



7-1-2023

You Can't Play With Us: Fifty- Year Anniversary of Title IX Marred by Trend of Anti Transgender Inclusion Acts

Samantha Gill

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Samantha Gill, *You Can't Play With Us: Fifty- Year Anniversary of Title IX Marred by Trend of Anti Transgender Inclusion Acts*, 30 Jeffrey S. Moorad Sports L.J. 365 (2023).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol30/iss2/5>

This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

YOU CAN'T PLAY WITH US: FIFTY-YEAR ANNIVERSARY OF
TITLE IX MARRED BY TREND OF ANTI
TRANSGENDER INCLUSION ACTS

I. INTRODUCTION: CELEBRATING FIFTY YEARS OF TITLE IX

Fifty years ago, President Nixon signed the Education Amendments of 1972 into law and, through Title IX of these Amendments, changed the trajectory of women's sports in the United States.¹ Title IX reads, “[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.”² While not on their face applicable to sports, these thirty-seven words marked the beginning of considerable progress towards gender equality in sports.³

Noticeably missing from Title IX is a definition for its use of the word “sex.”⁴ This lack of clarity has caused considerable confusion over Title IX's applicability to transgender athletes.⁵ Capitalizing on this confusion, legislation has been enacted nationwide prohibiting transgender athletes from participating in sports.⁶ However, following the Supreme Court's landmark decision in *Bostock v. Clayton*,⁷ there is precedent supporting the inclusion of gender identity within Title IX's meaning of sex.⁸

1. See Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (June 23, 2022), <https://www.history.com/news/title-nine-womens-sports> [<https://perma.cc/D3LD-A77M>] (analyzing history of Title IX and its impact on women in sports).

2. See 20 U.S.C. § 1681(a) (prohibiting sex-based discrimination in education).

3. See Beth A. Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Equal Funding to Women in Sports*, WORLD ECON. F. (Aug. 25, 2016), <https://www.weforum.org/agenda/2016/08/sustaining-the-olympic-legacy-women-in-sports-and-public-policy> [<https://perma.cc/HP9W-HZ3Y>] (“Since 1972, thanks to increased funding and institutional opportunities [under Title IX], there has been a 545% increase in the percentage of women playing college sports and a 990% increase in the percentage of women playing high school sports.”).

4. See Kathleen Comerford, *Put Me in, Coach!: How Title IX Should Regulate Transgender Female Athletes*, 52 SETON HALL L. REV. 869, 882 (2022) (noting Title IX's failure to define sex-based discrimination).

5. For further discussion of the confusion surrounding Title IX's applicability to transgender athletes, see *infra* notes 81–87 and accompanying text.

6. For further discussion of the legislation prohibiting transgender athletes from participating in sports, see *infra* notes 137–143 and accompanying text.

7. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).

8. See Comerford, *supra* note 4, at 882 (recognizing that *Bostock* provides precedent for Title IX to prohibit discrimination on basis of gender identity). For

In honor of Title IX's fiftieth anniversary, Section II of this Comment examines the progress toward gender equality that has been made in both education and sports during the past fifty years.⁹ It then discusses the history of the meaning of sex under Title IX and the implications of its meaning on transgender athletes' participation in sports.¹⁰ Section II closes with a discussion on the Supreme Court's decision in *Bostock*, the potential impact this holding might have on Title IX, and current cases considering similar issues to that in *Bostock*.¹¹

In Section III, this Comment explores the current legislation and rules governing transgender participation in athletics.¹² It suggests that going forward, any policy decisions regarding transgender participation in sports should favor transgender inclusion due to its positive impact on the mental health and development of transgender youth.¹³ Finally, Section III ends with the suggestion that, in light of *Bostock*, preventing transgender athletes from participating on the sports teams that correspond with their gender identities would violate Title IX and predicts that the courts currently considering this issue will come to the same conclusion.¹⁴

further discussion on the precedent supporting the inclusion of gender identity within Title IX's meaning of sex, see *infra* notes 211–215 and accompanying text.

9. For further discussion of the progress towards gender equality made under Title IX, see *infra* notes 15–78 and accompanying text.

10. For further discussion of the history of the meaning of sex under Title IX and its impact on transgender athletes, see *infra* notes 88–98 and accompanying text.

11. For further discussion of the facts and analysis of *Bostock v. Clayton County*, see *infra* notes 99–114 and accompanying text. For further discussion of *Bostock's* impact, see *infra* notes 115–120 and accompanying text. For further discussion of the current cases considering a similar issue to that considered in *Bostock*, see *infra* notes 123–133 and accompanying text.

12. For further discussion of the current legislation and rules governing transgender participation in athletics, see *infra* notes 137–175 and accompanying text.

13. For further discussion of why this Comment suggests policy decisions should be made in favor of transgender participation, see *infra* notes 190–210 and accompanying text.

14. For further discussion of why this Comment suggests the exclusion of transgender athletes from sports is a violation of Title IX, see *infra* notes 211–218 and accompanying text. For further discussion of why this Comment predicts the pending court cases will also hold the exclusion of transgender athletes from sports is a violation of Title IX, see *infra* notes 220–226 and accompanying text.

II. UNDERSTANDING THE GAME: THE HISTORY OF GENDER DISCRIMINATION AND TITLE IX

When President Nixon signed Title IX into law, many barriers prevented women from progressing and succeeding in society.¹⁵ Although the Civil Rights Act of 1964 purported to eliminate discrimination, it only prohibited discrimination based on sex in Title VII, which is limited to employment.¹⁶ As a result, the discrimination and unequal treatment of women in education, including athletics, continued unchecked.¹⁷

A. Before Title IX

Before the passage of Title IX, women were often subjected to unequal treatment within the realm of education.¹⁸ At the collegiate level, some educational institutions completely prohibited women from attending or only accepted the limited number of women needed to fulfill the school's quota.¹⁹ Even when higher education institutions admitted women, they were often prevented from taking certain courses or entering fields of study that were thought to be suitable for males only.²⁰ The women who managed to receive higher education and chose to remain in the field of education as professors were often denied tenure or the opportunity to be hired as professors.²¹

In addition to discrimination in education, women also faced considerable discrimination in athletics prior to Title IX.²² At the collegiate level, the women's athletic programs, if they existed, were not funded on the same level as the men's athletic programs.²³ Per-

15. See Pruitt, *supra* note 1 (discussing women's place in society before enactment of Title IX).

16. See *Civil Rights Act of 1964*, HISTORY (Jan. 10, 2023), <https://www.history.com/topics/black-history/civil-rights-act> [https://perma.cc/K8JB-L74K] (reporting how Civil Rights Act of 1964 banned employment discrimination on "the basis of race, color, religion, sex or national origin").

17. See Pruitt, *supra* note 1 (recounting issues women faced in 1970s despite passage of Civil Rights Act in 1964).

18. See *id.* (detailing gender discrimination women faced in education).

19. See *id.* (describing discriminatory treatment of women by colleges and universities during 1970s).

20. See *id.* (specifying that women were barred from courses or fields of study, including "everything from wood shop and calculus to criminal justice, law and medicine").

21. See *id.* (recounting how U.S. colleges and universities "denied tenure to female professors, or refused to hire them at all").

22. See Ashley Rohleder-Webb, *50 Years of Title IX: So Much More Than Sports*, 91 J. KAN. B. ASS'N 30, 30-31 (June 2022) (discussing increase in number of women competing in sports from before Title IX to today).

23. See *id.* at 30 (describing inequality between men and women's sports).

haps due to this lack of funding, the number of women competing in intercollegiate sports paled compared to the number of men competing.²⁴ Similarly, the number of girls that competed in high school sports was markedly less than the number of boys that competed.²⁵ For example, in the year before the enactment of Title IX, nearly four million students participated in high school sports.²⁶ Of these four million, less than 300,000 athletes were girls, while over three and a half-million were boys.²⁷ These clear inequalities led Congress to draft and eventually enact Title IX as part of the Education Amendments of 1972.²⁸

B. Title IX Over the Years

While the original text of Title IX remains unchanged, the case law, statutory changes, and regulations that followed its enactment changed Title IX's scope and impact.²⁹ The first major change to the impact of Title IX came in 1975 when the now-defunct U.S. Department of Health, Education, and Welfare ("HEW") issued regulations to effectuate the law.³⁰ With these regulations, Title IX compliance became mandatory three years after its enactment.³¹ However, once effectuated, years passed before Title IX became

24. See Brian L. Porto, *Unfinished Business: The Continuing Struggle For Equal Opportunity in College Sports on The Eve of Title IX's Fiftieth Anniversary*, 32 MARQ. SPORTS. L. REV. 259, 260 (2021) ("During the mid-1960s, only 15,000 women played intercollegiate sports, compared to 152,000 men.").

25. See Rohleder-Webb, *supra* note 22, at 30–31 (comparing statistics of women who participated in sports prior to Title IX with statistics of women who participate in sports today).

26. See *id.* (specifying number of students that competed in high school sports in 1971 to 1972).

27. See *id.* (illustrating large disparity in number of girls that competed in high school sports compared to number of boys that competed).

28. See Sabrina McKenna & Jennifer Rose, *Fifty Years of Title IX*, 26 HAW. B.J. 4, 6 (May 2022) (discussing purpose behind drafting of Title IX).

29. See *id.* (providing overview of Title IX's "history, evolution, and impact").

30. See Rohleder-Webb, *supra* note 22, at 33 (describing history of Title IX regulations); see also *United States Department of Health, Education and Welfare Records*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.jfklibrary.org/asset-viewer/archives/USDHEW#:~:text=The%20department%20was%20abolished%20by,of%20Health%20and%20Human%20Services> [https://perma.cc/8Y8P-29GF] (last visited Nov. 6, 2022) (explaining that HEW "was abolished by the Department of Education Organization Act . . . and was split into the Department of Education and the Department of Health and Human Services").

31. See 34 C.F.R § 106.1 (2020) ("The purpose of this part is to effectuate title IX of the Education Amendments of 1972 . . . The effective date of this part shall be July 21, 1975.").

what it is recognized as today: a champion of equality in the sphere of women's athletics.³²

1. *Application to Education*

When drafting Title IX, Congress sought to extend the 1964 Civil Right Act's prohibition on discrimination, including sex discrimination in higher education.³³ However, when Title IX was enacted, its language limited its applicability only to those "education program[s] or activit[ies] receiving Federal financial assistance."³⁴ Since athletics were viewed as part of education, Title IX was initially perceived to encompass schools' athletic programs until the Supreme Court's 1984 decision in *Grove City v. Bell*³⁵ severely limited Title IX's application to sports.³⁶

In *Grove City*, a private college consistently refused both state and federal funding in order "to preserve its institutional autonomy."³⁷ However, while the college itself refused federal financial assistance, it allowed its students to receive Basic Educational Opportunity Grants ("BEOGs") from the Department of Education ("DOE").³⁸ This led the DOE to conclude that, according to the regulations effectuating Title IX, the college was receiving federal financial aid.³⁹ As a result, the DOE requested that the college certify its compliance with Title IX.⁴⁰ When the college refused to do

32. See Rohleder-Webb, *supra* note 22, at 34 (characterizing Title IX as "the girls' and women's sports law").

33. See McKenna & Rose, *supra* note 28, at 6 (referencing intent of Senators who helped draft Title IX).

34. See 20 U.S.C. § 1681(a) (narrowing scope of Title IX to only those educational institutions that receive federal funding) (emphasis added).

35. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

36. See Kelsey Henderson, Ida Adibi, Emma D'Arpino, Lillian Tianyi Pang, Sophie Rebeil, Arielle Schechtman & Elan Wilkenfeld, *Athletics & Title IX of the 1972 Education Amendments*, 23 GEO. J. GENDER & L. 135, 136 (2022) ("[P]rior to the passage of [Title IX], athletics were recognized as a part of the educational process"); *Grove City*, 465 U.S. at 573 (construing Title IX narrowly to only apply to programs that receive direct federal financial assistance).

37. See *Grove City*, 465 U.S. at 559 (describing college's reasoning behind its refusal to accept either state or federal funding).

38. See *id.* (describing how college made up for its decision not to directly receive federal funding by enrolling large number of students who receive BEOGs).

39. See *id.* at 560 (quoting 34 C.F.R. §§ 106.2(g)(1), (h) (1982)) (concluding college "was a 'recipient' of 'Federal financial assistance' as those terms are defined in the regulations implementing Title IX").

40. See *id.* (stating that DOE "requested that the College execute the Assurance of Compliance"); see also Rohleder-Webb, *supra* note 22, at 36 (explaining that DOE found college was not Title IX compliant).

so, the DOE terminated the students' BEOGs and the college filed suit against the Secretary of Education.⁴¹

One of the key issues the Supreme Court considered in *Grove City* was whether receiving federal funding through BEOGs meant that the entire college must be compliant with Title IX or if merely the specific programs and activities that received the federal funding must be Title IX compliant.⁴² The Supreme Court resolved this issue by holding that only those programs or activities that receive federal funding may be regulated under Title IX.⁴³ Put differently, under *Grove City*, a school's programs and activities that did not receive direct federal financial assistance, such as the schools' athletics programs, did not have to be Title IX compliant.⁴⁴

2. *Application to Sports*

Since Congress had originally intended Title IX to apply only to higher education, athletics were not originally considered within Title IX's scope.⁴⁵ However, Title IX's potential impact on sports became apparent when Congress was inundated with requests that it exclude athletics from Title IX's scope.⁴⁶ While the Supreme Court's narrow holding in *Grove City* essentially did just that, Congress responded to the Court's decision by passing the Civil Rights Restoration Act of 1987 ("CRRRA") to expand Title IX's scope.⁴⁷ With the CRRRA, Congress overturned the *Grove City* decision and "amended Title IX to encompass all of the programs or activities of educational institutions that received *any* federal financial assistance."⁴⁸ Further, the CRRRA specified that Title IX does extend to

41. See *Grove City*, 465 U.S. at 561–63 (citation omitted *Grove City College v. Harris*, 500 F.Supp. 253 (1980)) (filing claim in District Court which ultimately decided BEOGs were federal financial aid but that DOE could not terminate aid to *Grove City* students due to school's failure to complete Assurance of Compliance).

42. See *id.* at 570–71 (considering whether "entire institutions are subject to the nondiscrimination provision whenever one of their programs receives federal assistance").

43. See *id.* at 573 ("We conclude that the receipt of BEOGs by some of [the college's] students does not trigger institution wide coverage under Title IX.").

44. See Rohleder-Webb, *supra* note 22, at 36 (discussing impact of *Grove City* decision on athletics).

45. See *id.* at 34 (debating how Title IX became known as sports law). For a further discussion of Congress's intent when drafting Title IX, see *supra* note 28 and accompanying text.

46. See McKenna & Rose, *supra* note 28, at 8 (recounting concerns over Title IX's impact on men's athletics programs).

47. See Henderson et al., *supra* note 36, at 140 (describing Congress's reaction to *Grove City* decision).

48. See *id.* (explaining effect of CRRRA on Title IX's scope); see also McKenna & Rose, *supra* note 28, at 9 (clarifying that, under CRRRA, "if any part of an educa-

a school's athletic programs if the school receives any federal funding.⁴⁹

3. *Title IX Compliance*

Per HEW's 1975 regulations effectuating Title IX, educational institutions were required to "(1) offer male and female students equal opportunities to participate in sports; (2) allocate athletic scholarship dollars equitably; and (3) treat male and female students equitably in all aspects of athletics."⁵⁰ In 1979, the Office of Civil Rights ("OCR"), the office within the DOE responsible for enforcing Title IX, issued a Policy Interpretation to resolve confusion over the 1975 regulations.⁵¹ Included in the 1979 Policy Interpretation was a three-prong test intended to clarify the requirements for offering male and female students equal opportunities to participate in sports, as required by the 1975 regulations.⁵² This three-prong test requires a school to have: "(1) athletic participation opportunities provided for male and female students [that] are 'substantially proportionate' to their respective enrollment, (2) a history and continuing practice of expanding athletic opportunities for the underrepresented sex, or (3) 'full and effective' accommodation of the interests and abilities of the underrepresented sex."⁵³ Under this test, a school must demonstrate that it conforms with at least one of these three prongs to comply with Title IX.⁵⁴

In 1998, the OCR interpreted the substantially proportionate requirement in the first part of the 1979 Policy Interpretation's three-prong test.⁵⁵ This requirement mandates that a school's scholarship budget for intercollegiate athletics be "substantially

tional institution receives federal funds, all of its programs and activities must comply with Title IX") (emphasis added).

49. See Henderson et al., *supra* note 36, at 140 (erasing any doubt as to whether Title IX's scope included schools' athletic programs).

50. See McKenna & Rose, *supra* note 28, at 8 (detailing Title IX's requirements "governing athletics").

51. See Rohleder-Webb, *supra* note 22, at 35 (describing how "OCR offered additional guidance related to intercollegiate athletics in a 1979 Policy Interpretation").

52. See McKenna & Rose, *supra* note 28, at 8 (reporting that this three-prong test has itself been clarified several times). For further discussion of the 1975 regulations, see *supra* note 50 and accompanying text.

53. See Henderson et al., *supra* note 36, at 149 (describing three ways school can demonstrate its compliance with Title IX).

54. See *id.* ("To defend a Title IX claim, a school must show that its athletic program conforms with at least one element of the . . . three-part test.").

55. See Rohleder-Webb, *supra* note 22, at 35 (explaining that OCR's 1998 interpretation was in response to twenty-five complaints made to OCR reporting confusion over substantially proportionate requirement).

proportionate' to the participation rates of male and female students."⁵⁶ To meet this requirement, the OCR's 1998 interpretation specified that "colleges' and universities' athletic scholarship budgets must be within one percent of the percentage of participants of each sex."⁵⁷ Today, this requirement applies beyond a school's athletic scholarship budget and requires schools to show that the percentage of women varsity athletes at the school is substantially proportionate to the percentage of women undergraduate students.⁵⁸

C. Progress Towards Gender Equality Under Title IX

1. *Progress in Sports*

Title IX's enactment dramatically increased the athletic opportunities available to girls and women.⁵⁹ In fact, even the mere discussion of a law like Title IX caused the number of women participating in college athletics to double.⁶⁰ This number doubled again over the next five years as Title IX regulations were proposed, adopted, and promulgated.⁶¹ Impressively, as of 2016, the number of women competing in college sports increased by 545%, and the number of women competing in high school sports increased by 990% since Title IX's enactment in 1972.⁶²

This major increase in women's participation in sports has led to a rise in the competitiveness of women's athletic teams, which has, in turn, led to an increase in women's success in sports.⁶³ This

56. *See id.* (reiterating substantially proportionate requirement from OCR's 1979 regulation).

57. *See id.* (providing example that "[w]here 60% of the school's athletes are male, 59%-61% of scholarship funds must be available to men, and the remaining to women").

58. *See Porto, supra* note 24, at 260 (explaining that today, institutions regularly fail to be in compliance with this substantial proportionality test as there is "twelve-point gap . . . between the percentages of women students and women athletes").

59. *See id.* (describing how Title IX's "legal nudge" combined with "Americans' cultural affinity for college sports" has led to this increase in athletic opportunities for girls and women); *see also* Rohleder-Webb, *supra* note 22, at 30 (reporting that Title IX's "impact in athletics [was] undeniable and . . . noticeable almost immediately").

60. *See Porto, supra* note 24, at 260 ("By 1972, as Title IX was being discussed and enacted, the number of women college athletes had doubled to 30,000 . . .").

61. *See id.* (recounting how number of girls and women participating in athletics increased from 30,000 in 1972 to 63,000 by 1977).

62. *See Brooke-Marciniak & de Varona, supra* note 3 (reporting major difference in women's participation in sports that has been made under Title IX).

63. *See* Bill Plaschke, *American Women Are Dominating The Games, And it Didn't Happen by Accident*, L.A. TIMES (Aug. 16, 2016, 6:05 PM), <https://www.latimes.com/sports/la-sp-oly-women-plaschke-20160816-snap-story.html> [<https://perma.cc/>

success is reflected in the historic number of women that have competed on the United States' Olympic Teams at the past three Olympics.⁶⁴ At the 2012 London Olympics, the United States' team comprised 268 women and 262 men.⁶⁵ Similarly, at the 2016 Rio de Janeiro Olympics, the United States had 292 women and only 263 men competing.⁶⁶ Most recently, at the 2020 Olympics in Tokyo, the United States' team again boasted a historic number of women, with 329 women and 284 men competing.⁶⁷ Comparatively, the 1972 United States Olympic team consisted of 428 athletes, of which only ninety were women.⁶⁸

2. *Progress Outside of Sports*

The impressive progress towards equality in sports is mirrored by the increase of women in higher education.⁶⁹ In 1972, only forty-two percent of those who graduated with a college degree were women.⁷⁰ As of 2017, however, fifty-four percent of undergraduate students in the United States are women.⁷¹ This growth is reflected in statistics from 2019 reporting that women made up

92BD-NCEX] (“Forty-four years after the landmark passage of Title IX, which prohibits discrimination against females in all areas of federally funded education including sports, American women’s athletics is indeed no longer just about participation, it’s about championships.”).

64. See Alex Azzi, *U.S. Olympic Team For Tokyo Features Record Number of Women*, NBC SPORTS (July 13, 2021), <https://onherturf.nbcsports.com/2021/07/13/u-s-olympic-team-for-tokyo-features-record-number-of-women/> [https://perma.cc/3GAW-289Q] (reporting on historic numbers of women that have been competing on United States' Olympic teams).

65. See *id.* (recounting number of women on United States Olympic team in London).

66. See *id.* (recounting number of women on United States Olympic team in Rio de Janeiro).

67. See *id.* (“The 329-woman U.S. Olympic roster also breaks the record for most women to represent a nation at a single Games. The previous record (291) was set by the U.S. at the 2016 Rio Games.”). See generally Christian Ortega, *Here’s Why ‘Tokyo 2020’ Remains Official Name For This Year’s Summer Olympics*, USA TODAY (July 25, 2021, 11:36 PM), <https://www.usatoday.com/story/sports/olympics/2021/07/24/tokyo-2020-official-summer-olympics-name-year-2021/8072187002/> [https://perma.cc/LJ3M-KCU9] (discussing how Tokyo 2020 Olympics were held in 2021 due to COVID-19 pandemic in 2020).

