

# Hurdles for Transgender Athletes: States Passing Bans on Transgender Athletes Primes a Fight Over Title IX and the Fourteenth Amendment

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## I. INTRODUCTION

Few endeavors allow a group of people with no commonality to come together and bond better than sports. Forgetting prejudice and seeing someone as a person is a byproduct of experiencing physical hardship and striving toward a common goal. There is perhaps no group of people less understood than those who identify as transgender. Transgender athletes have been excluded from the bonding power of competitive sports, or if they do get the green light to compete at the highest levels it is the rigorous testing that strips people of basic dignity. I contend that exclusion of a

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group that many do not understand from pursuits that serve as a unifying force is categorically wrong. Historically, the United States addresses issues of inequitable nature via legislation that is fair for all those involved. Women have historically been marginalized and underappreciated, leading to the passing of Title IX to ensure a base level of opportunity. With regards to athletics, Title IX was meant to level the playing field. Now, Title IX is being used by states to pass discriminatory laws against transgender women under the guise of maintaining equality for cisgender women.

Sports have the unique power to exclude while maintaining a motive aside from bigotry, though this is at times just a mask. Professional sports are notorious for high-horse morality that bans anyone for life who is seen to have had an unfair advantage. Pete Rose, the all-time leader in career hits in Major League Baseball, was banned from the sport for life after making bets while acting as a manager and player.<sup>1</sup> Barry Bonds holds the record for the most home runs hit of all time, yet he was denied entrance into the Hall of Fame in his final year of eligibility because he used performance-enhancing drugs (PEDs).<sup>2</sup> Marion Jones, a celebrated three-time gold medalist was stripped of her titles for PEDs.<sup>3</sup> Athletes that were household names are discarded in the name of fairness without a second thought. This rationale can allow some individuals to disguise prejudice with pure sportsmanship when refusing to acknowledge transgender athletes. People will argue until they are blue in the face that regardless of how arbitrary, the integrity of sports must be maintained at all costs, meaning that transgender women, in particular, are excluded.

The goal of this Comment is to delve into the complicated body of law surrounding transgender athletics ranging from high schools to the Olympics. In particular, this Comment will discuss transgender women, primarily because they are perceived as having a distinct advantage over their competitors due to higher testosterone levels. The International Olympic Committee (IOC) attempted to address the issue by allowing transgender athletes to compete in 2004, but only after undergoing sex reassignment surgeries, having legal recognition of their gender (impossible in many countries at the time), and a mandatory time period

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1. *Pete Rose Gets Booted from Baseball*, HISTORY, <https://www.history.com/this-day-in-history/pete-rose-gets-booted-from-baseball> (last updated Aug. 20, 2019).

2. Christian Red, *Barry Bonds, Roger Clemens Again Denied Entry Into Baseball Hall of Fame*, FORBES (Jan. 26, 2021), <https://www.forbes.com/sites/christianred/2021/01/26/barry-bonds-roger-clemens-again-denied-entry-into-baseball-hall-of-fame/>.

3. Sarah Bridge and Agencies, *Athlete Jones Stripped of Olympic Medals*, GUARDIAN (Dec. 12, 2007), <https://www.theguardian.com/world/2007/dec/12/usa.athletics>.

of receiving hormone therapy.<sup>4</sup> By the 2016 games, the IOC revised their policy to require only that transgender women declare their status and maintain a testosterone level below a threshold for a year leading up to the games, though little is required for transgender men.<sup>5</sup>

In the United States, the National Collegiate Athletic Association (NCAA) has developed a policy that relies on testosterone levels for competition, and public school districts in each state regulate based on their own laws.<sup>6</sup> Beginning in 2020, transgender athletes have been challenged by proposed bills that seek to categorically bar them from competing, even when such legislation would contradict the NCAA at the collegiate level and Title IX rulings within their jurisdictions. The *Bostock v. Clayton County* decision, however, makes it likely that schools receiving Title IX funding will soon be prohibited from discriminating against their transgender students due to the ruling changing the definition of “sex.”<sup>7</sup>

## II. THE IMPACT OF COMPETITIVE SPORTS ON THE MENTAL HEALTH OF ADOLESCENTS

A study conducted by the National Center for Transgender Equality in 2015 that built on a prior survey from 2011 showed that in school, transgender students experienced hostility at high rates.<sup>8</sup> Of those who were out during the formative period of K-12, 77% experienced negative treatment in various forms; 24% were physically attacked, 55% were verbally harassed, and 17% left school altogether as a result of abuse.<sup>9</sup> At the collegiate level, 24% of out transgender individuals surveyed experienced verbal, physical, or sexual harassment.<sup>10</sup> Of those surveyed

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4. *IOC Approves Consensus with Regard to Athletes who have Changed Sex*, INT’L OLYMPIC COMM., (May 17, 2004), <https://olympics.com/ioc/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex>.

5. Prof. Dr. Ugur Erdener et al., *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](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf).

6. Dr. Pat Griffin et al., *NCAA Inclusion of Transgender Student-Athletes*, NAT’L COLLEGIATE ATHLETIC ASS’N (Aug. 2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

7. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). (The decision included gender identity and sexual orientation in the meaning of “sex” for protection under Title VII. The language in Title VII is nearly identical to that of Title IX as discussed later in the article).

8. S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. TRANSGENDER EQUAL. (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

9. *Id.*

10. *Id.* at 136.

that were out as transgender during K-12 and experienced negative treatment as a result, 52% attempted suicide compared to 37% of those who did not report mistreatment.<sup>11</sup> The difference is statistically significant, but of the 37% who were not mistreated, attempting suicide indicates that there is vulnerability that preexists in these young people, perhaps explained by a lack of belonging. It is well known that physical activity in general is holistically beneficial to individuals. Competing in organized sports takes physical activity and combines it with a social component that is beneficial for overall psychological wellbeing. A study conducted in 2013 concluded that there is a correlation between participation in sports for children and adolescents and improved psychological and social health.<sup>12</sup> Team sports in particular showed better mental health. Transgender students are an at-risk group of people with or without experiencing abuse in school. To abate drastically high adverse mental health outcomes, it is imperative that participation in organized sports be encouraged rather than prohibited.

### III. CURRENT EVENTS SHOW CONFLICT BETWEEN THE EXECUTIVE BRANCH AND CONSERVATIVE STATE LEGISLATURES

In the past few years, several states have proposed and passed bills proposing to place limitations and bans on transgender athletes. In Mississippi for example, the Senate passed the Mississippi Fairness Act SB2536,<sup>13</sup> the purpose of which is to exclude transgender women from competing by requiring all school athletic teams to designate according to biological sex.

Arkansas passed the Fairness in Women's Sports Act (SB354),<sup>14</sup> which requires that any public elementary school, post-secondary school, charter school, or two-year and four-year institution of higher education must expressly designate their athletic teams according to biological sex. Within the language of the bill is a requirement that any of the enumerated types of schools that must designate sports teams based on biological sex may not accept a complaint concerning gender bias, shall not open an investigation, and shall not take any action against the school.<sup>15</sup> The bill

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11. *Id.* at 132.

