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SEX IS NOT A THREE-LETTER WORD: THE EFFECT OF MANIPULATING THE DEFINITION OF “SEX” ON THE FUTURE OF TRANSGENDER ATHLETES

*Emily Grubman**

Title IX makes it unlawful for educational institutions receiving federal funding to discriminate “on the basis of sex.” But in the context of high school and college athletics, and specific to transgender athletes, what should the meaning of “sex” be? The Obama administration believed that “on the basis of sex” in Title IX includes “gender” in the meaning of “sex.” However, the Trump administration has proposed revoking that understanding, limiting the term “sex” to mean male or female, defined at birth. In the coming year, the Supreme Court may decide in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* whether sex discrimination laws apply to discrimination against transgender people. Its ruling will be instrumental as precedent for lower courts in deciding Title IX cases.

This Note analyzes what the Supreme Court should consider in making its final judgment. This Note argues that the current interpretation of “sex” under Title IX should be maintained as defined by the Obama administration to mean that transgender high school and college athletes must be allowed to participate on the sports team that corresponds with their gender identity. This conclusion is supported by case law, as well as a close textual reading of Title IX, namely its use of the word “sex,” a term that can be interpreted broadly.

I. INTRODUCTION

There can be “no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”¹ Andraya

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Yearwood is a seventeen-year-old transgender sprinter at her high school in Connecticut who is transitioning from male to female.² She has consistently done exceedingly well in all competitions in which she has participated.³ As a result, opponents and spectators do not want her to compete, at least not on the women's team.⁴ Connecticut, however, has an inclusive policy regarding sports, where transgender athletes can compete without restrictions on the team that corresponds with their gender identity.⁵ Due to her success and the success of other transgender female athletes in track and field in Connecticut, three cisgender female track and field athletes from Connecticut—athletes “whose gender identity and gender expression align with [their] sex assigned at birth”⁶—filed a Title IX discrimination complaint in June 2019 over Connecticut's inclusive policy.⁷ They claimed that it put them at a competitive disadvantage and hurt their chances of earning college athletic scholarships.⁸ In response, Yearwood stated, “[i]t is so painful that people not only want to tear down my successes but take down the laws and policies that protect

1. Doe by & through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 528 (3d Cir. 2018) (citing Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017)).

2. Pat Eaton-Robb, *Transgender Sprinters Finish 1st, 2nd at Connecticut Girls Indoor Track Championships*, THE WASH. TIMES (Feb. 24, 2019), <https://www.washingtontimes.com/news/2019/feb/24/terry-miller-andraya-yearwood-transgender-sprinter/> [https://perma.cc/S77L-3Y64].

3. *Id.*

4. Mirin Fader, *Andraya Yearwood Knows She has the Right to Compete*, BLEACHER REPORT (Dec. 17, 2018), <https://bleacherreport.com/articles/2810857-andraya-yearwood-knows-she-has-the-right-to-compete> [https://perma.cc/FR7W-8CYW].

5. Samantha Pell, *Girls say Connecticut's Transgender Athlete Policy Violates Title IX, File Federal Complaint*, THE WASH. POST (June 19, 2019, 4:44 PM), <https://www.washingtonpost.com/sports/2019/06/19/girls-say-connecticuts-transgender-athlete-policy-violates-title-ix-file-federal-complaint/> [https://perma.cc/76TA-M47R].

6. *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, APA 1, 4 (July 8, 2019, 6:28 PM), <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> [https://perma.cc/5JNA-XBGA] (Defining cisgender as “[a]n adjective used to describe a person whose gender identity and gender expression align with sex assigned at birth.”).

7. Letter from Alliance Defending Freedom to the U.S. Department of Education, Office for Civil Rights (June 17, 2019), <http://www.adfmedia.org/files/SouleComplaintOCR.pdf> [https://perma.cc/MQR4-73PF].

8. *Id.*

people like me.”⁹ Yearwood acknowledged being “stronger than many of her cisgender competitors,” but also recognizes that female athletes “who are not transgender may have other advantages.”¹⁰ “One high jumper could be taller and have longer legs than another, but the other could have perfect form, and then do better,” Yearwood told one media outlet.¹¹ “One sprinter could have parents who spend so much money on personal training for their child, which in turn, would cause that child to run faster.”¹² Claiming that because an athlete is transgender, and therefore may have an advantage over her cisgender counterparts, does not justify taking away that athlete’s Civil Rights protections, including their protections under Title IX.

Title IX must support transgender athletes to protect these individuals from the humiliation of such lawsuits. Title IX makes it unlawful for educational institutions receiving federal funding to discriminate “on the basis of sex.”¹³ But in the context of high school and college athletics, what should the meaning of “sex” be? Courts often turn to case law interpreting Title VII of the Civil Rights Act of 1964 when faced with a Title IX case.¹⁴ Title VII, however, governs sex discrimination in the employment context.¹⁵

In a policy statement on the subject of transgender athletes, the National Collegiate Athletic Association (NCAA) defined “sex” as “the physical characteristics typically used to assign a person’s gender at birth, such as

9. Pell, *supra* note 5.

10. Eaton-Robb, *supra* note 2.

11. *Id.*

12. *Id.*

13. 20 U.S.C. § 1681(a) (2019).

14. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016).

15. 42 U.S.C. § 2000e-2(a)(1) (2019) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”).

chromosomes, hormones, internal and external genitalia and reproductive organs.”¹⁶ Additionally, the NCAA defined “gender” as “[t]he complex relationship between physical traits and one’s internal sense of self as male, female, both or neither as well as one’s outward presentations and behaviors related to that perception.”¹⁷ It clarifies that biological sex and gender are different because biological sex is connected to one’s physical anatomy, whereas gender identity is not.¹⁸

In a Dear Colleague Letter, a federal directive that, although lacks the force of law, still contained an implicit threat, specifically that schools that did not abide by the directive could face lawsuits or lose federal funding, the Obama administration’s Departments of Justice and Education argued that the phrase “on the basis of sex” in Title IX encompasses this concept of gender identity.¹⁹ Under this interpretation, Title IX bars discrimination against transgender people in athletics, which includes prohibiting a transgender individual from playing on the team that corresponds with his or her gender identity. However, the Trump administration proposed revoking that understanding.²⁰ It published its own Dear Colleague Letter in response to the Obama administration’s letter, withdrawing the guidance that gender identity should be included within the definition of “sex” in Title IX.²¹ Subsequently, in October of 2018, a memo prepared by the Department of Health & Human Services revealed that the Trump administration is working to remove

16. NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES at 22 (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf [<https://perma.cc/MFD7-HKM9>].

17. *Id.* at 22.

18. *Id.*

19. Letter from U.S. Dep’t of Just., Dear Colleague Letter on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/66FA-CBAH>].

20. Letter from U.S. Dep’t of Just., Dear Colleague Letter (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download> [<https://perma.cc/3PP2-42RA>]; see also Erica L. Green et al., ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/499X-HCSE>].

21. Dear Colleague Letter, *supra* note 20.

Obama-era protections for transgender people.²² The administration is “spearheading an effort to establish a legal definition of sex under Title IX” that would limit the term to refer only to the physical characteristics that determine whether a person is biologically “male” or “female.”²³

In response to the leaked memo, a group of twenty state attorney generals urged the U.S. Department of Health and Human Services to not adopt the proposed narrow definition of “sex.”²⁴ The attorney generals believe this change would cause the exclusion of transgender and gender nonconforming individuals from civil rights protections.²⁵ In fact, the Trump administration’s withdrawal of policies enacted under the Obama administration will impact more than which locker room or restroom transgender individuals are allowed to use.²⁶ With no definitive federal law or rulings on the question of transgender athletes’ participation in sports, transgender individuals will likely lose the right to participate on the sports team that corresponds with their gender identity. Instead, transgender athletes will have to participate on teams that align with their biological sex at birth.

On April 22, 2019, the Supreme Court granted certiorari in the case *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (“*EEOC*”).²⁷ The Court is set to decide “whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*” (“*Price Waterhouse*”).²⁸ Even though *Price Waterhouse* is not a Title IX case, courts often interpret Title

22. Green et al., *supra* note 20; Natasha Bach, *What the Trump Administration’s Proposed Gender Rules Changes Could Mean for Trans People*, FORTUNE (Oct. 22, 2018), <http://fortune.com/2018/10/22/transgender-rights-trump-administration/> [<https://perma.cc/Y4EC-R8G3>].

23. Green et al., *supra* note 20; Bach, *supra* note 22.

24. *Don’t Define ‘Sex’ To Exclude Transgender, AG Healey Says; 19 State AGs On Board, 31 Not*, NEWBOSTONPOST, (Nov. 20, 2018), <https://newbostonpost.com/2018/11/20/dont-define-sex-to-exclude-transgender-ag-healey-says-19-state-ags-on-board-31-not/> [<https://perma.cc/2EJT-3NRD>].

25. *Id.*

26. Bach, *supra* note 22.

27. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, 2019 U.S. LEXIS 2846 (Apr. 22, 2019).

28. *Id.* (citation omitted).

IX cases based on rulings in Title VII cases.²⁹ This Article will analyze what the Supreme Court should consider in making their final judgment as it could resolve the dilemma surrounding transgender athletes.

