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NOT THROWING IN THE TOWEL: CHALLENGING  
EXCLUSIVE INTERSCHOLASTIC TRANSGENDER  
ATHLETIC POLICIES UNDER TITLE IX

*“Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport. A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.”*<sup>1</sup>

I. INTRODUCTION

Jake Hofheimer is a seventeen-year-old second baseman for a Santa Monica high school baseball team in California.<sup>2</sup> Before he transferred to the Santa Monica high school, Jake was known as Emma Hofheimer.<sup>3</sup> When he was fourteen, Jake came out to his parents as transgender, and they overwhelmingly supported him.<sup>4</sup> His high school and teammates also showed overwhelming support, and now he is able to express his true identity and just be one of the guys.<sup>5</sup> Jake’s story, however, is often the exception when it comes to transgender youth.<sup>6</sup> While California has what is considered the most inclusive policy in the nation on transgender student-athletes’ participation in sports, other state policies effectively bar transgender youth athletes from playing on the same sports team as the

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1. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS 3 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/9QC E-6GAQ>] [hereinafter DEAR COLLEAGUE LETTER].

2. See Bill Plaschke, *Transgender Teenage Ballplayer at Santa Monica Prep School Spreads Message of Hope and Acceptance*, L.A. TIMES (Apr. 10, 2016, 4:00 AM), <http://www.latimes.com/sports/la-sp-transgender-baseball-plaschke-20160410-column.html> (reporting Jake’s story).

3. See *id.* (describing Jake’s early life).

4. See *id.* (quoting Jake’s mother, who said, “I would recommend to parents to look in their child’s eyes, look at their smile, look beyond any gender, and know this is your offspring, this is going to be your child’s story, and you’re going to want to be part of it.”).

5. See *id.* (quoting high school’s athletic director, who said, “Our school environment is one of diversity and acceptance and, well, to us, he’s just Jake.”).

6. For a discussion of the struggles the transgender community faces, see *infra* notes 39–45 and accompanying text.

gender with which they identify.<sup>7</sup> What is more, even in states with inclusive transgender policies, transgender youth, like Jake, still face the same internal and external struggles of expressing who they are.<sup>8</sup> Jake struggled with his identity, and he attended an all-girls middle school in an attempt “to conform to society’s standards” of what it meant to be a girl.<sup>9</sup> Instead, he was constantly bullied for how he dressed and for being a tomboy.<sup>10</sup> Unfortunately, like many transgender youth, the pressure became too much and Jake attempted suicide.<sup>11</sup> Although Jake survived and now leads a happy life as a transgender male, countless transgender youth still face harassment and bullying at school, lack the family and educational support that Jake received, and have attempted and committed suicide.<sup>12</sup>

On May 13, 2016, in response to high suicide rates in transgender youth and the nationwide epidemic of harassment towards transgender students and with the guidance of President Obama, the U.S. Departments of Justice (DOJ) and Education (DOE) released a *Dear Colleague Letter on Transgender Students* (“DOJ and DOE’s 2016 joint statement” or “Obama administration’s directive”) clarifying that Title IX of the Education Amendments of 1972 (“Title IX”) prohibits educational institutions from receiving federal funding from discriminating against students who identify as transgender.<sup>13</sup> The directive, like others promulgated by the DOJ,

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7. For a discussion of California and other states’ policies on transgender youth in sports, see *infra* notes 76–96 and accompanying text.

8. For a discussion of the struggles the transgender community faces, see *infra* notes 39–45 and accompanying text.

9. Plaschke, *supra* note 2 (quoting Jake Hofheimer).

10. See *id.* (reporting Jake was bullied at school and on social media).

11. See *id.* (reporting that Jake tried to hang himself in closet with belt, but the hook belt was attached to broke).

12. See Cleis Abeni, *San Diego Mourns Fourth Trans Teen Lost to Suicide This Year*, ADVOCATE (Oct. 7, 2015 1:59 PM), <http://www.advocate.com/transgender/2015/10/07/san-diego-mourns-fourth-trans-teen-lost-suicide-year> [<https://perma.cc/6U9P-4VUH>] (reporting four San Diego transgender teenagers, all sixteen years old or younger, have committed suicide in 2015). For a discussion of suicide rates for transgender individuals, see *infra* note 45 and accompanying text. For a discussion on statistics of harassment faced by transgender youth at school and its effects, see *infra* notes 43–45 and accompanying text. For a discussion on family and educational support for transgender youth, see *infra* notes 41–42 and accompanying text.

13. See U.S. DEP’T OF JUSTICE, U.S. DEPARTMENTS OF JUSTICE AND EDUCATION RELEASE JOINT GUIDANCE TO HELP SCHOOLS ENSURE THE CIVIL RIGHTS OF TRANSGENDER STUDENTS (May 13, 2016), <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights> [<https://perma.cc/JY4F-XA5T>] (summarizing joint statement of U.S. Departments of Justice and Education concerning Title IX’s protection of transgender students from discrimination). See 20 U.S.C. §§ 1681–1688 (2016) (prohibiting

DOE, and other agencies, was purely advisory and was not binding law.<sup>14</sup> Nevertheless, the directive was met with both praise and intense criticism.<sup>15</sup> On February 22, 2017, the DOJ and DOE withdrew their May 13, 2016 statement, because it did not “contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did [it] undergo any formal public process.”<sup>16</sup>

The statement released on May 13, 2016, did not unequivocally mandate that transgender youth athletes be allowed to participate on the same sports team as the gender with which they identify.<sup>17</sup> However, the 2016 joint statement provided welcomed support to transgender youth struggling for acceptance in both school and sports.<sup>18</sup> For example, the Obama administration’s directive prohibited schools from barring transgender students’ access to locker

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discrimination in educational institutions on basis of sex). For purposes of Title IX, an “educational institution” is “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education.” § 1681(c).

14. See Aaron Nisenon, *Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities*, 120 PENN ST. L. REV. 963, 969 (2016) (stating that government agencies have authority to issue guidance documents, such as Dear Colleague Letters, but that these guidance documents “do not have the force of law or regulation”).

15. For a discussion of the praise and criticism the Obama administration’s directive has received, see *infra* notes 99–118 and accompanying text.

16. U.S. DEP’T OF JUSTICE AND U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER, <https://www.justice.gov/opa/press-release/file/941551/download> [<https://perma.cc/CBY6-VUGH>] (Feb. 22, 2017).

17. See, e.g., Nico Lang, *President Obama Takes a Groundbreaking Stand for Transgender Equality*, ADVOCATE (May 17, 2016, 9:42 AM), <http://www.advocate.com/transgender/2016/5/17/president-obama-takes-groundbreaking-stand-transgender-equality> [<https://perma.cc/YE4U-HX5Z>] (praising Obama administration’s stance on transgender students). For the text of the Obama administration’s policy on transgender student-athletes, see DEAR COLLEAGUE LETTER, *supra* note 1, and accompanying text.

18. See, e.g., Liz Halloran, *Obama Administration Issues Guidelines to Ensure Trans Students Receive Appropriate Treatment* (May 12, 2016), <http://www.hrc.org/blog/obama-administration-issues-guidelines-to-ensure-trans-students-appropriate> [<https://perma.cc/8R5W-FLW9>] (reporting Human Rights Campaign commends Obama administration’s directive). The DOJ and DOE have issued other guidance letters concerning transgender students in recent years; however, these letters did not provide as strong of support as the May 13, 2016 directive. See, e.g., U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES (Dec. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> [<https://perma.cc/7YSZ-UC6N>]; see also U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON STUDENT-ON-STUDENT SEXUAL HARASSMENT AND SEXUAL VIOLENCE (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/H8U5-W94C>].

room facilities.<sup>19</sup> Despite the absence of an explicit directive for transgender athletes, the statement provided a critical starting point for transgender youth athletes in their struggle for equal access in sports.<sup>20</sup>

Part II of this Comment will discuss current issues in the transgender community, the nationwide influence of transgender athletes, state interscholastic policies on transgender athletic participation, and legal responses to the DOJ and DOE's 2016 joint letter.<sup>21</sup> Part III analyzes the DOJ and DOE's 2016 interpretation of Title IX and sex stereotyping theory, and refutes frequently cited arguments for excluding transgender athletes.<sup>22</sup> The Obama administration clarified that the DOJ and DOE "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."<sup>23</sup> If courts accepted this interpretation of Title IX, then state interscholastic policies that effectively exclude transgender student-athletes from participating on the same sports team as the gender they identify with will be in violation of Title IX.<sup>24</sup> If courts do not accept this interpretation, then transgender student-athletes will have a hard time challenging these policies under a sex stereotyping theory.<sup>25</sup> Lastly, Part IV summarizes the previous sections and argues that the DOJ and DOE should reinstate the 2016 directive and that courts should accept its interpretation of Title IX.<sup>26</sup>

## II. BACKGROUND

### A. Challenging Generalizations and Stereotypes: What it Means to Be Transgendered

The Supreme Court's landmark 2015 decision, *Obergefell v. Hodges*,<sup>27</sup> recognized the fundamental right of same-sex couples to

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19. See DEAR COLLEAGUE LETTER, *supra* note 1, at 3 ("A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so.").

20. See *id.* (discussing departments' position on athletics).

21. See *infra* notes 27–118 and accompanying text.

22. See *infra* notes 119–225 and accompanying text.

23. DEAR COLLEAGUE LETTER, *supra* note 1, at 2.

24. For a further discussion of why these policies would be in violation of Title IX, see *infra* notes 192–199 and accompanying text.

25. For a further discussion of Title IX challenges under a sex stereotyping theory, see *infra* notes 175–191 and accompanying text.

26. See *infra* notes 226–246 and accompanying text.

27. 135 S. Ct. 2584 (2015).

marry.<sup>28</sup> Both *Obergefell* and the DOJ and DOE's 2016 joint statement on the rights of transgender students were signals of progress for the LGBTQ community.<sup>29</sup> In the wake of these proclamations, transgender rights have been thrust to the forefront of national discourse.<sup>30</sup> The epicenter of debate over transgender rights is in public schools, especially concerning transgender students' use of bathrooms and locker rooms.<sup>31</sup> In fact, one media outlet has described America's public schools as "ground zero for clashes over transgender rights."<sup>32</sup> A person who identifies as transgender is one "whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth."<sup>33</sup> Many—but not all—transgender individuals experience gender dysphoria, which is a medical diagnosis that refers to "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)."<sup>34</sup> Although it is difficult to determine the national population of those who identify as transgender, one research institute estimates that there are roughly 1.4 million transgender adults in the United States.<sup>35</sup> Unfortunately, discrimination against transgender individ-

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28. See *id.* at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

29. See, e.g., Halloran, *supra* note 18 (discussing positive events for LGBTQ community).

30. For a discussion of the current issues surrounding transgender rights, see *infra* notes 99–118 and accompanying text.

31. See Alia Wong, *The K-12 Binary*, ATLANTIC (July 9, 2015), <http://www.theatlantic.com/education/archive/2015/07/the-k-12-binary/398060/> [<https://perma.cc/Y7E-FPHH>] (discussing debate throughout United States on rights of transgender students).

32. *Id.*

33. *Transgender Terminology*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Jan. 15, 2014), <http://www.transequality.org/issues/resources/transgender-terminology> [<https://perma.cc/KC4C-LYKD>].

34. THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH (WPATH), STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 2 (7th ed. 2011), available at [https://s3.amazonaws.com/amo\\_hub\\_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf) [<https://perma.cc/Z96F-9VZN>].

35. See ANDREW FLORES ET AL., WILLIAMS INST. AT UNIV. OF CAL. SCH. OF LAW, HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/5GPC-AGTN>] (reporting that approximately 0.6% of adults in the United States identify as transgender); see also GARY GATES, WILLIAMS INST. AT UNIV. OF CAL. SCH. OF LAW, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 6 (2011), avail-

uals is nothing new in the workplace, schools, and all walks of life.<sup>36</sup> Courts, however, have provided important protections for transgender individuals against discrimination in employment and in public accommodations under Title VII of the Civil Rights Act (“Title VII”).<sup>37</sup> Nonetheless, discrimination and harassment remain constant in the lives of transgender individuals.<sup>38</sup>

The discrimination and violence against transgender individuals provides a sobering account of the struggles faced by transgender individuals on a daily basis.<sup>39</sup> Transgender individuals are “four times as likely to be living in extreme poverty” compared to the general United States population.<sup>40</sup> Transgender youth are at a significant disadvantage because they often do not have family or educational support.<sup>41</sup> Only 43% of transgender students report

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able at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> [<https://perma.cc/U4RY-CJNX>] (explaining difficulty in determining transgender population because United States Census only provides “male” and “female” as answers to question of gender).

36. See, e.g., *National Transgender Discrimination Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <http://www.transequality.org/issues/national-transgender-discrimination-survey> [<https://perma.cc/4FN2-QK87>] (last visited Feb. 19, 2017) (reporting survey statistics of transgender individuals concerning discrimination and violence).

37. For a discussion of court rulings that have protected transgender individuals, see *infra* notes 153–163 and accompanying text.

38. See, e.g., *National Transgender Discrimination Survey*, *supra* note 36 (“Transgender people face discrimination and violence throughout society, from their family growing up, in school, at work, by homeless shelters, by doctors, in emergency rooms, before judges, by landlords, and even police officers.”).

39. See Dawn Ennis, *Congressional Forum to Investigate ‘Epidemic of Violence’ Against Trans People*, ADVOCATE (Nov. 13, 2015, 10:09 AM), <http://www.advocate.com/transgender/2015/11/13/congressional-forum-investigate-epidemic-violence-against-transgender-people> [<https://perma.cc/9KDL-DAM5>] (reporting first ever congressional forum on violence against transgender individuals by the House LGBT Equality Caucus); see also THE HUMAN RIGHTS CAMPAIGN (“HRC”) & TRANS PEOPLE OF COLOR ASSOCIATION (“TPOCC”), ADDRESSING ANTI-TRANSGENDER VIOLENCE: EXPLORING REALITIES, CHALLENGES AND SOLUTIONS FOR POLICYMAKERS AND COMMUNITY ADVOCATES 1–42 (2015), available at [http://assets.hrc.org/files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf?\\_ga=1.72225627.937730159.1488137989](http://assets.hrc.org/files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf?_ga=1.72225627.937730159.1488137989) [<https://perma.cc/9XVN-QEWF>] (providing statistics on violence against transgender individuals). In 2015, there were twenty-one reported deaths of transgender individuals due to violence, the most ever recorded. See *Violence Against the Transgender Community in 2016*, HRC (2016), <http://www.hrc.org/resources/violence-against-the-transgender-community-in-2016> [<https://perma.cc/Q3KA-APUD>] (last visited Mar. 28, 2016). As of the date of publication, there have been twenty-two deaths of transgender individuals due to violence in 2016. *Id.* The reported acts of fatal violence are almost entirely against transgender women (who were born male), especially women of color. See HRC & TPOCC, *supra*, at 5–26 (recounting stories of transgender women who were killed through acts of violence in 2015).

40. HRC & TPOCC, *supra* note 39, at 29.

41. See *id.* (discussing lack of educational and family support).

having a supportive family member, and transgender students are two times as likely to abuse drugs and alcohol as their peers.<sup>42</sup> The Gay, Lesbian and Straight Education Network's (GLSEN) 2013 National School Climate Survey reported that 37.8% of transgender students feel unsafe at school, as roughly 55% of transgender students reported verbal harassment at school, 22% reported physical harassment, and 11% reported physical assault.<sup>43</sup> Studies have shown that harassment and violence against transgender students, which creates a "hostile school climate," can have lasting and devastating repercussions on transgender students as they grow older.<sup>44</sup> Transgender individuals that experience rejection, exclusion, and loneliness are likely to face higher suicide rates than the general population, depression, substance abuse, poverty, homelessness, and poor academics.<sup>45</sup>

Family and educational support, along with policies of inclusion, at the middle and high school level are necessary to combat the root causes of violence and harassment against transgender individuals and their devastating consequences.<sup>46</sup> The United States

42. HRC, SUPPORTING AND CARING FOR OUR GENDER EXPANSIVE YOUTH 8 (2014), *available at* <http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/asets/resources/Gender-expansive-youth-report-final.pdf> [<https://perma.cc/S89V-HRBZ>] (providing survey results of transgender youth's personal well-being).

43. JOSEPH G. KOSCIW ET AL., GLSEN, THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS xvi–xvii (2014), *available at* [http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report\\_0.pdf](http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf) [<https://perma.cc/6QKX-NX6G>] (reporting survey statistics of transgender youth students).

44. *See id.* (reporting LGBT students are more likely than their peers to have lower grades, develop depression, and miss more school days); *see also* HRC, *supra* note 42, at 9 (reporting fewer transgender students indicated likelihood of achieving ambitions compared to their peers).

45. *See* BAUER ET AL., BMC PUBLIC HEALTH, INTERVENABLE FACTORS ASSOCIATED WITH SUICIDE RISK IN TRANSGENDER PERSONS: A RESPONDENT DRIVEN SAMPLING STUDY IN ONTARIO, CANADA 2 (2015), *available at* <http://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-015-1867-2> [<https://perma.cc/V9AU-LKKH>] (describing negative effects of exclusion and harassment to transgender individuals in Canada and the United States). Forty-one percent of surveyed transgender individuals report attempting to commit suicide, "which vastly exceeds the 4.6 percent of the overall U.S. population who report a lifetime suicide attempt, and is also higher than the 10-20 percent of lesbian, gay and bisexual adults who report ever attempting suicide." ANN P. HAAS, PHILLIP L. RODGERS & JODY L. HERMAN, WILLIAMS INST. AT UNIV. OF CAL. SCH. OF LAW, SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2014), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf> [<https://perma.cc/A6RX-4C9L>].

46. For a discussion of the causes of violence and harassment against transgender individuals and their devastating consequences, *see supra* notes 39–45 and accompanying text.

government and judiciary, along with countless transgender advocate groups, have attempted to address the “epidemic of violence” and discrimination against transgender individuals and its negative effects.<sup>47</sup> Importantly, policies concerning transgender students must be enforced and taken seriously at the local level by school administrators, teachers, and the community.<sup>48</sup>

The DOJ and DOE 2016 joint directive on transgender rights sent a message to states and school districts that discrimination and “sex-based harassment [that] creates a hostile environment” for transgender students is not tolerated under Title IX.<sup>49</sup> The directive made clear that compliance with Title IX is a prerequisite of receiving federal funding.<sup>50</sup>

With the increase of female students in higher education, Congress enacted Title IX on June 23, 1972, as part of the Education Amendments to the Civil Rights Act of 1964.<sup>51</sup> Title IX provides that no person “*on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>52</sup> The goals of Title IX were to promote gender equality between men and women in order “to avoid the use of federal resources to support discriminatory practices.”<sup>53</sup> But courts interpreting Title IX and similar statutes have generally concluded that Congress made no considerations for transgender persons when enacting this legislation.<sup>54</sup> These courts have recognized that it is

47. Ennis, *supra* note 39.

48. *See id.* (discussing importance of supportive local transgender students).

49. *See* DEAR COLLEAGUE LETTER, *supra* note 1, at 2 (“Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments [will] enforce Title IX accordingly.”).

50. *See id.* (conveying that compliance with Title IX is necessary to receive federal funding).

51. Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J. L. & PUB. POL’Y 123, 123 (1997) (describing Title IX’s impact on women’s rights).

52. 20 U.S.C. § 1681(a) (2016) (emphasis added).

53. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); *see also* Valentin, *supra* note 51, at 124 (stating that Title IX was enacted to prohibit discrimination in educational institutions in areas such as “admissions, recruitment, educational programs and activities, course offerings and access, counseling, financial aid, employment assistance, facilities and housing, health and insurance benefits and services, scholarships, and athletics”).

54. *See* Johnston v. Univ. of Pittsburgh, 97 F.Supp.3d 657, 676 (W.D. Pa. 2015) (citing Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007)) (proposing that plain meaning of “on the basis of sex” in Title IX refers to male and female).

the role of Congress and not the courts “to identify those classifications which are statutorily prohibited.”<sup>55</sup>

Certainly, policies that allow transgender student-athletes to play on the same sports team as the gender with which they identify will both further Congress’ goal to prevent funding discriminatory practices, and contribute to the support system crucial to boosting transgender students’ self-esteem and social skills.<sup>56</sup> According to a 2014 HRC report, however, only 12% of surveyed transgender students conveyed that they participated “very often” in sports for school or community leagues, and 64% conveyed “never” participating.<sup>57</sup> More inclusive policies on transgender youth participation in sports will provide another outlet for support to transgender students, as strong familial, educational, and social support is “significantly associated” with an “82% reduction in attempt[ed] [suicide] risk” by transgender individuals compared to those who lack support.<sup>58</sup> To provide school districts with guidance for adopting inclusive policies, the DOJ and DOE’s 2016 joint statement was accompanied by *Examples of Policies and Emerging Practices for Supporting Transgender Students*, which presented exemplary policies of other school districts throughout the nation.<sup>59</sup>

While the current legal transgender rights issue concerns access to bathrooms and locker rooms, public school policies that exclude transgender student-athletes have not received nearly as

55. *Id.* at 676–77 (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984)).

Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress. . . . For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating.

*Ulane*, 742 F.2d at 1086.

56. See HRC, *supra* note 42, at 12 (reporting statistics on transgender youths’ participation in different activities).

57. *Id.* at 12.

58. BAUER ET AL., *supra* note 45, at 6. The same study found that “strong support from leaders such as supervisors or teachers” was significantly associated with reductions in suicide attempts. *Id.* Certainly, a sports coach would qualify as a leader.

