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# EXPLORING THE TRANSGENDER QUESTION IN U.S. SEX-SEGREGATED SPORTS AND THE FUTURE OF TITLE IX<sup>†</sup>

Marc Edelman<sup>\*</sup>  
Amanda Siegrist<sup>\*\*</sup>

*In recent years, questions about who is eligible to compete on female high school and college sports teams has gained increasing attention based on three specific events: the inclusion of Lia Thomas, a transgender woman at the University of Pennsylvania, on her school's women's swim team; the inclusion of Blaire Fleming, a transgender woman at San Jose State University, on her school's women's volleyball team; and the inclusion of Becky Pepper-Jackson, a transgender girl from West Virginia, on her school's girls' track and cross country teams. On January 3, 2025, these questions about transgender inclusion in sex-segregated sports became even more germane when Florida Congressperson W. Gregory Steube introduced into Congress a bill entitled as the Protection of Women and Girls in Sports Act, which, if signed into law, would amend Title IX of the Patsy T. Mink Equal Opportunity in Education Act to provide that, for purposes of determining Title IX compliance, sex shall be defined "solely on a person's reproductive biology and genetics at birth."<sup>1</sup>*

*While much of the Congressional debate about transgender inclusion in sex-segregated sports has involved political posturing, this Article, to the best of our abilities, attempts to explore the complex question of transgender inclusion in girls' and women's sports in a legal and more*

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<sup>†</sup> This Article is the product of co-authorship by scholars from different disciplines, of different genders, and with different political party affiliations. Earlier drafts of this Article were presented the European Association of Management's 2023 Annual Conference in Dublin, Ireland (June 15, 2023), the 7th International Sport & Discrimination Conference in Besancon, France (May 31, 2024) and the 100th annual Academy of Legal Studies in Business Conference in Washington, D.C. (August 2024). The authors thank the many commentators who provided feedback to them at these conferences. They also thank Cornell Law School student and former University of California college soccer player Haley Lukas for her kind research assistance on this Article when it was in its early stages, during the summer of 2023.

<sup>\*</sup> Professor Marc Edelman (Marc@MarcEdelman.com) is a tenured Professor of Law at the Zicklin School of Business, Baruch College, City University of New York and the Director of Sports Ethics at the Robert Zicklin Center for Corporate Integrity.

<sup>\*\*</sup> Professor Amanda Siegrist (asiegrist@coastal.edu) is the Associate Dean for Student Success in the Conway Medical Center College of Health and Human Performance and a tenured Associate Professor of Recreation and Sport Management at Coastal Carolina University.

1. The Protection of Women and Girls in Sports Act, H.R. 28, 119th Cong. (2025).

*socially responsible manner. This Article begins by exploring the history of sex segregation in U.S. sports, as well as the history of early transgender athletes who have sought to compete on women's sports teams. The Article then proceeds to discuss statutory construction of Title IX of the Patsy T. Mink Equal Opportunity in Education Act, including the possible meanings of the word "sex" as it appears in that act. Part IV addresses reasonable considerations for Congress to address when amending Title IX to account for issues related to transgender inclusion in sex-segregated sports. Finally, Part V explains why Congress's proposed Protection of Women and Girls in Sports Act does not adequately address the policy concerns that call for reviewing and amending Title IX.*

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## I. INTRODUCTION

On June 23, 1972, President Richard M. Nixon signed into law Title IX of the Patsy T. Mink Equal Opportunity in Education Act (the “Act”), which states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>2</sup> This important piece of federal legislation continues today to serve as the bedrock of America’s sex-segregated high school and college sports system, which has facilitated the procurement of collegiate scholarships for women and the emergence of female celebrity athletes, as well as has helped to build self-esteem and physical self-confidence in young women throughout the United States.<sup>3</sup>

As times change, however, so too do the needs of our legal structures. With Title IX now more than fifty years old, one of the most challenging questions facing the Act today is the ever-complex transgender question—specifically, when, if at all, should a person who is chromosomally male be allowed to compete in women’s competitive sports and/or counted as female for Title IX compliance purposes.<sup>4</sup>

Over the past few years, this question has received a growing amount of attention in the media as Lia Thomas, a transgender woman at the University of Pennsylvania, competed on her school’s women’s swim team,<sup>5</sup> Blaire Fleming, a transgender woman at San Jose State University, competed on her school’s women’s volleyball team,<sup>6</sup> and Becky Pepper-Jackson, a transgender girl from

2. 20 U.S.C. § 1681.

3. *Title IX - Gender Equity in Education*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/title-ix-gender-equity-education> [<https://perma.cc/H2SL-54AV>] (last visited Jan. 2, 2026); Terri Visovatti, *Title IX: The Game-Changer in Women’s Athletics*, MY CHI. ATHLETE MAG. (Aug. 13, 2025), <https://www.mychicagoathlete.com/title-ix-the-game-changer-in-womens-athletics> [<https://perma.cc/6SK6-QML2>]; Beckett A. Broh, *Linking Extracurricular Programming to Academic Achievement: Who Benefits and Why?*, 75 SOC. EDUC. 69, 77 tbl. 2, 78 (2002).

4. See generally Kendra M. Vosler, *The Struggle for Equality: The Goal Is to Maintain Meaningful Competition for All Athletes—Male, Female, and Those Transitioning—But How?*, 55 CREIGHTON L. REV. 113, 115 (2021) (acknowledging that the question of transgender participation in sex-segregated sports is “a sensitive one” that “requires a careful balancing of the need for meaningful competition and [the] priceless value of human dignity”).

5. Robert Sanchez, *‘I Am Lia’: The Trans Swimmer Dividing America Tells Her Story*, SPORTS ILLUSTRATED (Mar. 3, 2022), <https://www.si.com/college/2022/03/03/lia-thomas-penn-swimmer-transgender-woman-daily-cover> [<https://perma.cc/5GTV-4BDW>].

6. Jackson Thompson, *Who Is Blaire Fleming? SJSU Volleyball Player Dominating Female Rivals and Enraging Women’s Rights Groups*, FOX NEWS (Nov. 30, 2024, at 08:31 ET), <https://www.foxnews.com/sports/who-blaire-fleming-sjsu-trans-athlete-dominating-female-rivals-enraging-nation> [<https://perma.cc/L62Z-XNJQ>].

West Virginia, competed on her school's girls' track and cross country teams.<sup>7</sup> In addition, the Tokyo 2020 Summer Olympics and the Beijing 2022 Winter Olympics showcased increasing gender diversity among their participants, with a record number of openly LGBTQ+ athletes, including the first openly nonbinary Olympian.<sup>8</sup>

Transgender inclusion in interscholastic sports has been front-and-center in the political media as well.<sup>9</sup> In 2016, the U.S. Department of Education, under President Barack Obama's administration, issued a "Dear Colleague" letter that clarified Title IX protections to include transgender persons.<sup>10</sup> When Donald Trump was inaugurated as president in 2017, his administration rescinded this guidance.<sup>11</sup> Since then, the topic of transgender inclusion has remained a political 'hot potato,' with transgender athletes' rights to compete in sports largely depending upon which political party had control of the White House.<sup>12</sup>

Most recently, the question of transgender inclusion has been taken up by the U.S. Congress.<sup>13</sup> On January 3, 2025, Florida Congressperson W. Gregory Steube introduced a bill entitled the Protection of Women and Girls in Sports Act, which seeks to amend Title IX of the Patsy T. Mink Equal Opportunity in Education Act to provide that, for purposes of determining Title IX compliance, sex shall be defined "solely on a person's reproductive biology and genetics at birth."<sup>14</sup> On January 14, 2025, the U.S. House of Representatives voted in favor of the bill, with voting split almost unanimously along party lines.<sup>15</sup> If this bill is passed by the Senate and signed into law by President Trump, it would prevent

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7. B.P.J. v. West Virginia State Board of Education, ACLU (Sep. 12, 2025), <https://www.aclu.org/cases/bpj-v-west-virginia-state-board-education> [https://perma.cc/BD6B-KYE7].

8. Robert Hart, *Record Numbers of Openly LGBTQ+ Athletes Will Compete at Beijing 2022—Including First Openly Nonbinary Winter Olympian*, FORBES (Feb. 9, 2022, at 04:18 ET), <https://www.forbes.com/sites/roberthart/2022/02/03/record-numbers-of-openly-lgbtq-athletes-will-compete-at-beijing-2022---including-first-openly-nonbinary-winter-olympian/> [https://perma.cc/K6S5-95QR].

9. See generally Michael Ramirez, *Cartoon: The Women's Rights Movement Has Come to This*, LAS VEGAS REV. J. (Mar. 12, 2023, at 21:01 MT), <https://www.reviewjournal.com/opinion/michael-ramirez/cartoon-the-womens-rights-movement-has-come-to-this-2743085/> [https://perma.cc/FXJ2-A5BP] ("A national ban on transgender athletes in girls' sports passes in a Congressional House committee, broadening the debate on whether trans athletes have an unfair physical advantage over female athletes."); Will Neal, *Piers Morgan and Neil deGrasse Tyson Clash Over Transgender Athletes: 'That's Ridiculous'*, DAILY BEAST (Dec. 8, 2024, at 03:36 ET), <https://www.thedailybeast.com/piers-morgan-and-neil-degrasse-tyson-clash-over-transgender-athletes-thats-ridiculous> [https://perma.cc/R88M-U3DT] (showcasing that debate has become prominent in political media).

10. Allie Grasgreen, *Obama Administration Releases Directive on Transgender Rights to School Bathrooms*, POLITICO (May 12, 2016, at 23:11 ET), <https://www.politico.com/story/2016/05/obama-administration-title-ix-transgender-student-rights-223149> [https://perma.cc/QN28-3GNL].

11. Anya Kamenetz & Cory Turner, *Trump and Transgender Rights: What Just Happened?*, NPR (Feb. 23, 2017, at 14:24 ET), <https://www.npr.org/sections/ed/2017/02/23/516837258/5-questions-about-the-trump-administrations-new-transgender-student-guidance> [https://perma.cc/7Y3D-LDVA].

12. Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023, 7023 (2021).

13. The Protection of Women and Girls in Sports Act, H.R. 28, 119th Cong. (1st Sess. 2025).

14. *Id.*

15. Ryan King, *House Clears Bill Barring Transgender Women from Girls' Sports*, N.Y. POST (Jan. 14, 2025, at 15:21 ET), <https://nypost.com/2025/01/14/us-news/bill-barring-transgender-women-from-girls-sports-clears-the-house> [https://perma.cc/3UU9-2ST3].

all transgender girls and women, on a national basis, from competing on sports teams consistent with their gender identities.<sup>16</sup> It would also lead to an almost certain constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment, likely to eventually make its way to the U.S. Supreme Court.<sup>17</sup>

While so much of what has been written about transgender inclusion in female sports has involved political posturing, this Article—written jointly by scholars of different disciplines, genders, and political affiliations—attempts to the best of our abilities to explore legalistically the complex question of transgender female inclusion in women’s sports. Part II of this Article explores the history of sex segregation in sports, as well as the history of transgender athletes competing in organized sports within those spaces. Part III discusses statutory construction of Title IX of the Patsy T. Mink Equal Opportunity in Education Act, including the possible meanings of the word “sex” as it appears in the Act. Part IV addresses reasonable considerations for Congress to address when amending Title IX to account for issues related to transgender inclusion in sex-segregated sports. Finally, Part V explains why the proposed Protection of Women and Girls in Sports Act does not adequately address the policy concerns that call for reviewing and amending Title IX.

Given the highly sensitive nature of our topic, we believe it is important to acknowledge two limitations to our work. First, we write this Article as experts in the fields of law, sports business, and higher education—not as scientists. While we cite at times to published scientific research that appears in literature including court decisions, we do not purport to have an independent basis for corroborating any scientific research findings. Second, we understand that both science and the human experience are rapidly evolving, and we write this Article based upon information available to us as of the time of publication.

## II. THE HISTORY OF SEX SEGREGATED SPORTS AND TRANSGENDER ATHLETES IN COMPETITIVE SPORTS

Based on the politically charged nature of the transgender question, it is helpful to begin this Article with an objective foundation for the present discussion in the context of history and facts. Section A of this Part provides a brief history of sex-segregated sports. Section B then seeks to define “transgender,” and it explores the challenges transgender individuals face in sex-segregated aspects of society including sports. Section C looks at the historic treatment of transgender athletes in sex-segregated sports. Section D discusses the emerging body of state law that seeks to govern transgender status in sex-segregated sports. Finally, Section E looks at the emerging efforts by Congress to regulate transgender status in sex-segregated sports specifically through the Protection of Women and Girls in Sports Act.

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16. *Id.*

17. *See infra* Section V.C.

A. *History of Sex-Segregated Sports*

As a starting point, we acknowledge that dividing sports into two distinct categories—male and female—represents an imperfect science.<sup>18</sup> On the one hand, the division of competitive sports is logical in that it ensures female athletes the opportunity to compete in a way that might not exist without sex-based segregation.<sup>19</sup> On the other hand, the division of men’s and women’s sports requires a binary allocation of athletes in a way that may not always be as simple as it seems.<sup>20</sup> Moreover, for those who prefer a “genderless society” (or perhaps, more accurately stated, a society where gender distinctions are deemphasized), sex-segregated sports, in itself, would be hard to defend.<sup>21</sup>

For most of recorded history, men and women occupied entirely different spheres within society, with competitive sports being reserved as a space for men.<sup>22</sup> For example, women were not allowed to participate, much less attend, the original Greek Olympic Games.<sup>23</sup> According to Greek mythology, “one woman named Kallipatiera [] defied the ban and risked punishment of death by disguising herself as a male trainer in order to watch her son compete.”<sup>24</sup> Only the goodwill for her family spared Kallipatiera’s life.<sup>25</sup>

Even into the late nineteenth century and early twentieth century, women around the world found themselves excluded from sports.<sup>26</sup> As recently as the founding of the modern Olympic Games in 1896, the event’s organizer and International Olympic Committee (“IOC”) president, Baron Pierre de Coubertin, opposed the inclusion of women in the Olympics, proclaiming that “[n]o matter how toughened a sportswoman may be, her organism is not cut out to sustain certain shocks.”<sup>27</sup> De Coubertin claimed that excluding women was necessary to

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18. Erin E. Buzuvis, *Transsexual and Intersex Athletes*, in *SEXUAL MINORITIES IN SPORTS: PREJUDICE AT PLAY* 55, 55 (Melanie L. Sartore-Baldwin ed., Lynne Rienner Publishers 2013).

19. Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 *WIS. J.L., GENDER & SOC’Y* 29, 29 (2016).

20. *See id.* at 29–30; *see also* Buzuvis, *supra* note 19, at 55 (“What makes this categorization difficult is that while the realm of sport divides the universe neatly into male and female categories, nature does not.”).

21. *See* Kimberly A. Yuracko, *Toward Feminist Perfectionism: A Radical Critique of Rawlsian Liberalism*, 6 *UCLA WOMEN’S L.J.* 1, 8, 37 (1995) (discussing former Stanford University professor of ethics Susan Okin’s view that traditional gendered roles in labor reinforce inequality and thus a true genderless society is needed to promote equality); Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 *DUKE J. GENDER, L. & POL’Y* 1, 33 n.170 (1990) (“Title IX was not intended to create a genderless society . . .”).

22. Jordan Buckwald, *Outrunning Bias: Unmasking the Justifications for Excluding Non-Binary Athletes in Elite Sport*, 44 *HARV. J.L. & GENDER* 1, 10–11 (2021).

23. *Id.* at 11; Buzuvis, *supra* note 19, at 31.

24. Buzuvis, *supra* note 19, at 31.

25. *Id.*

26. *See* Vasileios Stavropoulos, *The Evolution of Women Participation in Sports Events*, *STATATHLON*, <https://statathlon.com/the-evolution-of-women-participation-sports-events/> [https://perma.cc/EUM8-P4XX] (last visited Jan. 2, 2026) (discussing the evolution of women’s participation in sports around the globe); *see also* Jocelyn Samuels, *Reviewing the Play: How Faulty Premises Affected the Work of the Commission on Opportunity in Athletics and Why Title IX Protections Are Still Needed to Ensure Equal Opportunity in Athletics*, 3 *MARGINS: U. MD. L.J. RACE RELIGION, GENDER & CLASS* 233, 237 (2003).

27. Buckwald, *supra* note 22, at 11 (internal citation omitted).

maintain the tradition of the all-male ancient Games and to avoid the “indecent, ugliness, and impropriety” of female participation.<sup>28</sup> Nevertheless, many host-country organizing committees refused to go along with de Coubertin’s demands, and four different sports organizing committees ultimately permitted female athletes to compete.<sup>29</sup>

Female inclusion in the Olympics, especially over de Coubertin’s opposition, was a notable step toward achieving gender equity on the international stage; but, even where Olympic organizing committees included women, they were still confined for many years to “feminine” and bourgeois sports, such as tennis, sailing, croquet, equestrianism, and golf.<sup>30</sup> Women’s Olympic participation rates would not substantially improve until after 1984, nor would there be near equity between male and female participants until 2020 when female athletes made up 48% of athletes in the Tokyo Games.<sup>31</sup> Women did not even compete in every sport offered at the Olympic Games until 2012.<sup>32</sup>

Meanwhile, organized collegiate sports, which first emerged in the United States in 1852 beginning with the launch of intercollegiate rowing competitions, also meaningfully limited female competition.<sup>33</sup> Even though the first intercollegiate women’s sports competition occurred in 1896 between UC Berkeley and Stanford’s basketball teams, the governing bodies of college sports banned intercollegiate women’s sports in the following years “‘for the good of the students’ health’ and . . . for ‘the unpleasant publicity accompanying the contests.’”<sup>34</sup> And, even after women’s sports returned at the college level, like the Olympics, women were typically confined to “feminine” sports or allowed to participate in “male” sports with modified rules.<sup>35</sup> Before 1972, only 30,000 women in aggregate had participated in college athletics.<sup>36</sup>

The passing of Title IX in 1972 marked a watershed moment, changing informal or nonexistent athletic opportunities for women. With Title IX prohibiting sex-based discrimination in educational programs that received federal funding, U.S. high schools and colleges became required by law to take

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28. Sheila Mitchell, *Women’s Participation in the Olympic Games 1900-1926*, 4 J. SPORTS HIST. 208, 213 (1977).

29. *Id.* at 214.

30. *Id.* at 214–15; WOMEN IN THE OLYMPIC MOVEMENT, INT’L OLYMPIC COMM. 1, 3 (2025), <https://stillmed.olympics.com/media/Documents/Olympic-Movement/Factsheets/Women-in-the-Olympic-Movement.pdf> [<https://perma.cc/GT4Y-39BA>].

31. *Id.* at 7 tbl. A.

32. *Id.* at 4.

33. See *NCAA v. Alston*, 594 U.S. 73, 73 (2021). Harvard did not begin admitting women until the Graduate School of Education began to do so in 1920 and it would not accept women into its undergraduate program until 1975. *Women at Harvard University*, HARV. LIBR. (Sep. 9, 2025, at 16:35 ET), <https://guides.library.harvard.edu/c.php?g=1108872&p=8085578> [<https://perma.cc/5KQJ-NQC2>]; Yale’s first co-educational school was established in 1869. *A Timeline of Women at Yale*, WOMEN AT YALE, <https://celebratewomen.yale.edu/sites/default/files/files/Timeline-of-Women-at-Yale.pdf> [<https://perma.cc/6C9C-K3PH>] (last visited Jan. 2, 2026).

34. *The First Game*, STAN. 125 STAN. STORIES, NO. 32, <https://web.archive.org/web/20250201230129/https://125.stanford.edu/the-first-game/> [<https://perma.cc/F66X-MQZR>] (last visited Jan. 2, 2026).

35. *Id.*

36. Maria Cramer, *How Women’s Sports Teams Got Their Start*, N.Y. TIMES (May 5, 2022), <https://www.nytimes.com/2022/04/28/sports/title-ix-anniversary-womens-sports.html> [<https://perma.cc/N3EY-K9YZ>].

affirmative steps to increase their number of women's sports opportunities to meet student demand.<sup>37</sup> While the originally proposed regulations by the Department of Health, Education, and Welfare on the implementation of Title IX suggested that educational institutions would be "ordered to refrain from providing separate athletic programs on the basis of sex unless the selection of teams for that sport or athletic program was based on competitive skill,"<sup>38</sup> the regulations that ultimately took effect allowed for separate teams not only based on differences in competitive skill, but also in contact sports and where a school provides equal opportunity through separate teams to meet the needs of both sexes.<sup>39</sup> In addition, the final version of the guidelines ensured that "members of an excluded sex are allowed to compete for a place on a team if only one team is provided in a particular sport and if opportunities to participate in that sport have been previously limited for the excluded sex."<sup>40</sup> That provision is what has created the opportunity for a limited number of chromosomal women to appear on men's football teams, even despite a general system of sex-segregated sports.<sup>41</sup>

The NCAA and some of its member colleges initially expressed what the *American Bar Association Journal* described as a "strong opposition" to Title IX.<sup>42</sup> The NCAA even went as far as to file a federal lawsuit seeking to avoid complying with Title IX.<sup>43</sup> It lost.<sup>44</sup>

Eventually, when American colleges could fight the law no longer, Title IX and its subsequent agency interpretations began to lead to meaningful change for women at both the intercollegiate and secondary school levels.<sup>45</sup> There are presently 220,000 female athletes competing in NCAA championship sports,<sup>46</sup> with the percentage of intercollegiate athletes that are female having increased from a de minimis number to 43.9%.<sup>47</sup> Similarly, the percentage of high school sports participants that are female has increased from 7% in 1972 to 42.9% today.<sup>48</sup>

This transformation of the interscholastic sports landscape in favor of ensuring female opportunity, no doubt, represents an incredible accomplishment. And yet, at the same time, it begs a question so complex and politically charged

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37. Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 325 (2012).

38. *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1256 (1979) (citing 39 Fed. Reg. 22236 (1974) (to be codified at 45 C.F.R. pt. 86)).

39. *Id.* at 1257–58.

40. *Id.* at 1258.

41. See Lee Green, *Title IX Compliance—Part IV: Frequently Asked Questions*, NAT'L FED'N OF STATE HIGH SCHS. (May 15, 2022), <https://www.nfhs.org/articles/title-ix-compliance-part-iv-frequently-asked-questions/> [https://perma.cc/T7Q4-UNV6].

42. See A.B.A., *Colleges Fight Proposed Title IX Compliance*, A.B.A. J. 885, 885 (1979).

43. *Id.* at 886.

44. See *NCAA v. Califano*, 622 F.2d 1382, 1385 (10th Cir. 1980) (affirming district court's dismissal of the lawsuit filed by the NCAA).

45. See *infra* notes 46–49 and accompanying text.

46. Corbin McGuire, *A Look at Trends for Women in College Sports*, NCAA (Mar. 1, 2023, at 10:22 CT), <https://www.ncaa.org/news/2023/3/1/media-center-a-look-at-trends-for-women-in-college-sports.aspx> [https://perma.cc/39PD-G6LY].

47. Vosler, *supra* note 4, at 127.

48. *Id.* at 126–27.

that not even scientists, the Church of England nor the most recent U.S. Supreme Court appointee felt comfortable answering it—what exactly does it mean to be “female?”<sup>49</sup>

### B. Defining Transgender

For all of the incredible success of Title IX, the task of determining who is classified as “male” and “female” under Title IX, like in so many areas of life, remains a matter of intense debate.<sup>50</sup> According to *Black’s Law Dictionary*, the term “sex” means “[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism.”<sup>51</sup> Thus, sex-based classification is strictly a matter of biology.<sup>52</sup> By contrast, “gender” is defined as “the psychological and societal aspects of being male or female.”<sup>53</sup> Further, one’s “gender identity” refers to the specific gender with which one personally identifies.<sup>54</sup> The term “transgender” is thus “an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expression.”<sup>55</sup>

Although they may feel more prevalent based on current culture and media, transgender individuals represent less than 1% of the U.S. population (approximately 700,000 Americans),<sup>56</sup> albeit according to data from the Centers for Disease Control and Prevention, approximately 3% of current U.S. high school

49. See Bradley Cortright, *Scientists Claim There Is Not a ‘Simple’ Answer to Define ‘Woman’*, INDEP. J. REV. (Mar. 25, 2022, at 12:13 CT), <https://ijr.com/usa-today-claims-not-simple-answer-define-woman> [<https://perma.cc/53EF-9AXV>]; Michael Lee, *Church of England Refuses to Define the Word ‘Woman’*, FOX NEWS (July 11, 2022, at 14:26 ET), <https://www.foxnews.com/world/church-england-refuses-define-world-woman> [<https://perma.cc/MZ64-632K>]; Caroline Downey, *Judge Jackson Refuses To Define ‘Woman’ During Confirmation Hearing: ‘I’m Not a Biologist.’* YAHOO (Mar. 23, 2022, at 07:27 CT), <https://news.yahoo.com/judge-jackson-refuses-define-woman-122717280.html> [<https://perma.cc/E8GU-VQWG>].

50. See Rachel Rouleau, *Redefining ‘Sex’ Threatens Title IX*, ALL. DEFENDING FREEDOM (July 25, 2025), <https://adfllegal.org/article/redefining-sex-threatens-title-ix/> [<https://perma.cc/6DUA-RVX9>]; Cortright, *supra* note 49.

51. Kelli Rodriguez Currie, *If You Build It, “They/Them” Will Come: The Misgendering of the Transgender Nonbinary Athletes Is Discrimination on the Basis of Sex*, 31 J. LEGAL ASPECTS OF SPORT 312, 314 (2021) (citing *Black’s Law Dictionary* (9th ed. 2009)); see also Buzuvis, *supra* note 18, at 55, 57 (explaining that “[s]ex refers to the biological or physiological attributes that make someone male or female”).

52. See Buzuvis, *supra* note 18, at 57.

53. Currie, *supra* note 51.

54. *Understanding Gender Identity*, BROWN HEALTH (Aug. 5, 2021), <https://web.archive.org/web/20250513154625/https://www.brownhealth.org/be-well/understanding-gender-identity> [<https://perma.cc/DVE6-T2N>].

55. *B. P. J. v. West Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347, 351 (S.D.W. Va. 2021) (internal citations and quotations omitted); cf. Catherine Ordway, Matt Nichol, Damien Parry & Joanna Wall Tweedie, *Human Rights and Inclusion Policies for Transgender Women in Elite Sport: The Case of Australia ‘Rules’ Football*, SPORT, ETHICS & PHIL. 1, 6 (2023) (explaining that the Australian Human Rights Commission defines transgender as “people who view their gender differently to their sex assigned at birth”).

56. Buzuvis, *supra* note 18, at 55–56 (explaining that “transsexuality is an incongruity between one’s physical sex and one’s gender identity”); Vosler, *supra* note 4, at 114 (estimating that less than 0.6% of the U.S. population identifies as transgender); *B. P. J.*, 550 F. Supp. 3d at 356 (“Transgender people make up a small percentage of the population: 0.6% of the adult population generally, and 0.7% of thirteen-to-seventeen year olds.”). But see generally *Hecox v. Little*, 104 F.4th 1061, 1069 (9th Cir. 2024) (“Youth ages 13 to 17 are significantly more likely to identify as transgender, with the Centers for Disease Control (CDC) estimating that roughly 1.8 percent of high school students identify as transgender.”) (internal citation omitted).

students identify in this manner.<sup>57</sup> These individuals may have chromosomal and other biological traits entirely consistent with one sex, but they engage in behaviors and outward physical appearances that are consistent with the opposite sex.<sup>58</sup> Overwhelmingly, transgender individuals prefer to be classified with the sex of the gender with which they identify, even where that is inconsistent with their chromosomal makeup.<sup>59</sup> Sometimes, transgender individuals have even undergone hormone replacement therapy or anatomical changes through gender-affirming surgeries to increase the likelihood of being identified as being part of the sex with which they identify.<sup>60</sup>

For purposes of clarity, being “transgender” is entirely different from being “intersex.”<sup>61</sup> “Intersex” individuals are people who are born with both male and female biological traits and ambiguous genitalia.<sup>62</sup> Intersex individuals make up approximately 2% of the entire population, although they are often either ignored in mainstream discussions of sex or wrongly conflated with transgender individuals.<sup>63</sup> Given the biological basis for intersexuality, one can make a very strong argument that individuals who are intersex are entitled to “reasonable accommodations” under the Americans with Disabilities Act in forums where sex-based classifications may exist.<sup>64</sup> By contrast, it is not equally as clear that arguments related to protection based on disabled status would hold with respect to those who identify as transgender.<sup>65</sup> Even though many transgender individuals experience “gender dysphoria,” which the Fifth Edition, Text Revision of the Diagnostic and Statistical Manual of Mental Disorders defines as a bona fide medical condition, there is not necessarily a 100% correlation between identifying as transgender and receiving a medical diagnosis of gender dysphoria.<sup>66</sup>

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57. King, *supra* note 15.