This Article argues that courts should maintain the Obama administration's interpretation of "sex" under Title IX, and by extension, Title VII. This means transgender high school and college athletes must be allowed to play on the sports team that matches their gender identity. This conclusion is supported by case law that interprets the term "sex" in Title IX and Title VII to encompass gender identity, as well as a close textual reading of Title IX, and in particular, its use of the word "sex," a term that can be interpreted broadly. To adopt the Trump administration's proposed definition would be to abridge transgender individuals' civil rights,³⁰ including their right to be free from discrimination in federally-funded education programs as provided by Title IX.³¹

Section II of this Note discusses the legal background of Title IX. Section III begins by examining case law that could be applicable in a suit brought by a transgender student athlete alleging sex discrimination. It also analyzes the text of Title IX and Congress's intent in drafting and passing the statute. The Section will conclude that of the existing case law interpreting "sex" in Title IX and Title VII, the most persuasive cases are those that interpret "sex" to include gender identity. A close reading of the text of Title IX will also show that this interpretation is required. Section IV provides a factual and medical background regarding transgender athletes, as well as emphasizes the policy reasons why student athletes should be able to play on the team that matches their gender identity. This Section also looks to policy implications to illustrate the advantage of the Obama administration's definition of "sex" for the world of sports. Section V discusses solutions, such as redrafting Title IX to explicitly protect transgender individuals, passing independent legislation specifically regarding the protection of transgender persons, and local school board adoption of guidelines that protect these individuals. Irrespective of Trump's or a future administration's prerogative towards transgender persons, Title IX must be reworded as it carries with it the power of being binding law. Section VI concludes that because Title IX

29. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047–48 (7th Cir. 2017); *Bd. of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 867 (S.D. Ohio 2016).

30. *See* Bach, *supra* note 22.

31. 20 U.S.C. § 1681(a) (2019).

was designed to protect civil rights in the manner to be described in this Article, and because courts across the country are acknowledging this, legislature need only clarify this law to make it indisputable that transgender rights are protected.

II. LEGAL BACKGROUND OF TITLE IX

This Section provides a brief overview of the legal background of Title IX. Specifically, it describes what the statute says, how it is interpreted by courts, and how the Obama administration and Trump administration differ in their interpretations of its language. The Obama administration believes that the statute can be interpreted to protect transgender individuals, whereas the Trump administration says that because the plain text of the statute does not include the words “transgender” or “gender identity,” transgender persons are not protected.³² It also provides information on where states currently stand on transgender athletic participation in high school sports. Lastly, it gives an overview of the current circuit split regarding whether the term “sex” in Title IX encompasses gender identity, again with many courts arguing that the term “sex” can and should be interpreted to include gender identity, and other courts claiming that because the text of the statute does not include gender identity, the statute does not protect transgender individuals.³³

32. Doriane Lambelet Coleman, Note, *Sex in Sport*, 80 LAW & CONTEMP. PROB. 63, 65–66 (2017).

33. See *Dodds v. U.S. Dept. Of Edu.*, 845 F.3d 217, 219–20 (6th Cir. 2016) (holding that discrimination against transgender students likely constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); *Whitaker*, 858 F.3d at 1039 (holding that discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution). *But see Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that discrimination against transgender workers may sometimes constitute sex discrimination under Title VII but that such discrimination was not covered in all cases); *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status).

This Note uses definitions accepted by the American Psychological Association for the terms “gender identity,”³⁴ “transgender,”³⁵ “cisgender,”³⁶ and “transsexual.”³⁷ Additionally, it uses Planned Parenthood’s definition of “transitioning” as “the process of changing the way you look and how people see and treat you so that you become the gender you feel on the inside.”³⁸

Title IX would govern any claim of sex discrimination by a transgender student athlete.³⁹ The statute states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”⁴⁰ Courts turn to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance when faced with a claim brought under Title IX because there is more Title VII case law.⁴¹ Title VII, however, governs employment, and specifically states that “it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions,

34. *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, AM. PSYCHOL. ORG. (July 8, 2019, 6:28 PM), <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> [<https://perma.cc/QM6S-LBNN>] (stating that a person’s gender identity is “a person’s deeply-felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral) that may or may not correspond to a person’s sex assigned at birth or to a person’s primary or secondary sex characteristics. Since gender identity is internal, a person’s gender identity is not necessarily visible to others.”).

35. *Id.* (defining transgender as “an adjective that is a umbrella term used to describe the full range of people whose gender identity and/or gender role do not conform to what is typically associated with their sex assigned at birth.”).

36. *Id.* (defining cisgender as “an adjective used to describe a person whose gender identity and gender expression align with sex assigned at birth.”).

37. *Id.* (stating that being transsexual refers to a situation “when one’s gender identity and biological sex are not congruent.”).

38. *What do I Need to Know About Transitioning?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/what-do-i-need-know-about-transitioning> [<https://perma.cc/UH3N-T5DP>].

39. 20 U.S.C. § 1681(a) (2019).

40. *Id.*

41. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016).

or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁴²

The Obama and Trump administrations have espoused opposing views on how to interpret the language of Title VII and Title IX, specifically the word "sex."⁴³ The Obama administration included what is termed "gender identity" in its interpretation of "sex" in Title VII and Title IX.⁴⁴ The Trump administration declined to follow this interpretation.⁴⁵ Because of the ambiguity in how to properly interpret the statutes, federal courts are in disagreement over whether transgender discrimination constitutes a denial of opportunity "on the basis of sex" under Title VII and Title IX.⁴⁶

States have different policies regarding participation eligibility for transgender student athletes. With regard to kindergarten to high school age athletes, out of the fifty states and Washington D.C., the following states currently have an inclusive policy: Arizona, California, Colorado, Connecticut, Florida, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, North Carolina, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, Washington D.C. and Wyoming.⁴⁷ In these states, no hormone therapy or surgery is required for transgender students to participate on the sports team that corresponds with their gender identity.⁴⁸ Seventeen states consider transgender inclusion on sports teams through a state-

42. 42 U.S.C. § 2000e-2(a)(1) (2019).

43. Coleman, *supra* note 32, at 65-66.

44. *Id.* at 63.

45. *Id.* at 66.

46. See *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *G.G. ex rel. Grimm*, 822 F.3d at 709; *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. U.S. Dept. Of Edu.*, 845 F.3d 217 (6th Cir. 2016); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018). *But see*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Johnston v. Univ. of Pitt.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015); *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (opposing transgender inclusion in Title VII protections).

47. *K-12 Policies*, TRANSATHLETE (2019), <https://www.transathlete.com/k-12> [<https://perma.cc/AJ5Y-XEPN>].

48. *Id.*

determined process, which can include a case-by-case basis or individual review.⁴⁹ Eight states have a policy that requires athletes to play on the team that corresponds to their biological sex on their birth certificate or, if a transgender person has surgery to transition, the person must go through a hormone wait period before being allowed to participate.⁵⁰ The remaining six states have no policy concerning transgender athletes.⁵¹

Currently, there is a circuit split among the courts of appeals over whether the term “sex” is inclusive of gender identity in Title VII and Title IX, and therefore protects transgender individuals from discrimination. Numerous federal courts have ruled that sex discrimination laws, including Title IX, apply to discrimination against transgender people.⁵² Only a few recent cases have rejected this view.⁵³ The Supreme Court’s forthcoming ruling in *EEOC*⁵⁴ could conclusively resolve the uncertainty surrounding the interpretation of “sex” by deciding the scope of the term under Title VII.

49. *Id.* (Alaska, Delaware, Georgia, Illinois, Iowa, Kansas, Maine, Michigan, Missouri, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, and Wisconsin).

50. *Id.* (Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Nebraska, and Texas).

51. *Id.* (Hawaii, Mississippi, Montana, South Carolina, Tennessee, and West Virginia).

52. *Dodds v. U.S. Dept. Of Edu.*, 845 F.3d 217, 219–20 (6th Cir. 2016) (holding that discrimination against transgender students likely constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017) (holding that discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution).

53. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that discrimination against transgender workers may sometimes constitute sex discrimination under Title VII but that such discrimination was not covered in all cases); *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status).

54. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, 2019 U.S. LEXIS 2846 (Apr. 22, 2019).

III. TITLE IX AND HOW IT HAS BEEN APPLIED TO CASES INVOLVING THE RIGHTS OF TRANSGENDER INDIVIDUALS

This Section argues that Title IX protects transgender individuals not only because numerous courts have agreed that it does, and the logic these courts used is correct, but also because the language of Title IX supports this interpretation. Courts that have found Title IX and Title VII to protect transgender individuals generally hold that Title IX and Title VII protection is afforded to transgender individuals because gender identity discrimination is a subset of sex discrimination.⁵⁵ Additionally, because the language of Title IX is ambiguous, it is necessary to look to the intentions and goals of the drafters of the statute, which leads to the same conclusion that gender identity discrimination is a part of sex discrimination. Assuming this to be true, a transgender student athlete who is denied access to the team that corresponds with his or her gender identity, based on his or her gender non-conformity, would have a cause of action for per se sex discrimination in violation of Title IX.

