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# Sword or Shield? The Weaponization of Title IX Against Transgender Athletes

Jacqueline Brant<sup>†</sup>

## Introduction

Transgender people in the United States are under attack. There are currently over 1.6 million people above the age of thirteen who identify as transgender in the United States.<sup>1</sup> Trans issues have gained national attention in the political arena, leading to increased rates of violence and anti-trans legislation.<sup>2</sup> 2021 was a record-breaking year for the highest number of violent fatal incidents against transgender people, the majority of whom were people of color.<sup>3</sup> As of 2023, forty-five states had laws or pending legislation targeting the transgender community.<sup>4</sup> There were more than 300 anti-trans legislative proposals in 2022, 140 of which sought to deny trans-related medical care to trans youth.<sup>5</sup> Other examples of anti-trans legislation include banning gender changes

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1. JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O'NEILL, HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 1 (UCLA Sch. of L. Williams Inst. 2022).

2. See HUM. RTS. CAMPAIGN FOUND., DISMANTLING A CULTURE OF VIOLENCE: UNDERSTANDING VIOLENCE AGAINST TRANSGENDER AND NON-BINARY PEOPLE AND ENDING THE CRISIS (2021), [https://reports.hrc.org/dismantling-a-culture-of-violence?\\_ga=2.261641229.1013274671.1668485151-2053197631.1668485151](https://reports.hrc.org/dismantling-a-culture-of-violence?_ga=2.261641229.1013274671.1668485151-2053197631.1668485151) [<https://perma.cc/B5WE-VE5G>] (discussing how anti-trans stigma, cultural norms, and denial of opportunities prevent transgender people from participating fully in society and subjects them to violence).

3. HUM. RTS. CAMPAIGN FOUND., FATAL VIOLENCE AGAINST THE TRANSGENDER AND GENDER NON-CONFORMING COMMUNITY IN 2022 (2022), <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2022> [<https://perma.cc/7KHY-2MRP>].

4. *2023 Anti-Trans Legislation*, TRACK TRANS LEGIS., <https://www.tracktranslegislation.com/> [<https://perma.cc/TR3J-V7PQ>].

5. Arthur Jones II & Aaron Navarro, *This Year on Pace to See Record Anti-Transgender Bills Passed by States, Says Human Rights Campaign*, CBS NEWS (Apr. 22, 2022), <https://www.cbsnews.com/news/2022-anti-transgender-legislation-record-human-rights-campaign/> [<https://perma.cc/R6QL-4BMG>].

on birth certificates, banning discussions about gender in sex education curriculum, categorizing gender-affirming care as “child abuse,” not requiring school employees to respect students’ pronouns, banning transgender people from using public restrooms that align with their gender identity, banning medical transition services, banning irreversible gender reassignment surgery in minors, and forbidding youth from participating in gendered activities and athletics in accordance with their gender identity.<sup>6</sup>

Some scholars attribute the recent surge of anti-trans legislation to backlash from the legalization of gay marriage in 2015 with the *Obergefell v. Hodges* Supreme Court decision.<sup>7</sup> Much of this anti-trans legislation and debate focuses on the inclusion of transgender athletes in sex-segregated athletics.<sup>8</sup> At least thirty states have banned or are attempting to ban transgender youth from participating on sports teams that align with their gender identity.<sup>9</sup> In a world where transgender youth are significantly more likely to suffer from severe mental health concerns including depression, anxiety, self-harm, and even suicide, why has the issue of sports stolen the spotlight?<sup>10</sup>

Athletics are likely targeted by conservative groups for two reasons. First, young female athletes are convenient ‘victims’; legislators can frame young female athletes losing athletic competitions as a solid and tangible harm.<sup>11</sup> Second, athletics are

6. See 2023 Anti-Trans Legislation, *supra* note 4; Jones & Navarro, *supra* note 5.

7. See LOREN CANNON, THE POLITICIZATION OF TRANS IDENTITY: AN ANALYSIS OF BACKLASH, SCAPEGOATING, AND DOG-WHISTLING FROM OBERGEFELL TO BOSTOCK (Rowman & Littlefield Publ’g Grp., 2022) (explaining the political backlash phenomenon after *Obergefell*).

8. See Danielle Kurtzleben, *Political Dispute over Transgender Rights Focuses on Youth Sports*, NPR (Mar. 11, 2021), <https://www.npr.org/2021/03/11/974782774/political-dispute-over-transgender-rights-focuses-on-youth-sports> [<https://perma.cc/QUT7-M7SL>].

9. Jones & Navarro, *supra* note 5.

10. HUM. RTS. CAMPAIGN FOUND., MENTAL HEALTH AND THE LGBTQ COMMUNITY 1–2 (2016), [https://assets2.hrc.org/files/assets/resources/Human\\_Rights\\_Campaign\\_Foundation\\_-\\_LGBTQ\\_Mental\\_Health\\_One-Pager.pdf](https://assets2.hrc.org/files/assets/resources/Human_Rights_Campaign_Foundation_-_LGBTQ_Mental_Health_One-Pager.pdf) [<https://perma.cc/VUE4-UZJB>] (discussing that transgender youth are four times more likely to experience depression than non-trans peers, that one-third of transgender youth have seriously considered suicide, that one-fifth of transgender youth have made a suicide attempt, and that 40% of transgender adults report serious psychological distress).

11. See Shayna Medley, *[Mis]interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports*, 45 N.Y.U. REV. L. & SOC. CHANGE, 673, 674–75 (2022) (explaining how anti-trans advocates frame preventing trans people from participating in sports as protecting cisgender women and girls).

hugely important to many youths, bestowing on them a sense of belonging and community.<sup>12</sup> Thus, keeping trans kids out of sports in such a public manner serves to further humiliate and isolate transgender youth.<sup>13</sup>

Amongst the onslaught on transgender legislation, there have been several constitutional challenges to transgender rights as well. Anti-trans activists mounted a new legal attack strategy in *Soule v. Connecticut Association of Schools* that not only represents a potentially devastating constitutional attack on transgender youth in the United States, but also calls into question the validity, legitimacy, and very existence of the transgender identity.<sup>14</sup> In this case, cisgender girls within the Connecticut high school system alleged that the Connecticut Interscholastic Athletic Conference (CIAC) policy allowing transgender students to compete on teams in accordance with their gender identity violated the rights of cisgender girls.<sup>15</sup> The plaintiffs asserted that transgender girls competing on girls high school athletic teams violates Title IX because it infringes upon the equal opportunity for cisgender girls to compete in school sports.<sup>16</sup> *Using equal protection clauses in this manner is a perversion of these anti-discrimination policies. Title IX policies were enacted to shield groups that have been historically discriminated against from discrimination in the educational context, not to be utilized as a sword to facilitate discrimination against one minority group at the hands of another.*<sup>17</sup>

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12. See Michelle Román, *Fair Play: Transgender Athletes and Their Opponents on (and off) the Field*, 94 CLEARING HOUSE 237, 242 (2021) (explaining the sense of community that youth gain from school athletics).

13. See Madeleine Carlisle, *Inside the Right-Wing Movement to Ban Trans Youth from Sports*, TIME (May 15, 2022), <https://time.com/6176799/trans-sports-bans-conservative-movement/> [<https://perma.cc/WCJ5-GTBZ>] (discussing a January 2022 poll which found that 85% of trans youth said debates about anti-trans bills negatively impacted their mental health).

14. *Soule v. Conn. Ass'n of Schs.*, 57 F.4th 43 (2d Cir. 2022) (upholding the district court's holding that the plaintiffs failed to establish standing "for reasons of speculation" and that CIAC and its member schools did not have adequate notice that their policy violated Title IX).

15. See generally Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *Soule v. Conn. Ass'n of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022) [hereinafter Amended Complaint] (laying out the complaints and injuries the plaintiffs are claiming).

16. *Id.*

17. See Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 83–85 (2013) (explaining that the goal of Title IX was to "increase parity between men and women" because of historic sex discrimination against women).

In this Article, I will be discussing how athletics policies addressing transgender athletes became a subject of national debate, who exactly Title IX policy protects from discrimination and why, what Fourteenth Amendment law is relevant to the debate, and how Fourteenth Amendment law should guide courts to interpret discrimination on the basis of sex to protect transgender students from school-related athletics bans. The interpretation of sex discrimination in the context of Title IX has crucial implications not only for transgender students, but also women of color, intersex people, and cisgender women.

## I. Background

### A. *The State of Transgender Youth in National and International Sports*

There is a long history of transgender athletes participating in sporting events that align with their gender identity both in the United States and in international competitions. Prior to the 1968 International Olympic Committee (IOC) guidelines requiring gender verification checks, individual international sports administrations “began requiring female competitors to bring medical ‘femininity certificates’” and other types of gender verification procedures when athletes outside the gender binary—including intersex athletes—entered the public eye.<sup>18</sup> However, in the 1970s, U.S. tennis player Renée Richards—a transgender woman who underwent a full medical transition—won a lawsuit against the United States Tennis Association after the Association banned her from competing in the Women’s U.S. Open.<sup>19</sup> In this 1977 decision, the New York Court cited the professional conclusions of a doctor that Richards “should be classified as female . . . [m]easured by all the factors, including chromosomal

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18. Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> [https://perma.cc/GL3Y-EBMS]; see also Pat Griffin, Helen Carroll & Cyd Ziegler, *LGBTQ Sports History Timeline*, CAMPUS PRIDE (Oct. 24, 2012), <https://www.campuspride.org/resources/lgbt-sports-history-timeline/> [https://perma.cc/2FWD-LYQS]; elisewiegele, *History of Transgender Inclusion in Sports*, TIME TOAST, <https://www.timetoast.com/timelines/timeline-of-transgender-inclusion-in-sports> [https://perma.cc/G6GP-EZJU].

