[MIS]INTERPRETING TITLE IX: HOW OPPONENTS OF TRANSGENDER EQUALITY ARE TWISTING THE MEANING OF SEX DISCRIMINATION IN SCHOOL SPORTS

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ABSTRACT

Anti-trans advocates have created a smokescreen—painting transgender people as a threat to cisgender women and girls—in order to push their latest legislation targeting trans students' participation in school sports. This Article rebuts the argument that there are competing sex discrimination interests when it comes to school athletics and challenges the idea that rights and opportunities for cisgender women and girls are threatened when transgender people are treated equally. Anti-trans sports bans are not based in science or reality. Rather, science serves as a post hoc justification for race and sex stereotypes about women and sports. A look into the origins of "sex testing" in sports makes it abundantly clear that sex testing and trans exclusion is part and parcel of a long history of gender policing of women, girls, and nonbinary people, particularly people of color. Laws or policies that force people to prove their gender through invasive testing are antithetical to gender equality goals and only further entrench race and sex stereotypes. I argue that when such bans target students, they contravene federal law and the Constitution. The Supreme Court's recent decision in Bostock v. Clayton County *made clear that anti-trans discrimination is sex discrimination. I argue that there is no way for opponents to distinguish the breadth of* Bostock*'s holding from applying to school sports under Title IX—nor can these laws survive constitutional analysis. An examination of the asserted state interests in recent sports bans reveals that they are rooted in anti-trans animus and sex stereotypes, not a genuine interest in women's sports and gender equity.*

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I.
INTRODUCTION

Opponents of transgender equality are attempting to drive a wedge between cisgender women and girls and transgender people. By targeting transgender students and preventing them from participating in school sports under the guise of protection for cisgender women and girls, anti-trans advocates are distorting sex discrimination law and contravening the plain text and legislative purpose of Title IX. Attempts to ban transgender and intersex students from school sports also deny these students equal protection under the law in violation of the Fourteenth Amendment.

The Supreme Court's recent decision in *Bostock v. Clayton County*[1] leaves no doubt as to the statutory application of sex discrimination prohibitions to transgender people. Any attempt to write transgender students out of the statute's

1. 140 S. Ct. 1731, 1737 (2020) (holding that terminating an employee for their sexual orientation or gender identity is sex-based discrimination in violation of Title VII).

coverage when it comes to participation in athletics is driven by animus and advances a policy position completely divorced from the statute's text.

Justifications for such bans often come in the form of arguments about protecting opportunities for women and girls.[2] We must ask ourselves: which girls are these policies trying to protect? As this Article will show, arguments about women's fragility and need for protection only serve white, cisgender, class-privileged women. Such arguments begin with the presumption that only cis white girls are worthy of legal protection, while attempting to weaponize sex discrimination claims to the exclusion of those most susceptible to discrimination. In particular, anti-trans advocates are capitalizing on fears about Black transgender girls to fuel their campaign.[3] This Article argues that sex testing in school sports does nothing but further entrench sex stereotypes and discriminate against the students who are most vulnerable: girls of color and LGBTQ, intersex, and gender nonconforming students.

This Article proceeds in four parts. Part II posits that, in order to understand the current attacks on trans students in sports, it is necessary to understand the long history of gender policing in sports. This includes understanding the ways in which junk science has been used to entrench race and sex stereotypes. Girls and women of color are the ones most frequently targeted for so-called "sex testing," which reinforces sex- and race-based stereotypes and attempts to insulate cis white girls and women from competition against girls who are deemed too strong or too masculine to compete.

Part III surveys the recent legislative, administrative, and litigation attacks on transgender students in the context of school sports. This Part describes the ways in which anti-trans advocates have shifted focus from public accommodations to athletics, using two Black transgender girls as the target of their smear campaign, while spouting a fraudulent "interest" in women's protection and safety. These claims fare no better in the sports realm than in the context of bathrooms and locker rooms, but opponents capitalized on a sympathetic presidential administration under Trump in an attempt to further their theories in court and through the

2. Most of these bans have titles like "Protect Women's Sports" or "Fairness in Women's Sports." *See infra* Part III.B, III.E. Anti-trans advocates argue to the public, the legislatures, and the courts that banning trans girls from girls' sports teams is necessary to protect opportunities for cisgender girls. *Id.*

3. Andraya Yearwood and Terry Miller—two Black trans girls from Connecticut—became a national news story when they placed first and second in a regional track race in 2018. In a lawsuit filed against the Connecticut Association of Schools in 2020, anti-trans advocates used the story of their wins to argue that policies allowing the participation of trans athletes violated Title IX. Between 2020 and 2021, over 30 states across the country introduced some form of anti-trans sports legislation. *See, e.g.*, Madeleine Carlisle, *Andraya Yearwood, a Star of Hulu's New Changing the Game Documentary, Talks Life as a Trans Athlete*, TIME (June 10, 2021, 3:12 PM), https://time.com/6072672/andraya-yearwood-changing-the-game/ [https://perma.cc/MLU4-ZV9D]; *The Coordinated Attack on Trans Student Athletes*, ACLU (Feb. 26, 2021) [hereinafter ACLU, *The Coordinated Attack*], https://www.aclu.org/news/lgbtq-rights/the-coordinated-attack-on-trans-student-athletes/ [https://perma.cc/XQB2-S358].

Department of Education.[4] Though administrative agencies are less hostile under the Biden administration, state legislatures have continued to introduce harmful bills during the 2021 legislative session and legal challenges will continue to play out in court.[5]

Part IV charts the sex discrimination analysis under Title IX and the Equal Protection Clause, beginning with the most important takeaways from the Court's *Bostock* decision. While *Bostock* dealt with anti-trans discrimination in employment, there is no logical distinction to prevent the application of its reasoning with equal force in the parallel context of anti-trans discrimination in school programs and activities.

The Article concludes in Part V by offering two alternative legal theories for challenging anti-trans sports bans—through race discrimination and constitutional privacy claims. Attempts to screen students by so-called "sex testing" are often racially motivated and administered disproportionately against girls and women of color. In addition, sex testing is also a violation of students' constitutional right to privacy, as all girls and gender non-conforming students are threatened with invasive testing rooted in sex stereotypes in order to participate in school sports.

There are real gender inequalities remaining in school sports today—in expenditures, mentoring, scholarships, and opportunities, as well as sexual harassment and assault—and inequalities are experienced even more disproportionately along race and economic lines as well as LGBTQ status.[6] Girls' sports advocacy organizations have been trying to call attention to these disparities for years. These efforts should not be overshadowed by proponents of sex testing, whose arguments and motivations are grounded in anti-trans animus and sex stereotypes, resulting in the policing of all students who do not conform to societal gender norms.

II.
THE HISTORY OF GENDER POLICING IN SPORTS

The benefits of athletics, particularly to young people, are numerous. Team sports can provide student athletes with a community and support network[7]—something that all students can benefit from, but that is often life-saving for

4. *See infra* Part III.D.

5. *See infra* Part III.D, III.E.

6. *See infra* Part II.C.

7. *See* Brief of Amici Curiae 176 Athletes in Women's Sports, The Women's Sports Found., and Athlete Ally in Support of Plaintiffs-Appellees at 19–20, Hecox v. Little, Nos. 20-35813, 20-31815 (9th Cir. Dec. 21, 2020) [hereinafter Athletes Brief] (citing, e.g., Leanne Findlay & Robert Coplan, *Come Out and Play: Shyness in Childhood and the Benefits of Organized Sports Participation*, 40 CANADIAN J. BEHAV. SCI. / REVUE CANADIENNE DES SCIENCES DU COMPORTEMENT 153 (2008)); *see also* Shayna Medley & Galen Sherwin, *Banning Trans Girls from School Sports Is Neither Feminist nor Legal*, ACLU (Mar. 12, 2019), https://www.aclu.org/blog/lgbt-rights/transgender-rights/banning-trans-girls-school-sports-neither-feminist-nor-legal [https://perma.cc/7DCA-D8TF].

transgender young people who lack other supportive spaces.[8] Participation in athletics can promote physical and mental health, support the development of leadership skills, foster self-esteem, and confer prestige as well as academic and career opportunities.[9] There is also evidence that athletic participation in school has a positive effect on students' academic achievement and graduation rate.[10]

Given the benefits of sport, it is perhaps no surprise that people have been pushed out of participation along race and gender lines, starting from a young age. From the racist history of binary sex categories, to stereotypes about athletic success and fertility, femininity, and sexuality, to targeting women of color for "sex testing," there is a long history of relying on junk science as an excuse for restricting access to athletics on the basis of sex. This Part places the recent attempts to ban transgender youth from participating in school sports within this historical context. One can draw a direct line from these now-debunked gender myths to the present efforts to enforce "sex testing" in schools. Bans on trans students' participation are just another example of the reliance on unsupported science myths to

8. Athletes Brief, *supra* note 7, at 23 ("Significantly, participation in sport has also been reported to protect against feelings of hopelessness and suicidality. For transgender youth, who are at considerably higher risk for 'suicide and other life-threatening behaviors,' this is particularly important." (citing Lindsay Taliaferro, Barbara A. Rienzo, M. David Miller, R. Morgan Pigg, Jr., & Virginia J. Dodd, *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation*, 78 J. SCH. HEALTH 545, 545–53 (2008); Erin Buzuvis, *Transgender Student-Athletes and Sex Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. LAW 1, 48 (2011) [hereinafter Buzuvis, *Transgender Student-Athletes*])); *see also* Chris Mosier, Op-ed, *Pushing Trans Youth away from Sports Is Harmful*, OUT (Jan. 15, 2019, 11:45 P.M.), https://www.out.com/sports/2019/1/15/trans-athletes-south-dakota-chris-mosier [https://perma.cc/MD4E-6HF8] ("[B]arring trans people from participation hurts everyone. Young people start to think that there is no place for them in athletics and they drop out, even when it is the one place where they may find belonging and hope. It affects every aspect of their educational experience and can even reduce the likelihood that they graduate from high school. It robs transgender youth from connecting with their peers, and can even cause adults at schools to treat trans students differently." (citing Eleanor Barkhorn, *Athletes Are More Likely to Finish High School than Non-Athletes*, ATLANTIC (Jan. 30, 2014), https://www.theatlantic.com/education/archive/2014/01/athletes-are-more-likely-to-finish-high-school-than-non-athletes/283455/ [https://perma.cc/FY7P-648F])).

9. *See* DEBORAH L. RHODE, JUSTICE AND GENDER 300 (1991) ("Athletic activity promotes physical and psychological health; it reduces cardiovascular risks, provides coping mechanisms for stress and anxiety, and fosters personal skills and collegial relationships. In contemporary American society, athletic achievement also confers prestige, respect, and self-esteem, as well as educational and employment opportunities."); Athletes Brief, *supra* note 7, at 18–19; Medley & Sherwin, *supra* note 7.

10. Athletes Brief, *supra* note 7, at 17 (citing Kelly Troutman & Mikaela Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females' Educational* Attainment, 38 YOUTH & SOC'Y 443 (2007)); Angela Lumpkin & Judy Favor, *Comparing the Academic Performance of High School Athletes and Non-Athletes in Kansas in 2008–2009*, 4 J. SPORT ADMIN. & SUPERVISION 41 (2012)).

perpetuate sex stereotypes that are harmful to all girls, under the guise of protecting cisgender women.[11]

A. 'Science' as Cover for Sex Discrimination in Athletics

1. The Racist History of Binary Sex

To analyze the current attempts to legislate sex categories and police bodies that do not conform to gender stereotypes, it is necessary to contextualize current legislation in the American history of constructing binary sex. Other cultures around the globe have long recognized a nonbinary understanding of gender.[12] In Europe and in the United States, however, societal understandings of "male" and "female" are directly tied to—and a product of—racism, eugenics, and colonialism.[13] As Sandy O'Sullivan, a non-binary Professor of Indigenous Studies at Macquarie University, describes, part of the "project" of colonialism was to force indigenous people into western structures like the gender binary and nuclear family, intentionally erasing the unique and expansive understandings of gender and family that many indigenous communities held.[14]

In *The Biopolitics of Feeling*, Kyla Schuller describes the ways in which binary sex categories developed out of eugenic philosophies.[15] The American School of Evolution, a group of evolutionary theorists who rejected Darwin and instead followed the teachings of French naturalist Jean-Baptiste Lamarck, believed that gendered differences in men and women were a marker of white,

11. Given the prevalence and harm of such arguments, many have advocated that cisgender women have an obligation to say, "not in our name" in opposition to anti-trans legislation. *See, e.g.,* N.Y.U. School of Law, *BWLN/Ms. Foundation Panel: Protecting Gender Identity & Expression for America's Youth*, YOUTUBE (Nov. 22, 2021), https://www.youtube.com/watch?v=zDKw06ChWBg [https://perma.cc/7NPJ-D59M] (according to panelist Hayley Gorenberg, Legal Director of New York Lawyers for the Public interest, "Any of us who are cisgender women need to stand up and say, 'Not in our name. Not in our name. This is not making me safer, don't use me to justify it, it is hateful, it is discrimination.'").

12. *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Oct. 5, 2018), https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive [https://perma.cc/2WGT-2398] ("[N]on-binary identities have been recognized for millennia by cultures and societies around the world."). *See also* Sandy O'Sullivan, *The Colonial Project of Gender (and Everything Else)*, 5 GENEALOGY 67 (2021), https://www.mdpi.com/2313-5778/5/3/67 [https://perma.cc/35YP-4MEN] (discussing the history of indigenous people's understanding of gender and colonial erasure).

13. *See* KYLA SCHULLER, THE BIOPOLITICS OF FEELING: RACE, SEX, AND SCIENCE IN THE NINETEENTH CENTURY 16–17 (2018).

14. *See* O'Sullivan, *supra* note 12, at 3 ("Across the colonised North American continent, the modern term, Two Spirit/2-Spirit, has been formulated in recent decades to describe contemporary and historic genders and sexualities that were erased through the colonial record . . . .").

15. SCHULLER, *supra* note 13, at 16–17.

civilized society.[16] Schuller describes how these concepts were widely integrated into nineteenth century American culture, as racism fueled the regulation of sex and gender.[17] The history of distinct, binary sex categories in America thus "consolidated as a *function* of race."[18]

Scientists, philosophers, and other prominent thinkers of the nineteenth century adhered to this idea that two distinct sexes were the product of "only the civilized" and "all other peoples had only one sex."[19] They opposed the women's suffrage movement on these grounds, arguing women's political power would "stimulate the growth of masculine traits and atrophy feminine characteristics," causing the regress of civilization to primitiveness.[20]

This racist trope of white women as civilized and women of color as androgynous and primitive has persisted in different iterations throughout the course of American history. Early accounts of Native women engaging in physical labor and caricatures of nonwhite and poor people as androgynous served as evidence that "the less evolved" had not reached the "stage of sexual dimorphism" achieved only by "the civilized."[21] Into the twentieth century, scientists used the concept of hormonal differences to advance eugenicist ideas about "racial improvement."[22]

Denying the gender of women and girls of color, and Black women in particular, has persisted as an instrument of racism, and sport has been a key arena in which this trope has played out. "[I]n sports, just as during slavery, the Black body has been marked as inherently different from other bodies . . . and thus blackness is used as a way of othering male and female."[23] In 1936, Tidye Pickett and Louise

16. *Id.* at 16 ("[T]he achievement of rationality—a key component of civilization—is made possible only through the sex difference allegedly lacking in the racialized."). *See also id.* at 37 ("To [the American School] evolutionists, restricting the suffrage and deporting African Americans were necessary measures to maintain the dynamic attraction between civilized feminine sensitivity and masculine justice that propelled racial advance. . . .").

17. *See id.* at 16.

18. *Id.* at 17.

19. *Id.* at 59.

20. *Id.* at 62.

21. *Id.* at 59.

22. REBECCA M. JORDAN-YOUNG AND KATRINA KARKAZIS, TESTOSTERONE: AN UNAUTHORIZED BIOGRAPHY 9 (2019) (citing EVELYNN M. HAMMONDS AND REBECCA M. HERZIG, THE NATURE OF DIFFERENCE: SCIENCE OF RACE IN THE UNITED STATES FROM JEFFERSON TO GENOMICS 215 (2008)).

23. MILTON KENT, EDWARD ROBINSON, RON TAYLOR & TONYAA WEATHERSBEE, MORGAN STATE UNIV., BEATING OPPONENTS, BATTLING BELITTLEMENT: HOW AFRICAN-AMERICAN FEMALE ATHLETES USE COMMUNITY TO NAVIGATE NEGATIVE IMAGES 4 (Stella Hargett & Jacqueline Jones eds., 2018), https://www.documentcloud.org/documents/4528427-The-Image-of-Black-Women-in-Sports2.html#document/ [https://perma.cc/DBX4-7F5U]) (citing Jenny Lind Withycombe, *Intersecting Selves: African American female athletes' experiences of sport*, SOC. SPORT J. 28, 480 (2011)). *See also* Patricia Vertinsky and Gwendolyn Captain, *More Myth than History: American Culture and Representations of the Black Female's Athletic Ability*, 25 J. OF SPORT HIST. 532, 541 (1998) ("[R]acialized notions of the virile or mannish black female athlete stemmed from a number of persistent historical myths: the linking of African American women's work history as slaves, their supposedly 'natural' brute strength and endurance inherited from their African origins, and the notion that vigorous competitive sport masculinized women physically and sexually.").

Stokes became the first two Black women athletes to represent the United States in the Olympics, spurring Norman Cox, a member of the International Olympic Committee, to propose a rule barring them from competition with white women and forcing them instead to compete in their own category.[24] In making this proposal, Cox described Pickett and Stokes as "unfairly advantaged 'hermaphrodites' who regularly defeated 'normal women.'"[25]

The racist stereotypes of Black women, including Black women athletes, as not "real" women are still alive and well. A 2018 study by Morgan State University found that "[t]he politicization of black women's bodies that began in slavery has yielded in our day portrayals of black female athletes as alternately mannish or overly sexualized."[26] As section II.A.2 will show, professional athletes like Dutee Chand and Santhi Soundarajan of India and Caster Semenya of South Africa have been targeted for sex testing based on racially motivated ideas that they are "suspiciously masculine" and too strong for competition against other women.[27] And finally, in the context of school sports, three Connecticut athletes, represented by anti-LGBTQ legal organization Alliance Defending Freedom, targeted two Black transgender girls—Andraya Yearwood and Terry Miller—as the focal point of a complaint aiming to bar trans girls from competition.[28] In all of these contexts, science was used as a post hoc justification for race- and sex-based stereotypes about women and sports. This unsupported rationale continues to serve as the basis for anti-trans laws and policies in sports today.