Today's legal disputes regarding transgender athletics involve both Title VII and Title IX because courts interpret these statutes in reference to each other. However, there are currently no reported cases involving transgender athletes under either Title VII or Title IX. The most prominent litigation involving a transgender athlete was actually decided under state law. In *Richards v. U.S. Tennis Association*, Dr. Renee Richards, a post-operative transgender woman, was prevented from qualifying and participating in the United States Open Tennis Tournament as a woman in the Women's Division.⁵⁶ The governing bodies wanted her to take a sex-chromatin test to determine whether she had two X chromosomes, which the court held violated the Human Rights Law of New York and the Fourteenth Amendment.⁵⁷ Since Richards, the issues that are litigated with regard to transgender athletes have shifted from unfair sex verification testing to the possibility of actionable sex discrimination claims for disparate and unequal

55. *Barnes v. City of Cincinnati*, 401 F.3d 729, 736–37 (6th Cir. 2005); *Bd. of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 865–70 (S.D. Ohio 2016); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 536 (3d Cir. 2018); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir. 2016); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Whitaker*, 858 F.3d at 1047.

56. *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267, 268 (N.Y. Sup. Ct. 1977).

57. *Id.* at 268, 272.

treatment.⁵⁸ This is where the interpretation of Title IX and Title VII becomes crucial.

A. *Title IX and Its Application to Transgender Rights*

In recent years, cases concerning transgender individuals have become more prevalent, and many courts have found that the term “sex” includes gender identity in both Title IX and Title VII.⁵⁹ Courts have found several reasons why Title IX protects transgender individuals.⁶⁰ First, these courts⁶¹ cite the Supreme Court’s holding in *Price Waterhouse*, where a plurality found that sex stereotyping constitutes sex discrimination.⁶² Second, the courts cite the holding in *Oncale v. Sundowner Offshore Services, Inc.* (“*Oncale*”), where the Supreme Court held that statutes often reach beyond the original problem they were enacted to eliminate.⁶³ Third, recent courts have cited to persuasive policy statements that recommend including gender identity within the ambit of “sex” in statutes such as Title IX.⁶⁴ Meanwhile, the reasoning proffered by courts that hold otherwise is that the text of Title IX

58. Jennifer V. Sinisi, Note, *Gender Non-Conformity as a Foundation for Sex Discrimination: Why Title IX may be an Appropriate Remedy for the NCAA’s Transgender Student-Athletes*, 19 VILL. SPORTS & ENT. L.J. 343, 359 (2012).

59. *U.S. Dep’t of Educ.*, 208 F. Supp. 3d at 865–70; *Boyertown Area Sch. Dist.*, 897 F.3d at 536; *G.G. ex rel. Grimm*, 822 F.3d at 729; *Price Waterhouse*, 490 U.S. at 235; *Whitaker*, 858 F.3d at 1047.

60. See, e.g., *Boyertown Area Sch. Dist.*, 897 F.3d at 536 (citing *Whitaker*, 858 F.3d at 1049) (holding that Congress’s intent in passing Title IX grew to encompass the protection of transgender individuals); *G.G. ex rel. Grimm*, 822 F.3d at 718 (citing to the Department of Education’s Office for Civil Rights regulations implementing Title IX to determine that “sex” includes gender identity and therefore protects transgender individuals); *Whitaker*, 858 F.3d at 1047–48 (relying on the holding in *Price Waterhouse* and *Oncale* that both held that a broad interpretation of Title IX was necessary and therefore protected transgender individuals); *U.S. Dep’t of Educ.*, 208 F. Supp. 3d at 865–70 (relying on the interpretations of other courts, as well as the holding in *Oncale* calling for a broad interpretation of Title IX to protect individuals, including transgender individuals, from the evils originally envisioned by the drafters of the statute).

61. See, e.g., *Boyertown Area Sch. Dist.*, 897 F.3d at 536; *Whitaker*, 858 F.3d at 1047–48; *U.S. Dep’t of Educ.*, 208 F. Supp. 3d at 865–70.

62. *Price Waterhouse*, 490 U.S. at 228.

63. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

64. Dear Colleague Letter, *supra* note 19.

and Title VII does not explicitly use the terms “gender identity,” “gender transition,” or other similar terms.⁶⁵

As the Supreme Court held in *Oncale*, a Title VII case, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”⁶⁶ The “principal evil”⁶⁷ that concerned the drafters of Title IX and Title VII was likely not discrimination against transgender individuals. Today, however, sex discrimination against transgender persons is a “reasonably comparable evil”⁶⁸ that needs to be addressed and recognized by courts.

In recent years, concerns surrounding transgender rights continue to cause debate. One example concerns a transgender individual’s right to use a particular bathroom or locker room that corresponds with that individual’s gender identity.⁶⁹ The circuit courts of appeals are somewhat split over whether Title VII and Title IX protect this right. While numerous federal courts have ruled that they do,⁷⁰ a few recent cases reject this view.⁷¹ Finally,

65. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 672 (W.D. Pa. 2015); *Texas v. United States*, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016).

66. *Oncale*, 523 U.S. at 79.

67. *Id.*

68. *Id.*

69. *See Bd. of Educ. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 871 (S.D. Ohio 2016); *Etsitty*, 502 F.3d at 1222; *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir. 2016); *Johnston*, 97 F. Supp. 3d at 661; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017).

70. *U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (holding that discrimination against transgender students likely constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); *Whitaker*, 858 F.3d at 1049, 1054 (holding that discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution).

71. *Etsitty*, 502 F.3d at 1221–22 (holding that discrimination against transgender workers may sometimes constitute sex discrimination under Title VII but that such discrimination was not covered in all cases); *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status); *Johnston*, 97 F. Supp. 3d at 657, 676 (holding that Title IX does not prohibit discrimination based on gender identity or transgender status).

in the coming year, the Supreme Court may decide whether Title VII protects transgender individuals in *EEOC*.⁷² Its ruling will be instrumental as precedent for lower courts in deciding Title IX cases.

1. Upcoming Case Law Interpreting Title VII with Regard to Discrimination Against Transgender People

As mentioned in the introduction of this Note, *EEOC* is currently under review by the Supreme Court and has the potential to settle the question of whether transgender individuals are protected under Title IX. In *EEOC*, Aimee Stephens worked as a funeral director at R.G. & G.R. Harris in Michigan.⁷³ For most of the time Stephens worked at R.G. & G.R. Harris, she presented as a male.⁷⁴ The funeral home fired her shortly after she informed the owner that she intended to transition from male to female and would present as a woman at work.⁷⁵ After the owner fired Stephens, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she had been terminated as a result of unlawful sex discrimination.⁷⁶ After its investigation, the EEOC brought suit against the Funeral Home, alleging that it violated Title VII by “terminating Stephens’s employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes.”⁷⁷ The district court granted summary judgment in favor of R.G. & G.R. Harris Funeral Homes, Inc., but the Court of Appeals for the Sixth Circuit reversed.⁷⁸ The Sixth Circuit held that the termination of Stephens based on her status as transgender constituted sex discrimination in violation of Title VII.⁷⁹ It held that the owner’s decision to fire Stephens because she was “‘no longer going to represent himself [sic] as a man’ and

72. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107, 2019 U.S. LEXIS 2846 (Apr. 22, 2019).

73. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 566–67.

78. *Id.* at 567.

79. *Id.* at 600.

‘wanted to dress as a woman’” falls within the realm of sex-based discrimination forbidden under *Price Waterhouse* and *Smith v. City of Salem* (“*Smith*”).⁸⁰

In *Price Waterhouse*, a plurality of the Supreme Court concluded that the Title VII prohibition on employment discrimination based on “sex” encompasses sex stereotypes.⁸¹ Ann Hopkins was employed by Price Waterhouse, an accounting firm, and was denied partnership after waiting two years because she had been acting too masculine.⁸² The Justices reasoned that “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁸³ The plurality, along with two concurring Justices, concluded that a female employee who was subject to an adverse employment decision for failing to “walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have her hair styled, [or] wear jewelry,” could claim a violation of Title VII based on sex discrimination when the employment decision relied on gender-based stereotypes.⁸⁴ Using the holding in *Price Waterhouse*, the Sixth Circuit determined in *Smith* that “discrimination based on a failure to conform to stereotypical gender norms” is encompassed within the word “sex” in Title VII.⁸⁵

The Supreme Court will hear *EEOC* to determine “whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse*.”⁸⁶ The Court will look to past cases on the topic, and its ruling will have a lasting impact on how Title IX is interpreted and applied to transgender athletes. If it determines that Title VII does not prohibit discrimination against transgender people, it is likely that a student athlete who brings a Title IX claim against

80. *Id.* at 572 (citation omitted).

81. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

82. *Id.* at 231–32, 234–35.

83. *Id.* at 251 (citation omitted).

84. *Id.* at 235 (citation omitted).

85. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (relying on *Price Waterhouse*, 490 U.S. at 251).

86. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, 2019 U.S. LEXIS 2846 (Apr. 22, 2019).

their educational institution for refusing to allow them to participate on the sports team that corresponds with their gender identity will fail. In considering this issue, the Supreme Court should adopt the reasoning in the following cases that support protecting transgender individuals.