58. Marc Edelman, *Exploring Gender Minorities' Bathroom Rights Under the Donald Trump Presidency*, 56 U. LOUISVILLE L. REV. 381, 388 (2018).

59. See *Understanding Gender Identity*, *supra* note 54.

60. See Buckwald, *supra* note 22, at 20 (describing the International Olympic Committee's categorization of transgender individuals for purposes of sport eligibility); see also Buzuvis, *supra* note 18, at 58 (“Transsexual individuals may or may not undergo hormone treatment, surgery, or both to conform to the sex with which they identify.”).

61. See *infra* notes 62–67 and accompanying text.

62. Edelman, *supra* note 58, at 385–86 (2018); see Buzuvis, *supra* note 19, at 29, 34 (contrasting intersex with transgender); B. P. J. v. West Virginia State Bd. of Educ., 649 F. Supp. 3d 220, 230 (S.D.W. Va. 2023), *vacated and remanded*, 98 F.4th 542 (2024) (using the phrase “rare genetic mutations not at issue here” to describe the intersex population, and separate them for purposes of legal analysis from the transgender population).

63. See Edelman, *supra* note 58, at 386; see also *Hecox v. Little*, 104 F.4th 1061, 1069 (9th Cir. 2024) (noting that “[a]round two percent of the population are born ‘intersex’”).

64. Edelman, *supra* note 58, at 406.

65. See *id.*

66. *Hecox*, 104 F.4th at 1069 (internal citations and quotations omitted) (defining “gender dysphoria” as “a condition where patients experience ‘[a] marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months’ duration that is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning”).

### C. *Transgender Athletes in Competitive Sport*

For transgender and other non-binary individuals including intersex populations, fitting into the gender binary spaces of competitive sports presents a challenge, especially given disagreement about the definitions of “male” and “female.”<sup>67</sup> As one recent law review note acknowledges, “[p]olicymakers have been debating how to balance, on the one hand, hard-fought legislation and cultural changes that have allowed for more widespread acceptance of female athletes and, on the other hand, battling discrimination against transgender people—including transgender athletes.”<sup>68</sup> There is indeed no perfect answer to striking the right, delicate balance.

At present, there is wide diversity in how sports governing bodies address the transgender question in determining eligibility to compete on women’s sports teams.<sup>69</sup> In the professional sports space, the National Women’s Soccer League (“NWSL”) applies two bright-line rules.<sup>70</sup> First, the NWSL requires its athletes to have testosterone levels below 10 nmol/L.<sup>71</sup> Second, it requires its transgender athletes to have taken testosterone suppressive medication for at least twelve months.<sup>72</sup> In Australia, the women’s Australian rules football league, the AFLW, handles the question of transgender athlete eligibility in a bifurcated manner with two different eligibility policies: one for community-level football and the other for elite-level competition.<sup>73</sup> At the community level, the policy is meant to be

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67. See Currie, *supra* note 51, at 312–13 (discussing the challenges of classifying gender nonconforming athletes such as Oberlin College’s Leo Ross and Abby Bellows); Ordway et al., *supra* note 55 (explaining, more generally, that “transgender people challenge sport’s binary classification of sex”). Cf. *B. P. J.*, 649 F. Supp. 3d at 228 (where even a judge who has issued numerous decisions on the transgender sports issue announces that he “will not get into the business of defining what it means to be a ‘girl’ or ‘woman’”).

68. Vosler, *supra* note 4, at 131.

69. See Krista D. Brown, *The Transgender Student-Athlete: Is There a Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice*, 25 MARQ. SPORTS L. REV. 311, 312 (2014) (explaining that some governing associations “allow athletes to freely choose which team they would like to play for; others have certain criteria that must be met before a student-athlete can play on the team that is different than the athlete’s birth-sex; while other associations have decided to only allow student-athletes to play on their birth-sex teams or have no policy at all”). The sex verification of athletes in the modern Olympic games was first proposed in 1936 by U.S. coach and future IOC president, Avery Brundage, out of belief that certain intersex competitors were engaging in “gender fraud.” Buzuvis, *supra* note 19, at 31–32 (2016).

70. See *infra* notes 71–72 and accompanying text.

71. See Frankie de la Cretaz, *The IOC Has a New Trans-Inclusion Framework, but Is the Damage Already Done?*, SPORTS ILLUSTRATED (Mar. 23, 2022), <https://www.si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework> [<https://perma.cc/639Q-SVVA>].

72. See *id.*

73. For those unfamiliar with the sport of Australian Rules football, one recent article provides the following, very good explanation:

Australian Rules Football can resemble a chaotic mass of human athleticism with two teams attempting to take a ball to their scoring end through a mix of running, handballing and kicking in order to kick it through a set of four goal posts for a score of a goal (six points) or a behind (one point). Governed by the Australia Football League (“AFL”), the AFLW currently consists of 18 teams []. The sport is played between two teams of 16 (18 for men) on an oval-shaped ground with dimensions much larger than other football-type sports []. ‘Aussie’ Rules are similar in nature to Gaelic Football. Played with a ball akin to a rugby ball, it is renowned for its high level of physical contact with no padding or safety equipment.

Ordway et al., *supra* note 55, at 2 (internal citations omitted).

equally inclusive of chromosomal women and transgender women.<sup>74</sup> Meanwhile, at the elite level, transgender women, in order to compete, must provide twenty-four months of information including: (1) records of total testosterone levels (testosterone must remain below 5 nmol/L); (2) reports from a treating practitioner regarding maintenance of testosterone levels; and (3) data related to height, weight, bench press, squat, sprint time and vertical jump, as well as other biometric-related performance information.<sup>75</sup>

In the Olympic setting, the International Olympic Committee (“IOC”) adopted in 2004 the “Stockholm Consensus,” which allowed for male-to-female transgender athletes to compete for the first time in women’s sports, but only if they had undergone complete gender reassignment surgery, including genital surgery.<sup>76</sup> After being sued by transgender cyclist Kristen Worley, the IOC issued amendments to its policy that led to determining transgender athlete eligibility based on testosterone levels rather than physical anatomy.<sup>77</sup> Most recently, in March 2022, the IOC once again changed its policy—this time replacing it with a new “trans-inclusion framework” that would include guidelines tied to numerous factors, rather than just a bright-line rule tied to one’s testosterone.<sup>78</sup> The 2022 guidelines also recommend replacing the IOC’s past practice of applying the same framework for determining the eligibility of athletes in all sports with one that “allows international sporting federations to apply sport-specific knowledge to establish eligibility criteria informed by values of fairness, inclusion and non-discrimination.”<sup>79</sup> Thus, a transgender-female athlete who is deemed eligible to compete on a women’s team in one Olympic sport may be deemed ineligible in a different sport.<sup>80</sup>

When looking at interscholastic sports that accept federal education funding, the determination of eligibility to compete in female sports is similarly unsettled. In intercollegiate sports, prior to 2022, the NCAA had required transgender athletes to complete a year of hormone therapy before being allowed to participate with their identified gender—a policy that allowed transgender athletes such as Lia Thomas to transition from playing men’s to women’s sports with a one-year leave of absence.<sup>81</sup> In 2022, however, after receiving criticism

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74. *Id.* at 3.

75. *Id.* at 3, 12.

76. See Cretaz, *supra* note 71; Buzuvis, *supra* note 19, at 35 (discussing the “so-called Stockholm Consensus”); Ordway et al., *supra* note 55, at 3 (“The IOC stated that athletes who have post-puberty gender affirmation were only eligible to play sport if they had surgical anatomical changes, appropriate hormonal therapy and the relevant authority recogni[z]ed the person’s new gender.”). Prior to 2004, the IOC had used visual inspection of sexual organs (pre-1968) and a strict chromosomal test, known as the Barr Body Test (1968–2003) to determine eligibility for women’s sports. Buzuvis, *supra* note 18, at 59; Buzuvis, *supra* note 19, at 32–33.

77. See Cretaz, *supra* note 71. See also Buzuvis, *supra* note 19, at 36 (indicating that the IOC policy at the time limited competitors in women’s sports to testosterone levels of ten nanomoles per liter of serum).

78. See Cretaz, *supra* note 71.

79. Ordway et al., *supra* note 55, at 5 (internal citation omitted).

80. *Id.*

81. See Cretaz, *supra* note 71; Adia Robinson, *NCAA Criticized for Changing Policy on Transgender Athletes*, ABC NEWS (Jan. 21, 2022, at 11:05 CT), <https://abcnews.go.com/Sports/ncaa-criticized-changing-policy-transgender-athletes/story?id=82380905> [<https://perma.cc/BCF7-L4KV>].

from both ends of the political spectrum, the NCAA dropped this one-year hormone therapy requirement in favor of deferring to the U.S. governing bodies of each individual sport.<sup>82</sup> Presently, many sports' governing bodies allow transgender athletes to compete as long as their testosterone levels are below 10 nmol/L and they take twelve months of testosterone-suppressive medication.<sup>83</sup> Meanwhile, a few governing bodies, including USA Swimming, require "testosterone levels of 5 nmol/L, as well as [thirty-six] months of testosterone suppressive medication."<sup>84</sup>

#### D. U.S. State Legislation

Transgender eligibility to compete in interscholastic and other educationally funded sports (middle school, high school, college) was once regulated exclusively by school boards and interscholastic athletic associations, including the NCAA at the intercollegiate level.<sup>85</sup> In recent years, however, state legislatures have begun to pass laws to override school board and local association autonomy.<sup>86</sup> The emerging body of state law is overwhelmingly mixed on these issues. On one end of the spectrum, some states now mandate inclusion of nearly all transgender athletes simply based on their self-identification.<sup>87</sup> On the other end, there are a growing number of states that have passed bills to limit or ban transgender athletes from competing in sports in a manner that would be consistent with their gender identities.<sup>88</sup>

Founded in 2006, the Movement Advancement Project ("MAP") is an independent, nonprofit think tank that provides an overview of the various state laws that restrain transgender inclusion in interscholastic sports in a manner consistent with gender identity.<sup>89</sup> According to the MAP website, as of January 20, 2025 (the date of Donald Trump's inauguration for his second term as President of the United States), there are twenty-five states that maintain laws banning transgender athletes from competing in interscholastic sports in a manner consistent with their gender identities, two states with regulations or agency policies that limit transgender inclusion, and twenty-three states that do not ban

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82. See Cretaz, *supra* note 71; Robinson, *supra* note 81.

83. See Cretaz, *supra* note 71 (including, among sports governing bodies that adopt these thresholds the NWSL and the International Olympic Committee standard until recently); see also Buzuvis, *supra* note 19, at 45 (explaining that the average chromosomal woman has serum testosterone levels around one nanomole per liter, but these levels may vary).

84. See Cretaz, *supra* note 71.

85. See *Hecox v. Little*, 104 F.4th 1061, 1070 (9th Cir. 2023) ("In the United States, high school interscholastic athletics are generally governed by state interscholastic athletic associations, such as the Idaho High School Activities Association.").

86. See *infra* notes 89–100 and accompanying text.

87. See Cretaz, *supra* note 71.

88. See Sohum Pal, Note, *Countering a Phobic Frame: Understanding and Addressing Gender-Affirming Care Bans*, 124 COLUM. L. REV. 2371, 2389 (2024); Cretaz, *supra* note 71.

89. See *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/youth/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans) [<https://perma.cc/9JQ5-TW8Q>] (last visited Jan. 2, 2026).

transgender inclusion.<sup>90</sup> The map of states breaks down almost entirely along political party lines, with states with Republican legislators overwhelmingly limiting transgender inclusion consistent with their gender identities, and states with Democratic legislators overwhelmingly not doing so.<sup>91</sup>

Among recent efforts by state legislatures to limit transgender inclusion in sex-segregated sports, there are three state laws that require special attention, as each is the source of specific litigation referenced in this Article.<sup>92</sup> In Idaho, the Fairness in Women’s Sports Act, which was signed into law in March 2020, made Idaho the first U.S. state to limit transgender inclusion in sex-segregated sports.<sup>93</sup> The Idaho law amounts to a full ban on the participation of transgender women and girls in female student athletics, and it includes a “dispute verification process” where any athlete claiming to be female could be required to undergo “intrusive medical procedures to verify her sex, including gynecological exams.”<sup>94</sup>

In Florida, a state law also entitled the Fairness in Women’s Sports Act was signed into law in June 2021 under the stated purpose of “preserving fair opportunities for female athletes to demonstrate their strength, skills, and abilities in athletic competition.”<sup>95</sup> It has similar terms for eligibility for competition in sex-segregated sports as the Idaho law.<sup>96</sup> The main difference between the Florida law and the Idaho law is that in the Florida law, “[a] statement of a student’s biological sex on the student’s official birth certificate is considered to have correctly stated the student’s biological sex if the statement was filed at or near the time of the student’s birth.”<sup>97</sup>

Meanwhile, in West Virginia, the state’s Save Women’s Sports Act, which was signed into law more recently in 2024,<sup>98</sup> mandates that “[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex,” and defines “male” as “an individual whose biological sex determined at birth is male.”<sup>99</sup> The West Virginia law is silent on the process, if any, for one to provide proof of their biological sex.<sup>100</sup>

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90. *Id.*

91. *Id.*

92. *See infra* notes 93–100 and accompanying text.

