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**SYMPOSIUM:
GENDER, HEALTH, AND THE CONSTITUTION**

**THE NEW GENDER PANIC IN SPORT:
WHY STATE LAWS BANNING TRANSGENDER ATHLETES
ARE UNCONSTITUTIONAL**

Deborah L. Brake^{*}

The scope and pace of legislative activity targeting transgender individuals is nothing short of a gender panic. From restrictions on medical care to the regulation of library books and the use of pronouns in schools, attacks on the transgender community have reached crisis proportions.¹ A growing number of families with transgender children are being forced to leave their states of residence to keep their children healthy and their families safe and intact.² The breadth and pace of these developments is striking. Although the anti-transgender backlash now extends broadly into health and family governance, sport was one of the first settings—the gateway—to ignite the current culture war on transgender youth.³ At the time that states began enacting bans on transgender girls in girls' sports in 2020, there were not yet widespread bans on gender-affirming medical care and restrictions on restroom usage for transgender youth. But by the time twenty-some states had passed anti-transgender sports laws circa 2023, a broader legislative backlash was afoot.⁴ The sweeping anti-transgender attack that began in sports has now

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1. See Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. ____ (forthcoming 2024).

2. See Ernesto Londono & Azeen Ghorayshi, *Fight or Flight: Transgender Care Bans Leave Families and Doctors Scrambling*, N.Y. TIMES (July 6, 2023), <https://www.nytimes.com/2023/07/06/us/transgender-health-care-bans.html>.

3. See Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. J. 41 (2022); *Tracking the Rise of Anti-Trans Bills in the U.S.*, Trans Legislation Tracker, <https://translegislation.com/learn>.

4. See Francesca Paris, *The Upshot: See the States That Have Passed Laws Directed at Young Trans People*, N.Y. TIMES (June 5, 2023), <https://www.nytimes.com/2023/06/05/upshot/trans-laws-republicans-states.html>.

extended into other areas of public and private life, with great cost to the health and well-being of transgender children and their families.

This essay considers the role of sport in this new gender panic and examines how Title IX of the Education Act of 1972, the popular law responsible for the growth of opportunities for girls and women in sports, has been mobilized in service of a broader gender agenda. Far from providing a persuasive justification for the state laws banning transgender girls from girls' sports, Title IX—properly understood—supports the case for transgender inclusion, not exclusion. Lacking a genuinely substantial connection to the preservation of girls' and women's athletic opportunities, state laws excluding transgender girls and women from sports violate the Equal Protection Clause.

Although the immediate target of these laws is sports, they have broad and far-reaching implications for health, the topic of this symposium. Most directly, denying transgender girls and women the opportunity to participate in sports deprives them of the benefits to health, mental and physical, that sport provides. Transgender youth who face a particularly high risk of bullying, harassment, and depression may be particularly hurt by the denial of these benefits. Not only the physical benefits of sport but also the social value of inclusion and community are lost to the students targeted by these laws.⁵

The medical and biological discourses behind the laws targeting transgender girls and women in sports have a broader impact outside of sports. These laws are based on an understanding of sex and identity that leads directly to the logic behind laws denying access to gender-affirming medical care for transgender individuals. An ideology of biological essentialism unites the rationales for state laws banning transgender athletes from girls' sports, state laws prohibiting gender-affirming medical care, and even laws denying reproductive health care such as pregnancy prevention and abortion. Legal scholars Sherry Colb and Michael Dorf have described this unifying theme as “let nature take its course,” which has been deployed in support of legal restrictions on abortion and contraception as well as laws that refuse to recognize transgender identity in a wide array of settings.⁶

The transgender athlete bans have implications for constitutional controversies related to a broader agenda on gender and health care. In rejecting gender identity as a legitimate basis for recognizing a student as

5. See Alexander Sin, Katherine Rizzone & Gilbert Gonzales, *Sports Participation and Transgender Youths*, 177 JAMA PEDIATRICS 1121 (2023).

6. Sherry F. Colb & Michael C. Dorf, *Mandating Nature's Course*, CORNELL LEGAL STUD. RSCH. PAPERS 23-30 (Sept. 14, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4572336.

a girl, these laws support the denial of individual agency on matters central to personhood. They normalize the displacement of individual judgment in favor of state orthodoxy, substituting the state's political views for personal decisions made in accordance with evidence-based medical care. As with state regulation of pregnancy prevention and abortion, this state orthodoxy overrides the moral and personal autonomy of the individuals whose lives are at stake. And as with abortion, the prospect of "regret" looms large as a rationale for displacing individual decision-making on gender identity. With respect to abortion, Justice Kennedy, writing for the Court in *Gonzales v. Carhart*,⁷ famously posited—without evidence—that women would come to regret the use of the banned abortion procedure to terminate their pregnancies. Likewise, state laws that refuse to recognize gender identity depict transgender youth as unreliable agents, acting on inauthentic choices they may come to regret.⁸ So, while the focus of this essay is on the constitutionality of state bans on transgender participation in sport, the health implications of these laws extend to broader conflicts over gender and health that transcend sport and even to controversies over reproductive health care that go beyond transgender rights.

I. STATE BANS ON TRANSGENDER GIRLS IN SPORTS: A GENDER PANIC

What began as a trickle of state laws barring transgender girls from participating in girls' sports has accelerated into an avalanche. About half of the states have now enacted laws that impose a wholesale ban on transgender girls and women from participating in girls' and women's sports.⁹ The first state to enact such a law was Idaho in 2020, setting off a legislative frenzy of rare magnitude over the next three years.¹⁰ These laws are not nuanced responses to specific sports and local conditions. They categorically exclude all transgender girls and women from all girls' and women's school sports.

The focus of this gatekeeping is exclusively on girls' and women's sports; they leave eligibility for boys' and men's sports unchanged.¹¹ The

7. 550 U.S. 124, 156-60 (2007).

8. See Lindsey Tanner, *How Common is Transgender Treatment Regret, Detransitioning?*, AP NEWS (March 5, 2023) <https://apnews.com/article/transgender-treatment-regret-detransitioning-371e927ec6e7a24cd9c77b5371c6ba2b>.

9. *Equality Maps: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lebtmap.org/equality-maps/youth/sports_participation_bans (Jan. 14, 2024).

10. *Id.*

11. For further elaboration of the scope and provisions of these laws, and as support for the description of these laws throughout this section, see Brake, *supra* note 3, at 45-50.

template for these laws sets “biological sex” as the gatekeeper, restricting participation in girls’ and women’s sports to biological females.¹² Pointedly, these laws omit any reference to transgender persons or gender identity.¹³ This terminology is a deliberate tactic to erase transgender identity and naturalize sex as binary and fixed at birth. The simplistic treatment of biological sex in these laws is not consistent with the real-world complexity of sex, even as biology, much less as lived experience.¹⁴

The breadth and scope of these laws are striking. They apply to students of all ages, beginning in kindergarten and elementary school long before puberty has set in. They cover all sports, team and individual, contact and non-contact, even absent any actual advantage or safety risk traceable to transgender girls’ participation in the sport. And they apply to all levels of competition, including varsity, club, and intramural. There are no exceptions for pre-pubescent students or transgender girls taking puberty blockers and/or hormone therapy to keep levels of circulating testosterone equivalent to the norm for cisgender girls. The enforcement provisions in these laws are outright draconian, allowing anyone to challenge the biological sex of any athlete competing on a girls’ team. The vagueness of biological sex and how it is determined compound the risk of intrusive enforcement. The complexity of sex, even as a biological construct, is ignored.¹⁵ Some of these laws impose criminal penalties on students and their parents for violations.

These new state laws displace what had been the status quo of state and local athletic association rules, which typically permitted school districts and individual schools to take a more flexible approach.¹⁶ The most permissive of these rules allowed athletic participation according to

12. See Elizabeth A. Sharrow, *Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy*, 10 LAWS 1, 11 (July 2021).

13. *Id.*

14. For example, biological sex, as used in these laws, ignores entirely the existences of persons who are intersex, a term used to indicate that a person is born with sex chromosomes, gonads, and/or internal or external anatomy that do not neatly correspond with a binary determination of sex. See, e.g., JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 1-2 (2012).

15. See, e.g., Michele Krech, *The Misplaced Burdens of “Gender Equality” in Caster Semenya v. IAAF: The Court of Arbitration for Sport Attempts Human Rights Adjudication*, 19 INT’L SPORTS L. REV. 66 (2019) (discussing the case of South African track athlete Caster Semenya, who was identified as a girl from birth and knew herself only to be a woman, but was disqualified from international track competition for a condition known as hypoandrogenism, in which higher levels of testosterone than typical for females combine with androgen sensitivity).