2. Case Law Interpreting Title VII to Protect Transgender Individuals

Lower courts have struggled to determine whether transgender employees have legitimate sex discrimination claims under Title VII. Some courts have held that these claims are actionable as a form of gender stereotyping and sex discrimination.⁸⁷

The following cases illustrate the views of the courts that have held that discrimination against transgender individuals in the workplace is sex discrimination. The cases all began with lawsuits filed by individuals who claimed they suffered discrimination based on their transgender status in their workplace. The courts reasoned that not only are transgender individuals protected by their status as members of a protected class, these persons are also protected by the statutes themselves because, according to two highly cited Supreme Court cases, a broad interpretation allows for their protection against sex discrimination based on their gender identity.⁸⁸ Based on these rulings, if presented with a transgender student athlete's claim of discrimination based on their status as transgender, these courts⁸⁹ would also likely protect the transgender student athlete under Title IX. They would most likely hold that refusing a transgender athlete's request to participate on the team that corresponds with their gender identity is sex discrimination.

In *Smith*, the Sixth Circuit Court of Appeals held that Title VII prohibits sex discrimination against transsexual individuals—specifically when

87. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII of the 1964 Civil Rights Act); *Smith*, 378 F.3d at 571–73 (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII).

88. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998); see also *Price Waterhouse*, 490 U.S. at 235.

89. See, e.g., *Barnes*, 401 F.3d at 737 (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII of the 1964 Civil Rights Act); *Smith*, 378 F.3d at 571–73 (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII).

such discrimination falls under the category of “sex stereotyping.”⁹⁰ Jimmie L. Smith alleged that Salem discriminated against him on the basis of sex in violation of Title VII.⁹¹ He was a transsexual firefighter who began expressing himself in a more feminine manner at work.⁹² Smith was subsequently suspended and brought suit.⁹³ The court held that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.”⁹⁴ The court relied on the precedent set in *Price Waterhouse*, in which the Supreme Court concluded that Title VII’s prohibition on sex discrimination includes a prohibition on sex stereotyping: “[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁹⁵ The *Smith* court noted that in *Price Waterhouse*, “the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”⁹⁶

In *Barnes v. City of Cincinnati*, the Sixth Circuit Court of Appeals held that Phillip Barnes, a police officer, was a member of a protected class by virtue of his gender non-conformity and had been discriminated against by the city in violation of Title VII.⁹⁷ Barnes sued the City of Cincinnati for illegal sex discrimination in violation of Title VII.⁹⁸ He alleged that the city demoted him because of his failure to conform to sex stereotypes due to the fact that he, as a pre-operative male-to-female transsexual, lived as a male

90. *Smith*, 378 F.3d at 575.

91. *Id.* at 567–68.

92. *Id.* at 568.

93. *Id.* at 569.

94. *Id.* at 575.

95. *Id.* at 572 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)).

96. *Id.* at 573.

97. *Barnes v. City of Cincinnati*, 401 F.3d 729, 736–39 (6th Cir. 2005).

98. *Id.* at 735.

while on duty, but as a female when off duty.⁹⁹ The court held that he was discriminated against because he was a member of a protected class as a transsexual under Title VII and was denied a promotion that went to someone with similar qualifications who was not a member of the protected class.¹⁰⁰ In labeling Barnes a member of a protected class, the court relied on the ruling in *Smith*, which determined that transgender individuals are members of a protected class.¹⁰¹ The court found that the burden did not shift back to the City of Cincinnati to show that they had a non-discriminatory justification for demoting Barnes because Barnes only needed to “present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice,’” and he did that.¹⁰²

In *Lusardi v. McHugh*, the Equal Employment Opportunity Commission (EEOC) found that the Army discriminated against Tamara Lusardi in violation of Title VII.¹⁰³ Lusardi filed a complaint with the Army’s office of Equal Employment Opportunity alleging that the Army had discriminated against her on the basis of sex and gender identity in violation of Title VII.¹⁰⁴ She alleged that after her transition from male to female, she was required to use the separate single-user restroom instead of the women’s restroom until she had completely medically transitioned, and she was repeatedly referred to with male pronouns and by her previous name.¹⁰⁵ The Army concluded that she failed to prove that she suffered discrimination.¹⁰⁶ Lusardi appealed to the EEOC, which found that the Army violated Title VII.¹⁰⁷ The EEOC noted that “[n]othing in Title VII makes any medical procedure a prerequisite

99. *Id.* at 733.

100. *Id.* at 736–37.

101. *Id.* at 737 (relying on *Smith*, 378 F.3d at 575).

102. *Id.* at 739–40 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003)).

103. *Lusardi v. McHugh*, 2015 EEOPUB LEXIS 896, at *29 (Apr. 1, 2015).

104. *Id.* at *1.

105. *Id.*

106. *Id.* at *10–11.

107. *Id.* at *29.

for equal opportunity (for transgender individuals, or anyone else)[,]”¹⁰⁸ meaning that this treatment would have been unlawful even if Lusardi was born a woman and was not transgender.

3. Case Law Interpreting Title IX to Protect Transgender Individuals

Two of the most frequently cited cases interpreting Title IX with respect to transgender individuals hold that because the term “sex” in Title IX encompasses gender identity, discrimination against a transgender individual is sex discrimination.¹⁰⁹ Both cases cited *Price Waterhouse*, reasoning that the statute sought to protect men and women by being applicable to the full range of disparate treatment resulting from sex stereotypes.¹¹⁰

Beginning with *G. G. v. Gloucester County* (“*G.G.*”), the Fourth Circuit found that the local school board violated Title IX when it denied Gavin Grimm the right to use the boys bathroom in his high school.¹¹¹ Grimm, a transgender boy, sought to use the boys restrooms at his high school.¹¹² In response, the school board passed a policy that banned him from the boys restroom.¹¹³ The policy stated: “It shall be the practice of the [Gloucester County Public Schools] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.”¹¹⁴ Grimm claimed that the school board discriminated against him in violation of Title IX.¹¹⁵ In delivering its holding, the court explained that because the prohibition against sex discrimination in Title IX encompasses discrimination

108. *Id.* at *20.

109. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

110. *G.G. ex rel. Grimm*, 822 F.3d at 727; *Whitaker*, 858 F.3d at 1047.

111. *See G.G. ex rel. Grimm*, 822 F.3d at 729.

112. *Id.* at 714.

113. *Id.* at 714–15.

114. *Id.* at 716.

115. *Id.* at 715.

based on gender identity, transgender students must be able to access facilities consistent with their gender identity.¹¹⁶ The court cited to the Department of Education's Office for Civil Rights regulations implementing Title IX to determine that "sex" includes gender identity, and therefore protects transgender individuals.¹¹⁷ The regulations permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."¹¹⁸ The court emphasized that "[t]he Department recently delineated how this regulation should be applied to transgender individuals," which the Department explained that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . [.] a school generally must treat transgender students consistent with their gender identity."¹¹⁹

Similarly, in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, Ashton Whitaker, a transgender boy, sought to use the boys restroom at his high school.¹²⁰ The school district denied his request because it believed allowing Whitaker to do so would invade the privacy of his classmates.¹²¹ Whitaker brought suit alleging that the district's policy violated Title IX.¹²² The Court of Appeals for the Seventh Circuit looked to case law interpreting Title VII to construe Title IX.¹²³ It held that the school district violated Title

116. *Id.* at 718, 721.

117. *Id.* at 718.

118. *Id.* at 715 (quoting 34 C.F.R. § 106.33 (2019)).

119. *Id.* at 718 (citation and internal quotations omitted).

120. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017).

121. *Id.*

122. *Id.*

123. *Id.* at 1047–48 (“*See e.g.*, *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) (noting that “it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (holding that the plaintiff had been discriminated against by her employer for being too masculine in violation of Title VII); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (holding that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and

IX because “a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance.”¹²⁴ The court held that it is unlawful to punish someone for their gender non-conformance under Title IX because they will then be subject to “different rules, sanctions, and treatment than non-transgender students.”¹²⁵ In interpreting Title IX this way, the court relied on the reasoning in *Price Waterhouse* and *Oncale* that both called for a broad interpretation of Title VII.¹²⁶ In those cases, the Supreme Court held that in drafting Title IX, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,”¹²⁷ and that, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹²⁸

In *Dodds v. U.S. Dept. of Education* (“*Dodds*”), the Court of Appeals for the Sixth Circuit held that discrimination against transgender students likely constitutes sex discrimination under Title IX.¹²⁹ It came to this judgment because the anonymous defendant, Jane Doe, showed that she was excluded from using the bathroom of her choice because of her sex, and that this discrimination harmed her.¹³⁰ The court determined that because the definition of “on the basis of sex” in Title IX is ambiguous, by looking at how other courts have interpreted it to protect transgender individuals, they would apply that reasoning here to protect this student.¹³¹ This court cited

it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

124. *Whitaker*, 858 F.3d at 1049.

125. *Id.*

126. *Id.* at 1047–48.

127. *Id.* at 1048.

128. *Id.* at 1048 (citing *Oncale*, 523 U.S. at 79).

129. See *Dodds v. U.S. Dept. Of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016); *Bd. of Educ. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 871 (S.D. Ohio 2016).

130. *U.S. Dep’t of Educ.*, 208 F. Supp. 3d at 870–71.