2. Nineteenth Century Norms of Masculinity and Sport

History is littered with examples of sex stereotypes in sport that society has attempted to legitimize with unsubstantiated medical justifications. Erin Buzuvis,

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24. Brief for *Amici Curiae* Nat'l Women's Law Ctr., Law. Comm. for Civil Rts. Under L. and 60 Additional Org. in Support of Appellees & Affirmance at 20, Hecox v. Little, Nos. 20-35813, 20-35815 (9th Cir. Dec. 21, 2020) [hereinafter NWLC Brief] (citing KENT, ROBINSON, TAYLOR, & WEATHERSBEE, *supra* note 23).

25. *Id.* (citing KENT, ROBINSON, TAYLOR, & WEATHERSBEE, *supra* note 23); Vertinsky and Captain, *supra* note 23, at 541.

26. Maya A. Jones, *New Study Examines History of Black Women Fighting to be Respected as Athletes*, UNDEFEATED (June 25, 2018), https://andscape.com/features/morgan-state-university-study-examines-history-of-black-women-fighting-to-be-respected-as-athletes/ [https://perma.cc/AEB7-KR5R] (summarizing KENT, ROBINSON, TAYLOR, & WEATHERSBEE, *supra* note 23). Some of the world's top Black female athletes, including Serena Williams, are frequently targeted with racist, sexist slurs. *See* KENT, ROBINSON, TAYLOR, & WEATHERSBEE, *supra* note 23, at 2 (noting that Williams, world champion tennis player, has been called a "man" and a "gorilla" by the media); *see also* Jenée Desmond-Harris, *Serena Williams Is Constantly the Target of Disgusting Racist and Sexist Attacks*, VOX (Sept. 7, 2016), https://www.vox.com/2015/3/11/8189679/serena-williams-indian-wells-racism [https://perma.cc/2RUD-EKMK].

27. *See* NWLC Brief, *supra* note 24, at 21.

28. *See, e.g.*, Jon Greig, *High School Track Stars Targeted in Complaint About Inclusion of Trans Athletes in Competitions*, BLAVITY (June 19, 2019, 1:21 PM), https://blavity.com/high-school-track-stars-targeted-in-complaint-about-inclusion-of-trans-athletes-in-competitions?category1=news [https://perma.cc/GXQ5-ED9F].

Professor of Law at Western New England School of Law, describes the rise of the muscular Christianity movement shaping gender roles in American society:

> The muscular Christianity movement, imported from Europe in the mid-nineteenth century, introduced Americans to the idea that sports were integral to the development of men, who society worried were becoming too effeminized by their increasing employment in white-collar jobs that did not require physical labor. Athletics . . . were deliberately touted as the antidote to this perceived weakness.[29]

At the same time that men were being encouraged to pursue sport to become physically strong and powerful, women were fed claims that they were not physically suited for sport[30] and told that athletics would harm their fertility.[31] Women's increased participation in sports provoked objections that "[t]he female physique and disposition would not bear the strain of competition."[32] Throughout the 19th century and into the 20th, women were given medical advice not to exercise during menstruation and doctors "warned that those who did so put their prized fertility at risk."[33] People believed that sports would cause women to develop features considered unattractive for docile, feminine, white women—"they would develop large feet, coarse hands, and 'biceps like a Blacksmith.'"[34] In the Victorian era, women were warned that horseback riding would "coarsen[] the voice and complexion," and "produce[] an un-natural consolidation of the bones of the lower part of the body, ensuring a frightful impediment of future

29. Erin E. Buzuvis, *Survey Says . . . a Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 848–49 (2006) [hereinafter Buzuvis, *Survey Says*] (citing SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT 11 (1994); DAVID WHITSON, SPORT IN THE SOCIAL CONSTRUCTION OF MASCULINITY, IN SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES 19, 21 (Michael A. Messner & Donald F. Sabo eds., 1990)).

30. RHODE, *supra* note 9, at 300.

31. *Id.* at 301 ("If women persisted in their 'Amazonian ambitions,' their efforts could drain 'vital forces' necessary for reproduction (a threat that strenuous domestic work somehow failed to present)."). *See also* Buzuvis, *Survey Says*, *supra* note 29, at 849 ("Other medical excuses, such as the theory that women were allocated a fixed amount of physical energy that had to be reserved for reproductive functions, also contributed to the biological basis for constructing the prevailing view that men's participation in sports was natural and women's was not. From the late 1800s through the 1940s, conventional medical advice warned that exercise, or too much exercise, put women at risk of uterine displacement, malformed breasts, and menstrual and childbirth complications. These theories gave rise to the emerging—and enduring—myth of female fragility." (first citing JENNIFER HARGREAVES, SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN'S SPORTS 45 (1994); and then citing HELEN LENSKYJ, OUT OF BOUNDS: WOMEN, SPORT AND SEXUALITY 20, 27-29 (1986))).

32. RHODE, *supra* note 9, at 300.

33. Buzuvis, *Survey Says*, *supra* note 29, at 849 (citing SARAH K. FIELDS, FEMALE GLADIATORS: GENDER, LAW, AND CONTACT SPORT IN AMERICA 2 (2005); HARGREAVES, *supra* note 31, at 43; LENSKYJ, *supra* note 31, at 25–27).

34. RHODE *supra* note 9, at 301.

function."[35] Athletic women were also considered sexually deviant and assumed to be gay.[36]

Excluding women and girls from sports and, at the same time, portraying women who did excel in sports as unfeminine or not woman enough, served the goal of elevating the status of men. "Biology" was simply an excuse. By encouraging boys and discouraging girls from athletic participation, the qualities and benefits of sport were attributed to and conferred upon boys.[37] Much of society organized athletics this way—places like "religious institutions, schools, and businesses organized and promoted sport as a means to separate men from women and to cultivate manly virtues."[38] In 19th century American society, "participating in athletics was as much about defining what it means to be a man as what it means to be *not* a woman."[39] In this context, "[r]eclaiming masculinity through sports . . . required the exclusion of women."[40] The idea of biological differences served as "a more acceptable rationale for excluding women from sports."[41]

Women were, and continue to be, excluded from sports based on unsupported claims about athletic ability, veiled by pseudo-science and rooted in sex stereotypes. As described above, such categorizations have a deeply racist history.[42] With this historical backdrop, it should come as no surprise that modern iterations of "sex testing" disproportionately target women and girls of color for gender policing. In professional sports, women of color are singled out and forced to "prove" their gender with invasive medical tests in order to compete.[43] Notable

35. Mary Anne Case, *Heterosexuality as a Factor in the Long History of Women's Sports*, 80 LAW & CONTEMP. PROBS. 25, 33 (2017) (citing ALLEN GUTTMANN, WOMEN'S SPORTS: A HISTORY 90 (1991) (quoting DONALD WALKER, EXERCISE FOR LADIES: CALCULATED TO PRESERVE AND IMPROVE BEAUTY, AND TO PREVENT AND CORRECT PERSONAL DEFECTS, INSEPARABLE FROM CONSTRAINED OR CARELESS HABITS: FOUNDED ON PHYSIOLOGICAL PRINCIPLES (1836)).

36. *See* RHODE, *supra* note 9, at 301 (citing Charles R. Farrell, *Many Women Link Anti Sex-Bias Law to Outstanding Olympic Performance*, CHRON. OF HIGHER EDUC., Aug. 24, 1984, at 31; MARY A. BOUTILIER AND LUCINDA SAN GIOVANNI, THE SPORTING WOMAN 45 (1983)). *See also* Buzuvis, *Survey Says*, *supra* note 29, at 850 ("[A]s society became increasingly aware—and apprehensive—of its gay subculture, the fear that sports lead to sexual promiscuity was replaced by a fear that they lead to sexual deviance.") (citing Cahn, *supra* note 29, at 164–68).

37. Buzuvis, *Transgender Student-Athletes*, *supra* note 8, at 10 (describing how sex segregation "allows sport to sustain a hierarchy that privileges boys by constructing their activities as categorically superior").

38. *Id.* at 4 (quoting VARDA BURNSTYN, THE RITES OF MEN: MANHOOD, POLITICS AND THE CULTURE OF SPORT 45, 50–61, 100 (1999) ("[O]ne of sport's primary social functions in the nineteenth century was to create and establish dominant styles of [heterosexual] masculinity in extreme opposition to the qualities society had ascribed to women and femininity.")).

39. Buzuvis, *Survey Says*, *supra* note 29, at 849.

40. *Id.* (citations omitted).

41. *Id.*

42. *See supra* Part II.A.1.

43. *See* Medley & Sherwin, supra note 7 (citing Katie Matlack, *The Gender Policing of Women Athletes Is a Violation of Human Rights*, MEDIUM (Aug. 11, 2016), https://medium.com/the-establishment/the-gender-policing-of-women-athletes-is-a-violation-of-human-rights-f209b373863d [https://perma.cc/25DG-H7ZF?type=image]).

examples include Dutee Chand[44] and Santhi Soundarajan[45] of India and Caster Semenya[46] of South Africa, women of color Olympic athletes who the International Association of Athletic Federations ("IAAF") targeted for "sex verification" including chromosome testing (Soundarajan) or testosterone testing based on arbitrary limits (Chand and Semenya).[47] IAAF first began regulating professional women athletes' endogenous testosterone levels in 2011.[48] The most recent regulations, used to bar Caster Semenya from Olympic competition, require female athletes with testosterone levels above a certain limit to undergo unnecessary medical treatment to suppress their hormones in order to compete.[49] Most recently, these policies were used to target Namibian runners Christine Mboma and Beatrice Masilingi, preventing them from competing in the 400 meter race at the 2021 Tokyo Olympics.[50] A retired white male runner publicly called for hormone tests on Mboma, postulating that her appearance alone showed she was not a

44. Silvia Camporesi, *The Burden of Proving Femininity in Athletics: Why Dutee Chand Should Be Allowed to Compete*, HUFFINGTON POST (Mar. 25, 2015, 6:25 P.M), https://www.huffpost.com/entry/the-burden-of-proving-femininity-in-athletics_b_6940562?guccounter=1 [https://perma.cc/F5GK-WTU4].

45. Isheeta Sharma, *Santhi Soundarajan & the Misogyny of Sex Verification Tests in Sports*, FEMINISM INDIA (Nov. 25, 2020), https://feminisminindia.com/2020/11/25/santhi-soundarajan-gender-determination-test/ [https://perma.cc/A522-X2CS].

46. Matlack, *supra* note 43*; see also* Katrina Karkazis and Rebecca Jordan-Young, *The treatment of Caster Semenya shows athletics' bias against women of color*, GUARDIAN (Apr. 26, 2018, 12:40 P.M), https://www.theguardian.com/commentisfree/2018/apr/26/testosterone-ruling-women-athletes-caster-semanya-global-south [https://perma.cc/N5XX-SAHC].

47. *See* Camporesi, *supra* note 44 (describing how Dutee Chand was disqualified a few days before the Commonwealth Games in 2014 after a testosterone test determined that her levels were too high compared to IAAF standards); Sharma, *supra* note 45 (detailing how Santhi Soundarajan was targeted for chromosome testing after winning a medal at the 2006 Asian Games, was subsequently not allowed to compete, and had her medal rescinded when the test determined that she "did not have female sexual characteristics"); Matlack, *supra* note 43 (highlighting the IAAF's use of hormone testing to keep out athletes with high testosterone levels like Dutee Chand and Caster Semenya).

48. See JORDAN-YOUNG AND KARKAZIS, *supra* note 22, at 181.

49. Frida Garza, *Caster Semenya's Lawyers Say a Testosterone Limit for Women Runners Is 'Flawed' and 'Hurtful,'* JEZEBEL (Feb. 20, 2019, 12:00 P.M.), https://jezebel.com/caster-semenyas-lawyers-say-a-testosterone-limit-for-wo-1832754632?utm_source=jezebel_twitter&utm_medium=socialflow&utm_campaign=socialfow_jezebel_twitter [https://perma.cc/NSX6-3USG].

50. Danielle Maya Banks, *Namibian Runners Disqualified from Tokyo Competition Prove Eugenics Continues to Leave Black Girls Behind*, BLAVITY (July 27, 2021, 12:00 AM), https://blavity.com/namibian-runners-disqualified-from-tokyo-competition-prove-eugenics-continues-to-leave-black-girls-behind?category1=opinion [https://perma.cc/S82N-ZATN].

woman.[51] The regulations have been fiercely criticized by scientists, lawyers, and human rights groups alike.[52]

Hormone level regulations and "sex testing" in athletics continue to rely on the idea that white cisgender girls and women need to be protected from "'unfair' competition" from other women—women of color, intersex women, and transgender women.[53] As Katrina Karkazis and Rebecca Jordan-Young observe, these arguments ironically position more privileged women as those in need of protection.[54] The women who are being investigated, whose bodies are policed, "face harms that are nowhere in the calculus" when it comes to protectionist

51. Polish sprinter Marcin Urbás claimed Mboma's "construction, movement, [and] technique" were evidence she was not a woman and claimed her "testosterone advantage" could be "seen with the naked eye." Alex Bollinger, *Polish Sprinter Demands Namibian Silver Medalist Be Tested to See If She's "Definitely a Woman,"* LGBTQ NATION (Aug. 6, 2021), https://www.lgbtqnation.com/2021/08/polish-sprinter-demands-namibian-silver-medalist-tested-see-shes-definitely-woman/ [https://perma.cc/CNY6-HTTH]. He further stated that the failure to investigate her body would be an "insolent injustice against women who are definitely women." *Id.*

52. *See, e.g.*, Agence France-Presse, *South African Rights Groups Join Caster Semenya's Battle Against Ban, Vow to Petition United Nations*, FIRSTPOST (Sept. 18, 2020), https://www.firstpost.com/sports/south-african-rights-groups-join-caster-semenyas-battle-against-ban-vow-to-petition-united-nations-8830341.html [https://perma.cc/PZX5-99J7] (describing South African human rights organizations' criticism of the regulations as "gross human rights violations" and their plans to petition against the regulations to the United Nations and African Union); HUMAN RIGHTS WATCH, "THEY'RE CHASING US AWAY FROM SPORT": HUMAN RIGHTS VIOLATIONS IN SEX TESTING OF ELITE WOMEN ATHLETES (2020), https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women [https://perma.cc/VD9P-BZAE] (reporting that "[l]egal experts have distanced themselves from World Athletics due to the regulations," with the head of the Department of Private Law and Director of the Centre for Intellectual Property Law at Pretoria University stressing in his letter of resignation from the World Athletics Disciplinary Tribunal that "[t]he adoption of the new eligibility regulations for female classification is based on the same kind of ideology that has led to some of the worse injustices and atrocities in the history of our planet."); Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes,* N.Y. Times (June 28, 2016), https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html [https://perma.cc/DBR8-3VPL] (highlighting criticism against the new regulations, including comments from Stanford bioethicist Katrina Karkazis, who made clear that "[t]he rationale behind the I.A.A.F.'s 'hyperandrogenism regulation' is to make it sound more scientifically justifiable and less discriminatory, but nothing in those exams has changed from the old policy except the name. . . . It's still based on very rigid binary ideas about sex and gender.").

53. JORDAN-YOUNG AND KARKAZIS, *supra* note 22, at 200 ("The regulation rests on the premise that 'women athletes' are a vulnerable class that needs protection. But from whom? History is full of examples of how the 'female vulnerability' argument has benefited women with more privilege (whether from class, race, sexuality, gender presentation, or region) over women with less privilege, who are ironically but systematically seen as less vulnerable.").

54. *Id.*

concerns for girls and women in sports.[55] Such efforts are antithetical to gender equality goals for all women and girls.[56]

3. Today's Anti-Trans Sports Bans

With this history as a backdrop, anti-trans advocates are now relying on similar fears and disinformation about race and gender to propel their legislative agenda to ban transgender students from competition in school sports.[57] Over the past couple of years, numerous states across the country—17 states in 2020 and over 30 states in 2021—have introduced bills excluding transgender students from participation in athletics.[58] Anti-trans advocates argue that transgender girls are really boys, that there are real physiological differences between binary sexes, and that trans girls are taking opportunities from cisgender girls because of an unfair biological competitive advantage.[59] Like the junk science relied on in the past, current claims about the importance of sex-segregated sports likewise find no basis in science. Rather, rigid, binary sex categories provide a mechanism for enforcing, regulating, and surveilling socially constructed gender roles.

Anne Fausto-Sterling, a scientist and author from Brown University, explains that sex "is simply too complex" for the Euro-American binary.[60] "There is no either/or. Rather, there are shades of difference."[61] The idea that sex is not binary is not new.[62] For decades, the medical community, including the American Medical Association, has recognized sex is made up of a number of factors such as:

55. *Id.* (explaining that women subject to sex testing regulations have "their identity publicly debated, their genitals scrutinized, the most private details of their lives assessed for masculinity, and their careers and livelihoods threatened," and are subjected to "medically unnecessary interventions with lifelong consequences").

56. *See* Brief for *Amici Curiae* Nat'l Women's Law Ctr. et al. in Support of Respondent at 12, Gloucester Cnty Sch. Bd. v. G.G., No. 16-273 (U.S. Mar. 2, 2017) ("[The drafters of Title IX] regarded the statute as a comprehensive effort to combat discriminatory stereotypes and sex-based obstacles, which harm both cisgender and transgender students, thus ensuring that all students are afforded the full opportunity to realize the benefits of education."); *id.* at 20 ("Protective pretexts have long been used to justify discriminatory policies, and are grounded on the very sorts of harmful stereotypes that civil rights laws were designed to overcome."); *id.* at 26 ("Subsequently, the Court has made clear that exclusionary policies purportedly designed to protect women or other groups often do not serve that purpose in reality—and instead operate principally to disadvantage the disfavored groups.").

57. *See* ACLU, *The Coordinated Attack*, *supra* note 3.

58. *See Legislation Affecting LGBT Rights Across the Country*, ACLU (Dec. 17, 2021), https://www.aclu.org/legislation-affecting-lgbt-rights-across-country [https://perma.cc/6MPK-PFVX].

59. *See, e.g.*, Complaint at ¶¶ 41–47, ¶¶ 62–65, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Apr. 25, 2021); Appellants' Opening Brief at 31–34, Hecox v. Little, Nos. 20-35813, 20-35815 (9th Cir. Nov. 12, 2020).

60. Buzuvis, *Transgender Student Athletes*, *supra* note 8, at 36 (quoting ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 3 (2000)).

61. *Id.*

62. Vanessa Heggie, *Nature and Sex Redefined—We Have Never Been Binary*, GUARDIAN (Feb. 19, 2015, 3:07 AM), https://www.theguardian.com/science/the-h-word/2015/feb/19/nature-sex-redefined-we-have-never-been-binary [https://perma.cc/4HL7-P77C]. ("[T]here has never been scientific . . . consensus that there are simply two human sexes . . . .").