16. For a summary of state eligibility rules regarding transgender students’ sports participation, see *Gender Affirming and Inclusive Athletics Participation*, GLSEN (2022), https://www.glsen.org/sites/default/files/2022-05/GLSEN_Transathlete_Policies_Issue_Brief-04-2022.pdf.

an individual student's expressed gender identity.¹⁷ Some paired this approach with a requirement of medical intervention such as hormone therapy and puberty blockers for transgender girls in order to suppress any advantage from higher than average (for cisgender girls) levels of circulating testosterone. Others set no official policy and made determinations on a case-by-case basis. A few states had athletic association rules that policed the sex and gender boundary more strictly. At the college level, the National Collegiate Athletic Association (NCAA) sets the eligibility rules for member colleges and universities. For over a decade, the NCAA policy for intercollegiate varsity sports had been to permit transgender women to participate in women's sports if they had been on hormone therapy to reduce testosterone levels for at least one year.¹⁸ In 2022, the NCAA changed its policy to a sport-by-sport approach, whereby member schools must abide by the sport-specific rules set by the governing bodies for amateur sports.¹⁹ The rules for amateur sports are still in flux, but they are more flexible (and only apply to varsity sports) than the sweeping bans recently enacted at the state level.

The state laws banning transgender girls from girls' sports are not the product of a grassroots movement or a groundswell of concern by cisgender athletes and their parents. They are the result of a nationally orchestrated campaign by right-wing organizations with a deeply conservative agenda on gender issues, most notably, the Alliance Defending Freedom (ADF).²⁰ ADF's website describes them as a "defender of religious freedom, traditional marriage, and the sanctity of life."²¹ They are listed as a hate group by the Southern Policy Law Center because of their anti-LGBTQ rights agenda.²² Fairness in sports does not appear in the ADF mission statement nor figure prominently on their

17. For summaries of the various approaches discussed in this paragraph, see EDWARD SCHIAPPA, *THE TRANSGENDER EXIGENCY: DEFINING SEX AND GENDER IN THE 21ST CENTURY* 123 (2022) (identifying the approaches taken by high school athletic associations toward transgender athletes prior to the surge of state legislative activity on this issue).

18. *NCAA Inclusion of Transgender Athletes*, NCAA OFF. OF INCLUSION (Aug. 2011), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf.

19. *Transgender Student-Athlete Eligibility Review Procedures*, NCAA SPORTS SCI. INST., <https://www.ncaa.org/sports/2022/1/28/transgender-student-athlete-eligibility-review-procedures.aspx#:~:text=NC%20AA%20Transgender%20Student%20Athlete%20Eligibility%20Review%20Form%3B%20and%20student%20Athlete%20plans%20to%20compete> (Jan. 19, 2023).

20. See Sharrow, *supra* note 12, at 1.

21. See *Who We Are*, ALLIANCE DEFENDING FREEDOM, <https://adflegal.org/about-us#:~:text=Alliance%20Defending%20Freedom%20is%20the, and%20the%20sanctity%20of%20life> (last visited Jan. 17, 2024).

22. See *Why Is Alliance Defending Freedom a Hate Group?*, S. POVERTY L. CTR. (Apr. 10, 2020), <https://www.splcenter.org/news/2020/04/10/why-alliance-defending-freedom-hate-group>.

website. Rather, ADF's work on transgender sports laws is strategic in service of its broader gender agenda, which includes promoting anti-abortion and anti-gay marriage policies. The attacks on transgender girls in sport serve as a wedge issue for these other issues, a volley in the culture wars to mobilize voters in support of politicians who will work to reverse feminist policies and restore traditional gender norms.

Viewed as a whole, the scope and context behind these laws reveal a moral panic over changing norms of sex and gender.²³ Despite the title of these laws, which typically refer to fairness in sports or saving women's sports, their agenda is not actually about fairness or even about sports. The real aim is to inflict stigma on transgender people for its own sake; the issue of sports serves as a vehicle, not the goal, for fomenting the panic.

The literature on moral panics points to several commonalities with the wave of state laws restricting transgender athletic participation. A key feature of a moral panic is a disproportionality between the policy response to a problem and the empirical evidence that there is a problem. Here, the frenzy of legislative activity in the last three years and the scope and sweep of the enacted provisions are wildly disconnected from empirical support. There has not been a surge of transgender girls infiltrating girls' sports, and no data or evidence demonstrates that cisgender female athletes are being displaced by transgender girls in girls' sports. Indeed, most states where these bills have been enacted lacked even anecdotal evidence of transgender girls competing in sports and creating problems in their states. The number of transgender youth is very small compared to the general population of students. According to most estimates, fewer than two percent of high school students identify as transgender.²⁴ Not all of these are transgender girls, and not all transgender girls play sports. In fact, transgender girls play sports at much lower rates than other students. A Human Rights Campaign study found that only 12 percent of transgender girls in high school play sports, compared to 68 percent of youth overall.²⁵ The number of transgender

23. For elaboration of this argument, with citations to the literature on moral panics, see Brake, *supra* note 3, at 55-63.

24. Valerie Strauss, *CDC: Nearly 2 Percent of High School Students Identify as Transgender—and More than One-Third of Them Attempt Suicide*, WASH. POST (Jan. 24, 2019, 6:10 PM), <https://www.washingtonpost.com/education/2019/01/24/cdc-nearly-percent-high-school-students-identify-transgender-more-than-one-third-them-attempt-suicide/>. The Trevor Project puts the figure at 1.8 percent of high school students identifying as transgender. *National Survey on LGBTQ Youth Mental Health 2019*, THE TREVOR PROJECT (2019), <https://www.thetrevorproject.org/wp-content/uploads/2019/06/The-Trevor-Project-National-Survey-Results-2019.pdf>.

25. *Play to Win: Improving the Lives of LGBTQ Youth in Sports*, HUM. RTS. CAMPAIGN FOUND., <https://assets2.hrc.org/files/assets/resources/PlayToWin-FINAL.pdf>; *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women*, WOMEN'S SPORTS FOUND.

women who play sports in college is also very low. There are 200,000 women who compete in NCAA sports; only an estimated 50 of them are transgender women.²⁶ The furious pace and sweep of state legislative activity on this issue is far removed from any empirical foundation.

Another indicator of a moral panic is that the emotional pitch of its purveyors defies nuance and policy debate. In the case of state laws on transgender participation in sports, the ratcheting up of the stakes has been dramatic. To cite just one example, the Republican sponsor of the bill in the Idaho legislature framed the issue starkly, stating: “The progress that we, as women, have made over the last 50 years will be for naught and we will be forced to be spectators in our own sports.”²⁷ By posing an existential threat to women’s sports, attention is diverted from consideration of complexity in favor of the blunt force of a total ban for all ages, sports, and levels of competition. The distraction from policy analysis is in keeping with the actual objective of a panic, which is not the precise issue that serves as the catalyst but the marginalization and stigmatization of the group targeted. In the case of the sports bans, it is the very existence of transgender girls and women that is the threat. The threat is not actually to sports but to an agenda seeking to restore traditional gender roles of men and women in the family and society.

By seizing on the popular theme of support for girls’ and women’s sports, proponents of these laws used the tactic of moral licensing to reassure supporters that they did not have to see themselves as bigots to support these measures. This, too, is a common feature of a successful moral panic. To the extent purveyors of a moral panic can claim and redirect mainstream appeals to create common ground with a broader constituency, they are more likely to succeed in their agenda. Here, support for girls and women in sports was mobilized to make blatant discrimination against transgender girls and women more palatable to a base of supporters who do not necessarily sign on to the full reactionary gender agenda. The mantra “protect girls’ sports” gave cover to proponents of excluding transgender athletes, obscuring the bias behind discrimination against transgender girls.

The appeal of athletics as a prime site for pushing back against transgender rights was on display even before the onslaught of state

16 (2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf>.

26. Gillian R. Brassil & Jere Longman, *Who Should Compete in Women’s Sports? There are Two Almost Irreconcilable Positions*, N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html>.

