the NCAA has led by example in working to create and maintain a safe space for all athletes, including transgender athletes, to participate in sports. Government officials in Pennsylvania, the current home of Lia Thomas, should take a page from the NCAA’s playbook and use this opportunity to establish the Commonwealth as a leader in transgender athlete inclusion. An abundance of factors have situated Pennsylvania to be a leader in this movement for change. Notably, Pennsylvania House Bill 972, dubbed a “Fairness in Women’s Sports Act,” has made little progress in its route to law, but has not failed entirely.²⁴⁵ In March 2022, this bill, which requires students to participate on sports teams matching their sex assigned at birth, moved forward to the Pennsylvania Full House by majority committee vote nearly a year after its introduction.²⁴⁶ Pennsylvania’s Governor, Tom Wolf, has previously stated that he will “veto this discriminatory bill if it gets to [his] desk[.]”²⁴⁷ Dr. Rachel Levine, Pennsylvania’s former Secretary of Health and the current Assistant Secretary of Health for the U.S. Department of Health and Human Services, has stated that this type of legislation, which intervenes with a transgender individual’s decision to transition, is an issue of “health equity.”²⁴⁸ Dr. Levine, the

https://www.espn.com/college-sports/story/_/id/33529775/amid-protests-pennsylvania-swimmer-lia-thomas-becomes-first-known-transgender-athlete-win-division-national-championship (reporting that Lia Thomas finished 1.75 seconds ahead of the second place swimmer; Lia’s 500-yard freestyle swim was over 9 seconds slower than that of Olympian swimmer Katie Ledecky).

²⁴² See Stelzer, *supra* note 20 (Beth Stelzer is the founder of Save Women’s Sports).

²⁴³ Barnes, *supra* note 241.

²⁴⁴ Barnes, *supra* note 241.

²⁴⁵ H.B. 972, 2021-22 Reg. Sess. (Pa. 2021).

²⁴⁶ *Id.*; Caroline Vakil, *Pennsylvania Lawmakers Advance Ban on Transgender Athletes in Women’s Sports*, THE HILL (Mar. 29, 2022), <https://thehill.com/homenews/state-watch/600231-pennsylvania-lawmakers-advance-ban-on-transgender-athletes-in-womens/>.

²⁴⁷ Juwan J. Holmes, *Pennsylvania’s Governor Shuts Down Legislature’s Proposed Ban on Trans Youth in Sports*, LGBTQ NATION (Apr. 28, 2021), <https://www.lgbtqnation.com/2021/04/pennsylvanias-governor-shuts-legislatures-proposed-ban-trans-youth-sports/>.

²⁴⁸ John Riley, *Dr. Rachel Levine Speaks Out Against Bills Targeting Transgender Athletes, Health Care*, METROWEEKLY, Apr. 2, 2021.

first openly transgender federal official to be confirmed by the Senate,²⁴⁹ has suggested that fear may be the driving force behind these bills, stating that “people fear what they don’t understand[.]”²⁵⁰

Although fear may be a motivating factor for the sponsors of this bipartisan bill, those closer to the sports themselves seem unafraid of incorporating transgender athletes into their programs. The Atlantic Coast Conference (“ACC”), a group of NCAA Division I schools, pulled their championship games from North Carolina in 2016 following the state’s adoption of House Bill 2, an anti-trans bathroom bill.²⁵¹ Pennsylvania State Athletic Conference (“PSAC”), a group of 18 NCAA Division II schools, issued a statement of support for the NCAA’s transgender athlete policy in early 2021, asserting that “[e]very opportunity for participation in sports should be made available to young people at every stage of development from youth sports to high school to intercollegiate athletics.”²⁵² Similarly, the Centennial Conference (“CCA”), a group of NCAA Division III schools, updated their student-athlete inclusion policies in October 2021, noting that “[e]ngaging in sports and competition is a joyous part of many students’ lives and an opportunity that must be available to all students[.]”²⁵³

VI. CONCLUSION

The “why” of transgender athlete inclusion in sports is clear—no one should be denied the opportunity to have their life changed through sports simply because of who they are. USA Swimming’s new protocol, like Save Women’s Sports bills, is scientifically unsupportable, incongruent with other similar sports standards, and built from a framework of transgender exclusion. Conversely, the NCAA approaches transgender athlete inclusion by not being afraid of letting transgender athletes play, but instead remaining flexible and responsive to evolving data. The difference between the two is perspective. Save Women’s Sports and USA Swimming seem to view transgender athletes as the enemy, pushing them

²⁴⁹ Laurel Wamsley, *Rachel Levine Make History as 1st Openly Trans Federal Official Confirmed by Senate*, NPR (Mar. 24, 2021), <https://www.npr.org/2021/03/24/980788146/senate-confirms-rachel-levine-a-transgender-woman-as-assistant-health-secretary>.

²⁵⁰ Riley, *supra* note 248.

²⁵¹ Paul Blake & Will Gretsky, *ACC Pulls Championships from North Carolina Over Anti-LGBT Bathroom Law*, ABC NEWS (Sept. 14, 2016), <https://abcnews.go.com/US/acc-pulls-championships-north-carolina-anti-lgbt-bathroom/story?id=42089282>.

²⁵² Penn. Stat. Athletic Conf., *PSAC Statement on Transgender Participation*, PSACSPORTS (Apr. 20, 2021), <https://psacsports.org/news/2021/4/19/general-psac-statement-on-transgender-participation.aspx>.

²⁵³ Gettysburg College, *Centennial Conference Releases Student-Athlete Inclusion Policy*, GETTYSBURG CONNECTION (Oct. 9, 2021), <https://gettysburgconnection.org/centennial-conference-releases-student-athlete-inclusion-policy/>.

away because they fear that their inclusion will negatively impact the community they seek to protect. However, these organizations fail to realize that transgender athletes are a part of their communities, a perspective that the NCAA and other organizations take into account.

Policies and laws that strive to remove persons who are transgender from places in which they are already existing and contributing to society blatantly discriminate against them on the basis of their sex under *Bostock*.²⁵⁴ Pennsylvania and other states must strive to do better for their citizens who are transgender, both on and off the court, using the NCAA's model of inclusionary perspective as a guide. Rather than focusing on how we can restrict activities we all have a right to participate in, we must approach new situations from a perspective that persons who are transgender are not outsiders within our society; they are our coworkers and classmates, our teammates, our government leaders,²⁵⁵ and our friends.

²⁵⁴ *Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1744 (2020).

²⁵⁵ See Rachel Treisman, *James Roesener is the First Out Trans Man Elected to a U.S. State Legislature*, NPR (Nov. 9, 2022), <https://www.npr.org/2022/11/09/1135417129/new-hampshire-trans-lawmaker-james-roesener>.