

Sport Is for Everyone: A Legal Roadmap for Transgender Participation in Sport

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Introduction

Sport is a vehicle for social change and should be leveraged as such in 2021 and beyond to address matters of equality. In recent years, the public has paid greater attention to transgender athletes participating in sport at all levels—high school, collegiate, professional, and Olympic—despite the fact that transgender athletes have been competing in sports for decades.¹ Backlash has arisen in general but also more specifically in response to several recent Supreme Court cases that have both solidified and extended rights of lesbian, gay, bisexual, transgender, and other gender and sexual minorities.² In turn, state laws that seek to limit the rights of transgender students to participate in sports have been drafted around the country.³ To be sure, these laws are often built on erroneous data, a misunderstanding of facts, and ignorance, but their existence continues to fuel the public debate on whether transgender athletes should be allowed to participate based on their gender identity or their sex as determined at birth.

¹ Gillian R. Brassil and Jeré Longman, *Who should compete in women's sports? There are 'two almost irreconcilable positions'*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html>.

² Julie Moreau, *Advocates brace for anti-LGBTQ backlash at state level after Biden victory*, NBC NEWS (Jan. 26, 2021), <https://www.nbcnews.com/feature/nbc-out/advocates-brace-anti-lgbtq-backlash-state-level-after-biden-victory-n1255606>.

³ See Idaho Code § 33-6203.

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If sponsors of these bills aren't explicitly discriminatory in their rhetoric, the acceptable public rationale against transgender athletes participating assert that doing so creates an unfair competitive advantage.⁴ This position is most frequently espoused when discussing transgender women playing women's sports, as the perception is that someone born male will have an unfair competitive advantage over women based on physical stereotypes.⁵ Specifically, three arguments are often put forth in this regard. First, that transgender women are not "real" women and therefore should not be afforded the same opportunity as other women.⁶ Second, that transgender women would have physical advantages over cisgender women.⁷ And third, that men might fraudulently claim to be a transgender woman in order to seek a perceived competitive advantage to compete and dominate against other women.⁸ Each of these arguments will be addressed directly later in this article.⁹

While the law supports transgender athletes participating in sports based on their gender identity, opponents continue to object, primarily based on the aforementioned claims. Arguments cite physical advantages or loss of opportunities for cisgender girls and women, but in reality, they are often merely a distraction from outward discrimination. So, consider the following truth, transgender athletes pose no threat. Transgender women have been competing in sports for decades. There is no transgender athlete takeover at the high school or collegiate level. Not a single transgender athlete has ever won an Olympic medal in any sport. The basis of the argument to exclude transgender athletes from competing is rooted in stereotypes about unsettling the status quo rather than reality, and federal law explicitly prohibits such discrimination.

⁴ Sean Ingle, *Trans women retain 12% edge in tests two years after transitioning, study finds*, THE GUARDIAN (Dec. 7, 2020), <https://www.theguardian.com/sport/2020/dec/07/study-suggests-ioc-adjustment-period-for-trans-women-may-be-too-short>.

⁵ See *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (holding that "males would displace females to a substantial extent" if boys could try-out for an all-girls volleyball team because of average physiological differences).

⁶ For a brief overview of the terminology surrounding transgender, please refer to GLAAD's website for a glossary of terms they recommend to the media for correct usage. These terms include: sex, gender identity, gender expression, sexual orientation, transgender, transsexual, trans, and cis- and cisgender. GLAAD, <https://www.glaad.org/reference/transgender> (last visited Feb. 25, 2021).

⁷ Ashley Schwartz-Lavares, et al., *Trans women targeted in sports bans, but are they really at an advantage?*, ABC NEWS (April 7, 2021), <https://abcnews.go.com/US/trans-women-targeted-sports-bans-advantage/story?id=76909090>.

⁸ Chase Strangio and Gabriel Arkles, *Four myths about trans athletes, debunked*, ACLU (April 30, 2020), <https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked/>.

⁹ See Section II.D, discussing the basis of the defendants' argument in *Soule et al. v. Conn. Ass'n of Sch., Inc. et al.*, No. 3:20-cv-00201-RNC, 2020 WL 6580271 (D.Conn.) (Defendant's Reply Brief); see also *Hecox v. Little*, 479 F. Supp. 3d 930, 944 (D. Idaho 2020).



Making arguments about excluding transgender athletes from participating in sport is to deny them the substantial benefits that sport provides in developing a person's identity. The positive impact on a person's development gained by participating in sports, especially at an early age, cannot be underestimated. While limiting access is often distilled into a single person missing a season in a particular sport, this characterization does a disservice to the overwhelmingly positive impact sports can have on the long-term success, mentally and physically, of the participant.

In general, sports teach transformative lifetime skills that are unable to be recreated in the classroom. Participation in sports serves a critical and intended educational purpose: contributing to important character traits such as leadership, teamwork, dedication in the face of adversity, and the pursuit of a common goal.¹⁰ These traits serve all participants well and provide a foundation of success and training to be drawn upon during the rest of their lives, be it in an educational setting, a career, or in daily life.

Alternatively, limiting access to these fundamental lessons offered by participation can have disastrous effects on the physical and mental health of those blocked from sports. Being shunned and excluded from a social activity because of one's identity wreaks havoc on self-worth and development—an impact that lasts well into the future. And the law is clear, discriminating against transgender athletes is illegal under a variety of legal principles and case law.¹¹

The participation of transgender athletes is not new, as they have successfully competed in sports for decades under a variety of rules and regulations. Since 2003, the International Olympic Committee (IOC) has allowed athletes to participate based on their gender identity, albeit with some restrictions, which were further loosened in 2016.¹² The NCAA, under its Office of Inclusion, followed suit in 2010 when it passed its own guidelines for transgender athletes to compete in college sports.¹³ Despite federal case law and legislature, not unexpectedly, states have their own opinions and have passed, or are trying to pass, a broad range of rules and policies that address participation in education-based athletic programs—ranging from those seeking to eliminate transgender participation

¹⁰ Jennifer Y. Mak and Chong Kim, *Relationship among gender, athletic involvement, student organization involvement and leadership*, 25, 2, *WOMEN SPORT & PHYSICAL ACTIVITY J.* 89, 93 (2017).

¹¹ See *Hecox*, 479 F. Supp. 3d at 984.

¹² *Transgender athletes can now compete in Olympics without surgery*, *NY TIMES*, (Jan. 25, 2016), <https://www.nytimes.com/2016/01/26/sports/olympics/transgender-athletes-olympics-ioc.html>.

¹³ *NCAA inclusion of transgender student-athletes*, NCAA Office of Inclusion (Aug., 2011), https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_4a135824fabc-462183c71357c93a99b4.pdf.



entirely (such as Montana)¹⁴ and those allowing unfettered access (such as Connecticut).¹⁵ What is needed are clear and unambiguous guidelines that allow access based on equity and fairness on a national level.

This year, 2021, has been, and will continue to be, a year of dramatic change. Most notably, in the United States the change in federal administrations from former President Donald J. Trump's administration to one led by current President Joseph R. Biden will have major ramifications for sports broadly and transgender athletes specifically. A month after the election, more than 100 civil rights advocates including the National Women's Law Center, the American Federation of Teachers, and Know Your IX urged President Biden to immediately stop enforcement of new Title IX regulations and initiate new rulemaking.¹⁶ Proposed rulemaking would impact the Office of Civil Rights (OCR), a Department under the United States Health and Human Services (HHS), which "ensures compliance with our nation's civil rights, conscience and religious freedom, health information, privacy and security laws."¹⁷ Leadership from within both HHS and OCR will likely change as these government agencies offer broader LGBTQ protections and access.

On his first day in office, President Biden signed an executive order making it abundantly clear that gay and transgender people would have protection against discrimination in schools, health care, and the workplace.¹⁸ By ensuring a broad interpretation of the 2020 landmark Supreme Court decision in *Bostock v. Clayton County, GA*,¹⁹ this administration immediately signaled gay and transgender employees would be covered and protected by Title VII of the Civil Rights Act of 1964.²⁰ While this may appear radical given the previous administration's efforts, the current administration's announcement simply confirms that the federal government will follow the well-established law that protects LGBTQ people from discrimination. Only when compared to recent history does such a declaration seem newsworthy.

¹⁴ H.B. 112.3, 2021 Leg., 67th Sess. (Mo. 2021).

¹⁵ *Rules of eligibility and control for boys and girls high school athletics in Connecticut*, CIAC Handbook at 55 (2021), https://www.casciac.org/pdfs/ciachandbook_2021.pdf.

¹⁶ Jackie Gharapour Wernz, *Hundreds of organizations ask Biden for immediate change in Title IX; How realistic are the demands?* JD SUPRA (Dec. 14, 2020), <https://www.jdsupra.com/legal-news/hundreds-of-organizations-ask-biden-for-73784/>.

¹⁷ Office for Civil Rights, OCR Mission & Vision, (Oct. 9, 2019), <https://www.hhs.gov/ocr/about-us/mission-vision/index.html>.

¹⁸ Samantha Schmidt, Emily Wax-Thibodeaux, and Moriah Balingit, *Biden calls for LGBTQ protections in Day 1 executive order, angering conservatives*, WASH. POST (Jan 21, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/>.

¹⁹ *Bostock v. Clayton County*, 590 U.S. 140, 140 S. Ct. 1731 (2020).

²⁰ *See id.*



In late February, the Biden administration made an even more explicit and tangible statement on the federal government's policy toward transgender students participating in sports by withdrawing legal views filed by the Trump administration.²¹ Notably, the OCR informed parties it was withdrawing a letter previously submitted that interpreted Title IX to mean that transgender females could not participate in sports in order to preserve opportunities for cisgender women in the state of Connecticut.²² Additionally, the federal government notified a federal appeals court that it was withdrawing a brief, drafted by the Trump administration, supporting an Idaho state law attempting to ban transgender female athletes from competing in sports.²³ These cases are discussed later in detail, yet these actions by the Biden administration are a clear and public shift in the overall position of the federal government related to transgender athletes.

With the federal government explicitly stating their intent to support equality, LGBTQ, and transgender rights in the years ahead, now is the time to provide a clear roadmap for transgender participation in sports. This article does not offer the broadest and easiest recommendation possible, that all athletes, at all levels, be allowed to compete based on their gender identity rather than gender assigned at birth. While the authors may hope this simple policy be implemented and followed, we are proposing a more pragmatic approach that we anticipate is more acceptable to those who currently oppose a simple unilateral rule. As such, what follows is an attempt to develop policies and procedures that delineate acceptable steps today, with a hope for a more inclusive policy in the future.

This article will address the current legal framework, including Title IX, equal protection, and relevant case law. We will then discuss participation for transgender athletes within the elementary and secondary educational systems, advocating for a simple policy ensuring equity and access. Our attention will then turn to other participant groups and recommendations for these organizations, including college athletics, youth leagues, the International Olympic Committee (IOC), and finally professional leagues. And rather than merely arguing that change is necessary, we propose specific legislation that would comply with all existing laws while extending greater protection to the transgender community.

²¹ Mark Walsh, *Biden legal team steps back from Trump stance on transgender female sports participation*, EDUC. WEEK (Feb. 24, 2021), <https://www.edweek.org/policy-politics/biden-legal-team-steps-back-from-trump-stance-on-transgender-female-sports-participation/2021/02>.

²² *See id.*

²³ *See id.*



Section I.

The following section will provide a brief background on the law governing athletic participation by transgender athletes.