27. *Id.*

exclusion laws in Justice Alito's dissenting opinion in *Bostock v. Clayton County*.²⁸ In *Bostock*, the U.S. Supreme Court interpreted Title VII of the Civil Rights Act of 1964, the federal law prohibiting workplace discrimination, to encompass discrimination against transgender and gay employees under the statute's prohibition of sex discrimination. Although the case had no direct application to sports, Justice Alito, dissenting from the Court's opinion, used the specter of a transgender takeover of women's sports as a bogeyman to incite opposition to the Court's ruling protecting LGBTQ employees from discrimination.²⁹ If Title VII's protection from sex discrimination extends to transgender workers, Justice Alito argued, then Title IX's protection from sex discrimination might extend to the protection of transgender athletes from discrimination in school sports programs, spelling the end of Title IX's promise of equal opportunities for girls and women in sports. It is telling that Justice Alito chose the sports example to make the case against transgender rights in the workplace. Sport is a particularly appealing site for opponents of changing gender norms to stage a backlash against LGBTQ equality.

One reason why sport has proven to be such a fertile ground for inciting moral panic is the combination of the popularity of girls' and women's sports with the ongoing fragility of advances in girls' and women's athletic opportunities. Largely thanks to Title IX, female athletic participation has grown by leaps and bounds in the decades since Title IX was enacted. Prior to Title IX, playing a sport in school was a rare experience for a girl, while today, it is the norm.³⁰ And yet, too often, Title IX's promise of equal athletic opportunity for girls and women continues to disappoint. Disparities in resources are stubborn and palpable, and girls and women are often the first to lose athletic opportunities when budgets are tightened.³¹ This combination of popularity and scarcity set the table for proponents of transgender exclusion to hype a threat to girls' and women's sports from transgender athletes, triggering anxiety about backsliding in the fragile gains made by female athletes. Notably, legislators' support for excluding transgender girls and women from sports has not been accompanied by efforts to strengthen Title IX

28. 140 S. Ct. 1731 (2020).

29. *Id.* at 1779–80 (Alito, J., dissenting).

30. See *50 Years of Title IX: We're Not Done Yet*, WOMEN'S SPORTS FOUND. (May 2022), <https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf>.

31. *Id.*

enforcement or narrow the gap in disparities between men's and women's (or girls' and boys') athletic programs.³²

Another factor in the success of sport as a staging ground for a gender panic is its largely localized governance structure. Rolling back protections from workplace discrimination for transgender employees after *Bostock* would require either Congress to amend Title VII or the Supreme Court to overturn its precedent in *Bostock*. Neither appears realistic, at least at present. Similarly, overruling the right to marry a same-sex spouse would require either the Supreme Court to overrule its decision in *Obergefell v. Hodges*³³ or a constitutional amendment, in addition to Congress repealing its recently enacted federal statute protecting marriage equality.³⁴ Any of these actions would require longer term strategies. Athletic eligibility, on the other hand, is, for the most part, governed at the local level. Title IX permits but does not require schools to separate competitive sports by sex and does not define "sex" in the terms of the statute. That leaves the issue of Title IX's application to transgender athletes open to debate. This legal uncertainty at the federal statutory level, combined with local control, created an opportunity for state legislatures to override local eligibility rules with a sweeping ban on transgender girls and women's sports participation. Due to partisan gerrymandering and our polarized politics, many state legislatures are reliably conservative and have proved to be receptive audiences for a gender panic targeting transgender youth.³⁵

Exploiting fractures within the feminist movement in service of a reactionary gender agenda is a time-worn tactic, and supporters of the transgender exclusion laws did this successfully in their use of Title IX. Much like proponents of restroom restrictions who appropriated feminist-sounding themes calling out gender violence (despite no empirical evidence that transgender girls and women posed any threat to the safety of cisgender girls and women in restrooms), supporters of excluding transgender girls from sports deployed slogans like "save women's sports" to promote their agenda to restore traditional understandings of sex and gender. Their strategy achieved remarkable political success,

32. See, e.g., Cassie Miller, *Are GOP Lawmakers Pushing Ban on Transgender Athletes Ignoring Gender Inequities at Home Districts?*, PENN. CAP. STAR (Sept. 7, 2021, 7:10 AM) <https://www.penncapital-star.com/civil-rights-social-justice/lawmakers-who-sponsored-ban-on-transgender-athletes-find-title-ix-inequities-at-home-district>.

33. 576 U.S. 644 (2015).

34. Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

35. See Cassandra Haden-Nadar et al., *Polarization and State Legislative Elections*, Working Paper No. 22-05, Stanford Institute for Economic Policy Research (Feb. 2022), <https://drive.google.com/file/d/1upxvKgeCYcJxEYv3T6CtbT-dP0D-ORwb/view>.

furthered by a seeming alliance with some advocates for girls' and women's sports. A few high-profile advocates of women's sports equality have taken public positions, signing onto the view that transgender athletes pose a threat to women's sports.³⁶ Some of their rhetoric—such as using the term “male dominance,” first used by feminist scholars writing about women's subordination by cisgender men, to refer to transgender women's supposedly dominant athleticism—lends legitimacy to supporters of these restrictive new laws.³⁷ To be clear, these scholars and advocates parted ways with those pushing for the new transgender athlete restrictions in their sweeping application to all transgender youth at all levels of sport, reserving their support for transgender exclusion to elite levels of sport involving post-puberty athletes.³⁸ Nevertheless, the appearance of common ground reflects the success of weaponizing Title IX as a political strategy.

The reactionary agenda at the heart of this gender panic requires policing the boundaries of gender with clear lines demarcating who is a woman and who is a man.³⁹ A sharp separation between the sexes is the foundation of traditional gender roles. Transgender equality and the very existence of transgender youth pose a threat to a gender order that relies upon a fixed, biologically determined destiny for girls and boys and men and women. State laws that are based on an “‘archaic and overbroad’ generalization” about gender and gender roles, however, are constitutionally suspect.⁴⁰ The next section surveys the constitutional challenges generated by these new transgender exclusion laws.

36. Dorianne Lambelet Coleman, *Sex and Sport*, 80 L. & CONTEMP. PROBS. 63 (2017); Dorianne Lambelet Coleman, Michael J. Joyner & Donna Lopiano, *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69 (2020); *About Us*, WOMEN'S SPORTS POL'Y WORKING GRP., <https://womenssportspolicy.org/about-us/> (last visited Jan. 17, 2023).

37. See Dorianne Lambelet Coleman, Martinia Navratilova & Sanya Richards-Ross, *Pass the Equality Act, But Don't Abandon Title IX*, WASH. POST (April 29, 2019, 3:49 PM), https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-ab6-b29b90efa879_story.html.

38. See *Hecox v. Little*, 79 F.4th 1009, 1017–18 (9th Cir. 2023) (recounting the legislative history behind the passage of Idaho's Fairness in Women's Sports Act and explaining that law professor Dorianne Coleman urged the Governor to veto the bill and objected to the legislature's misuse of her research to support the bill).

39. Cf. Michael Conklin, *Grandstanding or Gotcha: Asking Ketanji Brown Jackson “Can You Provide a Definition for the Word ‘Woman’?”*, 58 NEW ENG. L. REV. FORUM 1 (2023).

40. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975).

II. SURVEYING THE CASE LAW

The constitutional challenges to state laws barring transgender girls from girls' sports have been fast and furious. The case law is very much in flux, but as of January 2024, it tilts toward the unconstitutionality of sweeping bans on transgender girls in girls' sports. Many of these challenges involve claims brought under Title IX as well as the Equal Protection Clause, but in order to avoid straying too far from the topic of this symposium, this discussion focuses on constitutional issues.

So far, the Ninth Circuit is the only U.S. Court of Appeals to discuss the merits of a constitutional challenge to a state law barring transgender girls from participating in girls' sports. The case, *Hecox v. Little*,⁴¹ involved a challenge to Idaho's "Fairness in Women's Sports Act," enacted in 2020. The appellate court affirmed the district court's grant of a preliminary injunction blocking the law from going into effect, finding the plaintiff likely to succeed on the merits of her equal protection claim. Calling the law "a first-of-its-kind," the court noted the sweeping nature of the categorical exclusion of transgender girls and women—from primary through college age, at all levels of competition, from intramural to elite, regardless of whether the athlete had gone through puberty or was undergoing testosterone-suppressing hormone therapy—despite the absence of any recorded history or complaints of transgender girls and women competing in girls' and women's sports in the state.⁴² The court pointed out the law's intrusive enforcement provisions, which allow anyone to "dispute" a female athlete's sex and subject that athlete to invasive medical examination.⁴³ Two plaintiffs challenged the law: Lindsay Hecox, a transgender woman receiving testosterone-suppressing hormone therapy who wished to try out for the Boise State University track and cross country teams,⁴⁴ and Jane Doe, a cisgender female high school athlete who was concerned about being subjected to the law's intrusive sex verification procedure if anyone disputed her sex.

