IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

RILEY GAINES, *et al.*,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Defendants,

and

NATIONAL WOMEN'S LAW CENTER,

[*Proposed*] *Intervenor-Defendant*.

No. 1:24-cv-01109-MHC

May 6, 2024

[PROPOSED] INTERVENOR-DEFENDANT NATIONAL WOMEN'S LAW CENTER'S MOTION TO INTERVENE AS DEFENDANT

Proposed Intervenor-Defendant National Women's Law Center ("NWLC") respectfully moves this Court for permissive intervention as a defendant pursuant to Federal Rule of Civil Procedure 24(b)(1). NWLC shows that the intervention is timely, its defense shares common questions of law and fact with the claims and defenses of the parties in this case, and the intervention will not unduly delay or prejudice the adjudication of the parties' rights.

Accompanying this motion is a memorandum of law, a supporting declaration, and a proposed motion to dismiss pursuant to Rule 24(c).

Counsel for Proposed Intervenor-Defendant advised the parties' counsel of NWLC's intent to file a motion to intervene in this action. Counsel for Plaintiffs stated that they do not consent to the motion; counsel for Defendant National Collegiate Athletic Association stated that they take no position on the motion and thus do not oppose it; and counsel for the State Defendants[1] stated that they do not consent to the motion but do not oppose it.

Dated: May 6, 2024

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RULE 7.1 CERTIFICATE OF COMPLIANCE WITH L.R. 5.1

Pursuant to Local Rule 7.1D, I hereby certify that this brief has been prepared in Times New Roman, 14-point font, one of the font and point selections approved by this Court in Local Rule 5.1C.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
Nneka Ewulonu

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
Nneka Ewulonu

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v.

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[PROPOSED] INTERVENOR-DEFENDANT NATIONAL WOMEN'S LAW CENTER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

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INTRODUCTION AND SUMMARY OF ARGUMENT

The National Women's Law Center ("NWLC") respectfully moves for permissive intervention as a defendant pursuant to Federal Rule of Civil Procedure 24(b)(1). For over 50 years, NWLC has been a leading advocate for equal opportunities for women and girls, including in athletics. NWLC advocates for inclusive policies that allow all women—including transgender women—to participate fully in society, including in sports.

Plaintiffs in this action seek to represent a sweeping nationwide class of all "[w]omen who are past, current, or future [National Collegiate Athletic Association] [("]NCAA["")] athletes," Compl. ¶ 562. Plaintiffs seek equally sweeping relief: a nationwide ban on transgender women participating in women's NCAA sports; a nationwide invalidation of all sports participation and athletic records of transgender women who have participated in NCAA athletic events to date; and a ban on transgender women using women's locker room, restroom, or shower facilities at the University System of Georgia and other institutions hosting NCAA competitions. *Id.* at 153. Plaintiffs even refuse to acknowledge transgender women in their Complaint, offensively referring to them as "male" or "males." *E.g.*, *id.* ¶ 64.

While Plaintiffs purport to speak on behalf of all women, they do not represent the interests of women who are transgender and want to continue participating in NCAA sports, nor the cisgender women who want to continue participating with

them. Their attempts to exclude transgender women from NCAA sports actually hurt *all* women—transgender and cisgender alike—by reinforcing pernicious sex stereotypes and depriving all individuals of the benefits of inclusive policies. Transgender inclusion helps all women and girls learn free from sex stereotypes and ensures all women and girls can enjoy the lifelong benefits of playing school sports.

For its part, the NCAA, facing increasing pressure from anti-transgender activists, in recent years added new restrictions to its longstanding policy that since 2010 had allowed transgender women to participate in women's sports after one year of gender-affirming hormone therapy.[1] And in the wake of this suit, the NCAA recently signaled it is reevaluating whether it will continue to permit transgender women and girls to participate *at all* in women's athletics.[2] Considering the external pressure it faces and its recent regressive steps, the NCAA plainly is not in a position to adequately defend the inclusive policies or the rights of the transgender women at

[1] Julie Kliegman & Jesse Dougherty, *Pressure mounts on NCAA to clarify stance on transgender athletes*, WASH. POST., Apr. 23, 2024, www.washingtonpost.com/sports/2024/04/23/ncaa-transgender-rule-changes/; Karleigh Webb, *NCAA caught between a lawsuit and a hard place on trans-athlete inclusion*, OUTSPORTS (Apr. 25, 2024, 3:38 PM), https://www.outsports.com/2024/4/25/24092572/ncaa-board-meeting-trans-athletes-riley-gaines-charlie-baker/.

[2] *Board of Governors revises penalties for campus sexual violence attestation*, NCAA (Apr. 25, 2024, 7:13 PM), https://www.ncaa.org/news/2024/4/25/media-center-board-of-governors-revises-penalties-for-campus-sexual-violence-attestation.aspx ("The Board of Governors discussed transgender student-athlete participation. The current policy remains under review.").

issue in this suit. And Plaintiffs in this case seek to determine the policies of not only the State Defendants,[3] but to determine the lawfulness of the NCAA's policies in every college and university where they apply. *See* Compl. at 152–53.

Whereas none of the existing parties to this case can adequately defend the claims at issue in this suit, NWLC can. NWLC seeks to intervene to defend the lawfulness of policies that are inclusive of transgender women, and to ensure the interests of all women are represented in this case. This Court should exercise its discretion to allow NWLC's intervention because, in protecting its own interests, NWLC will also represent a vital perspective not currently represented—that of women who support the inclusion of transgender women in women's sports.

BACKGROUND

NWLC

NWLC is a nonpartisan, nonprofit organization dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons to be free from sex discrimination. Ex. 1, Declaration of Emily Martin ("Martin Decl.") ¶ 4. NWLC was founded in 1972, the same year that Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, was enacted, and it has played a critical role in advocating for Title IX's protections and proper interpretation ever since. Martin Decl. ¶¶ 4–5. NWLC assists policymakers in

[3] *See* ECF No. 31 at 1 & n.1 (listing State Defendants).

enforcing Title IX's prohibition of and protections against sex discrimination, equips students with tools to advocate for their own rights to access equal educational opportunities, including the opportunity to play school sports, and litigates on behalf of students who have been harmed by sex discrimination.

For decades, a cornerstone of NWLC's work has been to enforce Title IX to ensure women and girls in athletics enjoy the full protection against sex discrimination promised by our laws, including through litigation. *Id.* ¶ 8 (citing *e.g.*, *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180 (3d Cir. 1998), *vacated*, 525 U.S. 459 (1999); *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910 (7th Cir. 2012); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff'd*, 459 F.3d 676 (6th Cir. 2006); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 678 F. Supp. 517 (E.D. Pa. 1987)).

Over 50 years of experience advocating for strong Title IX protections has led NWLC to firmly support the inclusion of women and girls who are transgender in all aspects of educational life—including sports—as a matter of both civil rights law and of human rights. NWLC is not alone. The overwhelming majority of women's rights and gender justice organizations share the view that the inclusion of women and girls who are transgender in sports advances the goal of equal opportunities for women and girls to benefit from athletic participation. Martin Decl. ¶¶ 11, 15;

Exhibit A to Martin Decl. ("Decl. Ex. A") at 3–4.

Policies excluding women and girls who are transgender from school sports harm not only those women and girls, but threaten all women and girls who excel in athletics, as well as all who depart from gender stereotypes. This is so because these policies rely on and invite inappropriate policing of students' bodies, appearances, and gender expressions. In the context of such exclusionary policies, any woman or girl who is perceived as "suspiciously" strong, fast, agile, or talented in her sport risks challenge, scrutiny by officials of their schools, school boards, and athletic associations, accusations, and the burden to prove she is a "real" woman or girl.[4] Among the more egregious examples of body policing promoted by policies that exclude transgender women and girls is sex verification, which refers to pseudoscientific, intrusive, and harmful practices ranging from collecting private, sensitive medical documents to needless and traumatizing genital examinations that expose student athletes to new risks of sex harassment and sexual assault.[5] Martin Decl. ¶ 23; Decl. Ex. A at 4. Black and brown women and girls who play school sports are at a particularly high risk of harm under these policies, because Black and

[4] *See, e.g.*, Zoe Christen Jones, *Utah investigates winning student athlete's gender after parents of second- and third-place finishers submit complaints*, CBS NEWS (Aug. 18, 2022, 3:13 PM), https://www.cbsnews.com/news/transgender-investigation-student-athelete-utah-high-school/.

[5] *See, e.g.*, *Ohio lawmakers advance trans sports ban with genital check*, REUTERS (June 3, 2022, 5:50 PM), https://www.reuters.com/world/us/ohio-lawmakers-advance-trans-sports-ban-with-genital-check-2022-06-03/.

brown women are often viewed as "nonconforming" with white-centric stereotypes of femininity. Decl. Ex. A at 3–4.

Targeting women who are transgender as insufficiently "feminine" forces *all* women into more rigid gender roles—a dynamic that has harmful implications far beyond sports. These policies also reinforce a false binary by assuming that those assigned male at birth are inevitably and inherently athletically superior and those identified as female are inherently weaker and less athletic. This narrative harms all women and girls and perpetuates harmful gender-based inequities in athletics, such as the over-resourcing of men's sports programs and the chronic failure to invest in women's sports programs and women athletes. *See* Decl. Ex. A at 6–7.

Depriving transgender women and girls of their right to play women and girls' sports—as Plaintiffs here seek to do—denies them opportunities to gain academic and social benefits of sports free from sex discrimination, including a sense of community and belonging among their peers. Martin Decl. ¶¶ 16–17; Decl. Ex. A at 4–5. It does so at great cost, robbing young transgender people—who face increased risk of suicide because of the disproportionate discrimination, hostility, and stigma they suffer—of the potentially life-saving benefits of playing sports. Decl. Ex. A at 4–5. Categorical bans excluding women and girls who are transgender from participating in women's sports also send the message that transgender students are acceptable targets for violence and harassment, and remove a much-needed bulwark

of safety and well-being that can insulate these students from the risks of discrimination and harassment they disproportionately face in school. *Id.* at 5.

Consistent with its mission of advancing the rights of all women and girls under Title IX and beyond, NWLC has been a strong public advocate for the inclusion of transgender women in women's sports and inclusive restroom and locker room policies. Martin Decl. ¶¶ 10–11, 14, 24–27. For example, the President and CEO of NWLC testified before the U.S. House Committee on Oversight and Accountability on "The Importance of Protecting Female Athletics and Title IX," during which she explained why trans-exclusionary policies undermine Title IX's purpose to ensure equal athletic opportunities for all students. *Id.* ¶ 10. NWLC submitted comments in response to the U.S. Department of Education's proposed Title IX rules advocating for the rights of transgender students to play school sports free from discrimination, helped lead efforts of over 80 organizations urging the release and finalization of rules that will do so, and co-lead advocacy against federal legislation that would amend Title IX to ban transgender girls from participating in sports. *Id.* ¶ 11. NWLC's work includes equipping students with the tools to advocate for their own Title IX rights, publishing reports on gender equity, educating coaches and school officials on Title IX obligations, and publishing educational materials advocating for the inclusion of women who are transgender in women's sports. *Id.* ¶ 10.

NWLC also is specifically involved with advocating for regulators of athletics, like the NCAA, to implement and maintain policies that promote values of inclusion and diversity in sports, including the inclusion of transgender women athletes. In 2020, NWLC advocated for the NCAA to relocate all NCAA events from Iowa because the state's passage of a law that bans transgender women and girls from competing on college teams. *Id.* ¶ 14. In 2022, NWLC wrote an open letter to the NCAA criticizing its new restrictions on transgender athletes' participation and joined with other organizations to call on the NCAA to comply with its NCAA principles of fairness and inclusion. *Id.* Most recently, NWLC sent the NCAA Board of Governors a letter urging it to reject regressive policies that would bar all women athletes who are transgender from participating in sports. *Id.* ¶ 13; Decl. Ex. A. Similarly, NWLC has responded to the decisions of athletic leagues to enact policy changes that exclude transgender women and reinforce dangerous stereotypes that harm all women. *Id*.

The NCAA Policy

In 2010, the NCAA adopted a policy allowing transgender women to participate in women's sports after one year of gender-affirming hormone therapy. Compl. App. A at 2. Since then, only a handful of transgender women have participated in NCAA sports. Compl. ¶¶ 14, 541, 552 (identifying only five transgender athletes who have competed in NCAA sports, only some of whom

competed post-season).

After Lia Thomas became the only transgender woman to win an NCAA Division I title at the NCAA nationals in March 2022, *id.* ¶ 471, athletic organizations, including the NCAA, faced a vocal backlash from anti-trans activists. Despite the individuals who loudly criticized Ms. Thomas's participation, many cisgender women athletes and NWLC, along with other national organizations within the gender justice movement, supported her. Martin Decl. ¶ 14. The NCAA nevertheless adopted increasingly restrictive policies that make it more difficult for transgender women to participate. Compl. App. A at 2. As of August 1, 2023, the NCAA newly required transgender women to document that they had lowered their level of circulating testosterone beneath a certain threshold set by the governing body for a particular sport (e.g., below 5 nmol/L for USA Swimming). *See id.* at 6, 13. And the NCAA announced plans to, as of August 1, 2024, require transgender women to show that they meet all the criteria of the relevant governing body, including not just lowering circulating testosterone beneath a particular threshold, but doing so continuously for a particular length of time (e.g., for 36 months for USA Swimming). *See* ¶ 254; App. A at 2.

Plaintiffs' Lawsuit and the NCAA's Response

Plaintiffs in this case are sixteen cisgender women who want to exclude transgender women from NCAA women's sports. Plaintiffs have participated in only

five different sports among them (swimming, track, volleyball, soccer, and tennis), yet seek to exclude transgender women from *all* sports. *See, e.g.*, Compl. at 48; 59–67 (discussing 25 women's sports); 69–71 (diving); 71–74 (water polo); 75–76 (rowing); 76 (triathlons). Only two of the sixteen Plaintiffs have ever competed against a transgender athlete in college: (a) Riley Gaines, who tied with a transgender woman swimmer for fifth place in the women's 200 freestyle at the 2022 NCAA Nationals rather than being the sole fifth place recipient; and (b) "Track Athlete A," who competes in Division III track and field and placed behind a transgender woman at the March 2024 All Atlantic Regionals in the 200-meter dash. Compl. ¶¶ 487, 541.