68. See Plaschke, *supra* note 63 (comparing numbers of women competing on U.S. Olympic team today to number of women that competed on U.S. Olympic team in year Title IX was passed).

69. See Porto, *supra* note 24, at 260 (discussing Title IX’s impact on women in higher education).

70. See Rohleder-Webb, *supra* note 22, at 30–31 (2022) (defining “college degree” to include associate, bachelor, master, and doctorate degrees).

71. See Porto, *supra* note 24, at 260 (predicting that percentage of women in college will continue to increase nationwide).

fifty-nine percent of people that graduated with a degree that year.⁷²

The passage of Title IX also caused an increase in the number of women in “the professions.”⁷³ To illustrate, in 1930, women comprised only fourteen percent of those in the professions.⁷⁴ By 1950, however, this percentage had dropped to below eleven percent.⁷⁵ Following this drop, it took until the 1970s for the number of women in the professions to increase back to the fourteen percent it had been in 1930.⁷⁶ In contrast, by 2014, the number of women in the professions had increased to forty-seven percent.⁷⁷ This impressive increase can be attributed to Title IX and the other laws protecting against sex discrimination.⁷⁸ However, while the progress towards gender equality made in sports, education, and the professions during the past fifty years is undeniable, “the play-

72. See Rohleder-Webb, *supra* note 22, at 30 (discussing improvement in number of women in higher education under Title IX).

73. See *id.* at 31 (defining “the professions” to include “law, the judiciary, medicine, dentistry, architecture, ministry, science, and university teaching”). Today, while the number of women in the professions has greatly improved since the early 1900s, it is undeniable that there remains room for improvement in this area, particularly when it comes to women in leadership positions. See Elan Kirshenbaum, *Twenty Yards From the End Zone: ADR, and the Potential for Greater Levels of Gender Equality in Professional Sports Employment*, 23 CARDOZO J. CONFLICT RESOL. 385, 388 (2022) (noting that while women have narrowed gap between men and women in labor participation, there is still a large gap between men and women in leadership positions). Specifically:

48.5% of associates in law firms are women, but this figure drops to 23.3% when gauging the number of female equity partners. Further, 40% of all physicians and surgeons are women, but only 16% of permanent medical school deans are women. Overall, women capture a paltry share of the top corporate leadership positions in the United States. Women lead just 167 of the country’s top 3,000 companies (5.56%), and women serve as CEOs in only forty-one of the Fortune 500 companies (8.2%).

See *id.* (citations omitted) (providing example of gap between men and women in leadership roles within professions). For further discussion of the progress made in the number of women in the professions, see *infra* notes 74–78 and accompanying text.

74. See Rohleder-Webb, *supra* note 22, at 31 (comparing number of women in professions prior to Title IX to those in professions after enactment of Title IX).

75. See *id.* (“This percentage dropped to just under 11% in 1950, due to forces like the Great Depression changing employment . . .”).

76. See *id.* (recounting how, after drop from fourteen percent to below eleven percent, “it would take until 1970 for women to again attain that level of representation in the professions”).

77. See *id.* (discussing increase in percentage of women in professions).

78. See *id.* (contrasting how it took twenty years, from 1950 to 1970, for percentage of women in professions to increase roughly four percent while it took only about forty years, from 1970s to 2014, for percentage to increase thirty-three percent following passage of Title IX).

ing field is still not entirely level” when it comes to individuals that identify as transgender.⁷⁹

D. The History of Title IX’s Application to Transgender Athletes

1. *Understanding the Meaning of Sex Within Title IX*

The purpose of Title IX is to prohibit discrimination based on sex.⁸⁰ However, the meaning of sex, as used in Title IX, has caused courts and individuals trouble, particularly with how sex relates to gender.⁸¹ While often used interchangeably, sex and gender do not mean the same thing.⁸² Sex refers to “a person’s biological status and is typically categorized as male, female, or intersex.”⁸³ Gender, in contrast, is defined as “the psychological and societal aspects of being male or female” and is often used when discussing gender identity, which is “a person’s internal sense of being male, female or something else.”⁸⁴ A person that identifies with the sex they were assigned at birth is referred to as cisgender, while a person that does not identify with the sex they were assigned at birth is referred to as transgender.⁸⁵ Unfortunately, the application of Title IX to people identifying as transgender is an area of great confu-

79. See Henderson et al., *supra* note 36, at 136 (describing how “Title IX’s protections have grown beyond discrimination against women” and now encompass all gender discrimination, including discrimination against transgender population).

80. For further discussion of Title IX’s use of the term sex, see *supra* note 2 and accompanying text.

81. See Comerford, *supra* note 4, at 873 (“Courts, as well as individuals, struggle to understand what ‘sex’ means and how it relates to gender, if at all.”).

82. See *id.* (clarifying difference between meaning of sex and meaning of gender).

83. See *id.* (quoting M. Psych. Ass’n, Definitions Related To Sexual Orientation And Gender Diversity In Apa Documents 1, 5 (2015)) (defining meaning of sex in order to understand Title IX’s prohibition of discrimination on basis of sex); see also Kelli Rodriguez Currie, *If You Build It, “They/Them” Will Come: The Misgendering of Transgender Nonbinary Athletes is Discrimination on the Basis of Sex*, 31 J. LEGAL ASPECTS SPORT 312, 314 (2021) (describing meaning of sex as “a word generally used to describe the biological aspects, such as chromosomes or genitalia, that differentiate males from females”).

84. See Currie, *supra* note 83, at 314 (using Black’s Law Dictionary to define gender); Comerford, *supra* note 4, at 873 (defining gender identity and positing that there have been “significant research developments regarding sex, specifically, as it relates to and informs gender identity” since passing of Title IX).

85. See Comerford, *supra* note 4, at 873–74 (explaining that “[a] transgender male is someone who identifies as male but was assigned the sex female at birth, and a transgender female is someone who identifies as female but was assigned the sex of male at birth”); see also Currie, *supra* note 83, at 315 (describing how some transgender individuals identify as nonbinary, meaning they identify as neither male nor female or, conversely, identify as both male and female).

sion because Title IX does not mention whether its prohibition on sex-based discrimination applies to transgender people.⁸⁶ While different presidential administrations have attempted to clarify this point, contradictory guidance from the Obama and Trump administrations only added to the confusion.⁸⁷

2. *Tracking the Various Interpretations of Sex Under Title IX*

Whether Title IX prohibits discrimination based on gender identity has elicited opposite answers from different presidential administrations.⁸⁸ Typically, an administration's stance on this issue varies greatly depending on which political party is in office.⁸⁹ Each administration's interpretation of Title IX is traditionally issued in the form of "Dear Colleague Letters" which are intended to serve as informal guidance letters and do not impose additional requirements onto the law.⁹⁰

In May 2016, the Obama administration issued a Dear Colleague Letter clarifying that it interpreted Title IX as prohibiting discrimination based on gender identity, which necessarily encompasses discrimination based on a student's transgender status.⁹¹ In February 2017, however, the Trump administration rescinded this inclusive policy.⁹² According to the Trump administration, the Obama administration's transgender-inclusive policy lacked any significant legal justification for why it interpreted Title IX as protec-

86. See Comerford, *supra* note 4, at 874 (describing this confusion as leaving transgender persons in serious need of protection against discrimination).

87. See *id.* (discussing part of what has contributed to confusion surrounding Title IX's applicability to transgender athletes).

88. See *id.* at 882 (reiterating issue leading to confusion on whether Title IX's protections apply to transgender athletes).

89. See Christopher M. Pardo & Katherine P. Sandberg, *Transgender Students and Sports: Title IX Compliance*, 39 No. 2 GPSOLO 66, 66 (2022) (noting that executive branch guidance regarding interpretation of Title IX changes depending on which party is in office).

90. See Comerford, *supra* note 4, at 875 (describing how Dear Colleague Letters have been used by presidential administrations to "provide [] guidance on either the inclusion or exclusion of transgender athletes").

91. See *id.* (explaining applicability of Title IX to transgender athletes under Obama's administration); see also James Casey Edwards, *Justifying the Margins: Granting Suspect Classification to Trans* Individuals in the U.S. Judicial System*, 55 UIC L. REV. 403, 409 (2022) ("Under the Obama Administration, an expanded interpretation of sex as inclusive of gender identity started to be recognized within Executive interpretations of Title VII and Title IX.").

92. See Comerford, *supra* note 4, at 876 (discussing how Trump administration's Dear Colleague Letter repealed Obama's policy which allowed for participation in sports based on gender identity).

tive against gender identity discrimination.⁹³ Further, the Trump administration believed that such a transgender-inclusive policy violated Title IX because it discriminated against cisgender women.⁹⁴

On his first day in office, President Biden effectively overturned the Trump administration's policy on excluding transgender participation in sports when he issued an Executive Order addressing the treatment of transgender athletes.⁹⁵ In section one of this order, Biden declared his administration is dedicated to preventing and combating discrimination based on gender identity.⁹⁶ He went on to order each governmental agency to review and amend their policies concerning transgender athletes' participation in sports to be consistent with this goal.⁹⁷ In March 2021, Biden issued another Executive Order that restated his policy to prohibit discrimination based on gender identity but targeted this order specifically at "educational environments."⁹⁸

E. *Bostock v. Clayton County*: Analysis and Impact

1. *Bostock's* Background and Disposition

In *Bostock*, the Supreme Court consolidated three cases, each alleging the same Title VII violation, into a single action.⁹⁹ The first case involved a gay man who had spent a decade working for a

93. *See id.* (referencing Trump administration's February 22, 2017 Dear Colleague Letter).

94. *See id.* at 876–77 (describing Trump administration's reasoning when it threatened to withhold millions of dollars of federal funding to Connecticut schools because Connecticut had policy allowing transgender athletes to compete on sports teams in accordance with their gender identities).

95. *See id.* at 882 ("While the Biden administration has yet to issue any Dear Colleague Letter or rulemakings on the inclusion of transgender athletes, President Biden signed an executive order on his first day in office indicating discrimination on the basis of sex included discrimination on the basis of gender identity.").

96. *See* Exec. Order No. 13988, 86 Fed. Reg. 7023 (2021) (stating that Biden administration's policy includes intent to fully enforce Title VII and other laws prohibiting discrimination based on gender identity); *see also* Comerford, *supra* note 4, at 882 (suggesting that Biden's Executive Order indicates Title IX's prohibition of discrimination on basis of sex encompasses discrimination based on gender identity).

97. *See* Exec. Order No. 13988, *supra* note 96 (continuing on to order each agency to consider how to implement statutes prohibiting discrimination on basis of gender identity or sexual orientation).

98. *See* Exec. Order No. 14021, 86 Fed. Reg. 13803 (2021) ("It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex . . . including discrimination on the basis of sexual orientation or gender identity.").

99. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020) ("Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or trans-

county in Georgia with no incident until he joined a recreational gay softball league.¹⁰⁰ Not long after joining this league, “he was fired for conduct ‘unbecoming’ a county employee.”¹⁰¹ In the second case, a skydiving instructor had worked with the same company for several seasons until he was fired just days after mentioning that he was gay.¹⁰² Finally, the third case concerned a transgender woman who had worked at a funeral home for six years presenting as a male.¹⁰³ Following a gender dysphoria diagnosis, the employee wrote a letter to her employer stating that she intended to transition to living full-time as a woman upon her return to work following an upcoming vacation.¹⁰⁴ However, before the employee left on vacation, she was fired by her employer who informed her it would not work out.¹⁰⁵

Following their respective terminations, each employee brought suit against their former employers claiming that they had been unlawfully discriminated against on the basis of sex under Title VII.¹⁰⁶ Each case was brought in a different jurisdiction, and a circuit split resulted when the Eleventh Circuit reached a different result than the Second and Sixth Circuits when considering the same issue.¹⁰⁷ The Eleventh Circuit decided that Title VII did not

gender—and allegedly for no reason other than the employee’s homosexuality or transgender status.”).

100. *See id.* (describing employee as successful at his job working for county in Georgia, with county winning national awards under employee’s leadership).

101. *See id.* at 1738 (recounting how leading community members made disparaging comments about employee’s participation in gay softball league shortly before employee was fired from county job).

102. *See id.* (implying skydiving company had no major issues with employee during several seasons that employee worked there and only fired him once company found out employee was gay).

103. *See id.* (stating that employee had been experiencing feelings of despair and loneliness and sought help from professionals who diagnosed her with gender dysphoria).

104. *See id.* (discussing contents of letter employee wrote to funeral home); *see also* Rohleder-Webb, *supra* note 22, at 37 (clarifying that employee was diagnosed with gender dysphoria after working at funeral home for two years but did not decide to transition to living as woman until sixth year of employment). *See generally* *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (Aug. 2022), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/7UZX-EUEJ>] (defining gender dysphoria as “psychological distress that results from an incongruence between one’s sex assigned at birth and one’s gender identity”).

105. *See Bostock*, 140 S. Ct. at 1738 (describing employer’s reaction to finding out biologically male employee was transitioning to living as woman).

106. *See id.* (specifying claims made against employers).

107. *See id.* (describing how Eleventh Circuit heard Georgia county employee’s case while Second Circuit heard skydiving instructor’s case and Sixth Circuit heard funeral employee’s case); *see also* Comerford, *supra* note 4 (reframing issue as “whether ‘sex’ includes ‘gender identity’”).

prohibit employers from firing employees due to their sexual orientation and dismissed the case.¹⁰⁸ The Second and Sixth Circuits reached the opposite conclusion and held that Title VII does prohibit employers from firing employees because of their sexual orientation.¹⁰⁹ The Supreme Court granted certiorari on these cases to resolve this circuit split.¹¹⁰ Ultimately, the Court sided with the Second and Sixth Circuits and held that the plaintiffs were unlawfully discriminated against based on sex in violation of Title VII.¹¹¹

The Court reasoned that while sex only refers to the biological differences between males and females, the language of Title VII “prohibits employers from taking certain actions ‘because of sex.’”¹¹² Thus, the Court concluded that “an employer who intentionally treats a person worse *because of sex*—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.”¹¹³ In other words, if sex was one “but-for cause” of the employer’s decision to fire an employee, “that is enough to trigger” a Title VII violation.¹¹⁴

2. *Bostock’s Impact*

As Title VII and Title IX are “inextricably linked,” the impact of *Bostock’s* unprecedented holding and its implications on Title IX became immediately apparent.¹¹⁵ Recognizing these potential implications, *Bostock’s* dissent predicted how the majority’s holding might be interpreted and applied to athletics:

108. *See Bostock*, 140 S. Ct. at 1738 (discussing decision Eleventh Circuit reached when considering county employee’s Title VII claim).

109. *See id.* (recounting how Second Circuit let skydiving instructor’s case proceed and Sixth Circuit’s holding after complex procedural history of funeral employee’s case).

110. *See Bostock*, 140 S. Ct. at 1738 (explaining how Court “granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII’s protections for homosexual and transgender persons”).

111. *See id.* at 1754 (affirming judgment of Second and Sixth Circuits and reversing judgment of Eleventh Circuit).

112. *See id.* at 1739 (describing but-for causation that results from Title VII’s ‘because of’ language, which “is established whenever a particular outcome would not have happened ‘but for’ the purported cause”).

113. *See id.* (explaining how “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex”) (emphasis added).

114. *See id.* (using but-for causation to conclude that termination due to person’s gender identity is discrimination on basis of sex in violation of Title VII).

115. *See Rohleder-Webb, supra* note 22, at 37 (discussing impact of *Bostock’s* holding). For further discussion of how Title VII and Title IX are linked, see *infra* notes 211–214 and accompanying text.

The effect of the Court’s reasoning may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male.¹¹⁶

OCR also recognized *Bostock*’s implications and revised its Title IX policies to align with *Bostock*’s holding.¹¹⁷ In June 2021, OCR issued a new Notice of Interpretation clarifying that, in light of *Bostock*, it would begin fully enforcing Title IX to prohibit discrimination on the basis of gender identity within education programs that receive federal financial assistance.¹¹⁸ Further, the interpretation clarifies that Title IX’s protections extend to persons excluded from participating in athletics and other extracurricular activities based on gender identities.¹¹⁹ While OCR did not hesitate to apply *Bostock*’s holding to Title IX, courts have been reluctant to do the same but have recently been forced to consider the issue by cases currently pending in the legal system.¹²⁰

116. See *Bostock*, 140 S. Ct. at 1779–80 (Alito dissent) (claiming in dissent that “one of [Title IX’s] major achievements, [namely] giving young women an equal opportunity to participate in sports” will be undermined by Court’s decision).

117. See Currie, *supra* note 83, at 326 (describing how OCR affirmatively adopted *Bostock*’s interpretation of sex).

118. See *id.* at 326–27 (reporting that OCR’s June 2021 interpretation was intended to “clarify the [DOE’s] enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX”); see also 86 Fed. Reg. 32637 (2021) (explaining that “courts rely on [the] interpretations of Title VII to inform interpretations of Title IX” as reasoning behind applying *Bostock*’s holding concerning interpretation of Title VII to language of Title IX).

119. See Currie, *supra* note 83, at 328 (explaining that OCR’s June 2021 “interpretation states clearly that Title IX prohibits discrimination, including being excluded from extracurricular opportunities, based on gender identity”); see also Rohleder-Webb, *supra* note 22, at 38 (2022) (discussing how, in response to OCR’s June 2021 interpretation, “20 states’ attorneys general, including Kansas’s and led by Tennessee’s, sued to [force] the Department of Education” to limit its interpretation of *Bostock* to only Title VII cases). In the initial complaint for this lawsuit, the states asked that the court hold *Bostock*’s interpretation unlawful and requested a preliminary injunction prohibiting the DOE from enforcing its new policy interpreting the meaning of sex under Title IX to include gender identity. See Complaint for Declaratory and Injunctive Relief, State of Tennessee, et al. v. U.S. Dep’t of Educ. et al., No. 3:21-cv-00308, 2021 WL 8314846 (E.D. Tenn. Aug. 30, 2021) (listing requests for relief).

120. For further discussion of the cases currently pending in the legal system, see *infra* notes 123–133 and accompanying text.

3. *Recent Cases Addressing Bostock's Applicability to Title IX*

*Soule v. Connecticut*¹²¹ and *Hecox v. Little*¹²² are pending cases that indirectly address the issue of whether *Bostock's* holding applies to Title IX.¹²³ In *Soule*, three cisgender high school athletes brought an action requesting a preliminary injunction prohibiting Connecticut from enforcing its transgender-inclusive participation law.¹²⁴ Through the preliminary injunction, these plaintiffs hoped to prevent transgender girls from competing in high school track events.¹²⁵ The plaintiffs' claim posits that Connecticut's law allowing transgender girls to compete against cisgender girls results in an unfair advantage for transgender girls in violation of Title IX.¹²⁶ To prove this claim, the plaintiffs argued that by allowing transgender girls to compete, Connecticut was "denying [cisgender girls] an opportunity to compete for places on the victory podium in violation of Title IX."¹²⁷ However, the District Court dismissed the case without addressing whether the state's transgender-inclusive participation policy violated Title IX.¹²⁸

121. *Soule by Stanescu v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021).

122. *Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020).

123. *See Henderson et al.*, *supra* note 36 at 158 ("*Hecox v. Little* and *Soule v. Connecticut* are both pending cases that both directly address the inclusion of transgender athletes at the college and high school level, respectively."); *see also Comerford*, *supra* note 4 (describing issues in *Soule* and *Hecox* as related because *Soule* questions "whether an inclusive transgender student-athlete policy in Connecticut violates Title IX" and *Hecox* questions "whether a restrictive transgender student-athlete policy in Idaho violates Title IX").

124. *See Soule*, 2021 WL 1617206, at *1 (explaining how cisgender athletes wished to "prevent transgender girls from competing in events scheduled to take place during [Connecticut's] . . . 2020 Spring Outdoor Track season").

125. *See id.* (describing how, in addition to state of Connecticut, two transgender girls that plaintiffs routinely competed against during Connecticut's high school track and field season were also named as defendants to this action).

126. *See id.* (discussing claims made by plaintiffs).

127. *See id.* (detailing complaint that alleges Connecticut's inclusive transgender participation policy "regularly result[s] in boys displacing girls in competitive track events in Connecticut" and excludes "specific and identifiable girls including Plaintiffs from honors, opportunities to compete at higher levels, and public recognition critical to college recruiting and scholarship opportunities that should go to these outstanding female athletes").

128. *See id.* at *10 (granting defendants' motion to dismiss on grounds that plaintiffs lacked standing to seek injunction enjoining enforcement of state's transgender inclusion policy and injunction to change defendants' records); *see also Soule by Stanescu v. Conn. Ass'n of Schs., Inc.*, 57 F.4th 43, 47 (2d Cir. Dec. 16, 2022) (affirming trial court's decision to dismiss case due to plaintiffs' lack of standing). However, the Second Circuit recently voted to reopen the case and hear the plaintiffs' appeal en banc. *See Soule by Stanescu v. Conn. Ass'n of Schs., Inc.*, No. 21-1365-cv (2d Cir. Feb. 13, 2023) (reinstating appeal).

The court in *Hecox* considered a similar issue to that in *Soule* when a transgender woman filed a lawsuit seeking a preliminary injunction to enjoin Idaho from enforcing its Fairness in Women's Sports Act, a law that prohibits transgender participation in sports.¹²⁹ In *Hecox*, a transgender woman intended to try out for the women's cross-country team at her university but was prevented by Idaho's Fairness in Women's Sports Act.¹³⁰ In response, she filed a lawsuit claiming that by barring transgender women from competing on the sports teams that align with their gender identity, the Fairness in Women's Sports Act violates Title IX by discriminating against transgender athletes based on sex.¹³¹ The *Hecox* court granted the transgender woman's request for a preliminary injunction in August 2020, preventing Idaho from enforcing its Fairness in Women's Sports Act.¹³² As of March 2023, the state's preliminary injunction appeal is pending before the Ninth Circuit Court of Appeals.¹³³

III. PREDICTING THE OUTCOME: ANALYZING THE CURRENT STATE AND FUTURE OF TRANSGENDER INCLUSION IN SPORTS

A. Transgender Inclusion Trends Outside of Title IX

While OCR requires educational institutions that receive federal funding to comply with its interpretations of Title IX, states and the governing bodies of athletic organizations are not subject to Title IX and often issue their laws and rules regarding transgender inclusion.¹³⁴ In recent years, there has been a trend of states passing legislation, frequently titled Fairness in Women's

129. See *Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020) (discussing transgender woman's constitutional challenge to Idaho's law that prohibits transgender women athletes from competing on women's sports teams).