The court applied heightened scrutiny in its equal protection analysis both because the law discriminates on the basis of sex, subjecting girls but not boys to invasive sex verification, and because it discriminates on the

41. 79 F.4th 1009 (9th Cir. 2023).

42. *Id.* at 1015, 1018.

43. *Id.* at 1015.

44. After bringing the lawsuit, while the district court's preliminary injunction was in place, Hecox tried out for and did not make the BSU women's track team and subsequently withdrew from BSU classes. However, the court found that Hecox's withdrawal from classes did not render her claim moot because she had a concrete plan to reenroll and try out again for the team. *Hecox v. Little*, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023).

basis of transgender status, a category the court recognized as a quasi-suspect class in its own right and as a species of sex-based discrimination.⁴⁵ On the latter point, the court rejected the argument that the law classified based only on “biological sex” and not transgender status, finding that the clear intent and design of the law is to target and exclude transgender girls and women.⁴⁶

Applying heightened scrutiny, the court found the law unlikely to survive this “demanding” standard of review, which places the burden wholly on the state to demonstrate an “exceedingly persuasive” justification for the challenged practice. The state failed to meet this burden, having marshalled no evidence that the law substantially furthered the important state interest of promoting equal opportunity for girls and women in sports. The court adhered to its prior circuit precedent upholding separate sports for girls and women as substantially related to promoting fairness and equality for female athletes but found no connection between the present Act’s means, a categorical ban on all transgender girls and women from participating in girls’ and women’s sports, and that important goal.⁴⁷ The court recited numerous differences between the exclusion of males from women’s sports teams, which it has upheld, and the sweeping exclusion of all transgender girls and women. First, there is no clear evidence that transgender girls and women who receive hormone therapy to enhance estrogen and suppress testosterone—and, certainly, transgender girls and women who have never gone through endogenous puberty—have any significant athletic advantage over cisgender girls and women. Second, unlike cisgender boys and men, transgender girls and women have been subjected to a history of bias and discrimination, placing them well within the purposes of sex discrimination laws, such as Title IX, aimed at eradicating the effects of gender discrimination. Additionally, unlike cisgender males who continue to have as much or greater athletic opportunity than cisgender women, transgender girls and women would be effectively barred from sports participation altogether unless permitted to participate on girls’ and women’s teams. Finally, there is no real expectation that the small numbers of transgender girls and women seeking to compete in sport will displace girls and women from their sports or pose a threat to their

45. *Hecox*, 79 F.4th at 1021–22.

46. *Id.* at 1022–28.

47. *Id.* at 1028.

opportunities to participate—a major concern behind the exclusion of male athletes from girls’ and women’s teams.⁴⁸

A pending constitutional challenge to Arizona’s similar law is unlikely to produce a different result in the Ninth Circuit.⁴⁹ The district court in that case also granted a preliminary injunction enjoining the state’s law, finding the plaintiffs’ challenge likely to succeed on the merits under both the Equal Protection Clause and Title IX.⁵⁰ Arizona’s state-wide ban on all transgender girls and women from competing in girls’ and women’s sports was challenged by two transgender girls who are receiving medical care for gender dysphoria (including puberty blockers). Both girls had been competing in girls’ sports for many years and from a very young age. The state appealed the district court’s decision, and the case is now before the Ninth Circuit. Short of overruling its prior precedent, it is difficult to see how the Ninth Circuit could reach a different result in this case than it did in *Hecox*.

Another pending appellate court case presents the Fourth Circuit with the opportunity to reach the constitutionality of West Virginia’s transgender exclusion law. This case was brought by B.P.J., an eleven-year-old (at the time she brought the suit) transgender girl receiving medical care for gender dysphoria, including puberty blocking medications. B.P.J. challenged West Virginia’s newly enacted “Save Women’s Sports Act” under both the Equal Protection Clause and Title IX for barring her from her school’s girls’ cross country and track teams. The district court initially entered a preliminary injunction blocking the law from being enforced to deny B.P.J. the opportunity to participate in these sports, finding that she was likely to succeed on the merits of both her equal protection and Title IX claims.⁵¹ The district court applied heightened scrutiny in its constitutional analysis both because transgender status is a quasi-suspect class and because transgender discrimination is necessarily based on sex. Under intermediate scrutiny, the court found no

48. In an interesting footnote revealing the intersection of this issue and other issues surrounding health and the Constitution, the court rejected the state’s reliance on *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022), to argue that the meaning of “sex” under the Equal Protection Clause should be bound by the Framers’ understanding of “sex” at the time the Fourteenth Amendment was ratified. The court pointed out the difference in constitutional methodology between due process and equal protection, and the incoherence of attempting to ascertain how the Framers would understand “biological sex” at a time before hormones and chromosomes had been discovered. *Hecox*, 79 F.4th at 1023 n.8.

49. See Brief of Amici Curiae National Women’s Law Center & 33 Additional Organizations in Support of Appellees and Affirmance, *Doe v. Home*, No. 23-16026 (9th Cir. Oct. 13, 2023) (explaining why the Ninth Circuit’s decision in *Hecox* should control).

50. *Doe v. Home*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831 (D. Ariz. July 20, 2023).

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

important state interest to be sufficiently related to the law's sweeping exclusion of transgender girls such as B.P.J.

In a subsequent proceeding, however, the same district court granted summary judgment to the state and issued an order dissolving the preliminary injunction, this time ruling that the law did not violate the Constitution or Title IX.⁵² The court explained its decision with some reluctance, noting that “not one child has been or is likely to be harmed by B.P.J.’s continued participation on her middle school’s cross country and track teams” and that “B.P.J. finishing ahead of a few other children” did not inflict any “substantial injury” on them.⁵³ Nevertheless, the court found that the state had an important interest in providing separate sports teams in general for girls and women to protect them from competition with male athletes, who, the court said, have an inherent physical advantage over female athletes. The law’s classification of “biological sex” substantially furthers that interest, the court concluded. Noting that B.P.J. did not challenge sex separation in sports in general, the court accepted the state’s definition of sex in biological terms as sufficiently, if imperfectly, related to the state’s interest in reserving separate teams for female athletes.⁵⁴ Finally, despite one of the bill’s cosponsor’s expressions of anti-transgender bias on social media, the court declined to find that the law itself was based on a “bare dislike” of transgender persons so as to violate equal protection under the Court’s animus doctrine.⁵⁵

B.P.J. appealed this decision and sought a stay in the Fourth Circuit while the appellate court considered the case. The Fourth Circuit granted the stay over the state’s objections leaving the district court’s earlier order issuing the preliminary injunction in effect.⁵⁶ In April of 2023, the U.S. Supreme Court denied the state’s application to vacate the stay and lift the preliminary injunction.⁵⁷ Two Justices, Justice Alito and Justice Thomas, dissented from this order and predicted that the issue would ultimately

52. *B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220 (S.D. W. Va. 2023).

53. *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 1805883, at *1 (S.D. W. Va. Feb. 7, 2023).

54. *B.P.J.*, 649 F. Supp. at 229, 232 (explaining that there is no “narrowly-tailored requirement” under intermediate scrutiny).

55. *B.P.J.*, 649 F. Supp. at 227.

56. *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078, 2023 WL 2803113 (4th Cir. Feb. 22, 2023). The court subsequently rejected the state’s argument to suspend the injunction in light of BPJ’s improved performance in throwing events, which the state argued deprived cisgender girls in those events of scoring higher. The court rejected this argument, with one judge dissenting. *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078(L) (4th Cir. Aug. 4, 2023).

57. *West Virginia v. B.P.J. by Jackson*, 143 S. Ct. 889 (2023).

have to be decided by the Supreme Court.⁵⁸ The case was argued in the Fourth Circuit in October 2023, and a decision is expected at any time. Whatever the circuit court decides, Justices Alito and Thomas are likely correct that the issue will wind up in the Supreme Court. At present, however, the injunction issued in the first round of the B.P.J. litigation remains in place in West Virginia.