59. U.S. DEP’T OF EDUC., EXAMPLES OF POLICIES AND EMERGING PRACTICES FOR SUPPORTING TRANSGENDER STUDENTS (2016), available at <http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/Examples%20of%20Policies%20and%20Emerging%20Practices%20for%20Supporting%20Transgender%20Students.pdf> [<https://perma.cc/T998-9F7J>] (providing guide identifying best practices for schools to follow to support transgender students).

much media or legal attention.<sup>60</sup> Undoubtedly, the interpretation that the DOJ and DOE ultimately decide, as well as the outcome of current and future litigation on transgender access to bathrooms and locker rooms, will have an enormous impact on the future of transgender youth athletes' legal rights.<sup>61</sup>

### B. Transgender Athletes: Defying Stereotypes and Others' Discomfort with Their Success

The rights of members of the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) community have gained significant media, social, and legal attention.<sup>62</sup> High-profile gay athletes, such as the NBA's Jason Collins, the WNBA's Brittney Griner, and the United States Women's Soccer Team's Abby Wambach and Megan Rapinoe have become vocal advocates for LGBTQ rights and have used their platform as athletes to bring awareness to LGBTQ issues.<sup>63</sup> On the heels of significant legal gains by the LGBTQ community, transgender rights have now become a focal point of national discourse.<sup>64</sup>

In a national climate of fierce debate over transgender rights in the United States, transgender athletes have emerged as both role models and figures of controversy.<sup>65</sup> Caitlyn Jenner, a highly decorated athlete and gold medal winner at the 1976 Olympics for

60. For a discussion of current litigation on transgender access to bathrooms and locker rooms, see *infra* notes 99–118 and accompanying text.

61. For a discussion of current litigation on transgender access to bathrooms and locker rooms, see *infra* notes 99–118 and accompanying text.

62. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (granting homosexual couples right to marry).

63. See *Abby Wambach, Megan Rapinoe Join Athlete Ally with 16 Fellow National Women's Soccer League Players*, ATHLETE ALLY (July 25, 2013), <http://www.athleteally.org/news/abby-wambach-megan-rapinoe-join-athlete-ally-16-fellow-national-womens-soccer-league-players/> (reporting Wambach and Rapinoe joined Athlete Ally, which is a non-profit organization that seeks to prevent homophobia and transphobia in sports); see Jeff Truesdell, *WNBA's Brittney Griner on Being a Gay Athlete: I Felt Like Half of Me Wasn't Accepted*, PEOPLE (May 16, 2014, 5:00 PM), <http://www.people.com/article/brittney-griner-gay-wnba-phoenix-mercury-coming-out-stories-book-in-my-skin> [<https://perma.cc/9QDC-4F3V>] (reporting Griner's goal to add to awareness and conversation of gay athletes in sports); see Jason Collins, *I'm Out*, PLAYERS' TRIB. (Nov. 19, 2014), <http://www.theplayertribune.com/jason-collins-retires/> [<https://perma.cc/HC5D-6G3A>] (discussing coming out as first active openly gay basketball player).

64. For a discussion of the current issues surrounding transgender rights, see *infra* notes 99–118 and accompanying text.

65. *Caitlyn Jenner Vows to 'Reshape the Landscape' in ESPYS Speech*, ESPN (July 16, 2015), [http://www.espn.com/espys/2015/story/\\_/id/13264599/caitlyn-jenner-accepts-arthur-ashe-courage-award-espys-ashe2015](http://www.espn.com/espys/2015/story/_/id/13264599/caitlyn-jenner-accepts-arthur-ashe-courage-award-espys-ashe2015) [<https://perma.cc/8UFM-MS6T>] (reporting on Jenner's decision to come out as transgender).

the Men's Decathlon, came out as transgender in 2015.<sup>66</sup> She quickly became a symbol and advocate for transgender awareness, as she received the Arthur Ashe Courage Award at the 2015 ESPY Awards.<sup>67</sup> During her acceptance speech, Jenner vowed to use her celebrity status as a means to call attention to the struggles of transgender youth.<sup>68</sup> She also expressed her hope that young transgender athletes would be "given the chance to play sports as who they really are."<sup>69</sup> In the last decade, other transgender athletes, such as Fallon Fox, Lana Lawless, Keelin Godsey, and Kye Allums have brought media attention to transgender athletes and helped shape professional sports and NCAA policies on transgender athletes.<sup>70</sup>

In 2015, Chris Mosier became the first transgender athlete to represent Team USA in global competition, and he has been breaking barriers and spreading awareness ever since.<sup>71</sup> Mosier became the first transgender athlete featured in *ESPN the Magazine's* annual

66. *Id.* (reporting on Jenner's speech at ESPN's annual sports award show).

67. *See id.* (highlighting important quotes from Jenner's speech).

68. *See id.* For a discussion of the struggles plaguing transgender youth (and adults), see *supra* notes 27–61 and accompanying text.

69. *Read the Full Text of Caitlyn Jenner's Inspirational Speech at the ESPY Awards*, TIME (July 15, 2015), <http://time.com/3960279/caitlyn-jenner-full-speech-espys-pys-text-transcript/> [<https://perma.cc/FH5F-HCZD>].

70. *See* Elizabeth M. Ziegler & Tamara Isadora Huntley, "It Got Too Tough to Not Be Me": Accommodating Transgender Athletes in Sport, 39 J.C. & U.L. 467, 471–73 (2013) (describing transgender athletes' decisions to come out as transgender and their impact on sports policy). Fallon Fox is an MMA fighter who was born male and underwent a sex-change surgery. *See id.* at 471–72. Lana Lawless, a member of the Ladies Professional Golf Association (LPGA), was born male and underwent a sex-change surgery. *See id.* at 472. LPGA bylaws initially barred her from competing in LPGA events, but she was permitted to compete after LPGA players voted to include transgender players. *See id.* Keelin Godsey, who was born male but identifies as female, and Kye Allums, who was born female but identifies as male, were two of the first NCAA athletes to identify as transgender. *See id.*

71. *See* Ashley Rodriguez, *In a Historic First, a New Nike Ad Features the First Transgender Athlete on the US National Team*, QUARTZ (Aug. 10, 2016), <http://qz.com/754994/rio-olympics-2016-chris-mosier-the-first-transgender-athlete-on-the-us-national-team-is-featured-in-a-new-nike-nke-ad/> [<https://perma.cc/NX2Q-JAXZ>] (reporting Mosier represented US men's national team at 2015 sprint duathlon national championships). He did not represent the United States at the Rio 2016 Olympics because the duathlon is not an Olympic event. *See id.* At the 2016 Rio Summer Olympics, two transgender British athletes, who were born male, became the first transgender athletes to compete in Olympic history. *See* Sanchez Manning & Ian Gallagher, *Transgender British Athletes Born Male Set to Make Olympic History by Competing in the Games as Woman*, DAILY MAIL (last updated July 4, 2016, 7:36 AM), <http://www.dailymail.co.uk/news/article-3671937/Transgender-British-athletes-born-men-set-make-Olympic-history-competing-games-women.html> [<https://perma.cc/Y9TK-ZKJP>] (describing British transgender athletes journey and International Olympic Committee's policy on transgender athletes).

Body Issue and a Nike advertisement.<sup>72</sup> More importantly, he has been a vocal advocate for inclusive transgender athletic policies and an inspiration for transgender athletes, as he sees his participation on the US men's team as "an amazing opportunity for other people to see themselves reflected in someone succeeding in sports as a trans man."<sup>73</sup>

Transgender athletes have certainly helped shape policies of inclusion in sports and brought global attention to transgender individuals.<sup>74</sup> Furthermore, transgender athletes serve as role models for transgender youth athletes who may be discouraged from expressing their identity and participating in sports.<sup>75</sup>

### C. State Interscholastic Policies on Transgender Youth Athletes

State policies on the inclusion or exclusion of transgender athletes are often influenced by science, morality, and the safety and health of students.<sup>76</sup> Unlike the uniform transgender athletic policies promulgated by the International Olympic Committee (IOC) and the National Collegiate Athletic Association (NCAA), athletic policies concerning transgender students and athletes are enacted by the state, state school athletic boards, or at the local school dis-

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72. See Rodriguez, *supra* note 71 (reporting Mosier is first transgender athlete in Nike ad); see Christina Kahl, *Chris Mosier: 'I Finally Feel Very Comfortable with My Body'*, ESPN (June 28, 2016), [http://www.espn.com/olympics/story/\\_/page/body-chrismosier/duathlete-chris-mosier-breaking-barriers-repping-team-usa-body-issue-2016](http://www.espn.com/olympics/story/_/page/body-chrismosier/duathlete-chris-mosier-breaking-barriers-repping-team-usa-body-issue-2016) [<https://perma.cc/XVM2-V472>] (interviewing Mosier on why he wanted to be in ESPN the Magazine's Body Issue). *ESPN the Magazine's* Body Issue has pictures of nude athletes to highlight different human body types. See *id.*

73. Rodriguez, *supra* note 71. In an interview with ESPN, Mosier spoke about the importance of inclusive transgender athletic policies:

Changing other policies means there can be young people out there who can fall in love with sport at a very young age and not have to compromise their identity as a person or their identity as an athlete in order to participate in those sports. I've been very focused on that positive piece of change.

Kahl, *supra* note 72.

74. For a discussion of athletes who have brought attention to transgender rights, see *supra* note 70 and accompanying text.

75. See, e.g., Kaitlin Cimini, *LGBT Athletes are Role Models, Too*, SPORTING NEWS (Oct. 29, 2015), [http://www.sportingnews.com/other-sports/news/gus-kenworthy-chris-mosier-you-can-play-lgbt-athletes-coming-out-influence/1jjl6knd3wez21axpwpmkcdzge](http://www.sportingnews.com/other-sports/news/gus-kenworthy-chris-mosier-you-can-play-lgbt-athletes-coming-out-influence/) [<https://perma.cc/CZ4V-J4L7>] ("Making coming-out stories public and accessible provides LGBT youth with the ability to point to someone when they themselves come out.").

76. See Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 28 (2011) (discussing influences on state policies).

strict level.<sup>77</sup> While many states have laws on transgender discrimination in schools, only California has a law that explicitly addresses transgender student-athlete participation.<sup>78</sup> Most states leave it to their high school athletic associations to form policies on transgender student-athlete policies.<sup>79</sup>

California has what is widely considered the most inclusive state policy concerning transgender student rights.<sup>80</sup> The School Success and Opportunity Act prohibits transgender discrimination and provides that “[a] pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”<sup>81</sup> Both the California Interscholastic Federation (CIF) and the Los Angeles Unified School District (LAUSD) provide guidelines on how to promote an inclusive atmosphere for transgender students and student-athletes, which the DOE identifies as exemplary policies to “ensure transgender students have the opportunity to participate in physical education and athletics consistent with their gender identity.”<sup>82</sup>

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77. See *K-12 Policies*, TRANSATHLETE.COM, <http://www.transathlete.com/k-12> [<https://perma.cc/S88P-VA5H>] (last visited Feb. 19, 2017) (reporting policies of different states and school districts within states). In 2004, the IOC promulgated rules requiring transgender athletes to “undergo sex reassignment surgery and then two years of hormone therapy—either testosterone supplementation (to go from female to male) or testosterone suppression (to go from male to female).” *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1738 (2014) (quoting Pablo S. Torre, *The Transgender Athlete*, SPORTS ILLUSTRATED (May 28, 2012), <https://www.si.com/vault/2012/05/28/106195901/the-transgender-athlete> [<https://perma.cc/7KDB-UFR8>]). The NCAA has more relaxed policies for transgender athletes that neither determine an athlete’s gender based on government documentation nor require sex reassignment surgery. *Id.* at 1738–39.

78. See *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 77, at 1740–42; see also Krista D. Brown, *The Transgender Student-Athlete: Is There A Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?*, 25 MARQ. SPORTS L. REV. 311, 314–16 (2014) (discussing state policies on transgender student-athletes’ participation).