12. Rochelle Eime et al., *A Systematic Review of the Psychological and Social Benefits of Participation in Sport for Children and Adolescents: Informing Development of a Conceptual Model of Health Through Sport*, INT'L J. BEHAV. NUTRITION PHYSICAL ACTIVITY (2013), <https://ijbnpa.biomedcentral.com/track/pdf/10.1186/1479-5868-10-98.pdf>.

13. S.B. 2536, Reg. Sess., (Miss. 2021).

14. S.B. 354, 93rd Gen. Assemb., (Ark. 2021).

15. *Id.*

purports to ensure sex equality through protecting female athletes. The Arkansas legislature relied on *United States v. Virginia*<sup>16</sup>—in which the Supreme Court states that sex classifications may be used to “advance the full development of the talent of our Nation’s people”—to support the logic that sex discrimination is allowable because sports are an area in which full development of talent may occur.<sup>17</sup>

The question for the Supreme Court in *United States v. Virginia*, was whether the Virginia Military Institute (VMI) violated the Fourteenth Amendment by refusing to admit women.<sup>18</sup> To defend a gender-based policy, there must be a demonstration of an “exceedingly persuasive justification.”<sup>19</sup> The Arkansas legislature contends that the exceedingly persuasive justification for disallowing transgender athletes from competing in their educational institutions is that there are inherent physiological advantages men have that result in different athletic capacities.<sup>20</sup> If transgender women were to compete, they would reduce the potential that female athletes have to develop athletically, or perform so that they could receive athletic scholarships. A flaw in this logic is that athletic development is an independent endeavor that cannot be measured simply through accolades. The aforementioned cherry-picked language from *United States v. Virginia* calls for full development of talent. Talent is not measured simply through winning. In fact, some of the greatest athletes in recent memory never won a championship, and some developed over time so that at the collegiate level none could have predicted they would inevitably be considered the greatest of all time. Because the development of talent is a solitary pursuit, the addition of transgender athletes should not hinder an individual’s capacity to be the best they can be.

The state of Florida passed their own fairness in sport act (H.B. 1475) through the House on April 14, 2021.<sup>21</sup> This particular bill directly intersects with the timing of both a NCAA statement on their stance toward similar bills, and the Department of Justice (DOJ) statement holding that transgender individuals are covered by the definition of “sex” as stated in *Bostock*.<sup>22</sup> HB 1475 proves to be one of the more egregious attempts at curtailing transgender participation in sport. There is no

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

17. *Id.* at 533.

18. *Id.* at 520.

19. *Id.* at 531.

20. S.B. 354, 93rd Gen. Assemb., (Ark. 2021).

21. H.B. 1475, 2021 Leg. (Fla. 2021).

22. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

support provided within the text for why the Florida legislature has the authority to ban transgender athletes other than a brief legislative intent statement that communicates the desire to maintain opportunities for female athletes.<sup>23</sup> The most offensive aspect of the bill is the requirement that a health care provider must verify an individual's sex in the case of a dispute.<sup>24</sup> Though this seems benign to those that do not recognize transgender identification as valid, the process of being subjected to investigation of genitals is invasive and can cause irreparable harm to the psyche of a child or college athlete. Although inspection of genitals is a common practice for men's physicals—indeed often required to participate in sports at the scholastic level—the requirement is not generally extended to women.<sup>25</sup> In forcing a physical inspection for transgender women, there is a failure to acknowledge that they are women.

While Florida House Bill 1475 passed through the House, the Senate considered the Florida SB 2012 titled “Promoting Equality of Athletic Opportunity Act.”<sup>26</sup> If passed, this Act would require express designation of a sports team based on biological sex.<sup>27</sup> It further stipulates that a person transitioning from male to female may compete in the female designation should they meet three conditions<sup>28</sup>: they must declare a female identity to their school or institution; they must demonstrate that their testosterone level does not exceed 10 nmol/L for twelve months; and their testosterone level must remain below the threshold throughout the period in which they desire to compete.<sup>29</sup> Comparatively, the Senate version is far more palatable in that there is no requirement that the gender of a child be confirmed by a physical. The Senate proposal aligns more with NCAA policy, reducing the potential danger that Florida lose their placement as host for collegiate championships. A prominent drawback to testosterone thresholds is the invasive nature of a medical treatment as applied to minors. There also may be some transgender athletes who do not desire undergoing hormone therapy and find it unnecessary for their own gender identity.

However, the final version that passed into law does away with the dispute process featured in the House bill, as well as the testosterone

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23. H.B. 1475, 2021 Leg. (Fla. 2021).

24. *Id.*

25. Mary Leigh Meyer, *The Importance of Sports Physicals*, TEXAS A&M TODAY, (Aug. 9, 2019), <https://today.tamu.edu/2019/08/09/the-importance-of-sports-physicals/>.

26. S.B. 2012, 2021 Leg. § 1006.205(1) (Fla. 2021).

27. *Id.* at § 1006.205(3)(a).

28. *Id.* at § 1006.205(3)(c).

29. *Id.*

minimum from the Senate bill.<sup>30</sup> Rather than requiring a medical professional to perform a genital inspection, the Florida bill considers birth certificates as verification of gender instead.<sup>31</sup> The caveat is that for the birth certificate to be viable, it must have been issued on or near the actual birth, rendering augmented identification that reflects gender identity useless.<sup>32</sup> The statute further eliminates the potential avenue to compete offered by the Senate bill by excluding the testosterone minimum.<sup>33</sup> Even for those with the opinion that testosterone requirements for high school athletes is a step too far, it served at the least as a less restrictive means to ensure fairness in sport. By eliminating any chance for transgender athletes to participate in sports, Florida set an example on discriminatory practice against transgender athletes.

In contrast, Louisiana's Governor John Bel Edwards vetoed legislation that was nearly identical to the Arkansas Fairness in Women's Sport Act.<sup>34</sup> On May 5, 2021, the Louisiana Senate passed the Fairness in Women's Sports Act by a vote of twenty-nine to six.<sup>35</sup> By the end of the month, the bill passed through the House by a vote of seventy-eight to nineteen.<sup>36</sup> The bill echoed its counterparts in Arkansas and Florida by calling for an outright ban on transgender women athletes through mandated sex assigned teams without exception.<sup>37</sup> In vetoing the bill, Governor Edwards explained that the bill is but "a solution in search of a problem that simply does not exist in Louisiana."<sup>38</sup> He went on to note that transgender youths are already at risk, and that it is incumbent to be inclusive rather than exclusive.<sup>39</sup> The Louisiana legislature was unable to garner enough votes to overcome the veto.<sup>40</sup>

Tennessee, North Dakota, and Utah have all voted on similar acts, and a number of other states have begun to consider their own in response to President Biden's Executive Order Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, put

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30. Fairness in Women's Sports Act, FLA. STAT. § 1006.205(3)(c)-(d) (2021).