Despite Plaintiffs' limited experience and perspective, they seek to bring a national class action representing all "future, current, or past NCAA women's athletes" in all sports "who have competed or may compete against [women who are transgender] athletes or who have shared or may share a locker room, shower, or restroom with a [woman who is transgender] by virtue of the NCAA's Transgender Eligibility Policies." Compl. ¶ 561. They also seek sweeping, nationwide relief prohibiting transgender women from competing in all NCAA events, banning transgender women from women's locker room, shower, and restroom facilities, and invalidating the athletic records of all transgender women. Compl. at 152–53.

In the wake of this lawsuit, the NCAA has signaled it is reevaluating whether it will continue to permit transgender women and girls to participate *at all* in

women's athletics, stating, "[T]he current policy remains under review." Martin Decl. ¶ 13. NWLC has continued to strongly urge the NCAA to include women who are transgender in women's sports, explaining in a recent letter to the NCAA Board of Governors, Decl. Ex. A, and in recent public statements, that bans on transgender women participating in sports "perpetuate harmful stereotypes about gender and athleticism and require the policing and scrutiny of women's bodies. These policies hurt all women," Martin Decl. ¶ 13.

ARGUMENT

Federal Rule of Civil Procedure 24(b) provides, "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(l). Granting permissive intervention "lies within the discretion of the district court." *Athens Lumber Co. v. Fed. Election Comm'n*, 690 F.2d 1364, 1367 (11th Cir. 1982); *accord Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996). In exercising its discretion, the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

NWLC meets the requirements of Rule 24 for permissive intervention, and the equities strongly favor allowing NWLC to intervene. First, NWLC's request to intervene is timely, as this litigation has just begun, and no responsive pleadings

have yet been filed. Second, NWLC has a strong institutional interest in the subject of the litigation, and its defense shares common questions of law and facts with existing parties. Finally, the equities strongly favor intervention, and NWLC's participation will not cause delay or undue prejudice. As an organization whose core mission is advancing and protecting the legal rights of *all* women and girls—including transgender women and girls—NWLC's participation will provide a critical perspective otherwise absent from this case. Including this perspective is particularly important given that Plaintiffs purport to represent all NCAA cisgender women athletes past, present, and future, but plainly do not.

I. NWLC Satisfies the Requirements for Permissive Intervention.

A. NWLC's Motion Is Timely.

As an initial matter, NWLC's motion is timely. The Court considers four factors in determining the timeliness of a motion to intervene:

> (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before petitioning for leave to intervene; (2) the extent of the prejudice that existing parties may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest; (3) the extent of the prejudice that the would-be intervenor may suffer if denied the opportunity to intervene; and (4) the existence of unusual circumstances weighing for or against a determination of timeliness.

Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC, 918 F.3d 1161, 1171 (11th Cir. 2019) (citation omitted).

NWLC's motion to intervene is timely under all these factors. First, this motion comes less than two months after the original Complaint was filed, ECF No. 1, and within the time Defendants were granted to answer or otherwise respond to the Complaint. ECF No. 35 (granting State Defendants and NCAA until June 5, 2024, to answer or otherwise respond to the Complaint); *see Owners Ins. Co. v. Hawkins*, No. 22 Civ. 1265, 2023 WL 1824930, at *3 (N.D. Ga. Feb. 7, 2023) ("[A]pproximately two months after learning of the action . . . is a reasonable length of time between when [proposed-intervenor] learned of this matter and when it sought to intervene."); *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (concluding motion to intervene was timely filed when party filed it seven months after original complaint, three months after motion to dismiss, and before any discovery had begun).

Second, no existing party to the litigation will be harmed or prejudiced by the timing of NWLC's motion to intervene, which the Eleventh Circuit has called the "most important consideration in determining timeliness." *Advance Loc. Media*, 918 F.3d at 1171 (citation omitted). This case is at a nascent stage: there have not yet been responses to the Complaint, and no scheduling order has yet issued. Thus, NWLC's intervention would do nothing to upset advances made through litigation, unlike cases where prejudice has been found. *Cf. Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, FL*, 254 F. App'x 769, 771 (11th Cir. 2007) (concluding

district court did not abuse its discretion in deciding intervention sought one day before district court approved a consent decree would substantially prejudice the existing parties "by practically undoing twenty-two months of litigation and settlement negotiations").

Third, NWLC—and the women whose interests it represents—would be prejudiced if NWLC is denied the opportunity to intervene. This is so because Plaintiffs purport to represent a class of *all* "future, current, or past NCAA women's athletes," Compl. ¶ 561, and seek to categorically ban women who are transgender from participation in NCAA sports. As noted, the core of NWLC's decades-long advocacy has been to ensure equal opportunity, including in sports, for *all* women—including women who are transgender. *See supra* p. 12. NWLC has publicly and directly advocated for the NCAA's inclusive policies and has publicly and directly opposed those policies' contraction. *See, e.g.*, Decl. Ex. A. Absent NWLC's intervention, its own interests in advancing the purposes and enforcement of Title IX will be harmed because it will be unable to defend the lawfulness of inclusive athletics policies, and the perspectives of women who support inclusion of transgender women in athletics—including the transgender women whom Plaintiffs seek to exclude—will be absent from this case. In other words, NWLC's participation will ensure that the Court will have the range of briefing and information necessary to resolve this lawsuit.

Fourth, there are no unusual circumstances weighing against timeliness. Thus, under all four factors, NWLC's motion to intervene is timely.

B. NWLC's Defense Shares Common Questions of Law and Fact.

NWLC also has a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "[T]he claim or defense clause of Rule 24(b)([1]) is generally given a liberal construction." *Lancer Ins. Co. v. Hitts*, No. 09 Civ. 302, 2010 WL 2867836, at *4 (M.D. Ga. July 20, 2010), *as amended* (July 22, 2010). "This provision plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940). Indeed, "a permissive intervenor does not even have to be a person who would have been a proper party at the beginning of the suit." 7C Fed. Prac. & Proc. Civ. § 1911 (3d ed.). "Close scrutiny of the kind of interest the intervenor is thought to have seems especially inappropriate under Rule 24 since it makes no mention of interest. The rule requires only that the intervenor's claim or defense share a common question of law or fact with the main action." *Id.*

Rule 24(b)(1)(B)'s requirement that a permissive intervenor "ha[ve] a claim or defense that shares with the main action a common question of law or fact" is thus met where, as here, a proposed defendant-intervenor "intend[s] to defend . . . based on the same law and facts that the existing parties to the litigation have already

raised." *Alabama v. U.S. Dep't of Com.*, No. 18 Civ. 772, 2018 WL 6570879, at *3 (N.D. Ala. Dec. 13, 2018) (holding requirement met where proposed intervenors, including "an organization that 'works to increase Latino political empowerment'" argued challenged rule was "lawful under [] both the Constitution and the APA") (internal quotation marks omitted); *see, e.g.*, *Kobach v. U.S. Election Assistance Comm'n*, No. 13 Civ. 4095, 2013 WL 6511874, at *4 (D. Kan. Dec. 12, 2013) (common question of law or fact met where applicants for intervention have "clearly shown their interests in either increasing participation in the democratic process, or protecting voting rights" and "[as] demonstrated by their answers, that their goal in this action is to defend against the claims of Plaintiffs"); *Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996) (holding "[t]he intervenors in this case have questions of law and fact in common with the parties" where "[t]he intervenors include rabbis, kosher consumers, and rabbinical and lay organizations all with an interest in the enforcement and the constitutionality of the Kosher Laws").

Notably, and supporting intervention here, when cisgender plaintiffs have challenged policies allowing transgender students to use restrooms and locker rooms, courts have routinely allowed advocacy organizations to intervene to defend those policies. *See Parents for Priv. v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1081 (D. Or. 2018), *aff'd sub nom. Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (Basic Rights Oregon granted permission to intervene to defend school

restroom and locker room policy); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 331 (E.D. Pa. 2017), *aff'd*, 897 F.3d 518 (3d Cir. 2018) (LGBTQ-advocacy organization, Pennsylvania Youth Congress, allowed to intervene to defend restroom and locker room policy); *Students & Parents for Priv. v. U.S. Dep't of Educ.*, No. 16 Civ. 4945, 2016 WL 3269001, at *1 (N.D. Ill. June 15, 2016) (granting permissive intervention to Illinois Safe Schools Alliance to defend policy). In the converse situation, when transgender student plaintiffs have challenged state laws banning transgender women and girls from sports teams, courts have likewise granted intervention to cisgender women interested in defending those laws. *See B.P.J. v. W. Va. State Bd. of Educ.*, No. 21 Civ. 316, 2021 WL 5711547, at *1 (S.D. W. Va. Dec. 1, 2021) (denying intervention as a matter of right but granting permissive intervention); *Hecox v. Little*, 479 F. Supp. 3d 930, 955 (D. Idaho 2020) (finding that proposed intervenors "met the test for intervention as a matter of right," and that "[a]lternatively . . . permissive intervention [wa]s . . . appropriate").

Here, NWLC has a substantial and longstanding interest in advocating for the equality of women and girls—including in athletics and access to sex-separated facilities, and including for women and girls who are transgender. *See supra* p. 7. Relatedly, it has a strong interest in the proper interpretation of Title IX and the Equal Protection Clause on these topics. *See id.* Those interests all would be directly

impaired if Plaintiffs were to obtain the relief they seek: a nationwide ban on the participation of transgender women in NCAA events and on transgender women using women's restrooms and locker rooms at those competitions.

NWLC's defense shares common questions of law and fact with the claims and defenses of the parties in this case. *Cf. Alabama*, 2018 WL 6570879, at *3; *Kobach*, 2013 WL 6511874, at *4. Among the common questions of law presented by NWLC's defense are: whether Title IX prohibits transgender women from participating on women's athletic teams; whether Title IX and the Fourteenth Amendment prohibit transgender women from using the same locker room, restroom, and shower facilities as other women; and whether there is a substantive due process right to exclude transgender women from such facilities. Among the common facts presented by NWLC's defense are the impacts that allowing transgender students to play has on opportunities for cisgender women and girls. *See* Martin Decl. ¶ 10 n.8 (referencing NWLC publication showing that the inclusion of girls who are transgender creates *more* opportunities for *all* women and girls to play and arguing lack of proof of categorical "dominance" or overwhelming advantage of transgender women or girls).

II. The Court Should Exercise Its Discretion to Grant NWLC Intervention.

Because NWLC has satisfied Rule 24's prerequisites for permissive intervention, whether to grant such intervention is "within the discretion of the

district court." *Athens Lumber*, 690 F.2d at 1367. The Court's discretion must be informed by, among other things, "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The Court should exercise its discretion to grant intervention. Critically, NWLC's intervention would ensure resolution of Plaintiffs' claims properly considers the rights and interests of transgender women athletes, who are otherwise completely absent from this litigation. NWLC's perspective is particularly useful in "assist[ing] the Court in 'resolv[ing] the issue'" because "neither of the parties share[s]" NWLC's interests in defending the interests of transgender student athletes. *De Fernandez v. Seaboard Marine, Ltd.*, No. 20 Civ. 25176, 2023 WL 3074980, at *7 (S.D. Fla. Apr. 25, 2003) (citation omitted). Rather, in response to external pressure, the NCAA has adopted more restrictive policies through rushed, non-transparent processes. Martin Decl. ¶ 13. As an organization dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons to be free from sex discrimination, NWLC does not have such conflicting interests. *See, e.g.*, *Sierra Club v. Espy*, 18 F.3d 1202, 1207–08 (5th Cir. 1994) (allowing timber industry to intervene in action against U.S. Forest Service given that "government must represent the broad public interest, not just the economic concerns of the timber industry").

NWLC's intervention would also ensure that the Court considers the interests

of the many cisgender women in athletics who do not wish to be represented by Plaintiffs in this class action and who support inclusive policies. Efforts to ban women and girls who are transgender from women's sports—like those of the Plaintiffs here—harm *all* women. Policing who is or isn't a "woman"—including through restrictive "sex verification" requirements—is dangerous; it erects barriers for *all* women, including cisgender women, who fall outside stereotypical notions of femininity. Martin Decl. ¶ 23; Decl. Ex. A at 7–8. Tall women, very muscular women, or women who present in more stereotypically masculine ways could be forced to undergo medical testing or be prevented from playing sports. Martin Decl. ¶ 23. Black and brown women and girls are particularly vulnerable to this sort of scrutiny given racist and sexist stereotypes, as they are already targeted for their nonconformity with society's ideals about white femininity. *Id.*; Decl. Ex. A at 3–4. Indeed, research indicates that in jurisdictions with trans-inclusive policies, more girls overall play school sports than in jurisdictions that have enacted hostile policies to exclude and target transgender and nonbinary students. Martin Decl. ¶ 22.

Moreover, NWLC is particularly well-suited to contribute to the case because of its deep subject-matter expertise with respect to Title IX in general and the athletics regulations under Title IX in particular. Where proposed intervenors "are substantial organizations with experienced attorneys who might well bring perspective that others miss or choose not to provide," permissive intervention is

appropriate. *Nielsen v. DeSantis*, No. 20 Civ. 236, 2020 WL 6589656, at *1 (N.D. Fla. May 28, 2020); *see Hartford v. Ferguson*, No. 23 Civ. 5364, 2023 WL 3853011, at *2 (W.D. Wash. June 6, 2023) ("Alliance's knowledge of the relevant subject matter will provide a helpful perspective that is not necessarily represented by other Defendants."); *335-7 LLC v. City of New York*, No. 20 Civ. 1053, 2020 WL 3100085, at *3 (S.D.N.Y. June 11, 2020) (granting intervention of two tenant groups "whose viewpoint and knowledge of the underlying circumstances would assist the court" in lawsuit filed by landlords challenging the constitutionality of city and state rent stabilization laws); *Pickup v. Brown*, No. 12 Civ. 2497, 2012 WL 6024387, at *4 (E.D. Cal. Dec. 4, 2012) (Equality California "will provide a helpful, alternative viewpoint from the vantage of some persons who have undergone [anti-LGBTQI+ conversion attempts] or are potential patients of treatment that will aid the court in resolving plaintiffs' claims fully and fairly").

Notably, NWLC's expertise provides a necessary correction to Plaintiff's distorted description of the historical and legal landscape. As demonstrated in NWLC's proposed motion to dismiss, Plaintiffs' claims are built on a fundamentally flawed understanding of Title IX's regulations and controlling policy interpretations. *See* Ex. 2 (NWLC's proposed motion to dismiss). Plaintiffs also tell a misleading story about the goals of Title IX and the historical causes of inequities in athletics. Contrary to Plaintiffs' uninformed narrative, Title IX's allowance for sex separation

did not "depend on the assertion of innate biological difference between the sexes, but rather on the historic and societal reality that women and girls have not had the benefit of anywhere near the same opportunities as boys and men to develop their athleticism." Deborah Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. OF RACE, GENDER, & SOC. JUST. 41, 70 (2023) (footnote omitted). Thus, some prominent scholars of Title IX have argued that, far from advancing the goals of Title IX, attempts to exclude girls who are transgender "rests on a biological determinism that has historically and continues to hurt women's equality in general and women's prospects for equal athletic opportunity in particular." *Id.* at 85 (footnote omitted). As Title IX advocates have reiterated for decades, men and boys continue to receive far more school sports opportunities at all ages and levels of play—and excluding women and girls who are transgender from women's and girls' sports perpetuates sex stereotypes rather than remedying any of the urgent problems facing women's and girls' sports.