79. See *K-12 Policies*, *supra* note 77.

80. See, e.g., Sonali Kohli, *How California Protects Transgender Students*, L.A. TIMES (May 17, 2016, 3:00 AM), <http://www.latimes.com/local/education/la-me-edu-transgender-student-rights-20160516-snap-htmllstory.html> (describing California’s protections for transgender students).

81. CAL. EDUC. CODE § 221.5(f) (West 2015).

82. U.S. DEP’T OF EDUC., *supra* note 59, at 8 (providing guide identifying best practices for schools to follow to support transgender students).

Other state high school athletic associations have adopted inclusive policies as well.<sup>83</sup> The high school athletic associations of Florida, Rhode Island, Washington, and Wyoming have similar policies that state all students “should have the opportunity to participate in interscholastic athletics in a manner that is consistent with their gender identity and expression, irrespective of the gender listed on a student’s birth certificate and/or records.”<sup>84</sup> The policies generally have procedures requiring notice of students’ gender identity and a written statement from students affirming the asserted gender identity is genuine and consistent before a board determines their eligibility.<sup>85</sup> In fact, the DOE points to the Rhode Island Interscholastic League’s policy as an exemplary policy for other associations to follow.<sup>86</sup> Other high school athletic associations, such as Alaska, allow individual school districts to formulate their own policies, which means inclusive policies and exclusive policies may exist across the state.<sup>87</sup>

On the other hand, some state high school athletic associations, such as Alabama and North Carolina, have policies that require athletes to participate on the same sports team as the sex that is recorded on their birth certificate.<sup>88</sup> States such as Idaho, Missouri, and Ohio require a student to undergo hormone therapy to participate on a sports team consistent with their gender identity.<sup>89</sup>

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83. See FLA. HIGH SCHOOL ATHLETIC ASS’N, BYLAWS OF THE FLA. HIGH SCHOOL ATHLETIC ASS’N: 2013–14 EDITION, Administrative Policy 4.3 (2013) [hereinafter FHSAA HANDBOOK], available at [https://www.fhsaa.org/sites/default/files/13-14\\_handbook.pdf](https://www.fhsaa.org/sites/default/files/13-14_handbook.pdf). Rhode Island, Washington, and Wyoming use similar language. See *K-12 Policies*, *supra* note 77.

84. See *K-12 Policies*, *supra* note 77 (describing states with inclusive policies).

85. See FHSAA HANDBOOK, *supra* note 83, at Administrative Policy 4.3.1 (“Notice to the School”), 4.3.2.3 (written statement); WYOMING HIGH SCHOOL ACTIVITIES ASS’N, 2016–17 HANDBOOK, Bylaw 6.8.1 (“Notice to the School”), 6.8.5 (“Documentation”) (2016), available at <http://www.whsaa.org/handbook/Handbook.pdf> [<https://perma.cc/W5QC-UFKD>].

86. See U.S. DEP’T OF EDUC., *supra* note 59, at 9 (describing Rhode Island’s policy).

87. See *K-12 Policies*, *supra* note 77 (describing Alaska School Activities Association policy).

88. See *id.* (describing these states’ policies); THE ALABAMA HIGH SCHOOL ATHLETIC ASS’N, 2012–13 CASE STUDIES, available at [http://media.wix.com/ugd/2bc3fc\\_87536da66cad4d6195ae056a573e67da.pdf](http://media.wix.com/ugd/2bc3fc_87536da66cad4d6195ae056a573e67da.pdf) [<https://perma.cc/2FD4-L7AT>] (“[P]articipation in athletics should be determined by the gender indicated on the student-athlete’s certified certificate of birth.”).

89. See IDAHO HIGH SCHOOL ACTIVITIES ASS’N, RULES AND REGULATIONS 2015–2016, Rule 11-3 (2015), available at <http://idhsaa.org.live.phydostyle.com/manage/articlefiles/56-15-16%20Rules%20and%20Regs.pdf> [<https://perma.cc/DVL5-BBB7>] (requiring hormone treatment for participation); OHIO HIGH SCHOOL ATHLETIC ASS’N, TRANSGENDER POLICY (2014), available at <http://ohsaa.org/Portals/0/Eligibility/OtherEligibilityDocs/TransgenderPolicy.pdf> [<https://>

In April 2016, the Nebraska State Activities Association (NSAA) rejected a birth certificate requirement in a contentious vote by state athletic directors.<sup>90</sup> If the rule had been adopted, the NSAA would have reinstated the birth certificate requirement, which was the rule before it was changed in January 2016.<sup>91</sup> The current rule, which requires hormones or reassignment surgery to prove a “consistent gender identity,” is still exclusive because of the gravity of the decision to take puberty suppression hormones and medical authority that recommends individuals wait until the legal age of majority to undergo gender reassignment surgery.<sup>92</sup>

In the wake of the DOJ and DOE’s 2016 joint statement, many state high school athletic associations opened up discussions on their transgender athletic policies or changed their policies.<sup>93</sup> For example, the Georgia High School Association (GHSAA) abandoned its previous policy requiring athletes to participate on the same sports team as the sex that is recorded on their birth certificate.<sup>94</sup>

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perma.cc/U48Z-V4JN] (requiring hormone treatment); Jenna Liu, *MSHSAA Policy Opens Discussion on Transgender Athletes*, BEARING NEWS (Apr. 28, 2016), <http://www.bearingnews.org/2016/04/mshsaa-policy-opens-discussion-on-transgender-athletes/> [https://perma.cc/FL52-AAX2] (reporting Missouri’s policy requires hormone treatment).

90. See Paul Hammel, *NSAA Assembly Rejects ‘Gender-at-Birth’ Rule for Transgender Student-Athletes*, OMAHA WORLD HERALD (Apr. 11, 2016), [http://www.omaha.com/news/nebraska/nsaa-assembly-rejects-gender-at-birth-rule-for-transgender-student/article\\_74fd26c8-fd9b-11e5-be18-73240a3cb6f3.html](http://www.omaha.com/news/nebraska/nsaa-assembly-rejects-gender-at-birth-rule-for-transgender-student/article_74fd26c8-fd9b-11e5-be18-73240a3cb6f3.html) [https://perma.cc/FKZ3-KPT9] (reporting on vote). Nebraska’s Catholic Conference, supported by three Catholic bishops, stated that a birth certificate requirement would reflect “the ‘fundamental truth’ of a student’s biological sex.” *Id.*

91. See *id.* (reporting on rule change in 2016).

92. *Id.*; see WPATH, *supra* note 34, at 17–18 (making recommendations for when individuals should undergo gender reassignment surgery). For a further discussion of hormones and reassignment surgery, see *infra* notes 200–204 and accompanying text.

93. For a discussion of such discussions, see *infra* notes 94–95. For a discussion of Texas’s opposition to the DOJ and DOE’s joint statement, see *infra* notes 111–115 and accompanying text.

94. Compare *K-12 Policies*, *supra* note 77 (reporting Georgia’s old policy), with GEORGIA HIGH SCHOOL ASS’N, *GHSAA CONSTITUTION AND BY-LAWS 2016–2017*, Bylaw 1.47(b)-(c) (2016), available at <https://www.ghsa.net/sites/default/files/documents/Constitution/Constitution2016-17Complete.pdf> [https://perma.cc/ZN98-P3GD] (reporting new policy).

GHSAA’s policy now states:

The GHSAA will honor a gender determination made by a member school. The GHSAA will not make gender identity determinations nor entertain appeals of the member school’s determination. (c) The GHSAA will attempt to accommodate requests for private restroom or locker/dressing room facilities for students requesting the same at GHSAA playoff events or contests provided notice of the request is made as soon as possible to the GHSAA office. No student shall be required to utilize the private facilities.

*Id.* at Bylaw 1.47(b).

Michigan's Board of Education released new guidelines that provide greater protections for transgender students and support for the Michigan High School Athletic Association's policy to decide transgender athletic participation on a case-by-case basis.<sup>95</sup> As transgender athletes gain more media attention, hopefully transgender athletes can rely on state high school athletic associations, rather than federal laws and litigation, to discard exclusive policies.<sup>96</sup>

#### D. Bathroom and Locker Room Litigation and the Response to the DOJ and DOE's 2016 Joint Statement

Since the Supreme Court's ruling in *Obergefell*, state legislatures have enacted or proposed nearly 100 laws with goals that critics have described as "legalizing discrimination against queer people."<sup>97</sup> Proponents of these laws argue that they protect safety and privacy.<sup>98</sup> On March 23, 2016, the North Carolina General Assem-

95. See generally Brian J. Whiston, *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students*, STATE OF MICH. DEP'T OF EDUC. (2016), available at [http://www.michigan.gov/documents/mde/Item\\_D\\_J\\_Memo\\_and\\_Guidance\\_LGBTQ\\_8-30-16\\_533504\\_7.pdf](http://www.michigan.gov/documents/mde/Item_D_J_Memo_and_Guidance_LGBTQ_8-30-16_533504_7.pdf) [<https://perma.cc/DCZ7-CBF4>] (providing new protections for transgender students).

96. See, e.g., Courtney Crowder, *Iowa's First Transgender High School Athlete Found His Truth on the Track*, DES MOINES REG. (2016), <http://www.desmoinesregister.com/story/life/living-well/2016/08/04/ben-christian-on-cedar-falls-transgender-athletes-olympics-iowa/87989532/> [<https://perma.cc/FY5Y-9FDV>] (reporting story of Iowa's first transgender athlete and acceptance he found on high school track team); see also Sandhya Somashekhar, *A Question for Schools: Which Sports Teams Should Transgender Students Play on?*, WASH. POST (Oct. 2, 2014), [https://www.washingtonpost.com/politics/a-question-for-schools-which-sports-teams-should-transgender-students-play-on/2014/10/02/d3f33b06-49c7-11e4-b72e-d60a9229cc10\\_story.html](https://www.washingtonpost.com/politics/a-question-for-schools-which-sports-teams-should-transgender-students-play-on/2014/10/02/d3f33b06-49c7-11e4-b72e-d60a9229cc10_story.html) [<https://perma.cc/SC8G-82G6>] (discussing school districts' policies on transgender athletes and the controversy surrounding transgender youth athletes). For a discussion of Jake Hofheimer, a transgender student-athlete in California, see *supra* notes 2–12 and accompanying text.

97. Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HUFFINGTON POST (Sep. 23, 2016), [http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination\\_us\\_570ff4f2e4b0060ccda2a7a9](http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9) [<https://perma.cc/38KG-YCUG>].

98. See, e.g., *Business Leaders Support HB2 & Governor McCrory*, KEEPNCSAFE, <http://keepmyncsafe.com/hundreds-business-leaders-show-support-hb2-governor-mccrory/> [<https://perma.cc/QM7H-QZKE>] (last visited Oct. 9, 2016) (listing hundreds of North Carolina businesses that support North Carolina's Governor, Pat McCrory, and HB2, a law that restricts transgender individuals from access to bathrooms consistent with gender identity). The KeepNCsafe Coalition released the following statement in support of Governor McCrory and HB2:

North Carolina is consistently one of the top five states in the nation for business and economic growth. Any businesses threatening to not do business in our great state based on dishonest attacks by opponents of women's and girls' privacy and safety are only hurting themselves. Thanks to

bly passed a law that prohibits transgender individuals, including students, from using the bathroom and locker room of the gender with which they identify.<sup>99</sup> The law, known as House Bill 2 (HB2) or The Public Facilities Privacy & Security Act, has been condemned as “state-sponsored discrimination against transgender individuals, who simply seek to engage in the most private of functions in a place of safety and security” and has sparked high-profile backlash estimated to have severe negative impacts on North Carolina’s economy.<sup>100</sup> On March 30, 2017, North Carolina re-

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Governor McCrory and the General Assembly’s leadership and immediate action to ensure North Carolinians’ privacy and safety receives maximum protection, North Carolina will continue to flourish. It would be a shame for any companies to miss out on that simply because they believe men should be allowed into locked rooms with girls and women.