131. *Id.* at 865–70.

to the same language in *Oncale* regarding statutory prohibitions, as quoted above, to conclude that protecting transgender individuals is a “reasonably comparable evil” to those evils envisioned in the drafting of Title IX.¹³²

In *Doe v. Boyertown Area Sch. Dist.* (“*Doe*”), the Court of Appeals for the Third Circuit rejected the claim that a school policy that protected transgender students violated other students’ rights.¹³³ The court relied on the holding in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* (“*Whitaker*”), “that a school district’s policy of prohibiting transgender students from using bathrooms and locker rooms consistent with their gender identity violated Title IX because it discriminated against transgender students by subjecting them to ‘different rules, sanctions, and treatment than non-transgender students.’”¹³⁴ The Seventh Circuit reasoned that Congress’s intent in passing Title IX could grow to encompass protecting transgender individuals.¹³⁵ The court in *Doe* held that a sex-neutral policy could not violate Title IX.¹³⁶

If the decisions of these courts and their interpretations of the protections afforded by Title IX to transgender individuals are adopted by other courts, then transgender student athletes would be protected when choosing to participate on the sports team that corresponds with their gender identity as opposed to their biological sex at birth. If they were not protected, they could be seen as being “punishe[d]”¹³⁷ for their gender nonconformity, which, because of how these cases have read and expanded their interpretation of Title IX under *Oncale* and the sex stereotyping theory under *Price Waterhouse*, violates Title IX.¹³⁸

132. *Id.* at 867.

133. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 536 (3d Cir. 2018).

134. *Id.* (citing *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017)).

135. *Whitaker*, 858 F.3d at 1049.

136. *Boyertown Area Sch. Dist.*, 897 F.3d at 534–35.

137. *Whitaker*, 858 F.3d at 1049.

138. *Doe by & through Doe*, 897 F.3d at 536 (citing *Whitaker*, 858 F.3d at 1049); *Whitaker*, 858 F.3d at 1047–48; *Bd. of Educ. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 867 (S.D. Ohio 2016).

4. Case Law Interpreting Title VII and Title IX to Exclude Protection for Transgender Individuals

There are a few courts that have held that transgender discrimination does not necessarily violate Title VII, and by extension, Title IX.¹³⁹ These courts have construed the word “sex” in Title VII, and by extension Title IX, strictly to mean biological sex.¹⁴⁰ Sexual orientation and gender identity would not be included in the interpretation.¹⁴¹ The courts have read Title IX and Title VII strictly—because the statute does not expressly mention gender identity or gender expression—they have refused to extend Title IX in those cases.¹⁴² These courts would hold that not allowing a transgender student to participate on the sports team that corresponds with his or her gender identity is not discrimination, barring any Title IX lawsuit.

This view was expressed by the U.S. District Court for the Western District of Pennsylvania in *Johnston v. Univ. of Pittsburgh* (“*Johnston*”), a case brought under Title IX.¹⁴³ Seamus Johnston alleged that “[d]efendants discriminated against him [in violation of Title IX] based on his sex and his transgender status [when they prohibited] him from using sex-segregated locker rooms and restrooms that were designated for men.”¹⁴⁴ The court held that a university that received federal funds is not in violation of Title IX when it prohibits a transgender male from using the locker room designated

139. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that discrimination against transgender workers may sometimes constitute sex discrimination under Title VII but that such discrimination was not covered in all cases); see, e.g., *Johnston v. Univ. of Pitt.*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status); see, e.g., *Texas v. United States*, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status).

140. *Etsitty*, 502 F.3d at 1222; *Johnston*, 97 F. Supp. 3d at 676; *Texas*, 201 F. Supp. 3d at 832–33.

141. *Etsitty*, 502 F.3d at 1222; *Johnston*, 97 F. Supp. 3d at 676; *Texas*, 201 F. Supp. 3d at 832–33.

142. *Etsitty*, 502 F.3d at 1221–22; *Johnston*, 97 F. Supp. 3d at 676; *Texas*, 201 F. Supp. 3d at 832–33.

143. *Johnston*, 97 F. Supp. 3d at 657.

144. *Id.* at 661.

for males.¹⁴⁵ The court reasoned that because Title IX does not mention “gender identity, gender expression, or gender transition,”¹⁴⁶ Johnston failed to state a cognizable claim for discrimination on the basis of sex.¹⁴⁷

The Tenth Circuit held the same in *Etsitty v. Utah Transit Authority* (“*Etsitty*”).¹⁴⁸ Krystal Etsitty alleged she was fired from her job with the Utah Transit Authority (UTA) because she disclosed being a transsexual to her boss and failed to conform to the stereotypical masculine behavior that was expected.¹⁴⁹ Etsitty brought suit alleging that her termination violated Title VII.¹⁵⁰ The district court ruled against her, holding that transsexuals are not a protected class under Title VII and that “the prohibition against sex stereotyping recognized by some courts should not be applied to transsexuals.”¹⁵¹ It further concluded that even if Title VII did apply, there was no evidence that UTA terminated Etsitty for failing to conform to gender stereotypes.¹⁵² She appealed, arguing that she should have been protected under Title VII based on her status as a transsexual since “a person’s identity as a transsexual is directly connected to the sex organs she possesses, [and] discrimination on this basis must constitute discrimination because of sex.”¹⁵³ However, the Court of Appeals for the Tenth Circuit affirmed, holding that “it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII . . . [and] there is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female.”¹⁵⁴ The court held that because the text of Title VII only refers to male and female, “discrimination against a

145. *Id.*

146. *Id.* at 672.

147. *Id.*

148. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007).

149. *Id.* at 1218.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1221.

154. *Id.* at 1221–22.

transsexual because she is a transsexual is ‘not discrimination because of sex,’”¹⁵⁵ and “[t]herefore, transsexuals are not a protected class under Title VII.”¹⁵⁶ However, Title VII does not actually refer to “male” or “female” in its text.¹⁵⁷

Another case, *Texas v. United States*, involved a discrimination claim based on transgender status under both Title VII and Title IX.¹⁵⁸ In that case, thirteen states and agencies sued the U.S. Departments of Education, Justice, Labor, the Equal Employment Opportunity Commission, and various other agency officials challenging the Dear Colleague Letter published under the Obama administration on May 13, 2016, directing schools to respect a transgender student’s choice of bathroom, locker room, and shower.¹⁵⁹ The states challenged the agencies’ assertion that respecting a transgender student’s choice of bathroom, locker room, and shower was required under Title VII and Title IX.¹⁶⁰ The court ruled in favor of the states, issuing an injunction against the agencies that “enjoined [them] from enforcing the [g]uidelines against Plaintiffs and their respective schools, school boards, and other public, educationally based institutions.”¹⁶¹ The court held that Title IX does not prohibit discrimination based on gender identity or transgender status because “the plain meaning of the term sex . . . following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth.”¹⁶²

These cases argue that the text of Title IX does not refer to transgender people, and therefore, they are not protected. This argument is flawed because the statute does not specifically refer to “males” or “females” in its

155. *Id.* at 1222 (citation omitted).

156. *Id.*

157. *See, e.g.*, 42 U.S.C. § 2000e-2 (2019).

158. *Texas v. United States*, 201 F. Supp. 3d 810, 815–17 (N.D. Tex. 2016).

159. *Id.* at 815–16.

160. *Id.*

161. *Id.* at 836.

162. *Id.* at 832–33.

text.¹⁶³ It only discusses discrimination on the basis of sex.¹⁶⁴ Additionally, lower court rulings demonstrate this flawed reasoning by applying the Supreme Court's holding in *Price Waterhouse*, where the Court confirmed that gender discrimination is a type of sex stereotyping,¹⁶⁵ which courts have always held as unlawful. They also apply the Court's holding in *Oncale*, that statutes such as Title VII, which extends to Title IX, should be interpreted to prohibit similar harms.¹⁶⁶ Discrimination against a transgender individual because he or she is transgender is a "similar harm"¹⁶⁷ to sex discrimination against women, which Title IX was specifically enacted to prevent.¹⁶⁸ It is necessary to look beyond the plain language of the statute to the objectives of the congressmembers when they were drafting and passing Title IX to see that it would be in line with their original objectives to now protect transgender individuals.

B. The Text of Title IX Requires the Interpretation That "Sex" Includes Gender Identity

Even though Congress likely did not specifically foresee the additional categories of "sex," other than male and female, when it drafted Title IX, the language in the statute was clearly intended to protect a holistic society. If Congress's intent was not to protect a holistic society, and instead to only protect cisgender males and cisgender females, it would have tailored the language of Title IX even further. However, the language of the statute is nevertheless ambiguous, as a new Congressional bill proposed by the Trump administration demonstrates. As scholar Adele Kimmel noted, "Title IX's effectiveness" in addressing transgender athletic participation "is limited by

163. See, e.g., 42 U.S.C. § 2000e-2 (2019).

164. *Id.*

165. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40 (1989).

166. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79–80 (1998).