Finally, NWLC's participation will cause no delay or prejudice. Responsive pleadings have not yet been filed and NWLC has already prepared its proposed motion to dismiss, which is being tendered simultaneously with this motion. NWLC is a single party and asserts no new claims. If intervention causes any delay at all, it will be "inconsequential compared to the overall length of th[e] case and the interests at stake," particularly given that Plaintiffs seek relief that will impact all transgender

and cisgender women and girls who play NCAA sports, have in the past, or dream of growing up to play one day. *De Fernandez*, 2023 WL 3074980, at *6.

NWLC has a long, demonstrated history of working to advance the rights of women and girls as student athletes and to ensure that all individuals—including transgender women—enjoy protection against sex discrimination. Accordingly, NWLC will bring a vital perspective to this lawsuit that Plaintiffs neglect and that the other Defendants cannot fully convey or defend.

III. The Court Should Accept the Proposed Motion to Dismiss as a "Pleading" Under Rule 24(c).

NWLC contemporaneously submits a proposed motion to dismiss as an exhibit, which "clearly spells out" NWLC's position regarding Plaintiffs' claims, *see Piambino v. Bailey*, 757 F.2d 1112, 1123 (11th Cir. 1985), to satisfy the Rule 24(c) requirement. *See, e.g.*, *Little River Transp., LLC v. Oink Oink, LLC*, No. 22 Civ. 22509, 2023 WL 3791781, at *5 (S.D. Fla. Apr. 13, 2023); *Cellco P'ship & N.Y. SMSA Ltd. P'ship v. Cnty. of Monmouth, N.J.*, No. 23 Civ. 18091, 2024 WL 989824, at *6 (D.N.J. Mar. 7, 2024).

CONCLUSION

For all of the forgoing reasons, NWLC respectfully requests that this Court allow NWLC to permissively intervene in this matter as a defendant.

Dated: May 6, 2024

/s/ Nneka Ewulonu

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RULE 7.1 CERTIFICATE OF COMPLIANCE WITH L.R. 5.1

Pursuant to Local Rule 7.1D, I hereby certify that this brief has been prepared in Times New Roman, 14-point font, one of the font and point selections approved by this Court in Local Rule 5.1C.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
Nneka Ewulonu

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
Nneka Ewulonu

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

RILEY GAINES, *et al.*,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Defendants,

and

NATIONAL WOMEN'S LAW CENTER,

[*Proposed*] *Intervenor-Defendant*.

No. 1:24-cv-01109-MHC

May 6, 2024

DECLARATION OF EMILY MARTIN

I, Emily Martin, hereby declare as follows:

1. I am the Chief Program Officer for the National Women's Law Center ("NWLC"), which is moving for intervention in the above-captioned action. I am over the age of 18, of sound mind, and am competent to make this declaration.

2. I submit this declaration in support of NWLC's motion to intervene, including to explain NWLC's interest in this litigation. I have personal knowledge of the statements set forth in this declaration, or I have learned the information provided herein from the cited data sources and knowledgeable NWLC employees. If called as a witness, I could and would testify competently to the matters set forth herein.

3. I joined NWLC in 2009. I currently serve as Chief Program Officer. In this role, I lead the development and execution of an integrated policy and legal strategy across NWLC's gender justice priorities, with a particular focus on low-income women, women and girls of color, and LGBTQI+ individuals. Before beginning my current position in December 2023, I served as NWLC's Vice President for Education & Workplace Justice, where I oversaw NWLC's advocacy, policy, and litigation efforts to forward frameworks that allow women and girls to achieve and succeed at school and at work. I have also served as NWLC's General Counsel.

4. NWLC was founded in 1972 and is a nonpartisan, nonprofit organization dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons to be free from sex discrimination. NWLC pursues its mission through working in the courts, in public policy, and through public education.

5. For over 50 years, NWLC has worked to secure equal opportunity in education for women and girls, including through full enforcement of the U.S. Constitution and Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq*. NWLC seeks to ensure that all individuals, including LGBTQI+ individuals, are protected from sex discrimination.

6. Founded the same year as Title IX was enacted, NWLC has participated

in all major Title IX cases before the Supreme Court as counsel or amicus curiae.

7. NWLC has itself been a party to litigation when necessary to advance the purposes and enforcement of Title IX, *see, e.g.*, *Nat'l Women's L. Ctr. v. U.S. Dep't of Educ.*, No. 17 Civ. 1137 (D.D.C. June 12, 2017), and other statutes that advance gender equality, *see, e.g.*, *Nat'l Women's L. Ctr. v. OMB*, No. 17 Civ. 2458, (D.D.C. Mar. 4, 2019); *Ctr. for Reprod. Rts. & Nat'l Women's L. Ctr. v. U.S. Dep't of Health and Hum. Servs.*, No. 18 Civ. 1688 (D.D.C. July 19, 2018).

8. NWLC has been counsel in numerous cases on the proper interpretation of Title IX. *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty. Bd. of Educ*., 526 U.S. 629 (1999); *Victim Rts. L. Ctr. v. Cardona*, 552 F. Supp. 3d 104 (D. Mass. 2021), *order clarified*, No. 20 Civ. 11104, 2021 WL 3516475 (D. Mass. Aug. 10, 2021); *SurvJustice Inc. v. DeVos*, No. 18 Civ. 535, 2019 WL 5684522 (N.D. Cal. Nov. 1, 2019). NWLC specifically has a long history of advancing the rights of girls and women as student athletes through litigation. *See, e.g.*, *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 183 (3d Cir. 1998) (arguing as counsel for amicus), *vacated*, 525 U.S. 459 (1999); *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910 (7th Cir. 2012) (NWLC, as party counsel, obtaining reversal of summary judgment against a challenge brought by members of a girls' basketball team, who argued an obvious disparity in prime-time scheduling of girls' and boys' high school basketball games denied plaintiffs equal

athletic opportunity); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff'd*, 459 F.3d 676 (6th Cir. 2006) (NWLC, as party counsel, successfully representing a class of girl student-athletes claiming the high school athletic association discriminated against them by scheduling athletic seasons and tournaments for girls' sports during nontraditional and less advantageous times of the academic year than boys' athletic seasons and tournaments); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (NWLC, as party counsel, successfully representing women's fast pitch softball team at Colorado State University in claiming university violated Title IX by discontinuing varsity team); *Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 678 F. Supp. 517 (E.D. Pa. 1987) (NWLC, as party counsel, representing class of women student athletes at Temple University alleging unlawful gender discrimination under Title IX and the federal and state constitutions).

9. In cases where (unlike here) there is already an existing party robustly arguing in favor of transgender-inclusive policies, NWLC also routinely files amicus briefs in the Courts of Appeals in Title IX cases in support of transgender students who experience sex-based discrimination. *See, e.g.*, Brief of Amici Curiae NWLC and 51 Additional Organizations in Support of Appellant, *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078, 2024 WL 1627008 (4th Cir. Apr. 16, 2024),

ECF No. 69-3[1]; Brief of Amici Curiae National Women's Law Center and 33 Additional Organizations in Support of Appellees, *Doe v. Horne*, No. 23-16026 (9th Cir. July 24, 2023), ECF No. 72 (appeal filed)[2]; Brief for Amici Curiae National Women's Law Center and 34 Additional Civil Rights and Other Organizations in Support of Appellees, *Soule v. Conn. Ass'n of Schs., Inc*., 90 F.4th 34 (2d Cir. 2023), ECF No. 124[3]; Brief for Amici Curiae National Women's Law Center, Lawyers' Committee for Civil Rights Under Law and 60 Additional Organizations in Support of Appellees and Affirmance, *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023), ECF No. 71, *withdrawn pending amendment*, 2024 WL 1846141 (9th Cir. Apr. 29, 2024)[4]; Brief of Amici Curiae National Women's Law Center and 58 Additional Organizations in Support of Appellee and Affirmance, *A.M. by E.M. v. Indianapolis Pub. Schs*., 617 F. Supp. 3d 950 (S.D. Ind. 2022), *appeal dismissed*, No. 22-2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023)[5]; *En Banc* Brief of the National Women's Law Center and 50 Additional Organizations as Amici Curiae in Support of Plaintiff-

[1]https://nwlc.org/wp-content/uploads/2023/04/2023.03.04-ECF-No.-69-3-Brief-of-Amici-Curiae-NWLC-and-51-Additional-Organizations-ISO-Appellant-and-Reversal.pdf.
[2]https://nwlc.org/wp-content/uploads/2023/10/2023-10-13-72-AMICI-CURIAE-NWLC-AND-33-ORGANIZATIONS-ISO-APPELLEES-AND-AFFIRMANCE.pdf.
[3]https://nwlc.org/wp-content/uploads/2021/11/ECF-Stamped-Soule-Amicus-Brief.pdf.
[4]https://nwlc.org/wp-content/uploads/2020/12/ECF-Stamped-Hecox-Amicus-12.21.2020.pdf.
[5]https://nwlc.org/wp-content/uploads/2022/11/2022.11.10-NWLC-Amicus.pdf.

Appellee and Affirmance, *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 816 (11th Cir. 2022) (en banc)[6]; Brief of Amici Curiae National Women's Law Center, Et Al., in Support of Respondent, *G.G. by Deirdre Grimm v. Gloucester Cnty. Sch. Bd.*, 15-2056 (Aug. 11, 2017) (appeal dismissed).[7]

10. NWLC's efforts are not limited to the courtroom. Its work includes extensive public education and advocacy. NWLC equips students with the tools to advocate for their own Title IX rights,[8] educates coaches and school officials about how to meet their obligations under Title IX,[9] provides testimony to state and federal congressional committees on Title IX,[10] and publishes reports on gender equity in

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[6]https://nwlc.org/wp-content/uploads/2022/03/2021.11.23-Amicus-Brief-of-NWLC-and-50-orgs-AS-FILED.pdf.

[7]https://nwlc.org/wp-content/uploads/2017/03/GG-Amicus-Brief.pdf.

[8] *See, e.g.*, Linda Bunker, *Keeping Score: An Athletics Equity Checklist for Students, Athletes, Coaches, Parents, Administrators, and Advocates*, NWLC (updated Sept. 2022), https://nwlc.org/wp-content/uploads/2023/03/final_nwlc_KeepingScore.pdf; *The Department of Education's Proposed Title IX Athletics Rule,* NWLC (Apr. 13, 2023), https://nwlc.org/resource/the-department-of-educations-proposed-title-ix-athletics-rule/#; *Submit a Comment Responding to President Biden's Proposed Title IX Rule,* NWLC (July 1, 2022), https://nwlc.org/resource/submit-a-comment-responding-to-president-bidens-proposed-title-ix-rule/.

[9] *See, e.g.*, Neena Chaudhry, *What You Need To Know About Title IX and Athletics: A Webinar For Coaches, Parents, and School Officials*, NWLC (Apr. 18, 2013), https://nwlc.org/wp-content/uploads/2015/08/2013_4_18_athletics_webinar_final.pdf.

[10] *See, e.g.*, Testimony of Fatima Goss Graves, *The Importance of Protecting Female Athletics and Title IX*, NWLC (Dec. 5, 2023), https://oversight.house.gov/wp-content/uploads/2023/12/2023.12.05_Written-Testimony-FGG.pdf; Testimony of Elizabeth Tang, *South Dakota Senate State Affairs Committee*, NWLC (Jan. 13, 2022), https://nwlc.org/wp-content/uploads/2022/02/SD-SB-46-testimony-1.13.22-1.pdf.

education.[11] These efforts include advocacy for, and publishing and distributing education materials regarding, the inclusion of transgender women in women's sports.[12]

11. NWLC also advocates to the U.S. Department of Education regarding the proper interpretation and application of Title IX in regulations. NWLC helped to lead advocacy, imploring President Biden "to swiftly release a Title IX athletics rule that would ensure *all* students, including transgender, non-binary, and intersex students, can participate fully and equally in school sports."[13] In 2023, NWLC submitted comments in response to the U.S. Department of Education's proposed Title IX rule addressing the rights of students who are trans, non-binary, and intersex to play school sports free from discrimination ("Title IX Athletics Rule")—both on

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[11] *See, e.g.*, NWLC & PRRAC, *finishing last: girls of color and school sports opportunities*, NWLC https://nwlc.org/wp-content/uploads/2022/03/final_nwlc_girlsfinishinglast_report.pdf.

[12] *See, e.g.*, Blog Post: *Once and For All: This is Why We Support Trans Women and Girls in Sports,* NWLC (Dec. 6, 2023), https://nwlc.org/once-and-for-all-this-is-why-we-support-trans-women-and-girls-in-sports/; Shiwali Patel, Blog Post: *Gender Justice in Sports Cannot Succeed without Trans Women and Girls*, NWLC (Mar. 31, 2023), https://nwlc.org/gender-justice-in-sports-cannot-succeed-without-trans-women-and-girls/. For earlier examples of such advocacy by NWLC, *see, e.g.*, *Fulfilling Title IX's Promise: Let Transgender and Intersex Students Play* (June 2022), NWLC https://nwlc.org/wp-content/uploads/2019/09/NWLC_Trans50th_FactSheet.pdf; *Facts on Trans Inclusion in Athletics,* NWLC (Sept. 2019), https://nwlc.org/wp-content/uploads/2019/09/Trans-Athlete-Facts.pdf.

[13] Letter from Women's Sports Foundation & NWLC to President Joseph Biden, Jr. Regarding Athletics NPRM (Aug. 10, 2022), https://nwlc.org/resource/wsf-nwlc-letter-to-president-biden-regarding-athletics-nprm/.

behalf of NWLC as an organization,[14] and on behalf of 41 Women and Girls' Rights & Gender Justice Organizations.[15] To equip students and other members of the public with tools to advocate for their own rights, NWLC created a Fact Sheet in partnership with other LGBTQI+ advocacy organizations on the proposed Title IX Athletics Rule[16] and encouraged students, parents, and others to submit their own comments.[17] NWLC also helped lead over 80 organizations to urge the finalization of the Title IX Athletics Rule protecting transgender, nonbinary, and intersex student athletes.[18]

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[14] Emily J. Martin, et al., *Nondiscrimination on the Basis of Sex in Athletics Education or Activities Receiving Federal Financial Assistance, 88 Fed. Reg. 22860, Docket ID ED-2022-OCR-0143*, NWLC (May 15, 2023), https://nwlc.org/wp-content/uploads/2023/05/NWLC-Comment-on-88-Fed.-Reg.-22860-Title-IX-Athletics-Rule-5.15.2023.pdf.