130. See *id.* at 946 (describing transgender woman as lifelong runner and explaining that she could not try out for her university's cross-country team due to Idaho's law, despite being qualified to compete under NCAA guidelines because she had "completed one year of hormone treatment").

131. See *id.* at 944 (characterizing issue before court as one that involves "the rights of all students to have complete access to educational opportunities, programs, and activities available at school").

132. See *id.* at 988 (recognizing decision to grant preliminary injunction "is likely to be controversial" but that "the Constitution must always prevail").

133. See generally Appellant's Opening Brief, *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 WL 6833367 (9th Cir. Nov. 12, 2020) (initiating appeals process to request reversal of District Court's decision to grant preliminary injunction).

134. For further discussion of why these athletic organizations are not subject to Title IX, see *supra* note 34 and accompanying text. For further discussion of the laws and rules of the states and athletic organizations, see *infra* notes 137-175 and accompanying text.

Sports Acts, that restrict the participation of transgender athletes.¹³⁵ Conversely, several governing bodies of athletic organizations, including the International Olympic Committee (“IOC”) and the National Collegiate Athletic Association (“NCAA”), have recently updated their rules on transgender participation to be more inclusive.¹³⁶

1. *Fairness in Women’s Sports Acts*

In March 2020, Idaho became the first state to pass a Fairness in Women’s Sports Act.¹³⁷ This law “explicitly bans students assigned male at birth from being on sports teams designated for women or girls.”¹³⁸ Since then, thirty-seven states have followed suit by proposing their own Fairness in Women’s Sports Acts, and twenty passed these Acts into law.¹³⁹ The applicability of these laws varies state-to-state by grade level, with some states applying these restrictions to kindergarten through twelfth grade and others limiting application to middle school and high school students.¹⁴⁰ Seven of these states also apply restrictions to students at the col-

135. For further discussion of the states’ Fairness in Women’s Sports Acts, see *infra* notes 137–146 and accompanying text.

136. See Comerford, *supra* note 4 (“[M]ajor athletic organizations, such as the National College Athletic Association (NCAA) and International Olympic Committee (IOC), have successfully implemented policies that include transgender athletes.”). For further discussion of the updated policies, see *infra* notes 149–175 and accompanying text.

137. See Adriana Rezal, *States Restricting How Transgender Students Play Sports*, U.S. NEWS & WORLD REPORT (Dec. 1, 2021), <https://www.usnews.com/news/best-states/articles/2021-12-01/these-states-restrict-how-transgender-students-participate-in-school-sports> [<http://web.archive.org/web/20230224014037/https://www.usnews.com/news/best-states/articles/2021-12-01/these-states-restrict-how-transgender-students-participate-in-school-sports>] (explaining trend of states passing Fairness In Women’s Sports Acts). *But see Hecox*, 479 F. Supp. at 988 (granting preliminary injunction to prevent Idaho from enforcing its Fairness in Women’s Sports Act).

138. See Rezal, *supra* note 137 (citing that reasoning behind this law is to prevent unfair athletic advantages between biological females and males, who have advantage of testosterone, competing in same sport).

139. See *id.* (reporting that as of November 2021, thirty-seven states have introduced legislation to restrict students to participating in school sports on basis of biological sex). See generally *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans [<https://perma.cc/T7VE-E9P6>] (last visited Apr. 7, 2023) (tracking number of states that ban transgender students from participating on sports teams consistent with their gender identities).

140. See Rezal, *supra* note 137 (distinguishing among states that have enacted Fairness in Women’s Sports Acts, reporting that “seven have guidelines that apply to public school students in grades K-12. In Florida, Tennessee, and West Virginia, however, the restrictions apply only to public middle schools and high schools”).

legiate level.¹⁴¹ Notably, a federal Fairness in Women's Sports Act is pending in the House of Representatives.¹⁴² If passed, this bill would end the debate on the meaning of sex under Title IX by expressly limiting its meaning to each person's gender assigned at birth.¹⁴³

While many states have either introduced or enacted Fairness in Women's Sports Acts, a number of states boast transgender-inclusive policies.¹⁴⁴ Of these inclusive states, fifteen states and Washington D.C. have enacted policies that allow transgender students to participate in school sports without requiring these students to medically or legally transition.¹⁴⁵ Other transgender-inclusive states either offer no guidance on transgender participation or have medical or legal transition requirements that transgender athletes must meet before they are able to participate.¹⁴⁶ This type of policy that limits a transgender athlete's ability to participate based on whether they have begun to medically or legally transition is reflected in the past policies of the IOC and NCAA.¹⁴⁷ However, these policies have since been updated to eliminate these medical and legal requirements.¹⁴⁸

141. *See id.* (identifying states that apply these restrictions at collegiate level to be Arkansas, Florida, Idaho, Mississippi, Minnesota, South Dakota, and West Virginia).

142. *See* Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118th Cong. (2023) (pending federal Fairness in Women's Sports Act).

143. *See id.* (describing aim of federal Fairness in Women's Sports Act).

144. *See* Shoshana K. Goldberg & Thee Santos, *Fact Sheet: The Importance of Sports Participation For Transgender Youth*, CTR. FOR AM. PROGRESS (Mar. 18, 2021), <https://www.americanprogress.org/article/fact-sheet-importance-sports-participation-transgender-youth/> [<https://perma.cc/2KW4-XHAY>] (discussing wide range of state policies on transgender participation in sports).

145. *See id.* (stating that these states are "together home to more than 6.8 million high school students and approximately 42 percent of transgender high school-age youth") (internal citation omitted).

146. *See id.* (describing these states' transgender policies as "patchwork of existing policies").

147. For further discussion of the IOC's transgender inclusion policy, see *infra* notes 149–164 and accompanying text. For further discussion of the NCAA's transgender inclusion policy, see *infra* notes 165–175 and accompanying text.

148. For further discussion of the updates that have been made to the IOC's policy, see *supra* notes 160–163 and accompanying text. For further discussion of the updates that have been made to the NCAA's policy, see *supra* notes 172–174 and accompanying text.

2. *The IOC's Trans-Inclusion Policy*

The IOC is the governing body for the National Olympic Committees and is responsible for planning the Olympic Games.¹⁴⁹ While the IOC's policies are only directly applicable to Olympic athletes, competing in the Olympics is the ultimate goal for most elite athletes so the international sport governing bodies often mirror the IOC's policies when creating the eligibility rules for their athletes.¹⁵⁰ In 2004, the IOC became the first athletic organization to enact a policy allowing transgender athletes to participate on the basis of their gender identity.¹⁵¹ However, the framework for this policy required transgender individuals to undergo sex reassignment surgery before they were allowed to participate on the team that aligned with their gender identity.¹⁵² Further, the policy demanded that the transition be accompanied by a sufficient amount of hormonal therapy and legally recognized by the appropriate authorities.¹⁵³

In 2015, the IOC revised the framework for its transgender inclusion policy, intending it to be more inclusive.¹⁵⁴ This revised framework centered around an athlete's testosterone levels.¹⁵⁵ These testosterone-centered policies stemmed from the idea that biological males enjoy a "natural competitive advantage" because testosterone contributes significantly to muscle mass and

149. See Comerford, *supra* note 4 (discussing history of IOC's policies on transgender inclusion).

150. See Frankie de la Cretaz, *The IOC Has a New Trans-Inclusion Framework, But is The Damage Already Done?*, SPORTS ILLUSTRATED (Mar. 23, 2022), <https://www.si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework#:~:text=the%20IOC%20rolled%20out%20a%20new%20framework%20in,many%20other%20leagues-with%20devastating%20consequences%20for%20trans%20athletes> [<http://web.archive.org/web/20230510134707/https://www.si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework>] (describing why international federations "having a different policy from the IOC's can complicate matters").

151. See Comerford, *supra* note 4, at 884 ("Prior to the implementation of this policy, all female athletes competing [in the Olympics] were required to undergo sex-verification" which consists of various "humiliating tactic[s] such as" "chromosomal tests, blood samples, or urine samples").

152. See *id.* at 885 (detailing sex reassignment surgery as "an invasive procedure that removes external genitalia and gonads").

153. See *id.* (describing IOC's 2004 policy as having "the effect of restricting transgender athletes' ability to participate due to burdensome legal and medical fees").

154. See de la Cretaz, *supra* note 150 (reporting that IOC made these changes after it was sued by athlete claiming its requirements for transgender inclusion were human rights violation).

155. See *id.* (describing IOC's testosterone-centered policy as having "trickle down" effect to even recreational sport level meaning IOC is effectively regulating who can and cannot participate in sports in society at large).

strength.¹⁵⁶ The logic of these policies posits that by reducing testosterone levels in transgender women, cisgender women will be protected from “an unfair advantage because testosterone suppression can effectively eliminate the differences between biological men and women.”¹⁵⁷ The IOC’s testosterone-centered framework allowed transgender women to compete against other women as long as the transgender women had been on testosterone suppression treatment for at least a year.¹⁵⁸ However, in order to qualify to compete, a transgender woman’s testosterone level must remain “below 10 [nanomoles per liter] for at least 12 months prior to her first competition” and remain below this level for the entirety of her desired period of eligibility.¹⁵⁹

In March 2022, the IOC again updated its transgender inclusion framework to move away from testosterone-centered restrictions.¹⁶⁰ According to the new framework, the IOC has decided it is “not in a position to issue regulations that define eligibility criteria for every sport, discipline or event across the very different national jurisdictions and sport systems.”¹⁶¹ This new approach requires

156. See Comerford, *supra* note 4, at 890 (suggesting one solution to issue of transgender participation in NCAA sports is to require transgender women athletes to complete one year of hormone suppression treatment before they are eligible to participate because science has demonstrated that one year of this treatment eliminates any competitive advantages transgender women may have had over biological women).

157. See *id.* at 892 (providing example of impact of reduced testosterone levels from “[a] 2015 study of transgender female runners” which “reveal[ed] that ‘[s]even of the eight [transgender female runners participating in the study] experienced a substantial reduction in running speed upon transition.’ The reduction in speed for the transgender athletes was attributed to their ‘vastly reduced testosterone levels,’ which also reduced ‘strength, speed, and virtually every other component of athletic ability’ for the women”) (quoting Joanna Harper, *Race Times for Transgender Athletes*, 6 J. SPORTING CULTURES AND IDENTITIES 1, 3, 6 (2015) (footnote omitted)).

158. See de la Cretaz, *supra* note 150 (reporting changes IOC made to its trans-inclusion policy in 2015 and calling new rule “a more welcoming stance to transfeminine athletes”).