31. *Id.* at § 1006.205(3)(d).

32. *Id.* at § 1006.205(3)(c).

33. *Id.*

34. S.B. 156, LA. STATE LEG. REG. SESS., <http://www.legis.la.gov/legis/BillInfo.aspx?i=240325>.

35. *Id.*

36. *Id.*

37. S.B. 156, Reg. Sess. § 444A-B (La. 2021).

38. *Gov. Edwards Vetoes Senate Bill 156 from the 2021 Regular Session*, OFFICE OF THE GOVERNOR (June 22, 2021), <https://gov.louisiana.gov/index.cfm/newsroom/detail/3230>.

39. *Id.*

40. *Id.*

forward on January 20, 2021. The purpose of this Executive Order was to extend the *Bostock v. Clayton County* holding to Title IX.<sup>41</sup> Numerous states have made efforts to prevent transgender minors from being treated for gender dysphoria with hormone therapy or reassignment surgery,<sup>42</sup> though only Arkansas has signed such a ban into law.<sup>43</sup> In effect, if someone cannot receive transitional treatment, and the laws of the state relating to interscholastic competition adhere to the NCAA standard, those students would not be able to compete anyway. Even if they can compete, lack of insurance coverage creates a barrier for students that would like to meet hormone level requirements but cannot afford to do so.

On March 26, 2021, the DOJ issued a memorandum addressing the application of the *Bostock* definition of sex to Title IX so that they could alleviate any confusion resulting from Biden's Executive Order 13988.<sup>44</sup> The DOJ concluded in their memorandum that application of *Bostock* applies to Title IX, consistent with Executive Order 13988.<sup>45</sup> The DOJ reasoned that the language of Title VII is similar enough to Title IX that it is logical to conclude that the protections are meant to extend to the same individuals.<sup>46</sup> In particular, the use of "on the basis of sex"<sup>47</sup> in Title IX and "because of . . . sex"<sup>48</sup> in Title VII are decidedly interchangeable. Because the individuals protected are in an identically proscribed class between the two Acts, the *Bostock* decision should apply. Transplanting the definition of "sex" may be problematic, however, since the Supreme Court purposely avoided rendering a decision on the term "sex" broadly, but rather just within the text of Title VII.<sup>49</sup>

In 2011, the NCAA issued their guidelines in *Inclusion of Transgender Student-Athletes*,<sup>50</sup> which sought to address inequities in

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41. Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021).

42. Chelsey Cox, *As Arkansas Bans Treatments for Transgender Youth, 15 Other States Consider Similar Bills*, USA TODAY (Apr. 8, 2021), <https://www.usatoday.com/story/news/politics/2021/04/08/states-consider-bills-medical-treatments-transgender-youth/7129101002/>.

43. H.R. 1570, 93rd Gen. Assemb., (Ark. 2021).

44. U.S. Dep't of Just., Civ. Rts. Div., Memorandum on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972, at 1 (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>; Exec. Order No. 13,988, 86 Fed. Reg. at 7023.

45. U.S. Dep't of Just., Civ. Rts. Div., Memorandum on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972, at 1 (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

46. *Id.* at 1-2.

47. 20 U.S.C. § 1681(a).

48. 42 U.S.C. § 2000e-2(a)(1).

49. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

50. NCAA Inclusion of Transgender Student-Athletes, NCAA (2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).



sports inclusion. In addressing the often-cited concern regarding fairness in competition, the NCAA requires that transgender women may not compete on a women's team until they have received testosterone suppression for one year.<sup>51</sup> A transgender male who is receiving testosterone treatment must be diagnosed with a gender identity disorder or gender dysphoria to compete and may no longer compete as a woman.<sup>52</sup> Advocates for fairness in sports tend to focus more on transgender women than they do transgender men, who receive testosterone even when testosterone treatment would be considered cheating if a cisgender man were taking it, evidenced by the bills consistently being titled "Fairness in Women's Sports."<sup>53</sup> The bills do not take an explicit stance against transgender men.<sup>54</sup> The underlying belief is that transgender men are not men and transgender women are not women, so a transgender man is just a woman and testosterone still will not close the gap to compete with the best men. The drafters of the bills fail to consider the variance in skill and physiology among all men and women. The same is said of transgender women, seen through the belief that even with hormone suppression they would be superior to cisgender women. It is telling that fairness in sports only matters when it suits proponents of barring transgender female athletes, otherwise transgender men would be disqualified for utilizing transitional treatment.

On April 12, 2021, the NCAA issued a statement that took a small step toward supporting transgender athletes.<sup>55</sup> The NCAA maintains that their long-standing policy that allows transgender athletes to participate after undergoing testosterone suppression provides inclusion and fairness, and that they will not hold championships in states that do not provide a environment free from discrimination.<sup>56</sup> This statement does not mean that they will absolutely refuse to hold a championship in a state that bans transgender athletes, only that such state's actions will be considered in assessing whether the actual site of a championship will be adequate. The hope is that the economic impact of disqualification to host will incentivize states to remain consistent with the NCAA standard. However, this strategy may have the opposite effect and harden the resolve of the

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51. *Id.*

52. *Id.*

53. S.B. 354, 93rd Gen Assemb., (Ark. 2021).

54. *Id.*

55. *NCAA Board of Governors Statement on Transgender Participation*, NCAA (April 12, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-board-governors-statement-transgender-participation>.

56. *Id.*

violators. An ulterior explanation for the NCAA failing to come down hard on states that contradict the NCAA stance on transgender athletes is that certain conferences and sports are cash cows, and some states possess more attractive sites, making it detrimental for the NCAA to sever ties.<sup>57</sup> In the south, where a number of these bills are circulating, the Southeastern Conference (SEC) reigns supreme. If enough states unify, there is mutually assured destruction. There can be proof that the state is discriminatory and against the general attitude of the NCAA, but the host university could show that there will not be any discriminatory actions taken against visiting athletes. It is impossible to separate the actions of a host state from the likelihood that visiting athletes can feel safe. Although the statement is not a strong condemnation of the discriminatory practices by state bans, in a sense the NCAA stands behind transgender inclusion.

#### IV. THE USE OF ANATOMY AS SUPPORT FOR DISCRIMINATORY POLICY

The following section elaborates on the notion that there is an unfair advantage in allowing transgender women to compete. Testosterone production is the most used evidence in supporting transgender bans from sports. Male testes produce higher levels of testosterone than ovaries or the adrenal gland, resulting in a large difference between the two sexes.<sup>58</sup> Males produce between 10.2 to 39.9 nmol/L, while females produce between 0.4 and 2.1 nmol/L.<sup>59</sup> The difference between the low end for males and the high end for females is 8.1 nmol/L.<sup>60</sup>

For frame of reference, the IOC requires that transgender women must maintain a testosterone level below 10 nmol/L, as does the NCAA.<sup>61</sup> 10 nmol/L would be just below the low end for males, and well above the high end for females. The evidence could suggest that the general 10% performance gap between male and female athletes is caused by genetic differences rather than discrimination.<sup>62</sup> Looking to the peak performing athletes in events such as swimming, a female world record setting

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57. See Molly Hensley-Clancy, *The NCAA Threatened States Over Anti-Transgender Bills. But the Games Went On.*, WASH. POST (June 3, 2021), <https://www.washingtonpost.com/sports/2021/06/03/ncaa-championships-transgender-athlete-bills/>.