93. *See* *Hecox v. Little*, 104 F.4th 1061, 1068, 1069 (9th Cir. 2023) (citing Fairness in Women’s Sports Act, IDAHO CODE, §§ 33-62101–06 (2020)).

94. *Id.* at 1068.

95. Press Release, Fla. Dep’t of Educ., Governor Ron DeSantis Signs Fairness in Women’s Sports Act (June 1, 2021), <https://www.flgov.com/eog/news/press/2021/governor-ron-desantis-signs-fairness-womens-sports-act> [<https://perma.cc/T7W9-BJGF>].

96. Katie Barnes, *Transgender Athlete Laws by State: Legislation, Science, More*, ESPN (Aug. 24, 2023, at 07:00 ET), [https://www.espn.com/espn/story/\\_/id/38209262/transgender-athlete-laws-state-legislation-science](https://www.espn.com/espn/story/_/id/38209262/transgender-athlete-laws-state-legislation-science) [<https://perma.cc/5PK5-UBMD>].

97. *Summary of CS/CS/SB/1028—Education*, FLA. S., <https://www.flsenate.gov/Committees/billssummaries/2021/html/1028> [<https://perma.cc/5TZ7-U66L>] (last visited Jan. 2, 2026).

98. *See* Chris Woodward & Billy Davis, *Protesting Female Athletes ‘Step Out’ After Court Strikes Down Law That Protects Them*, AM. FAM. NEWS (Apr. 19, 2024), <https://afn.net/legal-courts/2024/04/19/protesting-female-athletes-step-out-after-court-strikes-down-law-that-protects-them/> [<https://perma.cc/J7TM-CST7>] (providing year of the West Virginia act’s passage).

99. *B.P.J. v. West Virginia State Board of Education*, 98 F.4th 542, 550–51 (4th Cir. 2024).

100. Save Women’s Sports Act, W. VA. CODE § 18-2-25d (2025).

Courts to date have been mixed in their assessment of these laws under the Equal Protection Clause of the Fourteenth Amendment.<sup>101</sup> As recently as June 14, 2024, the U.S. Court of Appeals for the Ninth Circuit affirmed a preliminary injunction that prevented the State of Idaho's enforcement of its Fairness in Women's Sports Act, at least with respect to certain individuals.<sup>102</sup> In applying intermediate scrutiny,<sup>103</sup> the Ninth Circuit explained that Idaho's act was likely facially discriminatory,<sup>104</sup> as well as likely to have a discriminatory purpose and effect,<sup>105</sup> and likely to fail to serve any important governmental objective.<sup>106</sup> The Ninth Circuit also held that the act was likely overbroad because it affected the athletic eligibility of all transgender women and girls, including elementary school transgender girls as young as kindergarten, and transgender girls who had never undergone endogenous puberty.<sup>107</sup> In doing so, the Ninth Circuit, nevertheless, acknowledged that a more narrowly tailored bill might be better suited to pass constitutional muster.<sup>108</sup>

The U.S. District Court for the Southern District of Florida, by contrast, upheld Florida's Fairness in Women's Sports Act under the Equal Protection Clause.<sup>109</sup> There, the court did not even apply intermediate scrutiny, holding instead that, despite a U.S. Supreme Court ruling to the contrary in the context of Title VII of the Civil Rights Act,<sup>110</sup> "[the Eleventh Circuit] *doesn't* recognize a person's gender identity as a quasi-suspect class."<sup>111</sup> Although it is possible that the Southern District of Florida decision will be appealed and affirmed by the Eleventh Circuit, it is reasonable to presume that at least certain state laws, if ultimately challenged in the U.S. Supreme Court, might ultimately be struck down. If that were to happen, state legislators seeking to limit transgender

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101. See generally *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2023) (affirming the district court's grant of preliminary injunctive relief under the Equal Protection Clause to a transgender female athlete who sought to try out for the Boise State University women's track and cross-country teams); *B.P.J.*, 98 F.4th at 555.

102. See *Hecox*, 104 F.4th at 1090; see also *id.* at 1089 (remanding the case back to the district court to more clearly tailor the intended injunction with specificity as to what is being enjoined and with respect to whom).

103. The court explained that all gender classifications challenged under equal protection receive heightened scrutiny, *id.* at 1074, noting that the U.S. Supreme Court had recently held in *Bostock v. Clayton* that, in the context of a claim under Title VII of the Civil Rights Act of 1964, "it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex." *Id.* at 1079–80 (citing *Bostock v. Clayton*, 590 U.S. 664, 660 (2020) (internal quotations omitted)).

104. *Id.* at 1077.

105. See *id.* at 1074–77.

106. See *Hecox*, 104 F.4th at 1081. See *id.* at 1083–88 (providing the underlying legal analysis for the court's conclusion).

107. *Id.* at 1084. The Ninth Circuit also stated that "[r]equiring a student to find a medical practitioner to examine their reproductive anatomy, which is what a typical gynecological exam entails, is unconscionably invasive, with the potential to traumatize young girls and women." *Id.* at 1087.

108. See *id.* at 1088 (explaining that the court determined that it "need not and do not decide what policy would justify the exclusion of transgender women and girls from Idaho athletics under the Equal Protection Clause, because the profound lack of means-end fit here demonstrates that the Act likely does not survive heightened scrutiny").

109. *D.N. v. DeSantis*, 762 F. Supp. 3d 1219, 1245 (S.D. Fla. 2024); *D.N. v. DeSantis*, 701 F. Supp. 3d 1244, 1250–62 (S.D. Fla. 2023) (assessing the equal protection claim).

110. *Craig v. Boren*, 429 U.S. 190, 199–200 (1976).

111. See *D.N.*, 762 F. Supp. 3d at 1232 (applying rational basis review).

participation would likely propose more narrowly tailored bills, oriented toward circumstances where the argument is stronger as to competitive advantage.

### E. Federal Law

Most recently, the U.S. Congress has taken up the possibility of passing a federal law to nationally address the question of transgender athletes' eligibility to compete in sports consistent with their gender identities.<sup>112</sup> Specifically, on January 3, 2025, Congressperson W. Gregory Steube (R-Fla.) introduced a bill entitled The Protection of Women and Girls in Sports Act that seeks to amend Title IX of the Patsy T. Mink Equal Opportunity in Education Act to define one's sex as "solely on a person's reproductive biology and genetics at birth."<sup>113</sup> Similar to Florida and various other states' laws, the proposed federal Protection of Women and Girls in Sports Act specifies that individuals may only participate in athletic programs or sports designated for females if they are chromosomally female, which is to be determined by an individual's reproductive anatomy and genetic makeup at birth.<sup>114</sup> This bill is intended to apply to athletic programs and sports in schools and institutions receiving federal funding, purportedly ensuring compliance with Title IX of the Education Amendments of 1972.<sup>115</sup>

This is not Steube's first attempt to legislate federally on this topic.<sup>116</sup> He had previously introduced into Congress a similar bill in 2023,<sup>117</sup> which passed through the Republican-controlled House of Representatives but not the Democrat-controlled Senate.<sup>118</sup> With the results of the 2024 elections shifting the Senate majority from Democrat to Republican, Steube, not surprisingly, reintroduced the bill.<sup>119</sup>

As Steube expected, on January 14, 2025, the U.S. House of Representatives voted in favor of the bill, with voting split almost unanimously along party lines.<sup>120</sup> The Senate has not voted on the bill, although, with Republicans now in control of the Senate, there is an increased chance from 2023 that this time it will be taken up for a vote.<sup>121</sup> Supporters of Steube's proposed legislation assert that his proposed bill is necessary to maintain both fairness and safety in women's

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112. King, *supra* note 15.

113. The Protection of Women and Girls in Sports Act, H.R. 28, 119th Cong. § 2 (2025).

114. *Id.*

115. *Id.*

116. See *infra* notes 117–18 and accompanying text.

117. The Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118th Cong. (2023).

118. Ava Cloghessy, *House Passes Protecting Women and Girls in Sports Act*, CWLA (Apr. 20, 2023), <https://web.archive.org/web/20241113013038/https://www.cwla.org/house-passes-protecting-women-and-girls-in-sports-act/> [https://perma.cc/EKA5-GR53].

119. Caitlin Yilek, *The 119<sup>th</sup> Congress Begins Today. Here's What to Know for the 2025 Session*, CBS NEWS (Jan. 3, 2025, at 09:13 ET), <https://www.cbsnews.com/news/new-congress-2025-what-to-know/> [https://perma.cc/3MBL-VXW3].

120. See King, *supra* note 15.

121. Andy Villamarzo, *Protection of Women and Girls in Sports Act Passes House: A Closer Look at HR28 and Its Implications*, SPORTS ILLUSTRATED (Jan. 15, 2025), <https://www.si.com/high-school/news/protection-of-women-and-girls-in-sports-act-passes-house-a-closer-look-at-hr28-and-its-implications-01jhnnqrpma> [https://perma.cc/F2ST-SPKB].

sports.<sup>122</sup> The bill addresses concerns over a “female being deprived of a roster spot on a team or sport, opportunity to participate in a practice or competitions, scholarship, admission to an educational institution, or any other benefit that accompanies participating in the athletic program or activity.”<sup>123</sup>

By contrast, critics of Steube’s proposed bill contend that it discriminates against transgender athletes and conflicts with broader efforts to promote inclusivity and equality.<sup>124</sup> One particular critic, Congresswoman Alexandria Ocasio-Cortez (D-N.Y.), has also voiced strong concern that such a law could empower child sexual predators by requiring that certain prospective interscholastic athletes undergo inspection of their genitals prior to participation in sex-segregated sports.<sup>125</sup> It is not hard to understand why this requirement might make some prospective athletes apprehensive about participation.<sup>126</sup>

### III. TITLE IX AND ITS PRESENT APPLICATION TO TRANSGENDER ATHLETES

With a lack of consistency among governing bodies and state legislators about how to address the transgender question in sex-segregated sports, private transgender plaintiffs have increasingly begun to turn to filing Title IX lawsuits as a means to seek inclusion in sex-segregated sports in a manner consistent with their gender identities.<sup>127</sup> To an extent, courts have seemed more comfortable granting preliminary injunctions under Title IX to allow individual athletes to compete on their preferred sports teams than invalidating the entirety of state laws on Equal Protection grounds.<sup>128</sup> Section A of this Part provides a history of Title IX, its traditional application, and its interpretation in the context of intercollegiate sports. Section B explores the legal history of one specific lawsuit by a transgender plaintiff seeking a court order to compete in intercollegiate sports in a manner consistent with her gender identity. Section C briefly explores two other recent lawsuits that broach the topic of transgender athlete eligibility under Title IX. Finally, Section D explains the ambiguities in Title IX that make it difficult for courts to confidently apply Title IX to cases filed by transgender athletes seeking inclusion in sex-segregated sports in a manner consistent with their gender identities.

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122. Teresa Smallwood & Mariah Burton Nelson, *Debating Transgender Athletes and Gender Equity in Sports*, DIVIDED WE FALL (Mar. 29, 2023), <https://dividedwefall.org/transgender-athletes-in-womens-sports> [<https://perma.cc/77JG-SJE9>].

123. The Protection of Women and Girls in Sports Act of 2023, H.R. REP. NO. 118–35, at 4 (2023).

124. Jackson Thompson, *Democrat Voters Abandoning Party After AOC, Jeffries Claim Anti-Trans Athlete Bill Empowers Child Sexual Predators: ‘Progressives Have Failed!’*, N.Y. POST (Jan. 21, 2025, at 22:40 ET), <https://nypost.com/2025/01/21/us-news/democrat-voters-abandon-party-after-aoc-jeffries-say-anti-trans-athlete-bill-empowers-child-sexual-predators/> [<https://perma.cc/FM3F-GMD3>].

125. *Id.*

126. *See id.*

127. *See infra* notes 146–86 and accompanying text.

128. *See, e.g.*, B.P.J. by Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542, 555 (4th Cir. 2024) (granting summary judgment in favor of a transgender-female plaintiff on her Title IX claims, while rejecting summary judgment, based on the same underlying facts, on her equal protection claims).

A. *Title IX and Its Traditional Application*

To begin again with the statutory language, Title IX of the Patsy T. Mink Equal Opportunity in Education Act states that no person “on the basis of . . . sex” shall be excluded from participating in educational activities at schools that receive federal funds.<sup>129</sup> Senator Birch Bayh, along with Representatives Patsy Mink and Edith Green, first introduced Title IX as an amendment to the Education Amendments in 1972, citing its purpose as combating “the continuation of corrosive and unjustified discrimination against women” in the American educational system.<sup>130</sup> While Title IX was not originally focused on participation in sport, it became a catalyst for promoting equality in women’s athletics, although not without controversy.<sup>131</sup> Lawsuits and counter legislation were brought to weaken the law, but Representative Mink and others helped hold its ground.<sup>132</sup> At the time, Senator Bayh emphasized that the economic inequities faced by women in the United States are directly correlated to educational inequities.<sup>133</sup> Senator Bayh, nevertheless, opposed the idea of creating sex-based quotas on educational opportunities—stating that Title IX “does not require reverse discrimination,” but rather “only requires that each individual be judged on merit, without regard to sex.”<sup>134</sup> While this language is largely helpful in determining the interpretation of Title IX for most activities, it does not address the transgender question in organized sports, which, both at the time of Title IX’s passing and today, remains largely sex-segregated.<sup>135</sup>

In the context of determining the proper meaning of “sex” within a system of sex-segregated sports, courts are supposed to interpret statutes “in accord with the ordinary public meaning of its terms at the time of its enactment.”<sup>136</sup> Thus, one would reasonably need to ask the question as to whether, at the time of Title IX’s passing, male-to-female transgender athletes would be defined as “male” or “female.”<sup>137</sup> While some on the ideological Right claim that until very recently

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129. 34 C.F.R. § 106.1; see *About OCR*, U.S. DEP’T OF EDUC. (Apr. 11, 2025), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> [<https://perma.cc/7ZZ2-Y2PD>].