A. Title IX

Title IX of the Education Amendments of 1972 (Title IX) is a federal statute that prohibits discrimination based on sex in education programs or activities that receive federal financial assistance.²⁴ Though educational institutions subject to Title IX must generally make all programs open to students regardless of sex, athletics is one place where the law permits separate programs for each sex, so long as those programs are equitable.²⁵ As of today, neither Title IX nor its implementing regulations specify how the obligation to provide equitable athletic opportunities to members of each sex should apply to athletes who are transgender. Nor has any court been called upon to interpret whether Title IX requires schools to allow transgender athletes to compete in the gender category that matches their gender identity. However, as noted later in this article, courts have found that Title IX protects the rights of transgender students to use sex-segregated facilities like bathrooms and restrooms that correspond to their affirmed genders.²⁶

During the Obama administration, OCR announced its interpretation that Title IX encompassed discrimination based on a student's gender identity, including protecting against discrimination based on a student's transgender status.²⁷ At the time, OCR and the Department of Justice's Civil Rights Division jointly released nonbinding guidance (2016 Guidance)²⁸ interpreting a student's gender identity as a student's "sex" under Title IX. The guidance notified schools that Title IX prohibits them from treating transgender students differently from how they treat other students of the same gender identity. However, the Trump administration rescinded that policy, requiring that recipients of federal funding provide separate athletic teams to separate participants solely based on their biological sex, male or female, and not based on transgender status or homosexuality.²⁹

²⁴ 34 C.F.R. § 106.41(a)(b)(c).

²⁵ 34 C.F.R. § 106.37(b)(c).

²⁶ See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020).

²⁷ *Dear Colleague Letter on Transgender Students*, OCR (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

²⁸ See *id.*

²⁹ Dept. of Education Memorandum for Kimberly M. Richey, OCR (Jan. 8, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>.



Another administrative development that occurred during the Trump administration was the enforcement action that OCR initiated against school districts in Connecticut and the state's interscholastic athletic association. Connecticut state law prohibits discrimination based on gender identity, and this provision has been interpreted to provide a right to transgender students to participate in sports according to their affirmed genders.³⁰ OCR sustained the complaint of cisgender female high school athletes that the policy in Connecticut impairs their access to athletic opportunities in violation of Title IX, but did not conclude the process by which funding is withdrawn prior to the change of administration.³¹ The current administration has subsequently withdrawn OCR's decision.³²

In a marked departure from the previous administration, President Biden's administration has signaled its intention to enforce Title IX in a way that maximizes protection for transgender rights. Though it has not yet initiated any enforcement actions against schools that restrict the rights of transgender athletes, it has issued an interpretive rule clarifying that the Supreme Court's holding in *Bostock*, that Title VII's sex discrimination provision inherently prohibits discrimination on the basis of one's transgender status, also extends to Title IX.³³

Courts have not yet had the opportunity to decide whether denying a transgender student the right to participate in sports consistent with their affirmed gender violates that student's rights under Title IX. However, Title IX litigation in the analogous context of bathrooms and locker rooms has resulted in several judicial interpretations of Title IX confirming that a school's failure to affirm transgender students' gender identities, while doing so for cisgender students, is a form of sex discrimination prohibited by the statute.³⁴ For example, in *Grimm*, the ACLU filed suit against the Gloucester County School Board for adopting a discriminatory bathroom policy that segregates transgender students from their peers.³⁵ The school policy restricted transgender students from using communal

³⁰ See An Act Concerning Discrimination, 2011 Conn. Pub Acts 11-55.

³¹ Kimberly Drelich, *Compromise reached over magnet school funding for Groton, Norwich and LEARN*, THE DAY (Sep. 24, 2020), <https://www.theday.com/article/20200924/NWS01/200929650>.

³² Walsh, *supra* note 21. The complainants seeking administrative enforcement also filed a lawsuit in federal court, advancing the same Title IX arguments and referring to transgender athletes as "males claiming transgender identities." Soule, 2020 WL 6580263. The lawsuit was ultimately dismissed on grounds of mootness. Soule et al. v. Conn. Ass'n of Sch., Inc. et al., No. 3:20-cv-00201-RNC, 2021 WL 1617206, at *5 (D. Conn. Apr. 25, 2021).

³³ U.S. Dep't of Educ., Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock* v. Clayton County, 86 FR 32637 (June 22, 2021).

³⁴ *Grimm*, 972 F.3d at 618.

³⁵ See *id.*



restrooms aligning with their gender identities.³⁶ The Fourth Circuit found that transgender students were entitled to protection from school bathroom policies that prohibit them from affirming their gender.³⁷ Modern recognition of transgender students' rights in bathroom cases is an indicator that Title IX should be treated in the same way.

B. State Law

Though many state athletic associations have created policies governing the participation of transgender athletes, it is rarer for the issue to be addressed as a matter of public law (state statute, or state agency interpretation of a statute). Among these states, only California's nondiscrimination statute expressly secures transgender athletes' right to participate in sex-segregated sports that match their gender identity, in the elementary and secondary school setting.³⁸ In two more states, Massachusetts and Connecticut, state agencies have interpreted the state's statutory ban on gender identity discrimination to provide transgender students with the unqualified right to participate in sports that match their gender identity.³⁹

State law also has been used to restrict the rights of transgender athletes. In 2020, Idaho enacted the Fairness in Women's Sports Act (the Fairness Act or Act) to categorically bar transgender women from participating in women's sports.⁴⁰ The Act expressly designates that teams for women or girls should be based on biological sex and subjects all women student-athletes to the risk of having to undergo invasive testing, while permitting male student-athletes to participate without such risk.⁴¹ Specifically, the Act provides, a health care provider can verify a student's sex relying only on one or more of the following: her reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.⁴² Evaluating any of these criteria would require invasive examination, and

³⁶ *See id.*

³⁷ *See id.*

³⁸ California Educ. Code 221.5(f) ("A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.").

³⁹ *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-discrimination Laws*, Connecticut Safe School Coalition, at 9 (2012), http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf ("Transgender students should be permitted to participate in sex-segregated athletic activities based on their gender identity"); *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment*, Massachusetts Dep't of Elementary & Secondary Educ. (Feb. 15, 2013), <http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html> ("all students must be allowed to participate in a manner consistent with their gender identity").

⁴⁰ *See* Idaho Code § 33-6203.

⁴¹ *See id.*

⁴² *See id.*



testing would also necessarily reveal extremely personal health information such as a student's precise genetic makeup. Moreover, in permitting this criteria in response to "a dispute regarding a student's sex," the Act creates the possibility that any student's sex can be examined in this way, whether the student is cis or trans. Still, only participants in women's sports are exposed to this risk of public intrusion into one's private medical information.

The Idaho law is at odds with NCAA policy, which permits transgender women to compete on a women's team after one year of hormone treatment.⁴³ The state law thus creates a dilemma for NCAA member institutions located in Idaho. To comply with state law, they must violate the policy of their membership organization or vice versa. It is also potentially at odds with Title IX and creates a dilemma for Idaho schools: compliance with state law or compliance with Title IX. Title IX does not directly prohibit states from passing conflicting laws, but it would render schools in that state ineligible to receive federal funding on which Title IX is conditioned.⁴⁴ The Fairness Act has also been challenged on constitutional grounds, as discussed in the next subsection.

Despite actual or potential conflicts with NCAA policy, Title IX, and the U.S. Constitution, the Fairness Act has inspired duplication in a number of other states. As of July 1, 2021, eight states in addition to Idaho have passed laws excluding transgender women and girls from scholastic sports or scholastic and collegiate sports: Alabama, Arkansas, Florida, Mississippi, Montana, South Dakota, Tennessee, and West Virginia, and bills remain pending in several more.⁴⁵

C. Constitutional Protections

The U.S. Constitution's Equal Protection clause is an emerging source of protection for transgender rights, including in the context of sex-segregated spaces like bathrooms and locker rooms. For example, the Seventh Circuit Court of Appeals enjoined a high school's policy prohibiting a transgender student from using the restroom that matched his gender identity after recognizing the likelihood that the student would prevail on his constitutional claim.⁴⁶ The court applied heightened scrutiny and determined that the policy was not supported

⁴³ Hecox, 479 F. Supp. 3d at 988.

⁴⁴ Title IX, 20 U.S.C. 1681; see also Mariel Padilla, *The 19th explains: What did Title IX changes just do for trans students?*, THE 19TH (June 22, 2021), <https://19thnews.org/2021/06/the-19th-explains-what-did-title-ix-changes-just-do-for-trans-students/>.

⁴⁵ Movement Advancement Project, *Bans on transgender youth participation in sports* (last visited July 1, 2021) https://www.lgbtmap.org/equality-maps/sports_participation_bans. See also *Legislation affecting LGBT rights across the country*, ACLU (2021), <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country>.

⁴⁶ See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050-52 (7th Cir. 2017).



by a genuine and exceedingly persuasive rationale, rejecting that the policy was tailored to secure the privacy of other students.⁴⁷

Currently, legal challenges to Idaho's law already discussed will provide the first opportunity for the courts to consider whether the Equal Protection doctrine that protects a transgender student's right to be treated according to their affirmed gender in the context of sex-segregated facilities extends to sex-segregated athletic opportunities as well.⁴⁸

In *Hecox v. Little*, Lindsay Hecox, a 19-year-old transgender woman, along with Jane Doe, a cisgender woman, challenged the constitutionality of the Fairness in Women's Sports Act.⁴⁹ As a transgender college student at Boise State University, Lindsay was barred by the Act from competing and trying out for the women's track team. Lindsay seeks to enjoin the Act on the grounds that it effectively permits discriminatory treatment based on an athlete's transgender status in violation of her constitutional rights.⁵⁰

In August, the federal district court granted her injunction after finding a likely success on the merits of her claim. Applying circuit court precedent, the court acknowledged that state policies separating students by sex for athletic participation can be justified by the "legitimate and important governmental interest" of "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes."⁵¹ The precedent in question, *Clark v. Arizona Interscholastic Athletic Association*, upheld schools' exclusion of boys from girls' volleyball teams on these grounds, out of concern that that "the physiological fact that males would have an undue advantage competing against women," and would diminish opportunity for females.⁵²

However, the district court recognized that *Hecox* is distinct from *Clark* because, first, like women generally, women who are transgender have historically been discriminated against, not favored.⁵³ Second, unlike the boys in *Clark* who generally had equal athletic opportunities, women and girls who are transgender will not be able to participate in any school sports if Idaho's law is upheld.⁵⁴ Third, given that less than 1% of the population is transgender, cisgender girls are not vulnerable to displacement by transgender girls compared to displacement

⁴⁷ See *id.*; see also *Evancho v. Pine-Ridgeland Sch. Dist.*, 237 F. Supp. 2d 267, 292-93 (W.D. Pa. 2017); *Highland Local Sch. Dist. v. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016).

⁴⁸ See *Hecox*, 479 F. Supp. 3d at 988.

⁴⁹ See *id.* at 946.

⁵⁰ See *id.*

⁵¹ *Id.* at 952 (citing *Clark*, 695 F.2d at 1131).

⁵² *Id.*

⁵³ See *Barron*, 286 F. Supp. 3d, 1143-1145 (2018).

⁵⁴ See *Clark*, 695 F.2d at 1131.



by cisgender boys.⁵⁵ Finally, it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women.⁵⁶ Additionally, the Court questioned the Act’s legislative findings, including a study by Doriane Lambelet Coleman, which purportedly demonstrates the “absolute advantage” of transgender women.⁵⁷ Notably, Coleman asserts that her work was misused and urged Governor Brad Little to veto H.B. 500.⁵⁸ The Court noted that compelling evidence demonstrates that equality in sports is not jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women’s teams.⁵⁹

The fact that a cisgender woman serves as Lindsay Hecox’s co-plaintiff underscores other constitutional weaknesses in H.B. 500. The district court found that in subjecting athletes to the possibility of invasive medical testing, H.B. 500 imposed “a more onerous set of rules on women’s sports” that not only fail to advance, but actually undermine the important state interest in promoting athletic opportunities for women and girls.⁶⁰ The district court’s reasoning reveals how laws like Idaho’s infringe not only transgender athletes’ rights but all high school students and women.

Section II.