58. Doriane Lambelet Coleman, *Sex in Sport*, 80 L. & CONTEMP. PROBS. 63, 72 (2017).

59. *Id.*

60. *Id.*

61. See INT'L OLYMPIC COMM., *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015); see also NCAA *Inclusion of Transgender Student-Athletes*, [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

62. Coleman, *supra* note 58, at 74.

swimmer with an exceptional wingspan and height to the male world record setter in the same event who happened to be the same height had a difference of nine seconds between their times.<sup>63</sup> The argument this sets up is that should we eliminate the categorization of sex in sport, meaning the very best female would not be able to compete. The slippery slope then becomes, if there is not a strict categorization for females only, then they will eventually be phased out of all exceptional athletic positions. Women's teams would be solely comprised of transgender women, and all the cisgendered females will be the bottom of the barrel, unable to make the cut. Logical fallacies such as this illustrate the fear mongering tactics adopted by conservative states in their quest to discriminate against transgender people.

States adopting restrictive bills often cite to Professor Dorian Lambert Coleman in support of benefits of testosterone that make transgender women and men inherently advantaged. Professor Coleman was herself an All-American track athlete before becoming a legal scholar.<sup>64</sup> Coleman goes on to defend the notion that there should be rigid categorization to uphold the societal benefits that accompany athletic achievement, such as becoming role models to the community; leveraging athletic success to gain access to other endeavors; and tying national identity to athletic prowess.<sup>65</sup> Through Title IX, women are able to display their abilities, garnering recognition in the process.<sup>66</sup> The platform used would no longer be available if transgender individuals could compete.<sup>67</sup> Interestingly, Coleman recommended that the Governor of Idaho veto the bill that would categorically ban transgender athletes from competing because she believed her work was misused and instead favored using the same approach to transgender inclusivity practiced by the NCAA.<sup>68</sup>

First, there is an assumption that sports from high school to professional athletics would be inundated with enough transgender athletes that they would push out all of the millions of female athletes. Next, there is an assumption that most, if not all, transgender women will defeat their competition. However, there are not many transgender people

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63. *Id.* at 90.

64. *Doriane Lambelet Coleman*, DUKE UNIV. SCH. OF LAW, <https://law.duke.edu/fac/colemand/> (last visited Sept. 26, 2021). (Faculty Profile).

65. Coleman, *supra* note 58, at 94, 95, 96.

66. *Id.* at 96.

67. *Id.* at 96-7.

68. *Hecox v. Little*, 479 F.Supp.3d 930, 948 (D.Idaho 2020).

in proportion to the overall population.<sup>69</sup> A 2016 study by the Williams Institute estimated that roughly 1.4 million adults in the United States identify as transgender.<sup>70</sup>

Out of all the transgender people that are within the age range to compete in physical pursuits, only a fraction of them will even want to compete. A survey conducted in 2019 estimated that there were roughly 15.3 million high school students in the United States.<sup>71</sup> As recently as 2018-2019, the reported total of high school athletes in the United States was roughly 8 million.<sup>72</sup> Of those 8 million, roughly 3.4 million are female athletes.<sup>73</sup> While there is little data readily available on the projected population of individuals identifying as transgender, and even less data on the number of teenagers identifying as such, the Williams Institute has attempted to project estimates based on surveyed data. According to their study, the percentage of people between the age of 13 and 17 that identify as transgender is 0.7%, or roughly 150,000 people.<sup>74</sup> Assuming transgender students participate in sports at a similar rate as cisgender students, there may be around 75,000 transgender athletes, which is probably a generous total. Of those students, only a fraction will identify as women, so that figure could be cut by nearly half. There are at least as many high school age children in the United States presently that do not play sports as there are high school athletes, so it stands to reason that most transgender children will have no desire to play sports in the same way most cisgender children have no desire to play sports.

These estimates shed light on the fallacious logic utilized by proponents of transgender athletic bans. Conservative estimates such as these undercut the idea that women's sports will be inundated with transgender participants. From a purely probabilistic standpoint, the odds of transgender women supplanting cisgender women in sports is low. Even if every transgender high school aged student in the United States participated in sports, only a fraction of those would play in women's

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69. Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST. 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>.

70. *Id.*

71. Melanie Hanson, *K-12 School Enrollment & Student Population Statistics*, (Sept. 19, 2021), <https://educationdata.org/k12-enrollment-statistics>.

72. *2018-19 High School Athletics Participation Survey*, NAT'L FED'N STATE OF HIGH SCH. ASS'NS 54, [https://www.nfhs.org/media/1020412/2018-19\\_participation\\_survey.pdf](https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf).

73. *Id.*

74. Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States*, WILLIAMS INST. 2 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf>.

events and would be outnumbered by cisgender women by a great margin. With the potentially small number of transgender athletes in mind, legislation introduced to exclude all transgender athletes from sports without exception is overtly discriminatory and serves as a measure against a problem that does not exist. Any posturing that transgender athletes will compete in droves, thereby stealing opportunities from cisgender athletes, is without basis.

#### V. INTERNATIONAL STANDARDS ON TRANSGENDER INCLUSION IN SPORTS

Although the IOC no longer requires draconian gender verification and gender reassignment surgery to compete at the highest levels, they maintain a testosterone threshold that female athletes may not exceed to qualify for their respective sport.<sup>75</sup> There is a relevant link between hyperandrogenism and transgender athletes. The International Association of Athletics Federations (IAAF) regulated the eligibility of women with naturally occurring testosterone,<sup>76</sup> which was challenged in the 2015 case of *Chand v. Athletics Federation of India*.<sup>77</sup> Chand was an Indian sprinter who challenged the regulations on the grounds that they discriminate against females and those with higher testosterone, they are based on flawed assumptions of the role testosterone plays in performance, and that they are out of proportion with any legitimate interest.<sup>78</sup> The Court of Arbitration for Sport in Switzerland signaled that there was no such definitive link between higher testosterone levels and performance in sport to categorically ban women who naturally produced heightened androgen, so the IAAF was prohibited from barring female athletes with higher levels of testosterone until providing evidence.<sup>79</sup>

In 2018, the IAAF put forth new guidelines on testosterone maximums, but now only for female sprinters, resulting in the case of *Semenya v. IAAF*.<sup>80</sup> The Court of Arbitration for Sport in Switzerland

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75. See INT'L OLYMPIC COMM., *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015).