"external genital appearance, internal reproductive organs, structure of the gonads, endocrinologic sex, genetic sex, nuclear sex, chromosomal sex, psychological sex, [and] social sex."[63]

Over the past couple of years, states across the country have introduced and passed bills excluding students from participating in school sports, typically restricting participation to an undefined "biological sex" or sex assigned at birth.[64] These bills erroneously single out only one or two traits, ignoring the multitude of factors that may influence a person's sex and excluding the many individuals who possess traits that cannot be neatly categorized on one side of the binary.[65] Laws and policies attempting to force people into binary sex categories also ignore the reality that up to two percent of babies are born with intersex traits each year, according to some experts.[66] People born with Androgen Insensitivity Syndrome ("AIS"), one example of an intersex variation, have external genitalia typical of cisgender girls, but have XY chromosomes and testes, and no uterus or fallopian tubes.[67] Girls with AIS would be excluded from girls' teams under policies that define "biological sex" by chromosomes, but would be included under policies using genitalia or sex assigned at birth.

Many bills would only allow students assigned female at birth to participate on girls' sports teams.[68] But policies relying on sex assigned at birth are equally exclusionary, relying on a physician's decision to mark an 'M' or 'F' on an infant's birth certificate based on a brief visual determination about the baby's external genitalia at birth. This places importance on external, physical appearance at birth

63. Keith L. Moore, *The Sexual Identity of Athletes*, 205 JAMA 163, 164 (1968).

64. Idaho's bill, for example, restricts girls' sports based on "biological sex," which it does not define, but says a health care provider may resolve a "dispute" about a student's sex by "relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." Idaho Code § 33-6203(3) (2021). West Virginia's bill likewise restricts girls' teams based on "biological sex," which it defines as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." West Virginia Code § 18-2-25d(b)(1) (2021).

65. Shayna Medley, *Not in the Name of Women's Safety:* Whole Woman's Health *as a Model for Transgender Rights*, 40 HARV. J.L. & GENDER 441, 455 (2017). *See also* JORDAN-YOUNG & KARKAZIS, *supra* note 22, at 181 (noting that biological markers of sex are not binary, "can vary within individuals," and "[p]rior attempts that sports governing bodies made to determine sex ran afoul of this complexity").

66. *See* Melanie Blackless, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne, & Ellen Lee, *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 151 (2000) https://transgenderinfo.be/wp-content/uploads/2013/01/Blackless-How-Dimorphic-2000.pdf [https://perma.cc/A95Q-9VTR].

67. *See Intersex Definitions*, INTERACT, https://interactadvocates.org/intersex-definitions/ [https://perma.cc/4VMX-B727] (last updated Feb. 19, 2021).

68. *See*, *e.g.*, West Virginia Code § 18-2-25d (2021) (limiting girls' sports to "female" students defined by "biological sex determined at birth"); H.B. 3, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (mandating that students' participation on teams be determined by their sex assigned at birth), www.capitol.tn.gov/Bills/112/Bill/HB0003.pdf [https://perma.cc/47FU-JXGX]; H.B. 1298, 67th Leg. Assemb. (N.D. 2021) (excluding students assigned male at birth from participating in female athletic teams), https://www.legis.nd.gov/assembly/67-2021/documents/21-0140-01000.pdf [https://perma.cc/AJ3N-UY6H].

as more important than chromosomes, hormones, reproductive organs, social sex, etc.

Science cannot "tell us which of these [traits] is the best measure of sex."[69] Most people do not know what their own sex chromosomes are.[70] External genitalia, which can be surgically modified, also have no bearing on athleticism.

None of these categories alone is a proxy for athletic ability. Athleticism comes in all shapes and sizes; the different types of strength, flexibility, and endurance needed to excel vary widely among different sports. Karkazis and Jordan-Young use Usain Bolt as an example, a champion sprinter known as the fastest human in the world, who was quoted saying he never runs the 800 meter and "a woman could beat me."[71] This makes sense, the authors explain, because "the specific skills and physiologies needed to excel in one sport are not the same as those needed in any other sport. . . . [T]here is such a great difference between specialists in the 100 meter versus 800 meter that even the fastest man in the world can't switch distances and automatically dominate."[72]

ACLU Deputy Director for Transgender Justice, Chase Strangio, explains that binary sex classification "serves population control and surveillance and not medical purposes."[73] Thus, sex testing tells us more about the tester than the person being tested. These efforts will not give us an objective determination of sex, but may tell us something about "what we want to do with the results, why we're testing, and our cultural attitudes towards sex and gender."[74] As described above, these cultural attitudes about sex and gender continue to reflect racist stereotypes

69. Heggie, *supra* note 62.

70. Genetic testing is voluntary and not performed as part of routine medical care for adults. Some pregnant people undergo noninvasive prenatal testing ("NIPT"), which screens for prenatal chromosomal differences, and can predict fetal sex chromosomes by testing for the presence of X or Y chromosomes in the pregnant person's plasma. *See ACOG Guidelines Recommend NIPT for All Pregnancies Regardless of Risk*, GENOMEWEB (Aug. 17, 2020), https://www.genomeweb.com/molecular-diagnostics/acog-guidelines-recommend-nipt-all-pregnancies-regardless-risk [https://perma.cc/UUE7-SDRA]. Until 2020, ACOG only recommended NIPT for people 35 and older or who have known risk factors. *Id.* And because NIPT can result in false positives and false negatives, ACOG advises it is "not equivalent to diagnostic testing." *Id.*

71. JORDAN-YOUNG AND KARKAZIS, *supra* note 22, at 162.

72. *Id.* at 163. Karkazis and Jordan-Young debunk the myth that testosterone elevates athletic performance across the board, explaining the limitations of existing studies and the complexity of "athleticism" as a concept. *Id.* at 160-61 (noting that some studies showed a "correlation between higher baseline (endogenous) [testosterone] levels and either speed or 'explosive' power," while other studies show "weak or no links between baseline [testosterone] and performance" or even a negative correlation). Moreover, studies show that even if testosterone increases certain parameters of athleticism such as muscle mass or power, it does not necessarily translate to overall improved performance or demonstrate causation. *Id.* at 162.

73. Chase Strangio, *What Is a "Male Body"?*, SLATE (July 19, 2016, 1:08 PM), http://www.slate.com/blogs/outward/2016/07/19/there_s_no_such_thing_as_a_male_body.html [https://perma.cc/263U-U4SV].

74. *See* Heggie, *supra* note 62 ("[S]cience cannot . . . tell us which of these tests is the best measure of sex, or which gives us our 'true' identity.").

about women and girls of color.[75] It is no coincidence that two Black trans girls have been the center of the anti-trans advocacy campaign in athletics.[76]

When it comes to anti-trans sports bills, the goal is not gender equity, but the exclusion of people who transgress gender norms. Such bills aim to categorically exclude transgender students, as well as many intersex students who may or may not be trans. These policies also harm cis girls and non-binary students who don't conform to physical gender norms and who will be disproportionately subjected to invasive sex testing requirements in order to "prove" their gender. Biases and attitudes about people's physical appearance guide these policies, not science and medicine.[77]

B. The Passage of Title IX

> [F]ive words, "too strong for a woman," would not only change my life but would also change the lives of millions of women and girls because they would ultimately lead to the passage of Title IX.[78]

This reflection by Bernice Sandler, known as the Godmother of Title IX, describes the words of a male faculty member explaining why Sandler wasn't considered for a lecturer position at her university after finishing her doctorate.[79] Those words, "too strong for a woman," changed her life and inspired her advocacy for nationwide sex discrimination protections in education.[80] Title IX, which bars "any education program or activity receiving Federal financial assistance"

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75. *See supra* Part II.A.1.

76. *See infra* Part III.C.

77. Buzuvis, *Transgender Student-Athletes*, *supra* note 8, at 35 ("[E]mpirical research does not provide conclusive answers about the competitive advantage afforded by sex-based physical traits that are present at birth and/or that have been modified by surgical or hormonal transition. As such, policymakers should not rely on science alone to define the parameters of transgender athletes' participation"). First and foremost, transgender girls are girls. Second, transgender girls assigned male at birth do not necessarily have the same athletic capabilities as cisgender boys. *See id.* at 37 ("[S]tudies that compare athletic performance between girls and boys are unable to isolate the extent to which differences are due to biological, rather than environmental factors."). Though medical transition should not be a state-mandated basis for athletic participation, many trans girls undergo puberty blockers or hormone replacement therapy. *See* Motion to Intervene at 7, Soule v. Conn. Assoc. of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020) ("[A]s a result of puberty blockers and hormone therapy, many transgender girls go through a typically female puberty. . . ."). Like all girls, transgender girls experience extremely different socialization than cisgender boys with respect to sports, which may impact athletic interest, opportunity, and ability. *See* Buzuvis, *Transgender Student-Athletes*, *supra* note 8, at 38 (describing the preferential treatment and encouragement to participate in athletics directed at cisgender boys). For all of these reasons, cisgender boys are not an appropriate comparator for transgender girls when it comes to athletic performance.

78. Bernice R. Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 474 (2007).

79. *Id.*; Katharine Q. Seelye, *Bernice R. Sandler, 'Godmother of Title IX,' Dies at 90*, N.Y. Times (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/obituaries/bernice-sandler-dead.html [https://perma.cc/K8TX-BR84].

80. Sandler, *supra* note 78, at 474–76.

from discriminating "on the basis of sex,"[81] was eventually passed as part of the Education Amendments of 1972.[82]

Sandler credits the bill's passage, in part, to stakeholders' general lack of interest in it at the time. The American Council on Education, a key stakeholder that would be implicated by the statute, declined to testify at the hearings, signaling to the other interested parties that the bill was not a threat.[83] No discussion of school sports appears in the statute's text or legislative history, and athletic institutions seemed to scarcely contemplate the bill's potential impact. Indeed, "the statute's application to athletics was barely mentioned before it was enacted in 1972."[84]

Once stakeholders caught wind of the sweeping impact Title IX could have on boys' sports, Sandler observed, "the male athletic establishment was close to hysteria" and "[a]ll hell broke loose as the athletic establishment tried to undo Title IX's coverage of athletics."[85] Several regulations limiting Title IX's scope in athletics were introduced in subsequent years as power lobbies in college football and basketball "sought to protect the status-quo ante . . . ."[86] In 1975, one of these regulations went into effect, permitting schools to operate "separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[87] Known as "the contact sports exception," the regulation and subsequent court interpretations have been widely criticized for codifying sex discrimination and entrenching sex stereotypes about women's fragility.[88]

In 1979, the Department of Education issued a policy interpretation of the 1975 implementing regulations, which allowed for fewer college scholarships for women's sports so long as they were proportionally equal to the available opportunities, and permitted higher expenditures for men's sports with larger operating

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81. 20 U.S.C. § 1681(a) (2018).

82. Sandler, *supra* note 78, at 477; Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

83. Sandler, *supra* note 78, at 477 (noting the lobbyist for the American Council on Education "declined to testify, stating[,] 'There is no sex discrimination in higher education,' and 'even if there was, it wasn't a problem'").

84. Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 387 (2000); Sandler, *supra* note 78, at 480.

85. Sandler, *supra* note 78, at 480.

86. Sangree, *supra* note 84, at 382.

87. 34 C.F.R. §§ 106.1, 106.41(b) (2021).

88. *See, e.g.*, Sangree, *supra* note 84, at 381–82 (describing Title IX's guarantee of gender equality in athletics as "illusory" and purporting that "[g]ender remains the most relevant characteristic determining opportunity for athletes in contact sports"); Buzuvis, *Survey Says*, *supra* note 29, at 858 ("By allowing schools to exclude women from playing contact sports with men, the regulation reflects an assumption that women are too weak and frail to play with men—an assumption that is sometimes accompanied by express rhetoric relegating contact sports to an exclusively male domain."); Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 93 (2001) ("The more rugged, powerful contact sports are the preferred vehicles through which males prove their masculinity, and not coincidentally, the sports that are often the most valued in school athletic programs in terms of the resources, benefits and prestige that accompany those programs.").

costs.[89] Then, in 1996, the Department issued a Dear Colleague letter establishing a three-part test to determine if schools were meeting their obligations.[90] Schools had to demonstrate (1) substantial proportionality of participation in sports among the sexes; (2) a history and practice of expanding programs for the historically underrepresented sex; or (3) in the absence of a demonstration of expanding programs, a demonstration that athletic interests were nevertheless being fully and effectively accommodated.[91]

In their legal briefs, proponents of anti-trans bills have attempted to argue that Sandler's vision and the implementing regulations support bans on transgender students' participation.[92] As this Article emphasizes in Part IV discussing the Supreme Court's recent decision in *Bostock v. Clayton County*, the intentions of the legislators or bill's supporters at the time of its passage are irrelevant when the discrimination at issue violates the plain text of the statute.[93] But it is also a deep misunderstanding of Sandler's goals to suggest that bans on trans students' participation would further the vision of gender equality she was trying to achieve.

Sandler named her concerns in the context of athletics; she talked about disparities in budgets, scholarships, mentoring, coaching, and facilities.[94] As the next Section will show, these are many of the same inequalities that persist today. Sandler's primary concern in the context of sport was equal opportunity and access.[95] She believed some sex separation was necessary as a remedial measure to ensure girls and women had such opportunities—without designating teams and resources specifically for girls, schools would simply offer no opportunities, create

89. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, DEP'T OF EDUC. OFF. FOR C.R. (Dec. 11, 1979), https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html [https://perma.cc/C7MA-K3LN].

90. U.S. Dep't of Educ. Off. for C.R., Dear Colleague Letter on Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) [hereinafter 1996 Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/7W8M-4US3].

91. *Id.*

92. Complaint at ¶¶ 41–42, Soule v. Conn. Assoc. of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (arguing Sandler's testimony supports rigid segregation based on sex-assigned-at-birth because of women's biological inferiority). While Sandler did not opine on the statute's application to transgender students, it is false to suggest she supported rigid sex divisions in sports or the idea that cis women were biologically inferior. Instead, Sandler described the issue of coed sports as "complex" and opposed the contact sports exception as having "no legal basis under Title IX." *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. And Lab.*, 95th Cong. 343 (June 25, 1975) [hereinafter *Sandler Statement*] (statement of Dr. Bernice Sandler, Director Project on the Status & Education of Women, Ass'n of American Colleges). While Sandler was concerned that zero gender distinctions may effectively eliminate opportunities for women and girls, she in fact contemplated a number of structures that would allow for mixed gender teams, the emphasis being on whether—whatever structure an institution chose—the scheme was in line with equal opportunity. *Id.* at 344–45.

93. Bostock v. Clayton County, 140 S. Ct. 1731, 1751 (2020). ("'[I]n the context of an unambiguous statutory text,' whether a specific application was anticipated by Congress 'is irrelevant.'" (quoting *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998))).

94. Sandler, *supra* note 78, at 480–81.

95. *See generally id.*

no physical spaces, and not set aside money for girls' athletics.[96] Banning trans youth from sports would thwart, not further, these goals. Such bans seek to do exactly what Sandler feared—push a subset of students entirely out of school sports on the basis of sex, denying students equal opportunity.[97]

C. Remaining Gender Inequality in Sports

Gender inequality in athletics persists today, with many of Sandler's concerns far from resolved by the passage of Title IX. The backlash to Title IX and subsequent regulations sanctioned gender equity gaps in sports, from contact sports to expenditures and scholarships.[98] As described in Section II.B, the contact sports exception limits opportunities for women and girls in several prominent sports.[99] The regulations also permit disparities in overall operating budgets and allow for fewer scholarship opportunities for women as long as the number of scholarships is proportional to the overall number of athletic opportunities for women.[100]

There has also been a decline in opportunities for female coaches.[101] Coaching in college athletics is still male-dominated, and increasingly so—as more women's teams have formed, more male coaches have been hired.[102] Deborah Rhode and Christopher Walker document the remaining barriers to women's

96. *Id.* at 482–84. For arguments against the rigid segregation of sports by gender, *see generally* Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249 (2018).

97. *See* Hecox v. Little, 479 F. Supp. 3d 930, 984 (D. Idaho 2020) (rejecting outright the argument that banning trans students from teams consistent with their gender identity did not constitute an effective ban on their participation, declaring "the Proponents' argument that Lindsay and other transgender women are not excluded from school sports because they can simply play on the men's team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex").

98. Buzuvis, *Survey Says, supra* note 29, at 857.

99. *See supra* Part II.B; *see also* Buzuvis, *Survey Says*, *supra* note 29, at 857–58 ("A school must let a woman try out for the only tennis or swimming team it offers, but when it comes to football, basketball, baseball, ice hockey, rugby, wrestling, or boxing—the contact sports enumerated in the regulations—schools can bar women from trying out for the only team.").

100. Buzuvis, *Survey Says*, *supra* note 29, at 859–60 (noting that "[b]y one report, women receive $142 million less in scholarships than men" (citing Brake, *supra* note 88, at 76)). *See also* WOMEN'S SPORTS FOUNDATION, https://www.womenssportsfoundation.org/what-we-do/wsf-research/ [https://perma.cc/RC5Q-JLRW] (highlighting that at the high school level, "[a]nnually, boys get 1.13 million more sport opportunities than girls" (citing *2018–19 High School Athletics Participation Survey*, NAT'L FED'N OF STATE HIGH SCHOOL ASS'NS (2019), https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf [https://perma.cc/A269-DFGM])).

101. *See* Deborah L. Rhode & Christopher J. Walker, *Gender Equity in College Athletics: Women Coaches as a Case Study*, 4 STAN. J. C.R. & C.L. 1, 2–3 (2008) ("[A]s opportunities for female students have increased, opportunities for female professionals have declined. Only 42% of women's teams have a female head coach, compared to over 90% in 1972.").

102. *Compare id.* at 8 ("Female participation in both high school and college sports has soared, and the number of women's collegiate athletic teams has also increased from an average of 2.5 to 8.45 per school.") *with id.* at 9 ("The number of women in coaching and top level administrative positions, as well as leadership positions in the National Collegiate Athletic Association (NCAA), has dropped recently. . . . [W]omen account for only 42% of head coaches in women's sports and 2% in men's.").

employment in athletic coaching, including sex stereotypes about women coaches, favoritism in hiring, fewer mentors and networks, and lack of support or flexibility for family conflicts.[103]

Women and girls receive much less funding and scholarships for sports and drop out of sports at higher rates than boys.[104] Girls of color face even more staggering disparities. A study by the National Women's Law Center found that "girls at heavily minority high schools ha[d] [o]nly 39 percent of the opportunities to play sports as girls at heavily white schools do."[105] Girls and LGBTQ youth are also likely to face high levels of harassment and abuse while playing sports.[106] LGBTQ students participate in sports with less frequency due to discrimination. A report by the Trevor Project on LGBTQ youth ages 13–24 found that transgender students already participate in sports at significantly lower rates than their cisgender peers.[107] Transgender and nonbinary youth reported a 17% participation rate in sports compared to 27% reported by cisgender LGBQ youth.[108] Students who were less "out" at school were more likely to participate in athletics than those who were more "out" about their sexual orientation or gender identity.[109] The report cited discrimination, safety concerns, and "structural discrimination in the form[] of trans-exclusive policies" as possible reasons for these results.[110]

This Article underscores that the remaining gaps in gender equity in sport will only be hindered, not furthered, by making transgender athletes the scapegoats. Pushing gender minorities out of sports and denying students educational opportunities on the basis of sex further entrenches discrimination and sex

103. *Id.* at 34–35 (concluding women have more trouble commanding respect from athletes and coaches, with athletes finding male coaches "more authoritative and less emotional," but also noting that women receive lower leadership ratings when they adopt seemingly masculine, dominant coaching styles).