159. See Comerford, *supra* note 4, at 886 (“Most females ‘have natural testosterone levels of 0.12 to 1.79 [nmol/L] . . . while the typical male range after puberty is much higher, at 7.7 to 29.4 [nmol/L]” and that “[r]equiring a transgender woman’s testosterone to be below 10 nmol/L, a low level for a man, is an effective means of suppressing the competitive advantage that testosterone gives to men.”).

160. See de la Cretaz, *supra* note 150 (describing intentions behind IOC’s new framework).

161. See *IOC Releases Framework on Fairness, Inclusion and Non-discrimination on The Basis of Gender Identity and Sex Variations*, INT’L OLYMPIC COMM. (Nov. 16, 2021), <https://olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations> [<http://web.archive.org/web/20230427222533/https://olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations>] [hereinafter *IOC Releases Framework*] (detailing

each sport to devise its rules for transgender participation.¹⁶² Despite this, the IOC does recommend that each sport no longer require a specific testosterone level for women to compete.¹⁶³ However, the IOC's testosterone-centered framework was copied by many athletic organizations and is not likely to be abandoned.¹⁶⁴

3. *The NCAA's Trans-Inclusion Policy*

The NCAA is “a membership-driven organization that governs intercollegiate athletics across three divisions.”¹⁶⁵ Its members include 1,098 colleges and universities throughout the United States.¹⁶⁶ Like the IOC, the NCAA provides guidance to its members on including transgender athletes hoping to compete in the NCAA.¹⁶⁷ Before 2011, the NCAA allowed its athletes to participate on a sex-segregated team aligned with their sex recognized by the state.¹⁶⁸ In 2011, the NCAA provided specific guidance on transgender inclusion by issuing new policies setting out separate standards for the inclusion of transgender men and transgender women.¹⁶⁹ According to this guidance, a transgender man being treated with testosterone would be eligible to compete on a men's

IOC's new framework that went into effect in 2022 following Beijing Olympic Winter Games).

162. See de la Cretaz, *supra* note 150 (“Now, with the IOC's new framework in place, there is no longer a default policy that [international federations] can look to for guidance; they must come up with new ones for their sports on their own.”).

163. See *id.* (reporting that, despite IOC's recommendation, some sport federations “have no intention of changing their existing [testosterone-centered] policy”).

164. See *id.* (explaining that IOC's testosterone-based trans-inclusion policy has been widely copied, even beyond international federations, including by professional sport leagues in United States).

165. See Tyler Epps, *What is The NCAA?*, BEST COLLEGES (Oct. 14, 2020), <https://www.bestcolleges.com/blog/what-is-the-ncaa> [<https://perma.cc/LB6X-EQG2>] (providing history of NCAA); see also Henderson et al., *supra* note 36, at 159 (reporting that “the Supreme Court has held that the NCAA is not subject to the requirements of Title IX despite receiving dues payments from recipients of federal funds”).

166. See *What is The NCAA?*, NCAA, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx> [<https://perma.cc/NCQ9-8FRL>] (describing NCAA's members).

167. See Comerford, *supra* note 4 (detailing NCAA's guidance on transgender inclusion).

168. See *id.* (describing NCAA's previous policy).

169. See *id.* (“In 2011, the NCAA . . . ‘provided guidance to NCAA athletic programs’ in an effort ‘to ensure [that] transgender student-athletes [have] fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge.’”).

team but not on a women's team.¹⁷⁰ However, for a transgender woman to compete on a women's team, she must undergo testosterone suppression treatment and would not be eligible to compete until she completes one year of this treatment.¹⁷¹

In 2022, the NCAA updated its guidance regarding transgender participation.¹⁷² Similar to the IOC's updated framework, the NCAA's new guidance does away with the former hormone requirements and now asks each sports' governing body to set its eligibility requirements.¹⁷³ The NCAA intended this new guidance to be more inclusive for transgender athletes "while balancing fairness, inclusion and safety for all who compete."¹⁷⁴ However, this balance of ensuring fairness to both transgender and cisgender athletes is nearly impossible and has resulted in numerous lawsuits.¹⁷⁵

B. Predicting the Legality of Anti-Transgender Inclusion Policies

Amidst celebrations of Title IX's fiftieth anniversary, the question of whether Title IX protects transgender athletes' participation in sports based on their gender identities is a hot-button issue in the United States.¹⁷⁶ Demonstrative of this are the several cases on this issue, including *Soule* and *Hecox*, that are currently working their way through the legal system.¹⁷⁷ While there are policy argu-

170. See *id.* at 883–84 (illustrating differences between NCAA's participation policies for transgender men and transgender women).

171. See *id.* at 884 (noting "strong emphasis on testosterone" and explaining that this is "because medical evidence has shown that testosterone 'builds muscles' and allows for clear performance advantages").

172. See *Transgender Student-Athlete Participation Policy*, NCAA, <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> [<https://perma.cc/AB52-4UNB>] (last visited Feb. 24, 2023) ("At its January 19, 2022 meeting, the NCAA Board of Governors updated the transgender student-athlete participation policy governing college sports.").

173. See Henderson et al., *supra* note 36, at 159 (describing new guidance released by NCAA on participation of transgender athletes).

174. See *Transgender Student-Athlete Participation Policy*, *supra* note 172 (discussing NCAA's intention behind new transgender participation policy).

175. For further discussion on the lawsuits that have resulted from the struggle to balance fairness, see *supra* notes 123–133 and accompanying text.

176. See Eddie Pells, *Title IX's Next Battle: The Rights of Transgender Athletes*, ASSOCIATED PRESS (June 19, 2022), <https://apnews.com/article/title-ix-transgender-athletes-rights-9adfe49a8e07f66f07b5e2302bb94730> [<https://perma.cc/JC8R-NEGC>] (describing rights of transgender athletes as issue "on the front line of a culture divide").

177. See, e.g., *B.P.J. v. West Virginia State Bd. of Educ.*, 550 F.Supp.3d 347, 357 (S.D. W. Va. 2021) (holding eleven-year-old transgender girl has likelihood of success on her Title IX claim against West Virginia after West Virginia passed law preventing transgender girls from participating on girls' sports teams); *A.M. v. Indianapolis Pub. Schs.*, 617 F. Supp. 3d 950, 966 (S.D. Ind. 2022) (deciding ten-year-old transgender girl has likelihood of success in Title IX case against Indiana

ments both for and against transgender inclusion, current case law suggests that the meaning of sex under Title IX does encompass gender identity and thus protects transgender participation in sports.¹⁷⁸

1. *Policy Impasse: Nobody Wins*

a. Both Sides of the Debate

The policy reasons for prohibiting transgender athletes from competing and the policy reasons behind allowing them to compete are centered around equal opportunity.¹⁷⁹ *Soule* and *Hecox*, two pending cases addressing the issue of Title IX's applicability to transgender athletes, perfectly illustrate both sides of this debate.¹⁸⁰ The argument in favor of prohibiting transgender participation in athletics, reflected in *Soule*, focuses heavily on fairness.¹⁸¹ The proponents of non-inclusivity believe that transgender female athletes have an inherent advantage over cisgender female athletes.¹⁸² This belief stems from physical stereotypes, which imply that biological males have an unfair competitive advantage over cisgender women.¹⁸³ Further, those in favor of non-inclusivity argue that al-

law prohibiting biological males from participating on girls' athletic teams); *Roe v. Utah High Sch. Activities Ass'n*, No. 220903262, 2022 WL 3907182, at *1 (Utah Dist. Ct. Aug. 19, 2022) (granting preliminary injunction requested by three transgender teenage girls after Utah passed legislation prohibiting transgender girls from participating on girls' school sports teams). For further discussion of *Soule* and *Hecox*, see *supra* notes 123–133 and accompanying text.

178. For further discussion of the current case law and its implications on the meaning of sex, see *infra* notes 211–226 and accompanying text.

179. See Pells, *supra* note 176 (boiling debate “down to advocates who want to protect the space Title IX carved out for cisgender women . . . and those who want transgender athletes who compete as females to enjoy the same protections as anyone else”); see generally Off. for Civ. Rts., *Requirements Under Title IX of The Education Amendments of 1972*, U.S. DEP'T EDUC. (Jan. 10, 2020), [https://www2.ed.gov/about/offices/list/ocr/docs/interath.html#:~:text=title%20IX%20of%20the%20Education%20Amendments%20of%201972%20\(20%20U.S.C.,therefore%20covered%20by%20this%20law](https://www2.ed.gov/about/offices/list/ocr/docs/interath.html#:~:text=title%20IX%20of%20the%20Education%20Amendments%20of%201972%20(20%20U.S.C.,therefore%20covered%20by%20this%20law) [<https://perma.cc/6PHZ-VUNF>] (discussing how provision of equal opportunity in athletics is necessary for Title IX compliance).

180. For further discussion of *Soule* and *Hecox*, see *supra* notes 123–133 and accompanying text.

181. See Erin Buzuvis, Sarah Litwin & Warren K. Zola, *Sport is For Everyone: A Legal Roadmap For Transgender Participation in Sport*, 31 J. LEGAL ASPECTS OF SPORT 212, 213 (2021) (positing that “the acceptable public rationale against transgender athletes participating assert that doing so creates an unfair competitive advantage” for these transgender athletes).

182. See Pells, *supra* note 179 (including “sports icons” that “have long been at the forefront for equality in women's sports” among those “insisting trans athletes have an advantage”).

183. See Buzuvis et al., *supra* note 181, at 213 (describing three arguments typically put forth by those wishing to exclude transgenders from participating in

lowing transgender women to participate on women's teams and in women's competitions necessarily means fewer opportunities for cisgender women athletes to compete.¹⁸⁴ Thus, the argument against inclusivity posits that allowing transgender athletes to participate in women's sports deprives cisgender athletes of equal opportunity.¹⁸⁵

Conversely, by allowing trans-athletes to compete on sports teams that align with their gender identity, they are afforded equal opportunity with cisgender athletes that identify as the same gender.¹⁸⁶ The idea of affording trans-athletes equal opportunity is a driving factor behind the transgender inclusion policies of athletic

sports, including first “that transgender women are not ‘real’ women and therefore should not be afforded the same opportunity as other women. Second, that transgender women would have physical advantages over cisgender women;” and finally “that men might fraudulently claim to be a transgender woman in order to seek a perceived competitive advantage to compete and dominate against other women”) (footnote omitted); *see also* Dylan O. Malagrino, *May They Play: Soule v. Connecticut Association of Schools, Inc., Title IX, And a Policy of Inclusion For High School Transgender Athletes Without Prerequiring Hormone Therapy or Puberty Blockers*, 31 MARQ. SPORTS L. REV. 35, 46–47 (illustrating this belief through analysis of amended complaint filed by cisgender female athletes in *Soule*, in which “Plaintiffs allege that girls who are transgender go through ‘male puberty,’ which ‘quickly increases the levels of circulating testosterone’ and ‘drives a wide range of physiological changes that give males a powerful physiological athletic advantage over females”) (quoting Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *Soule* by *Stanescu v. Conn. Ass’n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021)).

184. *See* Second Amended Verified Complaint for Declaratory and Injunctive Relief and Damages ¶ 4, *Soule* by *Stanescu v. Conn. Ass’n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (alleging Connecticut's transgender inclusion policy results in fewer opportunities for cisgender female athletes). Specifically, the *Soule* plaintiffs alleged that, due to Connecticut's inclusivity policy:

[I]n scholastic track competition in Connecticut, more boys than girls are experiencing victory and gaining the advantages that follow, even though postseason competition is nominally designed to ensure that equal numbers of boys and girls advance to higher levels of competition. In the state of Connecticut, students who are born female now have materially fewer opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records, than students who are born male.