76. INT'L ASS'N OF ATHLETICS FED'NS, IAAF REGULATIONS GOVERNING ELIGIBILITY TO FEMALES WITH HYPERANDROGENISM TO COMPETE IN WOMEN'S COMPETITION, at 2 (2011), <https://www.sportsintegrityinitiative.com/wp-content/uploads/2016/02/IAAF-Regulations-Governing-Eligibility-of-Females-with-Hyperandrogenism-to-Compete-in-Women%E2%80%99s-Competition-In-force-as-from-1st-May-2011-6.pdf>.

77. *Chand v. Athletics Fed'n of India*, CAS 2014/A/3759, ¶ 4 (2014).

78. *Id.*

79. *Id.* ¶ 547-48.

80. *Mokgadi Caster Semenya v. Int'l Ass'n of Athletics Fed'ns*, 2018/O/5794, Ct. of Arb. for Sport (2018).

upheld the IAAF policies.<sup>81</sup> Although the policies were prima facie discriminatory, the objective was legitimate.<sup>82</sup> The regulations in question were found to be prima facie discriminatory in that they impose conditions on a subset of female athletes without similar conditions on male athletes.<sup>83</sup> Further support for identification as prima facie discrimination is that the rules target athletes with immutable characteristics, namely hyperandrogenism.<sup>84</sup> The panel in *Semenya* explained that even when a policy is prima facie discriminatory, it may nonetheless be valid if it is necessary, reasonable, and proportionate to a legitimate objective.<sup>85</sup> The panel claimed that ensuring fair competition in the female category is a legitimate objective, leading to the question whether the regulations were necessary for the ends.<sup>86</sup> The objective of separating athletes into male and female categories is not based on legal status, but rather on biological performative advantages.<sup>87</sup> The panel concluded that regulating who may compete in male or female categories by biological factors is legitimate, and that variance in these biological qualifications necessitates establishing conditions.<sup>88</sup> The panel goes on to explain that such requirements can only be valid when the biological factor will result in a performance advantage, depending largely on the event in question.<sup>89</sup> The enforcement of conditions only on specific events is not arbitrary because testosterone levels have more impact on sprinting events than others.<sup>90</sup> The panel found that though the regulations were discriminatory, they were necessary, reasonable, and proportional.<sup>91</sup>

These two examples are directly relevant to transgender women competing in that it is difficult to argue that there is a form of discrimination that occurs directly between transgender women and assigned-at-birth women in that both are required to demonstrate that their testosterone levels are below 10 nmol/L, and if they cannot meet this level then they are both allowed to compete in men's events. There is a point to be made that any policy mandating testosterone maximums for only women's sports is prima facie discriminatory for the same reasons

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81. *Id.* at 163.

82. *Id.* at 159-60.

83. *Id.* at 143.

84. *Id.* at 144.

85. *Id.*

86. *Id.* at 145.

87. *Id.* at 146.

88. *Id.*

89. *Id.* at 147.

90. *Id.* at 148.

91. *Id.* at 160.

articulated by the panel in *Semenya*. Transgender male athletes have no requirements to compete under IOC guidelines.<sup>92</sup> If states were to apply the same standard in which they require all women to be below a specified testosterone threshold, the policy may pass muster. Assuming a court in the United States accepts that there is a compelling state interest in maintaining fairness in women's sports and equality as mandated under Title IX, the states may meet the requisite justification standard by their means being appropriate for the ends. Rather than an absolute bar to maintain fairness, there could be hormone level caps. The means then are narrowly tailored to fit two competing interests without being unduly discriminatory.

#### VI. TITLE IX HANDLING OF TRANSGENDER RIGHTS CASES

Title IX serves the primary purpose of eliminating discrimination within the educational system, with sex being an enumerated protected group.<sup>93</sup> Title IX of the Education Amendments of 1972 mandates that “[n]o person . . . shall . . . be excluded from participation . . . or be subject[] to discrimination under any educational program or activity receiving Federal financial assistance.”<sup>94</sup> The definition of who is protected under sex discrimination is a hotly contested issue that could prove to be the key to transgender participation in sports as a whole. The issue presented by the landmark decision *Bostock v. Clayton County* was whether an employer violates Title VII of the Civil Rights Act of 1964 when they terminate employment for simply being homosexual or transgender.<sup>95</sup> In doing so, the Supreme Court would need to determine if the group protected from discrimination by the term “sex” included such individuals.<sup>96</sup> The court reasoned that because the intent of the drafters of Title VII was to mean that sex is not relevant to the hiring, evaluation, or compensation of employees, and that someone's sexual identification is equally irrelevant.<sup>97</sup> The court paints the picture that when an employer has two employees that are both attracted to men, but one is a man and one is a woman, the two employees are exhibiting the same actions.<sup>98</sup> Should the employer fire the man for being attracted to men, he is in essence tolerating

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92. See INT'L OLYMPIC COMM., *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015).

93. 20 U.S.C. § 1681(a).

94. *Id.*

95. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

96. *Id.*

97. *Id.* at 1741.

98. *Id.*

the exact action, but only from the female employee.<sup>99</sup> The act of tolerating the same actions but only for the woman is, by definition, sex discrimination.<sup>100</sup> The same logic would apply to a transgender woman and a biological woman.<sup>101</sup> In that case, the employer is tolerating the identification of being a woman in one, but not the other employee.<sup>102</sup> Unfortunately, the Supreme Court has not ruled on whether the definition of sex as decided in *Bostock* will also apply to Title IX of the Education Amendments Act of 1972.<sup>103</sup>

The Eleventh Circuit was presented with the case of Mr. Bostock before it reached the Supreme Court and decided that the law does not prohibit employers from firing individuals for their sexual orientation.<sup>104</sup> Interestingly, the Eleventh Circuit changed its tune by the time *Adams v. School Board.*, was decided, only two months after the Supreme Court reversed their decision in *Bostock*.<sup>105</sup> In *Adams*, the Eleventh Circuit needed to decide whether a Florida High School's policy of forbidding transgender individuals from using the restroom of the gender they identify with was in violation of Title IX and the Fourteenth Amendment to the United States Constitution.<sup>106</sup> Part of the argument against allowing transgender students access to the restroom of their choice was the unsupported belief that students would pretend to identify as gender fluid, with the implication that the male students would adopt this so that they could harass female students in the restroom.<sup>107</sup>

This argument echoes that of proponents of excluding transgender women from competitive sports. There is an unfounded fear that boys will abuse the ability to identify as women as a pretext for competing against smaller athletes. Under Title IX, no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>108</sup> When the opinion was initially issued, the court held that the restroom policy in place by the school district amounted to sex discrimination.<sup>109</sup> The reasoning relied largely on *Bostock*, but also

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.*

104. *Bostock*, 140 S. Ct. at 1738.

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

106. *Id.* at 1292.

107. *Id.* at 1294.

108. 20 U.S.C. § 1681(a).