*Id.* For a further discussion of HB2, see *infra* notes 99–102 and accompanying text.

99. See Michael Gordon, Mark S. Price & Katie Peralta, *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> [<https://perma.cc/9K9N-7Z3M>] (describing scope and impact of North Carolina’s law). Other states, such as Texas, Kentucky, and Virginia have considered enacting transgender bathroom bills similar to North Carolina’s law. See David A. Graham, *What’s Behind the New Wave of Transgender ‘Bathroom Bills’*, ATLANTIC (Jan. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/01/states-see-a-new-wave-of-transgender-bathroom-bills/512453/> [<https://perma.cc/KD4H-Y8G3>]. Lawmakers in Tennessee and Virginia have considered such transgender bills, but the bills have failed. See Laura Vozella, *In Virginia, Republican-led Committee Kills Transgender ‘Bathroom Bill’*, WASH. POST (Jan 19, 2017), [https://www.washingtonpost.com/local/virginia-politics/in-virginia-republican-led-committee-kills-transgender-bathroom-bill/2017/01/19/4428c0ee-de63-11e6-acdf-14da832ae861\\_story.html?utm\\_term=.073dc8396c6a](https://www.washingtonpost.com/local/virginia-politics/in-virginia-republican-led-committee-kills-transgender-bathroom-bill/2017/01/19/4428c0ee-de63-11e6-acdf-14da832ae861_story.html?utm_term=.073dc8396c6a) [<https://perma.cc/L8WW-M4PS>] (reporting transgender bathroom bill in Virginia failed in Virginia’s legislature); *Transgender Bathroom Bill Fails in Tennessee Legislature*, NBC NEWS (Apr. 19, 2016), <http://www.nbcnews.com/news/us-news/transgender-bathroom-bill-fails-tennessee-legislature-n558311> [<https://perma.cc/7WRP-6AZP>] (reporting transgender bathroom bill in Tennessee failed in Tennessee’s legislature).

100. *Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals*, UNITED STATES DEP’T OF JUSTICE (May 9, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint> [<https://perma.cc/N9E8-YTZ5>]; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST. AT UNIV. OF CAL. SCH. OF LAW, DISCRIMINATION, DIVERSITY, AND DEVELOPMENT: THE LEGAL AND ECONOMIC IMPLICATIONS OF NORTH CAROLINA’S HB2 1 (2016), *available at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Discrimination-Diversity-and-Development-The-Legal-and-Economic-Implications-of-North-Carolinas-HB2.pdf> [<https://perma.cc/WJ5Z-CQ4C>] (estimating that North Carolina could lose \$5 billion per year in federal funding, business investment, and travel and tourism). In response to House Bill 2, the National Basketball Association (NBA) moved the 2017 All-Star game from Charlotte. See Katherine Peralta & Rick Bonnell, *NBA Moves 2017 All-Star Game out of Charlotte over HB2; 2019 Return Possible*, CHARLOTTE OBSERVER (July 21, 2016, 3:28 PM), <http://www.charlotteobserver.com/news/business/article91066222.html> [<https://perma.cc/795Q-GB3J>]. On September 12, 2016, the

pealed HB2; however, cities and school districts are barred from installing protections for transgender individuals for at least the next four years.<sup>101</sup>

Several lawsuits have been filed in North Carolina over both the validity of the Obama Administration's directive and HB2.<sup>102</sup> Additionally, a transgender male, Gavin Grimm, in Virginia sued the Gloucester County school board under Title IX after he was prevented from using the boys' restroom at his high school.<sup>103</sup> The Fourth Circuit ruled that the DOJ and DOE's 2016 joint statement on transgender students was entitled to deference and that the school board violated Title IX by denying Grimm access to the boys' bathroom.<sup>104</sup> While the Supreme Court stayed the Fourth Circuit's ruling on August 3, 2016, the court granted certiorari to review the case on October 28, 2016.<sup>105</sup> However, on March 6, 2017, the Supreme Court vacated the Fourth Circuit's judgment and remanded

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NCAA announced it was relocating seven championship events that were scheduled to take place in North Carolina. See *NCAA to Relocate Championships from North Carolina for 2016-17*, NCAA (last updated Sep. 12, 2016, 7:22 PM), <http://www.ncaa.com/news/ncaa/article/2016-09-12/ncaa-relocate-championships-north-carolina-2016-17> [<https://perma.cc/4FS6-A8AK>] (announcing decision to move NCAA events out of North Carolina in response to North Carolina's law). The bill has received support from hundreds of local businesses. See *Business Leaders Support HB2 & Governor McCrory*, *supra* note 98.

101. See Mark Berman & Amber Phillips, *North Carolina Governor Signs Bill Repealing and Replacing Transgender Bathroom Law Amid Criticism*, WASH. POST (Mar. 30, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/?utm\\_term=.6317f92f6621](https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/?utm_term=.6317f92f6621) [<https://perma.cc/7TJT-5WPV>] (reporting on repeal of HB2 and limitations for potential transgender protections in state).

102. See *North Carolinians for Privacy v. United States Dep't of Justice*, No. 5:16-cv-00245 (E.D.N.C. filed May 10, 2016) (challenging validity of Obama administration's directive); *Berger v. United States Department of Justice*, No. 5:16-cv-00240 (E.D.N.C. filed May 9, 2016) (challenging validity of Obama administration's directive); *McCrory v. United States*, 5:16-cv-00238 (E.D.N.C. filed May 9, 2016) (challenging validity of Obama administration's directive); *Carcano v. McCrory*, No. 1:16-cv-00236 (M.D.N.C. filed Mar. 28, 2016) (challenging validity of HB2). In September 2016, North Carolina's governor, Pat McCrory, dropped his lawsuit against the United States challenging the validity of the Obama administration's directive. See Rebecca Hersher, *North Carolina Governor Drops 'Bathroom Bill' Lawsuit Against U.S.*, NPR (Sept. 19, 2016), <http://www.npr.org/sections/thetwo-way/2016/09/19/494573314/north-carolina-governor-drops-bathroom-bill-law-suit-against-u-s>.

103. See *G.G. ex rel. Grimm v. Gloucester Cty. School Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S.Ct. 369 (2016), *and vacated, remanded*, 2017 WL 855755 (Mar. 6, 2017) (recounting facts of case).

104. See *id.* at 723 (reversing district court's grant of preliminary injunction prohibiting Grimm from using male bathroom).

105. See *Gloucester Cty. School Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (granting school board's request to stay Fourth Circuit's ruling until it files a writ of certiorari); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (granting school board's petition for certiorari).

the case back to the Fourth Circuit “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.”<sup>106</sup>

Not surprisingly, the Obama administration’s 2016 directive on transgender student rights was released in the midst of the controversies in North Carolina and Virginia.<sup>107</sup> The 2016 joint directive explained that for public schools to receive federal funding, they must comply with Title IX, which “requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns.”<sup>108</sup> While not binding law, the Obama administration’s hope was for courts to defer to its interpretation of Title IX, as the Fourth Circuit initially did in *Grimm*.<sup>109</sup>

While many LGBTQ advocates have praised and school districts responded to the DOJ and DOE’s 2016 joint statement on transgender students, many states and critics expressed outrage and opposition to the Obama administration’s position.<sup>110</sup> Texas, in

106. *Gloucester Cty. School Bd. v. G.G. ex rel. Grimm*, 2017 WL 855755 (Mar. 6, 2017). The DOE and DOJ’s February 22, 2017 *Dear Colleague* letter states that the DOJ and DOE withdrew the policy statements made by the Obama administration in its May 13, 2016 *Dear Colleague Letter*. See DEAR COLLEAGUE LETTER, *supra* note 16.

107. For a discussion of *Grimm*, see *supra* notes 103–105 and accompanying text. It should be noted that on March 6, 2017, the Supreme Court vacated the Fourth Circuit’s ruling in *Grimm*, and remanded it back to the Fourth Circuit “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.” *Gloucester Cty. School Bd. v. G.G. ex rel. Grimm*, 2017 WL 855755 (Mar. 6, 2017).

108. DEAR COLLEAGUE LETTER, *supra* note 1, at 3.

109. For a discussion of *Grimm*, see *supra* notes 103–105 and accompanying text. It should be noted that on March 6, 2017, the Supreme Court vacated the Fourth Circuit’s ruling in *Grimm*, and remanded it back to the Fourth Circuit “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.” *Gloucester Cty. School Bd. v. G.G. ex rel. Grimm*, 2017 WL 855755 (Mar. 6, 2017).

110. Compare Mensah M. Dean, *Philly Schools Pass Sweeping Policy Protecting Transgender Students*, PHILLY.COM (June 18, 2016), [http://www.philly.com/philly/education/20160617\\_Philly\\_schools\\_pass\\_sweeping\\_policy\\_protecting\\_transgender\\_students.html](http://www.philly.com/philly/education/20160617_Philly_schools_pass_sweeping_policy_protecting_transgender_students.html) [<https://perma.cc/PKP8-TLRU>] (reporting that in response to Obama administration’s directive, Philadelphia School District, and counties neighboring Philadelphia, have adopted inclusive policies for transgender students, including allowing transgender students to play on same sports team as gender with which they identify) and Hayley Miller, *National Education Association Praises President Obama’s Directive on Transgender Youth*, HRC (May 19, 2016), <http://www.hrc.org/blog/national-education-association-praises-president-obamas-directive-on-transg> [<https://perma.cc/YD5X-39MK>] (reporting that National Education Association, along with HRC and other LGBTQ advocates, has “applauded” President Obama’s directive), with Amended Complaint at 22, *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex. June 15, 2016) ([T]he Joint Letter tries to

particular, boldly opposed the DOJ and DOE's 2016 joint statement.<sup>111</sup> Texas's Lieutenant Governor Dan Patrick, who also serves as Texas's Chair of Education, explained that the Obama Administration's directive "does nothing to improve education," and serves to create "total chaos" and safety concerns in schools.<sup>112</sup> Despite the possibility of losing federal funding, Lieutenant Governor Patrick instructed school districts to defy the directive, stating "we're not going to let Barack Obama blackmail us with thirty pieces of silver and threaten to take away our funding."<sup>113</sup> In January 2016, the University Interscholastic League, which governs Texas public high school sports, held a referendum to pass a new rule regarding transgender athletes.<sup>114</sup> In a 586–32 vote, public school superintendents voted to adopt a rule that requires a student-athlete's gender to be determined based on a student's birth certificate.<sup>115</sup>

On May 25, 2016, Texas, Alabama, Wisconsin, Tennessee, Oklahoma, Louisiana, Utah, Georgia, West Virginia, Mississippi, Kentucky, along with the Governor of Maine and the Arizona Department of Education, filed a joint lawsuit against the Obama administration over its interpretation of Title IX.<sup>116</sup> On August 21,

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rewrite Title IX by executive fiat. . . . The new policy has no basis in law.") and David Montgomery & Alan Blinder, *States Sue Obama Administration over Transgender Bathroom Policy*, N.Y. TIMES (May 25, 2016), [http://www.nytimes.com/2016/05/26/us/states-texas-sue-obama-administration-over-transgender-bathroom-policy.html?\\_r=0](http://www.nytimes.com/2016/05/26/us/states-texas-sue-obama-administration-over-transgender-bathroom-policy.html?_r=0) (reporting Louisiana Attorney General Jeff Landry's concern that federal government would "wreak further havoc on our schools," and that new policy "puts the safety and security of all of our children in jeopardy").