19. Griffin et al., *supra* note 18; see also Rachel Stark-Mason, *A Time of Transition*, NCAA CHAMPION MAG. (Nov. 17, 2019), <http://www.ncaa.org/static/champion/a-time-of-transition/> [https://perma.cc/Z8WE-T323] (explaining that Richards went on to compete in the Women’s U.S. Open, although she notably did not win).

structure,” and held that “[w]hen an individual such as [Renée Richards] . . . finds it necessary for [her] own mental sanity to undergo [sex reassignment surgery], the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female.”<sup>20</sup> Thus, the U.S. Tennis Association’s ban on Renée Richards was declared unlawful under the New York Human Rights Law, which made it “unlawful discriminatory practice for an employee, because of age, race, creed, color, national origin, sex or disability, or marital status of any individual to refuse to hire or employ or to bar or to discharge from employment such individual.”<sup>21</sup> Since then, there have been numerous transgender athletes in the United States who participated in competitions that align with their gender identity.<sup>22</sup>

In 2004, the IOC passed the Stockholm Consensus, which formally authorized transgender athletes to compete on teams and in events consistent with their gender identity.<sup>23</sup> The IOC found that “individuals undergoing sex reassignment of male to female before puberty should be regarded as girls and women” and recommended “that individuals undergoing sex reassignment from male to female after puberty (and the converse) be eligible for participation in female or male competitions.”<sup>24</sup> It is important to note that the IOC “pulls a lot of weight in the world of international sport competition” and yields substantial bargaining power over other countries who wish to participate in the Olympic games.<sup>25</sup> Over the years, the IOC has pushed many high-profile laws and agendas in countries beyond the scope of the Olympic games.<sup>26</sup> Thus, the IOC has significant influence over the way many sports

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20. *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977).

21. *Id.* at 273.

22. *Six Trans Athletes You Should Know*, SPORTANDDEV.ORG (Nov. 19, 2021), <https://www.sportanddev.org/en/article/news/six-trans-athletes-you-should-know> [<https://perma.cc/D2XT-GCYR>]; see also Stark-Mason, *supra* note 19; *Cross-Training – The History and Future of Transgender and Intersex Athletes (Page 1)*, TRANSAS CITY, <https://web.archive.org/web/20230315105944/http://transascity.org/cross-training-the-history-and-future-of-transgender-and-intersex-athletes-1/> [<https://perma.cc/3KET-9B9P>] (giving a history of “sex testing” and a brief history of transgender athletes starting in the 1950s).

23. INT’L OLYMPIC COMM., STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS 1 (Oct. 28, 2003).

24. *Id.*

25. Marc Zemel, *How Powerful is the IOC? – Let’s Talk About the Environment*, 1 CHI.-KENT J. ENV’T & ENERGY L. 173, 220 (2011).

26. S.T. Arasu, *Is the IOC Getting Too Powerful?*, GOSPORTS (Sept. 28, 2020), <https://www.gosports.com.my/view/is-the-ioc-getting-too-powerful/> [<https://perma.cc/84UB-PKZC>] (explaining the IOC’s influence in Italy, India, Malaysia, and Indonesia).

federations implement policies regarding transgender athletes.<sup>27</sup> In 2021, the IOC updated its policy on transgender athletes further: the new “framework” allows transgender athletes to compete in the event that aligns with their gender identity so long as they meet the eligibility requirements for the sport’s respective international organization.<sup>28</sup> Such requirements must rely on “robust and peer reviewed research,” while also respecting principles of non-discrimination, fairness, privacy, bodily autonomy, and prevention of harm.<sup>29</sup>

After the IOC issued this guidance in 2021, many international teams and associations in the United States and Europe began allowing transgender athletes to participate in events in accordance with their gender identity in line with the IOC guidance.<sup>30</sup> In particular, many United States organizations such as the National Collegiate Athletic Association (NCAA), the Premier Hockey Federation (previously known as the National Women’s Hockey League), the National Women’s Soccer League, and Athletes Unlimited have all released trans inclusion guidelines that allow trans women in particular to compete in women’s leagues.<sup>31</sup> Notably, the NCAA approved a policy mirroring the IOC guidance in 2011.<sup>32</sup> The NCAA stated that it:

believes in and is committed to diversity, inclusion and gender equity . . . [s]ince participation in athletics provides student-

27. Joanna Harper, *Transgender Athletes and International Sports Policy*, 85 DUKE L. & CONTEMP. PROBS., 151, 162 (2022) (“[T]he voice of the IOC is itself influential . . .”).

28. INT’L OLYMPIC COMM., IOC FRAMEWORK ON FAIRNESS, INCLUSION, AND NON-DISCRIMINATION ON THE BASIS OF GENDER IDENTITY AND SEX VARIATIONS 3 (2021).

29. INT’L OLYMPIC COMM., *supra* note 28, at 3–6; see *Transgender Guidelines*, WORLD RUGBY (2022), <https://www.world.rugby/the-game/player-welfare/guidelines/transgender#SummaryforTransgenderWomen> [<https://perma.cc/5KTB-SWQX>] (explaining that transgender women may not compete in international rugby competitions in the women’s division); WORLD AQUATICS, POLICY ON ELIGIBILITY FOR THE MEN’S AND WOMEN’S COMPETITION CATEGORIES (2022) (demonstrating eligibility requirements regarding acceptable testosterone level and acceptable transition period); Chris Mosier, *International Federations*, TRANSATHLETE.COM (2022), <https://www.transathlete.com/international-federations> [<https://perma.cc/F2L5-ULJF>] (outlining various transgender policies for different international sports organizations).

30. Griffin et al., *supra* note 18.

31. Julie Kliegman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (July 6, 2022), <https://www.si.com/more-sports/2022/07/06/transgender-athletes-bans-policies-ioc-ncaa> [<https://perma.cc/63GT-TAMG>].

32. Marta Lawrence, *Transgender Policy Approved*, NCAA (Sept. 13, 2011), <https://ncaanewsarchive.s3.amazonaws.com/2011/september/transgender-policy-approved.html> [<https://perma.cc/Y579-8RHX>].

athletes a unique and positively powerful experience, the goals of these policies are to create opportunity for transgender student-athletes to participate in accordance with their gender identity while maintaining the relative balance of competitive equity within sports teams.<sup>33</sup>

Since 2011, policies allowing transgender athletes to compete on teams that aligned with their gender identity were relatively uncontroversial in the United States until the 2015 *Obergefell v. Hodges* decision.<sup>34</sup> In *Obergefell*, the Supreme Court held that state prohibitions on gay marriage are unconstitutional.<sup>35</sup> Following the decision, anti-gay marriage activists turned their energy towards anti-trans legislation with much of the same anti-gay rhetoric, including an overarching mantra of protecting children.<sup>36</sup> Since then, the rights of trans athletes have come under fire. In particular, the NCAA updated its trans athlete policy in 2021 to defer to the “national governing bod[y]”—the bodies in charge of making decisions for international leagues and games—for each sport regarding eligibility decisions.<sup>37</sup> While this change affected many transgender athletes, it constituted a direct attack on swimmer and transgender woman Lia Thomas, whose participation in NCAA women’s swimming was hotly contested at the time this decision dropped.<sup>38</sup> At that time, Lia Thomas—dubbed “the most controversial athlete in America”—set two NCAA women’s swimming records and three Ivy League records after medically transitioning, leading to attacks on her character, skill, and identity by many national and international news sources.<sup>39</sup> Two months prior to the 2022 national championships, the NCAA and USA

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33. Lawrence, *supra* note 32.

34. Carlisle, *supra* note 13; *see generally* CANNON, *supra* note 7 (explaining the recent anti-trans legislation and violence as a backlash of the *Obergefell* decision).

35. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (ruling that state bans on gay marriage are unconstitutional).

36. *See* Carlisle, *supra* note 13.

37. Kliegman, *supra* note 31.

38. *Id.*

39. 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/3TJ7-B8HB>]; Eric Levenson & Steve Almasy, *Swimmer Lia Thomas Becomes First Transgender Athlete to Win an NCAA D-I Title*, CNN (Mar. 17, 2022), <https://www.cnn.com/2022/03/17/sport/lia-thomas-ncaa-swimming/index.html> [<https://perma.cc/ED4R-XS9L>]; Yaron Steinbuch, *Transgender Swimmer Lia Thomas is ‘Destroying’ Sport, Official Says*, N.Y. POST (Dec. 28, 2021), <https://nypost.com/2021/12/28/official-transgender-swimmer-lia-thomas-is-destroying-the-sport/> [<https://perma.cc/2KVE-5HYX>] (quoting transphobic rhetoric of former USA Swimming official Cynthia Millen on “Tucker Carlson Tonight”).



Swimming initiated new guidelines that put Thomas's eligibility in question.<sup>40</sup> Despite national attention and rage, the NCAA ultimately allowed Thomas to continue competing despite falling two months short of fulfilling USA Swimming's strict eligibility requirements for hormone therapy.<sup>41</sup> It is important to note that Thomas's NCAA championship in the 500-yard freestyle event was her only national title, and she failed to repeat past victories in the last swim competition of her collegiate career.<sup>42</sup>

Following *Obergefell*, there was "passion, dedication, and concern held by anti-marriage equality activists that had to go *somewhere*."<sup>43</sup> These activists turned this energy towards an anti-trans offensive, including "hundreds of explicitly anti-trans pieces of legislation proposed," rescinding Title IV protections of trans students, an uptick in transgender violence, restriction of transgender-related healthcare, and a general fight against the legal and social acceptance and "recognition of transgender persons."<sup>44</sup> This backlash is, at its core, a "collective response" on a national scale, resulting in a collective harm against the transgender community.<sup>45</sup> It is not unusual for backlashes to be targeted against "vulnerable [and] already marginalized" groups; in this way, backlash can be viewed as opportunistic because the targeting has "less to do with the original concern of the backlashes" and more to do with the ease of further oppressing an already marginalized group.<sup>46</sup>

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40. See Kliegman, *supra* note 31.

41. See *id.*; Katie Barnes, *NCAA Ruling Clears Path for Transgender Swimmer Lia Thomas to Compete at Nationals*, ESPN (Feb. 10, 2022), [https://www.espn.com/college-sports/story/\\_/id/33261181/ncaa-ruling-clears-path-transgender-swimmer-lia-thomas-compete-nationals](https://www.espn.com/college-sports/story/_/id/33261181/ncaa-ruling-clears-path-transgender-swimmer-lia-thomas-compete-nationals) [https://perma.cc/EV23-7MZW]; see also *USA Swimming Releases Athlete Inclusion, Competitive Equity and Eligibility Policy*, USA SWIMMING (Feb. 1, 2022), <https://www.usaswimming.org/news/2022/02/01/usa-swimming-releases-athlete-inclusion-competitive-equity-and-eligibility-policy> [https://perma.cc/E7GQ-QU7Y] (laying out the strict eligibility requirements in place for trans female athletes).