In Section II, we begin our analysis by illustrating the value of youth sports. The harm caused to girls broadly, and transgender students specifically, who are denied opportunities to participate in sports at the elementary and secondary school level is examined. We then propose that OCR use the notice-and-comment process to revise Title IX’s implementing regulations to require school districts and other K-12 institutions to permit transgender athletes to participate in athletics according to their gender identity. Under our proposed regulatory revision, elementary and secondary schools subject to Title IX are not permitted to impose hormone or other medical requirements as a condition for participation.

A. Scholastic and Youth Sports Matter

While consensus on any topic is virtually unheard of in today’s world, there is one statement that receives unilateral support and agreement—the benefits of participating in youth sports have long-term physical and mental benefits

⁵⁵ *Id.*

⁵⁶ Hecox, 479 F. Supp. 3d at 978.

⁵⁷ *See id.* at 980.

⁵⁸ *Id.* at 981.

⁵⁹ *Id.*

⁶⁰ *Id.* at 985-86.



for all. Research and science make this abundantly clear, and as a result, the United States federal government has made access and participation a national priority for centuries. In 1953, Dr. Hans Kraus and Ruth Hirschland (also known as Bonnie Prudden) published research findings about the poor state of physical fitness among American elementary school students.⁶¹ Following a subsequent article by Kraus and Hirschland two years later, comparing the poor health of youth in the United States to those in Europe,⁶² President Dwight D. Eisenhower was shocked into action and, in an attempt to make fitness a priority, founded the President's Council on Youth Fitness, which is now known as the President's Council on Physical Fitness and Sports.⁶³

In 2018, President Trump issued Executive Order 13824, which was an attempt to “expand and encourage youth sports participation, and to promote the overall physical fitness, health, and nutrition *of all Americans*”⁶⁴ (emphasis added). The order went on to declare, “Good health, including physical activity and proper nutrition, supports Americans’, particularly children’s, well-being, growth, and development. Participating in sports allows children to experience the connection between effort and success, and it enhances their academic, economic, and social prospects.”⁶⁵

As a consequence of this order, in 2019 HHS released a 112-page report, *The National Youth Sports Strategy*,⁶⁶ which continues to promote the benefits of youth sports participation for all.⁶⁷ Notably, even the Trump administration proposed that the primary focus of youth sports should not be on winning but rather on developing skills, improving performance, and achieving goals.⁶⁸

When athletic programs and sport teams are bias-free and inclusive, all athletes have a greater likelihood of having positive sporting experiences and gaining the benefits of team sports (e.g., leadership skills, self-confidence, teamwork). In contrast, when youth expect or experience harassment or denial

⁶¹ Hans Kraus & Ruth P. Hirschland, *Muscular fitness and health*, 24 J. OF THE AM. ASS'N FOR HEALTH, PHYSICAL EDUC., AND RECREATION (1953).

⁶² Robert Boyle, *The report that shocked the President*, VAULT (Aug. 15, 1955), <https://vault.si.com/vault/1955/08/15/the-report-that-shocked-the-president>.

⁶³ HHS, <https://www.hhs.gov/about/index.html> (last visited Feb. 23, 2021).

⁶⁴ Exec. Order No. 13824, *President's Council on Sports, Fitness, and Nutrition* (Feb. 26, 2018), <https://www.govinfo.gov/content/pkg/DCPD-201800119/pdf/DCPD-201800119.pdf>.

⁶⁵ *Id.*

⁶⁶ *National Youth Sports Strategy*, HHS (2019), https://health.gov/sites/default/files/2019-10/National_Youth_Sports_Strategy.pdf.

⁶⁷ HHS, <https://www.hhs.gov/about/index.html> (last visited Feb. 23, 2021).

⁶⁸ *The National Youth Sports Strategy*, Office of the Assistant Secretary for Health (2019), https://health.gov/sites/default/files/2019-10/National_Youth_Sports_Strategy.pdf.



of identity, this can deter future sport and physical activity involvement.⁶⁹ For adolescent students, in particular, sports team participation may be the major route by which they are physically active, and multiple studies suggest that participation on sports teams is also associated with better academic outcomes.⁷⁰

The unimpeachable reality is that participating in youth and scholastic sports serves as a critical development tool in the mental and physical wellbeing of all members of society. Therefore, any restriction of such a valuable opportunity is incompatible with government policy.

B. Women's Athletic Opportunities Face Other Real Threats

In 1872, the Supreme Court declared that “a woman’s place was in the home” in rejecting an equal protection argument by a woman who challenged a state of Illinois law denying women the opportunity to the state’s bar examination.⁷¹ Thankfully, times have changed. Constitutional and statutory civil rights recognize and protect women’s equal rights to public life, employment, and education opportunities—including school-sponsored athletics. However, notwithstanding Title IX’s requirement for equity in the distribution of athletic opportunities,⁷² the right to participate is not available equally to all.

Research indicates that the participation rates for girls and underserved populations are dramatically lower than others—a gap that is closing but one that is still unfortunately significant.⁷³ As a general trend, between the ages of

⁶⁹ See Calzo et al., *Physical activity disparities in heterosexual and sexual minority youth ages 12-22 years old: Roles of childhood gender nonconformity and athletic self-esteem*, ABM: PUB. SOCIETY OF BEHAVIORAL MEDICINE (2014).

⁷⁰ See Claudia Fox et al., *Physical activity and sports team participation: Associations with academic outcomes in middle school and high school students*, J. SCH. HEALTH (2010).

⁷¹ *Bradwell v. The State of Illinois*, 83 U.S. 130, 139 (1872).

⁷² See 34 C.F.R. § 106.37(c) (requiring equitable athletic opportunities); Dep’t of Health, Educ. and Welfare, Office for Civil Rights, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (creating the three-part test which requires schools to demonstrate (1) that participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) that there is a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that gender; or (3) that the interests and abilities of the members of that gender have been fully and effectively accommodated by the present program. See also *Cohen v. Brown*, 101 F.3d 155, 176 (1st Cir. 1996) (applying the three-part test and rejecting that women’s ostensible lack of interest was a factor in measuring compliance under the third part of the test).

⁷³ *The Child and Adolescent Health Measurement Initiative*, NSCH DATA RESOURCE CENTER FOR CHILD & ADOLESCENT HEALTH (2017), <http://www.childhealthdata.org>.



6 to 10, girls' participation in sports lags behind that of boys by 10 percentage points,⁷⁴ and the gap between high school boys' and girls' participation has not significantly narrowed in the past 20 years.⁷⁵

Female high school athletes receive 1.13 million fewer chances to participate in sports than their male counterparts (3.4 million females vs. 4.5 million males).⁷⁶ Female athletes receive 61,000 fewer opportunities at NCAA institutions (221,000 female vs. 282,000 male).⁷⁷ In 2017-18, only 8.6% of NCAA Division I institutions (30 of 348) offered athletic opportunities to female athletes proportional to their enrollment.⁷⁸ Female college athletes receive \$240 million less in NCAA athletic scholarships.⁷⁹ These disparities are partially attributed to Title IX's relatively weak enforcement mechanisms⁸⁰ that allow educational institutions to avoid accountability for prioritizing the growth of men's sports before gender equity has been achieved, and for cutting women's teams even when women have disproportionately few athletic opportunities. In addition, these disparities have been exacerbated by a nationwide trend of cuts to women's athletic programs as a result of the COVID-19 pandemic. Economic ramifications of the pandemic have caused university athletic departments to eliminate

⁷⁴ *State of play 2018: Trends and developments*, ASPEN INSTITUTE (2018), https://assets.aspeninstitute.org/content/uploads/2018/10/StateofPlay2018_v4WEB_2- FINAL.pdf.

⁷⁵ Zarrett et al., *Promoting physical activity within under-resourced afterschool programs: A qualitative investigation of staff experiences and motivational strategies for engaging youth*, APPL DEV SCI. (2018).

⁷⁶ National Federation of State High School Associations (NFHS) (2019).

⁷⁷ National Collegiate Athletic Association, *NCAA sports sponsorship and participation rates* (2020), <https://www.ncaa.org/about/resources/research/ncaa-sports-sponsorship-and-participation-rates-database>.

⁷⁸ Equity in Athletics Disclosure Act Data Analysis Cutting Tool, U.S. Dep't of Educ. (2019), <https://ope.ed.gov/athletics/#/>.

⁷⁹ *See id.*

⁸⁰ Title IX permits both government enforcement as well as private lawsuits. Public enforcement allows OCR to use the threat of withheld federal funding to motivate compliance, but the agency has never taken this step. Instead, it enters into resolution agreements that allow institutions to avoid funding withdrawal by agreeing to do that which the law already requires. Private lawsuits are usually only filed when there are highly motivated plaintiffs, such as the disappointed members of an unlawfully terminated women's team or other cases of extreme or pervasive inequality. While they might factor into some universities' decisions not to eliminate women's teams, they likely do not motivate educational institutions to prospectively correct long-standing inequalities at great cost. On the limits of public enforcement, *see e.g.*, Julie A. Davies & Lisa M. Bohon, *Re-imagining public enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 50-54 (2007); Sudha Setty, *Leveling the playing field: Reforming the Office for Civil Rights to achieve better Title IX enforcement*, 32 COLUMN. J.L. & SOC. PROBS. 331, 340-42 (1999).



women's programs, notwithstanding the fact that college women were already disadvantaged in the distribution of athletic opportunities by sex.⁸¹

For example, in July 2020, Dartmouth announced that it was eliminating the women's varsity intercollegiate golf and swimming and diving teams.⁸² It claimed that the elimination of these women's programs would not impact the percentage of women among varsity athletes as compared to the percentage of women in the undergraduate student body, thus ensuring compliance with Title IX. However, Dartmouth's undergraduate enrollment in 2019-2020 was 49.06% women, but the school offered females only 44.87% of the opportunities to participate in intercollegiate athletics.⁸³ There was a gap of 4.19% between women's undergraduate enrollment rates and their intercollegiate athletic participation rates.⁸⁴ With the elimination of the five teams, the athletic participation numbers dropped to 456 men and 392 women.

Female student-athletes threatened to file a class action lawsuit in federal court against Dartmouth for depriving women student-athletes and potential athletes of equal opportunities and treatment unless the school agreed to reinstate the teams and comply with Title IX.⁸⁵ In January 2021, Dartmouth reversed its decision, agreeing to reinstate the teams to develop a gender equity plan, and come into full compliance with Title IX to avoid a threatened class action sex discrimination lawsuit.⁸⁶

In another example, the University of Iowa announced in August 2020 that it would be eliminating women's swimming and diving as a varsity intercollegiate sport for the 2021–22 academic year. Iowa's athletic director, Gary Barta, had

⁸¹ For an ongoing tracker on the sports cut by various colleges around the country, refer to *Tracker: College sports programs cut during COVID-19 pandemic*, BCS, <https://businessofcollegesports.com/tracker-college-sports-programs-cut-during-covid-19-pandemic/> (last visited July 8, 2021).

⁸² Justin Kramer, Addison Dick and Lili Stern, *Dartmouth cuts five sports teams and closes Hanover Country Club*, THE DARTMOUTH (July 9, 2020), <https://www.thedartmouth.com/article/2020/07/dartmouth-cuts-five-sports-teams-and-closes-hanover-country-club>.

⁸³ Press Release, Bailey & Glasser, LLP, *Dartmouth College agrees to reinstate women's golf, swimming & diving; Develop gender equity plan; and comply with Title IX* (Jan. 21, 2021), <https://www.baileyglasser.com/pp/news-dartmouth-college-agrees-reinstate-womens-golf-swimming-diving-title-ix.pdf>.

⁸⁴ *Id.*

⁸⁵ Annika Johnson, *Dartmouth reinstates all 5 programs after Title IX claims*, SWIM SWAM (Jan. 29, 2021), <https://swimswam.com/dartmouth-reinstates-all-5-programs-after-title-ix-claims/>.