104. *See generally*, CHASING EQUITY: THE TRIUMPHS, CHALLENGES, AND OPPORTUNITIES IN SPORTS FOR GIRLS AND WOMEN, WOMEN'S SPORTS FOUND., 9, 31, 43, 48–49 (2020), https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf [https://perma.cc/Y6QP-8L8F] (illustrating gender inequality in sports through statistics about funding and dropout rates by gender).

105. FINISHING LAST: GIRLS OF COLOR AND SCHOOL SPORTS OPPORTUNITIES, NAT'L WOMEN'S L. CTR., 4 (2015), https://prrac.org/pdf/GirlsFinishingLast_Report.pdf [https://perma.cc/BY9X-S7UW].

106. THE TREVOR PROJECT RESEARCH BRIEF: LGBTQ YOUTH SPORTS PARTICIPATION 1 (June 2020), https://www.thetrevorproject.org/wp-content/uploads/2020/06/June-2020-Brief-LGBTQ-Youth-Sports-Participation-Research-Brief.pdf [https://perma.cc/76R7-5WGA].

107. *See id.* at 1–2 ("TGNB youth who were more 'out' about their gender identity were less involved in sports than those who were not 'out' about their gender identity.").

108. *Id.* at 1–2.

109. *Id.* at 1.

110. *Id.* at 2.

stereotypes.[111] Such laws and policies do nothing to address the gender inequities student athletes are facing in sports today.

III.
THE CURRENT LEGAL ATTACKS ON TRANSGENDER STUDENTS

For many years, opponents of anti-discrimination laws have used imaginary threats to white women as the basis for opposing legal protections for marginalized groups.[112] In that vein, opponents of transgender equality have relied on fear and misinformation about transgender people in order to block anti-discrimination protections for trans and LGBQ people.[113] They often claim to make these arguments in the name of women's safety, relying on this tactic that portrays transgender people as a threat to cis women and girls.[114]

This Part examines the ways in which anti-LGBTQ legal groups have targeted transgender youth in schools in recent years. I explore how bans on transgender students' access to bathrooms and locker rooms laid the groundwork for recent bans on participation in school sports and explain the ways in which anti-LGBTQ advocates are currently trying to push trans-exclusionary athletics laws and policies through legislatures, courts, and executive action.

A. Anti-Trans Messaging: The Shift from Bathrooms to School Sports

Anti-LGBTQ groups prominently featured alarmist imagery and messaging in the legal fights to pass bills banning transgender people from public facilities such as bathrooms and locker rooms, peddling an alleged concern for "women's safety" in their attempts to legislate transgender people out of public life.[115] Opponents created the "bathroom predator" myth as a scare tactic to dupe the public

111. *See* JORDAN-YOUNG & KARKAZIS, *supra* note 22, at 193 (discussing gender testing in the professional context and noting that "the regulations target women whose bodies don't conform to normative gender binaries, position those women as outside the group of women athletes who deserve fairness, and amplify widespread prejudices about difference rather than addressing any demonstrated problem in women's sports").

112. *See* Brief for *Amici Curiae* Nat'l Women's Law Ctr. et al. in Support of Respondent at 21–23, Gloucester Cnty. Sch. Bd. v. G.G., No. 16-271 (U.S. Mar. 2, 2017) (describing the history of the state using the safety and protection of white women as pretext for racial segregation, excluding women from certain professions, property ownership, and public spaces) (citing *Brown v. Bd. of Educ.,* 347 U.S. 483 (1954) (racial school segregation); *Muller v. Oregon,* 208 U.S. 412 (1908) (restricted work hours for women); *Goesaert v. Cleary,* 335 U.S. 464, 466 (1948) (banning women from bar ownership)).

113. *See, e.g.*, *id.* at 28–29; *see also* Medley, *supra* note 65, at 457–60.

114. *See* Medley, *supra* note 65, at 457–60.

115. *See, e.g.*, Diana Tourjee, *New Transphobic 'Bathroom Bill' Targets Trans Women but Not Trans Men*, VICE (Dec. 20, 2016, 2:35 PM), https://www.vice.com/en/article/9k9wv3/new-transphobic-bathroom-bill-targets-trans-women-but-not-trans-men [https://perma.cc/9HAE-7UXH].

into thinking anti-discrimination protections for transgender people created a danger to cisgender women.[116]

The "bathroom predator myth" was premised on a twofold lie—that "trans[gender] people are sexual predators" and that "cis[gender] men will abuse non-discrimination laws to assault women."[117] These ideas were based on harmful stereotypes and fear mongering—unsupported by facts or research and consistently debunked by experts.[118] In fact, the anti-trans lobby in Massachusetts admitted that their movement had "concocted the 'bathroom safety' male predator argument as a way to avoid an uncomfortable battle over LGBT ideology, and still fire up people's emotions" in an effort to repeal the state's anti-discrimination protections based on gender identity in public spaces.[119]

These arguments have been losing both in the courts and in public perception. Lawsuits claiming that LGBTQ policy protections in schools harm cisgender students have been rejected time and time again.[120] A recent ballot box attempt to

116. *See, e.g.*, Julie Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety, Study Finds*, NBC NEWS (Sept. 19, 2018, 12:33 PM), https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n911106 [https://perma.cc/82S2-LCEN]; Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk 'Bathroom Predator Myth,'* ABC NEWS (Apr. 22, 2016, 7:15 PM), https://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019 [https://perma.cc/B85S-84EG]; Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, MEDIA MATTERS (Mar. 19, 2014, 4:06 PM), https://www.mediamatters.org/sexual-harassment-sexual-assault/15-experts-debunk-right-wing-transgender-bathroom-myth [https://perma.cc/72Y5-QKQ8].

117. *See, e.g.*, Medley, *supra* note 65, at 456.

118. *See, e.g.*, *supra* note 116.

119. Dawn Ennis, *Anti-LGBTQ Activist Admits Bathroom Predator Myth Was 'Concocted' As Cover for Transphobic Hate*, INTOMORE (Dec. 5, 2018), https://www.intomore.com/impact/anti-lgbtq-activist-admits-bathroom-predator-myth-was-concocted-as-cover-for-transphobic-hate [https://perma.cc/6BYH-BFHR] (citing *Massachusetts Voters Overwhelmingly Say 'Yes' to Transgender 'Bathroom' Law. What happened?*, MASSRESISTANCE (Nov. 9, 2018) https://www.massresistance.org/docs/gen3/18d/NoTo3/election-analysis.html [https://perma.cc/P7LS-DHTM]).

120. *See, e.g.*, Parents for Privacy v. Barr, 949 F.3d 1210, 1226–28 (9th Cir. 2020) (dismissing cis students' claims, holding there is no constitutional or statutory right of cis students to exclude trans students from school restrooms); Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 535 (3d Cir. 2018) (finding cis students' citation to an egregious sexual harassment case where "cisgender men not only entered a locker room while cisgender female employees were changing" but also "'leer[ed]' at them, 'crowd[ed] the entrance to the locker room, forcing [them] to "run the gauntlet[,]" and brush[ed] up against them'" to support their claim that the "mere presence of transgender students in bathrooms and locker rooms constitutes sexual harassment" to be "patently frivolous"); Reynolds v. Talberg, No. 1:18-cv-69, 2020 WL 6375396, at *3–4 (W.D. Mich. Oct. 30, 2020) (dismissing cis students' claims for lack of standing, finding no actual or imminent injury); Students & Parents for Privacy v. U.S. Dep't of Educ., No. 16-cv-4945, 2017 WL 6629520, at *6 (N.D. Ill. Dec. 29, 2017) (denying plaintiffs' objections to magistrate's report and recommendation denying motion for preliminary injunction for failure to establish likelihood of success on constitutional and Title IX claims).

repeal state-wide anti-discrimination protections in Massachusetts was defeated by nearly 68%.[121]

Now, anti-trans advocates are targeting the transgender community by applying the same harmful stereotypes within a new context: sports. In particular, these groups have taken aim at transgender youth, launching attacks on students' right to participate in school athletics.[122] Opponents attempt to paint transgender students' participation in athletics as something novel and threatening.[123] In reality, transgender people have been participating in all aspects of life—including athletics—as themselves.[124]

Recent legal attacks on transgender students in schools have taken the form of (1) state legislation banning transgender students from participating in school sports consistent with their gender identity;[125] (2) legal challenges to trans-inclusive policies, advancing arguments that cisgender students have a legal right to exclude transgender students from competing on school sports teams;[126] and (3) executive action by the Department of Education under the Trump administration to rewrite the text of Title IX to serve its anti-trans policy goals.[127]

Just as anti-trans policies on public facilities were not borne out of a genuine concern for sexual violence,[128] trans-exclusive sports policies are not concerned with addressing disparities in girls' sports. As the following Sections will show, these attempts are both harmful to transgender students and counter to the overarching goal of gender equality in education and sport. Reinforcing sex stereotypes harms transgender girls and cisgender girls alike, as well as any students who do not conform to societal gender norms. When this kind of discrimination happens in school, it also violates federal law.

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121. *Massachusetts Question 3, Gender Identity Anti-Discrimination Veto Referendum (2018*), BALLOTPEDIA, https://ballotpedia.org/Massachusetts_Question_3,_Gender_Identity_Anti-Discrimination_Veto_Referendum_(2018) [https://perma.cc/4PFQ-FLY4] (last visited Aug. 27, 2021).

122. *See infra* Part III.B–III.E.

123. *See, e.g.*, Complaint at ¶ 2, Soule v. Conn. Assoc. of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 12, 2020) (alleging cisgender girls "are *now* being directly and negatively impacted by a *new* policy") (emphasis added); *cf.* Motion to Intervene at 5, Soule v. Conn. Assoc. of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020) (describing the complaint as misleading, given the policy at issue had existed for over seven years).

124. *See, e.g.*, Motion to Intervene at 5, Soule v. Conn. Assoc. of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020) ("Across the country, the overwhelming majority of high school athletic associations have policies allowing boys and girls who are transgender to play on the same teams as other boys and girls.").

125. *See infra* Parts III.B, III.E.

126. *See infra* Part III.C.

127. *See infra* Part III.D.

128. *See supra* notes 112–114.

B. 2020 Legislation and Idaho Challenge

Alliance Defending Freedom ("ADF"), a national anti-LGBT hate group,[129] has pushed a legislative campaign to attack transgender students' participation in school sports based on a manufactured crisis in girls' sports.[130] In the 2020 legislative session, bills based on ADF's campaign were introduced in Arizona, Alabama, Georgia, Indiana, Missouri, New Hampshire, Tennessee, and Washington.[131]

In 2020, the Idaho legislature became the first in the country to pass an intrusive sex-testing bill restricting the participation of transgender athletes in

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129. *Alliance Defending Freedom*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom [https://perma.cc/FNM5-EUEG] (last visited Aug. 27, 2021).

130. Kara Swisher, *Inside the Republican Anti-Transgender Machine*, N.Y. Times, at 06:01 (May 13, 2021), https://www.nytimes.com/2021/05/13/opinion/sway-kara-swisher-chase-strangio.html [https://perma.cc/9D93-AP9D] (quoting Chase Strangio, ACLU Deputy Director for Transgender Justice, calling the anti-trans legislative campaign "a crisis that is manufactured by groups that have long been working to solidify particular norms of gender and sexuality.")

131. Bob Christie, *Arizona Bill Would Ban Transgender Girls, Women from Sports Teams*, PBS NEWS HOUR (Jan. 24, 2020, 9:27 PM), https://www.pbs.org/newshour/education/arizona-bill-would-ban-transgender-girls-women-from-teams [https://perma.cc/UK58-X9AM]; S.B. 2077, 111th Gen. Assemb., Reg. Sess. (Tenn. 2020), https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2077&GA=111 [https://perma.cc/S52D-7FPT] (requiring schools receiving state or local government funding to restrict student participation in school sports to teams based on their "biological sex" assigned at birth); H.B. 2706, 54th Ariz. Leg., 2nd Reg. Sess. (Ariz. 2020), https://legiscan.com/AZ/bill/HB2706/2020 [https://perma.cc/AD2J-V3ZQ] (requiring school sports teams receiving state educational funding to be divided based on "biological sex"); H.B. 35, 2020 Ala. Leg., Reg. Sess. (Ala. 2020) (prohibiting schools from allowing "participation in athletic events conducted exclusively for females by any individual who is not a biological female as indicated on a birth certificate"); HB. 747, 2019–2020 Ga. Gen. Assemb., Reg. Sess. (Ga. 2019), https://www.legis.ga.gov/legislation/56634 [https://perma.cc/539D-FS8Z] (prohibiting schools receiving state funding from participating in or sponsoring athletic events conducted by an athletic association that allows "participation in athletic events exclusively for females by any person who is not a biological female"); H.B. 1088, 2020 Ind. Gen. Assemb., Reg. Sess. (Ind. 2020), http://iga.in.gov/legislative/2020/bills/house/1088?__cf_chl_jschl_tk__=p11abxqGSziUMXsIpcwTLyZNkgxhnK3.Fg1mTcCK.h8-1637349747-0-gaNycGzNA6U [https://perma.cc/9HNQ-S8SS] (prohibiting students from participating in an athletic event with students assigned a different sex at birth); S.J.R. 50, 2020 Mo. State Leg., Reg. Sess. (Mo. 2020), https://legiscan.com/MO/bill/SJR50/2020 [https://perma.cc/F682-VWQ2] (requiring a student "participating in any event or activity, that is a single-gender event, organized by any statewide activity association . . . to participate in the event corresponding to the student's biological sex" assigned at birth based on "a person's anatomy"); S.B. 480, 2020 N.H. Leg., Reg. Sess. (N.H. 2020), https://legiscan.com/NH/bill/SB480/2020 [https://perma.cc/KJ7F-BAY7] (restricting school-sponsored sports teams "designated for 'females,' 'women,' or 'girls'" to only "students of the female sex" and allowing disputes to be resolved by a physician's determination based on only "(a) [t]he student's internal and external reproductive anatomy; (b) [t]he student's naturally occurring level of testosterone; and (c) [a]n analysis of the student's chromosomes"); H.B. 2201, 2020 Wash. Leg., Reg. Sess. (Wash. 2020), https://legiscan.com/WA/bill/HB2201/2019 [https://perma.cc/6FAF-SRBN] (stating that certain rules adopted by school districts or voluntary nonprofits must prohibit "male students" as assigned at birth from competing against female students in an athletic activity that is "intended for female students" and is "[a]n individual competition sport").

sports.[132] Previously, Idaho had already imposed the requirement that transgender girls receive hormones for at least a year in order to compete on a girls team.[133] In spite of the existing rule, and the fact that no one had ever challenged an athlete's eligibility to compete on their respective team based on their gender, Idaho Representative Barbara Ehardt introduced H.B. 500, the "Fairness in Women's Sports Act," claiming that it "followed the spirit of Title IX."[134]

The Act categorically excluded transgender students and many intersex students from participation in school sports by requiring school sports teams be designated "based on biological sex."[135] The bill provided, in relevant part:

> A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.[136]

Touting the ADF messaging, Representative Ehardt claimed, "[t]his is all about saving opportunities for girls and women."[137]

On April 15, 2020, the ACLU and Legal Voice filed suit in federal district court against the state of Idaho on behalf of two Idaho student athletes, Lindsay Hecox and Jane Doe, arguing H.B. 500 violated Title IX and the Constitution.[138] The plaintiffs filed a motion for preliminary injunction, citing the immediate and irreparable harm to transgender and cisgender girls alike.[139] Plaintiffs argued the

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132. Idaho Code § 33-6203 (2020); Talya Minsberg, *'Boys Are Boys and Girls Are Girls': Idaho Is First State to Bar Some Transgender Athletes*, N.Y. Times (Mar. 29, 2021), https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html [https://perma.cc/G6EX-Z44C].

133. Idaho High Sch. Activities Ass'n, Rules and Reguls. 2018–2019, at 101 r. 11-3(a)–(c) (2018), https://idhsaa.org/asset/document/57-Manual.pdf [https://perma.cc/K945-92HS].

134. Kevin Richert, *Lawmakers Hear Emotional Testimony but Take no Action on Transgender Bill*, IDAHO EDUC. NEWS (Feb. 19, 2020), https://www.idahoednews.org/news/lawmakers-hear-emotional-testimony-but-take-no-action-on-transgender-bill/ [https://perma.cc/TW9H-5QV8].

135. IDAHO CODE § 33-6203 (2020).

136. *Id.*

137. Dan Levin, *A Clash Across America over Transgender Rights*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/03/12/us/transgender-youth-legislation.html [https://perma.cc/5DCG-BHNS].

138. Complaint, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-184). ADF filed a motion to intervene as Defendants, and the United States filed a Statement of Interest on Defendants' behalf. Motion to Intervene, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-184), ECF No. 30-1; Statement of Interest, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-184), ECF No. 53.

139. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 26–27, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-184).

purpose and effect of H.B. 500 was to "*categorically exclude* all women and girls who are transgender, and many who are intersex, from participating in school sports."[140] Lindsay Hecox is a transgender woman and life-long runner who would be barred from competing in college under Idaho's law.[141] Jane Doe is a cisgender girl who would be forced to submit to invasive sex testing if her sex is disputed.[142] Plaintiffs make clear that H.B. 500 burdens all women and girls and people who do not conform to gender stereotypes by subjecting them to invasive, discriminatory sex-verification requirements based on sex stereotypes.[143]

The District Court agreed. On August 17, 2020, Judge Nye granted Plaintiffs' motion for preliminary injunction.[144] The court found Plaintiffs were likely to succeed on the merits of their constitutional claims—both on the claim that H.B. 500 discriminates based on transgender status and that the law singles out all women and girls for sex verification—and that the state had not articulated a compelling state interest to justify such treatment.[145] Judge Nye opined that H.B. 500 "burdens all female athletes with the risk and embarrassment of having to 'verify' their 'biological sex' in order to play women's sports," while similarly situated boys and men were not subject to any "dispute process" because "Idaho's law does not restrict individuals who wish to participate on men's teams."[146] He concluded that both Lindsay and Jane would suffer irreparable harm if the law was not enjoined.[147] The State appealed, and the case was argued before the Ninth Circuit on May 3, 2021.[148]

C. Connecticut Lawsuit

Since 2013, the Connecticut Interscholastic Athletic Conference ("CIAC") has permitted transgender student athletes to compete on teams consistent with their gender identity, in accordance with Connecticut's state anti-discrimination

140. *Id.* at 3–5.
141. *Id.* at 9–10.
142. *Id.* at 10–11.
143. *Id.* at 12–16.
144. Hecox v. Little, 479 F. Supp. 3d 930, 943 (D. Idaho 2020).
145. *Id.* at 975, 979, 983.
146. *Id.* at 944.
147. *Id.* at 987. After Plaintiffs succeeded in obtaining a preliminary injunction at the district court, the State of Idaho appealed. Appellants' Opening Brief, Hecox v. Little, Nos. 20-35813, 20-35815 (9th Cir. Nov. 12, 2020). The case is now pending before the Ninth Circuit Court of Appeals.
148. *9th Cir. 20-35813 Docket*, EQUALITY CASE FILES, http://files.eqcf.org/cases/9th-cir-20-35813-docket/ [https://perma.cc/8KPE-SNUD] (last visited Oct. 14, 2021).

laws prohibiting sex discrimination.[149] According to the 2019–2020 CIAC handbook:

> [T]he school district shall determine a student's eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season. Accordingly, when a school district submits a roster to the CIAC, it is verifying that it has determined that the students listed on a gender specific sports team are entitled to participate on that team due to their gender identity and that the school district has determined that the expression of the student's gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics.[150]

Connecticut is one of 19 states that permit transgender students to compete on teams consistent with their gender identity on a case-by-case basis without requiring proof of medical transition.[151] Even more states permit students to compete under certain hormone or ID document requirements.[152] Transgender student athletes have participated and competed in accordance with the CIAC policy for years,[153] until anti-trans advocates picked up a story about one regional track meet and tried to turn it into a national controversy.

In 2018, Andraya Yearwood and Terry Miller found themselves in the crosshairs of the anti-trans agenda to dismantle legal protections for transgender people.[154] At the time, Andraya and Terry were high school track athletes in

149. *See* jcookson, *Statement on Transgender Policy Challenge*, CIAC (Feb. 12, 2020), http://ciacsports.com/site/?p=14124#:~:text=In%202013%20the%20CIAC%20adopted,regarding%20transgender%20participation%20in%20athletics.&text=Although%20OCR's%20investigation%20is%20still,chance%20to%20review%20it%20further [https://perma.cc/G2YC-EDED]. In November of 2000, the Connecticut Commission on Human Rights issued a declaratory ruling that transgender people are covered by state statutes prohibiting sex discrimination. *See* Declaratory Ruling on Behalf of John/Jane Doe (Nov. 9, 2000), https://portal.ct.gov/CHRO/Education-and-Outreach/Public/CHRO-Declaratory-Ruling-on-behalf-of-JohnJane-Doe [https://perma.cc/7UYG-GLLX]. The Commission relied on the Supreme Court's sex stereotyping jurisprudence in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and subsequent lower court rulings interpreting sex discrimination statutes to prohibit discrimination against transgender people. *Id.* (citing Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Rosa v. Park West Bank and Trust Co., 214 F.3d 213 (1st Cir. 2000)).

150. CIAC, 2019–2020 CIAC Handbook at 55 (2019–20), http://www.casciac.org/pdfs/ciachandbook_1920.pdf [https://perma.cc/2HZC-K7F2].

151. Motion to Intervene at 5, Soule v. Connecticut Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

152. *Id.*

153. *Id.* at 6.

154. *See* Carlisle, *supra* note 3.

Connecticut.[155] Andraya began running track in the seventh grade,[156] Terry in the ninth grade.[157] "I participate in athletics just like my peers to excel, find community, and meaning in my life," Terry explained.[158] On June 4, 2018, in the outdoor CIAC State Open championship, Terry and Andraya finished first and second respectively in one event: the 100 meter dash.[159] An otherwise unnoteworthy local high school athletic competition became a national news story because of the fact that Terry and Andraya are Black transgender girls.[160] The story of their first and second placements in this singular track meet became fodder for the national legal campaign led by ADF against transgender youth across the country.[161]

ADF started by filing a complaint with the U.S. Department of Education's Office for Civil Rights[162] and then filed a lawsuit in federal district court on behalf of three cisgender girls in Connecticut.[163] In their lawsuit, the plaintiffs allege the CIAC anti-discrimination policy violates Title IX—i.e., that by allowing transgender students to compete consistent with their gender identity, Connecticut schools are denying opportunities to cisgender girls.[164] Throughout the complaint, plaintiffs insist on referring to transgender girls as "boys," "men," and "males," and cite exclusively to statistics about cisgender boys.[165] The briefing is littered with legally irrelevant, intentionally harmful language, clearly aimed at painting

155. Yearwood Decl. ¶¶ 1, 6, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020); T.M. Decl. ¶¶ 1, 6, Motion to Intervene, Soule v. Connecticut Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

156. Yearwood Decl. ¶ 4, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

157. T.M. Decl. ¶ 6, Motion to Intervene, Soule v. Connecticut Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

158. *ACLU Responds to Lawsuit Attacking Transgender Student Athletes*, ACLU (Feb. 12, 2020) [hereinafter ACLU, *ACLU Responds to Lawsuit*], https://www.aclu.org/press-releases/aclu-responds-lawsuit-attacking-transgender-student-athletes [https://perma.cc/C7TD-JUFM] (statement of student athlete Terry Miller).

159. *CIAC State Open Championship*, ATHLETICNET (June 4, 2018), https://www.athletic.net/TrackAndField/meet/334210/results/f/1/100m [https://perma.cc/R7UQ-AWX4].

160. *See* Carlisle, *supra* note 3.

161. *See* ACLU, *The Coordinated Attack*, *supra* note 3; 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 [https://perma.cc/FKD6-JK62].

162. Alliance Defending Freedom, Title IX Discrimination Complaint on Behalf of Minor Children Selina Soule, [Second Complainant], and Alanna Smith (June 17, 2019), https://adfmedialegalfiles.blob.core.windows.net/files/SouleComplaintOCR.pdf [https://perma.cc/2A4N-Y3C3].

163. Complaint, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Apr. 25, 2021) https://www.aclu.org/legal-document/complaint-10 [https://perma.cc/MK5T-D7TR].

164. *Id.* at ¶ 5.

165. *Id. passim.*

transgender girls as cheaters and imposters set on pushing cisgender girls out of women's spaces.[166]

"I have known two things for most of my life: I am a girl and I love to run," Andraya said in a statement to the ACLU.[167] "There is no shortage of discrimination that I face as a young Black woman who is transgender."[168] Despite the challenges of navigating the world as Black transgender girls, Terry and Andraya largely felt supported by their communities. Andraya said she "ha[d] always been supported by [her] teammates and coaches" and "[e]veryone at [her] school knows [her] and treats [her] as a girl."[169] Both had been competing on girls' teams in accordance with Connecticut law for over four years[170]—since ninth grade[171]—and both shared their love for the sport of running.[172]

Both girls talk about the joy they experience from participating in sports, and the emotional toll the public criticism has taken on their lives. As Andraya testified, "Both my running and my mental health are negatively impacted by all the media attention and language that people use calling me a 'boy' and a 'cheater' and saying it is 'unfair' for me to run."[173] Similarly, Terry reflected on being "called a 'boy', 'a biological male', 'a male' and a 'cheater,'" saying the "attacks

166. *See id.* (emphasizing the alleged "competitive advantage" of transgender girls by comparing them to boys). The plaintiffs even went so far as to file a motion to disqualify the district judge for asking them to stop calling transgender girls "males," arguing that this demonstrated prejudice toward defendants. Plaintiffs' Motion to Disqualify, Soule v. Connecticut Ass'n. of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), https://www.aclu.org/legal-document/soule-et-al-v-ct-association-schools-et-al-plaintiffs-motion-disqualify [https://perma.cc/RV9Y-7G54]. The judge issued an order denying the request, noting plaintiffs' language was "needlessly provocative, and inconsistent with norms of civility in judicial proceedings," and had no bearing on the legal merits of the case. *See* Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC (D. Conn. June 16, 2020) (Order Denying Motion to Transfer/Disqualify/Recuse Judge), https://www.aclu.org/legal-document/soule-et-al-v-ct-association-schools-et-al-order-denying-recusal-request [https://perma.cc/GNG5-9MJ5].

167. ACLU, *ACLU Responds to Lawsuit*, *supra* note 158 (statement of student athlete Andraya Yearwood).

168. *Id.*

169. Yearwood Decl. ¶ 6, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

170. Motion to Intervene at 2, Soule v. Conn. Ass'n of Schs. No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

171. Yearwood Decl. ¶ 6, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020); T.M. Decl. ¶ 6, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

172. Yearwood Decl. ¶ 12, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020); T.M. Decl. ¶ 16, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

173. Yearwood Decl. ¶ 8, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

[were] deeply painful" and made her "lose confidence," sending her into "a spiral of sadness."[174]

In their Motion to Intervene in the case, Andraya testified that their cisgender peers frequently place ahead of them.[175] In fact, two days after the lawsuit was filed, at the Connecticut State Championships for Class S, Andraya was disqualified for a false start[176] and Terry placed second, behind cisgender plaintiff Chelsea Mitchell, who won the State Open title the following week.[177]

Anti-trans activists are creating panic about a nonexistent problem when, in reality, trans athletes have been competing on teams consistent with their gender identity in athletic associations across the country.[178] This fact is neither new[179] nor a problem. Trans girls are not "dominating" championships or claiming a disproportionate number of medals.[180] The claim that cisgender girls are being pushed out of sports as a result is disingenuous and unsupported. Gillian Branstetter of the National Women's Law Center took to Twitter to write, "There is hardly a more manufactured, artificial controversy than the one over trans athletes."[181] She emphasized that "the right's been ranting about the same Connecticut high school track meet for almost three years. Hundreds and hundreds of schools have inclusive policies and they have one track meet."[182]

The success of transgender girls in sports is not a given, nor are their victories unearned. Their wins, whenever they happen—in spite of the many forces working to curtail their success—should be celebrated. Cisgender students have no right to a singular spot, scholarship, or championship title. When transgender students do

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174. T.M. Decl. ¶ 13, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

175. Yearwood Decl. ¶ 11, Motion to Intervene, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020) ("Chelsea Mitchell and other non-transgender girls have placed ahead of me in the 55m, the 100m and other races.").

176. *Id. See also* Shawn McFarland, *More than Just a Race: Connecticut Runner Challenging Transgender Athletes in Lawsuit Goes Head-to-Head with Trans Athlete*, HARTFORD COURANT (Feb. 14, 2020, 9:25 P.M), https://www.courant.com/sports/high-schools/hc-sp-class-s-track-transgender-athletes-lawsuit-20200215-4rfrv3w3dfa4jfdfs74ntsjbay-story.html [https://perma.cc/V4G8-EUGS].

177. Shawn McFarland, *For the Second Week in a Row, Canton's Chelsea Mitchell Beats Terry Miller in 55-Meter Dash, this Time to Win State Open Title*, HARTFORD COURANT (Feb. 22, 2020, 11:17 P.M), https://www.courant.com/sports/high-schools/hc-sp-chelsea-mitchell-terry-miller-55-meter-dash-state-open-20200222-zdwb7shfbnfrxajs2hgmdwutbi-story.html [https://perma.cc/N26L-NQRP].

178. *See* Motion to Intervene at 5, Soule v. Connecticut Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

179. The CIAC policy had been in effect since 2013 and most other states have inclusive policies. *See* jcookson, *supra* note 149; Motion to Intervene at 5, Soule v. Connecticut Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Feb. 21, 2020).

180. *See* Cyd Zeigler, *Meet Some Trans Athletes Who Work Hard, Train Like Mad and (Almost) Never Win*, OUT SPORTS (Dec. 3, 2019, 8:18 AM), https://www.outsports.com/2019/12/3/20990763/trans-women-athlete-sports-winning-losing-transgender [https://perma.cc/53S3-Q2XL].

181. Gillian Branstetter (@GBBranstetter), TWITTER (Dec. 10, 2020, 9:03 PM), https://twitter.com/GBBranstetter/status/1337216494111887360 [https://perma.cc/7KTD-ANK6].

182. *Id.*

win, they are no less deserving. The arguments of the white cisgender girls in the Connecticut lawsuit are reminiscent of the white cisgender plaintiffs challenging affirmative action programs.[183] Commentators have rightly compared the Connecticut plaintiffs to Abigail Fisher[184]—a white woman who challenged the University of Texas's admission criteria when she was denied admission, despite not having the requisite grades to gain admission through the school's top ten percent program.[185] The idea that someone is "taking their spot" rests on the incorrect assumption that the spot is theirs to claim. Title IX's mandate is that of equal opportunity, not entitlement to a particular victory.[186] Cisgender athletes have no legal claim to exclude an athlete who performs better than them at a particular race because that athlete is trans. Andraya explains it better than anyone:

> One high jumper could be taller and have longer legs than another, but the other could have perfect form, and then do better. One sprinter could have parents who spend so much money on personal training for their child, which in turn, would cause that child to run faster.[187]

The campaign against transgender student athletes is based on little more than sexist and racist fearmongering grounded in the idea that cisgender, predominantly white, girls are more deserving of success.[188] As this Article shows in Part IV, the legal challenges in Connecticut have no basis in the text or purpose of Title IX. Rather, groups like ADF have capitalized on sex stereotypes, anti-transness, and

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183. *See, e.g.*, Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

184. Chase Strangio (@chasestrangio), TWITTER, (Mar. 14, 2019, 8:50 PM), https://twitter.com/chasestrangio/status/1106357072420057093?s=20 [https://perma.cc/622F-RKD7] ("Positing a white cis woman victim of trans existence is a classic play of the right. It is a continuation of the Abigail Fisher fight against affirmative action."). *Cf.* Steven L. Nelson, *Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of "House Rules" in Race-Related Education Cases*, 22 WASH. & LEE J. C.R. & SOC. JUST. 297, 325 (2016) (highlighting how Fisher's erroneous claim sent the message that "White Americans must not only be advantaged in the college admissions process, but White Americans must also win every time."); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 427–28 (2014) (describing how Fisher believed she "genuinely deserved admission . . . [and] seemed confident that somebody was erroneously granted [a] spot . . . that *belonged to her*.").

185. *Fisher II*, 136 S.Ct. at 2207.

186. *See* 20 U.S.C. § 1681(a)–(b) (2018) ("Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area. . . ."); 1996 Dear Colleague Letter, *supra* note 90 (recognizing the challenges that institutions face on "how to comply with Title IX and to provide equal athletic opportunities for all students" and committing to work with institutions "to find creative solutions that ensure[] equal opportunities in intercollegiate athletics").

187. Medley & Sherwin, *supra* note 7.

188. *See* ACLU, *The Coordinated Attack*, *supra* note 3 (detailing the coordinated campaign to exclude transgender student athletes from school sports, emphasizing how it is "based on a flawed understanding of what it means to be transgender" and will "perpetuate racist and sexist stereotypes").

anti-Blackness to construct the house of cards that is their "reverse discrimination" theory.[189]

D. Department of Education

It is no secret that the Department of Education under President Trump and Betsy DeVos made its mission to roll back civil rights. Among these efforts was the Department's recission of Title IX guidance issued under President Obama that clarified the statute's sex discrimination prohibition included anti-trans discrimination.[190]

Not only did the Department of Education withdraw the guidance soon after President Trump took office, it also turned Title IX into a tool of anti-trans discrimination, threatening to withdraw federal funds from schools with trans-inclusive policies.[191] The Office for Civil Rights ("OCR") conducted an investigation of Connecticut public schools and sent a letter finding several districts in violation of Title IX.[192] OCR concluded Connecticut schools in those districts had "den[ied] benefits and opportunities to female students" by permitting transgender girls to participate on the same teams.[193]

The Trump administration sought to weaponize a civil rights statute—intended to promote equal opportunity and combat sex discrimination—to require anti-trans discrimination, in clear violation of the text of Title IX and years of court precedent.[194] OCR took the position that Title IX requires school districts to

189. *See infra* Part IV.

190. On May 13, 2016, the Department of Education under President Obama issued a Dear Colleague Letter, explaining that the statute's sex discrimination prohibition "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status." U.S. Dep't of Educ. Off. for C.R., Dear Colleague Letter on Transgender Students (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/QKA5-FVBV]. The Department rescinded the guidance almost immediately after President Trump took office, in February of 2017. See Andrew Kreighbaum, *Transgender Protections Withdrawn*, NPR (Feb. 23, 2017, 3:00 AM), https://www.insidehighered.com/news/2017/02/23/trump-administration-reverses-title-ix-guidance-transgender-protections [https://perma.cc/4MYR-HRFD].

191. *See* Michael Levinson and Neil Vigdor, *Inclusion of Transgender Student Athletes Violates Title IX, Trump Administration Says*, N.Y. TIMES (June 16, 2021), https://www.nytimes.com/2020/05/29/us/connecticut-transgender-student-athletes.html [https://perma.cc/ZGX7-J62N].

192. Letter from Timothy C. J. Blanchard, Director, New York Office, U.S. Dep't of Educ. Off. for C.R., to Lori Mizerak, Assistant Corp. Couns., City of Hartford, David S. Monastersky, Howd & Luford, Peter J. Murphy and Linda L. Yoder, Shipman & Goodwin, and Johanna Zelman, Ford Harrison at 3 (May 15, 2020) [hereinafter OCR Letter], https://www.aclu.org/sites/default/files/field_document/souledoeimpendingenforcementletter.pdf [https://perma.cc/47GN-JWN5].

193. *Id.* at 4.