42. Levenson & Almasy, *supra* note 39; Delaney Parks, *Lia Thomas Takes Eighth Place in Her Final Swim of the NCAA Championships*, DAILY PENNSYLVANIAN (Mar. 19, 2022), <https://www.thedp.com/article/2022/03/lia-thomas-ncaa-championships-100-freestyle> [https://perma.cc/NX7M-TPC4]; Les Carpenter, *Lia Thomas Broke No Records at the NCAA Championships but Left Plenty of Questions*, WASH. POST (Mar. 20, 2022), <https://www.washingtonpost.com/sports/2022/03/20/lia-thomas-ncaa-swimming-championships-questions/> [https://perma.cc/TC26-EV6Y].

43. CANNON, *supra* note 7, at 30–31.

44. *Id.* at 31.

45. *Id.* at 93.

46. *Id.* at 87–89; see also Elizabeth Barnes, *Justice at What Cost?*, HIST. TODAY (Dec. 12, 2018), <https://www.historytoday.com/archive/history-matters/justice-what->

Thus, the “anti-trans offensive” following the *Obergefell* decision can be seen as a backlash against a “vulnerable [and] already marginalized” group: the transgender community.<sup>47</sup> Anti-trans activists frame their attack against transgender people as a method of protecting cisgender women.<sup>48</sup> Anti-trans activists assert that without laws protecting cisgender women from transgender women and girls, cisgender women would be “eliminated from participation and denied any meaningful opportunity for athletic involvement,” would be attacked by child predators who are transgender in public restrooms, or would be “abused” through gender-affirming care by parents who are forcing a transgender identity on children who are actually cisgender.<sup>49</sup> None of these claims are grounded in real-life statistics. This backlash reaction has set up the current debate regarding how Title IX applies to the rights of both cisgender women and transgender students, especially when these rights seemingly clash.

### B. Title IX Background and Relationship to Athletics

Title IX is “an example of how the [Fourteenth] Amendment has been interpreted over time.”<sup>50</sup> While the Fourteenth Amendment provides that “no state can deny to any person within its jurisdiction the equal protection of the laws,” Title IX uses this language to “specifically [prohibit] sex discrimination.”<sup>51</sup> When

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cost [<https://perma.cc/H9UB-L62L>] (outlining the backlash against Black women following emancipation); King-Kok Cheung, *(Mis)interpretations of (In)justice: The 1992 Los Angeles “Riots” and “Black-Korean Conflict”*, 30 MELUS 3 (2005) (explaining that violence against Koreans can be understood as a backlash against Koreans during the LA “riots” after the beating of Rodney King).

47. CANNON, *supra* note 7, at 87–89.

48. Medley, *supra* note 11, at 684–85.

49. Defendant’s Reply in Support of Motion to Dismiss at 11–12, *Soule v. Conn. Ass’n of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *aff’d*, 57 F.4th 43 (2d Cir. 2022); Josh Gelernter, *A Conservative Defense of Transgender Rights*, NAT’L REV. (Dec. 17, 2016), <https://www.nationalreview.com/2016/12/transgender-bathrooms-conservative-defense-transgender-rights/> [<https://perma.cc/3RLE-NGT3>]; Katy Steinmetz, *Why LGBT Advocates Say Bathroom ‘Predators’ Argument Is a Red Herring*, TIME (May 2, 2016), <https://time.com/4314896/transgender-bathroom-bill-male-predators-argument/> [<https://perma.cc/T3FT-C26Z>];

Eleanor Klibanoff, *Judge Temporarily Blocks Some Texas Investigations into Gender-Affirming Care for Trans Kids*, TEX. TRIB. (June 10, 2022), <https://www.texastribune.org/2022/06/10/texas-gender-affirming-care-child-abuse/> [<https://perma.cc/YT3W-RAUB>].

50. *The 14th Amendment and the Evolution of Title IX*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix> [<https://perma.cc/48AT-YY7W>].

51. *Id.*

Title IX was enacted as part of the Education Amendments of 1972, its purpose was to “provide equal access to educational opportunities to men and women” as well as to prohibit and prevent sex discrimination.<sup>52</sup> A key piece of “increas[ing] equality and promot[ing] parity in entrance to graduate school, math and science programs, and after school activities” was to provide an equal opportunity to participate in sports at all levels of education.<sup>53</sup> The text of Title IX reads: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>54</sup> Title IX notably does not explicitly address transgender students or transgender athletes.<sup>55</sup> Title IX applies to all schools, educational agencies, and other educational institutions that receive funds from the Department of Education; this accounts for “17,600 local school districts, over 5,000 postsecondary institutions, and charter schools, for-profit schools, libraries, and museums.”<sup>56</sup> For the purposes of Title IX, discrimination based on sex includes discrimination based on sexual orientation or gender identity.<sup>57</sup> Historically, Title IX has applied to sexual harassment, employment discrimination, athletics, and more.<sup>58</sup>

The Office for Civil Rights (OCR) under the U.S. Department of Education has flipped back and forth on several occasions regarding the status of transgender student athletes. Under the Obama Administration, the Department of Education and the OCR sent a letter stating that “when a student or student’s parent or guardian . . . notifies the school administration that the student will assert a gender identity that differs from previous

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52. TERESA R. MANNING, DEAR COLLEAGUE: THE WEAPONIZATION OF TITLE IX; HOW A FEDERAL LAW AIMED AT EQUAL ACCESS TO EDUCATION ORGANIZED THE CAMPUS SEX POLICE AND AUTHORIZED CAMPUS BUREAUCRATS TO CREATE A NEW GENDER HIERARCHY (Nat’l Ass’n of Scholars 2020); Steve K. Fedder, *Title IX on Campus: A Riddle Wrapped in an Enigma*, 51 MARYLAND. BUS. J. 16, 18 (2018); Emily Suski, *Subverting Title IX*, 105 MINN. L. REV. 2259, 2260–61 (2021).

53. Juliano, *supra* note 17.

54. 20 U.S.C. § 1681.

55. TITLE IX’S APPLICATION TO TRANSGENDER ATHLETES: RECENT DEVELOPMENTS, CONG. RSCH. SERV. (2020).

56. TITLE IX AND SEX DISCRIMINATION, U.S. DEP’T OF EDUC. – OFF. FOR CIVIL RTS. (2021).

57. *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity*, U.S. DEP’T OF EDUC. (June 16, 2021), <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity> [<https://perma.cc/JPP2-27MT>].

58. Juliano, *supra* note 17, at 84 n.9.

representations or records, the school will begin treating the student consistent with the student's gender identity"; additionally, schools may not "adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about differences between transgender students and other students of the same sex or others' discomfort with transgender students."<sup>59</sup> However, a few years later, the Trump Administration rescinded this 2016 guidance, stating that the guidance "did not 'contain extensive legal analysis' or undergo a public comment process."<sup>60</sup>

In addition to the Trump Administration's rescindment, the OCR did issue a letter specifically addressing the *Soule* lawsuit in 2020.<sup>61</sup> This letter stated:

[B]y permitting the participation of certain male student-athletes in girls' interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy, [the CIAC] denied female student-athletes athletic benefits and opportunities, including advancing to the finals in events, higher level competitions, awards, medals, recognition, and the possibility of greater visibility to colleges and other benefits.<sup>62</sup>

Once President Biden took office, the U.S. Department of Education reversed transgender policies in education again.<sup>63</sup> The reversal letter from June 16, 2021, stated that "Title IX's prohibition on discrimination on the basis of sex [includes]: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity."<sup>64</sup> Although this press release announces protection for transgender students across the educational board, it does not specifically mention athletics on any education level.<sup>65</sup> President Biden also released an executive order stating:

Children should be able to learn without worrying about

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59. RESCINDED OCR LETTER, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS, DEP'T OF EDUC. – OFF. OF CIVIL RTS. (2016); *see also* TITLE IX'S APPLICATION, *supra* note 55, at 2 (discussing the changing approach to transgender athletes within the Department of Education during the change from the Obama to Trump Administration).

60. TITLE IX'S APPLICATION, *supra* note 55, at 2 (quoting MANNING, *supra* note 52, at 2).

61. TIMOTHY C.J. BLANCHARD, REVISED LETTER OF IMPENDING ENFORCEMENT ACTION (U.S. Dep't of Educ. Off. For Civ. Rights 2020).

62. *Id.*

63. Press Release, U.S. Dep't of Educ., U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity (June 16, 2021), <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity>.

64. *Id.*

65. *Id.*

whether they will be denied access to the restroom, the locker room, or school sports . . . . The Supreme Court held [in *Bostock v. Clayton County*] that Title VII's prohibition on discrimination 'because of . . . sex' covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock's* reasoning, laws that prohibit sex discrimination – including Title IX of the Education Amendments of 1972 . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.<sup>66</sup>

Despite the U.S. Department of Education's reversal announcement and Biden's executive order discussed above, the state of transgender protections in education are murky at best. First, it is essential to note that executive orders and guidance from the Department of Education are highly unstable—these tools are easily reversible depending on which president is sitting in office, which is why the guidance has already flipped.<sup>67</sup> Therefore, even if the executive order and Department of Education guidance did definitively protect transgender athletes, those protections could last only as long as Biden remains in office.<sup>68</sup> Regardless, the inconsistent policies do reveal that at least some political authorities would interpret Title IX to cover protections for transgender athletes, teeing up a legislative and judicial battle over the interpretation of sex within Title IX.