⁸⁶ Press Release, Bailey & Glasser, LLP, *Dartmouth College agrees to reinstate women's golf, swimming & diving; Develop gender equity plan; and comply with Title IX*, at 3 (Jan. 21, 2021), <https://www.baileyglasser.com/pp/news-dartmouth-college-agrees-reinstate-womens-golf-swimming-diving-title-ix.pdf>.



said his decision to end the women's swimming program was based on cost-saving measures prompted by the COVID-19 pandemic, and he contended that the school was Title IX-compliant in doing so. However, the most recent data from the University's 2018–19 Equity in Athletics Disclosure Act (EADA) report discloses a 49.2%-50.8% male-female student-athlete ratio despite a student body consisting of only 46.4% men and 53.6% women—a 2.8% disparity that reflects 47 fewer athletic opportunities for women than there would be if participation were substantially proportionate to their representation on campus, even before any discussion of cutting women's programs.⁸⁷ In addition, data showed that the way Iowa has been counting its varsity participants, particularly the female ones, has concealed other opportunities for women's sport teams.⁸⁸

A group of women athletes challenged the university's decision in federal district court. Initially, the university stood its ground, stating that its continued ability to adequately support all of its intercollegiate athletics programs was no longer viable. In December 2020, the Court granted a preliminary injunction against the school to stop the University of Iowa from dropping women's swimming for the 2021-2022 school year.⁸⁹

By February 2021, Iowa decided to change course, announcing that they would not eliminate the women's programs. While Iowa's athletic director told the athletes that swimming has been preserved "indefinitely," he offered no apology or admission that he had been wrong to put the sport in jeopardy in the first place.⁹⁰ Meanwhile, elsewhere in the Big Ten Conference, Michigan State still faces a similar Title IX lawsuit over its plans to discontinue women's swimming. Brown University,⁹¹ East Carolina University,⁹² and William & Mary⁹³ also faced litigation or litigation pressure after announcing COVID-related cuts to women's

⁸⁷ See *Ohlensehln v. Univ. of Iowa*, 2020 WL 7651974, at 3 (S.D. Iowa Dec. 24, 2020).

⁸⁸ *Id.*

⁸⁹ *Id.* at 14.

⁹⁰ Mark Emmert, *Iowa reverses decision to cut women's swimming and diving but still faces Title IX challenge*, HAWK CENTRAL (Feb. 15, 2021), <https://www.hawkcentral.com/story/sports/college/iowa/2021/02/15/iowa-swimming-diving-gary-barta-title-ix-lawsuit-hawkeye-athletics/6757296002/>.

⁹¹ *Brown university to reinstate women's equestrian and fencing to comply with title ix and provide equal opportunity for women athletes*, ACLU (Sep. 17, 2020), <https://www.aclu.org/press-releases/brown-university-reinstate-womens-equestrian-and-fencing-comply-title-ix-and-provide>.

⁹² D'Arcy Maine, *East Carolina reinstates women's swimming, tennis*, ESPN (Jan. 7, 2021), https://www.espn.com/college-sports/story/_/id/30668871/east-carolina-reinstates-women-swimming-tennis.

⁹³ Rick Seltzer, *William & Mary backtracks on cutting women's sports*, INSIDE HIGHER ED. (Oct. 20, 2020), <https://www.insidehighered.com/quicktakes/2020/10/20/william-mary-backtracks-cutting-womens-sports>.



teams and agreed to restore those teams as a result of settlements reached in late 2020. For these schools, enforcement operated to protect women's athletic opportunities, but as higher education endures this grueling pandemic the unfortunate reality is that women's sports will likely to continue to be at risk of elimination.⁹⁴

The existing and expanding inequities that result from educational institutions' choices to diminish and constrain women's sports discussed in this subsection contextualize claims that inclusion of transgender athletes threatens to meaningfully diminish athletic opportunities for girls and women. Even setting aside the most important point, that transgender girls are girls, and therefore have the same access to girls' sports as any other girl, the potential displacement caused by the inclusion of a group that constitutes less than 1% of the population⁹⁵ pales in comparison to the extant inequality that educational institutions themselves have already caused and failed to remedy in Title IX's almost 50-year history. The argument is also ironic in its failure to recognize that transgender girls face not only the same diminished opportunities as cisgender girls, but additional barriers to participation unique to them. A Women's Sports Foundation report identified intolerance to gender nonconformity as a key barrier to participation.⁹⁶ According to a survey conducted by Dennison & Kitchen, 84% of Americans indicated that they either witnessed or experienced anti-LGBT attitudes in sport.⁹⁷ Beliefs driven by stereotypes and discrimination continue to keep many girls and women from fully participating in sport.⁹⁸ Peer pressure to conform to gender norms is also a factor in constraining women's participation in sports. In a survey of girls,⁹⁹ nearly one-third (32%) reported that sometimes boys made fun of them or made them feel uncomfortable while they practiced. In an analysis of physical activity disparities between heterosexual and sexual minority youth between the ages of 12 and 22 years, sexual minorities (lesbian, gay, bi-sexual, mostly heterosexual) were 46%-76% less likely to participate in

⁹⁴ For an in-depth study on the impact that COVID-19 has had on college athletics, see Ryan Swanson & Allison B. Smith, *COVID-19 and the cutting of athletic teams*, 23 *SPORT IN SOCIETY*, at 1724 (2020).

⁹⁵ See Section I.C, discussing this reasoning as a basis for the district court's enjoining Idaho's restrictive statute in *Hecox*.

⁹⁶ *Chasing Equity Executive Summary*, WOMEN'S SPORTS FOUND. (2020), <https://www.womens-sportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>.

⁹⁷ Dennison E., & Kitchen A., *Out on the fields: The first international study on homophobia in sport*, Nielsen, Bingham Cup Sydney 2014, Australian Sports Commission, Federation of Gay Games, OUT ON THE FIELDS (2015), <http://www.outonthefields.com/media/#United%20States>.

⁹⁸ *Chasing Equity Report*, WOMEN'S SPORTS FOUND. (2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf>.

⁹⁹ Nicole Zarrett, Cheryl Cooky & Philip Veliz, *Coaching through a gender lens: Maximizing girls' play and potential*, WOMEN'S SPORTS FOUND. (2019).



team sports than their same-sex heterosexual peers.¹⁰⁰ Women's sports are facing a real threat, but the culprit is not transgender athletes.

C. Sports Participation Is Particularly Valuable for Transgender Students

“The true measure of any society can be found in how it treats its most vulnerable members.” — Mahatma Gandhi¹⁰¹

In general, transgender students suffer disproportionately to others, a fact even more heightened during their high school years. And while this is a relatively small segment of the overall population, the challenges are real and consequential. Unfortunately, transgender people have worse health outcomes than cisgender people. Transgender people are reluctant to seek medical care; they often experience discrimination by medical staff, or staff are unfamiliar with issues they face and do not provide guideline-supported care.¹⁰²

In particular, sport spaces such as locker rooms and athletic facilities have been singled out as unsafe by transgender students.¹⁰³ Research shows bullying related to sexual and gender identities is strongly related to contemplation of suicide in sexual and gender minority youth.¹⁰⁴ These kids often feel different, or uncomfortable in their bodies.¹⁰⁵ When students feel targeted due to sexual and gender identities, they will be less likely to join school athletic teams and may not

¹⁰⁰ Calzo, *supra* note 78.

¹⁰¹ Attributed to Mahatma Gandhi despite debate over source, see Paul Knight, *Letter: Quote from Humphrey, not Gandhi*, THE COLUMBIAN (2016), <https://www.columbian.com/news/2016/nov/11/letter-quote-from-humphrey-not-gandhi/>; refer to David I. Conway, Alex D. McMahon, Denise Brown, & Alastair H. Leyland., *Reducing social inequalities in cancer: Evidence and priorities for research*, NCBI (2019), <https://www.ncbi.nlm.nih.gov/books/NBK566205/>.

¹⁰² Lauren Wilson, *Commentary: When it comes to transgender athletes, let the kids play*, 406 MT SPORTS (Jan. 20, 2021), https://406mtsports.com/406mtsports/commentary-when-it-comes-to-transgender-athletes-let-the-kids-play/article_64c5145f-517c-54da-9bfd-3a9e84bd2d74.html.

¹⁰³ Kosciw et al., *Developing physically active girls*, TUCKER CENTER FOR RESEARCH ON GIRLS & WOMEN IN SPORT, at 148 (2016), https://www.cehd.umn.edu/tuckercenter/library/docs/research/2018-Tucker-Center-Research-Report_Developing-Physically-Active-Girls_Full-Report.pdf.

¹⁰⁴ Michele Ybarra, Kimberly J. Mitchell, Joseph Kosciw & Josephine Korchmaros, *Understanding linkages between bullying and suicidal ideation in a national sample of LGB and heterosexual youth in the United States*, PREV. SCI. (2014).

¹⁰⁵ Lauren Wilson, *Commentary: When it comes to transgender athletes, let the kids play*, 406 MT SPORTS (Jan. 20, 2021), https://406mtsports.com/406mtsports/commentary-when-it-comes-to-transgender-athletes-let-the-kids-play/article_64c5145f-517c-54da-9bfd-3a9e84bd2d74.html.



be physically active.¹⁰⁶ Limitations on transgender student-athletes impacts their ability to find lifetime success arising from exposure to sports.

A recent Gallup poll indicates more young people identify as LGBTQ+ than ever before.¹⁰⁷ This reality will continue to shape policies and laws into the future. And when considering the youth transgender population, according to the United States Centers for Disease Control and Prevention (CDC) data from 2018, nearly 2% of high school students in the United States identify as transgender.¹⁰⁸ Despite the growing numbers of those that identify as transgender, data show that this segment of children suffers considerably:

- 27% feel unsafe at school or traveling to or from campus
- 35% are bullied at school
- 35% attempt suicide¹⁰⁹

In a large national study, 86% of those perceived as transgender in a K–12 school experienced some form of harassment, and for 12%, the harassment was severe enough for them to leave school.¹¹⁰ Pushing young people away from their gender identity has extremely harmful consequences. Denying transgender student-athletes the opportunity to compete consistent with their gender identity stigmatizes them and withholds affirmation of their gender identity that is required for positive self-image. Rejecting transgender identity may lead some students to withdraw or be distant from others. If questioning youth do not communicate their feelings or fears, they will not gain important social support to help them feel more comfortable.¹¹¹

Forcing transgender children to play on teams according to their sex assigned at birth, rather than the gender they live in, undermines their ability to belong to their community as their authentic selves, essentially excluding them from sports participation.¹¹² Transgender people who are not able to transition or

¹⁰⁶ Calzo, *supra* note 74.

¹⁰⁷ Jeffrey M. Jones, *LGBT identification rises to 5.6% in latest U.S. estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.

¹⁰⁸ Valerie Strauss, *CDC: Nearly 2 percent of high school students identify as transgender—and more than one-third of them attempt suicide*, WASH. POST (2019), <https://www.washingtonpost.com/education/2019/01/24/cdc-nearly-percent-high-school-students-identify-transgender-more-than-one-third-them-attempt-suicide/>.

¹⁰⁹ *Id.*

¹¹⁰ *2015 U.S. Transgender Survey: Idaho State Report*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, at 1–2 (Oct. 2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSIDStateReport%281017%29.pdf>.

¹¹¹ Kosciw, *supra* note 112.