109. *Adams*, 968 F.3d at 1310-11.



was supported by the parallel use of but for causation to show discrimination.<sup>110</sup> On July 14, 2021, the Eleventh Circuit vacated their prior opinion that decided for the plaintiff regarding Title IX in order to garner additional support from members of the Court.<sup>111</sup> The court upheld the Fourteenth Amendment claim, and ended their analysis there since relief was already granted.<sup>112</sup> An en banc rehearing of the Title IX issued was granted on August 23, 2021.<sup>113</sup> Upon rehearing, the Title IX claim should be granted utilizing prior analysis from the court.

In *Franklin v. Gwinnett County Public Schools*, the Eleventh Circuit held that the Title VII inclusion for sexual harassment as a form of sex discrimination also applied to instances in which a teacher or coach sexually harassed a student.<sup>114</sup> In *Franklin*, a student was subjected to continual sexual harassment and coerced intercourse by a teacher, and filed a complaint for a Title IX violation, that was subsequently dismissed by the Eleventh Circuit Court of Appeals.<sup>115</sup> The U.S. Supreme Court, in granting certiorari, reversed the Eleventh Circuit decision because, “the same rule should apply when a teacher sexually harasses and abuses a student” with regards to application of sex discrimination in Title VII being applicable in Title IX cases.<sup>116</sup> Utilizing the holding of *Franklin*, the Eleventh Circuit in *Adams* reminds us that the Supreme Court has looked to interpretations of discrimination from one Title in deciding the application in another to rebut the argument that a workplace is different from an educational institution.<sup>117</sup> Likening the illustration of what makes an act discriminatory from *Bostock*, the court in *Adams* points out that the school board allows all cisgender boys who have male driver’s licenses to use the boy’s restroom, but refuses the same treatment to a transgender student whose license corresponds with their gender identity.<sup>118</sup> Differential treatment and punishment for students who are exhibiting the same behavior is the definition of discrimination.

Similar circumstances led to the holding in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, after a transgender

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110. *Id.* at 1305.

111. *Adams v. Sch. Bd.*, 3 F.4th 1299, 1303-04 (11th Cir. 2021).

112. *Id.* at 1320.

113. *Adams v. Sch. Bd.*, 9 F.4th 1369, 1372 (11th Cir. 2021).

114. *Id.*

115. See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 911 F.2d 617, 618 (11th Cir. 1990), *rev’d*, 503 U.S. 60, 75 (1992).

116. *Franklin*, 503 U.S. at 75.

117. *Adams*, 968 F. 3d at 1305.

118. *Id.* at 1306.

student was denied use of the boy's restroom.<sup>119</sup> The student decided to restrict their water intake to avoid the detrimental impact using the girl's restroom would have on him.<sup>120</sup> The student in question was diagnosed with a condition that required ample hydration or else they would faint, so naturally cutting off his water supply proved to be a problem.<sup>121</sup> The school maintained that in order to use the restroom, he would have to undergo sex reassignment surgery.<sup>122</sup> The student brought a complaint alleging a violation of Title IX.<sup>123</sup> The Ninth Circuit Court of Appeals was left to decide whether a transgender student can make a claim for discrimination on the basis of their gender.<sup>124</sup> The Ninth Circuit based their theory on the gender stereotyping prohibition promulgated by the Supreme Court in *Price Waterhouse v. Hopkins*, in which the Court held that a plaintiff can bring a discrimination claim for disparate treatment resulting from sex stereotyping.<sup>125</sup> Although this avenue is perhaps a bit reductive and covers transgender students under the idea that they simply do not fit the stereotype of what they were assigned at birth, it does offer an explanation as to why actions can be classified as discrimination for purposes of Title IX. Transgender students are being treated differently for failing to act according to the expectation of an arbitrary gender construct.

The courts that have decided that transgender students are covered under Title IX cut the legs from underneath potential legislation that bars transgender women from competing from a purely Title IX perspective on discrimination. The Eleventh Circuit may decide upon rehearing *Adams v. School Board* that transgender students are covered under Title IX, meaning there will be conflict over the validity of any potential laws in Alabama, Georgia, or Florida.<sup>126</sup> Bills currently in the process of becoming law as well as those that have already survived the process defy conventional application of prior precedent regarding at the very least the ways courts have looked to prior interpretations in making novel decisions. It is common to look to how a similarly constructed statute defined a key word in determining whether it is appropriate for application. If the Supreme Court has gone out of their way to define sex

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119. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1041 (7th Cir. 2017).

120. *Id.* at 1040-41.

121. *Id.* at 1041.

122. *Id.*

123. *Id.* at 1039.

124. *Id.* at 1047.

125. *Id.* at 1047, 1048 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 151 (1989)).

126. *See Adams v. Sch. Bd.*, 9 F.4th 1369, 1372 (11th Cir. 2021).

as including gender identity and sexual preference with regards to employment discrimination, it makes no sense to argue that a very similarly worded prohibition on sex discrimination in educational facilities should not adopt the same definition. Indeed, circuit courts have already found this to be sensical.<sup>127</sup> The Fourth Circuit in *Grimm v. Gloucester County School Board* held a restroom policy precluding transgender students from using the facility of their choice to violate Title IX by aligning the legislative intent of Title IX with that of Title VI.<sup>128</sup> The court reasoned that *Bostock* applies to an evaluation of Title IX, because the explicit understanding of the two statutes is that they be interpreted in unison.<sup>129</sup> A law that categorically excludes based on transgender status goes against the thrust of Title IX. Any argument that they are excluding based on physiological advantages rather than identity is a pretext without merit and serves no purpose other than to further disadvantage an at-risk group.

#### VII. EQUAL PROTECTION AS APPLIED TO TRANSGENDER DISCRIMINATION

All legislation will inevitably classify in one way or another. When legislation is benign, it will only be subject to rational basis review in which there must only be a rational connection to a legitimate state interest.<sup>130</sup> If legislation classifies on the basis of sex, then the law will be subject to heightened review in the form of intermediate scrutiny, which requires that the classification substantially relate to a legitimate state interest.<sup>131</sup> The question becomes whether a policy that excludes transgender students from playing on the sports team that corresponds with their gender identity is sex classification, and if so, is there an exceedingly persuasive justification? A policy that mandates participation must be in correspondence with biological gender means that cisgender women may not play on cisgender men's teams. That alone seems to constitute gender classification, but there is further classification solely against transgender students. The policy in effect classifies transgender students and non-transgender students by excluding based on birth certificates. These classifications are *prima facie* discriminatory in that

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127. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

128. *Id.* at 616, 618-19.

129. *Id.* at 616.

130. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

131. *Id.* at 440-41.

they impose bars based on sex, but may be constitutional if they meet the standards of the appropriate tier of scrutiny.