## II. Analysis

This section will first address the intricacies, foundations, and arguments laid out in the *Soule* lawsuit, including the CIAC transgender policy at the heart of the lawsuit and the allegations and factual assertions set forth in the pleadings. Next, this section

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66. Exec. Order No. 13988, 86 C.F.R. 7023 (2021). *See generally* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (holding that firing an employee based exclusively on their identity as transgender or for their sexual orientation violates Title VII). The *Bostock* decision addresses discrimination under Title VII and in the employment context. *Id.* The Court held that discriminating “because of” sex also meant discrimination due to transgender status. *Id.* at 1741–43. While this interpretation of sex discrimination could certainly inform the interpretation decision under Title IX and the *Soule* lawsuit, the decision is not binding. Applying this decision to Title IX and *Soule* is outside the scope of this Article due to the stark differences between the employment sphere and the school athletics sphere.

67. *What is an Executive Order?*, AM. BAR ASS'N (Jan. 25, 2021), [https://www.americanbar.org/groups/public\\_education/publications/teaching-legal-docs/what-is-an-executive-order/](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/) [https://perma.cc/CWB5-WTDL]; Amy Kosanovich Dickerson, *New OCR Title IX Dear Colleague Letter Withdraws Obama Era Guidance*, FRANZKEK (Sept. 27, 2017), <https://www.franczek.com/blog/new-ocr-title-ix-dear-colleague-letter-withdraws-obama-era-guidance/> [https://perma.cc/DJD5-JZ8S] (discussing the recent flip in OCR policies under the Secretary of Education's direction).

68. *What is an Executive Order?*, *supra* note 67.

will address two landmark Supreme Court cases for LGBTQ+ rights under the Fourteenth Amendment—*Romer v. Evans* and *U.S. v. Windsor*—and apply these holdings to the *Soule* lawsuit. Together, *Romer* and *Windsor* can be read to forbid laws from having the explicit purpose of stigmatizing or identifying a group as inferior. Ultimately, the holdings from *Romer* and *Windsor* can and should guide the inquiry in the *Soule* case; the explicit effect and purpose of banning transgender youth from participating in school-sponsored athletics is to stigmatize transgender youth and identify transgender youth as different, dangerous, and overall inferior.

A. *The Soule Lawsuit: Discrimination on the Basis of ‘Biological’ Sex*

The *Soule* lawsuit was filed against the backdrop of these recent developments in Title IX regulations and nationwide debate regarding the legitimacy and existence of transgender people. The plaintiffs in the lawsuit are four female athletes from Connecticut represented by their mothers, and the defendants are the CIAC and various school boards around the state.<sup>69</sup> The policy in controversy states the following:

[F]or purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification . . . [T]he school district shall determine a student’s eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season.<sup>70</sup>

The CIAC stated that it adopted this policy in order to provide “transgender student-athletes with equal opportunities to participate in CIAC athletic programs consistent with their gender identity.”<sup>71</sup> In response, the plaintiffs allege that this policy violates the requirements of Title IX because “treating girls differently regarding a matter so fundamental to the experience of sports – the chance to be champions – is inconsistent with Title IX’s mandate of equal opportunity for both sexes.”<sup>72</sup> They assert the CIAC policy “result[s] in boys displacing girls in competitive . . . events,” that

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69. Amended Complaint, *supra* note 15, at 3–4 (laying out the complaints and injuries the plaintiffs are claiming).

70. See CONN. INTERSCHOLASTIC ATHLETIC CONF., REFERENCE GUIDE FOR TRANSGENDER POLICY (2020).

71. *Id.* at 1.

72. Amended Complaint, *supra* note 15, at 2–3 (quoting *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004)) (laying out the complaints and injuries the plaintiffs are claiming).

“more boys than girls are experiencing victory and gaining the advantages that follow” (such as recruitment opportunities and athletic scholarships), and that the “interests and abilities of male and female students” are not “equally effectively accommodated” to the “extent necessary to provide equal [opportunities].”<sup>73</sup>

The general thrust of the argument is that transgender women are biologically and physiologically male, and, therefore, allowing physiological and biological males to compete against women is a violation of equal opportunity under Title IX.<sup>74</sup> Biological differences that allegedly give transgender girls an edge in high school athletics include things like larger lung capacity, larger hearts and per-stroke pumping volume, increased number of muscle fibers, larger bones, increased mineral density, height advantage, and differences in body fat levels.<sup>75</sup> Further, the complaint states “plaintiffs do not know whether or if so at what time the students with male bodies who are competing in girls’ CIAC track events began taking cross-sex hormones,” and even if these athletes were taking hormone drugs, this would not “completely reverse their advantages in muscle mass and strength, bone mineral density, lung size, or heart size.”<sup>76</sup>

The plaintiffs conclude that “as increasing numbers of males are in fact competing in girls’ and women’s events each year, girls are in fact losing, and males are seizing one [championship] and record after another.”<sup>77</sup> This, they argue, has resulted in unequal athletic opportunity in violation of Title IX because “boys” are displacing and excluding “specific and identifiable girls” from competition.<sup>78</sup> They claim the CIAC’s policy thus has resulted in harm to girls beyond simply a lack of equal opportunity; they also assert why girls have suffered loss of hope of victory, success, recognition, loss of the chance to be champions, demoralization, anxiety, intimation, emotional and psychological distress, depression, and loss of college athletic exposure.<sup>79</sup>

Although there are many issues contained in the *Soule* complaint, the main point at issue is how courts should interpret “sex” within the greater context of Title IX. Title IX provisions forbid schools from discriminating on the basis of sex for any school-

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73. *Id.* at 1–8 (quoting *Policy Interpretation*, 44 Fed. Reg. at 71,417–18).

74. *Id.* at 11–13.

75. *Id.*

76. *Id.* at 17.

77. *Id.* at 18.

78. Amended Complaint, *supra* note 15, at 2.

79. *Id.* at 1–3, 106–15.

related or school-sanctioned activities.<sup>80</sup> Additionally, Title IX requires schools to protect the equal opportunity of “both sexes” in school-related and school-sanctioned activities.<sup>81</sup> The plaintiffs in *Soule* asked the court to find that transgender students essentially fall outside the reach of Title IX protection because Title IX requires “both” sexes be protected—that is, men and women.<sup>82</sup> Under the *Soule* plaintiffs’ proposed rule, gender is black and white; students cannot “switch” between the fixed boundary of binary sex, and individuals who do attempt to transition are “fraudulently being individuals they ‘biologically’ are not.”<sup>83</sup> On the other hand, schools with trans-inclusive athletic policies propose a different interpretation of these Title IX provisions. The defendants propose that “sex” and “gender” are not based solely on biological or physiological traits.<sup>84</sup> Rather, the defendants argue that there is no precedential Title IX decision, nor any text from Title IX itself that “purports to restrict schools from allowing girls who are transgender to play on the same teams as other girls,” acknowledging and affirming transgender students’ girlhood under Title IX.<sup>85</sup> Thus, the defendant’s interpretation of “sex” within the context of Title IX regulations would recognize transgender students who identify as trans girls and trans boys as true girls and boys, respectively.<sup>86</sup>

While the Second Circuit ultimately dismissed *Soule*, it was dismissed on procedural grounds alone.<sup>87</sup> The transgender students that were the subject of the lawsuit had graduated, as well as two of the four plaintiffs; additionally, there were no other transgender students that the remaining two plaintiffs were likely to compete against during their final year of eligibility.<sup>88</sup> The Second Circuit found that the plaintiffs in *Soule* lacked standing and injury, but it

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80. See generally Amended Complaint, *supra* note 15 (asserting that gender is a biological fact that is inescapable). Plaintiffs also fail to acknowledge the transness of two students, referring to them only as boys and men. *Id.*

81. 34 C.F.R. § 106.41.

82. Amended Complaint, *supra* note 15, at 8.

83. *Id.* at 12–17; M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 946 (2015).

84. Defendant’s Reply, *supra* note 49, at 6.

85. *Id.* at 6–7.

86. *Id.* Notably, neither the plaintiffs nor the defendants in *Soule* mention or propose how to handle transgender students who do not fall within the gender binary.

87. See Ruling and Order, *Soule v. Conn. Ass’n of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *aff’d*, 57 F.4th 43 (2d Cir. 2022) [hereinafter “Ruling and Order”] (dismissing case based on lack of standing and moot issue).

88. *Id.* at 8–9.



did not altogether reject the plaintiffs' claim that transgender athletes should be categorically barred from participation in high school athletics.<sup>89</sup> Thus, the general argument of the *Soule* lawsuit may be used in future cases and presents a serious threat to transgender rights and public health. If a different court upholds this argument as legitimate in a future lawsuit, it could not only limit transgender youth's ability to participate in school athletics, but also threaten the validity of transgender existence altogether. The plaintiffs' argument also threatens cisgender women, ultimately reinforcing and perpetuating the idea that cisgender women are inherently inferior physically and athletically to cisgender males. Future courts should therefore find that cisgender female athletes are not being harmed by transgender female athletes and thus may not use Title IX as a sword to perpetuate discrimination against transgender athletes—and ultimately themselves.

*B. Essence and Interpretations: Protecting Cisgender Women or Discriminating Against Transgender Students?*

*Romer v. Evans* and *U.S. v. Windsor* are two landmark Supreme Court cases that struck down laws discriminating against the LGBTQ+ community because they were found to violate the Fourteenth Amendment and equal protection principles.<sup>90</sup> Although neither of these decisions dealt directly with education or athletic inclusion, they shed light on the types of laws and exclusions that are explicitly in conflict with equal protection and the Fourteenth Amendment. These decisions, taken together, support the notion that laws cannot have the explicit purpose of excluding LGBTQ+ and other minority groups from legally protected activities—such as marriage or employment—nor can they peel back protections and rights that LGBTQ+ and other minority groups have previously been granted in furtherance of equality and equal protection.

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89. *Id.* at 15–18 (explaining that if a transgender athlete began competing in Connecticut during the plaintiffs' final year of eligibility, the plaintiffs would be permitted to "file a new action under Title IX along with a motion for a preliminary injunction").