Only one other court to date has decided the constitutionality of a state law banning transgender girls from girls' sports in favor of the state. In November 2023, a federal district court in Florida granted summary judgment to Florida Governor Ronald DeSantis in a challenge to that state's "Fairness in Women's Sports Act."⁵⁹ The lawsuit was brought by D.N., a transgender girl who had played multiple girls' sports from a young age and alleged that the Act violated both the Equal Protection Clause and Title IX. The court rejected both claims. On the equal protection claim specifically, the court found the separation of male and female sports based on biological sex to be sufficiently closely related to the important government interest in providing equal athletic opportunity to girls and women. Although the court seemed to acknowledge that the law bore a more tenuous connection to that interest as applied to D.N., who had been on puberty blockers since age 11 and was under medical care for hormone therapy, it refused to invalidate the law based on D.N.'s individual circumstances. The court emphasized that intermediate scrutiny is not as exacting as strict scrutiny on the means-ends relationship and requires only a substantial relationship, not the least restrictive means or narrow tailoring. The existence of average physical differences between girls and boys was enough to sustain the law, the court reasoned, even if D.N.'s particular circumstances (including never going through male puberty) differed from that of cisgender boys. The court dismissed the complaint but granted D.N. leave to amend her equal protection claim to plead additional factual material to support her argument that the law was motivated by anti-transgender animus and is unconstitutional on that basis.⁶⁰

A case that may bear on the constitutionality of similar state laws, albeit presented in a very different posture, is now being litigated in the Second Circuit. This case is the mirror image of the challenges to state bans on transgender girls in sports. Four cisgender girls and their parents sued the Connecticut high school athletic association over its inclusive

58. *Id.* at 889 (Alito, J., and Thomas, J., dissenting).

59. D.N. v. DeSantis, No. 21-CV-61344, 2023 WL 7323078 (S.D. Fla. Nov. 6, 2023).

60. D.N. filed an Amended Complaint and Supplemental Complaint for Declaratory and Injunctive Relief on January 11, 2024.

approach to transgender girls' participation in girls' sports. The association's rules for interscholastic competition base eligibility for girls' and boys' sports on an athlete's gender identity. The four cisgender girls who sued claimed that their losses at state track meets to two transgender girls who placed ahead of them in a few races denied them equal athletic opportunity in violation of Title IX. The district court dismissed the case in 2021 for lack of standing, holding, in part, that the plaintiffs lacked any injury in fact sufficient to support standing to sue.⁶¹ The court did not view losing to other competitors as a cognizable injury under Title IX. The court also observed that, after filing suit, one of the plaintiffs beat her transgender opponent in competition. The plaintiffs have since left high school and now compete on college track teams, while the transgender girls identified in the lawsuit have not competed in track since graduating from high school. The district court's decision denying standing was initially affirmed by a panel of judges on the Second Circuit.⁶² However, in December 2023, the full court voted to vacate that decision and allowed the case to proceed on the grounds that the plaintiffs had met the requirements for standing.⁶³ At the same time, the court ruled that the two transgender girls, who had intervened in the case, had standing to defend their athletic records in court and oppose the relief sought, which would deprive them of their athletic awards in races where they finished ahead of the plaintiffs.

Although the Connecticut case was brought under Title IX and not the Equal Protection Clause, it may have implications for the constitutionality of state laws banning transgender girls and women in sports, depending on how the court decides this case on the merits. If the cisgender plaintiffs are correct that Title IX requires the exclusion of transgender women from women's teams, that would likely support states' justifications for excluding transgender girls and women from female sports teams. However, as the Second Circuit observed in its most recent ruling on standing, no court to date has construed Title IX in favor of this position. If, on the other hand, the court rejects this interpretation of Title IX on the merits, that should further weaken states' justification for categorically banning transgender girls and women from girls' and women's sports.

61. *Soule by Stanescu v. Conn. Ass'n of Schs., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021).

62. *Soule by Stanescu v. Conn. Ass'n of Schs., Inc.*, 57 F.4th 43 (2d Cir. 2022).

63. *Soule v. Conn. Ass'n of Schs., Inc.*, No. 21-1365, 2023 WL 8656832 (2d Cir. Dec. 15, 2023).

Finally, rounding out the case law, a handful of courts in other cases have heard challenges to new state laws excluding transgender girls and women from female sports teams. These courts have enjoined recently enacted state laws banning transgender girls and women from girls' and women's sports, albeit without reaching the merits of the constitutional issue. A federal district court in Indiana granted a preliminary injunction barring that state's transgender exclusion law from going into effect based on the plaintiff's likelihood of success on her Title IX claim.⁶⁴ The court found the issue to be "not even a close call," as "[t]he singling out of transgender females is unequivocally discrimination on the basis of sex."⁶⁵ The case was argued on appeal in the Seventh Circuit, but the American Civil Liberties Union (ACLU), representing the plaintiff, withdrew the case after the plaintiff transferred to another school.⁶⁶ In another case, Utah's ban on transgender girls' sports participation was struck down by a state court under the state Constitution's equivalent to the Equal Protection Clause.⁶⁷ Finally, Montana's law was enjoined by a state court on narrow grounds for violating a state law that granted exclusive authority to state university officials to regulate athletic eligibility in their institutions.⁶⁸

Although the rationales have varied and more cases are likely to add to the mix of court decisions, so far, at least, most courts have acted to block state laws that categorically exclude transgender girls and women from girls' and women's sports. The next section further explores the constitutional objections to these laws and argues that sweeping laws banning transgender girls and women from participating in girls' and women's sports violate the equal protection clause.

64. *A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950 (S.D. Ind. 2022), *appeal dismissed sub nom. A.M. by E.M. v. Indianapolis Pub. Sch. & Superintendent*, No. 22-2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023). Because the court found in favor of the preliminary injunction based on Title IX, it applied the doctrine of constitutional avoidance and avoided reaching the constitutional issue. *Id.* at 969.

65. *Id.* at 965–66.

66. See Tom Davies, *Court Challenge to Indiana Trans Sport Ban Has Been Dropped*, AP NEWS (Jan. 18, 2023, 6:43 PM), <https://apnews.com/article/politics-sports-indiana-state-government-72deda08b406f161ef32c24f529ec84b>.

67. *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182 (Utah Dist. Ct. Aug. 19, 2022).

68. *Barrett v. State*, No. DV-21-581B (Mont. Dist. Ct. Sept. 14, 2022).

III. STATE LAWS BANNING TRANSGENDER GIRLS FROM SPORTS PARTICIPATION ARE UNCONSTITUTIONAL

Equal protection analysis requires courts to carefully scrutinize state laws that allocate benefits to, or inflict burdens upon, individuals on the basis of sex. As sex discrimination law has developed, this standard of scrutiny places the burden of proof squarely on the state to demonstrate “an exceedingly persuasive justification” for the sex classification at issue.⁶⁹ As the Supreme Court has explained, the state must show “at least” that the classification is substantially related to an important government interest.⁷⁰ A sex-based classification that is overly broad in relation to the important government interest asserted will fail what has come to be known as intermediate scrutiny.⁷¹

By establishing biological sex as the gatekeeper for participating in girls’ and women’s sports, these laws quite obviously contain a sex-based classification that triggers intermediate scrutiny. As codified in this new crop of state laws, biological sex is an overly broad classification in relation to what is an important government interest: the preservation of fair and equal athletic opportunities for girls and women. The extent of over-inclusiveness present in these laws fails the tough intermediate scrutiny test that applies to sex-based classifications.

All of the courts that have considered the issue have correctly recognized that providing girls and women with equal athletic opportunities is an important government interest for purposes of equal protection analysis.⁷² The long history of Title IX demonstrates both the federal commitment to this goal and the continuing need for vigilance in ensuring the sufficiency and adequacy of athletic opportunities for girls and women.⁷³ However, the biological sex classification used in these laws falls far short of being substantially related to this goal. The definition of sex as biologically fixed at birth, and determining eligibility for all girls’ and women’s sports, at all levels of competition, at all levels of schooling, and without regard to the affected athletes’ gender identity

69. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia (VMI)*, 518 U.S. 515 (1996).

70. *VMI*, 518 U.S. at 516.

71. See *Craig v. Boren*, 420 U.S. 190 (1976) (striking down Oklahoma statute for being overly broad); *VMI*, 518 U.S. at 542–45 (finding that VMI’s exclusion of women is too broad because some women could succeed at the institution).

72. See, e.g., *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *Kleczek ex rel. v. R.I. Interscholastic League, Inc.*, 768 F. Supp. 951, 956 (D. R.I. 1991); *Petrie v. Ill. High Sch. Ass’n*, 394 N.E.2d 855, 862–63 (Ill. App. Ct. 1979).