¹¹² Lauren Wilson, *Commentary: When it comes to transgender athletes, let the kids play*, 406 MT SPORTS (Jan. 20, 2021), https://406mtnsports.com/406mtnsports/commentary-when-it-comes-to-transgender-athletes-let-the-kids-play/article_64c5145f-517c-54da-9bfd-3a9e84bd2d74.html.



receive “gender affirming” medical care have high rates of anxiety, depression, self-harm, and suicide. It is estimated that more than half have suicidal thoughts, and 35% attempt suicide. In contrast, young children who have been allowed to live in their authentic gender from the start have rates of depression similar to age-matched cisgender peers.¹¹³

Despite the broad societal pressures and challenges facing transgender students, sports offer many a vehicle to combat this reality. The benefits to participating have been discussed thoroughly, yet the stark reality is that LGBTQ and transgender high school students do not take advantage of this opportunity at the same rates as others. The 2017 National Survey of Children’s Health (NSCH) continues to show that “the rates of youth sports participation are lower for youth with a disability and those who identify as gay, lesbian, bisexual, or not sure.”¹¹⁴

- In a study by the Human Rights Campaign (2017), 68% of high school students participated in sport, yet LGBTQ girls participated at a rate of 29%. The rate was merely 12% for transgender girls.¹¹⁵
- In a study conducted by GLSEN, an organization that works to eradicate discrimination against lesbian, gay, bi-sexual, transgender, and queer students (LGBTQ) in kindergarten through high school, four in ten LGBT students avoided locker rooms because they felt threatened and/or unsafe.¹¹⁶ These findings reflect similar trends reported in the 2015 National School Climate Survey, where a third of the LGBT students responded that they felt unsafe in school locker rooms.¹¹⁷ Nearly a quarter of LGBT students reported staying away from athletic facilities and fields for the same reason.¹¹⁸
- Four in five LGBT youth athletes remain closeted and do not disclose to their coach or coaches.¹¹⁹ Eighty-two percent of transgender and gender expansive youths are not out to their coaches.¹²⁰

¹¹³ *See id.*

¹¹⁴ *The National Youth Sports Strategy*, OFFICE OF THE ASSISTANT SECRETARY FOR HEALTH, at 35 (2019), https://health.gov/sites/default/files/2019-10/National_Youth_Sports_Strategy.pdf.

¹¹⁵ Chasing Equity Executive Summary, WOMEN’S SPORTS FOUND., at 16 (2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>.

¹¹⁶ *The 2015 National School Climate Survey*, GLESEN at 12 (2015), <https://files.eric.ed.gov/full-text/ED574780.pdf>.

¹¹⁷ *See id.*

¹¹⁸ *The experiences of LGBT students in school athletics*, GLESEN (2013), https://www.glsen.org/sites/default/files/2020-01/The_Experiences_of_LGBT_Students_In_School_Athletics_2013.pdf.

¹¹⁹ Bi+ Youth Report, HUMAN RIGHTS CAMPAIGN, (2019), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/images/resources/HRC-2019-Bi-Youth-Report.pdf?mtime=20200713140159&focal=none>.

¹²⁰ *Id.*



- While there are no figures available on how many transgender girls choose to participate in school-based sport programs, the Trevor Project reports that 1.8% of high school students are transgender.¹²¹ In the Trevor Project's first national survey of mental health issues facing LGBTQ students, released in 2019, 58% of transgender and non-binary youth reported being discouraged from using bathrooms that matched their gender identity.¹²²

And thus, a vicious cycle is created as self-worth, confidence, and physical and mental health suffer rather than grow. As opportunities to participate as one's true self are denied, students are looped back into this circle.

D. Protecting Girls' Sport Does Not Require Exclusion of Transgender Girls

Efforts to restrict the participation of transgender athletes are rooted in protectionism of girls and women's sports. Underscoring this argument is the belief that cisgender girls are incapable of competing alongside and against transgender girls, who may enjoy physical advantages as a result of their male, birth-assigned sex. We do not deny that post-puberty, generalized, sex-based differences exist.¹²³ But this does not mean cisgender girls are categorically disadvantaged when it comes to sport. After all, cisgender girls compete with and against cisgender boys all the time. Ironically, one of the Connecticut high school athletes suing over the interscholastic athletic association's inclusive policy beat one of the transgender girls whose participation threatens her rightful victory.¹²⁴ Even adult women routinely beat adult men in non-elite athletic contests, and elite competitions even have female winners at times. Additionally, the fact that

¹²¹ *Research brief: Data on transgender youth*, TREVOR PROJECT (Feb. 22, 2019), <https://www.thetrevorproject.org/2019/02/22/research-brief-data-on-transgender-youth/>.

¹²² *National Survey on LGBTQ Youth Mental Health 2019*, TREVOR PROJECT, <https://www.thetrevorproject.org/survey-2019/> (last visited Feb. 28, 2021).

¹²³ Athletic performance differences between males and females prior to puberty are often considered inconsequential or relatively small. See E. N. Hilton & T. R. Lundberg, *Transgender women in the female category of sport: Perspectives on testosterone suppression and performance advantage*, SPORTS MEDICINE, at 200 (2020).

¹²⁴ *Cisgender female who sued beats transgender athlete in high school race*, Fox 61 (Feb. 15, 2020), <https://www.fox61.com/article/news/local/transgender-athlete-loses-track-race-lawsuit-ci-ac-high-school-sports/520-df66c6f5-5ca9-496b-a6ba-61e828655bc6>.



many transgender girls delay puberty by treatment with testosterone blockers further dilutes the claim that transgender girls pose a categorical threat.¹²⁵

But more importantly, policies governing scholastic sports should not pursue the elimination of competitive advantage at the expense of promoting inclusion. Contest outcomes are far from the point of scholastic sport. Even Joanna Harper, a transgender athlete medical physicist, whose work is widely cited by those who support exclusion of transgender and intersex athletes from elite sports, contends that “where there’s no professional contracts, no money, no Olympic glory, policies should be very inclusive.”¹²⁶ As discussed earlier,¹²⁷ the reason the government promotes, and why taxpayers support, school-sponsored athletic programs is not to benefit the elite few who may claim a state title on their way to an Olympic or professional career, it is because youth generally benefit from athletic participation.

Concern that transgender inclusion will lead to the end of separate sports for boys and girls are unfounded. Scholastic sports are separated into sex-based categories in order to ensure generally that girls’ opportunities are protected. Historically, girls have been excluded and marginalized from sport, so this protectionism is warranted. However, this protection is not undermined by the inclusion of transgender girls. First and foremost, this is because transgender girls are girls themselves, and anti-female bias in sport affects them as well. In addition, the small size of the transgender population and the imperfect proxy between birth-assigned sex and athletic performance support this conclusion as well.

But not only does transgender inclusion not undermine the protection of girls’ athletic opportunities, the emphatic, high-profile exclusion of transgender girls could actually harm their athletic development. Stereotype threat is a well-documented phenomenon that calling an individual’s attention to a generalized weakness of a group to which that individual belongs ensures that the individual’s performance will reflect that weakness. Just as a well-timed message that “girls aren’t good at math” will measurably diminish their performance on a math test, female athletes may internalize the message, inherent in transgender exclusion policies, that female athletes are so athletically inferior that they cannot safely or effectively compete against even a single transgender girl competitor. Moreover,

¹²⁵ *Developing physically active girls*, TUCKER CENTER FOR RESEARCH ON GIRLS & WOMEN IN SPORT, at 150 (2018), https://www.cehd.umn.edu/tuckercenter/library/docs/research/2018-Tucker-Center-Research-Report_Developing-Physically-Active-Girls_Full-Report.pdf (citing de Vries et al., 2014); Lauren Wilson, *Commentary: When it comes to transgender athletes, let the kids play*, 406 MT SPORTS (Jan. 20, 2021), https://406mtsports.com/406mtsports/commentary-when-it-comes-to-transgender-athletes-let-the-kids-play/article_64c5145f-517c-54da-9bfd-3a9e84bd2d74.html.

¹²⁶ See Brassil, *supra* note 1.

¹²⁷ See Section II.A.



when transgender athletes do raise the level of athleticism in girls' sport, their teammates and competitors benefit. A strong athlete raises the level of play of those around them both physically and motivationally.¹²⁸ If the point of scholastic sport is to help develop athletic talent, athletes with diverse competitive abilities should be welcomed, not singled out for exclusion.

One final point helps demonstrate that emphasis on competitive equity is misplaced. Diversity of strength and size already exists within gender categories. Yet, among youth, there already is wide size variability among the group of girls or group of boys on the field or court. High school teams may consist of freshman and seniors, whose bodies differ in size and strength because of age. Genetic differences abound and many athletes benefit from physical characteristics that allow them to succeed in competition. For example, Michael Phelps was born with unusually long arms, large feet, and broad shoulders, a physique that gives him a considerable advantage in the swimming pool. Shaquille O'Neal is 7-foot-2 yet during his basketball playing career was incredibly fluid and strong for someone his size. The possibility of transgender-based athletic advantage is singled out for scrutiny, while other forms of athletic advantage are accepted as diversity that makes sport interesting. This suggests competitive equity may be operating as a pretext for bias against transgender people, serving as yet another reason why it should not be driving policy away from inclusion.

E. Medical Requirements Are Incompatible with Youth Participation

Subjecting girls to sex-verification requirements is discriminatory and a barrier to athletic participation. As Idaho's law demonstrates, sex-verification is employed as the means to distinguish transgender from cisgender girls. While this usage is relatively new, sex verification has historically been employed to detect men who are trying to fraudulently compete as women. But this history also shows that sex-verification efforts have been misused to humiliate and unfairly exclude women with intersex conditions.¹²⁹ Thus, efforts to marginalize transgender athletes are "... rooted in the same harmful history of gender discrimination and

¹²⁸ See, e.g., Deborah Brake, *Getting in the Game* 24 (2010) (acknowledging that an argument against letting the best female athletes play men's sports is to bolster women's sports by ensuring that female athletes play against the most talented female players).

¹²⁹ Lauren Wilson, *Commentary: When it comes to transgender athletes, let the kids play*, 406 MT SPORTS (Jan. 20, 2021), https://406mtsports.com/406mtsports/commentary-when-it-comes-to-transgender-athletes-let-the-kids-play/article_64c5145f-517c-54da-9bfd-3a9e84bd2d74.html.



stereotyping that has impeded the achievement of gender equality in sports as a whole.”¹³⁰

Under Idaho’s law, girls may also have to endure invasive medical tests that could constitute an invasion of privacy in order to “verify” their sex.¹³¹ Different treatment based on transgender status or homosexuality would generally constitute unlawful sex discrimination because students who do not identify as transgender or homosexual cannot generally be treated worse than students who identify as transgender or homosexual.¹³² Dr. Sara Swoboda, a pediatrician in Boise with approximately 1,500 patients across Idaho, explained that sex verification is not a necessary part of a sports physical or any standard medical examination absent medical concerns and indications of underlying health conditions necessitating treatment. Physiological characteristics are not tested for in any routine sports’ physical examination.¹³³ If a health care provider was to verify a patient’s sex related to their reproductive anatomy, genes, or hormones, none of that testing is straightforward or ethical without medical indication.¹³⁴ Moreover, a sex verification examination is unequal to the physical sports exam a male must have in order to play sports. Being subject to a sex dispute is itself a burden. The process creates a means for bullying girls perceived as less feminine or unpopular and dissuades them from participating in sports.

Policies that require transgender youth to undergo hormone treatment as a condition for participation also impose problematic medical requirements. While many transgender youth elect hormone-based treatments such as puberty-blockers and cross-sex hormones, such medical interventions should never be a condition to athletic participation imposed on youth. Health risks associated with such treatments are, fortunately, low, but risks, particularly risks to one’s fertility, nevertheless exist. To promote careful decision and to respect the autonomy of transgender youth, their families, and their medical providers, school-sponsored sport should not influence the personal decision of when and if to begin a medical transition.

¹³⁰ *Chasing Equity Report*, WOMEN’S SPORTS FOUND., at 43 (2020), <https://www.womenssports-foundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf> (quoting ACLU lawyer, Galen Sherwin).

¹³¹ Idaho Code § 33-6302(3).

¹³² See Bostock, 140 S. Ct. at 1747.

¹³³ See Hecox, 479 F. Supp. 3d at 986.

¹³⁴ *Id.* at 985-86.



