

Title Seven Ate Nine? Extending Bostock's Meaning of "Sex" from Title VII to Title IX

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NOTES

TITLE SEVEN ATE NINE? EXTENDING BOSTOCK'S MEANING OF "SEX" FROM TITLE VII TO TITLE IX

JULIA L. SHEA[†]

INTRODUCTION

When JayCee Cooper walked out onto the platform at a women's powerlifting competition for the first time, "everything else fell away: her years-long internal struggle over her gender identity, her decision to leave men's sports when she began transitioning, her doubts that she would ever feel safe if she returned to competitions."¹ Powerlifting was JayCee's way of feeling empowered in her own life, but after signing up for more competitions, she was told she could no longer compete because of a discriminatory policy that barred transgender women.² Transgender athletes play sports for the same reasons as anyone else, including improvements to physical and mental health.³ Yet, they face additional obstacles of hostility and exclusion that

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¹ Alex Berg, *Stuck on the Sidelines: A Transgender Powerlifter Fights for the Right to Compete*, NBC NEWS (Apr. 28, 2019, 4:11 AM EDT), <https://www.nbcnews.com/feature/nbc-out/stuck-sidelines-transgender-powerlifter-fights-right-compete-n998836> [<https://perma.cc/673A-X22C>].

² *Id.*

³ See James Factora, *Trans Inclusion in School Sports Doesn't Hurt Cisgender Girls, New Report Finds*, THEM (Feb. 8, 2021), <https://www.them.us/story/trans-inclusion-school-sports-study> [<https://perma.cc/66JR-54SF>]; *infra* notes 169–73 and accompanying text.

their cisgender counterparts have never dealt with.⁴ While discrimination happens in all areas of a transgender person's life, there has been recent legal progress barring such discrimination in the workplace.⁵ In June 2020, the Supreme Court of the United States decided *Bostock v. Clayton County*, which broadened Title VII of the Civil Rights Act of 1964's prohibition of employment discrimination on the basis of "sex" to include sexual orientation and gender identity.⁶ Thus, the Court broadened Title VII's interpretation of the phrase "on the basis of . . . sex" to protect transgender individuals.⁷ However, the Court expressly stated that its decision was limited to employment discrimination and declined to address whether this definition of "sex" would apply to other areas, such as student-athletics.⁸

This Note argues that *Bostock's* interpretation of "sex" should be extended to Title IX of the Education Amendments of 1972, which prohibits sex-based discrimination in any education program receiving federal funding. Additionally, this Note sets forth the constitutionality of various exclusionary policies, under different levels of scrutiny, by balancing the inclusion of transgender student-athletes with the underlying purpose of Title IX.⁹

Part I of this Note examines the Court's landmark decision in *Bostock*, the present situation for transgender students in athletics,¹⁰ and the purpose of Title IX¹¹ and its impact on women.¹² Specifically, Part I analyzes the current policies

⁴ See Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS (Feb. 8, 2021), <https://americanprogress.org/article/fair-play/> [<https://perma.cc/24G6-WK63>].

⁵ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1753 ("The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

⁹ See *infra* Part III.

¹⁰ See *Hecox v. Little*, 479 F. Supp. 3d 930, 943–44 (D. Idaho 2020); *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-CV-00201, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021).

¹¹ 20 U.S.C. § 1681.

¹² Haley Samsel, *Title IX Turns 45 Today. Its Impact Goes Beyond Women Playing Sports*, USA TODAY (June 23, 2017, 2:33 PM), <https://www.usatoday.com/story/college/2017/06/23/title-ix-turns-45-today-its-impact-goes-beyond-women-playing-sports/37433427/> [<https://perma.cc/38J2-MC94>].

implemented in different states¹³ and organizations,¹⁴ and examines how different federal courts have ruled on the constitutionality of anti-transgender restrictions.¹⁵ Part II balances the purpose of Title IX with the inclusion of transgender student-athletes,¹⁶ and ultimately argues that there is a stronger need for transgender student-athletes to participate on teams that match their gender identity.¹⁷ Finally, Part III examines anti-transgender policies that question the constitutionality of a broad definition of “sex.”¹⁸ This Part will analyze whether such policies will survive based on sex discrimination or an independent basis of discrimination, such as solely gender identity or transgender status.¹⁹

I. BACKGROUND

Title IX states, “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.”²⁰ While the original act did not address athletics, in 1987, the Civil Rights Restoration Act expanded the scope of Title IX to impliedly include sports.²¹ This additional law required collegiate athletic departments to comply with Title IX to ensure that universities were adequately representing both men’s and women’s sports.²² Title IX ensured that nondiscrimination in athletic programs was defined by a framework that allowed sex segregation in contact sports.²³ The regulations expressly allowed schools to offer separate competitive athletic programs

¹³ See *K-12 Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> [<https://perma.cc/5DAF-JPG4>] (last visited Mar. 2, 2023).

¹⁴ NCAA OFF. OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 12–13 (2011).

¹⁵ See *Hecox*, 479 F. Supp. 3d at 943–44; *Soule*, 2021 WL 1617206, at *1.

¹⁶ See *Factora*, *supra* note 3.

¹⁷ See *Goldberg*, *supra* note 4.

¹⁸ See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020).

¹⁹ See *id.*

²⁰ Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 373–75 (1972) (codified as amended at 20 U.S.C. §§ 1681–88 (2018)).

²¹ Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

²² Corinne Belkoff, *The Impact of Title IX on Women in Intercollegiate Sports Administration and Coaching*, 36 ENT. & SPORTS L. 45, 45 (2020).

²³ 34 C.F.R. § 106.41(b) (2020).

for their female and male students so long as those programs offered equitable opportunities.²⁴

Under Title IX, schools are required to: “(1) offer male and female students equal opportunities to play sports; (2) provide male and female athletes with equal benefits and services in their athletics programs; and (3) give male and female athletes their fair shares of athletic scholarship money.”²⁵ For a school to show that it is compliant with these Title IX requirements, it must satisfy one prong of a three-prong test.²⁶ First, a school may show that it provides comparable opportunities for female and male students to play sports.²⁷ Second, because female students have generally been given fewer athletic opportunities, the school may show that it has a continuing practice of expanding athletic opportunities for women.²⁸ Third, if the school is unable to offer its female students proportionate athletic opportunities, the school is still “fully meeting female athletes’ interests and abilities.”²⁹ While athletics were not originally contemplated in the drafting of Title IX, these final regulations have paved a path for women to participate and develop in sports and their subsequent futures.³⁰

²⁴ 34 C.F.R. § 106.41(c) (2020); see ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST BROWN ERA 134–35 (1986) (“Equality of opportunity for women students means not the *more or different is equal* resource allocation for other groups, but *equal treatment* or *equal access* at best.”).

²⁵ NAT’L WOMEN’S L. CTR., HOW TO COMPLY WITH TITLE IX ATHLETICS REQUIREMENTS: A PRIMER FOR SCHOOLS 1 (2007).

²⁶ *Id.*

²⁷ *Id.* (“Under [this] first prong, a school will be in compliance if, for example, female students are 48% of the student body and girls are 48% of the school’s athletes.”).

²⁸ *Id.*

²⁹ *Id.* However, courts have noted that this third prong does not allow schools to track the “relative interests” of female students when providing athletic opportunities. Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 6–7 (Deborah L. Brake, Martha Chamallas & Verna L. Williams, eds., 2021) [hereinafter Buzuvis, *Separate but Equal*].

³⁰ It is crucial to note, however, that because of the criticism that the Title IX regulations involving sports received, there were still inequalities drafted into the regulations. For instance, the final regulation does not require equal aggregate expenditures because of collegiate athletic departments’ concern about protecting resources for men’s athletics. See 34 C.F.R. § 106.41(c) (2020) (“Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section . . .”).

A. *Title IX's Purpose and Impact*

For centuries, women have been, and continue to be, “excluded from the universe of ‘all men’ presumably ‘created equal’” because of their limited opportunities due to economic inequalities and social misconceptions, both of which stem from narrowly drawn sex roles.³¹ Prior to the passage of Title IX in 1972, there were very few opportunities for female athletes.³² Importantly, Title IX attempted to halt “the continuation of corrosive and unjustified discrimination against women” in the American educational system.³³ Title IX’s purpose was to level the playing field for women.³⁴ As a result of Title IX, women were given the opportunity to earn athletic scholarships, which better enabled them to attend higher education institutions.³⁵

Title IX opened up opportunities for women to become “visible affirmations of what is possible, offering up strong, confident role models for future generations.”³⁶ Before Title IX, “[t]he National Collegiate Athletic Association (NCAA), which . . . had become the ruling body of college athletics, offered no athletic scholarships for women and held no championships for women’s teams.”³⁷ As a result of Title IX’s passage, from 1972 to 2016, participation in women’s sports has increased by 990% in high school athletics, and 545% in college athletics.³⁸ In comparison, before Title IX, only one out of every twenty-seven girls played high school sports, but in 2016, that ratio increased

³¹ SALOMONE, *supra* note 24, at 112, 135.