Next, the courts will decide if there is an argument that there is an exceedingly persuasive justification in classifying against transgender athletes. First, we must ask if there is a policy that classifies transgender students. Under *Adams*, the school board is utilizing differential treatment for transgender students because they are transgender.<sup>132</sup> The choice the school board made to create a separate gender-neutral restroom created a burden on transgender students, and in essence, separated them from the rest of the students.<sup>133</sup>

The interest promoted by the governments that have adopted a ban on transgender athletes in organized sport have only one viable option. They may argue that they are attempting to uphold Title IX by ensuring that women are equal in sport. Women, according to the legislature, simply cannot compete with biological men.<sup>134</sup> Their paternalistic approach to the matter assumes that female athletes are by default inferior, and in allowing transgender athletes to compete there will be less chance for biological women to excel. If the legislatures contend that they seek to ensure fairness in sport as a whole, they will fail because there is not generally a reciprocal emphasis placed on transgender men undergoing testosterone treatment. If holistic integrity in sport is the objective, there would be similar bills for fairness in men's sport that singles out transgender men consuming banned testosterone supplementation. At the present, the identifiable government interest is solitary.

One could argue that transgender individuals should be a suspect class that triggers heightened scrutiny.<sup>135</sup> Strict scrutiny is traditionally reserved to situations in which the government distinguishes among citizens based on race, ethnicity, or national origin with regards to the policy in question.<sup>136</sup> In order for such a policy to be upheld, it must be narrowly tailored to advance a compelling government interest.<sup>137</sup> The idea of tiers of scrutiny originated with *United States v. Carolene Products Co.*, particularly the idea that a more searching standard should be applied to protect classes of people who have been historically prejudiced, are subjected to this prejudice due to some immutable trait or characteristic,

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132. *Adams*, 958 F.3d at 1296.

133. *Id.*

134. S.B. 354, 93rd Gen Assemb., Section 1(a)(8)(Ark. 2021).

135. See *Adkins v. City of New York*, 143 F. Supp. 3d 134, 138-39 (S.D.N.Y. 2015); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

136. *Cleburne*, 473 U.S. at 440.

137. *Id.*

are part of a “discrete and insular” minority, or are not well represented politically.<sup>138</sup> While the idea was primarily used to advance interests in the civil rights movement, the list of suspect classes triggering strict scrutiny has failed to grow since.

On the one hand, transgender individuals would not have immutable characteristics that draw the ire of discrimination because they must make an affirmative choice to change the state they are born in.<sup>139</sup> Immutability traditionally would be attributed to national origin or race because the argument was that those are traits that are “the accident of birth.”<sup>140</sup> This notion of immutability is adopted by a number of people and is not without merit. Proponents of transgender rights contend that immutability can and should be understood rather as being something “so central to a person’s identity that it would be abhorrent for [the] government” to impose a penalty for changing to who they are.<sup>141</sup> Gender identity is the immutable characteristic, not the sex they are born with.

Whether transgender individuals fit the traditional description of a suspect class is debatable. An argument can be made that including transgender people in a discrete class implies that they are not members of the gender they identify with. How could we say that trans men are a minority when the objective is not to be a “trans man,” but just a man? Men as a whole certainly are not a discreet minority, so by categorizing trans men as anything other than men we in effect distinguish them from their gender identity and classify them as something different altogether. Instead, we should view discreteness based on how society has treated the group. Because society has easily identified this group as being the “other,” we in effect gave them this status. Touching on political participation, it was only a few months ago that the first openly transgender state senator was elected. They have next to no part in the political process. A dearth of transgender representatives supports the notion that transgender individuals are not well represented politically, adding to the argument that the qualifications for suspect classifications are met. Refusal to add transgender individuals to the suspect classifications list undercuts the supposed impetus for formulating such a list to begin with.

If the courts accept that transgender individuals are part of a suspect classification, then we look to the legislation in question to determine

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138. *Carolene Prods. Co.*, 304 U.S. at 152 n.4 (1938).

139. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

140. *Id.*

141. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, concurring).

whether it has, in fact, been narrowly tailored. In bringing forward a claim for discrimination, the circumstances leading to the legislation or policy are considered to see if there was a neutral construction of the law.<sup>142</sup> The state produces a reason, at which point the court must decide if it is plausible based on the facts.<sup>143</sup> This only applies to strict scrutiny. As applied to laws excluding transgender athletes, if the courts classified transgender individuals as a suspect class then the laws would undoubtedly fail on the grounds that the purpose was discriminatory. The Idaho legislature enacted H.B. 500 as the pandemic was beginning to shut down government.<sup>144</sup> Idaho rushed the process, even when sports as a whole were shut down.<sup>145</sup> Looking to Idaho's followers, many have begun the process shortly after the Biden Administration stated that these people would be covered under Title IX.<sup>146</sup> The circumstantial proof indicates that reasons offered are pretexts for invidious discrimination. A worthwhile thought experiment is that if we were to replace transgender athletes as the target of these bills with a group already considered a suspect class, the legislations would all undoubtedly fail.

#### VIII. TESTING CONSTITUTIONALITY AND TITLE IX

While banning transgender individuals from athletics is currently a trending issue in state legislatures, Idaho was ahead of the pack. In March 2020, Idaho enacted House Bill 500, which bars transgender women and intersex women from competing on teams that match their gender identity.<sup>147</sup> The legislative intent as written cites to *United States v. Virginia* in the reasoning that inherent differences between men and women can cause denigration of the opportunities available to members of a sex.<sup>148</sup> The listed inherent differences are physiological, namely higher testosterone levels, lung volume per body mass, and denser bones.<sup>149</sup> To Idaho, mandating sex specific teams was a way to promote sex equality in sport as established under Title IX, with no carve out for students to seek testosterone suppression to compete because of the belief expressed by the bill that hormone therapy requirements utilized by both the Olympics and

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142. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

143. *Id.* at 266.

144. *Hecox v. Little*, 479 F.3d 930, 984 (D.Idaho 2020).

145. *Id.*

146. U.S. Dep't of Just., Civ. Rts. Div., *supra* note 44, at 3.

147. Fairness in Women's Sports Act, IDAHO CODE § 33-6203 (2020).

148. *Id.* § 33-6202(1).

149. *Id.* § 33-6202(3)-(4).

the NCAA will not remedy the supposed advantage transgender women will have against cisgender women.<sup>150</sup>

Shortly after the law was passed, a complaint was issued by Lindsay Hecox and Jane Doe.<sup>151</sup> At the time, Hecox was a freshman at Boise State University who intended to try out for the cross country team.<sup>152</sup> Hecox is an avid runner who uses it as a form of therapy, as well as a way to connect with people.<sup>153</sup> Lindsay Hecox is not a man, so competing on the men's team was not an option.<sup>154</sup> Telling someone like Hecox to just put up with the rule and compete according to who the state says she is would be counterproductive to establishing her personal identity as a woman, and is a not-so-subtle way of discriminating against all transgender women.<sup>155</sup> The plaintiff challenged the Idaho law on the grounds that it violates both Title IX and is unconstitutional in violation of the Fourteenth and Fourth Amendments, and sought a preliminary injunction.<sup>156</sup> The district court did not need to consider those issues, as they would be decided at the appellate level.<sup>157</sup> Instead, the question for the court was whether the plaintiff had met the criteria for the court to enjoin enforcement of the law.<sup>158</sup> The criteria as stated are that the plaintiff must have a constitutional challenge to the law, whether they are likely to succeed on their claim, and whether they stated a facial or only as applied constitutional challenge.<sup>159</sup>

Under the Fourteenth Amendment to the U. S. Constitution, “all persons similarly situated should be treated alike.”<sup>160</sup> If a fundamental right is infringed upon, then the appropriate tier of review is strict scrutiny, which requires a compelling state interest that is narrowly tailored.<sup>161</sup> The court in *Hecox* acknowledged that competitive sport is traditionally not a fundamental right for purposes of strict scrutiny.<sup>162</sup> The court went on to apply intermediate scrutiny rather than strict, as they consider transgender individuals to be a “quasi suspect” class.<sup>163</sup> The court rejected the

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150. *Id.* § 33-6202(11)-(12).