F. Conclusion

In sum, transgender athletes should be allowed to compete according to their gender identity in scholastic sports programs for a number of important reasons discussed in this section. First and foremost, transgender girls are girls. There is nothing pathological about being transgender, but the stigma and shame that results from exclusion, from misgendering, and from harassment creates enormous health risks. At the same time, we know that when important individuals, such as family members, and important institutions, such as schools, affirm their identities, these risks are mitigated and transgender youth flourish. Thus, there is no neutral ground in this context. Inclusion is powerfully positive and the opposite is equally true.

It is also important to recognize the context of scholastic sport, which exists to provide opportunities to many, not the elite few. Accordingly, concerns about competition outcome and the pursuit of elusive “competitive equity” should not drive decisions over who should participate in scholastic sports. Relatedly, girls (transgender and cisgender alike) are diverse in skill and ability. Diversity should be welcomed in a learning environment such as scholastic sport, since competing with and against someone more skilled improves one’s own athleticism.

Fears that men will pretend to be female to compete on a women’s team are unwarranted given the entire 40-year history of ‘sex verification’ procedures in international sport competitions.¹³⁵ Some have gone so far as to claim that transgender women’s participation will lead to “the death of women’s sport.”¹³⁶ Yet, as this section has also demonstrated, the real threat to women’s sport is legal and institutional failures to ensure equal access to opportunity.

Section III.

This section argues that, to secure the rights of transgender athletes to compete according to their gender identity in scholastic sports, the OCR should use its enforcement authority under Title IX to promulgate regulations that require educational institutions to respect transgender students’ rights in the context of athletics. This section specifically argues that regulations, as opposed to other sources of law, are the most favorable vehicle to deliver this protection. Besides a handful of exceptions that are contained in the statute itself, the details

¹³⁵ Ronald S. Katz & Robert W. Luckinbill, *Changing sex/gender roles and sport*, 28 STAN L. & POLICY REV. (2) 215, 242 (2017).

¹³⁶ *Paula Radcliffe: Transgender athletes ‘could be death of women’s sport*, SKY NEWS (April 19, 2019), <https://news.sky.com/video/paula-radcliffe-trans-athletes-could-be-death-of-womens-sport-11697632>.



of Title IX’s requirements are found in the implementing regulations initially promulgated by the Department of Education’s predecessor agency in 1975, so Title IX regulations are a natural home for policy that regulates education, athletics, and sex at a high level of detail.

To be sure, OCR has made very few amendments to the regulations that have appeared since their initial promulgation,¹³⁷ as it clearly prefers to use nonlegislative rules—interpretive rules, clarifications, Dear Colleague Letters—to further expound on the details of the regulatory requirements. Transgender students’ civil rights have already been the subject of such regulatory guidance, including, as noted previously, the Obama administration’s OCR’s Dear Colleague Letter interpreting Title IX to protect the rights of transgender students in education including athletics,¹³⁸ the Trump administration’s withdrawal of that guidance,¹³⁹ and its subsequent enforcement action that inclusion of transgender athletes on girls’ sports teams violated the Title IX rights of female athletes who are not transgender. Then, on his first day in office, President Biden announced that restoring civil rights for transgender student-athletes is a top priority. He issued an executive order that requires the agencies under his control to take steps to harmonize their regulations and policies with sentiments of LGBTQ inclusion, including the idea that “[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.”¹⁴⁰

This section proposes that the Department of Education’s OCR should accomplish this goal by promulgating a regulation via notice-and-comment process, that protects generally the right of transgender athletes to compete according to their gender identity, and that specifically protects athletes in elementary and secondary schools from having to undergo medical intervention as a condition for such participation.

Specifically, OCR should seek to amend 34 C.F.R. 106.41(b), which reads in relevant part:

- (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams

¹³⁷ The recent rulemaking process that revamped the disciplinary process for sexual misconduct is the most notable example. The only other major regulatory revision to the Title IX regulations was the single-sex education rule promulgated in 2006, *see* 71 FR 62542 (Oct. 25, 2006).

¹³⁸ *Dear Colleague Letter on Transgender Students*, OCR (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹³⁹ *Dear Colleague Letter*, U.S. Dep’t of Educ. & U.S. Dep’t of Just. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁴⁰ Exec. Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 21, 2021). The Executive Order requires federal agencies to harmonize their regulations and policies with that and other aspects of nondiscrimination.



for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.¹⁴¹

To this provision, OCR should add:

(b)(1) Recipients whose teams are separated by sex shall permit athletes to compete according to their affirmed gender identity, regardless of their birth-assigned sex.

(b)(2) In implementing (b)(1), recipients may only impose participation requirements based on sound, current, and research-based medical knowledge, and which are narrowly tailored to promoting competitive fairness or physical safety of the sport.¹⁴²

(b)(3) Notwithstanding (b)(2), a recipient that operates an elementary or secondary school may not require medical treatment as a requirement for athletes seeking to compete according to their affirmed gender identity rather than their birth-assigned sex.

Proposed (b)(1) would operate to prohibit educational institutions from categorically restricting transgender athletes from participating in the gender category that matches their gender identity. We will refer to this aspect of the proposed regulation as the “inclusion mandate.” Proposed (b)(2) and (b)(3) address whether, consistent with the inclusion mandate, educational institutions can require transgender athletes to transition using hormones, as a condition for participation according to their gender identity. Proposed (b)(2) borrows language from OCR’s 2016 Dear Colleague Letter that effectively endorsed the prevailing NCAA hormone rule, and in this way signals that varsity college sports are permitted to require transgender women to transition via hormones in order to compete in women’s sports. OCR could issue interpretive guidance to clarify what type of participation requirements may be permissible. But proposed (b)(3) prohibits elementary and secondary schools from imposing medical requirements as a condition for transgender athletes’ participation.

The remainder of this section lays out the argument in favor of regulation, as opposed to nonlegislative rules or statutory amendments, to impart this

¹⁴¹ The authors also endorse removing the reference to contact sports in this and the second sentences of this regulatory provision. But while we note that our proposed revision to 106.41(b) provides an ideal opportunity to do so, the contact sport exception is beyond the scope of this article. For more on the contact sport exception and its incompatibility with Equal Protection, see Suzanne Sangree, *Title IX and the contact sports exemption: Gender stereotypes in a civil rights statute*, 32 CONN. L. REV. 381, 428 (2000).

¹⁴² This proposed provision borrows language from the 2016 Dear Colleague Letter; see *Dear Colleague Letter on Transgender Students*, OCR (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.



proposed policy. It will examine the distinct advantages that rulemaking offers in comparison to OCR’s historic approach of clarifying regulatory requirements via nonlegislative rules. It will also address why OCR rulemaking is better than the alternative of Congressional intervention on this issue.

A. Clarity and Stability

Agencies may issue nonlegislative rules—interpretive rules, policy statements, guidance—to interpret existing statutes or regulations that impose duties on regulated entities. The existing regulatory requirement that prohibits sex discrimination in athletics except in accordance with 106.41(b) is binding on funding recipients. Especially in light of *Bostock*, which arguably creates an obligation to incorporate sexual orientation and gender identity-based discrimination in Title IX, it would be legally justifiable for OCR to issue an interpretive rule clarifying how the separate team regulation squares with LGBTQ rights. But just because the agency can address this issue by issuing nonlegislative rules does not mean it should. Compared to nonlegislative rule, a regulatory change would add stability to this area of law. Unlike past interpretive policies that have resulted in enduring interpretations of Title IX—the most notable example being the 1979 Policy Interpretation that provided the framework for assessing equity in the distribution of athletic opportunities based on sex—today’s political climate suggests that LGBTQ rights will continue to be a litmus test in presidential politics. A regulatory change will not prevent a subsequent administration from scaling back the rights of transgender student-athletes once again, but it will provide procedural safeguards on any such effort, since changes at the regulatory level must employ the notice and comment process outlined in the Administrative Procedure Act.

Regulatory clarity and stability would also signal to states the adverse consequences to their educational institutions of passing statutes that exclude or restrict transgender students’ participation in conflict with the regulations. A regulatory provision that clearly requires inclusion and prohibits the imposition of hormone requirements on elementary and secondary school athletes will send a strong message to statehouses across the country that passing laws like Idaho’s risks Title IX compliance, and thus, federal funding for educational institutions within that state. This consequence will make it harder for legislators to support proposed legislation, and also provides political “cover” to those who favor inclusion but might otherwise cave to perceived pressure from constituents and donors.

B. Judicial Deference

Title IX enforcement takes place in two contexts: federal agency enforcement proceedings (by the Department of Education’s OCR, primarily) that threaten



to withdraw federal funding to educational institutions that fail to comply; and private lawsuits pursuing injunctive relief, money damages, and other judicial remedies. When courts consider whether plaintiffs' Title IX rights have been violated, they routinely defer to OCR's implementing regulations.¹⁴³ It is also common for courts to defer to an agency's interpretations of its own regulations. This deference doctrine—which derives from two Supreme Court cases called *Seminole Rock*¹⁴⁴ and *Auer*¹⁴⁵ and goes by either of those names—has been called into question by recent cases, including a case that, coincidentally, also involved Title IX and transgender rights. In *Grimm v. Gloucester School District*, the Fourth Circuit Court of Appeals deferred to OCR's interpretation, contained in its 2016 Dear Colleague Letter, of Title IX regulation permitting schools to have separate bathrooms for each sex, in concluding that excluding a transgender student from the bathroom that corresponded to his gender violated Title IX.¹⁴⁶ The Supreme Court granted certiorari to resolve, among other questions, whether the Auer doctrine should be overturned. Because the Trump administration's OCR withdrew the 2016 letter, this aspect of the case became moot and the Court revoked its plans to decide the case.¹⁴⁷ But there are many who believe the Court would have used it to overturn or scale back Auer deference. And while the Supreme Court later confirmed the Auer doctrine in a 2019 decision, *Kisor v. Wilkie*, only five Justices supported the idea of extending deference to agencies' interpretations of their own regulations, and one of those was now-departed Justice Ginsburg.¹⁴⁸ Thus, whenever the Court next has the opportunity to consider it, the Auer doctrine is vulnerable to being overturned. For this reason, between a regulation that interprets Title IX to require inclusion of transgender athletes, and a nonlegislative rule that interprets Title IX regulations to require inclusion of transgender athletes, the former is more likely to influence judicial decisions addressing this matter.

C. Agency Expertise, Not Divisive Politics

The Equality Act is legislation introduced in Congress in each of the last three congressional sessions that would expressly prohibit discrimination on the basis of sexual orientation and gender identity in a variety of contexts, including education. It was introduced into the current session on Feb. 18, 2021.¹⁴⁹

¹⁴³ *Chevron v. Natural Res. Def. Coun.*, 467 U.S. 837, 844 (1984).

¹⁴⁴ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 415 (1945).

¹⁴⁵ *Auer v. Robbins*, 519 U.S. 452, 463 (1997).

¹⁴⁶ *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723-24 (4th Cir. 2016).

¹⁴⁷ *Grimm*, 972 F.3d 586 at 601-02 (describing procedural history of the case).

¹⁴⁸ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

¹⁴⁹ Equality Act, H.R.5., 117th Cong. § 2(a) (2021).



Advocates believe that the Equality Act would provide consistent and explicit anti-discrimination protections for transgender people, since the act makes explicit that existing federal statutes prohibiting sex discrimination in education also prohibit sexual orientation and gender identity discrimination.¹⁵⁰

Some have called for amendments to the Equality Act that would specifically address its application to athletic programs that are separated by sex. However, attempting to resolve the question of transgender inclusion as a matter of congressional politics, rather than agency rulemaking, is disadvantageous for several reasons. First, the issue is politically divisive and would threaten the Equality Act's best chance of passing. Currently, vocal advocates for "women's sports" are pushing for Congress to consider a version of the Equality Act that would exclude transgender girls from participating as girls. If this approach receives momentum in Congress, the Equality Act would lose support from the political left. In 2007, the Equality Act's predecessor LGBTQ civil rights bill, the Employment Nondiscrimination Act, the civil rights community divided over whether to support a version of the bill that neglected protections for transgender people.¹⁵¹ But the fallout unified LGBTQ and allied civil rights groups going forward. In 2014, when proposed religious exemptions threatened to effectively diminish protection for some LGBTQ workers, the civil rights community was much more unified in its withdrawal of support for the bill as a whole.