[15] NWLC, *Comment from 41 Women's and Girls' Rights & Gender Justice Organizations: Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance, ED-2022-OCR-0143*, NWLC (May 15, 2023), https://nwlc.org/wp-content/uploads/2023/05/NWLC-Organizational-Sign-On-Comment-5.15.23.pdf; *see also* Emily J. Martin, et al., *Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, NWLC (Sept. 12, 2022), https://nwlc.org/wp-content/uploads/2022/09/NWLC-long-comment-9.12.22-vF.pdf.

[16] *The Department of Education's Proposed Title IX Athletics Rule*, NWLC (Apr. 13, 2023), https://nwlc.org/resource/the-department-of-educations-proposed-title-ix-athletics-rule/#.

[17] Auden Perino & Hunter Iannucci, *Just Let Kids Play!*, NWLC (May 10, 2023), https://nwlc.org/just-let-kids-play/.

[18] *See, e.g.*, Press Release: *Advocacy Groups Demand Immediate Release of Title IX Rule*, NWLC (March 15, 2024), https://nwlc.org/press-release/advocacy-groups-

12. NWLC also engages and advocates before regulators of athletics, like the National Collegiate Athletic Association (the "NCAA"), to implement and maintain policies that promote values of inclusion and diversity in sports, and has done so for decades.

13. Most recently, NWLC sent the NCAA Board of Governors a letter urging it to reject regressive policies that would bar all women athletes who are transgender from participating in sports. Letter from NWLC to the NCAA (Apr. 24, 2024) (attached hereto as Exhibit A). And NWLC joined with others to "call on the NCAA's Board of Governors to protect the freedom of transgender NCAA athletes to participate in the sports they love," emphasizing that "[e]very single student should have access to the lifesaving power of sports."[19] Following its Board of Governor's meeting, the NCAA stated that "[t]he Board of Governors discussed transgender student-athlete participation. The current policy remains under review."[20] NWLC released a public statement to caution the NCAA that bans on transgender women participating in sports "perpetuate harmful stereotypes about

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demand-immediate-release-of-title-ix-rule/; Letter to President Joseph R. Biden, Jr. (Mar. 15, 2024), https://nwlc.org/wp-content/uploads/2024/03/2024.03.15-Title-IX-Letter.pdf.

[19] Letter from NWLC to NCAA Board of Governors 1 (Apr. 23, 2024), https://www.athleteally.org/wp-content/uploads/2024/04/Open-Letter-to-NCAA-Orgs.pdf.

[20] *Board of Governors revises penalties for campus sexual violence attestation*, NCAA (Apr. 25, 2024), https://www.ncaa.org/news/2024/4/25/media-center-board-of-governors-revises-penalties-for-campus-sexual-violence-attestation.aspx.

gender and athleticism and require the policing and scrutiny of women's bodies. These policies hurt all women."[21]

14. NWLC's most recent efforts advocating before the NCAA's Board of Governors builds on its similar work in recent years during which the NCAA has faced increased pressure from anti-transgender activists to change its longstanding policy of including transgender women in women's sports, in effect since 2010.[22] In 2022, NWLC wrote an open letter to the NCAA criticizing it for its new restrictions on transgender athletes' participation made in response to that pressure.[23] Also in 2022, NWLC joined the Women's Sports Foundation and 25 organizations to voice concerns that the change was "unprecedented in both process and timeline" and

[21] Press Release: *National Women's Law Center on NCAA's Continued Review of Policy on Transgender Women Athletes: Make the Right Choice*, NCAA (Apr. 26, 2024), https://nwlc.org/press-release/national-womens-law-center-on-ncaas-continued-review-of-policy-on-transgender-women-athletes-make-the-right-choice/.

[22] Julie Kliegman and Jesse Dougherty, *Pressure mounts on NCAA to clarify stance on transgender athletes*, WASH. POST. (Apr. 23, 2024), http://www.washingtonpost.com/sports/2024/04/23/ncaa-transgender-rule-changes; Karleigh Webb, *NCAA caught between a lawsuit and a hard place on trans-athlete inclusion*, OUTSPORTS (Apr. 25, 2024), https://www.outsports.com/2024/4/25/24092572/ncaa-board-meeting-trans-athletes-riley-gaines-charlie-baker/.

[23] Blog Post: *Dear NCAA, It's Not Too Late to Let Trans & Intersex Students Play!*, NWLC (Jan. 27, 2022), https://nwlc.org/dear-ncaa-its-not-too-late-to-let-trans-intersex-students-play/.

"counter to the NCAA principles of fairness and inclusion."[24] In 2020, NWLC advocated for the NCAA to relocate all NCAA events from Iowa because the state's passage of a law that bans transgender girls from competing on college teams made the state out of compliance with the NCAA's anti-discrimination policy, which states the NCAA "must and shall operate [their] championships and events in alignment with [their] values as [they] strive to promote an inclusive atmosphere in which student-athletes participate[.]"[25] NWLC also advocates with other athletic associations on their policies concerning the participation of athletes who are transgender in sports.[26]

15. Leading women's rights organizations, including NWLC and organizations that advocate for the rights of women and girls in sports, understand gender equity in school requires equal access to participation in athletics for all

[24] *25 Organizations Join WSF Letter to NCAA Regarding Transgender Athlete Participation Policy*, WOMEN'S SPORTS FOUND. (Mar. 22, 2022), https://www.womenssportsfoundation.org/advocacy/25-organizations-join-wsf-letter-to-ncaa-regarding-transgender-athlete-participation-policy/.

[25] *Letter Urges NCAA to Remove Events from Idaho*, NAT'L CTR. FOR TRANSGENDER EQUAL. (June 10, 2020), https://transequality.org/press/releases/letter-urges-ncaa-to-remove-events-from-idaho.

[26] Press Release, *NWLC Condemns NAIA's Ban on Transgender Women's Participation in Women's College Sports*, NWLC (Apr. 8, 2024), https://nwlc.org/press-release/nwlc-condemns-naias-ban-on-transgender-womens-participation-in-womens-college-sports/.

women and girls, including those who are transgender.[27]

16. Policies that exclude women and girls who are transgender from school sports programs for women and girls undermine Title IX's intent to make athletic participation, with all its educational benefits, available to all students free from sex discrimination.

17. Athletics provide students with academic and social benefits—sometimes even lifesaving ones—including a sense of community and belonging among peers, improved academic outcomes, and leadership building.

18. Bans on women and girls who are transgender participating in sports single out these students as acceptable targets for violence and harassment, and remove a much-needed bulwark of safety and well-being that can insulate students from the risks of discrimination and harassment that they disproportionately face in school.[28]

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[27] *See, e.g.*, Letter to Congress from Women's & Girls' Rights Organizations Opposing H.R. 734 (Apr. 14, 2023), https://nwlc.org/wp-content/uploads/2023/03/Sign-on-Statement-Opposing-H.R.-734-4.14.23.pdf; Open Letter Supporting Trans Women & Girls (Mar. 31, 2021), https://nwlc.org/press-release/open-letter-supporting-trans-women-girls/; *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People* (Apr. 9, 2019), https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf.

[28] CDC data show transgender students are many times more likely than cisgender students to experience violence and harassment; a safe and supportive school environment, including access to sports opportunities, can promote academic

19. Attempts to prohibit transgender women from competing in all NCAA events; ban transgender women from locker room, shower, and restroom facilities; and invalidate the athletic records of transgender women threaten harm to all women and are counter to women's rights, gender justice, and Title IX.

20. Before Title IX, women and girls were explicitly, and as a matter of course, denied opportunities to play sports, denied equal training and support, and otherwise denied the opportunities to develop athleticism that were provided to men and boys, all based on the assumption men and boys were categorically athletically superior and naturally inclined towards physical activity and competition in a way that women and girls were not. Opponents of gender equity in sports based their beliefs on biological determinism—a mistaken (and sexist) belief that certain traits are innate and natural to men and women based on their sex assigned at birth and are fundamentally immutable.

21. The same tropes that were used to justify denying women and girls equal opportunity to play sports 50 years ago, are now being used to push women

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success and mitigate negative outcomes associated with discrimination and violence. Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 70 (2019); *Adolescent Health: What Works in Schools*, U.S. DEP'T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION (2020), https://www.cdc.gov/healthyyouth/whatworks/pdf/what-works-safe-supportiveenvironments.pdf.

and girls who are transgender out of school sports, allegedly in the name of "protecting women's sports." The arguments against inclusion of transgender athletes perpetuate the very same discriminatory and outdated stereotypes against which women and girls have fought so hard, both before and after Title IX's passage. These arguments rest on the false premise that anyone assigned female at birth is innately and eternally athletically inferior to anyone assigned male at birth; they send a powerful and harmful message to *all* women and girls of "innate biological female inferiority" and seek to codify sexist stereotypes of how women and girl athletes should look and play.[29]

22. Recent data from the CDC show state policies that prevent transgender high school students from playing are correlated with *lower* participation by *all* high school girls between 2011 and 2019; meanwhile, more girls overall are playing school sports in states with policies allowing transgender students to play.[30]

23. Excluding women and girls who are transgender from participation in sports also dangerously invites policing of who is or is not a woman—including through invasive and humiliating "sex verification" practices—and erects barriers

[29] Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. OF RACE, GENDER, & SOC. JUST. 41, 72–73 (2023) (Professor Brake, whose scholarly work has been cited in Supreme Court opinions, was previously senior counsel at NWLC).
[30] *Fair Play: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS, 14–17 (2021), https://www.americanprogress.org/article/fair-play/.

for all women and girls who play sports.[31] Under these laws, all women and girls who are students could be subjected to intrusive demands for medical tests or information. Especially tall women, very muscular women, women who present in more stereotypically masculine ways, and women whose athletic performance is especially excellent could be forced to undergo medical testing or be prevented from playing sports, in addition to being subjected to suspicion and harassment based on their physical appearance and athletic performance. This "sex testing" ranges from collecting sensitive medical documents to needless and traumatizing genital examinations, and it creates new risks of sex harassment against student athletes. Black and brown women and girls (who face increased body policing and gender scrutiny based on racialized stereotypes of femininity) and intersex women and girls would be especially vulnerable to this sort of scrutiny.

24. NWLC has also advocated for inclusive restroom and locker room policies.

25. NWLC joined with other sexual assault and domestic violence organizations, to oppose antitransgender initiatives that utilize and perpetuate the myth that protecting transgender people's access to restrooms and locker rooms

[31] *See, e.g.*, Marjorie Cortez, *After a girl beat their daughters in sports, Utah parents triggered investigation into whether she was transgender*, DESERET NEWS (Aug. 17, 2022, 8:20 PM MDT), https://www.deseret.com/utah/2022/8/17/23310668/school-investigates-female-athlete-transgender-complaint.

endangers the safety or privacy of others. These organizations together stated that based on their collective experience, the threat of sexual assault is real and pervasive, and that efforts to ban transgender people from using public restrooms put transgender people in harm's way but do not give anyone more security or make anyone safer.[32]

26. In NWLC's recent comments on Title IX regulations, it highlighted that transgender students are singled out and shamed when attempting to access school restrooms at alarming rates, making these spaces sites of intense pain and harm for the students subject to sex discrimination.[33]

27. Efforts to ban women who are transgender from playing sports or using

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[32] *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, NAT'L TASK FORCE (Apr. 13, 2018), https://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community.

[33] Emily J. Martin, et al., *Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, NWLC 48 (Sept. 12, 2022) https://nwlc.org/wp-content/uploads/2022/09/NWLC-long-comment-9.12.22-vF.pdf; *id.* at n.223 (discussing study examining the connection between discrimination and poor mental health outcomes in transgender and nonbinary youth from ages 13-24, 58% of transgender and nonbinary respondents reported being barred or discouraged from bathrooms aligning with their gender identity, and of those 58%, 85% reported depressive mood, and 60% seriously considered suicide. *See* Myeshia Price-Feeney et al., *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. OF ADOLESCENT HEALTH 1142 (2021)).

restrooms and locker rooms are contrary to NWLC's core mission: advancement and protection of the legal rights of women and girls, and the right of all persons to be free from sex discrimination. Policies and rules that affect the ability of transgender women and girls to fully participate in school sports and access restrooms and locker rooms, will directly impact NWLC, its mission, and the communities it serves.

28. As an organization that has been dedicated to women's rights and gender justice for over 50 years, and has been deeply committed to full implementation of Title IX from its inception, NWLC is uniquely positioned to represent the perspectives of women and girls (and, indeed, all individuals) who support the inclusion of women and girls who are transgender in women's and girls' sports.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Executed on this 6th day of May, 2024.

Emily Martin

EXHIBIT A

NATIONAL WOMEN'S LAW CENTER
Justice for Her. Justice for All.

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April 24, 2024

National College Athletic Association
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To the National College Athletic Association Board of Governors:

The National Women's Law Center ("NWLC") urges you to maintain the current eligibility standard for LGBTQI+ student athletes, and to continue working towards your values of inclusion and diversity in sport. The NCAA must not abandon existing policies based on heckling and legal threats from a vocal minority of anti-trans extremists. If you choose to enact a categorical membership ban targeting transgender and/or intersex[1] women, know that this reprehensible decision would expose the NCAA to legal liability for impermissible sex discrimination.

NWLC is a leading national organization in the fight to end sex discrimination, and to expand opportunities for women and girls in every aspect of life, including education and athletics. We work across issues central to the lives of women and girls, with a particular focus on women and girls of color, LGBTQI+ people, and low-income women and families. Since our founding in 1972—the same year Title IX was enacted—NWLC has participated in every major Title IX case before the US Supreme Court[2] (whether as counsel or as *amicus*), and in numerous court cases to clarify and fully enforce Title IX's broad promise of education opportunity, free from sex discrimination and enforcement of sex stereotypes. NWLC assists policymakers in enforcing Title IX's protections against sex discrimination, equips students with tools to advocate for their own rights in school sports and other aspects of education, and we litigate on behalf of students who have been harmed by sex discrimination.

NWLC is proud to represent the strong consensus of the gender justice movement in saying: trans women are women.[3] To that end, NWLC will seek to intervene as a defendant in the

[1] "Intersex" refers to people who have natural variations in sex-linked characteristics that are not perceived as fitting binary definitions of "male" or "female." People who are not intersex are sometimes referred to as "endosex."