³² *Id.* at 134–35.

³³ 118 CONG. REC. 5803 (1972) (“[S]ex discrimination reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales.”).

³⁴ *See id.*

³⁵ *See* Bob Bowlsby, *Athletic Scholarships Change Lives*, BIG 12 (Oct. 11, 2015), https://big12championsforlife.com/wp-content/uploads/2015/10/Athletic_Scholarships_Change_Lives.pdf [<https://perma.cc/2EPV-4HYE>]. One in five collegiate student-athletes is a first-generation college student. *Id.*

³⁶ *See* Samsel, *supra* note 12; Beth A. Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Equal Funding to Women in Sports*, WORLD ECON. F. (Aug. 25, 2016), <https://www.weforum.org/agenda/2016/08/sustaining-the-olympic-legacy-women-sports-and-public-policy/> [<https://perma.cc/6GJP-5EE6>].

³⁷ *Title IX Enacted*, HISTORY, <https://www.history.com/this-day-in-history/title-ix-enacted> [<https://perma.cc/6TEH-N9R3>] (June 22, 2021).

³⁸ Brooke-Marciniak & Varona, *supra* note 36.

to two out of every five girls.³⁹ Thus, Title IX has had a consequential impact on women's athletics.

B. The Meaning of "Sex" After Bostock

Title VII, like Title IX, makes it unlawful to discriminate against an individual on the basis of sex.⁴⁰ Courts have been, and continue to be, tasked with the challenge of interpreting what exactly discrimination on the basis of one's sex means.⁴¹ In *Bostock*, the Supreme Court held that Title VII prohibits employment discrimination against transgender employees.⁴² Notably, the Court examined the term "sex" and how it is defined within Title VII.⁴³ The Court reasoned that when an employer discriminates against an individual on the basis of their sexual orientation or gender identity, that employee violates Title VII "because of" that individual's sex.⁴⁴ To answer the question of how "sex" is defined within Title VII, the Court consolidated and examined three cases: two involved discrimination based on sexual orientation,⁴⁵ and one involved discrimination based on gender identity.⁴⁶

The case involving discrimination based on gender identity began with a Title VII action brought by the Equal Employment Opportunity Commission ("EEOC") on behalf of Aimee Australia Stephens.⁴⁷ Ms. Stephens is a transgender woman who was "assigned male at birth."⁴⁸ She is a former employee of R.G. &

³⁹ *Title IX and the Rise of Female Athletes in America*, WOMEN'S SPORTS FOUND. (Sept. 2, 2016), <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/> [<https://perma.cc/AD35-4M2H>].

⁴⁰ 42 U.S.C. § 2000e-2(a).

⁴¹ See *Hecox v. Little*, 479 F. Supp. 3d 930, 974 (D. Idaho 2020); *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-CV-00201, 2021 WL 1617206, at *10 n.16 (D. Conn. Apr. 25, 2021).

⁴² *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

⁴³ *Id.* at 1737–38.

⁴⁴ *Id.* Title VII makes it unlawful for an employer "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 . . . sex." 42 U.S.C. § 2000e-2(a).

⁴⁵ *Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 F. App'x 964, 964 (11th Cir. 2018), *rev'd sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018), *aff'd sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

⁴⁶ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018), *aff'd sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). This Note will primarily focus on the Court's discussion of sex regarding gender identity.

⁴⁷ *Id.* at 566.

⁴⁸ *Id.* at 567.

G.R. Harris Funeral Home and was fired because of her gender identity.⁴⁹ At the time of Ms. Stephens's hire in late 2007, she had presented as a male and still went by her "deadname,"⁵⁰ William Anthony Beasley Stephens.⁵¹ Ms. Stephens recalled knowing that she was a girl when she was just five years old, but she presented publicly as a male her entire life, which made her feel "imprisoned in a body that d[id] not match [her] mind."⁵² Ms. Stephens began therapy to address the mental health issues she dealt with "because of the difference between the sex she understood herself to be and the sex she was assigned at birth."⁵³ She was diagnosed with gender dysphoria,⁵⁴ and doctors recommended that she take steps to live consistently with her gender identity as a woman.⁵⁵ In July 2013, Ms. Stephens provided her employer with a letter describing her lifelong struggle with a gender identity disorder and informed him that "she [had] 'decided to become the person that [her] mind already [was].'"⁵⁶ Approximately two weeks after receiving Ms. Stephens's letter, her employer terminated her employment and specified that the reason for her termination was because she "was no longer going to represent [herself] as a man."⁵⁷

In Ms. Stephens's case, the Supreme Court had to determine whether an employer can legally fire or otherwise discriminate against an employee for being transgender.⁵⁸ The Court held that "[a]n employer who fires an individual for being . . . transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex

⁴⁹ *Id.* at 566.

⁵⁰ A deadname is "the name that a transgender person was given at birth and no longer uses upon transitioning." *Deadname*, MERRIAM-WEBSTER, <https://www.merriamwebster.com/dictionary/deadname> [<https://perma.cc/AC2W-83DF>] (last visited Mar. 2, 2023).

⁵¹ *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 567.

⁵² Brief for Respondent Aimee Stephens at 6, *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (No. 18-107) (alterations in original).

⁵³ *Id.*

⁵⁴ Gender dysphoria is "a distressed state arising from conflict between a person's gender identity and the sex the person has or was identified as having at birth." *Gender Dysphoria*, MERRIAM-WEBSTER, <https://www.merriamwebster.com/dictionary/gender%20dysphoria> [<https://perma.cc/EM7Z-5NW7>] (last visited Mar. 2, 2023).

⁵⁵ Brief for Respondent Aimee Stephens, *supra* note 52, at 6–7.

⁵⁶ *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 568 (second alteration in original).

⁵⁷ Brief for Respondent Aimee Stephens, *supra* note 52, at 9.

⁵⁸ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

plays a necessary and undisguisable role in the decision,” which is exactly the discrimination that Title VII forbids.⁵⁹ First, this case turned on the dispute between the parties on how broadly or narrowly the Court defined the term “sex.”⁶⁰ The Court ultimately adopted the employer’s argument stating that “the term ‘sex’ in 1964 referred to ‘status as either male or female [as] determined by reproductive biology.’”⁶¹

Nevertheless, the Court examined how sex is defined within Title VII.⁶² The Court also analyzed the language of Title VII which states “*because of sex*,”⁶³ and explained that this means “by reason of” or “on account of.”⁶⁴ The Court reasoned that there is no way for an employer to discriminate against someone who is transgender without discrimination in part *because of* an applicant’s sex.⁶⁵ If an employer fires a transgender woman who was identified as a male at birth, but “retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”⁶⁶ In this scenario, the employee’s sex played “an unmistakable and impermissible role in the discharge decision” and her gender identity was “inextricably bound up with sex.”⁶⁷

However, the Court explicitly limited its decision to Title VII’s employment context; it did not intend to address or include bathrooms, locker rooms, or “anything else of the kind.”⁶⁸ Justice Alito, however, wrote a dissent to discuss the possible extension of the Court’s decision into these other areas.⁶⁹ Justice Alito made a slippery-slope argument, maintaining that the inclusion of gender identity within the definition of sex could have “far-reaching consequences” that extend to other federal laws dealing with “sex,” like Title IX.⁷⁰ He feared that if the Court extended

⁵⁹ *Id.*

⁶⁰ *Id.* at 1738–39.

⁶¹ *Id.* at 1739 (alteration in original).

⁶² *Id.*

⁶³ 42 U.S.C. § 2000e; see *Bostock*, 140 S. Ct. at 1739 (emphasis added).

⁶⁴ *Bostock*, 140 S. Ct. at 1739 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

⁶⁵ *Id.* at 1746.

⁶⁶ *Id.* at 1741.

⁶⁷ *Id.* at 1741–42.

⁶⁸ *Id.* at 1753.

⁶⁹ *Id.* at 1778–83 (Alito, J., dissenting).

⁷⁰ *Id.* at 1778 (Alito, J., dissenting).

Bostock's definition of sex to Title IX, the result would “force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male.”⁷¹ Therefore, while *Bostock's* holding is limited to Title VII, Justice Alito’s dissent recognizes a possible extension to Title IX.⁷² Consequently, transgender advocates may use *Bostock* to advocate for more transgender inclusive policies under Title IX.