167. *Id.*

168. 118 CONG. REC. 5804 (daily ed. Feb. 28, 1972) (remarks of Sen. Bayh on the day Title IX was enacted, stating that "the field of education is just one of many areas where differential treatment [between men and women] has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.").

two key deficiencies: (1) courts [and the Department of Education’s Office for Civil Rights] are interpreting Title IX’s prohibition against sex discrimination too narrowly,” and (2) Title IX “does not expressly prohibit discrimination on the basis of sexual orientation or gender identity.”¹⁶⁹ A close reading of the text of Title IX, however, reveals that transgender people should be protected because gender identity is an integral part of sex.

Although modeled after Title VII, Title IX was enacted to accomplish two related but divergent objectives.¹⁷⁰ First, Congress wanted to ensure its funds were not used “to support discriminatory practices.”¹⁷¹ Second, Congress wanted to provide citizens protection against discriminatory practices.¹⁷² As floor debates proceeded on the day Title IX was enacted, Senator Birch Bayh advocated that Congress’s broad objective was “to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education.”¹⁷³ However, because of the era in which Title IX was enacted, it can be argued that it is doubtful that Congress specifically envisioned the term “sex” to include gender identity.¹⁷⁴ Congressmembers likely envisioned only cisgender males and cisgender females.¹⁷⁵

Soon after entering office, the Trump administration proposed a bill that states:

This bill prohibits the word “sex” or “gender” from being interpreted to mean “gender identity,” and requires “man” or “woman” to be interpreted to refer exclusively to a person’s genetic sex, for purposes determining the meaning of federal civil

169. Adele P. Kimmel, *Title IX: An Imperfect But Vital Tool To Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2012–13 (2016).

170. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

171. *Id.*

172. *Id.*

173. 118 CONG. REC. 5804 (1972) (remarks of Sen. Bayh).

174. See GENNY BEEMYN, *TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY* 515–18 (2014) (noting that the Stonewall Riots in NYC in 1969 was the turning point for the LGBT movement to gain momentum in the United States. Since this was only three years before the enactment of Title IX, it is unlikely that congress members were thinking about the LGBT community when drafting).

175. *See id.*

rights laws or related federal administrative agency regulations or guidance. No federal civil rights law shall be interpreted to treat gender identity or transgender status as a protected class, unless it expressly designates “gender identity” or “transgender status” as a protected class.¹⁷⁶

Even those who oppose a more inclusive interpretation of the statute acknowledge that the current meaning of “sex” is up for debate. If it were clear, there would be no need to pass this statute. Therefore, interpreting “sex” to include gender identity would not disrupt Congress’s original objectives; it would show how the interpretation has changed over time. Congress passed Title IX to ensure equal access to educational opportunities, including sports, for everyone, regardless of gender.¹⁷⁷ If Congress did not want everyone to be afforded protection, it would have narrowed the language of Title IX to reflect that desire. Because the text of the statute is ambiguous, it allows for the reading of gender identity into “sex.” Therefore, courts should conclusively hold that discrimination against transgender student-athletes violates Title IX, as the courts did in the cases discussed earlier in this section.¹⁷⁸

Regardless, because congressional intent is unclear, members of Congress should address the lack of clarity in interpreting “sex” in Title IX and by that, Title VII. Even though reading gender identity into the statute may not have been what Congress envisioned at the time the statute was drafted, until it clarifies, upon a close reading of the text, it is appropriate for current courts and government agencies to read “sex” as including gender identity. This is because “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,”¹⁷⁹ and today, discrimination against transgender individuals is a comparable evil to the discrimination that Congress was trying to eliminate when it drafted and passed Title IX.

Opponents of the Trump administration’s view towards the classification of individuals protected by Title IX argue that classifying transgender

176. H.R. 2796, 115th Cong. (2017).

177. Katelyn Burns, *The Challenges Ahead for Transgender Athletes and Title IX Under Trump*, VICE (July 28, 2017, 10:50 AM), https://sports.vice.com/en_ca/article/59px8b/the-challenges-ahead-for-transgender-athletes-and-title-ix-under-trump [<https://perma.cc/65T5-7TTD>].

178. *See supra* Section III. A. 3.

179. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

students according to the sex recorded on their birth certificates would contradict the original intent of Title IX, which sought to guarantee equal access to educational opportunities, such as sports, across all genders.¹⁸⁰ They argue that “[t]he very definition of being transgender relates to a person’s sex either because it turns on a person’s assigned sex, lived sex, or gender transition.”¹⁸¹ Because you need some concept of a transgender person’s sex, sexual identity, or gender identity to understand that they are transgender, discrimination against a transgender person because they are transgender is sex discrimination.¹⁸² Therefore, refusing to allow a transgender athlete to compete on the sports team that corresponds with his or her gender identity is discrimination in violation of Title IX.

IV. WHY ALLOWING TRANSGENDER INDIVIDUALS TO PARTICIPATE ON THE SPORTS TEAM THAT CORRESPONDS WITH THEIR GENDER IDENTITY IS GOOD FOR THE U.S.

The most frequent policy argument that academics and op-ed writers have put forward for opposing the inclusion of transgender athletes—and specifically transgender female athletes—from the teams that correspond to their gender identity is that including them will ruin sports by giving transgender students an unfair advantage.¹⁸³ This belief is unfounded.¹⁸⁴ In fact, there is more benefit to inclusivity than there is to selectivity.¹⁸⁵ This Section will first examine how transitions actually affect the performance of athletes and will show that medically transitioning takes away a transgender female athlete’s competitive advantage.¹⁸⁶ Next, this Section will discuss

180. *E.g.*, Burns, *supra* note 177.

181. *Id.*

182. *Macy v. Holder*, 2012 EEOPUB LEXIS 1181, at *34–35 (Apr. 20, 2012).

183. Bethany Alice Jones et al., *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 *SPORTS MED* 701 (2016).

184. *Id.*

185. Ray Yasser & Matthew Block, *Upon Further Review: Recognizing Procedural Due Process Rights for Suspended High School Athletes*, 26 *ENT. & SPORTS L.* 1, 29 (2008).

186. Joanna Harper, *Race Times for Transgender Athletes*, *J. OF SPORTING CULTURES AND IDENTITIES*, 2015, at 1, 6.

why allowing transgender student athlete participation on teams that corresponds with their gender identity is beneficial, regardless of whether transgender individuals have medically transitioned.

A. *How Transitions Affect Performance in Sports*

At a bare minimum, most studies and policy papers discussing transgender athletics consider whether an athlete was born male or female to be irrelevant to athletic ability.¹⁸⁷ The rationale is that transgender persons do not have a de facto competitive advantage over their cisgender counterparts.¹⁸⁸ Those who argue that transgender female athletes—that is, male-to-female athletes—have an unfair advantage primarily argue that this advantage stems from transgender individuals having higher testosterone levels.¹⁸⁹ However, there are at least two reasons to conclude that testosterone levels do not matter. First, the so-called “GH-2000” study, a study which measured testosterone levels in elite athletes, concluded that testosterone levels are irrelevant because the natural range of testosterone in all individuals is so wide.¹⁹⁰ Second, noted medical physicist Joanna Harper, the NCAA, and the International Olympic Committee (IOC) have all furnished data showing that the testosterone and muscle mass levels for individuals who have undergone testosterone suppression therapy, a medical treatment to bring a transgender woman’s originally male testosterone levels down to that of a cisgender female’s levels,¹⁹¹ are comparable to those levels in cisgender women.¹⁹²

187. See e.g., *id.*; NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 16, at 7–8.

188. See Harper, *supra* note 186, at 6; NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 16, at 7–8.

189. Jones et al., *supra* note 183, at 702.

190. M.L. Healy et al., *Endocrine Profiles in 693 Elite Athletes in the Postcompetition Setting*, 81 CLINICAL ENDOCRINOLOGY 294, 298, 302 (2014).

191. Harper, *supra* note 186, at 6.

192. See *id.*; NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 16, at 7–8; *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, INT’L OLYMPIC COMM. (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf [<https://perma.cc/P5BR-GFH4>].

Nonetheless, it is still commonly believed by athletics organizations and the general public that higher levels of androgenic hormones, especially testosterone, give an athlete a competitive advantage.¹⁹³ This belief is espoused by organizations such as the International Association of Athletics Federations (IAAF), a worldwide governing body for professional athletics that creates and regulates professional meets.¹⁹⁴ Due to that belief, transgender females are perceived as possessing an unfair advantage, especially when medication has not been taken to lower testosterone levels and bring them down to an average cisgender female level.¹⁹⁵ Those who are opposed to allowing transgender women to play on the team that matches their gender identity do not seem to believe that transgender men, namely female-to-male athletes, have a competitive advantage over cisgender men even though they are injected with testosterone when they medically transition—a patently hypocritical view.¹⁹⁶ The IOC’s rules allow transgender male athletes to enter competitions without restrictions, whereas transgender female athletes must demonstrate that their testosterone levels were below a certain threshold for at least a year before a competition.¹⁹⁷ However, if transgender female athletes were allowed to participate on teams that correspond to their gender identity on the condition that they undergo testosterone suppression therapy to balance their hormones with cisgender female athletes, while cisgender female athletes do not need to undergo any type of medical treatment concerning their hormones, it would likely violate Title IX.¹⁹⁸ Currently, there is no definitive or consistent research suggesting that

193. Jones et al., *supra* note 183, at 702.

194. *About the IAAF*, IAAF, <https://www.iaaf.org/about-iaaf> [<https://perma.cc/8RRC-UFYF>].