90. See *Romer v. Evans*, 517 U.S. 620 (1996); see also *United States v. Windsor*, 570 U.S. 744 (2013).

i. *Romer v. Evans*

A key case for LGBTQ+ rights in the United States is *Romer v. Evans*.<sup>91</sup> Before this case commenced, several Colorado municipalities passed laws prohibiting discrimination against LGBTQ+ individuals.<sup>92</sup> For example, some municipalities banned discrimination on the basis of sexual orientation in “many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.”<sup>93</sup> Cities in Colorado, notably Denver, were some of the first cities to provide anti-discrimination policies for LGBTQ+ people.<sup>94</sup> However, Amendment 2 was passed to the Colorado Constitution stating the following:

Neither the State of Colorado, through any of its branches or departments . . . municipalities or school districts shall enact, adopt, or enforce any statute, regulation, ordinance, or policy whereby homosexual, lesbian, or bisexual orientation . . . shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status, or claim of discrimination.<sup>95</sup>

Thus, this amendment essentially repealed any protective ordinances “to the extent they [prohibited] discrimination on the basis of ‘homosexual, lesbian, or bisexual orientation’ . . . .”<sup>96</sup>

The Supreme Court eventually held that this Amendment 2 was unconstitutional because it violated the Fourteenth Amendment’s Equal Protection Clause in several ways.<sup>97</sup> Importantly, the Court noted that the fact that there was no precedent for the amendment at issue indicated its unconstitutionality because “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>98</sup> The

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91. See *Romer*, 517 U.S. 620.

92. *A Brief History of LGBT Rights in Colorado*, LAW WEEK COLO. (June 18, 2018), <https://www.lawweekcolorado.com/article/a-brief-history-of-lgbt-rights-in-colorado/> [<https://perma.cc/CZ5K-2G47>]; see also *Romer*, 517 U.S. at 625 (providing background as to the local and municipal laws protecting LGBTQ+ individuals leading up to the lawsuit).

93. *Romer*, 517 U.S. at 625.

94. See *A Brief History of LGBT Rights*, *supra* note 92.

95. *Romer*, 517 U.S. at 625.

96. *Id.* at 624.

97. *Id.* at 630–36. Arguments of unconstitutionality include that the amendment is an abnormal deviation from common law, constitutes a denial of protection across the board, demonstrates a refusal to prohibit arbitrary discrimination in governmental and private settings, and subjects a group to immediate and substantial discrimination. *Id.*

98. *Id.* at 633 (citing *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38

fact that laws that singled out “a certain class of citizens for disfavored legal status or general hardships” were “not within [the] constitutional tradition” of the United States was particularly concerning to the Court in this case.<sup>99</sup>

Although not directly related to Title IX, athletics, or transgender people, there are numerous principles within the *Romer* opinion that are relevant to the question of whether Title IX and equal protection principles may allow transgender people to be excluded from the athletic teams of their choosing. Importantly, the Court in *Romer* was particularly concerned with the fact that the Colorado amendment removed affirmative protections; those protections, if revoked, would have subjected LGBTQ+ individuals “to immediate and substantial risk of discrimination . . . .”<sup>100</sup> In the same way, the plaintiffs in the *Soule* lawsuit are seeking to remove an affirmative protection that would subject trans athletes to “immediate and substantial risk of discrimination . . . .”<sup>101</sup> Equal protection principles generally “[forbid] the organized society to stigmatize an individual as a member of an inferior or dependent caste, or as a non-participant.”<sup>102</sup> The Court notes that laws and amendments such as at issue in *Romer* violate equal protection principles. By announcing that “gays and lesbians shall not have any particular protections from the law, [the amendment] [inflicted] on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”<sup>103</sup>

Ultimately, the principles enumerated in the *Romer* decision indicate that equal protection principles within the Constitution side “with tolerance over exclusion.”<sup>104</sup> Furthermore, it signals the broader idea that laws that discriminate against LGBTQ+ people are not constitutional “simply because the state wants to

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(1928)).

99. *Id.* at 633–34. The Court notes here that the fact that it was highly atypical for laws to remove protections that explicitly protected groups from discrimination was itself an indicator of its unconstitutionality.

100. *Id.* at 625.

101. *Id.*

102. Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 485 (1997) (explaining that a “central concern of the 14<sup>th</sup> Amendment was to guarantee for African Americans the substantive right to participation in civil society on an equal footing,” therefore signaling a “principle of equal citizenship.”) As the rights of protected classes under the Fourteenth Amendment expanded, these groups began to be entitled to the same principle of equal citizenship under the Amendment. Thus, a denial of equal protection is a denial of equal citizenship.

103. *Id.* at 486.

104. *Id.* at 489.

discourage” LGBTQ+ acceptance and behavior.<sup>105</sup> Thus, state and government actors must have a legitimate reason beyond simply wanting to discourage LGBTQ+ acceptance and legitimacy in order to pass laws that effectively discriminate against LGBTQ+ people.<sup>106</sup> This idea could prove highly relevant in the *Soule* case. The Department of Education must have a legitimate reason to ban transgender people from sports beyond wanting to discourage the acceptance and validation of transgender people and athletes.

ii. *U.S. v. Windsor*

The Supreme Court affirmed and re-applied the same reasoning from *Romer v. Evans* in 2013 in *U.S. v. Windsor*, resulting in the overturning of the Defense of Marriage Act (DOMA).<sup>107</sup> DOMA defined marriage as marriage between one man and one woman and allowed states to refuse to recognize gay marriages performed in other states.<sup>108</sup> The plaintiffs argued that the deprivation of marriage and the benefits conferred on couples through marriage resulted in injury and indignity to a degree that constituted “a deprivation of an essential part of the liberty protected by the Fifth Amendment,” due process, and equal protection principles.<sup>109</sup>

At the time of the lawsuit, New York state law allowed same-sex couples to register as domestic partners and recognize same-sex marriages performed in other states or countries as valid under New York law.<sup>110</sup> The Court found that DOMA sought to explicitly injure a class that New York was seeking to protect, and that the Constitution’s “guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”<sup>111</sup> Ultimately, DOMA was ruled unconstitutional because it was an “unusual deviation from the tradition of recognizing” marriage, and that there was “strong evidence of [the] law having the purpose and

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105. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996).

106. *Id.* at 61–63 (explaining why states must have a justification for statutes aside from pure animus or to discourage behavior that the state views as undesirable or immoral).

107. *See generally* United States v. Windsor, 570 U.S. 744 (2013) (ruling that DOMA was unconstitutional because it violated the Fourteenth Amendment).

108. *Windsor*, 570 U.S. at 746.

109. *Id.*

110. *Id.* at 753.

111. *Id.* at 746 (quoting *Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534–35 (1973)).

effect of disapproval of a class” operating to “deprive same-sex couples of the benefits and responsibilities that come with” recognition of marriage.<sup>112</sup> Finally, the Court found that DOMA’s “operation in practice” was to “identify and make unequal” a subset class as well as to “impose a disadvantage, a separate status, and so a stigma” upon gay people in the U.S.<sup>113</sup> This effect was not the “incidental effect” of the statute, but rather “its essence.”<sup>114</sup>

This language is strikingly similar to the language found in *Romer v. Evans*. The focus of both cases was the stigmatization and moral condemnation that was at the heart of the laws in question. Further, both cases highlighted the unusual nature of the laws. In *Romer*, the Court discussed how it was unusual to target one historically underrepresented group and deny them protection across the board.<sup>115</sup> Similarly, the Court in *Windsor* focused on the unusual nature of trumping a state’s definition for marriage and its effect of depriving couples the benefits and responsibilities of federal recognition of marriage.<sup>116</sup> Thus, in both cases, the Supreme Court highlights the fact that unusual or non-traditional laws, the main thrust of which is to deny the benefits or rights from one group for the sake of other groups, require “careful consideration” and are often unconstitutional.<sup>117</sup>

While the *Romer* Court focuses on the immediate discrimination that the LGBTQ+ population would be subjected to upon the passage of Amendment 2 as the non-traditional character of the amendment itself, the *Windsor* Court is particularly concerned with the way in which DOMA stripped LGBTQ+ people of dignity.<sup>118</sup> DOMA aimed to treat LGBTQ+ unions as “second-class,” not worthy of the same rights and respect as heterosexual marriages.<sup>119</sup> By withholding access to one simple institution—marriage—from only LGBTQ+ people, DOMA actually withheld social security benefits, copyright benefits, veteran’s benefits, estate law benefits, tax benefits, and healthcare benefits from people in LGBTQ+ relationships.<sup>120</sup> By withholding these rights and

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112. *Id.*

113. *Id.* at 746–47.

114. *Windsor*, 570 U.S. at 770.

115. *Romer v. Evans*, 517 U.S. 620, 627–30 (1996).

116. *Windsor*, 570 U.S. at 746.

117. *Id.* at 770 (quoting *Romer*, 517 U.S. at 633).

118. *Romer*, 517 U.S. at 633–34; *Windsor*, 570 U.S. at 769–72.

119. *Windsor*, 570 U.S. at 771.

120. *Id.* See also Brad A. Greenberg, *DOMA’s Ghost and Copyright Revisionary Interests*, 108 NW. U. L. REV. 391, 392–93 (2014) (explaining that through the Copyright Act, widows can inherit their spouse’s copyrights free of federal taxes, and

responsibilities, the Court found that DOMA restricted the dignity and visibility of LGBTQ+ people, essentially “writing inequality into the entire United States Code.”<sup>121</sup>

*C. Essence of Soule: Weaponizing Title IX Against Transgender Youth*

Although Title IX initially covered gender inclusion in traditional schooling and academic areas, additional regulations were added later to expand and solidify what Title IX did not originally cover, including athletics.<sup>122</sup> The regulations at the heart of the *Soule* case are the following:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.<sup>123</sup>

The plaintiffs in *Soule* focus on the equal opportunity clause.<sup>124</sup> Their argument interprets “both sexes” strictly—that is, “biological” males and “biological” females.<sup>125</sup> Under the plaintiffs’ framework in *Soule*, there are no options outside “biological” frameworks. Under this framework, allowing “biological” males to compete in women’s competitions would constitute a violation of the equal athletic opportunity promised by Title IX by preventing women from competing in athletics authentically. Any transgender students are “fraudulently being individuals that they ‘biologically’ are not”; thus, the plaintiffs find transgender people to be “immoral, fraudulent, mentally ill, delusional, medically wrong, or imaginary/nonexistent.”<sup>126</sup>

However, the opinions from *Romer* and *Windsor* conflict heavily with this interpretation. Both of these cases support the

that DOMA preempted this free exchange in states that did not recognize gay marriage).