[2] *E.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (concluding reprisal for complaining about sex discrimination constitutes intentional sex discrimination contemplated by Title IX); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (establishing school boards are liable for student-on-student harassment when they are deliberately indifferent to the harassment and create a hostile educational environment).

[3] *See, e.g.*, Letter to Congress from Womens' & Girls' Rights Organizations Opposing H.R. 734 (Apr. 14, 2023), https://nwlc.org/wp-content/uploads/2023/03/Sign-on-Statement-Opposing-H.R.-734-4.14.23.pdf; Open Letter Supporting Trans Women & Girls (Mar. 31, 2021), https://nwlc.org/press-release/open-letter-supporting-trans-women-girls/; Statement of Women's Rights and Gender Justice Organizations in Support

recently filed lawsuit against the NCAA's current eligibility standards (*Gaines et al. v. NCAA et al.*), to *all* women and girls are protected, including trans and intersex women and girls and nonbinary athletes. Gender equity in school sports, including intercollegiate competition, requires equal access to participation for trans women, cisgender women,[4] and intersex women. Anti-trans athletics policies perpetuate harmful stereotypes about gender, biology, and athleticism and require the policing and scrutiny of women's bodies. In this way, anti-trans policies harm *all* women.

I. Introduction

Over 50 years' experience advocating for a strong Title IX has led NWLC to firmly support the inclusion of trans, nonbinary, and intersex students in all aspects of school, including sports, as a matter of both civil rights law and of human rights. As many years of federal court decisions underscore, discriminating against students based on trans status or intersex traits *is* sex discrimination, as the U.S. Department of Education's new Title IX rules recognize and affirm.[5] Trans, nonbinary, and intersex students must be able to play school sports as their full selves, and not be bullied and excluded from the same opportunities their peers enjoy.

In addition to the harms that flow from targeting and excluding trans, nonbinary, and intersex students, these policies, cynically advanced using the language of gender equity, utterly fail to address the real barriers to equal athletic opportunity for women and girls, and substitute harmful scapegoating for actual needed reform. Sexism undeniably continues to pervade the world of university sports. Women college athletes continue to receive fewer opportunities—60,000 less—when compared to men.[6] Moreover, NCAA Division I schools spend $2 on men student athletes for every $1 they spend on women student athletes.[7] Excluding trans women from eligibility for Division I-FBS recruiting and athletic scholarships would do nothing to remedy the fact 74% of DI-FBS recruiting dollars are spent on men, and 56% of Division I-FBS athletic scholarship dollars are offered to men student athletes—leaving all women NCAA athletes only 44% of

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of Full and Equal Access to Participation in Athletics for Transgender People (Apr. 9, 2019), https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf.

[4] "Cisgender" refers to people whose gender fully aligns with their assigned sex. The term is sometimes abbreviated as "cis."

[5] 34 C.F.R. § 106.10. The Department of Education has proposed regulations on participation by trans, nonbinary, and intersex students in school sports, and has begun the process of clarifying that categorical bans targeting trans women and girls in school sports are unlawful under Title IX. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023), https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf. Were NCAA to implement a categorical ban on participation by trans women and girls in sports, this would subject NCAA and its member institutions to administrative enforcement by the Department of Education when it finalizes these proposed regulations.

[6] Women's Sports Foundation, *50 Years of Title IX* (May 2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf.

[7] This is while large Division I men's teams report deficits rather than net revenue for their schools. *See* National Women's Law Center, *Quick Facts About Title IX and Athletics* (June 21, 2022) https://nwlc.org/resource/quick-facts-about-title-ix-and-athletics.

scholarship dollars.[8] Women of color experience particular barriers, receiving fewer opportunities to play sports in college than men and white women, and are significantly underrepresented in NCAA divisions I, II, and III.[9] Artificially pitting the interests of cis women against trans women distracts from these issues and ultimately strengthens these unequal systems by perpetuating sexism, to the detriment of *all* women.

NWLC strongly encourages the NCAA to remain on the right side of both history and the law by *retaining* the current eligibility policies for student athletes, and by resisting pressure to enact the agenda of far-right, anti-trans extremists. Relying on disinformation and incorrect assertions about the law, these extremists are demanding policies that would violate Title IX and further entrench discrimination against a vulnerable group of women and girls. The NCAA must not acquiesce to these extremists' pressure and preemptively abandon its policy. Moreover, to the extent the NCAA believes that this acquiescence will insulate it from future litigation and enforcement efforts, it is mistaken.

II. The gender justice community supports trans inclusion because anti-trans policies hurt all women and girls.

Title IX was enacted to ensure *all* students can access the full scope of educational benefits and opportunities free from sex discrimination, including the opportunity to play sports. This unquestionably includes the rights of trans, nonbinary, and intersex students to play sports as their full selves, consistent with their affirmed gender.

Although anti-trans extremists—including the plaintiffs in the recent lawsuit against the NCAA—purport to speak for all women and girls in advocating for transphobic policies, they do not speak for the women's rights community and advocates, including groups like the Women's Sports Foundation, Legal Momentum, American Association of University Women, YWCA, National Organization for Women, and Equal Rights Advocates, which have voiced strong support for trans inclusion in athletics.[10] Our groups collectively have a long history of championing women's rights in all spaces, including in schools and in sports. We know the law requires that women and girls who are trans be given the same dignity, protection, and opportunities as women and girls who are cis. We also recognize how harmful anti-trans policies are to *all* women and girls.

Indeed, anti-trans sports policies undermine Title IX's purpose to secure opportunities for all women and girls by mandating harmful scrutiny and the policing of women's bodies. Although anti-trans policies aim to harm trans and nonbinary people, they present a serious threat to all women and girls who do not conform to narrow sex and race stereotypes, because these policies rely on inappropriate policing of bodies, appearances, and gender expressions. This harms both trans and cis women and girls. Athletics bans are especially likely to harm Black and brown women (who face increased body policing and gender scrutiny based on racialized stereotypes of femininity) and intersex women and girls (who are born with natural variations in sex-linked

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[8] *Id*.

[9] Women's Sports Foundation, *supra* note 6, at 12.

[10] *See, e.g.*, Letter to Congress from Womens' & Girls' Rights Organizations Opposing H.R. 734, *supra* note 3; Open Letter Supporting Trans Women & Girls, *supra* note 3; Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People, *supra* note 3.

characteristics). These harms include being subjected to dangerous and unscientific "sex testing" schemes, which can range from collecting private, sensitive medical documents to needless and traumatizing genital examinations that expose student athletes to new risks of sex harassment and sexual assault.[11]

Anti-trans bans mean any woman who is perceived as "suspiciously" strong, fast, agile, or talented in her sport (meaning she falls outside regressive stereotypes of white femininity) risks challenge, official scrutiny, and accusations of not being a "real woman." Recently, cis teenage girls in Utah have been subjected to "investigation" of their gender based on their success in school sports.[12] Black women in particular have long faced disgraceful, racist abuse that overlaps with scrutiny of their femininity and gender expression. In the 1930s, for example, Tidye Pickett and Louise Stokes became the first Black women on the US Olympic team after facing racist accusations they had unfair advantage over "normal women."[13] These biases persist today. For example, Caster Semenya and Serena Williams have faced repeated accusations of being "a man" or "a hermaphrodite" because they are fast, strong, and talented in their respective sports.[14]

Access to school sports opportunities is a key benefit of education. As the NCAA well knows, student athletes are more likely to complete secondary degrees, to plan for their futures, and to achieve academically in metrics from class attendance to higher grades and test scores.[15] Students who participate in school sports develop skills such as leadership and self-discipline that provide benefits throughout all other aspects of their lives.[16] Excluding trans girls and women from

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[11] *See, e.g., Ohio lawmakers advance trans sports ban with genital check*, REUTERS (June 2022), https://www.reuters.com/world/us/ohio-lawmakers-advance-trans-sports-ban-with-genital-check-2022-06-03/.

[12] Zoe Cristen Jones, *Utah investigates winning student athlete's gender after parents of second- and third-place finishers submit complaints*, CBS NEWS (Aug. 18, 2022), https://www.cbsnews.com/news/transgender-investigation-student-athelete-utahhigh-school/.

[13] Milton Kent et al., *Beating Opponents, Battling Belittlement: How African American Female Athletes Use Community to Navigate Negative Images*, SCH. OF GLOB. JOURNALISM & COMMC'NS, MORGAN STATE UNIV., 9, https://www.documentcloud.org/documents/4528427-The-Image-of-BlackWomen-in-Sports2.html#document/ (last visited Oct. 9, 2023).

[14] Anna North, *'I am a woman and I am fast': What Caster Semenya's Story Says About Gender and Race in Sports*, VOX (May 3, 2019), https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-genderrace-intersex-athletes; Jason Pham, *Serena Williams Shut Down Body Critics: 'I Am Strong and Muscular —and Beautiful'*, BUSINESS INSIDER (May 31, 2018), https://www.businessinsider.com/serenawilliams-shut-down-body-critics-who-said-she-was-born-a-guy-2018-5.

[15] Nat'l Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41–42 (2017), https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. OF SPORT MANAGEMENT 349, 349-50 (2013); R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 J. OF SCHOOL HEALTH 397-401 (2006).

[16] *See, e.g.*, Jennifer Y. Mak & Chong Kim, *Relationship Among Gender, Athletic Involvement, Student Organization Involvement and Leadership*, 25 HUM. KINETICS J. 89 (2016); Robert P. Dobosz & Lee A. Beaty, *The Relationship Between Athletic Participation and High School Students' Leadership Ability*, 34 ADOLESCENCE 215 (1999); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 INT'L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 98 (2013).

school sports creates deep harm by excluding them from these benefits. Moreover, categorical anti-trans bans identify trans and nonbinary students as acceptable targets for violence and harassment, and remove a much-needed bulwark of safety and well-being that can insulate students from the risks of discrimination and harassment that they disproportionately face in school.[17]

III. Should the NCAA categorically ban trans women and girls from playing sports, it will run afoul of federal law and expose its member institutions to legal liability.

Title IX prohibits sex discrimination against transgender women and girls, including in the form of anti-trans sports participation categorical bans. Moreover, public institutions of higher education are bound by the Equal Protection Clause, which also prohibits anti-trans categorical bans. The plaintiffs in *Gaines v. NCAA* misrepresent the law by erroneously arguing that permitting trans women and girls to play on teams consistent with their affirmed gender violates Title IX. But federal law is on the side of trans inclusion, with multiple federal courts holding anti-trans policies violate trans students' rights to be free from sex discrimination under Title IX and the Equal Protection Clause. Should the NCAA categorically ban trans women and girls from participating in sports consistent with their gender, both the NCAA and its member institutions will be exposed to liability for violating the law.

A. Anti-trans sports categorical bans violate Title IX.

Title IX was enacted 50 years ago to provide broad protection against "be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity" on the basis of sex.[18] As many federal courts have held,[19] Title IX's broad purpose requires that all students—including trans, nonbinary, and intersex students—have an equal opportunity to play school sports, regardless of their sex.

Multiple federal courts have held Title IX prohibits discrimination based on transgender status, and, in the context of sex-separated sports, have held that categorical bans on trans women and girls playing sports consistent with their affirmed gender violates Title IX.[20] Indeed, the

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[17] CDC data shows that transgender students are many times more likely than cisgender students to experience violence and harassment; a safe and supportive school environment, including access to sports opportunities, can promote academic success and mitigate negative outcomes associated with discrimination and violence. Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students, 2017*, 68 MORBIDITY AND MORTALITY WEEKLY REPORT 67, 70 (2019); U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *Adolescent Health: What Works in Schools* (2020), https://www.cdc.gov/healthyyouth/whatworks/pdf/what-works-safe-supportiveenvironments.pdf.

[18] 20 U.S.C. §§ 1681 et seq.

[19] *B.P.J. v. West Virginia*, No. 23-1078, 2024 WL 1627008, *4–5 (4th Cir. Apr. 16, 2024); *Doe v. Horne*, 2023 WL 4661831, 32 (D. Az. July 2023); *A.M. v. Indianapolis Pub. Sch.*, 617 F.Supp.3d 950, 966 (S.D. Ind. July 26, 2022).

[20] The Supreme Court in *Bostock v. Clayton County* affirmed that under Title VII, discrimination on the basis of transgender status is discrimination on the basis of sex. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Since then, several federal courts have applied the Supreme Court's reasoning to find that under Title IX, discrimination on the basis of transgender status is unlawful sex discrimination, including when it occurs in

U.S. Court of Appeals for the Fourth Circuit and federal district courts in Arizona and Idaho have blocked enforcement of state anti-trans sports categorical bans, with each holding that by singling out transgender students alone for exclusion *because* they are trans, anti-trans sports bans constitute impermissible sex discrimination under Title IX.[21] The U.S. Court of Appeals for the Eleventh Circuit's holding in *Adams v. School Board of St. John's County* that Title IX does not require that trans students be able to access sex-separated spaces consistent with their affirmed gender is the minority of decisions interpreting Title IX. The majority of federal courts addressing the question, including federal appellate courts, have held that preventing trans students from accessing sex-separated spaces or opportunities that match their gender is impermissible sex discrimination under Title IX.[22]

These holdings are consistent with longstanding Title IX regulations and with the purpose of Title IX. In 1975, the Department of Health, Education, and Welfare[23] ("HEW") issued regulations implementing Title IX which *permit*, but do not require, sex-separated sports teams where "selection for such teams is based upon competitive skill or the activity involved is a contact sport."[24] The purpose of enabling separate gender teams was not to enforce separation based on purportedly innate differences between men and women, but to ensure the equitable participation of women and girls in school sports given the history they faced of being systematically excluded and denied athletic opportunities as compared to men and boys.[25]

By asserting that Title IX permitting sex-separated teams requires excluding trans women and girls from sports because of a so-called gap in athletic performance created by "[b]iological differences between men and women,"[26] the *Gaines* plaintiffs and other anti-trans advocates not only mischaracterize Title IX's purpose, but reproduces the stereotypes historically used to deny women and girls opportunities to play—the very stereotypes that Title IX seeks to dispel. Before Title IX, women and girls were consistently denied the same opportunities to play sports or develop athleticism that were provided to men and boys, based on the assumption men and boys were athletically superior and naturally inclined towards physical activity in a way women and girls were

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the context of sex-separated programs like access to bathrooms and sports. *B.P.J. v. West Virginia*, No. 23-1078, 2024 WL 1627008 (4th Cir. Apr. 16, 2024); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, (2020), *as amended* (Aug. 28, 2020); *Doe v. Horne*, 2023 WL 4661831 (D. Az. July 2023); *A.M. v. Indianapolis Pub. Sch.*, 617 F.Supp.3d 950 (S.D. Ind. July 26, 2022). Even before the Supreme Court held that transgender people are protected from sex discrimination, several federal courts held that policies that prohibit trans students from accessing spaces like bathrooms consistent with their affirmed gender violates Title IX. *See, e.g.*, *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 564 (M.D. Pa. 2019). *See also Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

[21] *See B.P.J.* at 4–5; *Horne* at 32; *A.M.*, 617 F.Supp.3d at 966.