195. Jones et al., *supra* note 183, at 702.

196. *Id.*

197. *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, *supra* note 192.

198. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (holding that it is unlawful to punish someone for their gender non-conformance under Title IX because they will then be subject to “different rules, sanctions, and treatment than non-transgender students.” Forcing a medical transition to participate would subject transgender individuals to “different rules, sanctions and treatment”).

transgender females have a competitive advantage over cisgender females at any stage of their transition because of their higher testosterone levels.¹⁹⁹

In the GH-2000 study, researchers measured hormone levels, including testosterone levels, in elite athletes.²⁰⁰ Results showed that the most distinctive criterion in differentiating between male and female athletes is lean body mass, not testosterone.²⁰¹ The researchers believed that these findings were sufficient to account for the differences in strength and aerobic performance between the sexes.²⁰² They suggested that the hypothesis that testosterone levels are the primary determinant of sex differences in athletic performances is untenable.²⁰³ Based on these findings, policies in place that restrict participation by transgender individuals should be reconsidered and revised.²⁰⁴

Just as there is a great deal of physical variation among cisgender women and cisgender men, there is a great deal of physical variation among transgender women.²⁰⁵ Nevertheless, the general population often unconsciously or consciously generalizes that all transgender women are unusually tall and strong compared to cisgender women.²⁰⁶ This is not necessarily true.²⁰⁷ For example, a transgender woman could be small and slender even

199. Jones et al., *supra* note 183, at 701.

200. See generally Healy et al., *supra* note 190, at 294 (Stating that the objective of the study was “to measure a profile of hormones in a group of elite athletes.” “Blood samples were obtained from 813 volunteer elite athletes from a cross-section of 15 sporting categories. An endocrine profile was measured on a subset of 693.”).

201. *Id.* at 298 (“On average, a women’s lean body mass [LBM] is both proportionally and absolutely much lower than that of men When the difference in LBM between the sexes is calculated . . . on average, elite female athlete’s LBM is 85% that of elite men and elite male athletes have 118% the LBM of elite women. The difference in LBM is sufficient to account for the observed differences in strength and aerobic performance seen between the sexes without the need to hypothesize that performance is in any way determined by the differences in testosterone levels.”).

202. *Id.*

203. *Id.* at 298–302.

204. Jones et al., *supra* note 183, at 701.

205. NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 16, at 7.

206. *Id.*

207. *Id.*

without hormone blockers or estrogen.²⁰⁸ Medical legal consultants who worked with the NCAA to draft its transgender policy postulate that the assumption that all male-bodied people, including transgender women, are “taller, stronger, and more highly skilled in a sport” than their female-bodied counterparts is inaccurate.²⁰⁹ These medical experts challenge the assumption that transgender women have a competitive advantage.²¹⁰

In 2015, four years after the NCAA issued its policy, *The Journal of Sporting Cultures and Identities* published the first study ever conducted on transgender athletes, led by medical physicist Joanna Harper.²¹¹ She studied eight male-to-female transgender runners and the effect medical transitioning had on them.²¹² The study showed that hormone therapy used to medically transition from male-to-female did more than simply lower testosterone levels.²¹³ The therapy caused transgender women to experience a decrease in muscle mass along with other changes to their physical characteristics as their testosterone levels approached female norms.²¹⁴ As a result, transgender women experienced a loss of speed, strength, and endurance, all of which are important aspects of athleticism.²¹⁵

Harper later revealed her own personal experience as a transgender runner.²¹⁶ In less than a year from the start of her medical transition, she saw the effects in her athletic performance.²¹⁷ She was 12% slower.²¹⁸ After

208. *Id.*

209. *Id.*

210. *Id.* at 7–8.

211. Harper, *supra* note 186, at 7–8.

212. *Id.* at 3.

213. *Id.* at 3–6.

214. *See id.* at 6–7.

215. *Id.* at 6.

216. Libby Coleman, *Meet the Leading Expert on Trans Athletes*, OZY (Jan. 16, 2017), <https://www.ozy.com/rising-stars/meet-the-leading-expert-on-trans-athletes/74134> [https://perma.cc/64H5-MQZC].

217. *Id.*

218. *Id.*

documenting this, she initiated her experiment to see if this outcome was the same for all male-to-female athletes who medically transitioned.²¹⁹ Most demonstrated the same results she had experienced.²²⁰ After one year of testosterone suppression therapy, Harper found that the eight subjects had testosterone levels below the levels found in average cisgender women.²²¹ Of the eight subjects, seven showed reductions in their running speed post-transition.²²² The runners became comparably competitive in the women's division as their cisgender opponents.²²³

The IOC made their own determination in line with these findings regarding transgender athletes' competition in the Olympics.²²⁴ After receiving pressure for the mishandling of South African runner Caster Semenya's case in 2011, the IOC announced that it "would no longer question an athlete's sex or gender."²²⁵ It decided that it would allow those individuals who identified as women to compete in the women's category as long as their testosterone levels were within the female range.²²⁶

In 2018, the IAAF, a worldwide governing body for professional athletics that creates and regulates professional meets,²²⁷ announced new rules that would require female athletes, whether transgender or cisgender, to take medication to lower their testosterone levels to a certain range in order to

219. *Id.*

220. *Id.*; see generally Harper, *supra* note 186, at 4–7.

221. See generally Harper, *supra* note 186, at 6.

222. *Id.* at 3.

223. *Id.* at 6.

224. See *IOC Rules Transgender Athletes can Take Part in Olympics Without Surgery*, THE GUARDIAN (Jan. 24, 2016), <https://www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery> [<https://perma.cc/DAY7-A3XC>]; see generally *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, *supra* note 192.

225. Coleman, *supra* note 32, at 122.

226. *Id.*

227. *About the IAAF*, *supra* note 194.

compete.²²⁸ Semenya, a female-born runner with above-average testosterone levels, challenged this rule and took the case to the Court of Arbitration for Sport, which ruled against her in May 2019.²²⁹ The court's ruling allows the IAAF to require transgender female athletes to take medication to lower their testosterone levels if they wish to compete internationally.²³⁰

Although it is generally appropriate to separate males and females into separate sports teams since, in the aggregate, males are bigger and stronger,²³¹ it is unreasonable to attempt to police the boundaries precisely because there are individuals of varying abilities within each category. Some men are simply bigger and stronger than other men. The same is true for women. Whether cisgender or transgender, every athlete has their own advantages and disadvantages.²³² As *Washington Post* columnist Steven Petrow wrote:

People come in all shapes and sizes. We don't disqualify Michael Phelps for having super-long arms; that's just a competitive advantage he has in his sport. We don't regulate height in the WNBA or NBA; being tall is just an advantage for a center. For as long as sports have been around, there have been people who have had advantages over others. A universal level playing field does not exist.²³³

228. *IAAF Introduces New Eligibility Regulations for Female Classification*, IAAF (Apr. 26, 2018), <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classification> [<https://perma.cc/REB7-XFWD>].

229. *Caster Semenya: Olympic 800m Champion Loses Appeal Against IAAF Testosterone Rules*, BBC (May 1, 2019), <https://www.bbc.com/sport/athletics/48102479> [<https://perma.cc/9URR-TQ4P>].

230. *Id.*

231. A. E. J. Miller et al., *Gender Differences in Strength and Muscle Fiber Characteristics*, 66 *EUR. J. APPLIED PHYSIOLOGY* 254, 261 (1993).

232. Steven Petrow, *Do Transgender Athletes Have an Unfair Advantage at the Olympics?*, *THE WASH. POST* (Aug. 8, 2016), https://www.washingtonpost.com/lifestyle/style/do-transgender-athletes-have-an-unfair-advantage-at-the-olympics/2016/08/05/08169676-5b50-11e6-9aee-8075993d73a2_story.html?noredirect=on [<https://perma.cc/B2BA-SH3L>].

233. *Id.*

If one considers it unjust for any one female athlete to be better than another female athlete, there would be no competition. Sports authorities should not have to do testosterone tests for every athlete in all situations.

B. Why Allowing Transgender Individuals to Participate on the Team That Corresponds with Their Gender Identity Is Beneficial

Participation in an athletic program creates an “increased likelihood of overall academic success, an increased likelihood of completing school, the development of positive character traits, and better health and overall well-being.”²³⁴ It can also provide students with life lessons of self-respect, self-esteem, self-confidence, the importance of teamwork, how to deal with success and failure, along with the joy of being a member of a team.²³⁵

Refusing to allow transgender athletes to join the team that corresponds with their gender identity is not justifiable differential treatment. The Trump administration’s reasoning is not supported based on the science, as well as the fact that the number of transgender students is very small, and fundamentally not all of these individuals will necessarily wish to participate in sports.²³⁶ Only 0.7%–1.6% of adolescents identify as transgender in the United States.²³⁷ Even if gender-based classifications are maintained in sports, transgender female athletes will not be able to dominate the girls’ programs and “deny [cisgender girls] an equal opportunity to compete in interscholastic events.”²³⁸

Athletic participation provides unique benefits for young individuals, and transgender student athletes should not be denied those benefits on the

234. Yasser & Block, *supra* note 185, at 29.

235. *Id.* at 32.