121. *Windsor*, 570 U.S. at 747.

122. Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127, 127 (2008).

123. 34 C.F.R. § 106.41.

124. See generally Amended Complaint, *supra* note 15 (laying out the plaintiffs’ arguments).

125. *Id.*

126. Levasseur, *supra* note 83, at 946–66 n.101, n.114, n.122 (discussing the history of describing transgender issues, care, and people as “fraudulent”).

notion that laws are unconstitutional if the essence of those laws is to create a stigmatization to, express disapproval of, or identify a group as unequal, even if the law has a stated purpose that is not explicitly discriminatory.<sup>127</sup> For example, in *Romer*, Colorado claimed the amendment's purpose was to prevent LGBTQ+ people from receiving preferential treatment over non-LGBTQ+ people and to further the moral agenda and personal preferences of the citizens of Colorado.<sup>128</sup> In *Windsor*, proponents of DOMA argued that DOMA merely "[defended] the institution" of traditional marriage from alleged corruption.<sup>129</sup> The plaintiffs in *Soule* maintain that their interpretation of equal opportunity and sex in Title IX provisions has the purpose of promoting the equal opportunity of girls in high school.<sup>130</sup> Regardless, a law cannot deny protection of the law or remove protections for certain groups under the guise of removing "preferential treatment" that groups like the LGBTQ+ community supposedly possess.<sup>131</sup>

It is important to first highlight that it is not within constitutional nor Title IX tradition to remove students from participating in school activities—rather, Title IX's explicit purpose is to encourage equal participation and inclusivity.<sup>132</sup> As mentioned previously in this Article, transgender athletes—including trans women—have been able to compete in women's competitions for decades.<sup>133</sup> Out of 190 Title IX cases between 1993 and 2007, there were only nineteen cases that dealt with the exclusion of boys from girls' teams or girls from boys' teams.<sup>134</sup> Furthermore, although "sex testing" female athletes has existed for decades, professional sports governing bodies only began testing women for chromosomes and regulation of "professional women athletes' endogenous testosterone levels" in 2011.<sup>135</sup> Additionally, high schools and colleges have not engaged in sex testing or sex verification for students; however, since the *Soule* lawsuit, many states have looked into the new possibility of testing young female athletes who are suspected of being transgender, including required "genital

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127. *United States v. Windsor*, 570 U.S. 744, 746–47 (2013); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

128. *Romer*, 517 U.S. at 644–47 (Scalia, J., dissenting).

129. *Windsor*, 570 U.S. at 770–71.

130. Amended Complaint, *supra* note 15, at 8–10.

131. *Romer*, 517 U.S. at 639 (Scalia, J., dissenting).

132. Fedder, *supra* note 52, at 18; *see Suski*, *supra* note 52, at 2260–62.

133. *See Griffin*, *supra* note 18.

134. *Anderson & Osborne*, *supra* note 122, at 136–37.

135. *Medley*, *supra* note 11, at 683–84.

exams.”<sup>136</sup> There is no court in the United States that has ever interpreted Title IX’s equal opportunity provisions to not extend to transgender students, nor has any United States court ever determined that “sex” within Title IX explicitly excluded or failed to encapsulate the transgender identity.<sup>137</sup>

Preventing transgender children from participating in sports in accordance with their gender identity is unusual in the same way the laws in *Romer* and *Windsor* were. The plaintiffs in *Soule* are asking the court to find that transgender students in the United States be banned from participating in sports in accordance with gender identity across all levels of competition.<sup>138</sup> They make no allowances for individual consideration of transgender athletes, nor for transgender athletes who have medically transitioned.<sup>139</sup> Under this framework, transgender athletes may participate on teams that do not align with their identity—resulting in stigmatization and ostracization—or they cannot participate in athletics at all.<sup>140</sup> Such a rule under Title IX policy would thus serve as both a total ban on transgender athletes and spur social stigmatization. Forcing athletes to participate on teams that do not align with their gender identity would only apply to transgender students, singling them out for their transness and placing barriers to participation in school-sanctioned activities that do not exist for cisgender students.<sup>141</sup> Although some transgender athletes may choose to compete in athletics despite anti-trans athlete laws, many may choose not to pursue athletics to avoid the social stigmatization, medical procedures, and distressful media coverage.<sup>142</sup> Thus,

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136. Elizabeth A. Sharrow, *How High School Sports Became the Latest Battleground over Transgender Rights*, CONVERSATION (Dec. 22, 2020), <https://theconversation.com/how-high-school-sports-became-the-latest-battleground-over-transgender-rights-151361> [https://perma.cc/8VV9-B4YN] (explaining the introduction of laws that would authorize sex testing of high school and college athletes through genital exams and genetic and hormone testing across twenty states in 2020); Maia Belay & Russel Falcon, *Ohio Bill Would Require Genital Exams for Student Athletes if Sex is Questioned*, FOX 59 (June 10, 2022), <https://fox59.com/news/national-world/ohio-bill-would-require-genital-exams-for-student-athletes-if-sex-is-questioned/> [https://perma.cc/8QJD-4K8G].

137. Defendant’s Reply, *supra* note 49, at 9–11.

138. Amended Complaint, *supra* note 15, at 46.

139. *Id.* at 17.

140. *New Study Examines Why Transgender Girls Participate in High School Sports, as Wave of Sports Bans are Implemented Across the U.S.*, TREVOR PROJECT (Oct. 18, 2022), <https://www.thetrevorproject.org/blog/new-study-examines-why-transgender-girls-participate-in-high-school-sports-as-wave-of-sports-bans-are-implemented-across-the-u-s> [https://perma.cc/9DXD-F3V3].

141. *Id.*

142. *Id.*; Eddie Pells, *Title IX’s Next Battle: The Rights of Transgender Athletes*, AP NEWS (June 19, 2022), <https://apnews.com/article/title-ix-transgender-athletes->



banning transgender students from participating in high school athletics identifies children by a single trait—being transgender—as a class and denies them access to a program that all other children would normally have access to. This is an unusual law outside the tradition of Title IX’s mission of challenging traditional gender roles and battling sex discrimination and prejudice.<sup>143</sup>

Furthermore, like marriage in *Windsor*, the ability to fully participate in school and its activities is a cornerstone of the social and political landscape in the United States.<sup>144</sup> The effect of this type of stigmatization—especially in high school—cannot be understated. Athletic programs at all levels have benefits that reach far beyond just physical fitness.<sup>145</sup> Participation in athletics allows “students to develop care and empathy . . . learn to see things outside their own personal perspective,” “create a support system that transcends the field of play,” expand an understanding and acceptance of self, and “cultivate a second family.”<sup>146</sup> Furthermore, “participation in sports has been shown to counteract the harms suffered from bullying, rejection, and discrimination.”<sup>147</sup> Notably, schools and communities that implement transgender-inclusive policies—including inclusive athletic policies—“report lower suicide, greater school safety, and higher grades” for all

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rights-9adfe49a8e07f66f07b5e2302bb94730 [https://perma.cc/HH2F-YHWV]; Scott Gleeson, *It’s a Life or Death Issue: Trans Athletes Fight for Their Humanity While Battling Anti-Trans Laws*, USA TODAY (June 9, 2021), <https://www.usatoday.com/story/sports/2021/06/09/its-life-death-issue-trans-athletes-fight-draconian-laws/5290074001/> [https://perma.cc/P3RW-W74B] [hereinafter “*It’s Life or Death*”].

143. Amended Complaint, *supra* note 15, at 42; *Romer v. Evans*, 517 U.S. 620, 621, 633 (1996); *United States v. Windsor*, 570 U.S. 744, 768 (2013); MANNING, *supra* note 52.

144. See Kenneth Macri, *Not Just a Game: Sport and Society in the United States*, 4 INQUIRIES J. (2012) (explaining that high school sports participation has extensive benefits lasting long past graduation); Steve Amaro, *Participation in High School Athletics Has Long-Lasting Benefits*, NAT’L FED’N STATE HIGH SCH. ASS’NS, (Jan. 22, 2020), <https://www.nfhs.org/articles/participation-in-high-school-athletics-has-long-lasting-benefits/> [https://perma.cc/R7Z4-2AX9]; *Windsor*, 570 U.S. at 746–47 (“The state’s decision to give this class of persons [gay people] the right to marry conferred upon them a dignity and status of immense import.”).

145. See Medley, *supra* note 11, at 676–77 (“Participation in athletics can promote physical and mental health, support the development of leadership skills, foster self-esteem, and confer prestige as well as academic and career opportunities. There is also evidence that athletic participation in school has a positive effect on students’ academic achievement and graduation rate.”).

146. Amaro, *supra* note 144.

147. *Transgender Athletes: A Research-Informed Fact Sheet*, UNIV. KAN. SCH. SOC. WELFARE, <https://socwel.ku.edu/sites/socwel/files/documents/Transgender-Sports-Youth-Fact-Sheet.pdf> [https://perma.cc/W4GR-263C].

students, not just transgender students.<sup>148</sup> Thus, denying transgender students the ability to participate in sports denies them the social and mental health benefits associated with school athletic programs. The denial opens transgender students up to immediate stigmatization, as they are singled out as students who cannot participate fully in school programs. Singling out transgender students based on their transgender status in sports and in the greater school community gives the “stigmatizing message that a transgender boy is not a normal or real boy, or a transgender girl is not a normal or real girl,”<sup>149</sup> coinciding with the “cultural messages that drive bullying of transgender youth.”<sup>150</sup>

Proponents of banning transgender girls and women from participating in women’s sports would argue that the purpose of the ban is not to stigmatize or express disapproval of transgender people, but rather to promote equal opportunity for cisgender women. In this view, any adverse effects on the transgender community are merely side effects of the ban, not the essence of it.<sup>151</sup> However, this argument is reminiscent of the arguments found in *Windsor* and *Romer*, which the Court ultimately rejected. The essence of such a ban would be to uphold traditional gender roles. The plaintiffs make this apparent by repeatedly referring to transgender girls as boys, using the dead names when referring to transgender students, asserting that biological men are inherently more competitive and athletically gifted than biological women, and claiming that traditional gender roles are “inescapable biological facts of the human species, not stereotypes, ‘social constructs’, or relics of past discrimination.”<sup>152</sup> The plaintiffs also seemingly mock transgender athletes, saying they should not be “praised by schools and media as ‘courageous’” or “hailed as ‘female [athletes] of the year.’”<sup>153</sup> These anti-trans athletic rules and regulations along “binary sex categories provide a mechanism for enforcing, regulating, and surveilling socially constructed gender roles.”<sup>154</sup>

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148. *Id.*

149. Levasseur, *supra* note 83, at 992 (quoting Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WISC. J. L. GENDER & SOC’Y 301, 314 (2013)).