111. *Full Interview with Texas Lt. Gov. Dan Patrick*, MSNBC (May 13, 2016), <http://www.msnbc.com/all-in/watch/full-interview-with-lt-gov-dan-patrick-685493827761> (video interview of Dan Patrick on MSNBC's All In with Chris Hayes). Republican lawmakers in Texas, including Lieutenant Governor Patrick, have also proposed a transgender bathroom law—the Texas Privacy Act—similar to North Carolina's HB2. See Manny Fernandez & Dave Montgomery, *Texas Moves to Limit Bathroom Access*, N. Y. TIMES (Jan. 5, 2017), [https://www.nytimes.com/2017/01/05/us/texas-transgender-bathroom-access.html?\\_r=0](https://www.nytimes.com/2017/01/05/us/texas-transgender-bathroom-access.html?_r=0). For a discussion of HB2, see *supra* notes 99–102 and accompanying text.

112. *Full Interview with Texas Lt. Gov. Dan Patrick*, *supra* note 111.

113. *Id.*

114. See Christina Kahrl, *Texas High Schools to Use Birth Certificates for Athletes' Gender*, ESPN (Feb. 27, 2016), [http://www.espn.com/espn/story/\\_/id/14859720/texas-schools-vote-use-birth-certificates-determine-athletes-gender](http://www.espn.com/espn/story/_/id/14859720/texas-schools-vote-use-birth-certificates-determine-athletes-gender) (reporting on Texas's new transgender student-athlete rule).

115. *Id.*; see also University Interscholastic League of Texas, *Proposed Recommendation by UIL Review Advisory Committee to Standing Committee on Policy*, [http://www.uil-texas.org/files/policy/Section\\_360.pdf](http://www.uil-texas.org/files/policy/Section_360.pdf) [<https://perma.cc/PBL6-UL6T>] (last visited Oct. 13, 2016) (proposing birth certificate requirement). For a discussion of other state high school athletic associations that have a birth certificate requirement, see *supra* note 88 and accompanying text.

116. See *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex. May 25, 2016) (lawsuit against Obama administration over interpretation of Title IX). In addi-

2016, Judge Reed O'Connor of the Northern District of Texas granted a nationwide injunction preventing the DOJ and DOE from enforcing their 2016 joint statement.<sup>117</sup> Judge O'Connor, a George W. Bush appointee, ruled that the directive is not entitled to deference.<sup>118</sup>

### III. ANALYSIS

Although the pending litigation focuses on transgender students' access to bathrooms and locker rooms, the outcome of these events will have implications for the future of transgender student-athletes, who undoubtedly will also seek access to the locker room of the gender with which they identify.<sup>119</sup> Restricted access to locker rooms consistent with one's gender identity may discourage transgender students from participating in athletics and may encourage the perpetuation of policies that exclude transgender students from sports.<sup>120</sup> Courts have considered transgender discrimination under two different legal theories in different areas of civil rights litigation.<sup>121</sup> The first theory is the sex stereotyping or gender stereotyping theory first espoused in *Price Waterhouse v. Hopkins*.<sup>122</sup> The second theory, endorsed in the DOJ and DOE 2016 joint statement, is that discrimination on the basis of gender identity constitutes discrimination on the basis of sex.<sup>123</sup> Both theories

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tion, a different lawsuit challenging the Obama Administration's directive was filed in the Northern District of Illinois. *See* *Students and Parents for Privacy v. United States*, No. 16-04945 (N.D. Ill. May 4, 2016) (lawsuit against Obama administration over interpretation of Title IX).

117. *See* Preliminary Injunction Order at 36–37, *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex. Aug. 21, 2016) (granting plaintiffs request for nationwide injunction preventing DOJ and DOE from enforcing its joint statement).

118. *See id.* at 32–33 (stating DOJ and DOE's interpretation of Title IX is entitled to respect but not deference). The Supreme Court set forth the test for deference to administrative guidelines in *Auer v. Robbins*. *See* *Auer v. Robbins*, 519 U.S. 452 (1997). In *Auer*, the Supreme Court announced that an agency's interpretation of its own regulation is entitled to deference if: (1) the regulation is ambiguous; and (2) the interpretation is not "plainly erroneous or inconsistent with the regulation." *Id.* at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

119. For a discussion of the pending litigation concerning transgender students, see *supra* notes 99–118 and accompanying text.

120. For a discussion of policies that exclude transgender students from sports, see *infra* notes 88–92 and accompanying text.

121. For a discussion of these legal theories and how they apply to transgender student-athletes seeking access to the same sports team as the gender they identify with, see *infra* notes 153–199 and accompanying text.

122. 490 U.S. 228 (1989). For a discussion of *Price Waterhouse* and the sex stereotyping theory, see *infra* notes 153–157 and accompanying text.

123. *See* DEAR COLLEAGUE LETTER, *supra* note 1, at 2 (describing departments' interpretation of Title IX).

will be discussed and analyzed below in the context of transgender student-athletes' access to the same sports team as the gender with which they identify.<sup>124</sup> Finally, it will be argued that the DOJ and DOE should reinstate their 2016 interpretation of Title IX, and courts should accept it.<sup>125</sup>

### A. The Evolution of Title IX Interpretation

#### 1. *Transgender Bathroom Litigation and its Potential Impact on Transgender Student-Athletes' Access to Sports*

The key regulation for the purposes of transgender bathroom litigation is 34 C.F.R. section 106.33 (the “comparable facilities regulation”), which was promulgated by the DOE and provides that a school receiving federal funds “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”<sup>126</sup> The DOJ and DOE’s 2016 statement declared that “[t]he Departments treat a student’s *gender identity* as the student’s sex for purposes of Title IX and its implementing regulations.”<sup>127</sup> Opponents argue that an interpretation of “sex” as anything other than one’s biological sex is incompatible with Congress’s concern of safety and privacy and is a “radical re-authoring of the term now being foisted upon Americans by the collective efforts of [the Obama administration].”<sup>128</sup> Indeed, they highlight that Congress has specifically added “gender

124. For a discussion and analysis of both theories, see *infra* notes 150–199 and accompanying text.

125. For a discussion of this argument, see *infra* notes 230–235 and accompanying text.

126. 34 C.F.R. § 106.33 (2017).

127. DEAR COLLEAGUE LETTER, *supra* note 1, at 2 (emphasis added).

128. Amended Complaint at 12, *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex. June 15, 2016); see also *G.G. ex rel. Grimm v. Gloucester Cty. School Bd.*, 822 F.3d 709, 731 (4th Cir. 2016) (Niemeyer, J., dissenting) (referring to majority’s deference to Federal government’s interpretation of Title IX as an “unprecedented holding [that] overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.”), *cert. granted in part*, 137 S. Ct. 369 (2016), and *vacated, remanded*, 2017 WL 855755 (Mar. 6, 2017); see also Complaint at 41, *Students and Parents for Privacy v. United States*, No. 16-04945 (N.D. Ill. May 4, 2016) (“Minors have a fundamental right to be free from compelled intimate exposure of their bodies to members of the opposite sex.”). It should be noted that on March 6, 2017, the Supreme Court vacated the Fourth Circuit’s ruling in *Grimm*, and remanded it back to the Fourth Circuit “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.” *Gloucester Cty. School Bd. v. G.G. ex rel. Grimm*, 2017 WL 855755 (Mar. 6, 2017).

identity” to recent federal legislation, and is considering, but has not enacted, amendments to Title IX that include “gender identity.”<sup>129</sup> Furthermore, opponents argued that the Federal Government’s 2016 interpretation is not consistent with dictionary definitions of “sex” both at the time Title IX was enacted and today.<sup>130</sup> In contrast, the DOJ and DOE stated in their 2016 joint statement that their characterization of the term “sex” is consistent with courts’ and other agencies’ interpretations of Title VII concerning sex discrimination.<sup>131</sup>

One court has ruled on a transgender student’s access to bathrooms in opposition to the Obama administration’s interpretation that gender identity is included in “sex” under Title IX.<sup>132</sup> In *Johnston v. University of Pittsburgh*, a transgender male was denied from using any men’s bathroom while a student at the University of Pittsburgh.<sup>133</sup> The United States District Court for the Western District of Pennsylvania, citing Tenth Circuit Court of Appeals precedent, ruled that “the term ‘on the basis of sex’ in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one’s birth or biological sex.”<sup>134</sup>

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129. See Amended Complaint at 12, 17, *Texas*, No. 16-00054 (N.D. Tex. June 15, 2016) (describing two pending house bills, the Violence Against Women Act, and federal hate crime legislation that include gender identity). Congress is considering the Student Non-Discrimination Act of 2015, which “[p]rohibits public school students from being excluded from participating in, or subject to discrimination under, any federally-assisted educational program on the basis of their actual or perceived sexual orientation or gender identity or that of their associates.” S.349, 114th Cong. (2015).

130. See Amended Complaint at 16, *Texas*, No. 16-00054 (N.D. Tex. June 15, 2016) (citing respected dictionaries that define “sex” as biological sex); *Grimm*, 822 F.3d at 736 (Niemeyer, J., dissenting) (citing similar dictionaries), *cert. granted in part*, 137 S.Ct. 369 (2016), and *vacated, remanded*, 2017 WL 855755 (Mar. 6, 2017) It should be noted that on March 6, 2017, the Supreme Court vacated the Fourth Circuit’s ruling in *Grimm*, and remanded it back to the Fourth Circuit “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.” *Gloucester Cty. School Bd. v. G.G. ex rel. Grimm*, 2017 WL 855755 (Mar. 6, 2017).

131. See DEAR COLLEAGUE LETTER, *supra* note 1, at 2.

132. See *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). (dismissing Title IX claim on the merits). It should be noted that the decision was rendered one year before the Obama Administration’s directive. See *id.* (opinion published March 31, 2015).

133. See *id.* at 662–64 (describing student’s repeated attempts to use male bathrooms and eventual expulsion from school).

134. *Id.* at 676 (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007)). In *Etsitty*, the Tenth Circuit held that the plain meaning of sex in Title VII only encompassed biological males and females. See *Etsitty*, 502 F.3d at 1222. *Johnston* was not appealed to the Third Circuit because the case was settled. See Fred Barbash, *How a 1989 ‘Glass Ceiling’ Ruling Led to the Government’s Claim Against N.C.’s ‘Bathroom Law’*, WASH. POST (May 11, 2016), <https://www.washingtonpost.com>.