See id. (elaborating on claim of fewer opportunities for cisgender female athletes that results from Connecticut's transgender inclusive policy).

185. For further discussion of why transgender-inclusive policies deprive cisgender athletes of equal opportunity, *see supra* notes 181–184 and accompanying text.

186. *See generally* *Hecox v. Little*, 479 F. Supp. 3d 930, 952 (D. Idaho 2020) (describing plaintiffs as interested in “seeking equal opportunity for transgender female student athletes”).

organizations such as the IOC and NCAA.¹⁸⁷ However, as illustrated by the numerous changes these organizations have made to their transgender inclusion policies, determining the best way to “balanc[e] fairness, inclusion and safety for all who compete” has proven difficult.¹⁸⁸

b. Picking a Side

As Congress and states around the country contemplate limiting or prohibiting transgender athletes' participation in sports, the implications of these laws on transgender athletes are largely ignored.¹⁸⁹ Rather than limit transgender athlete participation, legislators and athletic organizations should favor transgender-inclusive policies that provide transgender athletes equal opportunity to participate and compete in athletics.¹⁹⁰ While this will result in some cisgender athletes being displaced from teams or competition podiums they might otherwise have earned, the positive implications of allowing transgender athletes to compete far outweigh any negative implications their participation might have on cisgender athletes.¹⁹¹

The positive impact that trans-inclusive policies in sports have on the mental health of transgender athletes works to correct the statistically poor mental health common among the transgender community.¹⁹² The poor mental health of the transgender commu-

187. See *IOC releases Framework*, *supra* note 161 (citing “the need to ensure that everyone, irrespective of their gender identity or sex variations, can practise [sic] sport” as reason behind IOC’s decision to issue new framework).

188. See *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022, 8:41 PM), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> [<https://perma.cc/M8TP-XCD4>] (discussing reasoning behind NCAA Board of Governor’s decision to amend organization’s trans-inclusion policy to follow “sport-by-sport approach”). For further discussion of the changes made to the IOC and NCAA’s trans-inclusion policies, see *supra* notes 151–163, 168–174 and accompanying text.

189. For further discussion on Congress and the states’ contemplation of limiting or prohibiting transgender participation in sports, see *supra* notes 137–142 and accompanying text. For further discussion on the implication of these bills on transgender athletes, see *infra* notes 192–200 and accompanying text.

190. For further discussion of why the policy considerations that should be favored in this debate are those concerned with providing transgender athletes equal opportunity, see *infra* notes 191–210 and accompanying text.

191. See *Goldberg & Santos*, *supra* note 144 (discussing statistics resulting from states with trans-inclusive policies in sports and how no evidence has been produced purporting harm to cisgender athletes). For further discussion of why the implications of allowing transgender athletes to compete outweigh any negative implications their participation might have for cisgender athletes, see *infra* notes 192–210 and accompanying text.

192. See *Goldberg & Santos*, *supra* note 144 (reporting that seventy-seven percent of transgender adults reported “verbal or physical harassment, physical or

nity is reflected by the forty-four percent of transgender youth that reported contemplating suicide in the year before.¹⁹³ The policies preventing transgender youth from participating in athletics directly contribute to the bad mental health of transgender youth.¹⁹⁴ Those experiencing these trans-exclusive participation policies “reported lower self-esteem and school belonging than those who had not, as well as higher rates of depression and school absenteeism.”¹⁹⁵ However, in schools with trans-inclusive participation policies, there have been “lower suicide risk and greater feelings of safety at school.”¹⁹⁶

Further, being involved in sports plays a significant role in youth development.¹⁹⁷ The ability to “[p]articipat[e] in sports serves a critical and intended educational purpose: contributing to important character traits such as leadership, teamwork, dedication in the face of adversity, and the pursuit of a common goal.”¹⁹⁸ The

sexual assault, or being prevented from dressing in accordance with their gender identity” while in school); *see also* Rachel Suss, *Protecting Transgender Youths’ Right to Participate in Sports*, COLUMBIA UNIVERSITY MAILMAN SCHOOL OF PUBLIC HEALTH (Feb. 25, 2021), <https://www.publichealth.columbia.edu/public-health-now/news/protecting-transgender-youths-right-participate-sports> [<https://perma.cc/C3Y2-C6YG>] (“Studies have found that transgender youth have over a threefold increased risk of depression and suicide attempts as compared to their non-transgender peers.”).

193. *See* Goldberg & Santos, *supra* note 144 (comparing forty-four percent of transgender youth that had reported considering suicide to only sixteen percent of cisgender youth that had considered same); *see also* Buzuvis et al., *supra* note 181, at 229 (“Research shows bullying related to sexual and gender identities is strongly related to contemplation of suicide in sexual and gender minority youth.”).

194. *See* Goldberg & Santos, *supra* note 144 (referencing evidence that shows “discriminatory school policies only harm [transgender youth] further”).

195. *See id.* (proving direct correlation between exclusive school athletic participation policies and worsened mental health in transgender youth).

196. *See id.* (specifying that “in states with fully inclusive athletic policies [transgender students] were 14 percentage points less likely to have considered suicide in the past year than students in states with no guidance”); *see also* Buzuvis et al., *supra* note 181, at 214 (discussing negative impact that non-inclusive policies have on transgender youth since “[b]eing shunned and excluded from [sports] because of one’s identity wrecks havoc on self-worth and development”).

197. *See* Buzuvis et al., *supra* note 181, at 214 (explaining how “sports teach transformative lifetime skills that are unable to be recreated in the classroom”); *see also* *Youth Sports Facts Benefits*, ASPEN INST.: PROJECT PLAY, <https://www.aspenprojectplay.org/youth-sports/facts/benefits#:~:text=Sports%20activity%20helps%20children%20develop,grades%20and%20standardized%20test%20scores> [<https://perma.cc/4Z3P-JKLV>] (last visited Feb. 5, 2023) (citing studies that prove sports help “children develop and improve cognitive skills” and are “associated with improved academic achievement” as well as better mental health).

198. *See* Buzuvis et al., *supra* note 181, at 214 (describing importance of these traits as providing “a foundation of success and training to be drawn upon during the rest of their lives”); *see also* Goldberg & Santos, *supra* note 144 (reporting that transgender student-athletes “had higher grades than those who did not participate in sports”).

effects of limiting access to sports can thus disastrously effect the physical and mental health of those prevented from participating in athletics.¹⁹⁹ Unfortunately, the sad reality of transgender youth in sports is that even when allowed to participate on teams aligned with their gender identities, many still feel uncomfortable or unwelcome and choose to forego this opportunity.²⁰⁰

In addition to the positive impact that participating in sports has on the mental health and development of transgender youth, there is no evidence that allowing transgender athletes to participate in sports harms cisgender athletes.²⁰¹ The fear that transgender athlete participation, particularly participation of transgender women, results in unfair competition and unequal opportunity led to a growing number of states passing Fairness in Women's Sports Acts.²⁰² However, the sponsors of these Acts have been unable to "cite a single instance in their own state or region where such participation has caused problems," implying that "trans-inclusive policies have no negative effect on girls' sports participation."²⁰³ In fact, statistics suggest that exclusive transgender participation policies have effectively decreased cisgender girls' participation in sports.²⁰⁴

199. See Buzuvis et al., *supra* note 181, at 214 (arguing that "excluding transgender athletes from participating in sport is to deny them the substantial benefits that sport provides in developing a person's identity").

200. See *id.* at 231 (reporting that majority of transgender youth feel unsafe or threatened in locker rooms and thus choose to avoid both locker rooms and athletic facilities for that reason).

201. See Goldberg & Santos, *supra* note 144 (examining states that have had trans-inclusive policies in athletics for years but have "produced no evidence of purported harms to cisgender people"); see also Jacqueline J. Drohan, *Transgender Youth in Sports: Questions Remain Unresolved*, 94 N.Y. B.J. 20, 21 (Feb. 2022) (noting that New York's trans-inclusive policies "have resulted in no harm to the welfare of cisgender girls or women or any competitive disadvantage in girls' or women's sports").

202. See Pells, *supra* note 176 (recording number of states that "had passed laws banning or restricting transgender participation in sports"); see also Buzuvis et al., *supra* note 181, at 212 (describing laws such as Fairness in Women's Sports Acts as "built on erroneous data, a misunderstanding of facts, and ignorance").

203. See David Cray & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, ASSOCIATED PRESS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [<https://perma.cc/TJ5E-C8Z8>] (specifying that investigators "reached out to two dozen state lawmakers sponsoring such measures around the country as well as the conservative groups supporting them and found only a few times it's been an issue among the hundreds of thousands of American teenagers who play high school sports"); see also Goldberg & Santos, *supra* note 144 (citing to California and Connecticut as examples of states where transgender inclusive policies actually increased girls' participation in sports).

204. See Goldberg & Santos, *supra* note 144 (explaining that in "states with inclusive policies, high school girls' participation in sports remained unchanged"

Finally, while transgender female athletes might have a physical advantage over cisgender women, this advantage is not so extreme that transgender women have become dominant in sports.²⁰⁵ Transgender women have been competing in women's sports for almost two decades and have yet to dominate at the high school, college, or elite level of sports.²⁰⁶ Further, this stereotype that cisgender women are "categorically disadvantaged when it comes to sport" is insulting to the abilities of cisgender women.²⁰⁷ Cisgender women frequently compete against men and routinely beat them.²⁰⁸ Notably, one of the plaintiffs in *Soule*, who claimed Connecticut's trans-inclusive policy deprived her of her "rightful victory" in several of the state's track and field events, beat a transgender girl during one of the competitions.²⁰⁹ Unfortunately, when transgender athletes succeed in their respective sports, this further proves to the proponents of non-inclusivity that transgender athletes have an unfair advantage over cisgender athletes.²¹⁰

while "[i]n states with exclusive policies, girls' participation has decreased"); see also Suss, *supra* note 192 (contending that "gender policing can also hurt cisgender girls and women who may be particularly big or muscular by making them undergo invasive procedures to prove their 'womanhood' if it is called into question").

205. See Buzuvis et al., *supra* note 181, at 213 (arguing that "transgender athletes pose no threat"); see also Bethany Alice Jones, Jon Arcelus, Walter Pierre Bouman & Emma Haycraft, *Sport and Transgender People: A Systematic Review of The Literature Relating to Sport Participation And Competitive Sport Policies*, 47 *SPORTS MED.* 701, 701 (2016) ("Currently, there is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition.").

206. See Buzuvis et al., *supra* note 181, at 213 (attempting to prove conception that transgender athletes have notable physical advantage over cisgender women is not grounded in reality).

207. See *id.* (debunking stereotype that transgender athletes have categorical advantage over cisgender athletes); see also Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, *SCIENTIFIC AM.* (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls-sports-teams/#> [<https://perma.cc/U8WV-8MRF>] (arguing against stereotype that transgender women have competitive advantage due to testosterone by pointing out that around ten percent of women have condition called polycystic ovarian syndrome, which causes elevated testosterone levels and results in these cisgender women having higher testosterone levels than even transgender women).