150. *Id.*

151. *Cf.* Amended Complaint, *supra* note 15, at 8–9 (alleging that the central issue is equivalent opportunities in sports without reference to exclusion); *see also* Medley, *supra* note 11, at 684–85 (noting that anti-trans activists emphasize unfair advantage for cisgender women as opposed to exclusion of transgender people).

152. Amended Complaint, *supra* note 15, at 12.

153. *Id.* at 19.

154. Medley, *supra* note 11, at 685.

Such rules are simply an effort to force people into compliance with social norms and are ultimately exclusionary policies claiming to serve as a “proxy for athletic ability.”<sup>155</sup>

Overall, the essence of banning transgender girls from competing in high school athletics is to discriminate or stigmatize one group of individuals based on their gender. Although the word “transgender” does not appear in the text of Title IX, nor does Title IX specifically purport to protect transgender students, there is nothing in the text that specifically states that transgender students are not included in the definition of “sex” or are not afforded Title IX protection.<sup>156</sup> While the *Soule* plaintiffs ask the court to find that “sex” is limited to “biological” sex in a way that excludes transgender students, such an interpretation directly conflicts with the values in landmark LGBTQ+ cases like *Romer* and *Windsor*.<sup>157</sup> Essentially, the *Soule* plaintiffs ask the court to conclude that transgender girls are not “real” girls by denying them, singling them out, and banning them from sports teams that align with their identity in a way that is explicitly unconstitutional under both the *Romer* and *Windsor* frameworks, which held that this type of singling out of LGBTQ+ people violated equal protection principles in other contexts.<sup>158</sup> The exclusion of transgender students from Title IX would result in a revocation of equal protection for transgender students, systemically denying them from the same fulfilling high school experience cisgender students have access to, as well as excluding a class of individuals based on one attribute.

#### D. Title IX As a Shield: Inclusive Interpretation Options

If courts ultimately reject the interpretation of sex that the plaintiffs argue for in *Soule*, the question regarding how the court should interpret “sex” remains. There are several ways that courts could “interpret the prohibition on sex discrimination” in a way that

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155. *Id.* at 687.

156. See Defendant’s Reply, *supra* note 49, at 6–7 (“Plaintiffs fail to identify any text from Title IX, the implementing regulations, the 1979 Policy Statement, or any other OCR Policy Statements pre-2020 that purports to restrict schools from allowing girls who are transgender to play on the same teams as other girls.”).

157. Amended Complaint, *supra* note 15, at 12 (referencing transgender students as biological males nine times).

158. See Levasseur, *supra* note 83, at 992 (“The cost to the transgender student when the student’s gender identity is not respected can be severe. This is precisely the kind of “badge of inferiority” that antidiscrimination laws, such as Title IX, forbid.”).

“would make the law available to transgender plaintiffs.”<sup>159</sup> Generally, courts should interpret “sex” under Title IX to include not only cisgender men and women, but transgender men and women, too. As noted above, there is nothing within the text of Title IX or in case law that explicitly bars this interpretation.<sup>160</sup> There are three lines of precedent in sex discrimination cases that could be applicable here, outlined below.

The available categories to which courts could choose to define sex discrimination include “discrimination on the basis of gender nonconformity,” discrimination “based on the change of one’s sex,” or discrimination “based on gender identity.”<sup>161</sup> Discrimination on the basis of gender nonconformity recognizes that discrimination can frequently occur based on how one presents their gender outwardly.<sup>162</sup> This would include people who fall outside the gender binary or intersex people but could run the risk of excluding transgender people who fall squarely within the gender binary, particularly those individuals who are able to “pass” as the gender they identify with. On the other hand, discrimination on the basis of “change” in sex explicitly protects transgender people who have taken steps to medically transition; however, it may not cover people who are generally gender nonconforming or individuals who choose to not medically transition for a variety of reasons.<sup>163</sup>

In the context of sex segregation—including sex-segregated sports—discrimination based on gender identity would be the most effective interpretation to extend Title IX anti-discrimination norms to transgender students.<sup>164</sup> Gender identity encapsulates change of sex, transgender status, and gender presentation in general, regardless of medical transitioning.<sup>165</sup> Banning transgender students from competing on teams that align with their gender identity necessarily requires the classification of

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159. Erin Buzuvis, *On the Basis of Sex: Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J. L. GENDER & SOC’Y 219, 220–21 (2013).

160. See Defendant’s Reply, *supra* note 49, at 6–7.

161. Buzuvis, *supra* note 159, at 221.

162. See *id.* at 230. For an example of a court decision finding that sex discrimination encapsulates discrimination on the basis of gender nonconformity, see *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001).

163. Buzuvis, *supra* note 159, at 231–32 (citing *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008)) (arguing that the *Schroer* court held that “refusing to hire someone who changes their sex targets that person because of sex,” which is sex discrimination “in the same sense that refusing to hire someone because they have converted from one religion to another is discrimination on the basis of religion.”).

164. *Id.* At 240.

165. *Id.* At 233.

individuals as cisgender and transgender *as well as* male or female. Many jurisdictions have already interpreted other statutes to explicitly prohibit discrimination against people based on gender identity, which necessarily includes the transgender identity.<sup>166</sup> Rules and classifications such as the ones in *Soule* essentially exclude transgender students “from a team that does not match the gender listed on the student’s birth records,” which would constitute unlawful discrimination on the basis of gender identity.<sup>167</sup>

Finding that discrimination on the basis of gender identity is included within the greater context of sex discrimination is not only consistent with the mission of Title IX, but actually furthers the mission of Title IX overall. Considering that the mission of Title IX is to eradicate any and all gender discrimination in school-related athletics, discrimination based on “gender identity” would be the most effective in protecting not only transgender people from sex-based discrimination, but also people of color (who are most frequently targeted for gender policing), intersex people, and cisgender women.

Despite the unique space athletics holds in the culture of the United States, it has been used as a tool to further the agenda of female inferiority, traditional gender roles, and racism. Historically, women were not able to participate in excessive physical activity due to supposed danger it presented to women both physically and psychologically, ultimately affecting their ability to have and raise children.<sup>168</sup> Similarly, racial segregation of sports was essentially an extension of Jim Crow laws excluding Black people not only from popular United States culture during the time period, but from the political and economic benefits of participating in professional sports.<sup>169</sup> Even the rules for men and women within

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166. *Id.* At 241–42.

167. *Id.* at 242 (quoting Memorandum from Mitchell Chester, Comm’r, Mass. Dep’t of Elementary & Secondary Educ., to Members of the Bd. of Elementary & Secondary Educ. (June 19, 2012)).

168. See Nancy Leong, *Against Women’s Sports*, 95 WASH. U. L. REV. 1251, 1251–55 (2018) (explaining how sports that are strictly segregated along gender lines imply that women are “physically, intellectually, or emotionally unable to compete with men.”). In fact, that data show that for many sports, women are just as athletically talented as men. See, e.g., Franck Le Mat, Mathias Géry, Thibault Besson, Cyril Ferdynus, Nicolas Bouscaren & Guillaume Millet, *Running Endurance in Women Compared to Men: Retrospective Analysis of Matched Real-World Big Data*, 53 SPORTS MED. 917, 917–18 (2023) (noting that women perform better in endurance sports). Ultimately, sex segregation of sports both is a product of and reinforces the notion that women are inferior to men on numerous fronts.

169. See Ronen Ainbinder, *Changing the Game: Sports in the Jim Crow Era*, LEARNING FOR JUST. (June 5, 2020), <https://www.learningforjustice.org/podcasts/teaching-hard-history/jim-crow->

the same sport—tennis, for example—uphold the notion that female athletes are weaker and athletically inferior; rules such as these not only reinforce this gender stereotype, but help make it so by preventing female athletes from competing under the same rules as men.<sup>170</sup> Another example is gymnastics: while men’s gymnastics highlight skills such as power, strength, and speed, women’s gymnastics highlights elegance, grace, and “artistry”; further, female gymnasts must wear leotards, specific hairstyles, and makeup, while men wear “long pants and tank tops.”<sup>171</sup> The implications of such rules are that female athletes should be valued and scored for “the way they look” rather than on their skill and talent.<sup>172</sup>

Strict “biological” rules that claim to be based in scientific fact which ultimately exclude individuals who fall outside of traditional gender roles are ultimately methods of policing gender on a broader scale. It is about deciding who gets to be a woman and what it means to be a woman.<sup>173</sup> Thus, it is no surprise that the women who have recently been determined to “run afoul of the gender verification rules” are all from the “global south” and women of color.<sup>174</sup> This phenomenon can be attributed to patriarchal power structures, but also a continued extension of colonial power in determining who may own and profit from their femininity.<sup>175</sup> Generally, sports testing and general policing disproportionately prejudice women of color and intersex people.<sup>176</sup> These tests are often predicated on gender stereotyping that is not always accurate and based in racist stereotypes.<sup>177</sup> For example, 16.5% of men exhibit “‘female’ levels”

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era/changing-the-game-sports-in-the-jim-crow-era [https://perma.cc/TQ6H-3QFM].

170. See Leong, *supra* note 168, at 1276 (“Artistic gymnastics . . . evaluates both men and women on acrobatic ability, but also evaluates women on elegance and grace, while emphasizing strength and power for men.”).