The differences between the issues of transgender access to bathrooms and locker rooms and transgender access to sports team are important for this analysis.<sup>135</sup> Under the current litigation, the outcome of whether transgender students must be granted access to the same bathroom and locker room as the gender with which they identify relies on the DOJ and DOE's forthcoming guidance on the interpretation of the word "sex" in Title IX, and subsequent courts deferring to or agreeing with it on the merits.<sup>136</sup> Transgender access to bathrooms, however, may turn on a constitutional review of the issue.<sup>137</sup> In this context, courts must carefully balance the constitutional rights of both transgender students and their peers, and consider how sex-segregated facilities achieve those goals.<sup>138</sup> Many courts have recognized that the constitutional right of privacy inherent in the Fourteenth Amendment includes a "legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex."<sup>139</sup> This right of privacy must be considered in light of the *Obergefell* Court's proclamation that "[t]he Constitution promises liberty," which includes individuals' rights "to define and express their identity."<sup>140</sup> The interest of bodily privacy is less in the balance when considering transgender student-athletes' access to the same sports team as the gender with which they identify.<sup>141</sup> A transgender student-athlete certainly may have a Fourteenth Amendment right to participate on the same sports team as the gender with which they identify.<sup>142</sup> However, if courts neither recognize this constitutional

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com/news/morning-mix/wp/2016/05/11/how-a-1989-glass-ceiling-case-unrelated-to-bathrooms-or-gender-identity-led-to-the-obama-administrations-case-against-n-c/ [https://perma.cc/RLN3-M73A] (discussing *Johnston* case).

135. See, e.g., Amended Complaint at 22, *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex. June 15, 2016) (describing joint statement's language on athletics).

136. For a discussion of the DOJ and DOE's interpretation of sex in Title IX and the arguments against it, see *supra* notes 127–134 and accompanying text.

137. See *G.G. ex rel. Grimm v. Gloucester Cty. School Bd.*, 822 F.3d 709, 723–24 (4th Cir. 2016) (stating it is inappropriate to consider constitutional principles because there was no constitutional challenge, but acknowledging that constitutional concerns exist), *cert. granted in part*, 137 S. Ct. 369 (2016), and *vacated, remanded*, 2017 WL 855755 (Mar. 6, 2017).

138. See *id.* at 734 (Niemeyer, J., dissenting) (describing constitutional rights to privacy).

139. *Id.* (citing a litany of Circuit court cases that recognize this interest).

140. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

141. See generally *Brown*, *supra* note 78 (discussing transgender athletes' constitutional rights).

142. For a detailed and insightful discussion of transgender student-athletes' Fourteenth Amendment right to participate on the same sports team as the gender

right, nor accept the DOJ and DOE's interpretation of "sex" in Title IX, transgender student-athletes will have a difficult time challenging exclusionary interscholastic policies under Title IX.<sup>143</sup>

After the DOJ and DOE's joint statement was released on May 13, 2016, and before it was withdrawn on February 22, 2017, no court ruled on the merits of transgender students' access to bathrooms or the meaning of the word "sex" in Title IX and its accompanying regulations.<sup>144</sup> As previously mentioned, the Fourth District and the Northern District of Texas ruled on whether the Obama administration's directive was entitled to deference, and both reached opposite conclusions.<sup>145</sup> The Obama administration's interpretation gained momentum, as district courts in Ohio and Wisconsin deferred to the DOJ and DOE's 2016 interpretation of Title IX.<sup>146</sup>

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with which they identify, see generally Brown, *supra* note 78. The author concludes that transgender student-athletes have a Due Process right to participate on the same sports team as the gender with which they identify. See *id.* at 327.

143. For a discussion of the difficulties of a Title IX challenge under a sex stereotyping theory, see *infra* notes 175–191 and accompanying text.

144. For a discussion of courts that have ruled on deference to DOJ and DOE's interpretation, but not the merits of the Title IX claims, see *infra* notes 145–146 and accompanying text.

145. See G.G. ex rel. Grimm v. Gloucester Cty. School Bd., 822 F.3d 709 (4th Cir. 2016) (reversing preliminary injunction denying transgender male access to boys bathroom), *cert. granted in part* 137 S. Ct. 369 (2016), and *vacated, remanded*, 2017 WL 855755 (Mar. 6, 2017); Preliminary Injunction Order at 36–37, Texas v. United States, No. 7:16-cv-00054 (N.D. Tex. Aug. 21, 2016) (granting plaintiffs request for nationwide injunction preventing DOJ and DOE from enforcing its joint statement). In *Grimm*, the Fourth Circuit considered an opinion letter from January 7, 2015, on how the comparable facilities regulation should apply to transgender students. See *Grimm*, 822 F.3d at 715. The opinion letter provides the same guidance as the May 13, 2016, DOE and DOJ joint statement; therefore, it is appropriate to discuss *Grimm* as if the Fourth Circuit were considering the May 13, 2016, joint statement. See OFFICE OF CIVIL RIGHTS, DEP'T OF EDUC., *Letter Emily T. Prince, Esq.* (Jan. 7, 2015), available at [http://www.bricker.com/documents/misc/transgender\\_student\\_restroom\\_access\\_1-2015.pdf](http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf) [<https://perma.cc/GSP4-8CZ9>]. The DOJ and DOE also withdrew the statements of the Prince letter in their February 22, 2017 statement. See DEAR COLLEAGUE LETTER, *supra* note 16.

146. See Bd. of Educ. of Highland Local Sch. Dist. v. Doe, No. 2:16-CV-524, 2016 WL 5372349, at \*1 (S.D. Ohio Sept. 26, 2016) (deferring to DOJ and DOE in case involving transgender girl's denied access to bathroom at elementary school); see Mary Gerbig & Anthony Wachewicz, *Wisconsin Federal Judge Allows Transgender Discrimination Lawsuit to Proceed Under Title IX and Issues Injunction Against Kenosha School Board*, DAVIS KUELTHAU ATTORNEYS AT LAW (Oct. 6, 2016), <http://www.dkattorneys.com/publications.cfm?id=3700> [<https://perma.cc/5WRC-A3HS>] (discussing Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-CV-943-PP, 2016 BL 313069 (E.D. Wis. Sept. 22, 2016), where the Eastern District of Wisconsin ruled that DOE and DOJ's 2016 joint statement was entitled to deference in case involving transgender boy's denied access to boy's bathroom).

It is worth noting that Congress recently considered the Student Non-Discrimination Act of 2015, which “[p]rohibits public school students from being excluded from participating in, or subject to discrimination under, any federally-assisted educational program on the basis of their actual or perceived sexual orientation or gender identity or that of their associates.”<sup>147</sup> While the bill was defeated in the Senate in July 2015, the proposed legislation would have provided a definitive win for the transgender community, but would most likely have led to its own flurry of litigation.<sup>148</sup> With Congress’ inability to address the issue, the outcome of transgender bathroom litigation will have tremendous impact on securing transgender student-athletes’ access to sports teams consistent with their gender identity.<sup>149</sup>

## 2. *Past Precedent to Inform the Current Conversation: Title VII and Equal Protection*

The specific question of whether an interscholastic transgender athlete can participate on the same team as the gender they identify with has not been addressed by any court.<sup>150</sup> However, legal questions about transgender student-athletes’ sports participation, as well as their access to bathrooms and locker rooms, can be informed by Title IX precedent concerning other transgender issues and precedent in other areas of civil rights litigation, including Title VII and Equal Protection jurisprudence on sex discrimination concerning transgender plaintiffs.<sup>151</sup> Moreover, courts, including the Supreme Court, have routinely employed interpretations of Title VII when conducting Title IX analysis.<sup>152</sup>

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147. *Summary: S.439—114th Cong. (2015–2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/439> [https://perma.cc/7T7E-GC6N] (last visited Apr. 1, 2017).

148. See John Riley, *Senate Defeats LGBT Student Nondiscrimination Amendment*, METRO WEEKLY (July 15, 2015), <http://www.metroweekly.com/2015/07/senate-defeats-lgbt-student-nondiscrimination-amendment/> [https://perma.cc/HRG4-XQ2P] (describing bill and its defeat in Senate).

149. For a discussion of transgender bathroom litigation, see *supra* notes 97–118 and accompanying text.

150. See Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protection for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 279 (2013) (stating no courts have addressed this specific issue).

151. See *id.* at 283 (stating Title VII interpretation is frequently used in Title IX analysis)

152. See *id.* at 283 n.65 (citing *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 250 n.4 (S.D.N.Y. 1997)) (proposing that “it is now established that the Title IX term ‘on the basis of sex’ is interpreted in the same manner as similar language in Title VII”). For example, in *Franklin v. Gwinnet County Public School*, 503 U.S. 60, 75 (1992), the Supreme Court “cited to Title VII precedent.” Skinner-Thompson &

Courts and federal agencies have addressed the issue of transgender discrimination in employment decisions and the workplace under Title VII.<sup>153</sup> In *Price Waterhouse v. Hopkins*, Ann Hopkins, a female employee who was being considered for a promotion to partner, was denied the promotion and sued her employer under Title VII.<sup>154</sup> Partners had described Hopkins as “macho” and overly aggressive for a woman, and one partner told her that to improve her chances at making partner, she should act more feminine.<sup>155</sup> The Supreme Court held that Title VII prohibited discrimination of individuals based on “sex stereotyping,” or non-conformance with perceived gender expectations.<sup>156</sup> Interpreting the Supreme Court’s ruling in *Price Waterhouse*, several Circuit Courts have held that discrimination of transgender employees for not conforming to gender stereotypes is actionable under Title VII and other similar statutes.<sup>157</sup>

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Turner, *supra* note 150, at 283, 283 n.66 (describing *Franklin*). In *Franklin*, a female high school student who had been sexually harassed by her coach sued her school district under Title IX alleging sex-discrimination. *Franklin*, 503 U.S. at 63. The Court quoted a Title VII case for the proposition that a coach who sexually harasses a student discriminates on the basis of sex, just as a work supervisor who sexually harasses an employee also discriminates on the basis of sex. *See id.* at 75 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

153. 42 U.S.C. § 2000e-2 (2016). Title VII states that is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” *Id.*

154. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32 (1989) (describing female employee who sued Price Waterhouse for discrimination on basis of sex under Title VII).

155. *See id.* at 235 (stating Hopkins was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”).

156. *Id.* at 250. The Court stated that it was “Congress’ intent to forbid employers to take gender into account in making employment decisions.” *Id.* at 239–40. Therefore, Title VII’s prohibition of discrimination based on sex “mean[s] that gender must be irrelevant to employment decisions.” *Id.* at 240.

157. *See Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (citing *Price Waterhouse* for the conclusion that transgender female denied loan for not wearing male clothing was actionable under Equal Credit Opportunity Act); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [plaintiff] in *Price Waterhouse*.”); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App’x. 492, 493 (9th Cir. 2009) (“[I]t is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men and women.”). *But see Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding plain meaning of sex in Title VII only encompassed biological males and females).

Federal courts have also protected transgender individuals from discrimination under the Equal Protection Clause of the Fourteenth Amendment.<sup>158</sup> In *Glenn v. Brumby*, Vandiver Elizabeth Glenn, a biological man who was in the process of completing a transition to become a woman, was fired from her state employer because her “intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn’s coworkers uncomfortable.”<sup>159</sup> Citing to *Price Waterhouse* and its progeny, the Eleventh Circuit held that Glenn was protected by the Equal Protection Clause because “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”<sup>160</sup>

Importantly, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII in employment, made a monumental ruling for transgender employment rights on April 20, 2012.<sup>161</sup> In *Macy v. Holder*, the EEOC, following the framework set by *Price Waterhouse* and *Glenn*, ruled that in the employment context “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based [on sex]” under Title VII.<sup>162</sup> The ruling

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158. See generally *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding firing of transgender female for failing to conform to gender stereotypes violated Equal Protection); see also *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003) (extending equal protection to transgender students who were discriminated against by other students and school officials).