C. *The Current Situation for Transgender Athletes*

The debate over transgender athletes in sports is one that has deeply divided women’s rights advocates.⁷³ Advocates on opposing sides have found it difficult to strike a balance between fairness and inclusion, especially among girls’ and women’s sports.⁷⁴ This difficulty is exhibited by the number of different policies amongst states, organizations, and courts across the country.⁷⁵

1. Current NCAA Policy

The NCAA continually adapts its transgender policy in an attempt to find the balance between providing an inclusive path for everyone, including transgender student-athletes, and preserving the integrity of women’s sports.⁷⁶ In January 2022, the NCAA announced a shift from its organizational policy to one that more closely resembles that of professional and international sports.⁷⁷ Previously, the NCAA placed varying

⁷¹ *Id.* at 1779–80 (Alito, J., dissenting).

⁷² *Id.*

⁷³ Kathleen Megan, *Transgender Sports Debate Polarizes Women’s Advocates*, CONN. MIRROR (July 22, 2019, 5:00 AM), <https://ctmirror.org/2019/07/22/transgender-issues-polarizes-womens-advocates-a-conundrum/> [<https://perma.cc/8AYN-65UE>].

⁷⁴ *Id.*

⁷⁵ See *supra* Sections I.C.i–iii.

⁷⁶ See *NCAA Transgender Policy Background, Resources*, NCAA (Apr. 26, 2021, 2:00 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-trans-gender-policy-background-resources> [<https://perma.cc/4GXJ-CDYX>].

⁷⁷ *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022, 8:41 PM), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> [<https://perma.cc/SJ87-7BQH>].

limitations based on an individual's sex, gender identity, and hormone treatment related to gender transition.⁷⁸

Prior to the most recent policy adoption in January 2022, the NCAA had one overarching standard for all sports. First, a transgender athlete who was not receiving any hormone treatment related to gender transition could participate on a team that aligned with their assigned sex at birth.⁷⁹ A transgender male student-athlete who was not taking testosterone was able to participate on either a men's or women's team.⁸⁰ In contrast, a transgender female who was not taking hormone treatments could only compete on a men's team.⁸¹ Additionally, a transgender male who had been diagnosed with gender dysphoria and had received a medical exception for testosterone treatment was not eligible to participate on a women's team, but could compete on a men's team.⁸² Whereas, a transgender woman receiving testosterone suppression medication for gender dysphoria could continue to compete on a men's team but was not able to compete on a women's team until completing one calendar year of the treatment.⁸³ Finally, a transgender student-athlete was also required to keep close communication with the athletic director about the process or plans to initiate hormone therapy as a part of gender transition to avoid challenges to their participation in their sport during the season.⁸⁴

The NCAA's current policy consists of a sport-by-sport approach to transgender participation, which purported purpose is to "preserve[] opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete."⁸⁵ This new policy evaluates eligibility based on the policy of the national governing body of that sport, but if there is no national governing body, the policy of the sport's international federation will govern.⁸⁶ According to NCAA president, Mark Emmert, this updated policy "provides consistency and further strengthens the relationship between college sports and the U.S.

⁷⁸ NCAA OFF. OF INCLUSION, *supra* note 14, at 12–13.

⁷⁹ *Id.* at 13.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 14.

⁸⁵ *Board of Governors Updates Transgender Participation Policy*, *supra* note 77.

⁸⁶ *Id.*

Olympics,” which is important because “[a]pproximately 80% of the U.S. Olympians are either current or former college athletes.”⁸⁷

2. High School Policies

High school policies regarding transgender student-athletes are not nearly as uniform as collegiate policies because there is no single governing organization like the NCAA.⁸⁸ Currently, there are seventeen state high school athletics associations that “have friendly policies that help facilitate the full inclusion of trans and nonbinary students in high school athletics.”⁸⁹ Another six states issued guidance that excludes transgender and nonbinary student-athletes by requiring those students to participate on teams based on their sex assigned at birth.⁹⁰ An additional three states completely bar transgender students from participation on teams that align with their gender identity unless they have undergone sex-reassignment surgery.⁹¹ There are sixteen states where discriminatory policies create additional barriers for transgender student-athletes to compete in sports, such as documentation of surgery or other confidential medical information.⁹² The ten remaining states “have not issued any statewide guidance on best practices that should be implemented in schools leaving students to navigate a patchwork of policies that differ between local education agencies and schools in the state.”⁹³ Thus, the lack of uniform guidance across the country has resulted in inconsistent policies for inclusion and various groups alleging Title IX violations.

⁸⁷ *Id.*

⁸⁸ *See K-12 Policies, supra* note 13.

⁸⁹ *Id.* Washington D.C., in addition to California, Colorado, Connecticut, Florida, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Carolina, Vermont, and Washington are all states that have friendly policies that help facilitate the full inclusion of transgender athletes. *Id.*

⁹⁰ *Id.* Alabama, Arkansas, Georgia, Idaho, New Mexico, and Texas require transgender student-athletes to participate on a team based on birth certificates or sex assigned at birth. *Id.*

⁹¹ *Id.* Indiana, Kentucky, and Louisiana require sex reassignment surgery to compete on the team of the student’s gender identity. *Id.*

⁹² *Id.* Arizona, Illinois, Iowa, Maine, Maryland, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Virginia, Wisconsin, and Wyoming all place discriminatory restrictions on transgender participation. *Id.* For a more specific look at the discriminatory policies of the individual states, see *id.*

⁹³ *Id.* Alaska, Hawaii, Kansas, Michigan, Mississippi, Montana, Pennsylvania, Tennessee, and West Virginia are all states that do not have statewide guidance. *Id.*

3. Case Law

In an attempt to extend the definition of “sex” under Title IX, parties have turned to the *Bostock* decision for support.⁹⁴ However, current case law has not yet reached a decision on the merits and thus has not yet decided if *Bostock*'s definition of sex would apply under Title IX.⁹⁵ There have been only two federal district court cases involving transgender athletes in women's sports, which demonstrate the clash of arguments between fairness and inclusion.⁹⁶ A transgender athlete challenging a state policy *excluding* transgender athletes brought one case,⁹⁷ and a group of cisgender female athletes challenging a policy that *includes* transgender athletes brought the other.⁹⁸

a. *Hecox v. Little*

Hecox v. Little involves an action brought by two plaintiffs: Lindsay Hecox, a transgender woman who enrolled at Boise State University in the fall of 2020 and intended to try out for the women's cross-country and track teams; and Jean and John Doe on behalf of their minor daughter, Jane Doe, a cisgender girl who competed on the Boise State High School soccer and track teams.⁹⁹ Plaintiffs filed suit against the Idaho Governor, Superintendent of Public Instruction, and Idaho state educational institutions and officials for signing Idaho's Fairness in Women's Sports Act (“Act”).¹⁰⁰ Plaintiffs claimed that the Act violated the Equal Protection Clause, as applied and on its face, and Title IX “by categorically barring transgender women from participating in women's sports.”¹⁰¹ Additionally, Plaintiffs raised concerns that the law established a dispute process that allowed an undefined class of individuals to challenge student-athletes' sexes, thereby requiring students to undergo potentially invasive sex-verification procedures.¹⁰²

⁹⁴ See *Hecox v. Little*, 479 F. Supp. 3d 930, 974 (D. Idaho 2020); *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-CV-00201, 2021 WL 1617206, at *10 n.16 (D. Conn. Apr. 25, 2021).

⁹⁵ See *Hecox*, 479 F. Supp. 3d at 988; *Soule*, 2021 WL 1617206, at *1.

⁹⁶ See *Hecox*, 479 F. Supp. 3d at 943–44; *Soule*, 2021 WL 1617206, at *1.

⁹⁷ *Hecox*, 479 F. Supp. 3d at 944–45.

⁹⁸ See *Soule*, 2021 WL 1617206, at *1 n.1.

⁹⁹ *Hecox*, 479 F. Supp. 3d at 946.

¹⁰⁰ *Id.* at 944, 946–47.

¹⁰¹ *Id.* at 945.

¹⁰² *Id.* at 944–45.