171. *Id.*

172. *Id.*

173. See Monica Hesse, *We Celebrated Michael Phelps’s Genetic Differences. Why Punish Caster Semenya for Hers?* WASH. POST (May 2, 2019), [https://www.washingtonpost.com/lifestyle/style/we-celebrated-michael-phelpss-genetic-differences-why-punish-caster-semenya-for-hers/2019/05/02/93d08c8c-6c2b-11e9-be3a-33217240a539\\_story.html](https://www.washingtonpost.com/lifestyle/style/we-celebrated-michael-phelpss-genetic-differences-why-punish-caster-semenya-for-hers/2019/05/02/93d08c8c-6c2b-11e9-be3a-33217240a539_story.html) [https://perma.cc/PPJ9-Z8FJ].

174. Melissa Block, *Olympic Runner Caster Semenya Wants to Compete, Not Defend Her Womanhood*, NPR (July 28, 2021), <https://www.npr.org/sections/tokyo-olympics-live-updates/2021/07/28/1021503989/women-runners-testosterone-olympics> [https://perma.cc/E73T-7ALK].

175. See *id.* (noting that Dr. Tlaleng Mofokeng believes that the double standard comes at least partially as a remnant of patriarchal and colonial power).

176. *Id.*

177. Morgan Campbell, *Rules Governing Olympic Runners Send a Disturbing Message to Female Athletes, Especially Those Who Are Black*, CBC (July 7, 2021), <https://www.cbc.ca/sports/opinion-case-of-namibian-runners-further-exposes-half->

of testosterone, while 13.7% of women exhibit “male’ levels” of testosterone naturally.<sup>178</sup> These are natural fluctuations in athletes’ bodies, yet they are treated as unfair advantages in a way that other biological advantages in athletics are not.<sup>179</sup> If having naturally high testosterone levels can be considered an advantage, why are attributes such as abnormal height, abnormal limb length, or low lactic acid production considered acceptable athletic anomalies?<sup>180</sup>

The Title IX framework under *Soule* would also punish women and girls who do not comply with traditional gender norms and stereotypes.<sup>181</sup> For example, the *Soule* complaint ignores intersex people altogether. Under the *Soule* framework, an intersex person assigned female at birth could be banned from competing in women’s sports despite presenting as and living as a woman for the entirety of their life. This has already happened on an international scale. Caster Semenya, an intersex woman from South Africa, was banned from the 2020 Summer Olympics in Tokyo after refusing to artificially lower her testosterone levels, which her body naturally produces.<sup>182</sup> She was assigned female at birth, lived her entire life identifying as a woman, and competed in women’s events; she was only banned from women’s sports following a required sex verification test after winning the 800-meter world championship at the age of 18.<sup>183</sup> Since Caster Semenya was banned, rates of sex testing have increased, and additional athletes have been banned from the international stage, most of them being women from African countries.<sup>184</sup>

Finally, the lawsuit has implications for cisgender women. The plaintiffs’ argument depends on inherent male superiority and notions that females are inherently worse athletes. The plaintiffs state that “as a result of these many inherent physiological

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baked-testosterone-regulation-1.6092033 [https://perma.cc/B4PL-MJNW].

178. Quispe Lopez, ‘Sex Tests’ on Athletes Rely on Faulty Beliefs About Testosterone as a Magical Strength Hormone, BUS. INSIDER (Aug. 1, 2021), <https://www.businessinsider.com/the-olympics-uses-testosterone-to-treat-trans-athletes-like-cheaters-2021-7> [https://perma.cc/7V86-ZQYY] (citing M. L. Healy, J. Gibney, C. Pentecost, M. J. Wheeler & P. H. Sonksen, *Endocrine Profiles in 693 Elite Athletes in the Postcompetition Setting*, 81 CLINICAL ENDOCRINOLOGY 294, 294 (2014)).

179. *Id.*

180. *Id.*; see also Hesse, *supra* note 173.

181. *Cf.* Medley, *supra* note 11, at 687 (“[S]ex testing tells us more about . . . ‘what we want to do with the results, why we’re testing, and our cultural attitudes towards sex and gender.’”).

182. Block, *supra* note 175.

183. *Id.*

184. *Id.*

differences between men and women after puberty, male athletes consistently achieve records 10-20% superior to comparably fit and trained women across almost all athletic events,” that males have “physiological advantages,” and that women have “little hope of winning” or competing with “biological [males].”<sup>185</sup> These types of arguments—and strict segregation of sports by gender in general—harm cisgender women by communicating that “women are weaker and less physically capable” than men, a notion that “underlies some of the more virulent arguments that women simply are not equal to men.”<sup>186</sup> This is the crux of the *Soule* argument: by seeing transgender girls and women as boys or men, the plaintiffs both assert and rely upon the fact that women are physically inferior to men, a presumption that is not necessarily true.<sup>187</sup> Notably, the complaint in *Soule* fails to address the fact that two of the four plaintiffs “outperformed both [transgender athletes] in championship races,” and only two transgender girls have ever competed within the CIAC division within the past seven years.<sup>188</sup>

Thus, while there are three precedential alternatives to interpreting sex discrimination, discrimination based on gender identity would extend the broadest level of protection to groups that are potentially affected by gender discrimination. Discrimination on the basis of gender identity would extend discrimination protection to cisgender women, intersex people, transgender people, and women of color irrespective of how these individuals choose to outwardly express their gender and medical-transition status. Protecting gender minorities is at the very root of Title IX, and a broad interpretation of gender discrimination would best accomplish gender equity in school settings. A broad interpretation would help all gender minorities have access to crucial academic and social programs such as athletics.

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185. Amended Complaint, *supra* note 15, at 10–20, 34.

186. Leong, *supra* note 168, at 1253.

187. *See generally* REBECCA M. JORDAN-YOUNG & KATRINA KARKAZIS, TESTOSTERONE: AN UNAUTHORIZED BIOGRAPHY 9 (Harv. Univ. Press 2019) (explaining the myth that testosterone levels are linked to higher levels of athleticism); *See generally* Leong, *supra* note 168 (noting that many sports are not sex-segregated, and females compete with males in those sports and win). Leong points to several sports and studies, including rock climbing, long-distance running, cycling, shooting, fencing, and wrestling. *Id.* at 1259. Many of these sports include other measures rather than gender, such as weight class. *Id.* at 1269.

188. Defendant’s Reply, *supra* note 49, at 11.



### Conclusion: High Stakes

There are several concerning points within the *Soule* lawsuit that elevate the stakes for transgender people nationwide. It is clear from the rhetoric of the complaint that this lawsuit is not just about the right to equal opportunity in sports, but rather the legitimacy of the transgender rights movement as a whole.<sup>189</sup> Although the lawsuit was filed against various school boards and not individual students, the plaintiffs do call out two specific students.<sup>190</sup> Throughout the entirety of the complaint, the plaintiffs refuse not only to call the transgender students by their correct pronouns, but also refer to them exclusively as “physiological males” or “biological males.”<sup>191</sup> They refer to trans female athletes as males, boys, and “students with male bodies who are competing in girls’ [competitions].”<sup>192</sup> From the outset of the complaint, the plaintiffs assert that transgender women are not “specific” or “identifiable” girls or women, as opposed to real cisgender girls and women.<sup>193</sup>

Additionally, the plaintiffs deny the existence and legitimacy of the transgender identity altogether. The plaintiffs present unsubstantiated and out-of-context “data” as “inescapable biological facts of the human species, not stereotypes, social constructs, or relics of past discrimination.”<sup>194</sup> Perhaps most concerning, the complaint suggests that waves of “males” are “claiming transgender identity as girls,” further cementing the fact that this lawsuit is not simply about women succeeding in sport, but also advancing a fundamentally anti-trans ideology.<sup>195</sup>

Although seemingly politically insignificant to some in the United States, athletics are and have always been political. Bans

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189. See Jack Mackey, *Engendering Trans Inclusion in Interscholastic and Intercollegiate Athletics: A Critical Analysis of Sex and Gender in Sports, Title IX Protections Post-Bostock, and Intersectional Methods of Antidiscrimination Law 57* (May 13, 2021) (B.A. thesis, William & Mary University) (explaining that the *Soule* lawsuit is an attempt to “codify a means by which it could be argued that the legal recognition of transgender people could constitute a form of sex discrimination [against cisgender women] in and of itself.”).

190. Amended Complaint, *supra* note 15, at 21 (identifying two transgender athletes in the CIAC sports system).

191. See generally *id.* (demonstrating the plaintiff’s refusal to refer to transgender women as women, including two high school students they specifically named); see also Mackey, *supra* note 189, at 68 (giving further background into the case, including the fact that the case stalled in the lower courts because the plaintiffs and their lawyers requested that the judge recuse himself after the judge refused to call the transgender women “males.”).

192. Amended Complaint, *supra* note 15, at 17.

193. *Id.* at 2.

194. *Id.* at 12.

195. Mackey, *supra* note 189, at 68 (quoting Amended Complaint, *supra* note 15).

based on rigid gender binary lines threaten not only the transgender community, but also cisgender women and intersex people. It has the potential to affect many underrepresented and historically discriminated-against groups at an international level, including women, non-binary people, and people of color. While banning transgender athletes from playing sports under Title IX in high school may seem like a narrow issue, allowing the rigid interpretation of gender and sex proposed by the plaintiffs in *Soule* under the guise of protecting women could open the door to allowing agencies and organizations to police identity and decide who counts as a “real” man or woman and who does not. Thus, excluding people from participating in high school athletics based on their transgender status facilitates generalized exclusion, discrimination, and stigmatization of not only transgender people, but also women and intersex people.

As transgender issues continue to dominate news cycles in the United States, the status of transgender athletes under Title IX will continue to evolve. Because an increasing number of lawsuits are being filed within this context, it is inevitable that new policies and rules will come out of various court decisions—including a Supreme Court ruling in the future. For these reasons, it is imperative that LGBTQ+ activists and politicians consider the most effective way to interpret discrimination on the basis of sex under Title IX so that the rights of transgender students and other minority gender groups are adequately protected. Because discrimination on the basis of gender identity would extend the broadest blanket of protection for students of all genders, courts should interpret “sex” in this manner, using Title IX as a shield to protect groups like the transgender community from discrimination rather than a sword with which to exclude otherwise vulnerable groups.