130. 118 CONG. REC. 5803 (1972) (statement of Sen. Birch Bayh).

131. Danna Bell, *Patsy Takemoto Mink’s Title IX Legacy*, LIBR. OF CONG.: TEACHING WITH THE LIBR. (June 23, 2022), [https://blogs.loc.gov/teachers/2022/06/patsy-takemoto-minks-title-ix-legacy/#\\_ftn5](https://blogs.loc.gov/teachers/2022/06/patsy-takemoto-minks-title-ix-legacy/#_ftn5) [<https://perma.cc/3HRA-6AX7>].

132. See *Colleges Fight Proposed Title IX Compliance*, 65 A.B.A. J. 885, 885 (1979); Bell, *supra* note 131.

133. See 118 CONG. REC. 5803 (1972) (statement of Sen. Birch Bayh).

134. *Synopsis of Purpose of Title IX, Legislative History, and Regulations—Title IX Legal Manual*, JUSTIA (Oct. 2024), <https://www.justia.com/education/docs/title-ix-legal-manual/synopsis-of-purpose-of-title-ix/> [<https://perma.cc/4SLD-GTPG>].

135. Symposium, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 392–93 (2012); *The Issue: Girls’/Women’s Competitive Sport Needs to Be Affirmed and Males Who Identify as Transgender Need to Be Respected*, WOMEN’S SPORTS POL’Y WORKING GRP., <https://web.archive.org/web/20250317062742/https://womenssportspolicy.org/the-issue/> [<https://perma.cc/SW6R-2SAV>] (last visited Jan. 2, 2026).

136. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020).

137. See Seth Lucas, Comment, *Equality on What Basis? Evaluating Title IX’s Requirements in the Transgender Context*, 31 GEO. MASON L. REV. 389, 392 (2023).

the ordinary meaning of “sex” had been sex assigned at birth,<sup>138</sup> it is questionable as to whether that was truly the case at the time of Title IX’s passing.<sup>139</sup>

An empirical review of legal decisions from the 1970s shows that, even during the era when Title IX was passed, some courts were willing to treat individuals who had undergone sex change operations in accordance with their re-assigned sex.<sup>140</sup> For example, in the field of professional sports, transgender male-to-female tennis star Renée Richards successfully sued the United States Tennis Association (“USTA”) to play at the 1977 U.S. Open after undergoing sex-reassignment surgery.<sup>141</sup> Richards utilized constitutional protections of the Fourteenth Amendment’s Equal Protection Clause and a violation of the New York State Human Rights Law to make her case.<sup>142</sup> The court reasoned that while it was not striking down the use of the “Barr body test”—a sex-chromatin test used by the USTA to determine a participant’s sex—such a test may not serve as the sole criterion where “the circumstances warrant consideration of other factors.”<sup>143</sup>

While the New York appellate court’s holding in *Richards v. U.S. Tennis Association* does not per se pertain to Title IX, it provides some support that, even during the time period of Title IX’s passing, there was some general recognition of determining one’s “sex” for purposes of federal statute by considering factors such as gender identity and/or outward appearance of genital structure.<sup>144</sup> As such, it would be dubious to simply presume on its face that the drafters of Title IX were necessarily defining “sex” based purely on chromosomal makeup, even though the term had been defined that way in many earlier centuries.<sup>145</sup>

### B. B.P.J. v. West Virginia State Board of Education

Since the time of Renée Richards, there have been several Title IX challenges to state laws restricting transgender participation in sports consistent with their identified gender.<sup>146</sup> One of the most significant of these challenges has been *B.P.J. v. West Virginia State Board of Education*—a case in which the U.S.

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138. See Kim Parker, Juliana Menasce Horowitz & Anna Brown, *Americans’ Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (June 28, 2022), <https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/> [https://perma.cc/A8RN-PS9J].

139. See *infra* notes 144–45 and accompanying text.

140. See *infra* notes 141–45 and accompanying text.

141. *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 273 (Sup. Ct. 1977).

142. *Id.* at 268.

143. *Id.* at 272–73.

144. See *id.* at 271.

145. See *id.*

146. See, e.g., *id.* at 268; *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1138 (C.D. Cal. 2000); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1077 (D. Nev. 2001); *Doe v. Reg’l Sch. Unit 26*, 2014 ME 11, 86 A.3d 600, 603; *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020); *Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020); *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 798 (11th Cir. 2022); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2023 U.S. Dist. LEXIS 20427, at \*2–3 (S.D.W. Va. Feb. 7, 2023); *D.N. by Jessica N. v. DeSantis*, 701 F. Supp. 3d 1244, 1247 (S.D. Fla. 2023); *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 114 F.4th 660, 666 (8th Cir. 2024).

Court of Appeals for the Fourth Circuit held that it violated Title IX Patsy T. Mink Equal Opportunity in Education Act to deny a specific, middle-school transgender girl the opportunity to compete on her school's girls track and cross country teams on the basis of her gender identity.<sup>147</sup>

The story of B.P.J. is not unlike that of other transgender youths in America.<sup>148</sup> B.P.J. was assigned the sex of male at birth, but she had publicly identified as a girl since the third grade.<sup>149</sup> Since that time, B.P.J.'s elementary and middle schools "created gender support plans to affirm her gender identity and ensure she is recognized as a girl at school."<sup>150</sup> B.P.J. had changed her name to a name commonly associated with girls, and she was issued a birth certificate by the State of West Virginia that recognized this name change and presently lists her sex as "female."<sup>151</sup> B.P.J. also began taking puberty-delaying treatment that "prevent[ed] endogenous puberty and therefore any physiological changes caused by increased testosterone circulation."<sup>152</sup> And, since elementary school, she competed exclusively on female sports teams.<sup>153</sup>

One month after West Virginia's Save Women's Sports Act took effect and B.P.J. became denied the opportunity to continue to compete on girls sports teams, B.P.J., through her mother, sued the West Virginia State Board of Education, its then-superintendent, the local school board of education, and the local school board's superintendent, arguing that the enforcement of the Save Women's Sports Act, specifically against her, violated both the Equal Protection Clause and Title IX.<sup>154</sup> At the early stages of this litigation, the U.S. District Court for the Southern District of West Virginia issued a preliminary injunction on the Title IX issue in her favor.<sup>155</sup> The defendants did not appeal.<sup>156</sup> Although the preliminary injunction did not overturn the Save Women's Sports Act, it did entitle B.P.J., for the intermittent period, to compete on her school's track and

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147. B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-cv-00316, 2023 U.S. Dist. LEXIS 20427, at \*3 (S.D.W. Va. Feb. 7, 2023).

148. See *Four Groundbreaking Cases Protecting LGBTQ+ Student Rights*, LAMBDA LEGAL (Sep. 3, 2024), [https://lambdalegal.org/blogs/us\\_20240903\\_lgbtq-students-rights-court-cases-laws/](https://lambdalegal.org/blogs/us_20240903_lgbtq-students-rights-court-cases-laws/) [https://perma.cc/H5UP-FJSE].

149. See B.P.J. by Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542, 551 (4th Cir. 2024).

150. *Id.* at 564.

151. *Id.*; B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 351 (S.D. W. Va. 2021).

152. B.P.J., 550 F. Supp. 3d at 351.

153. B.P.J. by Jackson, 98 F.4th at 564.

154. *Id.* at 551.

155. B.P.J., 550 F. Supp. 3d at 358 (discussing the district court's ruling).

156. Lisa M. Hawrot, *WV Transgender School Athlete Successful in U.S. Court*, SPILMAN THOMAS & BATTLE, PLLC (Apr. 30, 2004), <https://www.spilmanlaw.com/resource-article/wv-transgender-school-athlete-successful-in-u-s-court/> [https://perma.cc/5BRY-CDC8].

cross country teams that were consistent with her gender identity.<sup>157</sup> That she did.<sup>158</sup>

Yet, more than a year later, the district court reversed its stance.<sup>159</sup> Opining on opposing motions for summary judgment, the same judge who had decided the preliminary injunction motion in B.P.J.'s favor now concluded that, despite his earlier preliminary injunction ruling, the West Virginia Save Women's Sports Act could not, as a matter of law, violate Title IX because, even according to the facts provided by B.P.J., "transgender girls are not excluded from school sports entirely" but rather "are permitted to try out for boys' teams, regardless of how they express their gender."<sup>160</sup> This subsequent ruling set the stage for B.P.J.'s appeal to the U.S. Court of Appeals for the Fourth Circuit, which ultimately held in her favor—concluding that the district court's first inclination was correct: the exclusion of B.P.J. from competing on the track and cross-country teams consistent with her gender identity did indeed amount to a Title IX violation.<sup>161</sup>

In reversing the district court's granting of summary judgment for the defendants and instead remanding with instructions to grant summary judgment on the Title IX issue in favor of B.P.J., the Fourth Circuit Court of Appeals decision held that "[b]ecause B.P.J. can show both worse treatment based on sex and resulting harm, she has established each of the disputed requirements for a Title IX claim."<sup>162</sup> With respect to the first prong—worse treatment based on sex—the Fourth Circuit explained that not only did that circuit in the context of Title IX already recognize that discrimination based on gender identity constitutes discrimination based on sex,<sup>163</sup> but also that a policy that prohibits transgender girls, but not transgender boys, from participating in sports consistent with their gender identities "discriminates based on sex assigned at birth."<sup>164</sup> With respect to the second prong—that being resulting harm—the majority pointed to several different forms of harm suffered specifically by B.P.J., including "emotional and dignitary harm," which the court noted is "legally cognizable under Title IX."<sup>165</sup>

The Fourth Circuit also explained that the purported choice that B.P.J. had to compete in middle school sports on boys teams was "no real choice at all" as

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157. B.P.J. by Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542, 551 (4th Cir. 2024). In reaching this conclusion, the district court decision explained that Title IX was likely violated by B.P.J.'s exclusion based on her gender identity "[t]he law could not exclude B.P.J. from a girls' athletics team without referencing her 'biological sex' as defined in the statute," and that under the Save Women's Sports Bill B.P.J. would have been "the only girl at her school . . . forbidden from playing on a girls' team." B. P. J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 356 (S.D. W. Va. 2021). Given that discrimination in the Title IX context "mean[s] treating that individual worse than others who are similarly situated," *id.* at 357 (alteration in original) (citing Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618 (4th Cir. 2020)), Judge Goodwin further explained that under the West Virginia Save Women's Sports Bill "B.P.J. [would] be treated worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity." *Id.*

158. Hawrot, *supra* note 156.

159. See B.P.J. v. W. Va. State Bd. of Educ., 649 F. Supp. 3d 220, 232 (S.D. W. Va. 2023).

160. See *id.* at 233.

161. B.P.J. by Jackson, 98 F.4th at 555.

162. *Id.* at 563.

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

164. *Id.* (citing Grimm, 972 F.3d at 618).

165. B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542, 563 (4th Cir. 2024) (citing Grimm, 972 F.3d at 618).

it would “countermand her social transition, her medical treatment, and all the work she has done with her schools, teachers, and coaches for nearly half her life by introducing herself to teammates, coaches, and even opponents as a boy.”<sup>166</sup> In addition, because B.P.J. had never undergone male puberty, she would be exposed to similar risks of physical danger and inability to compete on an equal playing field to those that a chromosomal girl would face if made to compete on a boys’ team.<sup>167</sup>

Nevertheless, the Fourth Circuit’s favorable ruling for B.P.J. cannot be generally extrapolated to all Title IX claims filed by transgender athletes seeking to compete in sports consistent with their gender identity.<sup>168</sup> First, *B.P.J.* is merely the law of one circuit, and the Supreme Court, to date, has not addressed the issue on a broader level.<sup>169</sup> In addition, the finding of resulting harm as articulated by the court in *B.P.J.* would likely not apply to a transgender female plaintiff who had undergone male puberty or who had previously competed on the public stage in organized sports as a male.<sup>170</sup> Political ideology also may have implicitly made its way into the *B.P.J.* decision, given that the two judges who coauthored the majority opinion were both Democrat appointees, while the one judge who authored a dissent was appointed by a Republican president.<sup>171</sup> Finally, even the majority decision in *B.P.J.* acknowledges certain limits. As the court decision states:

We do not hold that government officials are forbidden from creating separate sports teams for boys and girls or that they lack power to police the line drawn between those teams. We also do not hold that Title IX requires schools to allow every transgender girl to play on girls teams, regardless of whether they have gone through puberty and experienced elevated levels of circulating testosterone. We hold only that the district court erred in granting these defendants’ motions for summary judgment in this particular case and in failing to grant summary judgment to B.P.J. on her specific Title IX claim.<sup>172</sup>

A Supreme Court review of the *B.P.J.* ruling could have led to greater legal certainty, but that was not to be.<sup>173</sup> On November 18, 2024, the U.S. Supreme Court denied certiorari in *B.P.J.*, leaving behind more questions than answers about how U.S. sports governing bodies that accept federal funds should interpret Title IX when determining policies for eligibility to compete in sex-segregated sports.<sup>174</sup> Thus, much like the legality of state laws limiting transgender athlete

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166. *Id.* at 564.

167. *Id.*

168. *See infra* notes 176–86 and accompanying text.

169. *U.S. Supreme Court Rejects West Virginia’s Effort to Deny a 12-Year-Old Trans Girl Her Right to Play*, ACLU (Apr. 6, 2023, at 14:52 CT), <https://www.aclu.org/press-releases/us-supreme-court-rejects-west-virginias-effort-to-deny-a-12-year-old-trans-girl-her-right-to-play> [<https://perma.cc/XSY8-KY6V>].

170. *See B.P.J. v. West Virginia State Board of Education*, *supra* note 7.

171. *See B.P.J.*, 98 F.4th at 546.

172. *Id.* at 565.

173. *See infra* note 174 and accompanying text.