Instead of consigning the civil rights of a powerless and potentially unpopular minority to a divisive political process, the question of transgender athletes' inclusion should instead be assigned to a process that permits government experts in education and civil rights to take a leadership role, influencing public opinion in support of inclusion by using the rulemaking process as an opportunity for education and national conversation. To implement an inclusion regulation via the rulemaking process, OCR would first publish a proposed regulation accompanied by a rationale and justification that emphasizes the benefits of inclusion and the education-driven purpose of scholastic athletic programs. It would then provide an opportunity to the public to submit comments in support or opposition of the agency's proposal. Those authoring comments intended to persuade the agency to change the proposed regulation will necessarily read and consider the agency's rationale. Thus, compared to a political process, the notice and comment process engages opponents of inclusion to at least consider the other point of view before solidifying their own. And unlike the political process,

¹⁵⁰ Equality Act, H.R.5., 117th Cong. § 2(a) (2021).

¹⁵¹ Troy Masters, *10 years later, firestorm over gay-only ENDA vote still informs movement*, LA BLADE (2017), <https://www.losangelesblade.com/2017/11/06/10-years-later-firestorm-gay-enda-vote-still-informs-movement/>.



the outcome of a notice-and-comment process is not determined by the loudest, largest collection of voices. Compared to the political process, the rulemaking process allows logic and reason to dictate the result. For these reasons, an agency led by experts in education and civil rights is more likely to produce an inclusive rule than Congress.

D. Consistent with Title IX

A statutory amendment is not necessary to authorize OCR to promulgate the regulatory changes proposed in this section. The inclusion provision is not only within the scope of Title IX, it is required by Title IX. The proposed provisions that permit colleges, but not elementary and secondary schools, to restrict participation based on hormones are within the scope of Title IX and justified as a matter of rational policy.

Title IX prohibits discrimination based on sex. As with other federal civil rights statutes that prohibit sex discrimination, Congress did not expressly define the concept of sex discrimination or address its relationship to discrimination against LGBTQ individuals. In recent years, however, various federal appellate and district courts have confirmed that sex discrimination includes discrimination on the basis of someone's transgender status. This theory was confirmed in 2020 when the Supreme Court ruled in *Bostock v. Clayton County* that the sex discrimination provision in Title VII necessarily prohibited an employer from firing a transgender employee because of her transgender status.¹⁵² In reaching this result, the Court employed a "straightforward" application of the "plain and settled meaning" of sex discrimination. What makes a person transgender is the relationship between their sex and their gender identity. Therefore, the Court reasoned, "it is not possible to discriminate against a person for being ... transgender without discriminating against that individual based on sex."¹⁵³ If an employer would fire a person who was assigned male at birth, but whose gender identity is female, but the same employer would not fire a person who was assigned female at birth, but whose gender identity is female, the employer is impermissibly using sex as the deciding factor in the discharge decision.¹⁵⁴

Typically, judicial interpretations of sex discrimination in a single civil rights statute are precedential in determining the scope of sex discrimination provisions in other civil rights statutes. Though the Supreme Court expressly refrained from extending the ruling in *Bostock* to other contexts, besides a

¹⁵² See *Bostock*, 140 S. Ct. at 1741.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1741-42.



discriminatory termination of an employee under Title VII,¹⁵⁵ lower courts would surely employ the Court's rationale in Title IX cases, and rule that, like employers, schools cannot discriminate against transgender individuals just because they are transgender.

But *Bostock* did not involve discrimination in the context of a sex-segregated activity like sports, which raises questions about whether its reasoning, even if adopted for the purposes of generally understanding Title IX, necessarily resolves the sports question. Unlike employment, sports permit sex discrimination in the sense that boys can be excluded from girls' teams and vice versa. So, the Court's simple explanation that sex discrimination occurs when a natal-male/female identified person is treated differently than a natal-female/female identified person does not apply.

Still, there is sex discrimination when a school tells transgender students that they cannot play sports according to their gender identity, in contrast to cisgender students, who can. If transgender students are categorically singled out for differential treatment and excluded from the gender-affirming participation, they are, as a group, being treated differently from cis-gender students on the basis of their defining characteristic, transgender status, which is defined by reference to both their gender identity and their sex. While *Bostock* does not automatically resolve the question of discrimination in sex-segregated contexts, its recognition that sex is an inextricable reference point for understanding the concept "transgender" signals that policies singling out transgender students and excluding them from activities that affirm their gender identities is similarly impermissible.

In addition to *Bostock*, other judicial decisions support the conclusion that Title IX requires inclusion of transgender athletes in the context of athletics. Lower court decisions affirm transgender students' rights under Title IX to use the sex-segregated bathroom and locker room that corresponds to their gender identity. Most notably, in the wake of *Bostock*, the Fourth Circuit Court of Appeals held that a school district's policy prohibiting transgender students from using the restroom that corresponded to their gender violated Title IX. The plaintiff, a transgender boy, "was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender."¹⁵⁶ Other courts, even prior to *Bostock*, have held similarly.¹⁵⁷ No

¹⁵⁵ *See id.*

¹⁵⁶ Grimm, 972 F.3d at 618.

¹⁵⁷ Whitaker, 858 F.3d at 1049 (holding a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 564 (M.D. Pa. 2019) ("[T]he District's policy discriminates against A.H. on the basis of her gender non-conformity, where, under the District's policy, all students except for A.H. can use the restroom corresponding with his/her gender identity.").



cases have arisen yet in which students have challenged exclusion from athletic programs under Title IX, but with *Bostock* signaling Title IX's application to transgender discrimination generally, and other cases applying Title IX to secure transgender students' rights in the analogous context of segregated bathrooms, it is clear that the statute supports a regulatory inclusion provision like the one proposed in this section.

Bostock and the bathroom cases do not as clearly address whether educational institutions might impose conditions for participation in the form of a hormone transition requirement. As a matter of policy, if not law, hormone requirements are most defensible when they are minimally infringing on a student's opportunity to participate in sport. The opportunity to compete in varsity collegiate athletics is already an exclusive one. Most college students do not have the expectation that they can compete. So, hormone-based restrictions on participation at the college level affect a much smaller subset of the student population than if similar restrictions were applied to elementary and secondary school athletics. In addition, compared to the rights of elementary and secondary school students, the rights of college athletes are less impaired by a hormone requirement because college students are of adult age and have had more time to make a decision to transition via hormones for reasons unrelated to athletics.

As a legal matter, there is regulatory precedent for defining Title IX violations differently for elementary and secondary institutions on one hand and post-secondary institutions on the other. For example, the Title IX regulations permit elementary and secondary schools to operate single-sex programs—so long as they are voluntary and tailored toward a permitted objective—while colleges and universities have no such leeway.¹⁵⁸ Elsewhere, Title IX regulations require post-secondary institutions to hold a live hearing as part of the grievance process for sexual harassment, while granting discretion to secondary and elementary schools to decide whether a live hearing should occur.¹⁵⁹ Thus, it is normal for Title IX regulations to decide as a matter of policy that a statute applies differently in the college setting than in K-12.

E. Conclusion

OCR should promulgate amendments to Title IX's implementing regulations that would expressly require federally funded educational institutions to permit transgender athletes to compete according to their gender identity. This regulation should specify that no medical requirements can be placed on a transgender athlete seeking to compete in school-sponsored athletic programs at

¹⁵⁸ 34 C.F.R. § 106.34(b).

¹⁵⁹ 34 C.F.R. § 106.45(b)(6).



the elementary or secondary level. In order to promote stability and clarity, and so that judicial deference will be applied, OCR should use notice-and-comment process to promulgate a regulation, rather than employing a non-legislative rule such as a Dear Colleague Letter. The notice-and-comment process is also preferable to resolving this issue by statutory amendment, because it provides a greater opportunity for government leadership and public education than a contentious political debate.

Section IV.

So far, this article has addressed sports participation in school-sponsored sports programs at the elementary and secondary level and has argued that students must be allowed to participate in sports based on their gender identity without any medical requirements or conditions. This final section will acknowledge the athletic contexts that are not directly affected by our proposed policy.

A. College Athletics

Initially called the Intercollegiate Athletic Association of the United States (IAAUS), the National Collegiate Athletic Association (NCAA) was formed in 1906 to draw up competition and eligibility rules for college sports.¹⁶⁰ Over 100 years later, in 2010, the NCAA's Office of Inclusion created a handbook titled "NCAA Inclusion of Transgender Student-Athletes"¹⁶¹ which was intended to "provide guidance to NCAA athletic programs about how to ensure transgender student-athletes fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge," and also provides "best practice and policy recommendations for intercollegiate athletic programs to provide transgender student-athletes with fair and equal opportunities to participate."¹⁶²

Oft criticized as reactionary and slow to enact change, on this topic, the NCAA was thoughtful and direct when describing the need to address transgender student participation at the college level when they declared:

"First and foremost, core values of equal opportunity and inclusion demand that educational leaders adopt thoughtful and effective policies that enable all students to participate fully in intercollegiate athletics programs. Over the course of many years, schools have learned and continue to appreciate the value and necessity of accommodating the

¹⁶⁰ *The Oxford handbook of American sports law*, edited by Michael McCann for Oxford University Press (2017).

¹⁶¹ *NCAA inclusion of transgender student-athletes*, NCAA Office of Inclusion (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

¹⁶² *See id.* at 4.



sport participation interests of students of color, women, students with disabilities, and lesbian, gay, and bisexual students. These are all issues of basic fairness and equity that demand the expansion of our thinking about equal opportunity in sports. The right of transgender students to participate in sports calls for similar considerations of fairness and equal access.”¹⁶³

The NCAA does require transgender athletes to undergo hormonal treatment for gender transition if they seek to participate in sports separate from their assigned birth gender. The NCAA policy on transgender student-athlete participation reads:

“The following policies clarify participation of transgender student-athletes undergoing hormonal treatment for gender transition:

1. A transgender male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men’s team but is no longer eligible to compete on a women’s team without changing that team status to a mixed team.
2. A transgender female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men’s team but may not compete on a women’s team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.

Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.

A transgender male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men’s or women’s team.

A transgender female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women’s team.”¹⁶⁴

While this paper supports the right of all transgender athletes to compete in their self-identified gender without restriction, it intentionally targeted elementary and secondary education because the age of the participants and the

¹⁶³ *Id.* at 7.

¹⁶⁴ *Id.* at 15.



participatory nature of those athletic programs makes the arguments for inclusion most compelling. The proposal presented here would permit, but by no means require, collegiate athletics to impose a medical requirement based on hormones, as the NCAA currently does.

First, participation at the NCAA college varsity level is not a guaranteed right and, by definition, already selective. Not everyone who wants to play varsity sports has the skills and ability to do so, and as such, access is not guaranteed for all. Second, while college athletics offers the same transformative skills that competing in sports does at the elementary and secondary level, in general, it does not have the same long-term impact on the development of one's mental and physical health. Finally, by the time a transgender man or woman has reached the age of majority, they often have already begun to take hormone treatments related to gender transition and have been able to make a mature decision in this regard in ways students at the elementary and secondary level are not equipped to make. Furthermore, any student wishing to compete in club or intramural sports at the collegiate level should be able to freely do so based on their gender identity just like our proposals for students at the elementary and secondary level.