[22] *B.P.J.*, No. 23-1078; *Grimm*, 972 F.3d 586; *Whitaker*, 858 F.3d 1034.

[23] In 1979, HEW was abolished and was split into the U.S. Department of Education and U.S. Department of Health and Human Services.

[24] 34 C.F.R. § 106.41(b).

[25] Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 64 (2023) (citing Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, OXFORD HANDBOOK OF FEMINISM & L. IN THE U.S. 23) ("Similar to the case for women-only discussion groups, the concern was that male players might hog the playing field, refusing to fully engage with women as teammates or opponents, creating negative sport experiences that would further suppress girls' and women's interests and abilities.").

[26] Complaint at 141, *Gaines v. National Collegiate Athletic Ass'n et al.*, No. 1:24-cv-01109 (N.D. Ga 2024), ECF No. 24.

not.[27] By claiming that being assigned male at birth is innately linked to athletic success while suggesting individuals assigned female at birth will always be inferior to individuals assigned male at birth in their athletic performance, anti-trans advocates rely on the very same misogyny and stereotyping women and girls fought so hard against before and during Title IX's passage. This does not just promote anti-trans discrimination, but discrimination against all women and girls who challenge sex stereotypes because of how they look or play.[28]

B. Categorical bans targeting trans women athletes fail constitutional review under the Equal Protection Clause.

As the Supreme Court recently explained, "it is impossible to discriminate against a person for [being] transgender without discriminating against an individual based on sex."[29] The two are inextricably linked. For this reason, federal courts judging constitutional claims against policies that discriminate against transgender students have consistently applied a standard known as heightened scrutiny. This means that a policy discriminating based on a person's transgender status must contain a very strong justification. Courts agree that a desire to harm or exclude a politically unpopular minority is *not* a legally valid interest.

Federal courts scrutinizing policies that target trans women and girls for exclusion from education opportunities by banning them from accessing sex-separated spaces and programming that match their affirmed gender, including school sports, have consistently found it is unconstitutional to subject students to worse treatment because they are trans. This includes the Ninth Circuit, which prevented an Idaho sports categorical ban targeting trans women and girls from being implemented, reasoning that targeting trans women and girls because they are trans and excluding them from the benefits of playing sports violated the Equal Protection Clause. The Ninth Circuit rejected the Idaho's legislature claim that it needed to protect women's sports from supposed "dominance" by trans women and girls,[30] determining the proffered explanation was not

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[27] Brake, *supra* note 25, at 86 (citing Susan Cahn, *Coming on Strong: Gender and Sexuality in Twentieth Century Women's Sport* 4 (1994)) ("Women were long protected out of sports due to beliefs about the frailty of 'the fairer sex' and a purported threat to women's fertility…[and] the belief that women are naturally inferior to men in sports competition.").

[28] The *Gaines* complaint also wrongly asserts that they were robbed of their right to championship under Title IX, arguing that they experienced "losses of placement" and awards when competing against trans athletes. Complaint, *supra* note 26, at 125, 145. However, no such right under Title IX exists. Neither the statute nor the regulations implementing Title IX suggest there is a right to championship, because Title IX's purpose is not about competition or winning, but providing all students access to equal athletic opportunities free from sex discrimination.

[29] *Bostock v. Clayton Cty.*, 150 S.Ct. 1731, 1747 (2020).

[30] Since 2008, 17 states and Washington D.C. have implemented inclusive school sports policies that protect the rights of trans students. In the 16 years these policies have been in place, including trans girls and women has *not* led to any competitive dominance or reduction in opportunities for cis girls and women. Fearmongering about the supposed athletic advantages of trans girls is based on false stereotypes about the connections between physical characteristics and athleticism. *See* American Civil Liberties Union, *Four Myths About Trans Athletes, Debunked* (Apr. 20, 2020), https://www.aclu.org/news/lgbtq-rights/four-myths-about-transathletes-debunked; Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, Ctr. for Am. Progress 14–15 (2021), https://www.americanprogress.org/wp-content/uploads/sites/2/2021/02/Fair-Playcorrection2.pdf; National Women's Law Center, *Fulfilling Title IX's Promise: Let Transgender and Intersex Athletes Play* 2 (2022), https://nwlc.org/resource/fulfilling-title-ixs-promise-let-transgender-and-intersexstudents-play/.

a legitimate interest to support such a policy.[31] Instead, the appeals court concluded Idaho's explanation was pretext for discrimination and encouraged invasive, abusive sex verification practices—which would hurt all women and girls.[32]

Additionally, the Fourth Circuit recently held that a West Virginia anti-trans sports categorical ban, which was enacted to target the *only* openly trans middle school girl in the state seeking to play school sports, triggers heightened review because it impermissibly singles out trans women and girls. This is consistent with previous precedent from the Fourth Circuit[33] finding that anti-trans school policies run afoul of the Equal Protection Clause, because they target trans students for mistreatment because they are trans.[34] The Fourth Circuit explained any law that has the sole purpose of excluding trans girls from the definition of "female" to ban them from educational opportunities, including sports, facially discriminates on the basis of trans status, which the Equal Protection Clause forbids.[35] In applying the Equal Protection Clause to claims involving trans girls seeking to play school sports, the Fourth and Ninth Circuits have analyzed the ways that anti-trans school sports policies increase stigma and discrimination in ways that deny trans women and girls equal education opportunity—and also send harmful messages to all students that sex stereotypes accurately spell out the bounds of their futures and destinies.

IV. Conclusion

We strongly urge the NCAA to maintain its current eligibility standards for LGBTQI+ student athletes. Sidelining athletes because of who they are, what they look like, or how they play runs deeply antithetical to the values of inclusion and diversity in sport the NCAA must strive to uphold.

Were the NCAA to bend to anti-trans demands and impose a categorical ban, the effect of this decision will ripple through the lives of all student athletes. Not only athletes in NCAA member schools, but including young students in high school and middle school just beginning their athletic careers will hear the message that they do not belong. A NCAA categorical ban also is likely to stoke further hostility towards and violence against trans, nonbinary, and intersex people who are already living with targets on their backs because of aggressive attacks at the local, state, and federal levels on their rights and safety. We urge the NCAA to stay on the right side of history and the right side of law, by ensuring the policies it maintains reflect that trans, nonbinary, and intersex student athletes deserve the opportunity to devote themselves to the sports they love as their full selves. Please reach out with any questions about this letter. Thank you for your consideration.

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[31] *Hecox v. Little*, 79 F.4th 1009, 1027–28 (9th Cir. 2023).
[32] *Id.*
[33] *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (2020), *as amended* (Aug. 28, 2020) (in which the Fourth Circuit held that a Virginia school's policy preventing a trans boy from using the boys' bathroom violated the Equal Protection Clause by singling him out for mistreatment because he was trans).
[34] *B.P.J. v. West Virginia*, No. 23-1078, 2024 WL 1627008, *6 (4th Cir. Apr. 16, 2024) (citing *Grimm*, 972 F.3d at 610–13) (applying Fourth Circuit precedent holding that mistreatment of students because they are trans violates the Equal Protection Clause to find that heightened scrutiny applies because of the West Virginia law's "differing treatment of cisgender and transgender girls," and explaining that "[i]f B.P.J. were a cisgender girl, she could play on her school's girls team," and because the law defines a person's sex based on their "reproductive biology and genetics at birth," the only purpose of the law is "to exclude transgender girls from the definition of 'female' and thus to exclude them from participation on sports teams").
[35] *Id.*

Signed,
The National Women's Law Center

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EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

RILEY GAINES, *et al.*, *Plaintiffs*, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*, *Defendants*, and NATIONAL WOMEN'S LAW CENTER, [*Proposed*] *Intervenor-Defendant*.	No. 1:24-cv-01109-MHC May 6, 2024

[PROPOSED] INTERVENOR-DEFENDANT NATIONAL WOMEN'S LAW CENTER'S MOTION TO DISMISS

Proposed Intervenor-Defendant National Women's Law Center ("NWLC") hereby moves this Court to dismiss the Complaint ("Compl."), ECF No. 1, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7) for, respectively, lack of jurisdiction, failure to state a claim, and failure to join an indispensable party. Accompanying this motion is a memorandum of law.

Dated: May 6, 2024

/s/ Nneka Ewulonu

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RULE 7.1 CERTIFICATE OF COMPLIANCE WITH L.R. 5.1

Pursuant to Local Rule 7.1D, I hereby certify that this brief has been prepared in Times New Roman, 14-point font, one of the font and point selections approved by this Court in Local Rule 5.1C.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
Nneka Ewulonu

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
Nneka Ewulonu

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

RILEY GAINES, *et al.*,
Plaintiffs,
v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Defendants,
and

NATIONAL WOMEN'S LAW CENTER,
[*Proposed*] *Intervenor-Defendant*.

No. 1:24-cv-01109-MHC

May 6, 2024

[PROPOSED] INTERVENOR-DEFENDANT NATIONAL WOMEN'S LAW CENTER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6), AND 12(b)(7)

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Intervenor-Defendant National Women's Law Center ("NWLC") hereby moves to dismiss the Complaint ("Compl."), ECF No. 1, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7) for lack of jurisdiction, failure to state a claim, and failure to join a necessary party.

INTRODUCTION

Plaintiffs are several cisgender women who believe women who are transgender (whom Plaintiffs offensively call "males") should be prohibited from participating in women's sports. They seek to represent a nationwide class of "future, current, or past [National Collegiate Athletic Association] [("]NCAA["")] women's athletes who have competed or may compete against [women who are transgender] or who have shared or may share a locker room, shower, or restroom with a [woman who is transgender] by virtue of the NCAA's Transgender Eligibility Policies." Compl. ¶ 561. And Plaintiffs seek nationwide relief prohibiting transgender women from competing in NCAA events, banning them from women's locker room, shower, and restroom facilities, and invalidating all of their NCAA records.

Plaintiffs' sprawling 155-page Complaint is subject to dismissal on multiple grounds, both procedural and substantive. First, the Complaint is an impermissible "shotgun" pleading. Second, it fails to allege that any Plaintiff has standing to seek injunctive relief. Third, the Complaint identifies only one transgender woman (Sadie Schreiner) who might plausibly compete against any Plaintiff (Track Athlete A) in

the future, but fails to—indeed, cannot—join Ms. Schreiner, thus requiring severance and dismissal of Track Athlete A's claims.

Fourth, and most fundamentally, Plaintiffs' claims on the merits reflect a profound misunderstanding of both Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") and the Fourteenth Amendment. Whereas some courts have disagreed about whether Title IX and the Fourteenth Amendment *require* that women who are transgender be allowed to participate on women's teams and use women's restroom and locker room facilities, no court has ever held —as Plaintiffs here claim—that Title IX and the Fourteenth Amendment *prohibit* transgender women from participating in such activities. Plaintiffs' unprecedented arguments are meritless and should be dismissed.

BACKGROUND

Transgender women have been competing on sports teams alongside cisgender women for decades, in accordance with the regulations of sporting organizations and the antidiscrimination laws of many states. *See* Brief of Amici Curiae States at 19-21, *Soule ex rel. Stanescu v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34 (2d Cir. 2023) (en banc) (No. 21-1365).

In 2010, the NCAA adopted a policy allowing transgender women to participate in women's sports after one year of gender-affirming hormone therapy. Compl. App. A at 2. Since the adoption of that policy, a handful of transgender

women have participated in NCAA sports. Compl. ¶¶ 14, 541, 552 (identifying only five transgender women, only some of whom competed post-season).

At the March 2022 NCAA swimming and diving championships held at Georgia Tech, Lia Thomas won first place in the women's 500-yard freestyle swimming, becoming the only transgender woman to win an NCAA Division I title. *Id.* ¶ 471. During the same competition, Ms. Thomas placed eighth out of eight in the women's 100 freestyle and tied for fifth place in the women's 200 freestyle. *Id.* ¶ 507. Ms. Thomas graduated in 2022 and no longer participates in NCAA sports.

Ms. Thomas's success sparked a vocal backlash from certain quarters, and, some athletic organizations, including the NCAA, subsequently adopted policies making it more difficult for transgender women to participate. Compl. App. A at 2. As of August 1, 2023, transgender women were permitted to participate in NCAA sports only if they documented they have lowered their level of circulating testosterone beneath a certain threshold set by the governing body for a particular sport (e.g., below 5 nmol/L for USA Swimming). *See id.* at 2, 13.[1]

Plaintiff Riley Gaines is a former NCAA athlete who tied with Ms. Thomas for fifth place in the women's 200 freestyle at the 2022 NCAA swimming and diving

[1] As of August 1, 2024, transgender women must show they meet all the criteria of the relevant governing body, including lowering circulating testosterone beneath a particular threshold continuously for a particular length of time (e.g., for 36 months for USA Swimming). *See* Compl. ¶ 254; Compl. App. A at 2.

championships. Compl. ¶ 471. The other Plaintiffs in the case are:

- Four cisgender women who also participated in the March 2022 NCAA women's swimming and diving championships but who never competed against Ms. Thomas; they object to the fact that she was allowed to use the women's locker room at the championships. *See id.* ¶¶ 209, 373, 384, 395.

- Reka Gyorgy, a cisgender woman also participated in the March 2022 NCAA women's swimming and diving championships claims her school would have placed higher than 23rd place at the championships absent Ms. Thomas' participation. *See id.* ¶ 516.

- Six cisgender women from the swim team at Roanoke College who objected when a transgender woman wanted to join the school team, ultimately leading the transgender woman to abandon her attempt to participate. *See id.* ¶ 540.

- "Track Athlete A," a cisgender woman who competes in Division III track and field and placed behind a transgender woman—Ms. Schreiner—at the March 2024 All Atlantic Regionals in the 200-meter dash. *See id.* ¶ 541.

- A cisgender volleyball player who previously competed against a transgender girl in high school; now plays volleyball at a Division II school; and is worried she may play against the same transgender woman if she is also recruited to play on a college volleyball team at a Division II school. *See id.* ¶¶ 548–50.