Before the Act's passage, the Idaho High School Activities Association ("IHSAA") governed all of Idaho's high school interscholastic athletics.¹⁰³ The IHSAA policy allowed for transgender girls in K-12 athletics to participate on girls' teams "after completing one year of hormone therapy suppressing testosterone under the care of a physician for purposes of gender transition."¹⁰⁴ The IHSAA policy was akin to the NCAA policy at that time, which also allowed transgender women to compete on women's teams after one year of hormone therapy.¹⁰⁵ The Act applied its policies to generally all public institutions and trumped the IHSAA and NCAA policies in Idaho.¹⁰⁶ Under the Act, all public institutions were required to designate their sports based on biological sex, and explicitly mandated that "sports designated for females, women, or girls shall not be open to students of the male sex."¹⁰⁷ Moreover, the Act included a dispute process that permitted an undefined a class of individuals, "who may wish to 'dispute' any transgender or cisgender female athlete's sex," to do so.¹⁰⁸ However, the Act did not require an individual to act in good faith when bringing such a challenge.¹⁰⁹

Hecox had undergone hormone therapy, and under the current NCAA rules, she was eligible to compete at NCAA events in September of 2020.¹¹⁰ Doe, although she is cisgender, was worried that her competitors may dispute her sex under the Act "[b]ecause most of her closest friends are boys, she has an athletic build, rarely wears skirts or dresses, and has at times been thought of as 'masculine.'"¹¹¹ Plaintiffs moved for a preliminary injunction preventing enforcement of the Act pending trial on merits.¹¹² Conversely, two cisgender female

¹⁰³ *Id.* at 947.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; see *supra* text accompanying note 83.

¹⁰⁶ IDAHO CODE ANN. § 33-6203 (West 2020) (the Act shall apply to all "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, [or] a public institution of higher education."); *Hecox*, 479 F. Supp. 3d at 948.

¹⁰⁷ IDAHO CODE ANN. § 33-6203 (West 2020); *Hecox*, 479 F. Supp. 3d at 948.

¹⁰⁸ *Hecox*, 479 F. Supp. 3d at 948–49, 966.

¹⁰⁹ *Id.* at 966 ("[T]he Act currently provides that essentially anyone can challenge another female athlete's sex and protects any challenger from adverse action regardless of whether the dispute is brought in good faith or simply to bully or harass.").

¹¹⁰ *Id.* at 946.

¹¹¹ *Id.*

¹¹² *Id.* at 944.

track athletes at Idaho State University moved to intervene in support of the Act, and Idaho officials moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim.¹¹³ The United States District Court for the District of Idaho ultimately granted Hecox's motion for a preliminary injunction, which enjoined the State from enforcing this law without deciding whether it violated Title IX.¹¹⁴ The court arrived at this decision because it believed that there was a "likelihood of success on the merits," and if the motion were not granted, there would be irreparable harm to Plaintiffs' athletic opportunities.¹¹⁵ Defendants filed an appeal of the court's order to the Ninth Circuit, which resulted in remand to the district court to determine whether Hecox's claim was now moot.¹¹⁶ This case demonstrates that anti-transgender legislation not only impacts transgender women, but may also directly harm all women.¹¹⁷

b. *Soule v. Connecticut Association of Schools, Inc.*

Soule v. Connecticut Association of Schools, Inc. involves an action brought by a group of three cisgender female high school student-athletes against the Connecticut Interscholastic Athletic Conference ("Conference") for allegedly violating Title IX.¹¹⁸ The plaintiffs claimed that the Conference's policies allowed transgender female athletes to unfairly dominate track and field events when those events were intended for cisgender female competitors.¹¹⁹ The Trump administration supported the lawsuit and issued guidance that interpreted Title IX in line with the

¹¹³ *Id.* at 947, 950.

¹¹⁴ *Id.* at 988–89.

¹¹⁵ *Id.* at 968, 971 ("If the Court withholds its decision, both Plaintiffs risk being forced to endure a humiliating dispute process and/or invasive medical examination simply to play sports."). Without the injunction, *Hecox* would have been "categorically barred from participating on BSU's women's teams this fall and will also lose at least a season of NCAA eligibility, which she can never get back." *Id.* at 968.

¹¹⁶ Remand Order at 2, *Hecox*, 479 F. Supp. 3d 930 (No. 143). At the time of the Ninth Circuit's order, Hecox was no longer enrolled at Boise State University but declared that she would re-enroll at the university in January 2022 after gaining in-state residency. *Id.* at 2. Doe's claim was undisputed as moot because she had graduated from high school and planned on attending college out of state. *Id.* at 2 n.1.

¹¹⁷ *Hecox*, 479 F. Supp. 3d at 987.

¹¹⁸ *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-CV-00201, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021).

¹¹⁹ *Id.*

plaintiffs' arguments.¹²⁰ This case also caught the attention of the U.S. Department of Education, Office for Civil Rights, which found that the transgender participation policy “denied athletic benefits and opportunities to female student-athletes.”¹²¹

The United States District Court for the District of Connecticut ultimately dismissed the action on the ground of mootness and did not reach the merits.¹²² The court held that the issue was moot because the transgender athletes in question had already graduated from high school and would not participate in the Conference's events, and therefore, there was nothing left to decide.¹²³ After this case, the ACLU issued a statement that “it intended to challenge any legislation that prohibited transgender[] athletes from participating in interscholastic sports, so future litigation is likely.”¹²⁴ Although the courts have not yet been able to issue guidance on the merits, with the increasing policy clashes across the country, these issues will likely persist.

II. THE STATUTORY QUESTION OF WHETHER TO EXTEND THE MEANING OF “SEX” FROM TITLE VII TO TITLE IX

The Court must eventually decide whether Title VII's definition of sex, which includes gender identity, should be extended to Title IX. At first glance, it seems as though there is no issue as to why the Court should not extend this definition. However, there are countervailing interests relevant to Title IX that were not apparent in Title VII discussion.¹²⁵ Title IX created opportunities for women that were nonexistent before its enactment, specifically in the sports arena.¹²⁶

¹²⁰ Martin D. Edel & Yara Kass-Gergi, *Making the Roster: Conflicting Title IX Interpretations Present Challenges for Transgendered Athlete Participation*, NAT'L L. REV. (June 25, 2021), <https://www.natlawreview.com/article/making-roster-conflict-ing-title-ix-interpretations-present-challenges-transgendered> [https://perma.cc/5R5K-R5KV].

¹²¹ Revised Letter of Impending Action from U.S. Dep't of Educ., Off. for C.R., to Conn. Interscholastic Athletic Conf., Glastonbury Pub. Schs., Bloomfield Pub. Schs., Canton Pub. Schs., Cromwell Pub. Schs., Danbury Pub. Schs., & Hartford Pub. Schs., (Aug. 31, 2020), <https://adfflegal.org/sites/default/files/2020-09/Soule%20v.%20Connecticut%20Association%20of%20Schools%20-%20U.S.%20DOE%20Office%20for%20Civil%20Rights%20revised%20letter%20of%20impending%20action.pdf> [https://perma.cc/47KD-Z766].

¹²² *Soule*, 2021 WL 1617206, at *1.

¹²³ *Id.* at *4.

¹²⁴ Edel & Kass-Gergi, *supra* note 120.

¹²⁵ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020).

¹²⁶ See *supra* Section I.A.

A. *Legislative Intent*

Opponents of a broad definition of sex subscribe to the view that one's biological sex is much more relevant to their athletic performance than their work capabilities—so much so, that inclusion is outweighed by so-called fairness. This counterargument, supported by original legislative intent for enacting Title IX, is admittedly more relevant than it was in the analysis of Title VII.¹²⁷ For athletics, the reasoning behind the separation of biological sexes was the physical differences between biological males and females, which could create unfair advantages.¹²⁸ On the contrary, no parallel argument could have been applied to Title VII regarding employment.¹²⁹ Many sports involve physical contact in which strength, speed, and other physical characteristics help or hinder performance and competition, which is not true for most employment.¹³⁰ Those who oppose a broad definition of sex under Title IX, argue that the Court has “found it appropriate to look to other evidence of ‘congressional intent,’ including legislative history,” when there is ambiguity in the terms of a statute.¹³¹ According to those opponents, legislative history shows that the athletics regulations allow sex segregation if it is “based upon competitive skill or the activity involved is a contact sport.”¹³² Those opponents may argue the same point that the employers in *Bostock* did, that is, “[L]egislators only intended expected applications or that a statute’s purpose is limited to achieving applications foreseen at the time of enactment,” meaning merely biological sex.¹³³ However, the Court already rejected this argument by reasoning that “[o]ften lurking just behind such objection[] resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group.”¹³⁴ The Court also

¹²⁷ See *Bostock*, 140 S. Ct. at 1753.

¹²⁸ See 34 C.F.R. § 106.41(b) (2020).

¹²⁹ For a discussion on the insufficiency of privacy concerns in school restrooms and how they do not sufficiently relate to restrictions on transgender students to use the restroom that matches their gender identity, see *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613–15 (4th Cir. 2020).

¹³⁰ See NSCA’s Guide to Tests and Assessments, *Sport Performance and Body Composition*, NAT’L STRENGTH & CONDITIONING ASS’N, <https://www.nsc.com/education/articles/kinetic-select/sport-performance-and-body-composition/> [https://perma.cc/M8NC-DNHR] (last visited Mar. 2, 2023).