73. See generally DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION* (2010).

or medical circumstances, is far too broad to pass intermediate scrutiny. The evidence states have marshalled in support of this classification fails to show that transgender girls and women pose a threat to the opportunities for girls and women to participate in sports. State legislatures passed these laws without any record of diminished athletic opportunity for girls and women as a result of transgender girls and women competing in sports in their states.⁷⁴ As the Ninth Circuit soundly concluded, the biological sex exclusion is far too sweeping in relation to any actual justification of protecting girls' and women's sports, applying, as it does, to pre-pubescent children, to sports with no substantial bodily contact, and to non-elite club and intramural sports.⁷⁵ Even for elite sports at higher levels of competition, the categorical exclusion of transgender women is disconnected from any relation to actual athletic advantage, which the preexisting rules that are displaced by these state laws addressed with more targeted approaches, responsive to conditions such as puberty and hormone levels that may actually affect athletic performance.⁷⁶ The biological sex classification used in these laws is too far removed from any genuine concern for preserving girls' and women's athletic opportunities to pass constitutional muster.

The two district courts that have reached a contrary conclusion seem to have assumed that striking down the state laws at issue would spell the end of sex separation in sports altogether.⁷⁷ That is not the case. It is axiomatic that striking down a suspect or quasi-suspect classification for failing heightened scrutiny does not necessarily invalidate any and all

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

75. *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023).

76. See SCHIAPPA, *supra* note 17, at 123 (discussing the various approaches high school athletic associations have taken to transgender students' participation in sports); *Transgender Student-Athlete Eligibility Review Procedures*, NCAA SPORTS SCI. INST. (Jan. 28, 2022), <https://www.ncaa.org/sports/2022/1/28/transgender-student-athlete-eligibility-review-procedures.aspx#:~:text=NCAA%20Transgender%20Student%20Athlete%20Eligibility%20Review%20Form%3B%20and,student%20Athlete%20plans%20to%20compete>.

77. *B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220 (S.D. W. Va. 2023); *D.N. v. DeSantis*, No. 21-CV-61344, 2023 WL 7323078 (S.D. Fla. Nov. 6, 2023). This assumption appears to stem from confusion about the distinction between facial and as-applied constitutional challenges. An as-applied challenge may succeed without showing that all, or almost all, applications of this classification are unconstitutional, the standard for a facial challenge. See Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 658 (2010). The biological sex classification in the new crop of state laws may be found unconstitutional as applied to transgender girls even if it is constitutionally permissible to exclude cisgender boys from girls' sports.

such classifications, if more narrowly drawn.⁷⁸ In *Mississippi University for Women v. Hogan*,⁷⁹ for example, the Court struck down the sex classification at issue, which excluded men from admission to a women-only nursing school, on the ground that it did not actually advance the state's asserted compensatory interest in remedying discrimination against women in educational opportunities. The Court did not invalidate the women-only admissions policy in place elsewhere in the institution nor suggest that a more program-specific classification more closely tailored to the state's interest would fail. Likewise, in *United States v. Virginia (VMI)*,⁸⁰ the Court did not invalidate sex-separate education across the board, finding only that the exclusion of women from VMI did not substantially advance an actual and important state interest. Similarly, striking down the draconian biological sex classification in the transgender exclusion laws for their lack of fit with the state's objective does not call into question the constitutionality of preexisting rules separating boys and men from girls' and women's sports.

Courts had found separate sports for girls and women to pass constitutional muster long before the new crop of state laws adopted the much more restrictive biological sex classification as the gatekeeper for girls' and women's sports.⁸¹ A less rigid sex classification excluding cisgender boys and men from girls' and women's sports would avoid the extreme overbreadth problems discussed above. As the Ninth Circuit concluded, the evidence of average sex differences in athletic performance does not support any such conclusion about performance differences between transgender girls and women and cisgender girls and women.⁸² Moreover, sex-based average differences in athletic performance due to differences in typical levels of circulating testosterone may be offset by gender-affirming medical care typically provided to transgender girls and women approaching puberty.⁸³ Data comparing boys' and girls' and men's and women's athletic performance cannot soundly be extrapolated to project a similar performance advantage for transgender girls and women.⁸⁴

78. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring) (leaving open the possibility that a more narrowly drawn use of race might pass constitutional muster).

79. 458 U.S. 718, 723 n.7 (1982).

80. 518 U.S. 515, 533–34, 533 n.7 (1996).

81. See BRAKE, *supra* note 73, at 20, 55–56.

82. *Hecox v. Little*, 79 F.4th 1009, 1030–32 (9th Cir. 2023).

83. *Id.* at 1031.

84. *Id.*

Equally important, the rationale for separating boys and men from girls' and women's sports draws strength from the sheer numbers of cisgender boys and men who might otherwise encroach upon girls' and women's opportunities and displace female athletes from competing.⁸⁵ This rationale is responsive to the historical reality that when Title IX was enacted, girls and women had far fewer competitive opportunities available to them. The case for excluding transgender girls and women lacks this key feature; the small numbers of transgender girls and women seeking to compete in girls' and women's sports pose no such threat. Nor is there a similar history of over-representation and privilege in sports for transgender girls and women as there was, and remains, for cisgender boys and men. Another important difference is that excluding boys and men from female sports does not shut these athletes out of athletic opportunities altogether. Yet, this is very much the case for transgender girls and women. It is no answer (and borders on cruelty) to suggest, as the Florida District Court did, that transgender girls can still play sports even if barred from girls' teams because they can simply join the boys' team.⁸⁶ It is not a realistic option for transgender girls to participate on boys' athletic teams.⁸⁷ The authorization of sex-separate sports pre-dating this new crop of state laws does not present the same constitutional objections as the use of biological sex in the laws now under consideration and being challenged for their sweeping exclusion of transgender girls and women.

To the extent that state legislators have relied on Title IX's allowance of sex-separate sports programs to justify these laws, they have distorted Title IX in letter and in spirit. Title IX does permit (though not require) separating sports by sex where the sport is a contact sport or when team selection is based on competitive skill.⁸⁸ Even so, Title IX grants cross-over try-out rights for sports offered only to the other sex, at least where the sport is not a contact sport if opportunities for the excluded sex have been limited.⁸⁹ This has given girls and women the right to try out for non-

85. See Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for Varsity College Athletic Positions Defensible?*, 97 NW U. L. REV. 731 (2003).

86. D.N. v. DeSantis, No. 21-CV-61344, 2023 WL 7323078, at *8 (S.D. Fla. Nov. 6, 2023).

87. *Hecox*, 79 F.4th at 1029–1030.

88. See 34 C.F.R. § 106.41(b).

89. *Id.* This exception, known as the contact sports exception, is one of the most controversial parts of Title IX and may well be unconstitutional under modern equal protection jurisprudence. See, e.g., Suzanne Sangree, *Title IX and the Contact Sports Exception: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000). At public schools, where the Equal Protection Clause applies, courts have refused to import a contact sports exception on the grounds that it reinforces

contact sports that the school offers only to boys and men. The reason this provision has not supported a similar right for boys and men to try out for a sport offered only to girls is that male athletes have not had their athletic opportunities limited by sex.⁹⁰ This is not the case for transgender girls and women, however, who must contend with both the limits on opportunities available to girls and the distinct and increasingly harsh overlay of discrimination specifically targeting transgender girls.⁹¹ In sum, Title IX's denial to boys of a right to try out for girls' teams in sports not otherwise available to them should not apply to the very different situation facing transgender girls in sports. Without access to girls' sports, transgender girls would have no athletic opportunities available to them.

Nor does Title IX's rationale for permitting the separation of girls' and boys' sports support the sweeping exclusion of transgender girls and women from girls' and women's sports. As the Ninth Circuit explained, the evidence of sex-based performance gaps in some sports and at some levels of competition does not support extrapolating from this to infer similar disparities in performance between transgender girls and women and cisgender girls and women.⁹² Moreover, advocates of these new exclusionary laws have overstated and distorted the biological case for separating male and female athletes, even as it applies to cisgender boys and girls. Title IX accepted sex-separate sports as a pragmatic, flexible compromise in order to support the growth and expansion of girls' and women's participation in sports and the ability of such programs to respond to girls' and women's distinct interests in sport instead of folding them into existing programs designed by and for males.⁹³ Title IX's rationale for sex separation was never entirely or exclusively based on a biologically fixed conception of girls' and women's inherent inferiority as athletes. Although average sex differences in performance were acknowledged, drafters of the Title IX athletics rules emphasized the

stereotypes of female fragility and inferiority. See BRAKE, *supra* note 73, at 49 (explaining the legal framework and discussing case law).