208. See Buzuvis et al., *supra* note 181, at 213 (pointing out that "adult women routinely beat adult men in non-elite athletic contests, and elite competitions even have female winners at times").

209. See *id.* (citing cisgender girl in *Soule* as example of how cisgender women beat men and transgender women); see also Turban, *supra* note 207 ("[T]wo days after [*Soule*] . . . was filed by the cisgender girls' families, one of those girls beat one of the transgender girls named in the lawsuit in a Connecticut state championship.").

210. See Katie Barnes, *Former University of Pennsylvania Swimmer Lia Thomas Responds to Critics: 'Trans Women Competing in Women's Sports Does Not Threaten Women's*

2. *Case Law*

Historically, when courts have been asked to interpret the language of Title IX, they look to Title VII for guidance.²¹¹ While Title VII and Title IX prohibit discrimination in different areas, they “both prohibit discrimination on the basis of sex.”²¹² Importantly, Title IX’s prohibition of sex discrimination in education is worded the same as Title VII’s prohibition of sex discrimination in employment.²¹³ Due to the language similarities between Title VII and Title IX, courts rely on case law interpreting Title VII to guide their Title IX interpretations.²¹⁴ Therefore, if the courts continue to rely on Title VII caselaw to interpret Title IX, *Bostock’s* holding will be applied to Title IX which will have major implications on the issue of transgender participation in athletics.²¹⁵

In *Bostock*, the Supreme Court held that Title VII’s prohibition of discrimination on the basis of sex includes discrimination on the basis of gender identity.²¹⁶ Applying this holding to Title IX results in the conclusion that Title IX’s prohibition on the basis of sex similarly includes discrimination on the basis of gender identity.²¹⁷ Thus, any policy that prevents transgender athletes from participating in school athletics because of their gender identity violates Title

Sports; ESPN (May 31, 2022), https://www.espn.com/college-sports/story/_/id/34013007/trans-women-competing-women-sports-does-not-threaten-women-sports [<https://perma.cc/5ZAE-XMF7>] (reporting on college swimmer Lia Thomas, transgender woman who, after winning “the 500 freestyle, and . . . plac[ing] fifth and eighth, respectively, in the 200 and 100 freestyle” at NCAA swimming championship, received heavy criticism and was used as inspiration in “statehouses across the country as legislators” invoked her name when they “introduced bills designed to restrict transgender athletes’ ability to compete in sports”).

211. See Comerford, *supra* note 4 (discussing how courts rely on Title VII when interpreting Title IX).

212. See Henderson et al., *supra* note 36 (“Title VII is limited to employment discrimination while Title IX is limited to educational discrimination.”).

213. See *id.* (providing background on why courts use Title VII to interpret Title IX).

214. See Comerford, *supra* note 4, at 877 (specifying that courts look to Title VII case law when interpreting Title IX).

215. For further discussion of these implications, see *infra* notes 216–226 and accompanying text. Notably, if the federal Fairness in Women’s Sports Act is passed into law, this will overrule *Bostock* and greatly limit the progress towards gender equality that has been made during the past fifty years under Title IX. See generally Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118th Cong. (2023). For further discussion of the proposed federal Fairness in Women’s Sports Act, see *supra* notes 142–143 and accompanying text.

216. For further discussion of the Court’s decision in *Bostock*, see *supra* notes 99–113 and accompanying text.

217. For further discussion of why the application of *Bostock’s* holding results in this conclusion, see *supra* notes 211–215 and accompanying text.

IX.²¹⁸ With this in mind, the probable outcome of cases like *Soule* and *Hecox*, the two cases considering the issue of whether Title IX protects transgender participation in athletics, becomes apparent.²¹⁹

If the *Soule* and *Hecox* courts were to decide the cases directly on the issues, the likely outcome is best explained by applying *Bostock*'s but-for test to the facts of each case.²²⁰ In *Bostock*, the Court provided an example to illustrate the but-for causation that it used to hold that discrimination on the basis of gender identity violates Title VII:

[T]ake [for example] an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. . . . [T]he individual employee's sex plays an unmistakable and impermissible role in the discharge decision.²²¹

In *Soule*, the cisgender athletes sought to prohibit transgender athletes from participating in Connecticut's high school track competitions because the transgender athletes identified as male at birth.²²² Similarly, in *Hecox*, the transgender woman requested the court enjoin Idaho from enforcing its Fairness in Women's Sports Act which prevents "transgender female athletes from participating on women's sports" teams because they identified as male at birth.²²³ In

218. For further discussion of why the discrimination of someone based on their gender identity violates Title IX, see *supra* notes 112–113 and accompanying text.

219. For further discussion of these predictions, see *infra* notes 220–226 and accompanying text.

220. See *Soule v. Conn. Ass'n of Sch., Inc.*, 57 F.4th 43, 56 (2d Cir. 2022) (affirming District Court's reasoning that case should be dismissed due to plaintiffs' lack of standing and without addressing issue of whether discrimination on basis of gender identity is prohibited by Title IX). For further discussion of the *Bostock* Court's but-for test, see *supra* notes 112–114 and accompanying text.

221. See *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020) (illustrating how discriminating against someone on basis of their gender identity is impossible to do without also discriminating against that person on basis of sex).

222. See *Soule by Stanescu v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (reporting that three cisgender female athletes brought case to request that court prevent transgender female athletes from competing in high school track events because otherwise, cisgender girls will be forced to compete against "male-bodied athletes").

223. See *Hecox v. Little*, 479 F. Supp. 3d 930, 944 (D. Idaho 2020) (describing issue before court as whether it "should enjoin the State of Idaho from enforcing a

these cases, a party seeks to prohibit transgender female athletes from participating in sports the way cisgender female athletes do solely because the transgender athletes identified as male at birth while the cisgender athletes identified as female at birth.²²⁴ Thus, but for the transgender athletes' biological sex, the plaintiffs in *Soule* and the defendants in *Hecox* would not be seeking to prevent the transgender athletes from participating in women's sports.²²⁵ Due to this but-for causation, the courts in *Soule* and *Hecox* should find that transgender athletes are being discriminated against on the basis of sex in violation of Title IX.²²⁶

IV. CONCLUSION: FIFTY YEARS LATER AND TITLE IX IS STILL A WORK IN PROGRESS

Since Title IX's enactment in 1972, great strides have been made toward gender equality inside and outside sports.²²⁷ While Title IX initially only applied to the educational programs that directly received federal assistance, its scope was later broadened to encompass all programs at an institution that received any federal funding, including the institutions' athletic programs.²²⁸ However, since Title IX does not define the meaning of sex, the application of Title IX to transgender athletes is unclear and a topic of much debate.²²⁹ While OCR attempted to provide guidance on this by issuing Notices of Interpretation, these interpretations were contradictory due to the varying politics of the different presidential ad-

newly enacted law which precludes transgender female athletes from participating in women's sports").

224. See generally *Soule*, 2021 WL 1617206 at *1 (implying there is no issue concerning participation of cisgender girls in high school sports); see also *Hecox*, 479 F. Supp. 3d at 944 (implying Idaho's Fairness in Women's Sports Act does not prevent cisgender females from participating on women's sports teams).

225. See generally *Soule*, 2021 WL 1617206 at *1 (seeking to prevent transgender girls' participation in track because they were born male); *Hecox*, 479 F. Supp. 3d at 944 (seeking to prevent transgender women's participation in sports because they were born male).

226. For further discussion of the District Courts' decisions in *Soule* and *Hecox*, see *supra* notes 128, 132 and accompanying text.

227. For further discussion of the strides towards gender equality made under Title IX, see *supra* notes 59–78 and accompanying text.

228. See, e.g., *Grove City College v. Bell*, 465 U.S. 555, 573 (1984) (holding that Title IX only applied to programs that received direct federal financial assistance). For further discussion of *Grove City v. Bell*, see *supra* notes 36–44 and accompanying text. For further discussion of how Title IX was deemed applicable to entire institutions, including their athletic programs, see *supra* notes 47–49 and accompanying text.

229. For further discussion of Title IX's failure to define its meaning of sex and the implications of this for transgender athletes, see *supra* note 86 and accompanying text.

ministrations.²³⁰ Due to this, there has been great confusion on whether Title IX protects transgender participation in sports.²³¹

In response to the confusion concerning Title IX's application to transgender athletes, states and athletic organizations have made laws and rules regulating transgender athlete participation.²³² These laws and rules have specifically focused on whether or not to allow transgender female athletes to participate due to their perceived physical advantage over cisgender women.²³³ While these laws and rules represent both sides of the debate on allowing transgender athletes to participate, the arguments for prohibiting trans-participation are largely based on false stereotypes.²³⁴ Further, solid research supports the argument in favor of trans-participation since both the inclusive policies themselves and the experience of participating in sports positively impact the mental health and development of transgender youth.²³⁵

In June 2020, the Supreme Court finally provided indirect guidance on the issue of whether Title IX protects transgender participation in sports.²³⁶ This guidance came from its decision in *Bostock*, in which it held that the meaning of discrimination on the basis of sex under Title VII includes discrimination on the basis of gender identity.²³⁷ As courts have historically used Title VII case law to interpret Title IX, this decision has a major impact on the meaning of sex under Title IX.²³⁸ Thus, in light of this Supreme Court decision, the courts currently considering the issue of whether transgender participation is protected by Title IX, including those in

230. For further discussion of OCR's various Notices of Interpretation, see *supra* notes 90–94 and accompanying text.

231. See Comerford, *supra* note 4 (explaining that “[c]onfusion surrounding Title IX requirements for transgender athlete participation on the basis of their gender identity results in part from contradictory guidance provided by the” various presidential administrations).

232. For further discussion of the states’ and athletic organizations’ laws and rules, see *supra* notes 137–175 and accompanying text.

233. For further discussion on the specifics of these laws and rules, see *supra* notes 137–175 and accompanying text.

234. For further discussion of the argument against trans-inclusion in athletics, see *supra* notes 181–185 and accompanying text.

235. For further discussion of the argument in favor of trans-inclusion in athletics, see *supra* notes 190–210 and accompanying text.

236. See generally *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020) (considering whether employers that fired employees because of their sexual orientation and gender identity violated Title VII).

237. For further discussion of the Supreme Court’s decision in *Bostock*, see *supra* notes 111–114 and accompanying text.

238. For further discussion of the Court’s historic use of Title VII to interpret Title IX, see *supra* notes 211–214 and accompanying text.

Soule and *Hecox*, should find that Title IX prohibits the exclusion of transgender athletes from the teams that align with their gender identity.²³⁹

*Samantha Gill**

239. For further discussion on the prediction of the outcome in *Soule* and *Hecox*, see *supra* notes 219–226 and accompanying text.

* J.D. Candidate, May 2024, Villanova University Charles Widger School of Law. I dedicate this Comment to my family. Mom and Dad, thank you for the constant love and support. I owe everything to you. Lauren, Joe, and Luke, thank you for being my built-in best friends and for always keeping me laughing. Finally, thank you to James, Grace, Laura, and the rest of my law school family for celebrating my highs and providing comfort during my lows. You have become my home away from home.