¹³¹ *Bostock*, 140 S. Ct. at 1776 (Alito, J., dissenting).

¹³² 34 C.F.R. § 106.41(b) (2020).

¹³³ *Bostock*, 140 S. Ct. at 1750.

¹³⁴ *Id.* at 1751.

stated that “whether a specific application was anticipated by Congress ‘is irrelevant’” when the statutory text is unambiguous.¹³⁵

Additionally, from a policy standpoint, this opposition argument ignores the nuances of different sports and the different skills each sport requires to be a successful athlete.¹³⁶ For example, in certain sports, such as track and field or football, the physical-biological differences between females and males are more apparent.¹³⁷ Still, the level of relevance of biological differences varies widely based on the sport.¹³⁸ In sports such as equestrian competition or shooting, the biological difference that results in differing strength or size between females and males is entirely irrelevant to the performance score.¹³⁹ Sitting in between either end of the spectrum is a sport like soccer.¹⁴⁰ In soccer, physical characteristics are relevant, but biological differences have created stylistic differences such that physical dominance would not necessarily result in athletic success.¹⁴¹ Physical differences between the sexes contribute to vastly different playing styles and qualities.¹⁴² An individual playing on a team of one biological sex would likely have to completely change their approach in order to succeed within that team of the other sex.¹⁴³ For example, because females have smaller lung capacity than their male counterparts, women’s soccer is a collaborative effort to move the ball efficiently around the field for ninety minutes.¹⁴⁴ Furthermore, women soccer players are trained extensively on shorter distance passing to move the ball quickly and cohesively, whereas men take on individual battles

¹³⁵ *Id.* (quoting Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 2012 (1998)).

¹³⁶ Lexa W. Lee, *How Do Men and Women Differ Athletically?*, SPORTSREC (Dec. 11, 2018), <https://www.sportsrec.com/6580144/how-do-men-and-women-differ-athletically> [<https://perma.cc/5LV2-6FNA>].

¹³⁷ *See id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Alex McIlvaine, *Comparing the U.S. Men and Women’s Teams’ Playing Styles*, SOCCER POL., <https://sites.duke.edu/wcwp/tournament-guides/world-cup-2015-guide/playing-style-differences/united-states-women-vs-men/> [<https://perma.cc/Q2QU-CGM6>] (last visited Mar. 2, 2023).

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *Id.*

to advance on the field.¹⁴⁵ This collaborative play between the eleven athletes on the field therefore minimizes the advantages that *one* individual *may* possess.¹⁴⁶

Additionally, one athlete who has been stuck at the forefront of this fairness and inclusion debate is the University of Pennsylvania swimmer, Lia Thomas.¹⁴⁷ Opponents of inclusion have used Thomas as an example for why it would be unfair for transgender women to compete in women's leagues, pointing to her collegiate swimming success following her transition.¹⁴⁸ Many of these opponents purport to support Thomas in her right to live her life authentically, but that support does not extend to the pool, fearing an unfair advantage over competition.¹⁴⁹ Opponents argue that Thomas's success in competitive women's swimming solely to her "biological advantage," while conveniently ignoring the success she earned in her swimming career before her transition.¹⁵⁰ Before her transition, Thomas spent her freshman and sophomore years participating on the men's swim team, and while opponents downplay her previous success, she was already excelling in a competitive collegiate environment.¹⁵¹ As a freshman, Thomas set the fifth-fastest men's time in the 1,000-yard freestyle for the season, while also being in the top 100 times in the 500-yard freestyle and the 1,650-yard freestyle.¹⁵² Another factor that is often ignored when

¹⁴⁵ Arve Vorland Pedersen et al., *Scaling Demands of Soccer According to Anthropometric and Physiological Sex Differences: A Fairer Comparison of Men's and Women's Soccer*, FRONTIERS PSYCH., Apr. 9, 2019, at 6–7.

¹⁴⁶ See *id.* at 2, 9.

¹⁴⁷ Eric Levenson, *How an Ivy League Swimmer Became the Face of the Debate on Transgender Women in Sports*, CNN (Mar. 22, 2022, 1:10 PM EDT), <https://www.cnn.com/2022/02/22/us/lia-thomas-transgender-swimmer-ivy-league> [https://perma.cc/D9T2-FJJ4].

¹⁴⁸ *Id.*

¹⁴⁹ Jacob Lev, *16 UPenn Swimmers Ask School Not to Challenge Transgender Policy That Could Block Teammate Lia Thomas from Competing*, CNN (Feb. 4, 2022, 1:20 PM EST), <https://www.cnn.com/2022/02/04/us/lia-thomas-ncaa-transgender-policy-letter/index.html> [https://perma.cc/5F77-6U98].

¹⁵⁰ Levenson, *supra* note 147.

¹⁵¹ *Id.*

¹⁵² *Id.*; NCAA Division I: Top Times Report, USA SWIMMING, <https://www.usaswimming.org/times/otherorganizations/ncaa-division-i/top-times-report> [https://perma.cc/37ZS-DNHX] (to find, choose "Individual" in "Time Type"; then choose "All" from "Conference" dropdown; then choose "Male" under "Gender"; then choose "2017-2018" from "Competition Year" dropdown; then select the "Specified Event" box; then select "1000" from the "Distance" dropdown, "FR" from the "Stroke" dropdown, and "SCY" from the "Course" dropdown; then click "FIND TIMES" box) (last visited Mar. 2, 2023). Lia continued to improve her times into her

discussing Thomas's recent success is her improved mental health, and how an athlete's mental health can substantially impact her performance.¹⁵³ Unlike environmental performance inhibitors, which impact athletes equally, psychological impediments are individualized and affect athletes' relative performance at significantly different rates.¹⁵⁴ Athletes who overcome these psychological hurdles are able to minimize any limitation on their relative performance, making it much easier to perform optimally.¹⁵⁵ While Thomas's absolute performance and race times decreased as a result of the hormone replacement therapy, her proportionate relative performance increased, which is explained by the positive mental and emotional changes that came along with her transition.¹⁵⁶

Additionally, watering down an athlete's ability to their physical build and testosterone levels perpetuates an outdated stereotype of what it means to be a woman.¹⁵⁷ The view that physical biology is the only deciding factor in what makes a successful athlete reinforces the idea that female athleticism is not the norm.¹⁵⁸ Over time, there have been evolving societal changes, allowing women to be treated as more than two-dimensional characters with generalized interests and abilities in athletics.¹⁵⁹ However, those who do not support the inclusion of transgender women in women's sports often resort to those

sophomore year. Levenson, *supra* note 147 ("Thomas took second place at the 2019 Ivy League championships in the men's 500-yard, 1,000-yard and 1,650-yard freestyle, shaving seconds off her earlier times.").

¹⁵³ Chris J. Gee, *How Does Sport Psychology Actually Improve Athletic Performance? A Framework to Facilitate Athletes' and Coaches' Understanding*, 34 BEHAV. MODIFICATION 386, 393 (2010).

¹⁵⁴ *Id.* at 397. An athlete's "absolute performance" refers to her "theoretical optimal performance" while "relative performance" recognizes the specific competition performance including the factors that impact the athlete's ability at any given time. *Id.* at 389, 391.

¹⁵⁵ For an in-depth explanation on how an athlete's minimization of psychological impediments can result in stronger performance than a competitor who has an overall higher absolute performance, see *id.* at 396–98. ("Individuals who are able to minimize or control the effects of these psychological impediments (e.g., elevated anxiety, lowered confidence, distractions, and motivation) will experience a much lower drop in their absolute performance than will individuals who succumb to these psychological impediments.").

¹⁵⁶ See Good Morning America, *Swimmer Lia Thomas Breaks Silence About Backlash, Future Plans* | GMA, YOUTUBE (May 31, 2022), <https://www.youtube.com/watch?v=wMrZ2T46ZXs> [<https://perma.cc/F5AC-WW7W>].

¹⁵⁷ See Buzuvis, *Separate but Equal*, *supra* note 29, at 12–14.

¹⁵⁸ *Id.* at 13.

¹⁵⁹ *Id.* at 8–9.

outdated notions when they refuse to recognize such individuals by how they identify.¹⁶⁰

Exclusion of transgender women from women's sports teams inhibits them from being recognized as who they are.¹⁶¹ Title IX is meant to protect women from sex discrimination, and after *Bostock*, exclusion of transgender women from women's sports, results in discrimination "by reason of" their sex and their deviation from the outdated generalizations of femininity.¹⁶² The hostility towards transgender women participating on women's sports stems from the idea that women's athletics is an accommodation because of "inferior athleticism."¹⁶³ The exclusion of transgender girls and women based on testosterone levels also belittles the accomplishments of cisgender women by whittling their success down to limited ability that could never compare to someone with higher levels of testosterone.