174. *See* *W. Va. Secondary Sch. Activities Comm’n v. B.P.J. Next Friend Jackson*, 145 S. Ct. 568 (2024).

inclusion under the Equal Protection Act, the status of transgender athlete inclusion under Title IX remains at least somewhat unsettled.<sup>175</sup>

### C. Other Relevant Title IX Decisions

Beyond *B.P.J.*, there are two other recent court decisions that broach the Title IX question in the context of transgender athletes.<sup>176</sup> In *Hecox*, which was referenced earlier in Section II.D of this Article, Lindsay Hecox (a transgender woman who wanted to try out for the Boise State University women's track and cross-country teams) and Jane Doe, (a cisgender woman who played high school varsity sports and feared possible genital inspections) sought a declaratory judgment that Idaho's Fairness in Women's Sports Act violated both Title IX and the Equal Protection Act.<sup>177</sup> Both plaintiffs, however, then moved for a preliminary injunction on their equal protection claims, which was granted by the district court.<sup>178</sup> This nullified the need for an imminent Title IX ruling.<sup>179</sup> After succeeding in gaining a preliminary injunction on Equal Protection Act grounds, Hecox tried out for the Boise State University track team.<sup>180</sup> But she failed to make the team, presumably on her athletic merits.<sup>181</sup> She thereafter withdrew from school.<sup>182</sup>

In the case of *D.N.*, the plaintiff, a sixteen-year-old transgender girl who had been diagnosed with gender dysphoria at age seven, began taking puberty blockers at that time and legally had her birth certificate changed to reflect being female, sought a declaratory judgment to allow her to compete for her high school's girls' volleyball team.<sup>183</sup> The U.S. District Court for the Southern District of Florida rejected this claim, based on a previous Eleventh Circuit decision regarding bathroom access, and held that Title IX applied only to biological sex and not gender.<sup>184</sup> The court suggested that perhaps *D.N.* would have a viable Title IX claim if she challenged the fact that she, as a transgender female, is being treated differently and worse than transgender males.<sup>185</sup> *D.N.*, however, chose not to pursue that claim.<sup>186</sup>

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175. See Barnes, *supra* note 96.

176. See *infra* notes 177–86 and accompanying text.

177. *Hecox v. Little*, 104 F.4th 1061, 1072 (9th Cir. 2024).

178. *Id.*

179. See *id.*

180. See *id.*

181. See *id.*

182. *Id.*

183. *D.N. by Jessica N. v. DeSantis*, 762 F. Supp. 3d 1219, 1225–26 (S.D. Fla. 2024).

184. *D.N. by Jessica N. v. DeSantis*, 701 F. Supp. 3d 1244, 1263–65 (S.D. Fla. 2023) (referencing the U.S. Court of Appeals for Eleventh Circuit's decision in *Adams v. Sch. Bd. of St. John's Cnty.*, 3 F.4th 1299, 1336 (11th Cir. 2021), in which that court differentiated the treatment of transgender discrimination under Title IX from its treatment under intermediate scrutiny by the U.S. Supreme Court under Title VII).

185. See *id.* at 1265 (“The Plaintiff, after all, chose not to make the only viable argument still available to her—that, as a biological male, she’s being treated differently (and worse) than [other] biological females.”).

186. See *id.*

#### D. Statutory Ambiguities

While courts do their best to reasonably apply Title IX to cases brought by transgender athletes seeking inclusion in sex-segregated sports, applying the Title IX framework to issues pertaining to the transgender question has undoubtedly proved challenging. Judges deciding these cases are forced to contend with a statute that is today more than fifty years old, and that was passed during a time period in which transgender people were far less visible in society.<sup>187</sup> As such, there are aspects of Title IX that, while perhaps sufficient in 1972, would benefit from legislative clarification today.<sup>188</sup>

One aspect of Title IX that would benefit from legislative clarification is the Act's intended definition of "sex."<sup>189</sup> The authors of this Article acknowledge that defining terms such as "sex," "female" and "woman," on the outer contours, present challenges, with even the U.S. Court of Appeals for the Ninth Circuit conceding that, in the context of transgender inclusion in sex-segregated sports, "such seemingly familiar terms as sex and gender can be misleading."<sup>190</sup> These terms also leave open the possibility that the proper definition of "sex," in this context, could be defined in a number of different ways—all leading to different outcomes in terms of opportunities to compete in sports.<sup>191</sup> With the opportunity to amend Title IX, Congress may choose to define "sex" for purposes of Title IX based upon any of the following: (a) sex assigned at birth; (b) the sex listed on one's birth certificate; (c) the sex listed on one's driver's license or other state issued identification card; (d) the inspection of one's genitalia; (e) overall bodily composition; (f) hormonal levels; and/or (g) gender identity. It would be helpful, if not necessary, for Congress to stipulate its intended definition; albeit the authors strongly caution against adopting any definition of "sex" that would require adults to inspect athletes' genitals.

A second aspect of Title IX that needs clarification is whether "equal opportunity" in the context of high school and intercollegiate athletics means equal opportunity to win, or simply an equal opportunity to join teams and compete.<sup>192</sup> Given that Title IX was not initially perceived as a statute relating primarily to athletics, the language of the Act does not perfectly address sex-segregated sports.<sup>193</sup> This begs two important questions: (1) are sex segregated sports required, or even permitted, today (for example, should "women's soccer" be

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187. See R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFAIRS (2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> [<https://perma.cc/4TPT-QX4G>].

188. See *infra* notes 189–95 and accompanying text.

189. See generally Brody Levesque, *Federal Judge Temporarily Blocks Anti-Trans Youth Sports Law in Indiana*, WASH. BLADE (July 27, 2022), <https://www.washingtonblade.com/2022/07/27/federal-judge-temporarily-blocks-anti-trans-youth-sports-law-in-indiana/> [<https://perma.cc/MSP5-LUEX>] (quoting ALCU legal director Ken Falk for the position that Title IX prevents prohibiting athletes from competing in sports consistent with their gender identity).

190. *Hecox v. Little*, 104 F.4th 1061, 1068 (9th Cir. 2024) (internal citations and quotations omitted).

191. See *infra* note 219 and accompanying text.

192. See *Title IX*, U.S. DEP'T OF JUST.: C.R. DIV., <https://web.archive.org/web/20250103082141/https://www.justice.gov/crt/title-ix> [<https://perma.cc/B4W5-9LSL>] (last visited Jan. 2, 2026).

193. See *id.*

replaced by “soccer for people with less than 10 nmol/L), and (2) do unisex sports teams meet the “equal opportunity” requirement where an overwhelming majority of athletes that are starters or prize-winners on a team are classified as “male.”<sup>194</sup>

Meanwhile, a third open question under Title IX pertains to whether a classification for purposes of an individual’s participation on a particular intercollegiate sports team necessarily needs to be consistent with their classification for purposes of ensuring equal opportunity in intercollegiate sports for males and females.<sup>195</sup> An issue that has not been addressed in any court decision, legal pleading or academic writing to date, but is worthy of consideration, is whether a transgender female athlete could participate on a female sports team in a manner that supports recognizing her gender identity but still be counted in aggregated statistical information for Title IX compliance purposes as “male”—thus simultaneously fostering an environment of transgender inclusion consistent with gender identity and, at the same time, not reducing opportunities for chromosomal females to compete in sports for purposes of “equal opportunity” under Title IX.

#### IV. REASONABLE TOPICS FOR CONGRESS TO ADDRESS WHEN AMENDING TITLE IX TO ACCOUNT FOR TRANSGENDER ATHLETES

An amended Title IX could serve as a reasonable framework for addressing the issue of transgender inclusion in sex-segregated sports; however, it is probably not enough for Congress to simply resolve the statutory ambiguities explained in the previous part and stop there. Although transgender individuals represent a very small share of the U.S. population,<sup>196</sup> the underlying question of how to include transgender athletes in sex-segregated sports remains at the forefront of the present American culture wars.<sup>197</sup> And, new legislation pertaining to transgender inclusion in sex-segregated sports reasonably could yield unintended effects in terms of the broader perception of transgender individuals in society overall. Thus, any meaningful revision of Title IX to address questions pertaining to transgender athletes would need to balance between the bona fide interests of transgender athletes to compete in sports consistent with their gender identities and various other good-faith public policy concerns.

This Part moves beyond existing law and explores the broader public policy issues and open questions that Congress needs to consider when balancing the relevant protections afforded to chromosomal females and transgender females if and when Congress amends Title IX. In particular, this Part discusses six important considerations: (1) how frequently does transgender inclusion affect

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194. *See id.*

195. *See Title IX, supra* note 192.

196. *See* Jody L. Herman & Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST. (Aug. 2025), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/> [<https://perma.cc/WJ8C-A62S>]; *see also* Vosler, *supra* note 4, at 114 (estimating that less than 0.6% of the U.S. population identifies as transgender).

197. *See* Ramirez, *supra* note 9; Neal, *supra* note 9.

sporting outcomes within given sports; (2) are federally funded sports about competing or winning; (3) should federally funded sports remain a sex-segregated space; (4) do certain procedures for ensuring sex segregation expose athletes to heightened risk of sexual abuse; (5) are privacy interests relevant; and (6) whether both transgender females and transgender males still have available opportunities to compete.

A. *How Frequently Does Transgender Inclusion Affect Sporting Outcomes?*

At present, the transgender issue in sex-segregated sports is front and center because Lia Thomas, a transgender female at the University of Pennsylvania, placed atop the finishers in a number of different 2021–22 swimming events,<sup>198</sup> and Blaire Fleming, a transgender female at San Jose State University, helped lead her school’s volleyball team to a second place finish in 2024 in the Mountain West Conference.<sup>199</sup> Many observers thus presume that all transgender athletes are meaningfully affecting the outcomes in female sporting events.<sup>200</sup> This presumption, of course, requires further exploration.

The prevailing concern that transgender women are overwhelmingly affecting the outcomes of women’s sporting events may be overstated for a number of reasons, including an anchoring bias.<sup>201</sup> In reality, just 0.6% of the population identifies as transgender, and the percentage of transgender individuals competing in organized sports is even less,<sup>202</sup> although the rate of high school students identifying as transgender today may be somewhat higher than before.<sup>203</sup> To illustrate the low relative percentage of interscholastic athletes who identify as transgender, when Ohio recently passed its Save Women’s Sports Act, the Ohio High School Athletic Association (“OHSAA”) reported there was only one identified transgender female participating in high school athletics at the time.<sup>204</sup> Moreover, since 2015, OHSAA reports that forty-eight transgender girls have applied to take part in girls’ sports, eleven of whom were approved.<sup>205</sup> Of those eleven, no disruption in competition or loss of opportunity for chromosomal females has been raised.<sup>206</sup>

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198. See Katie Barnes, *Amid Protests, Penn Swimmer Lia Thomas Becomes First Known Transgender Athlete to Win Division I National Championship*, ESPN (Mar. 17, 2022, at 19:23 ET), [https://www.espn.com/college-sports/story/\\_/id/33529775/amid-protests-pennsylvania-swimmer-lia-thomas-becomes-first-known-transgender-athlete-win-division-national-championship](https://www.espn.com/college-sports/story/_/id/33529775/amid-protests-pennsylvania-swimmer-lia-thomas-becomes-first-known-transgender-athlete-win-division-national-championship) [<https://perma.cc/XUT6-YYT9>].

199. Thompson, *supra* note 6.

200. *See id.*

201. See *Anchoring Bias: Definition and Examples*, EXPLORE PSYCH. (Jan. 22, 2022), <https://www.explorepsychology.com/anchoring-bias/> [<https://perma.cc/PZ4B-2KEB>] (explaining that the anchoring bias leads people to rely too heavily on the first piece of information that receive on a topic).

202. See Herman & Flores, *supra* note 196; Vosler, *supra* note 4, at 114.

203. See Vosler, *supra* note 4, at 114.

204. See Jake Zuckerman, *She’s Ohio’s Only Trans Female Playing Varsity Sports; Lawmakers Want Her Out*, CINCINNATI.COM (Jun. 13, 2022, at 16:26 ET), <https://www.cincinnati.com/story/news/2022/06/13/ohio-transgender-law-would-prevent-one-athlete-playing-her-story/7615376001/> [<https://perma.cc/A6L5-WZ8A>].

205. See Jeff. St. Clair, *Proposed Ohio Transgender Athlete Ban Would End OHSAA Policy That Ensures Fairness*, WOSU PUB. MEDIA (May 13, 2021, at 06:40 ET), <https://news.wosu.org/politics/2021-05-13/proposed-ohio-transgender-athlete-ban-would-end-ohsaa-policy-that-ensures-fairness> [<https://perma.cc/2RBU-3DS3>].

206. *Id.*

The effect of including transgender women on competitive balance in organized sports may become even less dramatic still when accounting for team sports, rather than just individual ones, given that in team sports, a single player represents just a part of the contest outcome.<sup>207</sup> To illustrate this point, while it is hard to discount the effect on competitive balance that Lia Thomas had on the results of certain individual women's swimming events,<sup>208</sup> Blaire Fleming's effect on the competitive balance within the NCAA Division-I Mountain West Conference volleyball matches may be far less significant.<sup>209</sup> Indeed, with Fleming competing as an outside hitter on the San Jose State University volleyball team, her team lost seven matches, including a loss in their conference championship match to Colorado State.<sup>210</sup> When removing San Jose State's seven victories that were earned by forfeit due to her opponents refusing to compete against a team that included a transgender woman,<sup>211</sup> the San Jose State University volleyball team's season record was merely 9-7, which amounts to a .563 winning percentage.<sup>212</sup> That hardly supports the argument that Fleming's inclusion denies chromosomal women the opportunity to be relatively competitive in their games when transgender women are also included.

In a recent journal article, Australian scholars Catherine Ordway, Matt Nichol, Damien Parry and Joanna Wall Tweedie discuss the purported "competitive advantage" of transgender women over cisgender women and suggest that the focus on an individual player's competitive advantage in a team sport represents an "outlier" in terms of overall game results.<sup>213</sup> In reaching their conclusion, they cite a study conducted among Australian female athletes in *Sport, Ethics and Philosophy* that found "[only] 24.1 per cent of females believe transgender women have an unfair advantage" when competing in women's sports.<sup>214</sup> The results of this study seem somewhat surprising, at least based on what seems to be the American female athlete position.<sup>215</sup> It is possible, however, that a few vivid examples of transgender athletes excelling in their sport represent the exception, rather than the rule.<sup>216</sup>

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207. See *infra* notes 213–16 and accompanying text.