194. *See* Scott Skinner-Thompson, *Trump Administration Tells Schools: Discriminate Against Trans Athletes or We'll Defund You*, SLATE (June 4, 2020, 4:33 P.M.), https://slate.com/news-and-politics/2020/06/betsy-devos-transgender-athletes-connecticut.html [https://perma.cc/2FCA-7UW8].

exclude transgender girls from competing against cisgender girls.[195] The threat to withhold federal funds is nearly unprecedented.[196] While OCR has the power to withhold school funding as a Title IX enforcement mechanism, the power has rarely been used because cutting off federal funding to public schools would have devastating effects on students. "It would basically mean that New Haven schoolchildren would have less access to educational opportunities," New Haven Mayor Justin Elicker said, in response to OCR's threat to withhold federal funds over Connecticut's anti-discrimination policy. [197] Federal grants are worth about $3 million a year to the city of New Haven, and $18 million for all of Connecticut.[198]

After receiving OCR's threatening letter, the New Haven Mayor and the superintendent of schools for the education council refused to sign an agreement to rescind their policies—"[N]o amount of money will deter us from accepting all children for who they are and providing equitable access to programs and services," Mayor Elicker said.[199] Governor Ned Lamont promised that the state would "stand up and fight against discrimination," and asked the federal government to "[l]eave our kids alone."[200] However, not all school policies withstood the pressure of the rescission of federal funds. Franklin Pierce University in New Hampshire instituted a policy in 2018 permitting transgender women to compete on women's sports teams after a year of hormone therapy, but withdrew the policy

195. OCR Letter, *supra* note 192.

196. As of 2010, the American Bar Association reported, "OCR has never withheld federal funding for a Title IX violation and has referred only one case for litigation—nearly thirty years ago." Kristen Galles, *Title IX and the Importance of a Reinvigorated OCR*, ABA (July 1, 2010), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/title_ix_and_the_importance_of_a_reinvigorated_ocr/ [https://perma.cc/U56P-6Q84]. In 2018, Title IX funds were withheld from Chicago Public Schools ("CPS"), which Department of Education officials called "rare" and "drastic," because CPS had failed to comply the Department's requested steps for addressing sexual abuse. David Jackson, Jennifer Smith Richards, Juan Perez Jr., and Gary Marx, *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, CHI. TRIB. (Sept. 28, 2018, 6:55 AM), https://www.chicagotribune.com/news/breaking/ct-met-cps-civil-rights-20180925-story.html [https://perma.cc/E54U-4BQ3].

197. The Associated Press, *Federal Funding Threatened over Transgender Athlete Policy*, NBC News (Sept. 18, 2020, 9:34 A.M.) (quoting Elicker), https://www.nbcnews.com/feature/nbc-out/federal-funding-threatened-over-transgender-athlete-policy-n1240416 [https://perma.cc/UR7T-9AT5].

198. *Id.*; Matt Baume, *Trump Is Threatening to Withhold Funds to Force Trans Athletes Out of School Sports*, THEM. (Sept. 18, 2020), https://www.them.us/story/trump-witholding-funds-for-school-sports-affects-trans-athletes [https://perma.cc/5NBU-LVEC].

199. Associated Press, *supra* note 197 (quoting Elicker).

200. Karleigh Webb, *Gov. Ned Lamont to Betsy De Vos: 'Butt Out… Leave our Kids Alone*,*'* OUT SPORTS (Sept. 22, 2020, 5:00 A.M. PT) (quoting Lamont), https://www.outsports.com/2020/9/22/21449838/connecticut-transgender-rights-transgender-athletes-devos-lamont-election-2020-politics [https://perma.cc/66C9-KCW8].

with "regret" in an announcement in October after OCR found the institution in violation of Title IX.[201]

While agency interpretations are entitled to some deference when statutes are ambiguous, agency interpretations cannot *contravene* the plain text of the statute.[202] As the District Court noted in *Hecox*, "the OCR Letter is . . . of questionable validity given the Supreme Court's recent holding in *Bostock v. Clayton* [*County*]. . . . (clarifying that the prohibition on discrimination because of sex in Title VII includes discrimination based on an individual's transgender status) . . . ."[203] As Part IV will show, *any* law or policy that bars students from participating in schools sports on the basis of transgender status amounts to sex discrimination under the plain text of Title IX and also violates the Fourteenth Amendment.[204]

On his first day in office, President Biden issued an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, in which he explicitly enumerates discrimination in school sports as prohibited by federal law.[205] The Order instructs heads of administrative agencies to "consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination."[206] This signals an affirmative commitment to trans-inclusive education policies and demonstrates that advocates may once again be able to use the administrative complaint process to vindicate the rights of transgender students in schools, including in school sports. But even with a new administration in 2021 and a friendly Department of Education, the state and federal legislative attacks on transgender youth show no sign of slowing down[207] and their legality will continue to play out in federal court in the years to come.

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201. Riley Gillis, *New Hampshire College Rescinds Trans-Inclusive Athletic Policy After Federal Complaint*, METRO WEEKLY (Oct. 22, 2020) (quoting Franklin Pierce University announcement), https://www.metroweekly.com/2020/10/new-hampshire-college-rescinds-trans-inclusive-athletic-policy-after-federal-complaint/ [https://perma.cc/FF7B-6RYR].

202. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

203. Hecox v. Little, 479 F. Supp. 3d 930, 962 (D. Idaho 2020).

204. *See infra* Part IV.

205. Exec. Order 13988, 86 FR § 7023 (2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/ [https://perma.cc/TL6Y-A7YZ].

206. *Id.*

207. *See* ACLU, *Legislation Affecting LGBT Rights*, *supra* note 58.

E. Continuing Legislative Attacks and West Virginia Challenge

Despite failed court challenges[208] and a shift in presidential administrations, state legislatures have continued their attacks on transgender youth in the 2021 legislative session—in health care, in schools, and of course, in sports.[209]

In 2021, the number of states introducing anti-trans sports bans rose to an astounding 31.[210] Since Idaho passed its ban in 2020, eight more states have enacted such bans as of June 2021.[211] Many of these bills would effectively impose total bans on transgender students' participation in school sports.[212] On March 11, 2021, Mississippi Governor Reeves signed S.B. 2536, requiring schools to designate teams based on "biological sex," which the Act does not define.[213] Two weeks later, Arkansas Governor Hutchinson signed S.B. 354, becoming the

208. *Hecox*, 479 F. Supp. 3d at 931 (granting plaintiffs' motion for preliminary injunction to prevent enforcement of Idaho's "Fairness Against Women's Sports Act" and finding that plaintiffs were likely to prevail on their equal protection claims); Soule v. Conn. Ass'n of Sch., No. 3:20-cv-00201-RNC, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (dismissing cisgender plaintiffs' claim that the Connecticut Interscholastic Athletic Conference's policy allowing transgender students to participate in team sports in accordance with their gender identity is a violation of Title IX); B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-CV-00316, 2021 WL 3081883 at *6–8 (S.D. W. Va. July 21, 2021) (granting plaintiff's motion for preliminary injunction to enjoin enforcement of West Virginia's "Save Women's Sports Bill" and finding that plaintiff was likely to succeed on the merits of both her equal protection and Title IX claims).

209. *See* ACLU, *The Coordinated Attack*, *supra* note 3.

210. *Id.*

211. *See Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (last updated Aug. 23, 2021), https://www.lgbtmap.org/equality-maps/sports_participation_bans [https://perma.cc/U7U3-CFQE]; Devan Cole, *Florida Becomes 8th State to Enact Anti-Trans Sports Ban This Year*, CNN (June 2, 2021), https://www.cnn.com/2021/06/01/politics/florida-transgender-sports-ban-ron-desantis/index.html [https://perma.cc/6W6N-NZJ5].

212. *See, e.g.*, H.B. 3, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (mandating that students' participation on teams be determined by their sex assigned at birth), www.capitol.tn.gov/Bills/112/Bill/HB0003.pdf [https://perma.cc/47FU-JXGX]; S.B. 311, 58th Okla. Leg., First Sess. (Okla. 2021) (banning students from participating on teams other than that of their "biological sex," which is undefined by the bill), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/SB/SB331%20INT.PDF [https://perma.cc/Q2LJ-V5GA]; H.B. 1298, 67th Leg. Assemb. of N.D. (N.D. 2021) (prohibiting students from participating on teams other than their sex assigned at birth), https://www.legis.nd.gov/assembly/67-2021/documents/21-0140-01000.pdf [https://perma.cc/AJ3N-UY6H]; H.B. 112, 67th Mont. Leg., Reg. Sess. (Mont. 2021) (banning students from participating on teams other than their "biological sex"), https://leg.mt.gov/bills/2021/billpdf/HB0112.pdf [https://perma.cc/FX72-RYEV].

213. S.B. 2536, 2021 Miss. Leg., Reg. Sess. (Miss. 2021), http://billstatus.ls.state.ms.us/documents/2021/pdf/SB/2500-2599/SB2536SG.pdf [https://perma.cc/FUX9-CTAU]. *See also* Dan Avery, *Mississippi Governor Signs Bill Banning Trans Athletes from School Sports*, NBC NEWS (Mar. 11, 2021, 1:26 PM), https://www.nbcnews.com/feature/nbc-out/mississippi-governor-signs-bill-banning-trans-athletes-school-sports-n1260709 [https://perma.cc/MN4Q-MC4M].

second state in 2021 to pass such a ban,[214] shortly followed by Tennessee.[215] In April and May 2021, West Virginia,[216] Alabama,[217] Montana,[218] and Florida[219] followed. Though South Dakota Governor Noem vetoed the legislature's proposal over legal concerns, she signed two executive orders banning transgender girls from playing sports at the K-12 and college levels and indicated her intent to call a special legislative session to address the issue.[220]

Bills that ban students from participating on teams other than their "biological sex" fail to provide any scientific or rational definition of the term and, as described above, do not account for the numerous biological factors that make up sex and gender.[221] If construed to mean sex assigned at birth, such bans would mean there is no way for a transgender student to compete on a team consistent with their gender identity, even if they medically transitioned before puberty, and even if they have changed the gender marker on their birth certificate. These bans would also likely exclude many intersex students whose sex assigned at birth does not accurately reflect their gender.

Former Representative Tulsi Gabbard also introduced a bill in the last few weeks of her term, which would prohibit recipients of federal funds under the Education Amendments of 1972 from permitting transgender girls to participate in school sports.[222] H.R. 8932, the "Protect Women's Sports Act," proposed amending Title IX to effectively bar transgender women and girls from participating on

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214. S.B. 354, 93rd Ark. Gen. Assemb., Reg. Sess. (Ark. 2021), https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R%2FPublic%2FSB354.pdf [https://perma.cc/U6FC-KSFF]. *See also* Christopher Brito, *Arkansas Becomes Second State to Ban Transgender Athletes from Female Sports Teams*, CBS News (Mar. 26, 2021, 12:54 PM), https://www.cbsnews.com/news/arkansas-transgender-girls-ban-sports/ [https://perma.cc/LA4V-Q4CX].

215. S.B. 0228, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021), https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0228&ga=112 [https://perma.cc/W47H-N4BG]; Nico Lang, *Tennessee's New Anti-Trans Sports Law Is Already a Total Disaster*, THEM. (Mar. 30, 2021), https://www.them.us/story/tennessee-anti-trans-sports-law-governor-bill-lee-disaster [https://perma.cc/FWA5-QGH5].

216. H.B. 3293, 2021 W. Va. Leg., Reg. Sess. (W. Va. 2021), http://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=3293&year=2021&sessiontype=RS&btype=bill [https://perma.cc/45EA-4DED].

217. H.B. 391, 2021 Ala. Leg., Reg. Sess. (Ala. 2021), https://legiscan.com/AL/text/HB391/id/2286056 [https://perma.cc/UX3J-ERUG].

218. H.B. 112, 67th Mont. Leg., Reg. Sess. (Mont. 2021), https://leg.mt.gov/bills/2021/billpdf/HB0112.pdf [https://perma.cc/FX72-RYEV].

219. S.B. 1028, 2021 Fla. Leg., Reg. Sess. (Fla. 2021), https://www.flsenate.gov/Session/Bill/2021/1028/BillText/er/PDF [https://perma.cc/3BB2-EQ9Z].

220. S.D. Exec. Order 2021-05, https://governor.sd.gov/doc/2021-05.pdf [https://perma.cc/24FA-AY4L]; S.D. Exec. Order 2021-06, https://governor.sd.gov/doc/2021-06.pdf [https://perma.cc/S8FA-SAAD]; Lee Strubinger, *South Dakota Governor Bans Transgender Girls From Sports Teams By Executive Order*, NPR (Mar. 29, 2021, 9:43 PM), https://www.npr.org/2021/03/29/982474861/south-dakota-governor-bans-transgender-girls-from-sports-teams-by-executive-order [https://perma.cc/92TB-D3LZ].

221. *See supra* Part II.A.3.

222. Protect Women's Sports Act, H.R. 8932, 116th Cong. § 2 (2020).

teams consistent with their identity, without exception.[223] The Act defines "biological sex" as "determined at birth by a physician," and bars anyone "whose biological sex at birth is male" from "participat[ing] in an athletic program or activity that is designed for women or girls."[224] Like the Idaho bill, H.R. 8932 targets women and girls for sex "verification," while placing no restrictions on students who compete on boys' teams. And like Idaho's bill, it provides *no* avenue for transgender or intersex people who were assigned male at birth to compete on girls' teams—regardless of whether a student has medically transitioned or changed their ID documents—out of step with all national regulations.[225] Gabbard is no longer in office, but the bill has several remaining Republican co-sponsors, and could be re-introduced.[226]

Also at the federal level, some legislators have invoked anti-trans rhetoric in the sports context as a potential reason to oppose the Equality Act, which would provide national protections for LGBTQ people in education, employment, housing, jury service, and public accommodations.[227] The Act passed the House, but faces an uphill battle in the Senate, with Senators like Chuck Grassley of Iowa now claiming a "deep[] concern[] about this act's potential negative implications for all girls and women in sports."[228] To combat this narrative, a group of women's rights and gender justice organizations penned a letter urging Congress to pass the Equality Act, writing "[u]nfortunately, transgender girls' and women's participation in school sports consistent with their gender identity has become a cudgel used to attack the Act," when in fact, the Act is needed to address the

223. *See id.*

224. *Id.*

225. *Compare id.* (making it illegal for "a person whose biological sex at birth is male to participate in an athletic program or activity that is designated for women or girls" without describing any dispute process), *with* Idaho Code § 33-6203 (2020) (providing teams be determined by "biological sex," that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex" without a corresponding provision regarding boys' sports, and describing a dispute process by which a school can request verification of a student's "biological sex" via medical examination). See also Brief for Appellees at 2, Hecox v. Little, No. 20-35813 (Dec. 14, 2020) (stressing that the Idaho bill "contradicts the National Collegiate Athletic Association ("NCAA") rules governing college athletics across the country").

226. The bill's co-sponsors still in office are Rep. Jeff Duncan (R-SC), Rep. Alexander Mooney (R-WV), Rep. Markwayne Mullin (R-OK), and Rep. Bill Johnson (R-OH). *All Information (Except Text) for H.R.8932 - Protect Women's Sports Act of 2020*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/8932/all-info?r=53&s=1 [https://perma.cc/A77J-TGUT] (last visited Sep. 2, 2021).

227. Kate Sosin, *Trans Youth Sports Debate Consumes Equality Act Senate Hearing*, 19TH NEWS (Mar. 18, 2021, 11:21 AM), https://19thnews.org/2021/03/trans-youth-sports-debate-consumes-equality-act-senate-hearing/ [https://perma.cc/ZQE7-V6MB].

228. *Id.* (quoting Grassley).

disproportionate rates of violence and discrimination faced by transgender women and girls.[229]

As attacks at the state and federal level continue, legal challenges to the anti-trans sports bills that get signed into law are inevitable. While the Connecticut lawsuit was dismissed as moot,[230] other challenges proceed.[231] In May 2021, the ACLU and Lambda Legal filed suit challenging West Virginia's anti-trans sports ban representing Becky Pepper-Jackson, an 11-year-old cross-country runner in the state.[232] The district court granted plaintiff's motion for preliminary injunction, finding her likely to succeed on the merits of her equal protection and Title IX claims.[233] The court concluded the policy discriminated on the basis of sex by treating B.P.J. "worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity," and she would be irreparably harmed by the "unnecessary distress and stigma" of being excluded from athletics "because of who she is: a transgender girl."[234]

As the following sections will show, the outcome in all ongoing and forthcoming challenges should be clear: bills targeting transgender people are sex discrimination under federal law. Where state action is involved, anti-trans discrimination also violates the Constitution—both as equal protection violations on the basis of sex and transgender status and violations of the constitutional right to privacy.[235]

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229. Letter from Nat'l Women's L. Ctr. to Senate Judiciary Comm., Statement of Women's Rights and Gender Justice Organizations in Support of the Equality Act (Mar. 16, 2021), https://nwlc.org/resources/statement-of-womens-rights-and-gender-justice-organizations-in-support-of-the-equality-act-2/ [https://perma.cc/WMC7-HSSV].

230. In April 2021, the district court dismissed the case as moot given that Andraya and Terry had graduated high school and Plaintiffs' claims were now speculative. Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206, at *5 (D. Conn. Apr. 25, 2021). Plaintiffs filed an appeal to the Second Circuit. Opening Brief of Appellants, Soule v. Conn. Ass'n of Schs., 21-1365 (2d Cir. July 9, 2021).

231. Hecox v. Little, No. 20-35813, 2021 U.S. App. LEXIS 18903 (9th Cir. June 24, 2021) (remanding to lower court for mootness determination); B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-cv-00316, 2021 WL 3081883 (S.D. W. Va. July 21, 2021) (granting preliminary injunction).

232. Ja'han Jones, *ACLU Joins Lawsuit Over West Virginia Banning Trans Girls and Women From Sports*, HUFFPOST (May 26, 2021), https://www.huffpost.com/entry/aclu-west-virginia-anti-trans-law_n_60aec80ce4b03135479fe866 [https://perma.cc/MYW8-VX6H]; *see also* Caroline Kitchener, *An 11-Year-Old Trans Girl Was Barred from Her School's Cross-Country Team. She's Suing.*, LILY (June 2, 2021), https://www.thelily.com/an-11-year-old-trans-girl-was-barred-from-her-schools-cross-country-team-shes-suing/?utm_campaign=wp_main&utm_medium=social&utm [https://perma.cc/5HDH-L2S4].

233. B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-CV-00316, 2021 WL 3081883, at *1 (S.D. W. Va. July 21, 2021).

234. *Id.* at *7. The court also rejected the state's asserted interests, finding the state had not shown the law was substantially related to its alleged interest in providing equal athletic opportunities for girls—it had not provided nearly the evidence required to demonstrate that cis girls were being denied opportunities or threatened by the inclusion of trans girls on girls' teams. In fact, the court discussed just how little of an impact allowing the plaintiff to participate in her school's athletics would have on other girl athletes. *Id.* at *1, **5–6.

235. *See infra* Part IV.