- Two other cisgender women at Division I schools who compete in soccer, tennis, and track and field, and are concerned they may have to compete against hypothetical transgender women in the future. *See id.* ¶¶ 552–54.

Together, Plaintiffs collectively allege the NCAA's past and current policies regarding the participation of transgender women (and their enforcement by the State Defendants[2]) violate Title IX of the Education Amendments of 1972 and the Fourteenth Amendment. *Id.* ¶¶ 91–111, 582–637. Plaintiffs also seek to represent a

[2] *See* ECF No. 31 at 1 & n.1 (listing State Defendants).

nationwide class of "future, current, or past NCAA women's athletes who have competed or may compete against [transgender women] or who have shared or may share a locker room, shower, or restroom with a [transgender woman] by virtue of the NCAA's Transgender Eligibility Policies." Compl. ¶ 561. Plaintiffs seek, among other things: (i) an injunction against the NCAA and the State Defendants preventing them from enforcing the NCAA's policy allowing women who are transgender to participate in women's sports; (ii) an injunction requiring the NCAA to alter athletic records to invalidate the records of women who are transgender and "reassign" their titles to cisgender women; (iii) an injunction against the NCAA and the State Defendants prohibiting them from allowing transgender women to use women's locker room, shower, or restroom facilities; and (iv) damages. *Id.* at 152-154 (Prayer for Relief).

ARGUMENT

I. The Complaint Is an Impermissible "Shotgun Pleading."

For three reasons, the Complaint should be dismissed as a "shotgun pleading." *See Barmapov v. Amuial*, 986 F.3d 1321, 1324, 1329–30 (11th Cir. 2021); *Smith v. Bell*, No. 23 Civ. 2091, 2023 WL 9107304, at *3 (N.D. Ga. Nov. 30, 2023).

First, the Complaint contains "multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint." *Smith*,

2023 WL 9107304, at *3 (citation omitted). *See* Compl. ¶¶ 582, 621, 629.

Second, the Complaint does not "separat[e] into a different count each cause of action or claim for relief." *Smith*, 2023 WL 9107304, at *3 (citation omitted). In particular, Count II combines claims under Title IX and the Equal Protection Clause, rendering it vague at best. *See* Compl. at 148–49.

Third, the Complaint "mixes claims by multiple plaintiffs against multiple defendants[]" without specifying which Plaintiffs are bringing which claims against which Defendants and for which form of relief. *Perry v. Ryan*, No. 22 Civ. 2752, 2023 WL 2403889, at *3 (M.D. Fla. Mar. 8, 2023); *accord Doe I v. City of Pelham, Ala.*, No. 07 Civ. 478, 2010 WL 11614151, at *4 (N.D. Ala. Apr. 13, 2010) (noting that shotgun complaint "d[id] not state, where appropriate, which Plaintiffs are linked to particular counts, but lump[ed] them all together with the cavalier use of the word 'Plaintiffs'"); *see* Compl. ¶¶ 582, 620, 621, 628, 629, 637 (referring collectively to "Plaintiffs" in each Count of the Complaint); *id.* at 152–54 (referring collectively to "Plaintiffs" in Prayer for Relief).

II. Plaintiffs Lack Standing for Injunctive Relief.

Virtually all of Plaintiffs' claims for injunctive relief should be dismissed under Rule 12(b)(1) for lack of standing.[3] "[S]tanding is not dispensed in gross;

[3] The only exceptions are that Track Athlete A's claims, which should be dismissed pursuant to Rule 12(b)(7), and Ms. Gaines's claim for injunctive relief with respect to alteration of records, which should be dismissed pursuant to Rule 12(b)(6).

rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). That remains true even when a plaintiff seeks to bring a class action. "It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) (internal quotation marks omitted). "Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Id.* (internal quotation marks omitted).[4]

A. Plaintiffs Lack Standing for Injunctive Relief Regarding Transgender Women's Participation in Future NCAA Competitions.

The Complaint fails to allege any Plaintiff has standing to pursue injunctive relief regarding the participation of transgender women in NCAA sports, or, by extension, to seek injunctive relief on behalf of a class. To support standing for injunctive relief, an alleged injury must be "actual or imminent, not conjectural or hypothetical," and a future injury must either be "certainly impending," or there must be a "substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*,

[4] Because this Rule 12(b)(1) motion is a "facial attack" on Plaintiffs' standing, "the Court proceeds as if it were evaluating a 12(b)(6) motion." *Parson v. Ga. Dep't of Nat. Res.*, No. 20 Civ. 328, 2021 WL 2043960, at *1 (S.D. Ga. May 21, 2021).

573 U.S. 149, 158 (2014) (cleaned up). For allegations of future injury, the Eleventh Circuit has imposed "a 'high standard,' which demands 'a robust judicial role in assessing [the] risk' of harm" occurring. *Banks v. Sec'y, Dep't of Health & Hum. Servs*., 38 F.4th 86, 94–95 (11th Cir. 2022). Plaintiffs fail to make that showing.

First, with the sole exception of Track Athlete A, none of the Plaintiffs plausibly alleges a substantial risk of competing against a transgender woman at an NCAA event in the future. Indeed, many Plaintiffs appear to be *former* NCAA athletes. *See* Compl. ¶¶ 116–20. The Complaint alleges some Plaintiffs are currently NCAA athletes who fear they may someday compete with a transgender woman. *See* Compl. ¶¶ 550, 553. But none, other than Track Athlete A, can identify a non-hypothetical transgender woman in NCAA athletics against whom they compete.

To find standing under these circumstances, the Court would have to accept a "speculative chain of possibilities": that a hypothetical, currently unknown transgender woman would (i) qualify to participate in an NCAA women's sport, (ii) participate in the same sport as one of the Plaintiffs, (iii) participate in the same NCAA division as one of the Plaintiffs, and (iv) outperform the Plaintiff. *See Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 (2013). Article III requires more. *See Soule by Stanescu v. Conn. Ass'n of Sch., Inc.*, No. 20 Civ. 201, 2021 WL 1617206, at *5 (D. Conn. Apr. 25, 2021), *vacated and remanded on other grounds sub nom.*, *Soule*, 90 F.4th 34 (rejecting standing based on such a chain of

possibilities).

Thus, except for Track Athlete A, Plaintiffs' claim for injunctive relief regarding the future participation of transgender women in NCAA competition should be dismissed for lack of standing. Track Athlete A's claims are independently subject to dismissal under Rule 12(b)(7). *See supra* n.4; *infra* p. 14-15. This leaves no Plaintiff with standing to raise these claims for injunctive relief.

B. Plaintiffs Lack Standing for Injunctive Relief Regarding the Use of Locker Room, Shower, and Restroom Facilities.

The Complaint likewise fails to allege any Plaintiff has standing to seek injunctive relief regarding transgender women's future use of locker room, shower, and restroom facilities, or to represent a class seeking such relief. None of the Plaintiffs allege they are at any risk of having to share locker room, shower, or restroom facilities with a transgender woman in the future.

Six plaintiffs, who are now *former* NCAA athletes, allege they used the same locker rooms as Ms. Thomas while competing at the 2022 nationals at Georgia Tech, but "[p]ast exposure to [alleged] illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Williams v. Reckitt Benckiser LLC*, *RB*, 65 F.4th 1243, 1255 (11th Cir. 2023) (alterations incorporated). In the absence of any allegation these Plaintiffs will continue to participate in NCAA events or experience the complained-of conduct, they—like all the Plaintiffs—lack standing to pursue injunctive relief.

C. Plaintiffs Lack Standing to Alter Athletic Records for Any Plaintiff Other than Ms. Gaines and Track Athlete A.

Finally, although the Complaint seeks injunctive relief to "render invalid and reassign and revise" NCAA athletic records affected by competition with transgender women, *see* Compl. at 153, only three Plaintiffs allege they have any records in need of alteration. Ms. Gaines alleges she should be designated as the sole fifth-place finisher instead of having to share that spot with Ms. Thomas. *See id.* ¶ 517. Ms. Gyorgy alleges the Virginia Tech team would have placed higher absent Ms. Thomas' participation. *See id*. ¶ 516. And Track Athlete A alleges she would have placed higher in the March 3, 2024, All Atlantic Regional Championship absent the participation of Ms. Schreiner. *See id.* ¶ 541. Because Ms. Gaines, Ms. Gyorgy, and Track Athlete A are the only Plaintiffs who have alleged any records in supposed need of alteration, the remaining Plaintiffs' claims for injunctive relief with respect to athletics records should be dismissed.

III. Track Athlete A's Claims Must Be Severed and Dismissed for Failure to Join an Indispensable Party.

Track Athlete A's claims should be severed and dismissed under Rule 12(b)(7) for failure to join an indispensable party, Ms. Schreiner. As observed, *supra* Section II.A, Track Athlete A is the only Plaintiff who alleges she will compete against a non-hypothetical transgender woman—Ms. Schreiner—in the future. Yet, despite identifying Ms. Schreiner by name and seeking injunctive relief that would

bar her from participating in NCAA sports and nullify her NCAA accomplishments, the Complaint fails to join Ms. Schreiner as a party. Because Ms. Schreiner is a required party to Track Athlete A's claims, and joinder is not feasible because the Court lacks personal jurisdiction and venue over Ms. Schreiner, Track Athlete A's claims must be severed and dismissed pursuant to Rule 12(b)(7).

"[A] failure to join a party under Rule 19 is a ground for a Rule 12(b) motion to dismiss" under Rule 12(b)(7). *English v. Seaboard Coast Line R. Co.*, 465 F.2d 43, 44 n.1 (5th Cir. 1972). In ruling on a Rule 12(b)(7) motion, the court first considers whether the third party is "required" under Rule 19(a)(1). Second, if the party is required, the court assesses whether joinder is feasible. Third, if joinder is infeasible, the court decides whether the case can fairly proceed without that party or must be dismissed. *See Steusloff v. Finelli*, No. 23 Civ. 207, 2024 WL 470251, at *2 (N.D. Ga. Jan. 2, 2024). If the case cannot proceed fairly without that party, the absent party is considered indispensable. *Id.* (citation omitted).

A. Ms. Schreiner Is a Required Party for Track Athlete A's Claims.

Ms. Schreiner is a required party under Rule 19(a)(1)(B)(i) because she has an interest in the action and resolving the action in her absence may "as a practical matter impair or impede [her] ability to protect that interest." Fed. R. Civ. P. 19(a)(1)(B)(i). First, the Complaint seeks to bar the NCAA from allowing transgender women, including Ms. Schreiner specifically, to participate on women's

sports teams, whereas Ms. Schreiner has an interest in continuing to participate in NCAA Division III track and field. Second, Plaintiffs seek to require the NCAA to "render invalid and reassign and revise all awards" won by transgender women while competing in a women's event. Compl. at 153. Such relief would directly implicate Ms. Schreiner, who this year won an NCAA conference title at the Liberty League Championships in the 200 meter and finished second in the 400 meter.[5] Ms. Schreiner and other transgender athletes "have an ongoing interest in litigating *against* any alteration of their public athletic records," *Soule*, 90 F.4th at 49 (emphasis in original). Resolving the action in Ms. Schreiner's absence would impede her ability to protect those interests. *See Delta Med. Sys. v. Dre Health Corp.*, No. 21 Civ. 1687, 2021 WL 6752169, at *4 (N.D. Ga. Nov. 8, 2021).

B. Ms. Schreiner Cannot Be Joined in this Action.

Joinder is not feasible when a court lacks personal jurisdiction over a non-party or venue is not proper. *See* Fed. R. Civ. P. 19(a)(1); *Tick v. Cohen*, 787 F.2d 1490, 1493–94 (11th Cir. 1986) ("Limitations on service of process, subject matter jurisdiction, and venue . . . may bar joinder in some cases."); *Cooley v. First Data Merch. Servs.*, No. 19 Civ. 1185, 2020 WL 13526633, at *3 (N.D. Ga. Feb. 7, 2020)

[5] *See* Karleigh Webb, *Trans Sprinter Sadie Schreiner races for NCAA DII title and history*, OUTSPORTS (Mar. 8, 2024), https://www.outsports.com/2024/3/8/24088020/12adie-schreiner-trans-athlete-sprinter-ncaa-diii-rochester/.

(joinder not possible absent personal jurisdiction).

Joining Ms. Schreiner is not feasible. First, Ms. Schreiner is not "subject to service of process" of the Court because she resides in Rochester, New York.[6] The "bulge service" rule for joining third parties allows service only within "100 miles from where the summons was issued," Fed. R. Civ. P. 4(k)(1)(B); *see Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 417 n.5 (5th Cir. 1979), and Rochester is more than 100 miles from Georgia. Nor is Ms. Schreiner "subject to the jurisdiction of a court of general jurisdiction" in Georgia. Fed. R. Civ. P. 4(k)(1)(A). Georgia's long-arm statute is limited to Georgia and actions "affecting specific real property or status, or in any other proceeding in rem." Ga. Code Ann. § 9-11-4(f)(2).

Moreover, even if personal jurisdiction were not a barrier, the Complaint fails to allege any facts establishing venue for Track Athlete A's claims in this district. *See* 28 U.S.C. § 1391. Track Athlete A raced against Ms. Schreiner at Nazareth University in Rochester (in the Western District of New York), and the spring 2024 NCAA Division III championships in track and field will take place in Myrtle Beach (in the District of South Carolina).[7] Accordingly, Ms. Schreiner cannot be joined.

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[6] *See 2023-24 Women's Track & Field Roster: Sadie Rose*, RIT ATHLETICS, https://ritathletics.com/sports/womens-track-and-field/roster/sadie-rose/17578 (last accessed on May 6, 2024). Intervenor-Defendant requests that this Court judicially notice the location of Ms. Schreiner's residence. Fed. R. Evid. 201(b).

[7] *See* ALL-ATLANTIC REGION TRACK & FIELD CONFERENCE, https://www.aartfc.org/ (last visited May 6, 2024) (noting that the All-Atlantic Region Track and Field

C. Track Athlete A's Claims Cannot Continue in Ms. Schreiner's Absence.

Where joinder of a necessary party is not feasible, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Here, all four of Rule 19(b)'s "closely interrelated" factors, *Tick*, 787 F.2d at 1494, favor dismissal of Track Athlete A's claims.

First, a judgment rendered in Ms. Schreiner's absence would prejudice her right to compete in NCAA Division III track and field and to retain her NCAA records. *See Quinn v. Powell*, No. 21 Civ. 3163, 2024 WL 1395153, at *6 (N.D. Ga. Mar. 31, 2024) (granting 12(b)(7) dismissal where non-party's property rights would be prejudiced by a judgment rendered in the non-party's absence).