236. Kari Oakes, *Hormones taken by transgender female teens affect fat levels, muscle mass*, MDEdge (Mar. 26, 2019), <https://www.mdedge.com/endocrinology/article/197471/transgender-health/hormones-taken-transgender-female-teens-affect-fat> [HTTPS://PERMA.CC/UN86-MZN3]; NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 16, at 7.

237. Oakes, *supra* note 236.

238. O’Connor v. Bd. of Educ., 449 U.S. 1301, 1307 (1980) (Stevens, J., vacate stay denied).

basis of their gender identity.²³⁹ Young men and women develop their identity in their teens and twenties, particularly during high school and college,²⁴⁰ and gender is a core part of one's identity.²⁴¹ Forcing transgender students to suppress their gender, whether in athletics or otherwise, will negatively impact their lives and social abilities.²⁴²

However, some scholars believe allowing transgender individuals' participation in sports is not the right solution.²⁴³ One scholar agrees that reading gender identity into the term "sex" could produce important benefits for transgender individuals, but argues that despite these benefits, allowing transgender individuals to participate on the team that corresponds to his or her gender identity will impede the success of competitive sport's institutional goals.²⁴⁴ The same scholar goes on to state that reading gender identity into "sex" "would be a costly exchange[,]" and therefore, "the question is ultimately whether, on balance, the case for respecting identity outweighs the case for respecting biology."²⁴⁵

As the Third Circuit recently proclaimed, there can be "no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."²⁴⁶ Transgender individuals have been relentlessly marginalized throughout history.²⁴⁷ The transgender community is "associated with high levels of stigmatization, discrimination and victimization, contributing to negative self-image and increased rates of other mental

239. Yasser & Block, *supra* note 185, at 28–29.

240. See Monique Verhoeven et al., *The Role of School in Adolescents' Identity Development. A Literature Review*, 31 EDUC. PSYCHOL. REV. 35, 35–63 (2018).

241. NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 16, at 5.

242. *Id.* at 7.

243. Coleman, *supra* note 32, at 63; Ray D. Hacke, "Girls Will be Boys, and Boys Will be Girls": The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools That Want to Keep Their Playing Fields Level - For Athletes of Both Genders, 18 TEX. REV. ENT. & SPORTS L. 131, 152–53 (2018).

244. Coleman, *supra* note 32, at 111.

245. *Id.*

246. Doe by & through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 528 (3d Cir. 2018).

247. Coleman, *supra* note 32, at 102.

disorders.”²⁴⁸ To alter that trend, a policy that recognizes and accepts transgender athletes—from the adolescent stages—as having the same opportunities as cisgender athletes, could help deter the stigma associated with identifying as transgender. Transgender individuals must be enabled to grow up and express themselves in the way they choose, including in the realm of sports. Given the established benefits of physical activity and sport for youths, athletic inclusivity is necessary.²⁴⁹ This is especially important for transgender students because of the historical marginalization these individuals have suffered and the high risk that they will continue to be marginalized.

Sports present a unique challenge to courts and lawmakers. In determining how to create or construe the law, they must “balanc[e] the need for equal access [to opportunities] with concerns . . . [about] unfair competitive advantage.”²⁵⁰ This intention does not in itself require sports to be perfectly fair. A competitive advantage always exists, whether due to an athlete’s longer arms for swimming, or a height advantage in basketball. The door for opportunity simply needs to remain open to everyone. Moreover, concerns about safety and fairness in high school and college sports are not enough to justify discrimination against transgender student athletes.²⁵¹ The balancing of need for equal access with concerns about fairness clearly tips in favor of civil rights protections for transgender students. The threat these individuals present to fairness in sports is, as demonstrated above, substantially overblown. Therefore, transgender athletes should be able to participate on the sports team that matches their gender identity.

V. HOW THE GOVERNMENT SHOULD SOLVE THE UNCERTAINTY SURROUNDING THE RIGHTS OF TRANSGENDER STUDENT ATHLETES

Students who have medically transitioned through surgery or hormone use should be allowed to participate on the sports team that corresponds with their gender identity. Emerging medical research reveals that post-transition transgender women have no competitive advantage over cisgender

248. *Id.*

249. *See* Jones et al., *supra* note 183, at 714.

250. Burns, *supra* note 177.

251. Thomas R. Smith, *Not Throwing in the Towel: Challenging Exclusive Interscholastic Transgender Athletic Policies Under Title IX*, 24 JEFFREY S. MOORAD SPORTS L.J. 309, 342 (2017).

women.²⁵² However, even without medically transitioning, transgender student athletes should be able to participate on the sports team that corresponds with their gender identity. Even if these individuals do have a competitive advantage, this is a reasonable price to pay because transgender individuals' interests in equality will not fundamentally alter the sex equality benefits that are derived from having sex-segregated teams because there are so few of these individuals. They should have the choice to compete on the team that corresponds with their gender identity by qualifying on the basis of ability, not genetic assignment at birth. Often, individuals incorrectly apply a causation effect to the world of sports. If you are tall, you must be good at basketball. Likewise, if you are fast, you must run track or cross country. However, physical features mean nothing if the athlete does not have the skill, knowledge, and training to be competitive. The winner of two equally quick runners, one of whom is cisgender and the other transgender, will turn on who has the longer strides, knows how to carry his or her arms with the wind, knows when to pace themselves, understands the appropriate breathing habits, understands when to accelerate and when to not, pays attention to the clock, and more.

It may seem as though the fairest solution would be to require transgender female athletes in high school and college to medically transition—either surgically or with hormones—to lower their testosterone levels before allowing them to participate with other athletes of their gender. However, in *Lusardi v. McHugh*, the Equal Employment Opportunity Commission ruled that “[a]n agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.”²⁵³ Therefore, it may be held unconstitutional for a school to require transgender student athletes to medically transition in order to participate on the sports team that corresponds with the student’s gender identity. Thus, forcing students to medically transition to participate on sports teams would likely be impermissible under Title IX. Although courts are just beginning to address discrimination claims by transgender students under Title IX, they should allow them as per se discrimination claims.²⁵⁴

252. Petrow, *supra* note 232.

253. *Lusardi v. McHugh*, 2015 EEOPUB LEXIS 896, at *20–21 (Apr. 1, 2015).

254. Kimmel, *supra* note 169, at 2027–30.

Congress can directly support the civil rights of transgender individuals through a number of actions. First, Congress could amend the language of Title IX to specifically include transgender individuals. For example, the amended statute could read: “No person in the United States shall, on the basis of sex, *including biological sex, sexual orientation, gender, and gender identity*, 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.” It could also pass independent legislation that creates the same result. This could include passing the proposed Student Non-Discrimination Act of 2015,²⁵⁵ which was reintroduced in Congress in 2018.²⁵⁶ This legislation would protect LGBTQ students from discrimination in their schools.²⁵⁷ Because of the ambiguity of Title IX’s protections as written, this Act would function as a clarification of the scope of the statute, explicitly stating that transgender individuals are protected. Section 4(a) states that:

No student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.²⁵⁸

It is modeled on Title IX, but would explicitly protect transgender individuals who choose to participate in any activities a school offers, including using a particular bathroom or choosing to join a specific sports team.

Regardless of whether Title IX gets clarified or revised, schools should also adopt their own policies allowing transgender students to participate on sports teams that correspond to their gender identity. Individual school boards should enact policies to protect transgender students even beyond athletic participation, including the choice of which locker room or bathroom to

255. Student Non-Discrimination Act, S. 439, 114th Cong. § 4(a) (2015).

256. Jennifer Pike Bailey, *Student Non-Discrimination Act Reintroduced in Congress*, HUMAN RIGHTS CAMPAIGN (Mar. 21, 2018), <https://www.hrc.org/blog/student-non-discrimination-act-reintroduced-in-congress> [<https://perma.cc/RU9N-DS6E>].

257. *Id.*

258. S. 439 § 4(a).

use, by roundly prohibiting sexual orientation and gender identity discrimination in their school facilities.

VI. CONCLUSION

The interpretation of “sex” under Title IX should be readopted as defined by the Obama administration to mean that transgender high school and college athletes cannot be prohibited from playing on the sports team that corresponds with their gender identity. This reading is consistent with several court rulings on Title VII’s interpretation of “sex,” which courts have applied to Title IX causes of action, as well as the few Title IX rulings on the subject. Limiting the definition of ‘sex’ to biological sex abridges transgender individuals’ civil rights. Concerns about safety and fairness do not justify this abridgement.²⁵⁹

Courts should hold that discrimination against transgender student athletes is unlawful under Title IX because sex discrimination is a form of gender discrimination, as courts and scholars have continued to acknowledge. Supporting this interpretation and enacting inclusive policies for transgender student athletes can help create and foster support for transgender youth, working to erase the stigma associated with identifying as transgender.²⁶⁰ Title IX was designed to protect civil rights in the manner described in this Article, and courts across the country are acknowledging this fact.²⁶¹ Clarifying the inclusivity of Title IX, however, must come from the government to dispel all doubt that federal law protects transgender rights.

259. See Smith, *supra* note 251, at 342.

260. *Id.* at 349.

261. See Section III. A. 3.