These bills are egregious and unduly restrictive—they leave no room for transgender or intersex students to participate in sports under any conditions and will burden female, nonbinary, and gender nonconforming athletes, either implicitly or expressly subjecting them to unnecessary sex testing requirements that male students do not have to endure to compete.[236] The next round of legislative proposals may be more tailored, but the effect is the same. As Part IV will show, barring *any* students from participating in sports because they are trans or intersex is sex discrimination, and sex-testing requirements are always borne of sex stereotypes and have the effect of burdening women and girls, particularly girls of color, with having to "prove" their sex.[237] As history has demonstrated, these restrictions will undoubtedly be wielded most aggressively against girls of color to disproportionately exclude them from athletic opportunities for failing to conform to stereotypes of white, cisgender femininity.[238]

IV.
TRANS EXCLUSION IN ATHLETICS IS SEX DISCRIMINATION

Anti-trans sports bans and sex testing requirements are clear examples of sex discrimination, and legal challenges to such laws and policies are most frequently formulated on these grounds. Banning transgender students from participation in school sports violates the plain text of Title IX and also amounts to sex discrimination under the Equal Protection Clause of the United States Constitution. This Part will show that (1) the Supreme Court's recent decision in *Bostock v. Clayton County* dispels any remaining doubts that statutory protections against sex discrimination encompass discrimination against transgender people; (2) opponents have not, and cannot, assert any successful legal arguments that would distinguish this analysis under Title IX; and (3) anti-trans sports bans in the context of school athletics also amount to sex discrimination under the federal Constitution.

A. Bostock*'s Expansive Holding*

"[T]he limits of the drafters' imagination supply no reason to ignore the law's demands."[239]

In the 2020 term, the Supreme Court in *Bostock v. Clayton County* held that when an employer takes an adverse employment action against an employee because of the employee's sexual orientation or transgender status, the employer necessarily discriminates on the basis of sex.[240] Justice Gorsuch, writing for the majority, affirmed the Plaintiffs' textualist reading of Title VII of the Civil Rights

236. *See, e.g.*, Idaho Code § 33-6203 (2020); West Virginia Code § 18-2-25d (2021).

237. *See infra* Part IV.

238. *See supra* Part II.

239. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

240. *Id.* at 1754 ("An employer who fires an individual merely for being gay or transgender defies the law.").

Act.[241] The decision did not contain sweeping proclamations of LGBTQ equality,[242] but its message was clear: LGBTQ people cannot be written out of a statute when the application of the text clearly prohibits such discrimination.[243]

The Court confirmed, contrary to what anti-LGBTQ advocates have persistently argued, that application of sex discrimination statutes does not require engaging in a cultural debate about the meaning of "sex."[244] "The question isn't just what 'sex' meant, but what Title VII says about it."[245] Title VII provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.][246]

The Court reiterated that "'the ordinary meaning of "because of" is "by reason of" or "account of."' . . . [T]his . . . incorporates the 'simple' and 'traditional' standard of but-for causation."[247] Applying this test, the Court held, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[248]

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241. *Id.* at 1741–42.

242. Prior to his retirement, Justice Kennedy authored several landmark LGBT rights opinions, known for lofty proclamations about justice and equality. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996) (invalidating Colorado's "Amendment 2," which prohibited any State action treating sexual orientation as a protected status); Lawrence v. Texas, 539 U.S. 558, 563, 578-79 (2003) (striking down a Texas law prohibiting "deviate sexual intercourse with another individual of the same sex"); United States v. Windsor, 570 U.S. 744, 775 (2013) (striking down the Defense of Marriage Act, defining "marriage" to exclude same-sex couples). Most recently, authoring the Court's opinion on marriage equality, he wrote:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.

Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

243. *See Bostock*, 140 S. Ct. at 1747 ("Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.").

244. *Id.* at 1739.

245. *Id.*

246. 42 U.S.C. § 2000e-2(a)(1) (2018).

247. *Bostock*, 140 S. Ct. at 1739 (first quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013); then citing *Nassar*, 570 U.S. at 346, 360).

248. *Id.* at 1741. The Court reasoned that "sex" is the but-for cause of discrimination when, in the case of sexual orientation, an employer objects to a man attracted to men but not a woman attracted to men; and in the case of transgender status, the employer objects to someone assigned male at birth identifying as a woman but not someone assigned female at birth identifying as a woman. *Id.* Thus, the Court concluded, "homosexuality and transgender status are inextricably bound up with sex." *Id.* at 1742.

The Court summarily rejected the employers' arguments that attempted to carve out LGBTQ people from the statute's protection and named these legal arguments for what they were—naked policy arguments with no basis in the text:

> If we were to apply the statute's plain language, [defendants] complain, any number of undesirable policy consequences would follow. Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best.[249]

As the following sections explore, anti-LGBTQ arguments in the Title IX context fair no better. Unfounded fears and parades of horribles are trotted out by opponents[250]—arguments that not only have no basis in science or reality, as the preceding sections have shown,[251] but also have no basis in the text of Title IX.[252]

B. Applying Bostock *to Title IX*

Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .[253]

Prior to the Court's recent decision in Bostock, numerous lower courts had already held that Title IX's prohibition on sex discrimination in education requires

249. *Id.* at 1753 (citation omitted).

250. Throughout their arguments in court opponents use inflammatory language, calling transgender girls "boys" and claiming victories and opportunities will be unfairly taken from cisgender girls. *See, e.g.*, Complaint at ¶¶ 64–67, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (claiming under trans-inclusive policies "those born female—girls—will simply vanish from the victory podium and national rankings").

251. *See supra* Part II.A.3.

252. *See infra* Part IV.B.

253. 20 U.S.C. § 1681(a) (2018).

educational institutions to treat transgender students consistently with their gender identity when accessing sex-separated programs and facilities.[254]

There is little question that the Court's reasoning interpreting Title VII's sex discrimination prohibition in the employment context is equally applicable to analyzing sex discrimination in the education context under Title IX. Courts, including the Supreme Court, have repeatedly held that Title VII and Title IX are to be interpreted coextensively.[255] And now, the Supreme Court has settled that anti-trans discrimination is sex discrimination.[256]

Courts interpreting Title IX post-*Bostock* have agreed. In fact, every court to interpret the application of Title IX to LGBTQ people since the Supreme Court's

254. *See, e.g.*, Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048–49 (7th Cir. 2017) (concluding that anti-trans discrimination necessarily involves sex stereotyping and finding the plaintiff had adequately demonstrated his likelihood of success in a claim that a school district's policy excluding trans boys from boys' restrooms violated Title IX); Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444, 458 (E.D. Va. 2019), *aff'd*, 972 F.3d 586 (4th Cir. 2020) (concluding that a school board violated Title IX when its policy excluded a trans boy from the boys' restroom); M.A.B. v. Bd. of Educ. of Talbot Cnty., 286 F. Supp. 3d 704, 715 (D. Md. 2018) (finding a trans boy forced to use the girls' locker room had stated a claim under Title IX because "claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory"); Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286 (11th Cir. 2020) ("[T]he meaning of 'sex' in Title IX includes 'gender identity' for purposes of its application to transgender students."); Parents for Privacy v. Dallas Sch. Dist. No. 2, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018), *aff'd sub nom.* Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020) ("A court order . . . requir[ing] students to use only facilities that match their [sex assigned at birth] or to use gender-neutral alternative facilities would violate Title IX."); *see also* Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 871 (S.D. Ohio 2016), *stay denied sub nom.,* Dodds v. U.S. Dep't of Educ., 845 F.3d 217 (6th Cir. 2016) (concluding that a transgender girl denied access to the girls' bathroom was likely to succeed on a Title IX claim).

255. *See* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 617 n.1 (1999) (Thomas, J., dissenting) ("This Court has . . . looked to its Title VII interpretations of discrimination in illuminating Title IX.") (citing *Franklin v. Gwinnett Cnty. Pub. Schs.,* 503 U.S. 60, 75 (1992)). *See also, e.g.*, Tumminello v. Father Ryan High Sch., 678 F. App'x 281, 284 (6th Cir. 2017) ("[W]e turn to prior Title VII decisions to aid our interpretation of Title IX's 'on the basis of sex' requirement."); Emeldi v. Univ. of Or., 698 F.3d 715, 724 (9th Cir. 2012) (noting that the court is "join[ing] [its] sister circuits" in interpreting Title IX provisions in accordance with Title VII); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."); Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002) ("[T]he reasoning of *Oncale* is fully transferable to Title IX cases . . . . [T]here is no principled basis for construing Title IX more grudgingly [than Title VII]."); Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ., 245 F.3d 1172, 1176 (10th Cir. 2001) ("Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims."); Torres v. Pisano, 116 F.3d 625, 630 n.3 (2d Cir. 1997) ("We have held that Title VII principles apply in interpreting Title IX.").

256. Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) ("In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being . . . transgender defies the law.").

decision have come out the same way.[257] The Fourth Circuit in *Grimm v. Gloucester County School Board* affirmed the District Court's grant of summary judgment to Gavin Grimm, a transgender man who filed suit against his school board when he was in high school, challenging the Board's policy prohibiting him from using the boys' restrooms. The court held, "[Grimm's] sex remains a but-for cause for the Board's actions. Therefore, the Board's policy excluded Grimm from the boys restrooms 'on the basis of sex.'"[258] The panel noted, "Bostock forecloses that 'on the basis of sex' is ambiguous as to discrimination against transgender persons . . . ."[259]

Anti-LGBTQ advocates have attempted to distinguish the Title IX cases, arguing that the principles from the Title VII cases are somehow inapplicable and that the legislative purpose of Title IX permits trans exclusion.[260] These efforts are completely divorced from reality and the statute's text. Like the Fourth Circuit in *Grimm*, the Eleventh Circuit in *Adams ex rel. Kasper v. School Board of St. Johns County* held school policies prohibiting transgender students from accessing sex-separated facilities violated Title IX.[261] The court explained, "[w]ith *Bostock*'s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."[262] The court found the school board's attempts to distinguish *Bostock* unpersuasive. It rejected the Board's baseless claim that "schools are a wildly different environment than the workplace[,]" concluding that "Congress saw fit to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces."[263]

The Eleventh Circuit in *Adams* also rejected the school board's argument that Title IX "was only 'intended to address discrimination plaguing biological women.'"[264] As explained in Part II, the board's assertion finds no basis in the

257. *See Grimm.*, 972 F.3d at 616–17 (noting that after *Bostock*, the court had "little difficulty holding that a policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'"); Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020) (following *Bostock* and holding that "Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex"); Maxon v. Fuller Theological Seminary, No. 19-cv-09969, 2020 WL 6305460, at *5 (C.D. Cal. Oct. 7, 2020) (applying *Bostock*'s holding and stating that sex discrimination encompasses discrimination based on sexual orientation under Title IX, despite ultimately holding that the plaintiff's claims were barred by Title IX's religious exemption); Doe v. Univ. of Scranton, 2020 WL 5993766, at *5 n.61 (M.D. Pa. Oct. 9, 2020) (noting *Bostock*'s reasoning in the Title VII context applied with equal force to Title IX).

258. *Grimm*, 972 F.3d at 616–17.

259. *Id.* at 619 n.18.

260. *See Adams*, 318 F. Supp at 1321, 1324–25 (rejecting the school board's arguments that Title IX's legislative history supports a trans-exclusionary definition of "sex" and that the principles of the Title VII cases are inapplicable).

261. Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020).

262. *Id.*

263. *Id.*

264. *Id.* (quoting Appellant's Brief at 39, Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286 (11th Cir. 2020)).

legislative history of Title IX. Even more importantly, the *Adams* court found the board's interpretation could not be squared with the statute's plain text:

> Bostock teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the "starkly broad terms" of the statute require nothing less. This reasoning applies with the same force to Title IX's equally broad prohibition on sex discrimination.[265]

Opponents' arguments in the sports context fair no better. In court, defenders of anti-trans sports bans barely engage with the wealth of precedent establishing anti-trans discrimination is sex discrimination, arguing only that gender identity is irrelevant in the sports context due to physiological differences based one's sex assigned at birth.[266] But *Bostock* makes clear that any attempt to carve out transgender people from a statute's sex equality guarantee would be a judge-made exception that finds no basis in the text of Title IX.[267] Just as banning transgender students from school facilities amounts to unlawful sex discrimination, so too does banning trans students from school sports. Opponents have repeatedly tried to establish a "reverse" sex discrimination claim in the context of bathrooms and locker rooms, arguing that cisgender girls have a statutory right to exclude trans students from sharing common facilities, but Courts have resoundingly rejected such claims.[268] Faithful application of precedent should yield the same result in the sports context: there is no Title IX right of cisgender girls to participate in school sports in the absence of transgender students.

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265. *Id.* (quoting Bostock v. Clayton County., 140 S. Ct. 1731, 1753 (2020)) (citation omitted).

266. *See* Appellants' Opening Brief at 4 n.1, 23–24, Hecox v. Little, No. 1:20-cv-184 (9th Cir. Nov. 12, 2020). Appellants in *Hecox* attempt to distinguish *Bostock* in a mere two sentences, arguing without explaining that sex assigned at birth impacts athletic ability and thus "this incongruity in the narrow area of sports does not conflict with the principle that sex is irrelevant in other contexts, such as employment." *Id.* at 23–24. *See also id.* at 4 n.1. (arguing that Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522 (3d Cir. 2018) can be distinguished because the "distinction between sex and gender identity is important when physiological differences are relevant, such as in athletics").

267. *See Bostock*, 140 S. Ct. at 1747 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.").

268. *See, e.g.*, Parents for Privacy v. Barr, 949 F.3d 1210, 1227 (9th Cir. 2020) (holding that school district plan permitting trans student to use restrooms consistent with their gender identity did not discriminate on the basis of sex); *Boyertown*, 897 F.3d at 533 (affirming that plaintiffs were unlikely to succeed on the merits of their claim that allowing trans students to use restrooms consistent with their gender identity constituted a violation of Title IX); Reynolds v. Talberg, No. 1:18-cv-69, 2020 WL 6375396, at *8 (W.D. Mich. Oct. 30, 2020) (dismissing sex discrimination claim in part because plaintiffs had failed to allege an "actual or imminent injury" based on policies permitting trans students to use restrooms and in accordance with their gender identity); Students & Parents for Privacy v. U.S. Dep't of Ed., No. 16-cv-4945, 2017 WL 6629520, at *3 (N.D. Ill. Dec. 29, 2017) (affirming denial of preliminary injunction partially based on finding that plaintiffs were not likely to succeed on merits of sex discrimination claim against policy allowing trans students to access sex-segregated facilities consistent with their gender identity).

C. Anti-Trans Policies Violate the Equal Protection Clause

Where state action is involved, sex discrimination also violates the Equal Protection Clause of the Fourteenth Amendment and is subject to heightened scrutiny.[269] In order to survive heightened scrutiny, the state must demonstrate an "exceedingly persuasive justification" for the challenged sex-based classification that serves "important governmental objectives."[270] The "discriminatory means employed" must be "substantially related to the achievement of those objectives."[271]

Transgender plaintiffs facing discrimination in public schools often bring both Title IX and equal protection claims, and courts almost exclusively reach the same conclusion on both claims—anti-trans discrimination amounts to sex discrimination under the Constitution just as it does under the statute.[272] Though the bounds of the Constitution are not defined by statutes, the sex discrimination analysis in *Bostock* is instructive. Indeed, in its discussion of the applicable level of scrutiny for plaintiffs' equal protection claims, the District of Idaho in *Hecox* found *Bostock*'s reasoning persuasive.[273] Several courts have also separately

269. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 555 (1996) [hereinafter *VMI*].

270. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (citation omitted).

271. *Id.* (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

272. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608–16 (4th Cir. 2020) (rejecting the board's asserted privacy justifications and holding that prohibiting transgender students from using school bathrooms consistent with their gender identity violated the Equal Protection Clause); Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1297–1304 (11th Cir. 2020) (same); Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1050–54 (7th Cir. 2017) (finding that the school district had not demonstrated a strong privacy interest in support of their policy requiring students use bathrooms based on the sex listed on their birth certificate, and holding that the trans plaintiff had adequately met his burden in showing that the policy likely violated the Equal Protection Clause); M.A.B. v. Bd. of Educ. of Talbot Cnty., 286 F. Supp. 3d 704, 717–26 (D. Md. 2018) (holding that a school board's policy not allowing a trans student to use the school locker room consistent with his gender identity constituted sex discrimination under both Title IX and the Equal Protection Clause because it was based on sex-based stereotypes); Evancho v. Pine Richland Sch. Dist., 237 F. Supp. 3d 267, 293 (W.D. Pa. 2017) (finding anti-trans bathroom policy not substantially related to asserted privacy or safety interests and student plaintiffs likely to succeed on merits of their equal protection claim); Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 874–77 (S.D. Ohio 2016) (holding that a transgender girl was likely to succeed on the merits of her equal protection claim based on denied access to girls' bathroom because school's restroom policy was not rationally related to asserted dignity, privacy, safety, and anti-lewdness interests), *stay denied sub nom.,* Dodds v. U.S. Dep't of Educ., 845 F.3d 217 (6th Cir. 2016).

273. Hecox v. Little, 479 F. Supp. 3d 930, 974–75 (D. Idaho 2020) ("[I]n the context of Title VII, the Supreme Court has, as mentioned, recently stated, 'it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.'" (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020))). The district court noted that Defendants acknowledged that heightened scrutiny may apply to transgender people and focused their arguments entirely on the Act's ability to survive heightened scrutiny. *Id.* The Court further concluded heightened scrutiny was required under seminal Supreme Court sex discrimination cases. *Id.* (citing Craig v. Boren, 429 U.S. 190, 197 (1976); *VMI*, 518 U.S. at 533; Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (holding policies subjecting transgender people to less favorable treatment are subject to scrutiny "more than rational basis but less than strict scrutiny")).

analyzed claims on the basis of transgender identity, concluding transgender people are at least a quasi-suspect class subject to heightened scrutiny.[274]

Proceeding with the analysis that discrimination against transgender people is also sex discrimination under the Constitution and subject to at least heightened scrutiny, the state may only make such classifications upon a showing of an important state interest.[275] The Constitution allows for some sex classifications as remedial measures, "to compensate women 'for particular economic disabilities [they have] suffered,' . . . to 'promot[e] equal employment opportunity,' . . . [and] to advance full development of the talent and capacities of our Nation's people."[276]

State actors prohibiting transgender students from participating in school sports can offer no such important government interest for anti-trans sports laws. While anti-trans advocates attempt to paint trans-exclusionary sports laws as some sort of remedial measure,[277] these justifications find no support in fact or science.

Both Idaho and Arkansas's anti-trans sports bills cite *VMI*, attempting to characterize the bans as one of the sex classifications permitted under the Equal Protection Clause as a remedial measure for historic discrimination.[278] As Karkazis and Jordan-Young explain in the context of professional sports regulations, the state's "narrative of harm is inverted."[279] Sex separation in athletics has persisted, which may be permissible as a remedial measure to combat the systemic inequalities and disparate opportunities afforded to cisgender boys and men.[280] There is certainly no comparable history of transgender students as a group receiving increased opportunities, funding, support, or scholarships in school sports.[281] On the contrary, as described in section II.C., transgender students face significant

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274. *See., e.g.*, *Grimm*, 972 F.3d at 610–13; *Karnoski*, 926 F.3d at 1200; *Evancho*, 237 F. Supp. 3d at 288; *M.A.B.*, 286 F. Supp. 3d at 719–22; *Highland*, 208 F. Supp. 3d at 874; Adkins v. City of New York, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015).