The second and third factors also demonstrate any judgment rendered in Ms. Schreiner's absence would prejudice her and be inadequate. *Tick,* 787 F.2d at 1495 (considering the second and third factors together). Any relief afforded to Track Athlete A could not be tailored to lessen or avoid any prejudice to Ms. Schreiner.

Conference Championships were hosted at Nazareth University); *Championships: Division III Men's & Women's Outdoor Track & Field*, NCAA, https://www.ncaa.org/sports/2013/11/4/division-iii-men-s-and-women-s-outdoor-track-and-field.aspx (last visited May 6, 2024) (indicating that the NCAA Division III championships in track and field will take place in Myrtle Beach, South Carolina). The Court may take judicial notice of these facts because they are "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (b)(2).

Track Athlete A explicitly seeks to bar Ms. Schreiner from competing in the NCAA and nullify her athletic records. *See Steusloff*, 2024 WL 470251, at *7. Moreover, judgment rendered in Ms. Schreiner's absence would be inadequate for similar reasons; the broad relief Track Athlete A seeks makes it "difficult to envision any conceivable way to fashion a meaningful judgment which will not affect the absent [non-party's] interests." *Tick*, 787 F.2d at 1495.

Finally, Track Athlete A "would suffer minimal prejudice if the Court were to dismiss [her claims] because" she has no claims against the State Defendants, and the Western District of New York is an "alternative forum [] that will allow all required parties to join." *Steusloff*, 2024 WL 470251, at *6. Accordingly, Track Athlete A's claims should be severed and dismissed.

IV. The Complaint Fails to State a Claim for Which Relief Can Be Granted.

Unlike other matters percolating through the courts, this case is not about whether Title IX or the Equal Protection Clause *require* that women's sports teams or women's facilities be accessible to transgender women. In those cases, the Fourth, Seventh, and Ninth Circuits have correctly held that categorically excluding transgender people from restrooms or sports teams consistent with their gender identity violates Title IX, the Equal Protection Clause, or both. *See B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020); *A.C. by M.C. v. Metro. Sch. Dist. of*

Martinsville, 75 F.4th 760 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024) (same); *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023), *withdrawn pending amendment*, 2024 WL 1846141 (9th Cir. Apr. 29, 2024). By contrast, the Eleventh Circuit erroneously held in *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 816 (11th Cir. 2022) (en banc), that Title IX defines sex as "biological sex," and that 34 C.F.R. § 106.33, a regulation allowing schools to designate separate restrooms on the basis of sex, allows schools to exclude transgender students from the restrooms consistent with their gender identity.[8]

Even assuming *Adams*'s vitality, however, and even assuming that *Adams*'s reasoning applies to sports, the question in this case is entirely different from the one in *Adams*. The question presented here is not whether Title IX or the Constitution *allows* Defendants to exclude transgender women from sex-separated teams and facilities consistent with their gender identity. It is whether Title IX or the Constitution *requires* Defendants to exclude such students. No court has ever accepted such arguments, and for good reason—they are wrong and unsupported. Plaintiffs have failed to state a claim for relief under either Title IX or the Fourteenth

[8] The Department of Education has now issued new Title IX regulations disagreeing with *Adams* and clarifying that 34 C.F.R. § 106.33 does not allow sex separation that inflicts more than *de minimis* harm, and specifically does not allow transgender students to be excluded from restrooms or locker rooms consistent with their gender identity. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33802, 33820 (Aug. 1, 2024 (to be codified at 34 C.F.R. pts. 106.10, 106.31(a)(2)).

Amendment, and their claims must therefore be dismissed.[9]

A. Title IX Does Not Prohibit Transgender Women from Participating on Women's Teams.

Count I of the Complaint is based on a fundamentally flawed premise: that, under Title IX, "[s]eparate athletic teams for women are how women are provided equal athletic opportunity in sport." Compl. ¶ 600. To the contrary, sex-separated teams are *one* way schools may seek to provide equal athletic opportunity; they are not a required strategy to meet Title IX's equal opportunity mandate. Thus, even assuming for argument's sake that inclusion of transgender women on women's teams could be taken to mean these track teams were no longer "sex-separated"—an assumption that Intervenor-Defendant strongly disputes—Plaintiffs could not state a claim under Title IX.

Instead of addressing athletics in the text of Title IX, Congress passed a separate provision directing the predecessor to the Department of Education to promulgate regulations "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." *See* Pub. L. 93-380, Title VIII, Sec. 844, August 21, 1974, 88 Stat. 612. The agency did so in 1975. Far from mandating sex-separated teams, those regulations establish a "[g]eneral" rule

[9] "To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

prohibiting schools from "provid[ing] . . . athletics separately" on the basis of sex. 34 C.F.R. § 106.41(a) (emphasis added). Subsection (b) of the regulations then carves out an exception to that general prohibition, stating that "a recipient *may* operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 106.41(b) (emphasis added). Subsection (b) only mandates "[W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited," members of the "excluded sex" must be allowed to try out for the team unless it is a contact sport. 34 C.F.R. § 106.41(b). Subsection (c) of the regulation further requires schools to provide "equal athletic opportunity," listing factors for recipients to consider when determining whether "equal athletic opportunity" is available, but does not identify sex separation as a relevant factor for consideration. *Id.* § 106.41(c).

Thus, as numerous courts have acknowledged, Title IX's governing regulations are "purposely permissive and flexible on [allowing sex-separated teams], rather than mandatory." *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981) (striking high school athletic association rule mandating sex separation for all teams as inconsistent with Title IX); *Force by Force v. Pierce City R-VI Sch. Dist.*, 570 F.

Supp. 1020, 1024–25 (W.D. Mo. 1983) (holding that Title IX did not require sex separation for contact sports and "simply takes a neutral stand on the subject"); *cf. Gordon v. Jordan Sch. Dist.*, No. 21-4044, 2023 WL 34105, at *4 (10th Cir. Jan. 4, 2023) (emphasis in original) ("[J]ust because the Constitution *permits* separate teams for girls and boys doesn't mean that the Constitution *requires* separate teams."). Indeed, courts have long recognized that allowing girls to play on boys' teams, and vice versa, can sometimes be necessary to provide equal athletic opportunity under Title IX or the Fourteenth Amendment.[10]

That same flexibility is found in the Department of Education's Intercollegiate Athletics Policy, which is the only regulatory document specifically addressing when a school is required to provide sex-separated teams. *See* Title IX of the Education Amendments of 1972: A Policy Interpretation, at § VII.C.4.b(3), 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation]; *See Berndsen v. N.D. Univ. Sys.*, 7 F.4th 782, 789 (8th Cir. 2021) (discussing 1979 Policy Interpretation § VII.C.4)). The 1979 Policy Interpretation states, "[W]here an institution sponsors a team in a particular sport for members of one sex, it may be required *either* to permit the excluded sex to try out for the team *or* to sponsor a

[10] *See, e.g.*, *D.M. by Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019) (injunction allowing boys to compete on girls' competitive dance team); *Bednar v. Neb. Sch. Activities Ass'n*, 531 F.2d 922, 923 (8th Cir. 1976) (injunction allowing girl to compete on boys' cross-country team).

separate team for the previously excluded sex." 1979 Policy Interpretation § VII.C.4 (emphases added). Sex-separated teams in non-contact sports such as swimming and track and field are required only if, among other things, "[m]embers of the excluded sex do not possess sufficient skill to be selected for a single integrated team or to compete actively on such a team if selected." *Id.* § VII.C.4.b(3); *see Brooks v. State Coll. Area Sch. Dist.*, 643 F. Supp. 3d 499, 508 (M.D. Pa. 2022) (concluding "Merely allowing female athletes to show up for co-ed tryouts is not enough to satisfy Title IX," where school created a mixed hockey team but "none of those slots were offered to interested females" after tryouts).

Thus, Plaintiffs cannot state a claim under the 1979 Policy Interpretation, unless they can show they do not possess sufficient skill "to be selected for a single integrated team or to compete actively" on a mixed team. 1979 Policy Interpretation § VII.C.4.b(3). Even under Plaintiffs' faulty assumption that a transgender woman's participation on a woman's team is an "integrated team," Plaintiffs fail to plausibly allege the denial of effective accommodation under this standard. Any argument Plaintiffs and other cisgender girls were unable to "be selected for" the team or to "compete actively" on a team with women who are transgender is belied by facts incorporated in the Complaint itself. Ms. Gaines not only competed actively against Ms. Thomas but *tied* with her for fifth place (behind four cisgender women). Compl. ¶¶ 484–87.

Plaintiffs have also failed to allege the type of systemic imbalance necessary to support a Title IX claim based on lack of "participation opportunities." *See* 1979 Policy Interpretation § VII.C.5.a.[11] A claim based on "participation opportunities" is assessed at the aggregate level based on a school's athletic program as a whole, rather than on any one particular individual's ability to compete on a given team in a given event. *See, e.g.*, *Thomas v. Regents of Univ. of Cal.*, No. 19 Civ. 6463, 2020 WL 3892860, at *9 (N.D. Cal. July 10, 2020) (effective accommodation claim regarding "systemwide imbalance in athletic opportunities for women"); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117, 1125 (M.D. Ala. 1997) ("Only when the institution, in a broad-spectrum inquiry, is first found to be in violation of Title IX in one of the respects earlier outlined, does the question of individual or group causes-of-action for relief properly arise."). By contrast, the sporadic success of a handful of transgender women does not come close to establishing the systemwide imbalance to support such a claim. *Cf. Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020), *aff'd*, 79 F.4th 1009 ("It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to

[11] Under the 1979 Policy Interpretation, a covered entity must either provide (1) "participation opportunities for male and female students . . . in numbers substantially proportionate to their respective enrollments," (2) show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex," or (3) show "that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program." *Id.*

compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women.").

In short, the plain text of Title IX says nothing about athletics; the plain text of 34 C.F.R. § 106.41 permits sex-separated sports in specific circumstances but imposes no requirement of sex separation; and the plain text of the 1979 Policy Interpretation requires sex-separated teams if, and only if, women lack the ability to be "selected for" or "compete actively" on a mixed team. No court has ever held these provisions require funding recipients to exclude transgender women, and multiple courts have held categorical exclusions of transgender women violate Title IX or the Equal Protection Clause.

B. Title IX and the Fourteenth Amendment Do Not Bar Transgender Women from Using Women's Facilities.

Neither Title IX nor the Fourteenth Amendment allows schools to exclude transgender students from restrooms and locker facilities consistent with their gender identity—much less requires them to do so, as Plaintiffs contend in Count II. Compl. at 148–49. As to Title IX, the Eleventh Circuit in *Adams* held 34 C.F.R. § 106.33 creates a regulatory "carveout" allowing schools to separate restrooms and locker rooms based on sex designated at birth. 57 F.4th at 811. But, as already noted, that purported regulatory "carveout" no longer exists: the Department of Education has now issued new Title IX regulations clarifying that 34 C.F.R. § 106.33 does not allow transgender students to be excluded from restrooms or locker rooms that are

consistent with their gender identity. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33802, 33820. And even if *Adams* were still controlling, the regulatory "exception is permissive—Title IX does not require that an institution provide separate privacy facilities for the sexes." *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018). "[J]ust because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020).

Nor do Title IX athletics regulations require sex-separated locker rooms. The 1979 Policy Interpretation provides that in determining whether schools provided equal athletic opportunity, the enforcement agency will consider a list of factors, including the "[p]rovision of locker rooms, practice and competitive facilities." 34 C.F.R. § 106.41(c)(7). The 1979 Policy Interpretation further clarifies claims related to locker rooms are "equal treatment" claims, and that a school may be liable for denial of equal treatment "[i]f comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability," for "members of both sexes." *See* 1979 Policy Interpretation § VII(B)(2). For example, schools violate Title IX when "the quality, size and location of the locker rooms were better for male athletes than female athletes." *Ollier v.*

Sweetwater Union High Sch. Dist., 858 F. Supp. 2d 1093, 1111 (S.D. Cal. 2012). Plaintiffs have alleged nothing of the kind.[12]

C. Plaintiffs Do Not Have a Fundamental Right to Exclude Transgender Women from Women's Facilities.

Plaintiffs' Count III—that substantive due process requires exclusion of transgender women from women's facilities—also fails to allege a constitutional violation, much less a "clearly established" right to overcome qualified immunity. Courts have consistently rejected "a privacy right to avoid any risk of being exposed briefly to opposite-sex nudity by sharing locker facilities with transgender students in public schools." *Parents for Priv.*, 949 F.3d at 1224; *Boyertown*, 897 F.3d at 531 ("[W]e decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no court has ever done so.").

To be sure, the Eleventh Circuit has recognized a "right to bodily privacy," noting that "most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993). But the fundamental right to bodily privacy does not extend beyond

[12] Plaintiffs also have not alleged any other basis for a Title IX violation or a denial of equal protection, such as a hostile environment. "[T]he use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender." *Parents for Priv.*, 949 F.3d at 1229.

situations "involving certain compelled nudity." *Padgett v. Donald*, 401 F.3d 1273, 1281 (11th Cir. 2005); *see Mitchell v. Stewart*, 608 F. App'x 730, 735 (11th Cir. 2015) ("[I]ndividuals maintain a right to bodily privacy, in particular the right not to have their genitals exposed to onlookers.").[13]

The Complaint fails to allege any forced or involuntary nudity for a substantive due process claim under these precedents, and the Complaint concedes Plaintiffs were able to change in stalls or a separate storage area. *See* Compl. ¶¶ 381, 388–89, 413. Plaintiffs allege that those alternatives were uncomfortable and inconvenient for them, but the solution to that problem is not an injunction excluding transgender students. It is for school institutions to provide better privacy options "for any student who does not feel comfortable being in the confines of a communal restroom or locker room." *Boyertown*, 897 F.3d at 531. While Plaintiffs object to sharing a group locker room with a transgender woman, their right to bodily privacy can be fully accommodated with the option to change in private shower stalls or single-user facilities. *See id.* at 530.

CONCLUSION

For all these reasons, the Complaint should be dismissed.

[13] *Adams* held schools can *choose* to protect a broader "privacy interest" in "using the bathroom away from the opposite sex." *Adams*, 57 F.4th at 804. But that does not mean they are constitutionally *required* to do so as a matter of substantive due process. The constitutional right to bodily privacy is narrower and limited to compelled nudity.

Dated: May 6, 2024

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RULE 7.1 CERTIFICATE OF COMPLIANCE WITH L.R. 5.1

Pursuant to Local Rule 7.1D, I hereby certify that this brief has been prepared in Times New Roman, 14-point font, one of the font and point selections approved by this Court in Local Rule 5.1C.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
Nneka Ewulonu

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
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