208. See Barnes, *supra* note 198.

209. See *infra* notes 210–16 and accompanying text.

210. *Blaire Fleming—Women's Volleyball Roster*, SAN JOSÉ STATE ATHL., <https://sjsuspartans.com/sports/womens-volleyball/roster/player/blaire-fleming> [<https://perma.cc/746C-UMCB>] (last visited Jan. 2, 2026).

211. *Women's Volleyball*, SAN JOSÉ STATE ATHL., <https://sjsuspartans.com/sports/womens-volleyball> [<https://perma.cc/G4WX-EPBD>] (last visited Jan. 2, 2026).

212. *Id.*

213. See Ordway et al., *supra* note 55, at 7.

214. *Id.* at 2.

215. *Id.*

216. See Barnes, *supra* note 198; see also Vosler, *supra* note 4, at 114 (estimating that less than 0.6% of the U.S. population identifies as transgender).

*B. Are Federally Funded Sports About Competing or Winning?*

Presuming that transgender women are indeed disproportionately affecting the outcomes in certain female sports (a question that remains unsettled and requires more than just anecdotal study), that begs a second, important question: would it even matter? In other words, is the primary purpose of federally funded high school and college sports about competition or winning? That question again warrants serious and meaningful analysis.

While the answer to this question may at first seem purely opinion-based, a review of statutory text and court opinions may be helpful in assessing the original intent in this regard.<sup>217</sup> For example, Title IX states that “no person . . . shall, on the basis of sex, be *excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity . . . which is a recipient of Federal financial assistance.*”<sup>218</sup> Even if one were to define “sex” as being one’s assigned sex at birth, adding a transgender swimmer as an additional competitor onto a women’s sports team would not seem to exclude any assigned-at-birth woman from “participation” nor serve as a form of “discrimination.”<sup>219</sup> Meanwhile, presuming that inclusion of transgender females on female teams does not meaningfully limit the number of available roster spots available to assigned-at-birth female competitors, the answer as to whether denying an assigned-at-birth female a reasonable likelihood of winning an event would constitute “being denied the benefit of” remains opaque.

It is also possible that this distinction may come down to a review of particular athletic associations’ bylaws and/or the athletic institution’s mission.<sup>220</sup> For example, in *Duffley v. New Hampshire Interscholastic Athletic Association, Inc.*, the Supreme Court of New Hampshire reviewed the bylaws of the New Hampshire Interscholastic Athletic Association and concluded that the bylaws specifically referenced “education”—thus strengthening the argument for an athlete’s property interest to compete in athletics.<sup>221</sup> Meanwhile, if an athletic association’s bylaws are worded differently, the reasonable outcome could be different.<sup>222</sup> Even within the realm of intercollegiate sports, one could make reasonable arguments that the importance of winning is different between revenue and non-revenue sports, between conference levels of athletic competition, and between intercollegiate and intramural sporting events.<sup>223</sup> There may also be an argument

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217. See *infra* notes 218–24 and accompanying text.

218. 117 CONG. REC. 30, 30156 (1971).

219. See *supra* notes 198–216 and accompanying text.

220. See Amanda Siegrist, W. Andrew Czekanski & Steve Silver, *Interscholastic Athletics and Due Process Protection: Student-Athletes Continue to Knock on the Door of Due Process*, 6 MISS. SPORTS L. REV. 1, 2 (2016).

221. 446 A.2d 462, 467 (1982).

222. *Id.* at 466.

223. See Jay L. Caulfield, Felissa K. Lee & Catharyn A. Baird, *Navigating the Ethically Complex and Controversial World of College Athletics: A Humanistic Leadership Approach to Student Athlete Well-Being*, 183 J. BUS. ETHICS 603, 603–17 (2023); Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports*, PBS NEWSHOUR (Mar. 18, 2023, at 19:14 ET), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports> [<https://perma.cc/84SV-F3BW>].

that the ability to win is considered less important than learning the rules and strategy of a sport when the participants are comparatively younger in age.<sup>224</sup>

*C. Should Federally Funded Sports Remain a Sex-Segregated Space?*

Yet another emerging question related to the transgender issue is whether federally funded sports should remain a sex-segregated space. Some may argue that contact and/or competitive advantage based on size or strength may warrant a separation between chromosomal males and females in a competition.<sup>225</sup> Others may argue that maintaining sex-segregated spaces in federally funded high school and college sports helps to develop confidence and leadership skills in young women, as well as prepares them for later-in-life Olympic and other professional opportunities.<sup>226</sup> And yet, still others may argue that a societal goal should be to minimize any form of segregation, including sex-segregation: comparing the present athletic situation to segregation for certain academic subjects that historically existed in certain public schools throughout the country.<sup>227</sup>

It is relevant to recognize that youth sports such as tee-ball and soccer are often co-ed.<sup>228</sup> At that age and level of competition, the physical advantages of size and strength are not a safety concern nor an unfair advantage.<sup>229</sup> The goal is more for participation, learning, development, activity, and socializing.<sup>230</sup> As children begin to age through elementary school, the sex-segregation of sports emerges with private associations such as Little League, which historically chose to split participants into baseball for boys, and softball for girls.<sup>231</sup> But, at least at the pre-pubescent age, this early sex-segregation of sports may lead to the emergence of differential performance of boys and girls based on differences in coaching, training and expectations of the athletes, rather than innate differences in ability based on sex.<sup>232</sup> Thus, perhaps if private associations such as Little League did not sex-segregate sports from an early age, there would be less need for certain federally funded sports associations to self-segregate as a means to keep female athletes on-field competitive.

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224. See Donna L. Merkel, *Youth Sport: Positive and Negative Impact on Young Athletes*, 4 J. SPORTS. MED. 151, 151 (2013).

225. See Dennis L. Weisman, *Transgender Athletes, Fair Competition, and Public Policy*, 45 REGUL. 18, 18–21 (2022).

226. See *Sports Benefit Girls in Many Ways*, CHILD. MED. GRP. (Jan. 31, 2019), <https://childrensmedicalgroup.net/sports-benefit-girls-in-many-ways/> [<https://perma.cc/KK76-MUB7>].

227. See Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue*, 40 CARDOZO L. REV. 1813–56 (2023).

228. See Melissa Flandreau, *Coed Sports: When Should Boys and Girls Play Separately?*, ACTIVEKIDS (June 29, 2015), <https://www.activekids.com/parenting-and-family/articles/coed-sports-when-should-boys-and-girls-play-separately> [<https://perma.cc/Y5ZF-FC5X>]; Lewis First, *First with Kids: The Game Plan for Coed Sports*, NBC5 (Aug. 13, 2019, at 17:27 ET), <https://www.mynbc5.com/article/first-with-kids-the-game-plan-for-coed-sports/28690935> [<https://perma.cc/H6KM-N7QC>].

229. Flandreau, *supra* note 228; First, *supra* note 228.

230. Flandreau, *supra* note 228; First, *supra* note 228.

231. Flandreau, *supra* note 228.

232. First, *supra* note 228.

While such an approach would likely not hold true for all sports after the onset of puberty (for example, it is hard to imagine most females after the onset of puberty being able to compete effectively against males in basketball), there may be more practical ways of allocating prospective athletes to particular sports teams other than based on assigned-at-birth sex.<sup>233</sup> At present, many sports associations that offer so-called “female” sports are, more exactly, determining eligibility based on criteria pertaining to body type and/or hormones.<sup>234</sup> Meanwhile, eligibility to compete on certain sports teams or in certain sporting events could also theoretically be determined by weight class (*e.g.*, wrestling, sprint football), height, muscle mass, performance, or a conglomerate of these variables. In this regard, one could argue that the ongoing sex-segregation of sports teams rather than the segregation of athletes by more pertinent variables is the problem here, and that if one of these other means of segregating athletes were adopted, questions pertaining to how to label transgender athletes, as well as intersex athletes, would naturally resolve themselves.

In addition, there are some activities where sex segregation has historically occurred, but it should be deemed unnecessary, even after puberty.<sup>235</sup> For example, in August 2023, the Associated Press ran an article criticizing how the International Chess Federation, which in 1999 became recognized by the International Olympic Committee as a Global Sporting Organization, was denying transgender women the opportunity to compete in women’s chess competitions—requiring transgender women instead to compete either with men or in an “open” category.<sup>236</sup> Clearly, chess is not an activity where transgender women have physical advantages of size and strength that would create a safety concern or an otherwise unfair advantage when competing against chromosomal men.<sup>237</sup> Further, in today’s society, where males and females are increasingly educated together and provided with similar extracurricular opportunities, separating even chromosomal males from chromosomal females makes little sense. Indeed, as activities such as chess gain traction as being “sports,” perhaps the only division should be an open division. On high school and collegiate competition levels, existing laws such as Title IX could then be used to ensure that females (however that term ultimately is defined) enjoy equal opportunity to participate on these teams, rather than being granted separate teams.

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233. See *infra* notes 234–37 and accompanying text.

234. *Sex Eligibility Rules for Female Athletes Are Complex and Legally Difficult. Here’s How They Work*, NBC NEWS (Aug. 8, 2024, at 11:59 CT), <https://www.nbcnews.com/nbc-out/out-news/sex-eligibility-rules-female-athletes-are-complex-legally-difficult-s-rcna165802> [https://perma.cc/6CFK-869P].

235. See *infra* notes 236–37 and accompanying text.

236. Jamey Keaten, *World Chess Federation Bars Transgender Women from Competing in Women’s Events*, AOL (Aug. 17, 2023), <https://www.aol.com/world-chess-federation-bars-transgender-104414016.html> [https://perma.cc/XHV7-XB7U].

237. *Id.*

*D. Do Certain Procedures for Ensuring Sex Segregation Expose Athletes to Heightened Risk of Sexual Abuse?*

A fourth question that requires careful consideration is whether the benefits of maintaining segregated sports, however sex is defined, justify the potential harms of ensuring the athletes are properly segregated. Here, the answer again likely depends—specifically based on the narrow underlying purpose of the segregation, and the degree of intrusiveness of the procedures used to ensure athlete conformance with the intended segregation.

By way of an example, the inspection of athletes’ “internal . . . reproductive anatomy” to ensure athletes have the internal anatomy consistent with segregated sports is a dubious endeavor, as the physical appearance of one’s genitalia is hardly the best test for one’s likely ability to perform in an athletic venture, especially when compared to body-type testing and hormonal testing.<sup>238</sup> Moreover, inspecting the internal genitalia of young athletes comes at a substantially heightened degree of invading one’s privacy and increasing one’s potential exposure to sexual abuse.<sup>239</sup> Especially given the horrifying pain inflicted on young athletes by Larry Nassar—the disgraced former USA gymnastics and Michigan State University doctor who was sentenced to forty years in prison for penetrating his patients intra-vaginally with ungloved hands—it seems hard to imagine requiring young athletes to undergo an examination of their internal reproductive anatomy without a bona fide medical need or purpose.<sup>240</sup> By contrast, a sports league’s requirement that its athletes have testosterone levels below a certain level and requiring a blood test to assess individuals’ hormonal levels, may, under certain circumstances, be comparatively more justifiable.<sup>241</sup>

*E. Are Privacy Interests Relevant?*

A fifth question relates to the privacy rights of the athletes. Privacy laws of paramount importance, such as the Family Educational Rights and Privacy Act (“FERPA”) and the Health Insurance Portability and Accountability Act (“HIPAA”) dictate the sharing of information in relation to the privacy of a student surrounding their education records and medical records.<sup>242</sup> Thus, it follows that there is a need to strike a balance between ensuring a level sports playing field and protecting the right to privacy in both the educational and medical contexts for the purpose of participation in athletics.

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238. Save Women’s Sports Act, OHIO REV. CODE §§ 3313.5317, 3345.561 (2021–22).

239. *Id.* For several disturbing examples of medical personnel, including doctors, sexually abusing patients under the guise of treatment, see Troy Crossen, *Pain Doctor Found Guilty of Sexually Assaulting Patients*, N.Y. TIMES (Aug. 15, 2022), <https://www.nytimes.com/2022/07/29/nyregion/ricardo-cruciano-sexual-assault.html> [<https://perma.cc/R8T4-HHBC>] (discussing the sexual abuse of patients by physician Ricardo Cruciani, amongst others).

240. Heather Udowitch, *The Larry Nassar Nightmare: Athletic Organizational Failures to Address Sexual Assault Allegations and a Call for Corrective Action*, 16 DEPAUL J. SPORTS L. 93, 93 (2020).

241. *See supra* note 234 and accompanying text.

242. 20 U.S.C. § 1232g; 34 C.F.R. Part 99 [hereinafter “FERPA”]; 42 U.S.C. § 1320d-2 [hereinafter “HIPAA”].

The Fourth Amendment of the U.S. Constitution affords all citizens protection from unreasonable search and seizures by state actors.<sup>243</sup> Courts have upheld high school athletic associations' random drug testing policies when they have implemented urinalysis as opposed to blood testing, based on the minimal invasion of taking a urine sample since it is waste leaving the body.<sup>244</sup> But policies requiring the inspection of an athlete's genitalia—as well as perhaps policies requiring the detailed review of medical records, testing of testosterone and estrogen—may just be too invasive or overbroad in regards to weighing constitutional protections against unreasonable search and seizure.<sup>245</sup>

There also may be special concerns that emerge for athletes in nontraditional settings such as shared locker rooms and hotel rooms. These questions about bodily privacy in such environments deserve careful consideration by legislators as they seek to pass new laws. There may be a wide array of ways that these issues may be reasonably addressed.<sup>246</sup>

*F. Do Both Transgender Females and Transgender Males Still Have Available Opportunities to Compete?*

A sixth and final question, meanwhile, is how to address the potentially unintended side-effect of an uncarefully crafted bill, which could lead to the de facto exclusion of transgender males from certain sports.<sup>247</sup> While a primary factor motivating certain states to pass laws governing who may participate on certain sports teams has been to prevent transgender females from competing on female teams, the way at least some of these bills are written, they would also prevent transgender males from competing on male teams.<sup>248</sup> This is problematic because many of the regulatory bodies for organized sports already exclude these same individuals from competing in women's sports based on their likely testosterone levels post-transition.<sup>249</sup> Consequently, unlike transgender women who are simply denied the opportunity to compete in sport alongside the gender with which they identify, transgender men are excluded from competing in the entirety, unless they cease to take male hormones to conform with requirements for

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243. U.S. CONST. amend. IV.

244. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (reasoning that the privacy interests compromised by urine samples are negligible since the conditions of collection are similar to public restrooms). The Court's discussion of such a search centered largely around whether the intrusion outweighed the health, safety, and fairness concerns, which could be relevant as policy is created surrounding the transgender question. See *id.* at 664–65.

245. M. Olivia McQuade, *Drug-Free Is the Way to Be Except If You're Transgender: A Constitutional Analysis of High School Athletic Associations' Transgender Policies*, 32 MARQ. SPORTS L. REV. 185, 185 (2021).

246. As in any co-authored work, there is occasionally a level of disagreement among the two authors on a particular point. One of us believes that, as part of the right to privacy, there should be a legal duty to inform college athletes specifically if they are competing against a transgender athlete or assigned to room with a transgender athlete. We both believe that a more prudent approach would be one where all college athletes have the option of staying in their own hotel room or dorm room on the road, and that if college administrators are not forced to share hotel rooms on business trips, neither should be college athletes.

247. See *infra* notes 249–50 and accompanying text.

248. See *infra* notes 249–50 and accompanying text.

249. See *supra* note 71 and accompanying text.

girls' and women's teams.<sup>250</sup> Thus, the choice forced upon transgender men based on some state bills is even more severe, as they are forced to choose between taking gender-confirming hormones and not competing in the entirety of sex-segregated sports.

## V. WHY THE PROTECTION OF WOMEN AND GIRLS IN SPORTS ACT IS INADEQUATE

Although we recognize there is a need for Congress to amend Title IX to account for the issues of the day, we believe Congress's proposed version of the Protection of Women and Girls in Sports Act marks a significant step in the wrong direction.<sup>251</sup> And, while we acknowledge that the bill succeeds in its efforts to remove ambiguity from the interpretation of Title IX, we believe the bill is specifically flawed in four respects.<sup>252</sup> First, as a procedural matter, Congress's proposed Protection of Women and Girls in Sports Act only has a sponsor from one political party and seems to be being pushed toward a vote at an unusually fast speed.<sup>253</sup> Second, as a substantive matter, the proposed bill seems to fail to balance between the competing legal interests of chromosomal female and transgender female athletes based on the important considerations raised in Part IV of this Article.<sup>254</sup> Third, we believe the proposed bill runs the same risks of being found unconstitutional under the Equal Protection Clause as both the Idaho and West Virginia bills that remain the subject of ongoing litigation.<sup>255</sup> And, finally, we believe the bill does not meet the needs of American society, given substantial regional differences in social norms and the lack of moral free space afforded by the bill to the individual states.<sup>256</sup>

### A. *Procedural Shortcomings*

Among the many factors that underlie our concern with Congress's proposed Protection of Women and Girls in Sports Act is the uncommon speed with which the bill was proposed and rushed to vote on the House floor—all without any hearings, debate, or bipartisan conversation.<sup>257</sup> It is highly unusual for any bill to be introduced by a representative and then voted on by the House of Representatives all in just an eleven-day period.<sup>258</sup> At the time the House of Representatives voted on the Protection of Women and Girls in Sports Act, the bill had

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250. See Mo. S.B. 39, 102nd Gen. Assemb. Reg. Sess. (Mo. 2023); *supra* note 71 and accompanying text.

251. See *infra* Part V.

252. See *infra* Part V.

253. See *infra* notes 257–59 and accompanying text.

254. See *infra* notes 260–64 and accompanying text.

255. See *infra* notes 265–73 and accompanying text.

256. See *infra* notes 274–77 and accompanying text.

257. See *supra* notes 112–23 and accompanying text.

258. Cf. *How Are Laws Made*, U.S. H.R., <https://www.house.gov/the-house-explained/the-legislative-process> [<https://perma.cc/AGK4-QB2A>] (last visited Jan. 2, 2026) (explaining that if a bill is released by a committee, it is placed on a calendar to be debated and potentially amended prior to vote).

not even been assigned a number yet.<sup>259</sup> As such, we would support efforts by Congress to slow down the voting process, seek to work toward a truly bipartisan bill on transgender inclusion, and include in the discussion experts from various disciplines such as education, law, medicine, and sports management.

### B. *Failure to Analyze and Balance Competing Interests*

Congress's proposed Protection of Women and Girls in Sports Act also fails in its entirety to attempt to balance the interests of transgender individuals with those of chromosomal females—both historically marginalized groups with their own respective interests.<sup>260</sup> Balancing between these various sets of legitimate concerns, of course, leaves the inevitability that some forms of discrimination will remain, and various constituent groups will not be entirely satisfied with the outcome. But that does not mean a good faith attempt to balance the relative interests of both groups altogether lacks merit.

Throughout society, certain forms of discrimination have been deemed acceptable because allowing for them seems less bad than the alternative.<sup>261</sup> Among these forms of discrimination are discriminating against a surgeon for having shaky hands, discriminating against a White person for leading a regional chapter of the NAACP, or discriminating against a Jewish person for a job as a Catholic priest (or a Catholic for the job as a rabbi).<sup>262</sup> Where protecting the interests of one group necessarily requires some level of discrimination against the other group (and vice versa), it is necessary to first answer the question of “whether prima facie discrimination can ultimately be justified.”<sup>263</sup>

Such balancing, however, does not seem to have occurred with respect to Congress's proposed Protection of Women and Girls in Sports Act. To the contrary, the interests of transgender populations, especially at levels of sport where countervailing concerns seem minimal (*e.g.*, perhaps certain middle school junior varsity teams), do not receive even an angstrom of consideration.<sup>264</sup>

### C. *Questionable Constitutionality*

Third, Congress's proposed Protection of Women and Girls in Sports Act fails to reasonably address the Equal Protection Clause issues raised by transgender plaintiffs against similar state laws.<sup>265</sup> While the U.S. District Court for the Southern District of Florida recently upheld a similar bill passed by the

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259. See The Protection of Women and Girls in Sports Act, H.R. 28, 119th Cong. (2025).

260. See Cloghessy, *supra* note 118.

261. Veronic Ivy & Aryn Conrad, *Including Trans Women Athletes in Competitive Sport*, 46 PHIL. TOPICS 103, 108 (2018).

262. See *id.* at 105 (providing Rawls's example of discriminating against a surgeon with shaky hands); see also *id.* at 108 (explaining that the European Union's right to free movement is overridden when one is incarcerated for committing a crime, in exploring the inevitability that one statutory scheme will sometimes necessarily override the rights provided to one in a different scheme).

263. *Id.* at 108.

264. See Smallwood & Nelson, *supra* note 122.

265. See *infra* note 270 and accompanying text.

State of Florida, the U.S. Court of Appeals for the Ninth Circuit, among others, has expressed skepticism about whether blanket bans on transgender females from competing in interscholastic female sports would conform with constitutional mandates.<sup>266</sup>

In applying intermediate scrutiny to Idaho's Fairness in Women's Sports Act, the Ninth Circuit applied the same level of scrutiny to Idaho's law that the U.S. Supreme Court applied to transgender employment discrimination under Title VII of the Civil Rights Act in *Bostock v. Clayton*.<sup>267</sup> In *Bostock*, Justice Neil Gorsuch, writing for the Supreme Court majority, concluded that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."<sup>268</sup> While the Supreme Court's decision in *Bostock* related to an equal employment claim, it still would be more likely than not that the Supreme Court would apply intermediate scrutiny to any law treating cisgender females and transgender females differently.<sup>269</sup> This would mean, to defend the Protection of Women and Girls in Sports Act, the United States would need to prove that the act serves an important governmental objective that is substantially related to the restraints imposed on transgender females by the law.<sup>270</sup>

Given the hurried manner in which Congress has pushed the Protection of Women and Girls in Sports Act and the lack of evidence that Congress considered less restrictive alternatives that may better balance their objectives with the interests of transgender athletes, there is a reasonable chance that a federal court, and perhaps even the Supreme Court, would reject the proposed law as unconstitutional.<sup>271</sup> To illustrate these concerns, the Ninth Circuit in *Hecox* recently concluded that Idaho's proposed law limiting transgender inclusion was likely overbroad because it affected the athletic eligibility of all transgender women and girls, including elementary school transgender girls as young as kindergarten, and transgender girls who had never undergone endogenous puberty.<sup>272</sup>

Congress could have meaningfully increased the likelihood that the Protection of Women and Girls in Sports Act would survive constitutional scrutiny by following the implied guidance of the Ninth Circuit in *Hecox* and limiting its exclusion of transgender females to those individuals who have already attained a certain minimum age and/or had undergone the beginnings of female puberty.<sup>273</sup> Congress, however, has not done so.

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266. See *Hecox v. Little*, 104 F.4th 1061, 1068, 1072 (9th Cir. 2024) (affirming the district court's grant of preliminary injunctive relief under the Equal Protection Clause to a transgender female athlete).

267. *Id.* at 1079–80.

268. *Bostock v. Clayton*, 590 U.S. 644, 660 (2020).

269. *Hecox*, 104 F.4th at 1080 (citing *United States v. Virginia*, 581 U.S. 515, 533 (1996)).

270. *Id.* at 1081.

271. See *id.* at 1084.

272. *Id.* The Ninth Circuit also stated that "[r]equiring a student to find a medical practitioner to examine their reproductive anatomy, which is what a typical gynecological exam entails, is unconscionably invasive, with the potential to traumatize young girls and women." *Id.* at 1087; see *id.* at 1083–88.

273. See *Hecox*, 104 F.4th at 1084 (discussing concerns about the Idaho law raised by the court in *Hecox*).

*D. Lack of Moral Free Space for States*

Finally, the proposed act fails to account for regional and local differences in social norms within our vast country, the United States.<sup>274</sup> In a seminal *Academy of Management Review* article entitled “Toward a Unified Conception of Business Ethics,” Wharton School legal studies and ethics professor Thomas Donaldson and his late colleague, Thomas W. Dunfee, discuss the importance, in the absence of global hypernorms, of allowing for business behaviors to be guided by “moral free space,” which is the specific cultural, ideological and religious norms of the local community where one is doing business.<sup>275</sup> While the notion of moral free space emerges in the context of multinational business ethics, a similar concept logically applies in favor of allowing for individual states to enjoy some flexibility to implement social practices consistent with their local values.<sup>276</sup> Thus, a policy on transgender inclusion in sex-segregated sports that may be suitable to the contemporary social norms of Florida may not be suitable to the norms of California.<sup>277</sup>

Given that there is no global hypernorm at present on transgender inclusion in sex-segregated sports, one can make a reasonable argument that individual states, if not local sports associations, should enjoy a reasonable degree of freedom in setting their own policies. As such, Congress’s Protection of Women and Girls in Sports Act unnecessarily tramples upon the freedoms of individual states to allow for greater degrees of transgender athlete inclusion in sex-segregated sports. And, conversely, if Congress were to regain a Democratic majority, Congress similarly should not thrust upon states such as Florida, Idaho, and West Virginia a system of transgender inclusion that is neither consistent with any global hypernorm nor consistent with those states’ local values.

## VI. CONCLUSION

As of the time of publishing this Article, the question of transgender inclusion in sex-segregated sports remains troublingly divisive. On one end of the political spectrum, certain transgender athletes and their supporters continue to push for full, transgender inclusion in a manner consistent with their gender identities, irrespective of potential adverse effects on competitive balance, athlete safety and opportunities for chromosomal women.<sup>278</sup> On the other end of the spectrum, certain Republican members of Congress, including W. Gregory Steube, have supported a federal bill to ubiquitously ban transgender athletes from participating in their preferred manner in sex-segregated sports.<sup>279</sup>

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274. See *supra* notes 112–15 and accompanying text.

275. Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contract Theory*, 19 *ACAD. OF MGMT. REV.* 252, 260–62 (1994).

276. See *id.*

277. See *id.*

278. Ordway et al., *supra* note 55, at 3.

279. See *supra* note 14 and accompanying text.

While both constituent groups insist on looking at transgender inclusion as a zero-sum game, both groups ignore the potential for establishing policies that reasonably protect the interests of both chromosomal and transgender females.<sup>280</sup> This Article does not suggest the exact contours of transgender inclusion in sex-segregated sports, nor does it suggest “splitting the baby” for its own sake. But we do recommend that regulations pertaining to transgender-athlete inclusion entail some degree of good-faith balancing of interests, as well as the implementation of situation-specific solutions.

In trying to achieve this delicate balance, there are a number of important topics that deserve further inquiry. Among these topics is the question of how to define the terms “sex” and “equal opportunity” under Title IX. Another topic involves assessing how significantly including transgender athletes would affect competitive balance in each particular sport. A third topic pertains to determining how to best preserve both the privacy interests and bodily integrity of athletes. Meanwhile, additional topics of inquiry relate to whether particular legislative solutions would comport with the Equal Protection Clause of the Fourteenth Amendment and with normative principles related to global hypernorms and moral free space.

The topic of transgender inclusion in sex-segregated sports, of course, lends itself to no perfect solution. But, by proposing carefully tailored policies to address a broad framework for inclusion in specific circumstances, we invite a more socially responsible discussion about these topics. As scholars and authors of this Article, we implore Congress, executive agencies, state legislators and even sports governing bodies to adopt our careful and more nuanced approach to addressing questions pertaining to transgender eligibility to compete in sex-segregated sports. At the same time, we denounce any approach that lacks a good-faith effort to carefully balance competing interests on this topic.

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280. See *supra* notes 87–88 and accompanying text.