90. See BRAKE, *supra* note 73, at 22, 57.

91. See Jonah P. DeChants, Amy E. Green, Myeshia N. Price, & Carrie K. Davis, "I Get Treated Poorly in Regular School—Why Add to It?": Transgender Girls' Experiences Choosing to Play or Not Play Sports, *TRANSGENDER HEALTH* (Oct. 12, 2022), <https://doi.org/10.1089/trgh.2022.0066>.

92. *Hecox*, 79 F.4th at 1030–31. See also Blair Hamilton, Fergus Guppy & Yannis Pitsiladis, Comment on: "Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage," *SPORTS MED.* (Sept. 20, 2023) <https://link.springer.com/article/10.1007/s40279-023-01928-8> (criticizing published article for extrapolating from cisgender men to assume physical advantages in transgender women athletes).

93. See Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 *CLEV. STATE L. REV.* 513 (2007).

denial of training, support, and opportunity that have long suppressed the development of female athletic interests and abilities.⁹⁴ For social reasons, as much as biological ones, separate sports for girls and women were accepted as a way to provide a more empowering space for female athletes to develop their abilities and engage in competition.⁹⁵ And, although thwarted by the subsequent NCAA takeover of women's sports from the Association for Intercollegiate Athletics for Women in the early 1980s, separate sports for girls and women were supported by many advocates for gender equality in sport as a way of maintaining control over women's sports.⁹⁶ These rationales for sex separation rest on a social constructionist—rather than a biological—account of sex differences in sports and are fully compatible with transgender inclusion in girls' and women's sports.⁹⁷

Even adherence to biological sex difference as the sole rationale for sex separation in sport does not support the state laws now using biological sex, fixed at birth, to exclude transgender girls and women from all female sports. The biological case for preserving separate spaces for girls and women in sport rests on the risk of an influx of boys that would otherwise take over girls' sports and thwart the growth of female athletic participation. Allowing transgender girls and women to join girls' and women's teams poses no such risk. No serious claim can be made that the small numbers of transgender girls and women competing in sports will squeeze out cisgender girls and women from these opportunities. Moreover, the problematic stereotype of inherent female athletic inferiority is more pronounced when biology is used as the basis for excluding transgender girls and women than when it is used to exclude cisgender boys and men. If a few transgender girls would decimate girls' opportunities, as the proponents of these bills claim, then female athleticism must be very fragile indeed. Biological inferiority was once

94. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71419 (Dec. 11, 1979) (discussing how girls' and women's athletic interests have been historically suppressed and the restricted opportunities they have received for coaching and resources).

95. See Nicole Zarrett, Cheryl Cooky & Philip Veliz, *Coaching Through a Gender Lens: Maximizing Girls' Play and Potential*, WOMEN'S SPORTS FOUND. (2019), <https://www.womenssportsfoundation.org/wp-content/uploads/2019/04/coaching-through-a-gender-lens-report-web.pdf>; Daniel Smith & Sarah Martiny, *Stereotype Threat in Sport: Recommendations for Applied Practice and Research*, 32 SPORT PSYCH. 10 (2018); Sian L. Beilock & Allen R. McConnell, *Stereotype Threat in Sport: Can Athletic Performance Be Threatened?*, 26 J. SPORT & EXERCISE PSYCH. 597 (2004).

96. See generally SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN WOMEN'S SPORT* (2d ed. 2015).

97. See Cheryl Cooky, "Girls Just Aren't Interested": *The Social Construction of Interest in Girls' Sport*, 52 SOCIO. PERSPS. 259 (2009).

used to bar girls and women from sports altogether.⁹⁸ It continues to be used to justify allocating better treatment and more resources to male athletes on the assumption that they are the biologically superior athletes.⁹⁹ Inherent biological difference has never been a good foundation for developing Title IX's legal framework to secure equal athletic opportunity for girls and women in sport.

The case for transgender exclusion from girls' and women's sports rests on a model of sport that is antithetical to Title IX, an emphasis on winning for its own sake rather than valuing sports for their educational value. Title IX applies only to educational programs and activities. Title IX's application to athletics is predicated on the assumption that athletics is part of the educational programming offered by schools. Title IX's legal framework guarantees an equal opportunity to participate in sports; it does not guarantee any athlete her best chance to win. Nor do the educational benefits of sports depend on winning. And yet, the case for transgender exclusion rests on the specious argument that inherently biologically superior transgender girls and women will reduce cisgender girls' and women's chances to win. The flaws in assuming biological superiority have already been discussed; but even assuming (counter-factually) that transgender girls and women have an insurmountable biological advantage in competition with cisgender girls and women,¹⁰⁰ there remains an irreconcilable tension between this argument and the goals of Title IX. The whole structure of Title IX prioritizes girls' and women's participation opportunities. Protecting cisgender girls' and women from competition with transgender girls and women prioritizes cisgender female athletes' chances of winning over the ability of transgender girls and women to participate in sports at all. This result is at odds with the logic of Title IX and the reason it applies to sports in the first place: that participation in sports has important educational value.

The most recent federal administrative developments under Title IX confirm that excluding transgender athletes from girls' and women's sports is not necessary to secure Title IX enforcement. In April of 2023, the Biden Administration proposed rule changes for Title IX that would bar the categorical, outright exclusion of transgender girls and women

98. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, 24 SPORT J., Mar. 14, 2008, at 1, 1.

99. See, e.g., Michael A. Messner & Nancy M. Solomon, *Social Justice and Men's Interests*, 31 J. SPORT & SOC. ISSUES 162, 171 (2007) (quoting opponent of Title IX enforcement as attributing men's greater interest in sports to male biology).

100. See, e.g., *Soule by Stanesco v. Conn. Ass'n of Schs., Inc.*, 57 F.4th 43, 48–49 (2d Cir. 2022) (noting that cisgender plaintiffs actually did beat transgender girls in competition after the complaint was filed).

from girls' and women's sports while leaving room for more nuanced, evidence-based sport-by-sport eligibility rules tailored to particular sports and levels of competition.¹⁰¹ Because the Department of Education's position has vacillated on this issue in recent years as different presidential administrations have come to power, it is unclear how much, if any, deference this position will receive in court for judges deciding Title IX challenges to these state laws.¹⁰² Regardless of how the courts treat these rules in deciding claims brought under Title IX, however, the federal government's position should be relevant to an equal protection challenge where the state bears the burden of proof to demonstrate that excluding transgender girls and women is substantially necessary to protect girls' and women's athletic opportunities. The fact that the federal agency charged with Title IX enforcement finds that the categorical exclusion of transgender girls and women is inconsistent with Title IX's statutory policies should undercut the state's argument that such exclusion is needed to protect equal opportunities for girls and women in sport.

There is yet another constitutional infirmity in these laws, and that is their surveillance and enforcement of biological sex with respect to only girls and women, without any equivalent sex verification requirements for disputing and verifying the biological sex of boys and men playing sports. This is a form of sex discrimination that hurts all girls and women in sports. For example, the Idaho statute enjoined by the Ninth Circuit permits anyone to question the biological sex of an athlete participating in a girl's or women's sport.¹⁰³ No such provision applies to participants in boys' and men's sports in the state. Only girls are subject to accusations that they are not who they claim to be. If their sex is disputed, girls and only girls must subject themselves to a potentially invasive medical examination. Pretending that this double standard is a sex-neutral classification based on the designation of the sport and not the sex of the athlete, as the Florida district court supposed—that cisgender boys and men who participate in girls' and women's sports are also subjected to these sex verification requirements¹⁰⁴—elevates form over substance. The clear design and intent of these laws is to provide a mechanism to question the sex of girls and women playing sports while exempting boys' and men's sports from such surveillance.

101. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (Apr. 13, 2023).