B. *Usurpation of Opportunities in Women's Sports*

The argument that inclusion of transgender women and girls will usurp access to athletics for cisgender women and girls is also not supported by population statistics.¹⁶⁴ First, only about 1.4 million, approximately 0.6% of adults in the United States, openly identify as transgender.¹⁶⁵ In just high school alone, 3.2 million girls participated on some athletic team in the 2021–22 school year.¹⁶⁶ The population of transgender girls and women interested in sports is much too small for their inclusion to result in an usurpation of opportunities for cisgender girls and women.¹⁶⁷ The objective of anti-transgender policies is not to preserve opportunities for cisgender girls to participate in sports, but instead to "prevent[] a transgender girl from potentially depriving a cisgender girl of the opportunity to *win*."¹⁶⁸

¹⁶⁰ See *id.* at 10–11, 20.

¹⁶¹ See *id.* at 20.

¹⁶² *Id.* at 9–10, 20; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020).

¹⁶³ See Buzuvis, *Separate but Equal*, *supra* note 29, at 20.

¹⁶⁴ See ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016).

¹⁶⁵ *Id.* This statistic is of *all* transgender individuals and this population does not identify which of the transgender people are interested in playing sports.

¹⁶⁶ Maya Riser-Kositsky & Holly Peele, *Statistics on School Sports: How Many Students Play Sports? Which Sports Do They Play?*, EDUC. WEEK (Sept. 28, 2022), <https://www.edweek.org/leadership/statistics-on-school-sports-how-many-students-play-sports-which-sports-do-they-play/2021/07> [<https://perma.cc/US5R-PMYL>].

¹⁶⁷ Buzuvis, *Separate but Equal*, *supra* note 29, at 21.

¹⁶⁸ *Id.* at 21–22 (emphasis added).

First, this objective assumes that the only value of sports comes from winning, ignoring other impacts sports can have on an athlete's life.¹⁶⁹ Sports require "memorization, repetition and learning," skills directly applicable to academics; they teach collaborative and problem-solving skills; and they can improve one's self-esteem, mental health, and physical health.¹⁷⁰ Title IX's purpose was to increase opportunity for women, not specifically to win a game, but to succeed in a society that has historically shut them out.¹⁷¹ By excluding transgender women from Title IX's reading, we are not fulfilling that duty owed to all women.¹⁷² The inclusion of transgender women and girls in sports helps all transgender people by increasing the visibility of successful transgender people in a society that has historically been prejudiced against them.¹⁷³ Title IX is meant to create opportunities beyond sports and education, such as permitting women to live in an equitable world.¹⁷⁴ The benefits of inclusion far outweigh the argued, but unsupported, disadvantages of cisgender girls not having the opportunity to win a game, match, or race.

Second, this position exudes bias and prejudice towards transgender women by relating their success to their size or hormone levels, an argument that would not be employed against a six-foot-tall cisgender girl with higher-than-average testosterone levels in her blood. This view continues to put forth a narrow and outdated "definition of female that disregards intersectional feminists' emphasis on women's multiple, simultaneous, and diverse identities and fails to connect the

¹⁶⁹ *The Mental Benefits of Sport*, ACTIVE NORFOLK (May 7, 2021), <https://www.activenorfolk.org/2021/05/mental-benefits-of-sport/> [<https://perma.cc/QL7N-JTMH>].

¹⁷⁰ *Benefits of Sports for Adolescents*, MU HEALTH CARE, <https://www.muhealth.org/conditions-treatments/pediatrics/adolescent-medicine/benefits-of-sports> [<https://perma.cc/PW3G-27RG>] (last visited Mar. 2, 2023).

¹⁷¹ Buzuvis, *Separate but Equal*, *supra* note 29, at 21–22.

¹⁷² *See id.* at 20.

¹⁷³ *See* Samsel, *supra* note 12.

¹⁷⁴ *See* SALOMONE, *supra* note 24, at 135 ("[I]t cannot be denied that Title IX has provided women's groups with a means of legal redress, has served as a stick to be wielded at [noncompliant] school districts, and has heightened the awareness of girls and women as to the life choices traditionally closed to them. Above all, Title IX has drawn considerable national attention to the educational, and ultimately the economic impact of narrowly drawn sex roles in our society. . . . Obviously, the life plans our educational system allows female students to design will shape tomorrow's society.").

gender oppression that creates discrimination against women's sport as whole to the discrimination transgender women face."¹⁷⁵

III. LIMITATIONS ON TRANSGENDER ATHLETE INCLUSION AND THE EQUAL PROTECTION CLAUSE

After the statutory question of whether Title IX's definition of sex includes gender identity is decided, there is a subsequent constitutional question that must be answered as well. Any transgender inclusion or exclusion policies must not violate the Equal Protection Clause.¹⁷⁶ There are three plausible arguments that the Court will likely have to decide between and analyze. First, the Court may hold that gender identity is within the meaning of sex in Title IX, which would lead to an intermediate scrutiny analysis based on sex discrimination.¹⁷⁷ However, supposing the Court declines to include gender identity within the meaning of sex, the Court must then decide what level of scrutiny to apply to any regulations or legislation discriminating against transgender individuals from an Equal Protection standpoint. Therefore, the second possibility is that the Court may identify transgender people as their own quasi-suspect class by using the indicia of suspectness.¹⁷⁸ The analysis based on this classification would still require the same level of scrutiny as if gender identity was included in the sex classification.¹⁷⁹ Third, because it has been hesitant to label more groups as quasi-suspect classes, the Court may apply only rational basis review.¹⁸⁰

A. *Analysis Under Sex Discrimination and a Gender Identity Inclusive Definition of "Sex"*

If the Court decides to include gender identity within Title IX's definition of sex, any restriction must withstand intermediate scrutiny.¹⁸¹ To accomplish this, the "party seeking to uphold government action based on sex must establish an

¹⁷⁵ Buzuvis, *Separate but Equal*, *supra* note 29, at 21.

¹⁷⁶ See U.S. CONST. amend. XIV, § 1.

¹⁷⁷ See *supra* Part II; *United States v. Virginia*, 518 U.S. 515, 570–71 (1996).

¹⁷⁸ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹⁷⁹ See *Karnoski v. Trump*, 926 F.3d 1180, 1199–2000 (9th Cir. 2019).

¹⁸⁰ See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

¹⁸¹ See *Virginia*, 518 U.S. at 532–33.

‘exceedingly persuasive justification’ for the classification.”¹⁸² The burden is on the defender of the challenged action to show “at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”¹⁸³ Justice Ginsburg’s discussion gave explicit direction that the justification for the discrimination “must be genuine, not hypothesized or invented *post hoc* in response to litigation.”¹⁸⁴ The justification “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹⁸⁵

Any anti-transgender legislation or policies would have difficulty surviving intermediate scrutiny to justify sex discrimination. The purported important governmental objective would be to prevent the usurpation of opportunities in women’s sports, which is the same objective put forward by the opponents of a broad definition of sex in the statutory interpretation question.¹⁸⁶ In other words, the important objective would be to protect Title IX, and to specifically safeguard women’s sports.¹⁸⁷ However, with the statutory definition of sex including gender identity, the objective would also be to protect transgender women in women’s sports, not just cisgender women.¹⁸⁸ As a result, any outright ban of transgender girls and women based on their biological sex would undoubtedly violate the Equal Protection Clause.¹⁸⁹

Even partial restrictions would likely be unconstitutional, such as ones that follow an International Olympic Committee guidance, in which inclusion is conditional, based on whether the individual (1) had sex affirmation surgery; (2) received at least two years of hormone therapy; and (3) “received legal recognition of their transitioned sex.”¹⁹⁰ This standard is not substantially

¹⁸² *Id.* at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

¹⁸³ *Id.* (quoting *Miss. Univ. for Women*, 458 U.S. at 724).

¹⁸⁴ *Id.* at 533.

¹⁸⁵ *Id.*

¹⁸⁶ *See supra* Part II.

¹⁸⁷ *See Samsel, supra* note 12.

¹⁸⁸ *Supra* Part II.

¹⁸⁹ *See Virginia*, 518 U.S. at 532–33.