151. Complaint at 6, *Hecox v. Little*, 479 F.3d 930 (D. Idaho 2020). (No. 20-35813).

152. *Id.*

153. Complaint at 15, *Hecox v. Little*, 479 F.3d 930 (D. Idaho 2020). (No. 20-35813).

154. Complaint at 14, *Hecox v. Little*, 479 F.3d 930 (D. Idaho 2020). (No. 20-35813).

155. *Id.*

156. *Hecox*, 479 F.3d. at 943.

157. *Id.*

158. *Id.* at 944.

159. *Id.*

160. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

161. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

162. *Hecox* at 973 (citing *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 159-60 (5th Cir. 1980)).

163. *Id.* at 974-75.

purported government interest of making amends for past discrimination as applied to women's sports and promoting equality and opportunity between the sexes.<sup>164</sup> The intent of Title IX with regards to athletics was to redress inequitable treatment between men and women since men had not been marginalized and women had.<sup>165</sup> Transgender individuals are a disadvantaged group, so the onus of the statute was not meant to apply to them.<sup>166</sup> The court went on to disclaim the concern that transgender athletes would displace cisgender women in a similar reduction of probability as articulated prior.<sup>167</sup> At the time there was no evidence of transgender women taking over sports. There is no actual problem to be solved, and therefore, there can be no legitimate governmental interest.<sup>168</sup> If a similar analysis is employed to combat the new bans springing up around the country, the prospects of one taking effect are dismal, particularly in jurisdictions where the Circuit have already decided that transgender students are covered under Title IX, rendering a Fourteenth Amendment analysis unnecessary.<sup>169</sup>

#### IX. CONCLUSION

Since *Bostock* was decided, there has been a great deal of speculation as to whether the definition of sex will change to include gender identity and sexuality in statutes aside from Title VII. It is logical to conclude that eventually there will be broad protections against discrimination for transgender individuals. The United States has experienced a gradual metamorphosis with regards to what society deems acceptable, which is reflected in court precedent and law. Historically, the side advocating for hate has lost. It was not so long ago that women were unable to vote, and segregated schools<sup>170</sup> were commonplace. Being a homosexual was illegal for all intents and purposes.<sup>171</sup> Gay couples could not be married, then later they could be married only if the domiciled state would allow such.<sup>172</sup> People in the LGBTQ community could be discriminated against in the

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164. *Id.* at 977.

165. *Title IX and the Rise of Female Athletes in America*, WOMEN'S SPORTS FOUND. (Sept. 2, 2016), <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/>.

166. *Hecox*, 479 F. 3d at 977.

167. *Id.*

168. *Id.* at 979.

169. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

170. *Brown v. Bd. of Educ.*, 347 U.S. 483, 486-88 (1954).

171. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

172. *Obergefell v. Hodges*, 576 U.S. 644, 662 (2015).



workplace.<sup>173</sup> Basic human dignity has not always been a priority in this nation, but progress has slowly arrived regardless. Each of the infractions against marginalized groups has been usurped by basic decency. The latest battle for human dignity is occurring in schools, with states using transgender athletes as a guinea pigs to goad opposition from progressives.

It is no coincidence that after the Biden Administration articulated that *Bostock* applies to Title IX, red-leaning states have attempted to pass legislation to the contrary. A similar tactic is simultaneously being employed by these states to overturn abortion precedent. Several states have passed abortion laws that directly violate precedent from *Roe v. Wade*<sup>174</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>175</sup> with the hopes that when an injunction is inevitably issued, they may eventually be granted certiorari by the Supreme Court. The strategy came to fruition following the Fifth Circuit decision, which invalidated a Mississippi law prohibiting abortions after fifteen weeks of gestation.<sup>176</sup> The Supreme Court granted certiorari to consider the issue of whether the law was an unconstitutional ban on pre-viability abortions.<sup>177</sup> The strategy hinges on faith given to a Supreme Court that yields a 6-3 majority conservative panel following the appointment of Amy Coney Barrett.

The hope in instigating a fight to exclude transgender students from competing in sports is pretextual and is likely driven by the hope that eventually the issue of whether transgender students are covered under Title IX will be taken by the Supreme Court and decided in favor of the states passing legislation. Transphobia is based in a fundamental lack of understanding, which is explained away conveniently by offering elaborate hypotheticals that have little basis in reality.

Analogous arguments may be offered as rebuttals for resistance to transgender women competing against cisgender women. The testosterone range difference is the most frequently cited explanation for why it is unfair and perhaps even dangerous to allow such competition. In reality, there is a far greater range of testosterone levels between males than there is between transgender women abiding by NCAA maximum levels as compared to cisgender women.<sup>178</sup> Men are a greater danger to men in sports by far than transgender women are to cisgender women, and the

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173. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

174. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

175. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992).

176. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268-69 (5th Cir. 2019), *cert. granted*, 209 L.Ed.2d 748 (U.S. 2021).

177. *Dobbs v. Jackson Women's Health Org.*, 209 L.Ed.2d 748, 748 (U.S. 2021).

178. *Coleman*, *supra* note 58, at 72.

supposed performance differences accounted are also greater among men. Yet, as a society, we have no problem with the bigger, stronger, faster boys competing against an average boy. There are very few instances of transgender athletes competing against, much less defeating, cisgender athletes. In fact, Lindsay Hecox would not have qualified for the Boise State women's track team. She was too slow.

Unfounded fears based in prejudice should not be allowed to serve as an exclusionary tool for an activity so vital to social development and belonging. It is imperative that transgender youths are given the basic respect afforded to all other students. Although competing in sports is not a guaranteed right, but rather a privilege, the autonomy to pursue participation should be afforded to all. Inclusion is the only way to ensure that these children and young adults can be recognized as who they are, which is vital to the mental development of all. *Stare decisis* is powerful, and the Court will hopefully refrain from straying from the *Bostock* interpretation should they take the issue. The landscape of transgender discrimination is changing even as this is being written, and I hope that sooner than later everyone will be given to chance to compete and strive to be better in the realm of athletics.