102. See Brake, *supra* note 3, at 75-76 (recounting this history).

103. Hecox v. Little, 79 F.4th 1009, 1019 (9th Cir. 2023).

104. D.N. v. DeSantis, No. 21-CV-61344, 2023 WL 7323078, at *9 (S.D. Fla. Nov. 6, 2023).

Sex verification in women's sports has a cautionary history. Challenges to the sex of athletes competing in women's amateur sports and the processes for resolving such challenges have been rife with gender and racial bias.¹⁰⁵ Early sex verification processes included naked parades where officials visibly examined women's naked bodies as a condition of their participation in Olympic sports.¹⁰⁶ More modern practices have continued to spark sharp criticism. Women who do not conform to dominant cultural stereotypes of femininity and women who are simply too good at their sport can be subjected to lengthy and embarrassing processes to prove that they are "real" women. In the history of Olympic sports, it has been the bodies of women of color who have been most likely to trigger scrutiny.¹⁰⁷ Inviting challenges to girls' and women's biological sex reinforces the very stereotypes at the root of sex discrimination in sports: that girls and women are not naturally athletic, so being good at sports renders an athlete's femininity suspect.¹⁰⁸ Calling an athletic girl a "tomboy"—a real insult in the pre-Title IX era—is a reflection of the cultural conflicts facing girls in sports that Title IX was meant to correct. Laws that require athletic girls and women to prove that they are biologically female are entirely at odds with the state's asserted purpose of protecting equal athletic opportunity for girls and women in sports.

Finally, state laws policing biological sex in girls' and women's sports are vulnerable to constitutional challenge as a form of discrimination on the basis of transgender status. If analyzed as transgender discrimination, courts will have to decide what level of scrutiny to apply. One approach is to treat transgender status as a quasi-suspect class in its own right, triggering intermediate scrutiny, as the Ninth Circuit has done.¹⁰⁹ Transgender discrimination might also be understood as inherently a form of discrimination based on sex and subjected to intermediate scrutiny on that basis, as it cannot be practiced

105. See Mireia Garces de Marcilla Muste, *You Ain't Woman Enough: Tracing the Policing of Intersexuality in Sports and the Clinic*, 31 SOC. & LEGAL STUD. 847 (2022).

106. See Krech, *supra* note 15, at 69.

107. See Katrina Karkazis & Rebecca M. Jordan-Young, *The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes*, 30 FEMINIST FORMATIONS 1 (2018); Michele Krech, *To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics*, 35 BERKELEY J. INT'L L. 262, 265 (2017).

108. Cf. Cindy Boren, *Three Girls' Soccer Players Cut Their Hair Short. Now They're Accused of Being Boys*, WASH. POST (Aug. 8, 2017, 11:50 AM), <https://www.washingtonpost.com/news/early-lead/wp/2017/08/08/what-happens-with-three-girls-soccer-players-cut-their-hair-short-theyre-accused-of-being-boys/>.

109. *Hexco v. Little*, 79 F.4th 1009, 1021 (9th Cir. 2023).

without consideration of the individual's sex.¹¹⁰ Alternatively, a court might decide to apply a tough version of rational basis review to transgender discrimination.¹¹¹

Whatever level of scrutiny applies to transgender discrimination, it is no answer to deny that transgender discrimination is afoot by pointing to the law's failure to expressly specify transgender status as the basis for excluding transgender girls. Courts have correctly rejected this subterfuge for the same reason that laws denying same-sex couples the ability to marry discriminate on the basis of sexual orientation despite the absence of express reference to sexual orientation in their text.¹¹² Restricting participation in girls' sports to girls whose biological sex is assigned female at birth necessarily discriminates between cisgender and transgender girls.¹¹³ Nor does it negate the existence of transgender discrimination to point out that only transgender girls and not transgender boys are barred from girls' sports. Just as sex plus some other characteristic is still sex discrimination, so too an exclusion based on transgender status plus some other characteristic (here, identifying as a girl) is still transgender discrimination.¹¹⁴ A cisgender girl is allowed to play on the team, while a transgender girl may not. That is the hallmark of disparate treatment on the basis of transgender status.

Whatever the level of scrutiny a court applies, the transgender discrimination carried out by these laws should not survive an equal protection challenge. Even under rational basis review, a bare desire to harm a disfavored group of people is an impermissible and constitutionally deficient purpose.¹¹⁵ Nor is it necessary for a challenger to supply reams of animus-laden statements from a plurality of legislators to prove animus.¹¹⁶ Animus may be inferred when the burden on the disfavored group is sweeping and acute and is so disconnected from any legitimate government purpose that a court can only conclude that the actual purpose of the classification is to burden the group for its own

110. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020). *See also* *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

111. *Cf. Romer v. Evans*, 517 U.S. 620 (1996).

112. *Hecox*, 79 F.4th at 1022.

113. *Contra D.N. v. DeSantis*, No. 21-CV-61344, 2023 WL 7323078, at *9 (S.D. Fla. Nov. 6, 2023).

114. *Bostock*, 140 S. Ct. at 1743.

115. *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985); *Romer*, 517 U.S. at 634; William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 157 (2019).

116. *Contra D.N.*, 2023 WL 7323078, at *7.

sake.¹¹⁷ That is precisely the case with this new crop of state laws. Without access to girls' and women's sports, transgender girls and women are effectively barred from school sports entirely, at great cost to their health, education, and happiness. At the same time, the sweeping exclusion of all transgender girls and women, without regard to age, ability, or circumstance, from all girls' and women's sports at all levels of competition is so far removed from any purpose of actually protecting cisgender girls' sports opportunities that it must be understood for what it is: a scapegoating of transgender girls and women that the legislature sought to accomplish for its own sake.

Ultimately, the case for excluding transgender girls from girls' sports assumes that sex equality in sport is a zero-sum game in which transgender girls' (unproven) presumptive athletic advantage comes at the expense of maximizing cisgender girls' chances of winning. This logic stands in tension with the approach case law has taken elsewhere in considering what girls stand to gain from competition with and against talented elite athletes. When a highly talented (cisgender) female basketball player asserted a right to try out for the boys' basketball team, arguing that it would better develop her talent and ability and that she was insufficiently challenged on the girls' team, she lost the argument.¹¹⁸ Under the logic of Title IX, extending a right to the most talented female athletes to try out for the boys' team would deprive other girls of the opportunity to sharpen their skills by competing with and against the most talented female athletes.¹¹⁹ The resulting talent drain to girls' sports could hurt the development of girls' sports. Why, when a (presumptively) talented girl is transgender, does her presence on the girls' team suddenly register as a threat instead of an opportunity? Anti-transgender bias, rather than any real concern for girls' and women's equality in sport, provides the answer.

IV. CONCLUSION

True sex equality in sport is hindered, not advanced, by state laws excluding transgender girls and women from girls' and women's sports. One of the key lessons of feminism in recent decades is the importance of understanding women's issues intersectionally. Sidelining the least

117. *Romer*, 517 U.S. at 631–32; *Cleburne*, 473 U.S. at 446; *United States v. Windsor*, 570 U.S. 744, 770 (2013); WILLIAM D. ARAIZA, *ANIMUS: SHORT INTRODUCTION TO BIAS IN THE LAW* (2017).

118. See *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301 (1980) (Stevens, J., in chambers).

119. See BRAKE, *supra* note 73, at 23–26 (discussing the case law and underlying rationale on challenges to denying girls' tryout rights for boys' teams where there is a girls' team in that sport).

privileged girls and women from feminism's gains is never a good strategy for holding onto the successes of the women's rights movement.

In the transgender panic in sports, much more is at stake than access to sports. States' use of biological sex to set the boundaries of girls' and women's sports substitutes an ideological position for an evidence-based, medically sound approach to determining athletic eligibility. How courts respond to this, either deferentially or with the meaningful critical review that is required in an equal protection analysis, will determine the constitutionality of these laws. A similar tension between states' ideological commitments and sound medical evidence underlies other pending health-related constitutional controversies, such as state bans on gender-affirming health care and the regulation of reproductive health. On these issues, too, significant numbers of states have enacted laws and policies based on an ideology of biological essentialism that treats biology as destiny and denies individuals autonomy over their lived experience of sex and gender. A crucial issue in all these disputes is the proper role of courts in reviewing the medical and scientific evidence supporting state legislation. Recognizing this, the state of West Virginia, in defending its transgender exclusion law in the *B.P.J.* case, has argued for judicial deference to the legislature's judgment that, even without having gone through puberty, a transgender girl has an athletic advantage over cisgender girls.¹²⁰ The Ninth Circuit's opinion enjoining Idaho's similar law carefully and correctly explained why the medical and scientific evidence does not support such a sweeping exclusion.¹²¹ Wholesale judicial deference to such state pronouncements would conflict with equal protection doctrine and should be rejected in the constitutional challenges to these laws.

120. *B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220, 230 (S.D. W. Va. 2023).

121. *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023).