¹⁹⁰ Erin E. Buzuvis, *Including Transgender Athletes in Sex-Segregated Sport*, in *SEXUAL ORIENTATION AND GENDER IDENTITY IN SPORT: ESSAYS FROM ACTIVISTS, COACHES, AND SCHOLARS* 23, 26 (George B. Cunningham ed., 2012) [hereinafter *Buzuvis, Including Transgender Athletes*].

related to the government's stated objectives,¹⁹¹ as there is no scientific basis for requiring a transgender girl or woman to undergo sex-reassignment surgery to participate in women's sports.¹⁹² Relying on these propositions with little scientific support is a post hoc response to exclude transgender girls and women, which Justice Ginsburg instructed policymakers to avoid doing.¹⁹³ The statutory inclusion of gender identity in Title IX's definition of sex is potentially the most promising path for fuller transgender inclusion. A contradiction would be created if the attempt to protect the integrity of girls' and women's sports was resolved by excluding a statutorily defined class of women.

B. An Independent Basis for Review: If the Court Does Not Extend Title VII's "Sex" to Title IX

By excluding gender identity from the definition of sex in Title IX, the Court would be tasked with determining what level of scrutiny to apply to transgender individuals under the Equal Protection Clause.¹⁹⁴ The Court would be required to apply the traditional indicia of "suspectness" to determine whether transgender persons merit additional judicial solicitude.¹⁹⁵ Courts measure suspectness using the following factors: whether the class of persons (1) has been subjected to a history of purposeful unequal treatment,¹⁹⁶ (2) has a defining characteristic that bears a relation to its ability to perform or contribute to society;¹⁹⁷ (3) may be defined as a discrete group by obvious, immutable characteristics;¹⁹⁸ and (4) has been relegated to such a position of political powerlessness such that it commands extraordinary protection from the majoritarian political process.¹⁹⁹

¹⁹¹ See PAT GRIFFIN, & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 51 (2010).

¹⁹² *Id.*; Buzuvis, *Including Transgender Athletes*, *supra* note 190, at 26 ("[T]he requirement for surgery seems only to underscore the permanence and irrevocability of the athlete's transition in order to ensure that the athlete is really transgender, and not temporarily transitioning for the purpose of competitive advantage. Yet this concern is hardly supported by history, as evidenced by the fact that IOC's decades-long history with gender verification testing has never revealed a case of fraud.").

¹⁹³ See *Virginia*, 518 U.S. at 532–33.

¹⁹⁴ U.S. CONST. amend. XIV, § 1.

¹⁹⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹⁹⁶ *Id.*

¹⁹⁷ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

¹⁹⁸ *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

¹⁹⁹ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

Both the Fourth²⁰⁰ and Ninth²⁰¹ Circuits have already held that transgender people constitute a separate quasi-suspect class by applying the four factors of suspectness.²⁰² First, transgender people have been subject to a long history of discrimination.²⁰³ Transgender and non-binary primary and secondary education students experience alarmingly high “rates of harassment (78%), physical assault (35%) and sexual violence (12%).”²⁰⁴ Moreover, transgender people experience double the unemployment rate as compared to the general population.²⁰⁵ Second, transgender people have no defining characteristic that bears a relation to their ability to contribute to society. Unlike non-suspect classes such as age²⁰⁶ or disability,²⁰⁷ where the Court has held that there are characteristics that may inhibit an individual’s ability to contribute to society, there are none as such that are related to being transgender.²⁰⁸ Third, transgender people are a discrete group by immutable characteristics, as their transgender status is neither chosen nor changeable.²⁰⁹ “[I]t strains logic to say that a person chooses to become part of the transgender class—membership in which quadruples one’s risk of suicide and exposes the person to almost certain discrimination in nearly

²⁰⁰ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (“[W]e conclude that heightened scrutiny applies to Grimm’s claim because the bathroom policy rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class.”).

²⁰¹ *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (“[I]n light of the analysis in *Virginia* and *Witt*, the district court should apply a standard of review that is more than rational basis but less than strict scrutiny.”).

²⁰² *Id.* Only the Tenth Circuit holds otherwise, but it reluctantly followed a since-overruled Ninth Circuit opinion. *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (noting that “[r]ecent research concluding that sexual identity may be biological suggests reevaluating *Holloway*” but following it regardless because the plaintiff’s allegations were “too conclusory to allow proper analysis”); *Karnoski*, 926 F.3d at 1200.

²⁰³ *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/understanding-the-transgender-community> [<https://perma.cc/85UL-FBWK>] (last visited Mar. 2, 2023).

²⁰⁴ JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3 (2011).

²⁰⁵ *Id.* For more information on the discrimination faced by transgender people, see *id.*

²⁰⁶ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 310–11 (1976).

²⁰⁷ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445–46 (1985).

²⁰⁸ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020).

²⁰⁹ *Id.* at 612 (“[G]ender identity is formulated for most people at a very early age, and . . . being transgender is not a choice.”).

every aspect of life.”²¹⁰ Fourth, transgender people are a clear minority in the population, making up less than 1% of the entire adult population.²¹¹ Additionally, transgender individuals have struggled to find representation among lawmakers; a transgender person has never been elected to the federal legislature or presidency, nor have they served as a federal judge, as they have been “severely limited in their ability to attract the attention of lawmakers.”²¹² Based on the four factors of suspectness, some level of heightened scrutiny is warranted to determine if legislation or policies regarding transgender individuals violate the Equal Protection Clause.²¹³

1. Transgender Status as a Separate Quasi-Suspect Class

By correctly applying the four factors of suspectness, the Court should label transgender individuals as their own quasi-suspect class, and any restrictions would have to survive intermediate scrutiny.²¹⁴ While the Court would focus on transgender status instead of sex-based classifications in this instance, the test of intermediate scrutiny standard is the same.²¹⁵ The burden would be on the government to show that its policy is substantially related to an important government interest.²¹⁶ However, the analysis would differ because, while the general governmental interest is to safeguard women’s sports and all of the opportunities that are derived from their participation,²¹⁷ the term “women” would be understood narrowly only to include cisgender women. Even with this change in the analysis, the results should and would likely be the same.

An outright ban of transgender girls and women from women’s sports based on their biological sex cannot be seen as substantially related to protecting women’s sports, simply because transgender individuals do not pose a risk to sports’

²¹⁰ Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 560 (2016).

²¹¹ See *supra* text accompanying note 165.

²¹² Barry et al., *supra* note 210, at 564 (“This lack of political power is epitomized by the exclusion of transgender people from four federal civil rights laws—the Fair Housing Act, Rehabilitation Act, ADA, and the ADAAA—for no reason other than moral animus.”).

²¹³ See *generally id.*

²¹⁴ See *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019).

²¹⁵ See *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

²¹⁶ *Id.* (citing *Miss. Univ. for Women*, 458 U.S. at 724).

²¹⁷ *Supra* Section III.A.

integrity.²¹⁸ The percentage of transgender women and girls is minuscule in comparison to the number of opportunities for all women to participate in sports if they wish.²¹⁹ Thus, while safeguarding women's sports and ensuring that cisgender women have opportunities that derive from their participation in such sports are important governmental interests, a blanket ban of transgender women from women's sports is not substantially related to achieving those goals.

Next is an analysis of narrower but still discriminatory policies that require surgery or medical treatment, such as puberty blockers or hormone treatment to set testosterone boundaries. First, every transgender individual is at a different point in their journey of self-acceptance.²²⁰ Some may not be ready to start hormone treatment, while others may never want to partake in this treatment at all.²²¹ Second, even those individuals who want some type of hormonal treatment or other gender-affirming healthcare, may not have sufficient access to it.²²² Even if every transgender girl and woman who wished to participate in sports was willing and had access to these treatments, the scientific research is not strong enough to show that these restrictions are substantially related to the important governmental objective.²²³

For example, "female athletes who use hormonal contraceptives, which lower the body's androgen levels, do so without measured effect on athletic performance."²²⁴ The data

²¹⁸ Buzuvis, *Separate but Equal*, *supra* note 29, at 21.

²¹⁹ See *supra* Section II.B.

²²⁰ It is important to note that while no two journeys are the same, no decision makes an individual's gender identity more or less valid than the other.

²²¹ Fan Liang, *Gender Affirmation: Do I Need Surgery?*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/wellness-and-prevention/gender-affirmation-do-i-need-surgery> [<https://perma.cc/VXE8-7XES>] (last visited Mar. 2, 2023).

²²² For an in-depth analysis of the current lack of access to gender-affirming healthcare, see Samantha Gagnon, *Children's Right to Feel Safe at Home and at Home in Their Bodies: A Proposal to Protect Transgender and Gender Nonconforming Children's Right to Access Gender-Affirming Health Care*, in A.B.A. SECTION FAM. L. 1, 4–6 (2021), https://www.americanbar.org/content/dam/aba/administrative/family_law/schwab/2021/2021_schwab_gagnon.pdf [<https://perma.cc/2PPP-AYSG>].