It should be noted that within the NCAA there are three divisions (I, II, and III) that espouse different values.¹⁶⁵ It would not be unreasonable to eventually have more inclusive policies in divisions that have the highest participation rates, that espouse values of participation, and that believe in the potential for athletics to foster student development. In contrast, those divisions who view their athletic programs as commercial enterprises and favor competition outcomes rather than student development outcomes could be expected to sustain hormone-based rules. It also must be pointed out that the NCAA only governs intercollegiate varsity competition and does not speak to club or intramural sports, where access is not widely restricted. Rationale for restricting participation by transgender athletes in those contexts are weak.

B. Youth Leagues

Most youth leagues such as Little Leagues, the Amateur Athletic Union (AAU), USA Swimming, or US Youth Soccer provide inclusive opportunities for transgender children to compete. Like state policies, however, leagues vary on how they manage transgender females (male to female) who are not taking hormone treatment related to their gender transition. For example, the Missouri Youth Soccer Association (MYSA) requires that transgender females engage in

¹⁶⁵ Our three divisions, NCAA, <https://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions>.



hormone treatment in order to compete according to their gender identity.¹⁶⁶ They base this policy in part on the approved NCAA Transgender Participation Policy, as published in 2012.¹⁶⁷ The policy may also rest on two legitimate theories: player safety and equitable opportunities on the field. Still, player safety does not justify applying a college policy to youth athletes.¹⁶⁸ Administrators may explain that the policy is fair because unlike public or private school sports, the nature of the league is exclusive and does not guarantee any person the right to play. This rationale conflicts with MYSA's mission statement, which states: "At its core, MYSA's mission is to provide children from all walks of life the opportunity to play and learn valuable life lessons from participation in the world's most populous sport."¹⁶⁹ Because youth sports leagues often create a pathway for higher levels of achievement in sport, it is imperative that these leagues further accept and include transgender youth absent gender requirements. While the proposal advanced in this article does not directly apply to youth leagues, it does provide applicable rationale for inclusion.

C. Olympics

The International Olympic Committee (IOC) Medical Commission drew up guidelines in 2003 for the participation of athletes who had undergone gender reassignment, listing three conditions for participation.¹⁷⁰ These conditions were: 1) athletes must have undergone sex reassignment surgery; 2) athletes must show legal recognition of their gender change; and 3) athletes must have undergone hormone therapy. In 2004, the IOC allowed transgender athletes to participate in the Olympic Games.¹⁷¹

Recognizing the hardship for many individuals coming from countries where gender transition is illegal, in 2015, the IOC modified these guidelines considerably, removing the requirement of sex reassignment surgery.¹⁷² Specifically, the

¹⁶⁶ *MYSA policy on transgender youth athlete participation*, MISSOURI YOUTH SOCCER ASSOCIATION (MYSA), (2018) <https://bsbproduction.s3.amazonaws.com/portals/25843/docs/player%20%20team%20admin/forms%20and%20downloads/mysa/policy%20on%20transgender%20athletes%20v1.1.pdf>.

¹⁶⁷ *See id.*

¹⁶⁸ *See* Section II.D.

¹⁶⁹ MYSA, <https://www.missourisoccer.org/> (last visited Feb. 28, 2021).

¹⁷⁰ Myron Genel, *Transgender athletes: How can they be accommodated?* YALE CHILD HEALTH RESEARCH CENTER, THE AMERICAN COLLEGE OF SPORTS MED. (2017), http://revdesportiva.pt/files/para_publicar/Transgender_Athletes_How_Can_They_Be.7.pdf.

¹⁷¹ *See id.*

¹⁷² The Associated Press, IOC rules transgender athletes can take part in Olympics without surgery, *THE GUARDIAN* (Jan. 24, 2016), <https://www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery>.



IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism released a two-page report outlining updated guidelines.¹⁷³ The new standards indicate “those who transition from female to male are eligible to compete in the male category without restriction.”¹⁷⁴ Furthermore, transgender women are able to compete against cisgender women so long as they meet a few standards; specifically, that they declare their gender and not change that assertion for four years and that the athlete demonstrates a total testosterone level in serum below 10 nmol/L.¹⁷⁵

The proposal advanced in this article does not apply to the IOC and governing bodies that operate under the Olympic umbrella. Title IX regulatory policy as modified by the proposal in this article can provide a counterpoint to IOC’s policy and serve and help anchor resistance to the idea that sport generally look to the IOC for guidance in policy formation around transgender inclusion. Sport contexts are diverse and serve different purposes in society. They serve different ages as well. There is no reason to model all sports policies on the IOC’s.

D. Professional Leagues

None of the men’s professional leagues in the United States (MLB, MLS, NBA, NFL, and the NHL) have any explicit restrictions against transgender men, or women for that matter, competing in their leagues.¹⁷⁶ The WNBA does not have an official policy on transgender women participating in their league but the NWHL

¹⁷³ IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism, IOC (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf.

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* (The guidelines for transgender women in their entirety state that “Those who transition from male to female are eligible to compete in the female category under the following conditions: 2.1. The athlete has declared that her gender identity is female. The declaration cannot be changed, for sporting purposes, for a minimum of four years. 2.2. The athlete must demonstrate that her total testosterone level in serum has been below 10 nmol/L for at least 12 months prior to her first competition (with the requirement for any longer period to be based on a confidential case-by-case evaluation, considering whether 12 months is a sufficient length of time to minimize any advantage in women’s competition) www.olympic.org. 2.3. The athlete’s total testosterone level in serum must remain below 10 nmol/L throughout the period of desired eligibility to compete in the female category. 2.4. Compliance with these conditions may be monitored by testing. In the event of non-compliance, the athlete’s eligibility for female competition will be suspended for 12 months.”).

¹⁷⁶ Although in 1931, Major League Baseball Commissioner Judge Kenesaw Mountain Landis did ban women from competing after 17-year-old pitcher Virne Beatrice “Jackie” Mitchell strikes out Babe Ruth and Lou Gehrig in an exhibition game for the Chattanooga Lookouts. Landis voids Mitchell’s contract, saying baseball is “too strenuous” for women. This ban was struck down in 1992. *See* Tony Horwitz, *The woman who (maybe) struck out Babe Ruth and Lou Gehrig*, SMITHSONIAN MAG. (July 2013), <https://www.smithsonianmag.com/history/the-woman-who-maybe-struck-out-babe-ruth-and-lou-gehrig-4759182/>.



does. The NWHL allows anyone designated female at birth to be eligible.¹⁷⁷ Furthermore, it prohibits anyone who is in transition to male or who has taken testosterone from participating.¹⁷⁸ Finally, the NWHL policy for transgender women mirrors the policy crafted by the IOC in requiring a declaration of a female gender identity and a limit on her total testosterone level in serum.¹⁷⁹

Section V.

This article offers a roadmap for protecting transgender participation in sport. We have provided the most often cited arguments against such allowance and categorically addressed each one on the basis of research and science. While we have addressed a variety of topics relative to the participation of transgender athletes in sports, there are an abundance of related areas on which we have not been able to focus. However, we would be remiss if we did not mention them in passing.

By intent, this paper focuses on the laws in the United States. There is no doubt that other countries are dealing with this very issue under other legal systems.¹⁸⁰ Different countries provide a spectrum of protections based on equality and protection, and we have not provided a comparative law analysis. Further, it is also not beyond the scope of reason that restricting any person's ability to participate is a violation of broad human rights, as a variety of international rights instruments do exist to protect transgender individuals on a variety of fronts.¹⁸¹ Perhaps one day any discrimination against transgender individuals will be broadly protected on the international stage.

¹⁷⁷ *NWHL transgender policy*, NATIONAL WOMEN'S HOCKEY LEAGUE (NWHL), <https://www.nwhl.zone/nwhl-transgender-policy>.

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ For example, in Canada trans female cyclist Kristen Worley brought a case before the Ontario Human Rights Tribunal arguing she was being discrimination against by the Ontario Cycling Association and the Cycling Canada Cyclisme because of gender verification and anti-doping policies of these organizations. *See* *Worley v. Ontario Cycling Association*, 2016 HRTO 952 (CanLII), <https://www.canlii.org/en/on/onhrt/doc/2016/2016hrto952/2016hrto952.html?autocompleteStr=worley&autocompletePos=1> and *Worley v. Ontario Cycling Association*, 2016 HRTO 1246 (CanLII), <https://www.canlii.org/en/on/onhrt/doc/2016/2016hrto1246/2016hrto1246.html?resultIndex=3>.

¹⁸¹ In fact, the Office of the High Commission of the United Nations of Human Rights states "The legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly." *See* OHCHR, <https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> (last visited Feb. 25, 2021).



There have also been debates by some on “what makes a woman a woman?”¹⁸² The most public example of this behavior has been the case of Caster Semenya, a South African female track and field star from South Africa. Semenya is an intersex cisgender woman, assigned female at birth with XY chromosomes and naturally elevated testosterone levels due to a 5 α -Reductase deficiency.¹⁸³ In 2019, International Association of Athletics Federations (IAAF) rules passed that restricted her from international competition unless she took medication to lower her testosterone levels. And in late February of 2021, she announced she was taking the IAAF to the European Court of Human Rights to challenge these rules.¹⁸⁴

While not exclusively, we should mention that all too often when people challenge the physical gifts of women there are certainly undertones of racism, as is the case with Semenya. In the United States, Venus and Serena Williams are both strikingly tall, strong, and coordinated. These physical and genetic gifts have allowed them to be among the most dominating tennis players of all time. Yet women of color are consistently viewed differently than others—in both their physical prowess and temperament on the court.¹⁸⁵

As we have noted, the topic of transgender participation in sports is a topic receiving a considerable amount of attention worldwide—from the general public to mainstream media, and as we have pointed out, legislative activity. We are conscious of the fact that this article will not reflect the latest developments since the speed of change in this space is rapid, but are confident that our recommendations are accurate and will remain relevant.

There is very little that is more important than living one’s true life, which includes the opportunity to live based on one’s self-identified gender. Efforts to curtail such freedom must have a high bar to be considered appropriate—morally and legally. Transgender discrimination clearly falls under sexual discrimination and has been consistently struck down as illegal. Participating in sports should enhance, not chip away at, one’s self-worth, confidence, stability, and health.

¹⁸² Cheryl Cooky, Ranissa Dycus, & Shari L. Dworkin, “What makes a woman a woman?” versus “Our first lady of sport”: A comparative analysis of the United States and the South African media coverage of Caster Semenya, *J. SPORT & SOCIAL ISSUES*, 37, 31-56 (2012).

¹⁸³ Victoria Jackson, *The decadelong humiliation of Caster Semenya*, SLATE (May 1, 2019), <https://slate.com/technology/2019/05/caster-semenya-testosterone-gender-appeal-ruling.html>; Robert Johnson, *What no one is telling you about Caster Semenya: She has XY chromosomes*, LET’S RUN.COM (May 2, 2019), <https://www.letsrun.com/news/2019/05/what-no-one-is-telling-you-about-caster-semenya-she-has-xy-chromosomes/> (last visited July 7, 2021).

¹⁸⁴ Gerald Imray, *Semenya taking case to European Court of Human Rights*, ABC NEWS (Feb. 25, 2021), https://abcnews.go.com/Sports/wireStory/semenya-taking-case-european-court-human-rights-76106450?cid=clicksource_4380645_15_hero_headlines_headlines_hed.

¹⁸⁵ See C. Litchfield, E. Kavanagh, J. Osborne, & I. Jones, *Social media and the politics of gender, race and identity: The case of Serena Williams*, *EUROPEAN J. FOR SPORT & SOCIETY* 15 (2), 154–170 (2018).



Currently, banning transgender athletes from competing in sports fall under a variety of legal protections including, most notably, gender discrimination. There is no doubt that the participation of transgender athletes is both complex and highly charged. Accordingly, for purposes of further clarity and equity, we propose specific legislation that would comply with all existing laws while extending greater protection to the transgender community. We do so while holding fast to the truism that sport is for everyone, and access to participate should not be limited based on antiquated notions of one's assigned sex at birth.