275. *See, e.g.*, *Hogan*, 458 U.S. at 724 (maintaining that the government must show an "exceedingly persuasive justification" for sex classifications and show the classification is "substantially related" to "important governmental objectives" to survive heightened scrutiny) (citations omitted).

276. *VMI*, 518 U.S. at 533 (citing Califano v. Webster, 430 U.S. 313, 320 (1977) (*per curiam*); California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 289 (1987)).

277. *See, e.g.*, Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 4, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-184) (claiming that excluding trans girls was necessary for "fair competition" and to avoid repetition of the "disturbing and demoralizing experience of encountering male participation in their sport competitions" that the cisgender girl plaintiffs had previously had to deal with).

278. Idaho Code § 33-6202(6); S.B. 354 § I(a)(6), 93rd Ark. Gen. Assemb., Reg. Sess. (Ark. 2021).

279. JORDAN-YOUNG & KARKAZIS, *supra* note 22, at 200.

280. *See Sandler Statement supra* note 92, at 325–26 (describing that sex-separation is generally disfavored, but may be permissible in some circumstances in athletics to further the interest of equal opportunity for women, noting the question is a difficult one and it "cannot be said with any certainty" which system best serves that goal).

281. *See* THE TREVOR PROJECT RESEARCH BRIEF: LGBTQ YOUTH SPORTS PARTICIPATION, *supra* note 106, at 2.

barriers when it comes to accessing educational programs and activities, including athletics, and are often pushed out of sports due to individual harassment or structural discrimination.[282]

The district court in *Hecox* did not find the state's justifications compelling. In considering whether plaintiffs were likely to succeed on the merits of their equal protection claim for the purposes of issuing a preliminary injunction against H.B. 500, the District of Idaho found "[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."[283] The court therefore concluded Lindsay was likely to succeed on the merits of her equal protection claim as a transgender student athlete subject to the ban.[284] The court also found Jane Doe, a cisgender girl, likely to succeed on the merits of her equal protection claim because the Act subjects all girls to an unequal threat of medically unnecessary sex verification in order to compete.[285] Both Lindsay and Jane would have faced irreparable harm in the absence of an injunction. Lindsay would have faced the threat of being banned from trying out for college cross-country and losing a year of NCAA eligibility, as well as the stigmatic harm of "the State's 'moral disproval' of her identity, which the Constitution prohibits."[286] Jane, who wished to try out for high school soccer, would have been "subject[ed] to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex," an irreparable injury that the Constitution does not allow.[287] As Plaintiffs argued, H.B. 500's justifications "are laden with the very 'baggage of sexual stereotypes' the Supreme Court has repeatedly disavowed."[288]

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282. *Id.* ("In addition to discrimination and safety concerns, structural discrimination in the forms of trans-exclusive policies and sex-segregated sports teams and locker rooms may also exert a strong influence on the lower rates of sports participation among TGNB youth."); *see also*, Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS (Feb. 8, 2021), https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/ [https://perma.cc/JW9Q-Z7VQ] ("While there are numerous reasons why transgender youth and young adults are less likely to participate in sports, access is one prominent barrier. Stemming from the sex assigned at birth and/or the gender-segregated nature of most sport leagues, whether a transgender athlete can compete in accordance with their gender identity in the United States, versus their sex assigned at birth, currently depends on their age, where they live, what sport they play, and where they go to school.").

283. Hecox v. Little, 479 F. Supp. 3d 930, 983 (D. Idaho 2020). The Court also found it telling that "the Idaho government stayed in session amidst an unprecedented national shut down to pass two laws which dramatically limit the rights of transgender individuals[,] suggest[ing] the Act was motivated by a desire for transgender exclusion, rather than equality for women athletes. . . ." *Id.* at 984.

284. *Id.* at 985.

285. *Id.* at 987. The court was troubled that the Act "creates a means that could be used to bully girls perceived as less feminine or unpopular and prevent them from participating in sports." *Id.* at 985.

286. *Id.* at 987.

287. *Id.*

288. Motion for Preliminary Injunction at 19–20, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-184) (quoting Latta v. Otter, 771 F.3d 456, 491 (9th Cir. 2014) (Berzon, J., concurring)).

As outright bans on trans students' participation get struck down, states may attempt to pass bills that appear more "tailored" to their goals—i.e., laws that permit trans students to participate in some contexts, but only if they meet certain medical requirements. As unfriendly courts consider regulations outside of blanket exclusions that appear better drafted to assess athletic ability, it is important to emphasize that *any* sex testing requirement amounts to an outright ban on participation for at least some trans and intersex students. Furthermore, they subject all girls and gender nonconforming students to the threat of invasive and unnecessary sex verification procedures on the basis of sex stereotypes.

V.
ADDITIONAL LEGAL THEORIES: SEX TESTING AS RACE DISCRIMINATION AND AN UNCONSTITUTIONAL CONDITION

As we've seen in Part IV, bans on trans students' participation in school sports should be struck down as clear instances of sex discrimination under Title IX and the Constitution. But litigators may want to consider bringing additional claims to articulate the full breadth of the harm. This Part explores two other possible litigation strategies to supplement sex discrimination claims: race discrimination claims and unconstitutional conditions claims on the basis of privacy and freedom from unreasonable searches.

A. Sex Testing as Race Discrimination

Part II explored the racist and, specifically, anti-Black history of policing binary sex categories. By framing sex testing requirements in this historical context, litigants may also have a viable argument that such laws and policies are racially motivated in violation of Title VI and the Equal Protection Clause. These claims may be particularly salient when there is evidence that trans and gender nonconforming students of color are being disproportionately singled out for "sex verification" under such policies.[289]

Title VI of the Civil Rights of Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program receiving federal financial assistance.[290] The Supreme Court has held that the analysis under Title VI closely follows that of the Equal Protection Clause.[291] While laws that make distinctions

289. Scholars have argued that looking only at the axis of sex discrimination fails female athletes of color. *See, e.g.*, Alfred Dennis Mathewson, *Remediating Discrimination Against African American Female Athletes at the Intersection of Title IX and Title VI*, 2 WAKE FOREST J.L. & POL'Y 295, 298 (2012) ("Title IX, in remediating gender discrimination, does not mitigate the effect of racial discrimination against African American females, creating an imbalance in gains between African American and white female athletes.").

290. 42 U.S.C. § 2000d (1964).

291. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

on the basis of race are automatically subject to strict scrutiny,[292] Title VI and the Constitution also proscribe laws and policies that are neutral on their face but have "a disproportionately adverse effect upon a racial minority" if "that impact can be traced to a discriminatory purpose."[293]

Anti-trans sports bills are facially neutral with respect to race, and thus plaintiffs would have to prove discriminatory motive in order to succeed.[294] The Supreme Court has recognized that historical background and legislative history are two relevant evidentiary sources of discriminatory intent.[295] Litigators could take this opportunity to incorporate into their legal claims the racist history of sex testing laws and the anti-Black transmisogyny that has propelled the discourse and passage of recent sports bans.[296] Although claims based on discriminatory motive have historically been difficult to prove and win, there may still be value in advancing these claims, such as to bring this history into the public consciousness.

Section 602 of Title VI also permits agencies to promulgate regulations to enforce Section 601.[297] Federal agencies, including the Department of Education, have issued regulations prohibiting disparate impact discrimination in addition to intentional discrimination.[298] However, the Supreme Court in *Sandoval* held there is no private right of action under Title VI to enforce disparate impact regulations.[299] Thus, litigants would have to prove discriminatory intent in order to succeed, with evidence such as a legislature's hyper-focus on Black trans athletes or reliance on racist junk science to support the bills. However, litigants face an uphill battle in winning claims of racially discriminatory intent, given the strict standard and historic rarity with which courts recognize intent absent the most egregious fact patterns.[300]

Advocates may have more success using the Title VI administrative complaint process with the Office for Civil Rights to further such claims, given that the Title VI regulations recognize disparate impact theories. Jabari Julien makes

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292. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

293. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

294. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

295. *Id.* at 267–68.

296. *See supra* Part II.A.

297. *See* 42 U.S.C. § 2000d-1 (1964).

298. *See*, *e.g.*, 34 C.F.R. § 100.3(b) (1980).

299. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

300. *See* Jabari Julien, *Leveraging Title VI and the Administrative Complaint Process to Challenge Discriminatory School Dress Code Policies*, 119 COLUM. L. REV. 2205, 2225–26 (2019) ("Students experiencing discrimination could theoretically prevail on Title VI intentional discrimination claims by showing that a particular school's . . . policy is enforced in an extremely disproportionate manner, such that discriminatory intent may be inferred, thereby permitting recovery for the plaintiffs. However, such cases are 'rare' and require evidence of a 'stark' pattern, making success on such claims unlikely absent truly extraordinary facts.") (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

this argument regarding racially discriminatory dress code and grooming policies.[301] With a new secretary of education under the Biden administration, agency enforcement of disparate impact regulations against sports policies that disproportionately target trans students of color may be viable.

B. Sex Testing as an Unconstitutional Condition

In addition to amounting to unlawful sex discrimination under Title IX and the Constitution, "sex verification" requirements may also impose an unconstitutional condition on students' access to sport. While the Supreme Court has not found an unconstitutional condition in all cases where plaintiffs have raised allegations of the state conditioning benefits on giving up a constitutional right,[302] scholars have urged for application of the doctrine to areas such as drug testing in employment, sports, and welfare programs.[303] Litigators should examine the nature of the challenged sex testing law and consider urging courts to recognize such laws as an unconstitutional condition on students' educational rights.

To bring an unconstitutional condition claim, a plaintiff must allege the state is conditioning a government benefit on giving up a constitutional right.[304] Here, access to a public education activity like athletics is the relevant government benefit. Students' athletic participation is conditioned on submitting to some form of "sex verification" test. Depending on the nature of the sex testing requirement, such policies may implicate the right to privacy under the Due Process Clause of the Fourteenth Amendment and/or the Fourth Amendment right to be free from unreasonable searches.

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301. *Id.* at 2225 (arguing that "employing the enforcement powers of agencies is the best way to address the issue of discriminatory enforcement of school grooming policies").

302. The Supreme Court, for example, declined to find an unconstitutional condition in the Hyde Amendment, which prohibits the use of Medicaid funds for abortions. Harris v. McRae, 448 U.S. 297, 322 (1980). *See also* KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 83 (2017) (arguing that the Supreme Court's application of the unconstitutional conditions has depended on whether the Court believes there is "value in the actor wielding the burdened right, . . . uphold[ing] conditions that burden poor mothers' ostensible privacy rights, as the Court frequently believes that there is no value or a negative value in poor mothers wielding the right to shield themselves from state intervention in their private lives.").

303. *See, e.g.*, Jonathan V. Holtzman, *Applicant Testing for Drug Use: A Policy and Legal Inquiry*, 33 WM. & MARY L. REV. 47, 57–61 (1991) (employment); Sally Lynn Meloch, *An Analysis of Public College Athlete Drug Testing Programs Through the Unconstitutional Condition Doctrine and the Fourth Amendment*, 60 S. CAL. L. REV. 815, 849–50 (1987) (sports); Ilan Wurman, *Drug Testing Welfare Recipients as a Constitutional Condition*, 65 STAN. L. REV. 1153, 1192–93 (2013) (welfare). *See also Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures,* 128 HARV. L. REV. 951, 954 (2015) (arguing that mandatory ultrasound laws may constitute fourth amendment searches and thus impose an unconstitutional condition on the right to abortion).

304. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989) ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.").

The Fourteenth Amendment's due process guarantee includes a privacy right to be free from government intrusion into certain personal information and decisions.[305] In *Griswold v. Connecticut*, the Supreme Court recognized a privacy right to use contraception.[306] While the Court initially relied on the privacy of the marital relationship in its reasoning, it extended this holding to unmarried persons in *Eisenstadt v. Baird*, making clear that the right to privacy belonged to the individual.[307] The right also extends to the right to abortion[308] and to sexual relations.[309] Due process includes not only the right to autonomous decision making around contraception, abortion, and sexual relationships, but also the right to be free from government-imposed disclosure of private information.[310] Many courts have held that forcing people to disclose information about their sexual orientation or gender identity amounts to an unlawful violation of privacy.[311] Advocates may find success in emphasizing that sex testing laws force students to reveal private information about their sex-based characteristics—whether it be their sex assigned at birth, chromosomes, genitalia, or hormone levels—in violation of constitutional substantive due process guarantees.

The right to privacy also encompasses the right to refuse medical treatment.[312] The Supreme Court in *Cruzan* explained that the Fourteenth Amendment's liberty guarantee includes a right to bodily integrity.[313] The right is not absolute and must be weighed against the state's interests.[314] As described in Part III of this Article, the state's interest in excluding students from sports based on an examination of chromosomes, genitalia, or hormones is not reasonably calculated to assess athletic ability, does not serve interests in protecting girls' athletic

305. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

306. *Id.* at 485.

307. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

308. Roe v. Wade, 410 U.S. 113, 155 (1973).

309. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

310. Whalen v. Roe, 429 U.S. 589, 598–99 (1977) (noting that the "constitutionally protected 'zone of privacy'" includes "the individual interest in avoiding disclosure of personal matters").

311. *See., e.g.*, Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000) (concluding that sexual orientation was "an intimate aspect of [plaintiff's] personality entitled to privacy protection under *Whalen*"); *see also* Bloch v. Ribar, 156 F.3d 673, 685 (6th Cir. 1998) ("Our sexuality and choices about sex, in turn, are interests of an intimate nature which define significant portions of our personhood. Publicly revealing information regarding these interests exposes an aspect of our lives that we regard as highly personal and private."); Eastwood v. Dep't of Corr., 846 F.2d 627, 631 (10th Cir. 1988) (finding that a right to privacy "is implicated when an individual is forced to disclose information regarding sexual matters"); Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) ("The interest [the plaintiff] raises in the privacy of her sexual activities are within the zone protected by the constitution.").

312. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 262 (1990) ("A competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment.").

313. *See id.* ("[I]t is assumed that a competent person would have a constitutionally protected right to refuse lifesaving hydration and nutrition.").

314. *Id.*

opportunities, and only serves the goal of excluding transgender and gender nonconforming students from school programs.[315] None of these interests can justify the invasive nature of "sex verification" exams. Moreover, laws that require students to physically alter their bodies in order to compete, such as maintaining certain hormone levels, intrude on the fundamental right to refuse medical treatment. For many transgender young people, access to gender affirming medical care is necessary and lifesaving.[316] However, this does not change the constitutional analysis of conditioning receipt of a benefit on such treatment. As described above, hormone limits are arbitrary, do not give us information about athletic ability, and would exclude many cisgender and intersex athletes with levels outside the average range who do not wish to take hormones as well as transgender students who do not have access to gender-affirming care.[317]

Sex testing may also constitute a Fourth Amendment search. The Fourth Amendment is not limited to law enforcement and also applies to schools.[318] Though students have a more diminished expectation of privacy than the general public, courts determine reasonableness by balancing the government's interest against the students' expectation of privacy.[319] Cases assessing reasonableness of other kinds of student athlete testing may be an apt comparison. Though courts have generally upheld suspicionless drug testing for student athletes, several courts have found individual instances where students were singled out for drug

315. *See supra* Part III.

316. *See Five Things to Know About Gender-Affirming Health Care*, ACLU (July 15, 2021), https://www.aclu.org/news/lgbtq-rights/five-things-to-know-about-gender-affirming-health-care [https://perma.cc/AVF3-JSXP].

317. Young people may not have access to gender affirming medical care for a number of reasons, including financial barriers, unsupportive families, or state laws. For example, many of the same states attempting to ban trans youth from school sports are simultaneously trying to ban their access to health care. *See* Chase Strangio, *Conservative Legislators Want Transgender Kids' Lives as the New Battlefield in Their Culture War*, NBC NEWS (Jan. 17, 2021, 4:30 AM), https://www.nbcnews.com/think/opinion/conservative-legislators-want-transgender-kids-lives-new-battlefield-their-culture-ncna1254483 [https://perma.cc/H6GW-4K2K].

318. *See* Doe v. Woodard, 912 F.3d 1278, 1290 (10th Cir. 2019) ("[The Fourth Amendment] 'protects the right of the people to be "secure in their persons" from government intrusion whether the threat to privacy arises from a policeman or a [school] administrator.'" (quoting Dubbs v. Head Start, Inc., 336 F.3d 1194, 1205 (10th Cir. 2003))), *cert. denied sub nom.* I.B. v. Woodard, 139 S. Ct. 2616 (2019).

319. *See* Safford Unified Sch. Dist. No. 1. v. Redding, 557 U.S. 364, 370 (2009) (noting that "for searches by school officials 'a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause'" and "a school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985))).

tests and pregnancy tests to be unreasonable searches.[320] With regards to sex testing, this Article has demonstrated the state's asserted protectionist interests for singling certain students out for "sex verification" find no support in the bills' history or in science and medicine.[321] As described above, laws that "requir[e] women athletes to undergo invasive and humiliating tests to 'prove' their sex"[322] are deeply intrusive into extremely private aspects of students' lives. Thus, there is a strong argument that sex testing in school sports rises to the level of an unconstitutional search because the asserted government interests are baseless and the burden on student privacy is high.

VI.
CONCLUSION

We can expect to see more efforts to push trans students out of school sports at the state level in the coming years and these issues will continue to play out in court. As critics attempt to obscure the public discourse, the legal analysis should remain clear: *Bostock* teaches that the plain text governs and forcing trans students out of school sports is sex discrimination. Sex verification laws also disproportionately impact students of color and intrude on students' constitutional right to privacy. As this Article has shown, any attempt to frame trans exclusion as a remedial measure for cis women and girls flips history and science on its head. Bans on trans students' participation, and any policy that subjects students to "sex testing" requirements, are borne of anti-trans animus and the same sex stereotypes that have been used to obstruct gender equality in sports for centuries.

320. *See, e.g.*, *Gruenke v. Seip*, 225 F.3d 290, 301 (3d Cir. 2000) (holding it was an unreasonable search under the Fourth Amendment for a high school swim coach to require a student to take pregnancy test); Cummerlander v. Patriot Preparatory Acad. Inc., 86 F. Supp. 3d 808, 822 (S.D. Ohio 2015) (finding school official did not have reasonable suspicion to drug test student and search was therefore unconstitutional).

321. See *supra* Part III.

322. Motion for Preliminary Injunction at 7, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho Aug. 17, 2020) (No. 1:20-cv-184).