²²³ Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J.L. GENDER & SOC'Y 29, 41 (2016) [hereinafter Buzuvis, *Hormone Check*].

²²⁴ *Id.* "Additionally, women whose bodies are completely insensitive to testosterone (complete androgen insensitivity syndrome, an intersex condition) are actually overrepresented among elite female athletes, a fact that further confounds the perceived correlation between testosterone and athletic ability." *Id.*

demonstrating that “16.5% of elite male athletes are competitive in their sports despite having endogenous testosterone levels . . . within the permissible range for female athletes competing in women’s sports” significantly weakens the argued relationship between endogenous testosterone and athletic performance.²²⁵ The burden would be on the government to show the scientific data that supports the idea that because transgender women may have higher testosterone levels, they would usurp all athletic opportunities for cisgender women.²²⁶ Because of the common overlap of testosterone levels of elite athletes who are biologically male or biologically female, the idea that lower testosterone levels equate to inferior athleticism cannot be supported.²²⁷

These policies also appear facially discriminatory and create potential issues with how they would be applied. By not including gender identity within Title IX’s definition of sex, anti-transgender policies will not only negatively impact transgender women, but they may result in discrimination against cisgender women as well.²²⁸ For instance, in *Hecox*, the legislation at issue had the potential to harm all women and girls by allowing anyone to dispute the sex of a female athlete, even if it was not made in good faith.²²⁹ Sex-verification procedures are nothing new in the world of women’s sports; at the 1966 European Athletics Championship, female athletes had to undergo a “visual examination of the genitals and secondary sexual features.”²³⁰ This practice eventually stopped due to its ineffectiveness, the humiliation it brought women, and its violation of privacy.²³¹ By reimplementing sex-verification procedures, either (1) compulsory testing would result in all women being subjected to invasive examinations just to be able to participate in sports, or (2) suspicion-based sex-verification would result in women who

²²⁵ *Id.* The testosterone level of below eight nmol/L is within the allowed range for women to compete in women’s sports, showing that in elite athletes, cisgender men’s and cisgender women’s testosterone levels often overlap. *Id.*

²²⁶ See *United States v. Virginia*, 518 U.S. 515, 516 (1996).

²²⁷ See Buzuvis, *Hormone Check*, *supra* note 223, at 41.

²²⁸ Louis J. Elsas et al., *Gender Verification of Female Athletes*, 2 GENETICS MED. 249, 253–54 (2000).

²²⁹ See *supra* text accompanying note 109.

²³⁰ Vanessa Heggie, *Testing Sex and Gender in Sports; Reinventing, Reimagining, and Reconstructing Histories*, 34 ENDEAVOUR 157, 159 (2010).

²³¹ *Id.* at 160.

do not appear to conform to stereotypical notions of femininity to be unfairly targeted.²³²

2. Applying Rational Basis Review to Transgender Status

Because of the current framework of Equal Protection jurisprudence and the Court's reluctance to identify new suspect or quasi-suspect classes based on contemporary prejudice, the Court may choose to apply rational basis review, the minimum level of constitutional scrutiny.²³³ "To withstand equal protection review, legislation that distinguishes between the [class of people in question] and others must be rationally related to a legitimate governmental purpose."²³⁴ This low level of scrutiny would likely be detrimental to the fight for transgender inclusion in girls' and women's athletics.²³⁵ The Court, in applying the rational basis standard to both sexual orientation²³⁶ and disability²³⁷ did not apply the conventional rational basis, but a more challenging standard.²³⁸ Legislation or policies that must withstand rational basis review are presumptively valid, and the Court typically applies minimal scrutiny unless there is some inappropriate animus operating, in which the Court will apply the review with "bite."²³⁹ Discrimination based on gender identity is similar to discrimination based on sexual orientation and disability in that way. Before *Bostock*, the practice of the Court applying rational basis with bite to discrimination against transgender individuals would be consistent with jurisprudence.²⁴⁰ However, under ordinary rational basis review—considering the Court's current composition—essentially any proposed restrictions or limitations

²³² See *Elsas et al.*, *supra* note 228, at 253–54 (2000).

²³³ See Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 J. CONST. L. 739, 741–43 (2014).

²³⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

²³⁵ See Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018).

²³⁶ See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

²³⁷ *City of Cleburne*, 473 U.S. at 446.

²³⁸ Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779–80 (1987).

²³⁹ Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972) (noting that after "explicitly voicing the traditionally toothless minimal scrutiny standard," the Court "found bite in the equal protection clause").

²⁴⁰ Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2104 (2015).

would likely be held to not violate the Equal Protection Clause of the Fourteenth Amendment.²⁴¹

CONCLUSION

In *Bostock*, the Supreme Court took a significant step to create more equitable employment for transgender individuals. Despite the Court's explicit note to address discrimination against a transgender person *only* in the context of employment,²⁴² the decision created an opportunity for change in other contexts, such as Title IX.²⁴³ Transgender individuals now have some Supreme Court footing to argue for greater inclusion in the women's sports arena.²⁴⁴ The extension of *Bostock's*

²⁴¹ See Walter, *supra* note 235, at 79. However, while this low level of scrutiny would allow for an anti-trans policy on its face, restrictions are increasingly likely to be applied in a discriminatory way against a separate classified group. See Patricia Vertinsky & Gwendolyn Captain, *More Myth than History: American Culture and Representations of the Black Female's Athletic Ability*, 25 J. SPORT HIST. 532, 541 (1998). Black women are already disproportionately targeted based on racist, anti-Black stereotypes and the fact that femininity is often synonymous with white. See *id.* at 540–41. Predictably, Black women have been common targets of suspicion-based sex-verification tests. See Derrick Clifton, *Anti-Trans Sports Bills Aren't Just Transphobic — They're Racist, Too*, THEM (Mar. 31, 2021), <https://www.them.us/story/anti-trans-sports-bills-transphobic-racist> [https://perma.cc/R2DT-TFMJ]. Serena Williams's treatment is possibly the most obvious example of how transphobia and racism can vest within each other. See *id.* Critiques of Williams's athletic physique perpetuate the generalized, outdated stereotype of what a woman should look like, and put forth the idea that because she does not fit that image, she must not be a woman, or she must be using performance-enhancing drugs. See Gina Vivinetto, *Serena Williams on How She Struggles with Cruel Remarks About Her Body*, TODAY (Sept. 7, 2017, 5:42 PM EDT), <https://www.today.com/style/serena-williams-body-shamers-i-don-t-let-anything-break-t116063> [https://perma.cc/VES9-JVHH]; *Serena Williams, Drug Tested More than Other Top Players This Year, Cites "Discrimination"*, CBS NEWS (July 25, 2018, 10:53 AM), <https://www.cbsnews.com/news/serena-williams-doping-tests-more-often-than-other-top-players-cites-discrimination/> [https://perma.cc/SN7A-3S3A]. Williams has been disproportionately drug tested throughout her career, and this is a preview for how another suspicion-based testing could be applied in a discriminatory way to other successful Black female athletes, or other female athletes who do not necessarily fit the generalized stereotype of white femininity. See Vertinsky & Captain *supra*, at 540–41.

²⁴² *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (“Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’”).

²⁴³ See *Hecox v. Little*, 479 F. Supp. 3d 930, 974 (D. Idaho 2020); *Soule v. Conn. Ass’n of Schs., Inc.*, No. 3:20-CV-00201, 2021 WL 1617206, at *10 n.16 (D. Conn. Apr. 25, 2021).

²⁴⁴ See *Bostock*, 140 S. Ct. at 1753.

definition of sex to Title IX is most consistent with the Court's recent jurisprudence, and would lead to the fairest assessment of the subsequent Equal Protection question.²⁴⁵

However, hope is not lost if the Court fails to extend Title IX's definition of sex to include gender identity, nor is it lost if the Court declines to do a sex discrimination analysis on anti-transgender policies. Transgender people have a strong argument to establish themselves as their own independent quasi-suspect class.²⁴⁶ Either basis for intermediate level scrutiny would likely allow for a comprehensive inclusion of transgender athletes in girls' and women's sports.²⁴⁷ The only obstacle transgender women may face is if the Court decides to grant only rational basis review with a minimal level of scrutiny.²⁴⁸ Although the Supreme Court might shy away from this complex issue for the time being, it is bound to appear before the Court eventually and, at that time, *Bostock* should be used to argue for a more inclusive environment for transgender athletes.

²⁴⁵ *See id.*

²⁴⁶ *See, e.g.*, Karnoski v. Trump, 926 F.3d 1180, 1200–01 (9th Cir. 2019).

²⁴⁷ *See id.*

²⁴⁸ *See* Walter, *supra* note 235, at 79.