159. *Glenn*, 663 F.3d at 1314.

160. *Id.* at 1317. While the Eleventh Circuit relied on a sex stereotyping theory, it foreshadowed an understanding that discrimination against individuals based on their transgender status is actually discrimination on the basis sex when it said:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. [T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

*Id.* at 1316 (alteration in original) (internal quotations omitted) (citations omitted).

161. See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012).

162. *Id.* at \*11 (internal quotations omitted). When explaining its holding in *Macy*, the EEOC analogized the circumstances of the case with *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008), which involved religious discrimination in the workplace. See *id.* See also *Employment Law - Title VII - EEOC Affirms Protections for Transgender Employees. - Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), 126 HARV. L. REV. 1731, 1734 (2013) (discussing *Macy*). One scholar discussed the EEOC’s comparison to *Schroer* as follows:

in *Macy* goes beyond a sex stereotyping approach; instead, like the DOJ and DOE's 2016 joint statement, it espouses that discrimination on the basis of gender identity is per se sex discrimination.<sup>163</sup>

While these cases focus on employment and will not specifically provide transgender student-athletes' access to sports teams or bathrooms, they are important precedent protecting transgender individuals from discrimination and may "prove analogous when litigating the scope of protected parties in discrimination cases under Title IX."<sup>164</sup> Indeed, the concurring opinion in *Grimm* acknowledged that "circuit authority [that interprets] analogous statutes" as prohibiting discrimination against transgender individuals lends to the conclusion that "[Plaintiff] has surely demonstrated a likelihood of success on the merits of his Title IX claim."<sup>165</sup> In addition, the Obama administration stated that its interpretation of Title IX is in accord with these cases' interpretations of laws that prohibit sex discrimination.<sup>166</sup> Furthermore, just as the *Glenn* court refused to accept the supervisor's rationale that other employees would find Glenn's transition objectionable and uncomfortable, the Obama administration affirmed that "the desire to accommodate others'

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If an employer fired someone because she converted from Islam to Christianity, it would constitute discrimination because of religion. Whether the termination was based on hatred of Christians, stereotypes about Muslims, or discomfort with the transition itself, the adverse action would be per se religious discrimination. Under parallel reasoning, discriminatory treatment because of change in sex impermissibly considers sex in making an employment decision.

*Id.*

163. See DEAR COLLEAGUE LETTER, *supra* note 1, at 2 (treating gender identity as sex under Title IX). An employer accused of discrimination against a transgender employee under Title VII can challenge the EEOC's ruling in *Macy* in federal court, but is unlikely to succeed. See DANA BEYER, JILLIAN T. WEISS & RICKI WILCHINS, TRANSGENDER LAW CTR., NEW TITLE VII AND EEOC RULINGS PROTECT TRANSGENDER EMPLOYEES 1 (2014), <http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf> [<https://perma.cc/7C39-JE9A>] (discussing *Macy* and its future implications).

164. Ziegler & Huntley, *supra* note 70, at 499.

165. G.G. ex rel. Grimm v. Gloucester Cty. School Bd., 822 F.3d 709, 727 (4th Cir. 2016) (Davis, J., concurring) (citing to *Price Waterhouse* and its progeny and referring to plaintiff's need to show he is likely to succeed on merits to gain preliminary injunction allowing him to use boys bathroom), *cert. granted in part*, 137 S.Ct. 369 (2016), and *vacated, remanded*, 2017 WL 855755 (Mar. 6, 2017). It should be noted that on March 6, 2017, the Supreme Court vacated the Fourth Circuit's ruling in *Grimm*, and remanded it back to the Fourth Circuit "in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017." *Gloucester Cty. School Bd. v. G.G. ex rel. Grimm*, 2017 WL 855755 (Mar. 6, 2017).

166. See DEAR COLLEAGUE LETTER, *supra* note 1, at 2 n.5 (citing to *Price Waterhouse* and its progeny).

discomfort cannot justify a policy that singles out and disadvantages a particular class of students.”<sup>167</sup>

## B. Challenging Transgender Athletic Policies Under Both Theories

Before the transgender bathroom litigation, one case dealt directly with a transgender plaintiff suing under Title IX.<sup>168</sup> In *Miles v. New York University*, a transgender student, who was in the process of transitioning to a female, was allegedly sexually harassed by her professor.<sup>169</sup> After filing a complaint, she was treated harshly by school officials and professors and left the school.<sup>170</sup> Although the plaintiff was admitted to the university as a female and treated as a female by the community, the defendants argued that she was not entitled to protection under Title IX because she was still a biological male.<sup>171</sup> The court denied summary judgment and reasoned that defendants “should [not] be rewarded with legal pardon just because” no one was aware the student was not a biological female.<sup>172</sup> While this case presents a common-sense interpretation of Title IX, it does little to answer whether discrimination based on gender identity is sex discrimination or whether transgender students should be protected from failing to conform to gender stereotypes.<sup>173</sup>

Armed with the instructive precedent of Title VII transgender employment cases and support of the DOJ and DOE’s 2016 joint statement, it is time for courts to provide greater protections for students who are discriminated against based on their gender identity.<sup>174</sup>

### 1. Sex Stereotyping Theory

Federal courts have interpreted Title IX similarly to *Price Waterhouse’s* interpretation of Title VII to protect individuals from

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167. *Id.* at 2. For a discussion of *Glenn v. Brumby*, see *supra* notes 158–160 and accompanying text.

168. See generally *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

169. See *id.* at 249 (describing harassment).

170. See *id.* (describing harsh treatment).

171. See *id.* (seeking summary judgment).

172. *Id.* at 249.

173. See *id.* at 250 (stating transgender individuals can claim discrimination as male or female, but not addressing gender non-conformity). It should be noted that a jury found in favor of defendants at trial. See *Miles v. New York Univ.*, No. 94 Civ. 8685, 1998 WL 460209, at \*1 (S.D.N.Y. July 29, 1998) (denying defendant’s motion for attorney fees after defendant received jury verdict in its favor).

174. See *Miles*, 979 F. Supp. at 249.

discrimination and harassment based on failing to conform to gender stereotypes.<sup>175</sup> In these cases, however, the students making Title IX claims did not identify as transgender, but were sexually harassed because they were perceived as feminine and “not man enough.”<sup>176</sup> The courts’ holdings that discrimination based on failing to conform to gender stereotypes will also protect transgender students from similarly motivated harassment in the future.<sup>177</sup> One scholar, however, argues that the sex stereotyping theory is weak because it “ignore[s] the plaintiff’s transgender status altogether.”<sup>178</sup> The pitfalls of the sex stereotyping theory are exemplified in *Johnston v. University of Pittsburgh*.<sup>179</sup> The District Court for the Western District of Pennsylvania dismissed the plaintiff’s sex stereotyping claim because he did not allege discrimination based “on the way he looked, acted, or spoke.”<sup>180</sup> The plaintiff “allege[d] only that the University refused to permit him to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex.”<sup>181</sup>

A Title IX challenge of a state’s interscholastic athletic association’s policy under a sex stereotyping theory would be very diffi-

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175. See *Pratt v. Indian River Cent. School Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011) (holding that “allegations of harassment based on sexual orientation do not defeat a sex stereotyping claim”); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (holding that grade school boy pleaded sufficient allegations to defeat motion to dismiss and bring sex stereotyping claim under Title IX).

176. *Doe*, 552 F. Supp. 2d at 823; see also *Pratt*, 803 F.Supp.2d. at 152 (describing high school homosexual boys’ allegation that he was harassed because of his feminine mannerisms, and he was called a “pussy,” “sissy,” and “girl”). The *Doe* court described that the student received persistent verbal and physical abuse by other males that included hitting and twisting the boy’s testicles to the point that his testicles eventually required surgery. *Doe*, 552 F.Supp.2d. at 820. After surgery, the boy was again hit in the testicles, which caused even more complications. See *id.*

177. See *Pratt*, 803 F.Supp.2d at 151 (citing *Price Waterhouse* for proposition that sex stereotyping claim is cognizable under Title IX just as it is under Title VII). Since courts have interpreted Title VII to protect transgender individuals, it is logical that transgender students will be able to bring a sex-stereotyping claim under Title IX, so long as they plead sufficient allegations of harassment based on nonconformity with gender stereotypes. See *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“[A] label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”).

178. Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J. L. GENDER & SOC’Y 245, 255 (2013) (citations omitted).

179. For a further discussion of *Johnston*, see *supra* notes 132–134 and accompanying text.

180. *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 680–82 (W.D. Pa. 2015).

181. *Id.* at 680.

cult.<sup>182</sup> For example, a transgender male who is excluded from playing on a male team is not being excluded for failing to conform as a woman, but is being excluded for being a biological female.<sup>183</sup> Since all females are excluded, and this is allowed under Title IX regulations, there is no discrimination.<sup>184</sup> Even if a policy relied on “overly broad generalizations or stereotypes” about transgender athletes and other students who share the same *gender identity*, transgender students would still run into challenges because traditional sex stereotyping views a plaintiff as the *biological sex* they were assigned at birth.<sup>185</sup> Accordingly, a sex stereotyping analysis from this new perspective would inevitably require a reading of “sex” to include gender identity.<sup>186</sup> Furthermore, defendants can “shield themselves from liability by arguing that the discrimination and harassment plaintiff experienced was not on the basis of nonconformity with gender stereotypes,” which makes “a defense of discrimination based on gender identity attractive.”<sup>187</sup> Indeed, this argument has been used in a current transgender bathroom case.<sup>188</sup> In an interview, an attorney for Alliance Defending Freedom stated that “[n]o one is saying [transgender students] are insufficiently masculine to use the boy’s bathroom.”<sup>189</sup> Instead,

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182. See Erin Buzuvis, “On the Basis of Sex”: Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WIS. J. L. GENDER & SOC’Y 219, 237–38 (2013) (describing advantages and disadvantages of sex stereotyping theory). *But see* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-CV-943-PP, 2016 BL 313069 (E.D. Wis. Sept. 22, 2016) (“[T]he plaintiff had alleged sufficient facts to support a claim of gender stereotyping, alleging that the defendants had discriminated against him because he did not fit standard stereotypes of girls (the sex the school insists is his).”).

183. See Buzuvis, *supra* note 182, at 241 (describing sex stereotyping in sex-segregated situations).

184. See *id.* (describing sex stereotyping in sex-segregated situations).

185. DEAR COLLEAGUE LETTER, *supra* note 1, at 3; see also *Smith*, 378 F.3d at 575 (“[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [plaintiff] in *Price Waterhouse*.”).

186. See Rao, *supra* note 178, at 256 (“[T]he gender nonconformity approach puts transgender student plaintiffs in an uncomfortable and perhaps humiliating position that forces them to identify themselves as their biological sex, as opposed to their gender identity.”) Thus far, courts have generally rejected a reading of “sex” to include gender identity under Title IX. See, e.g., *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (dismissing Title IX claim on the merits).

187. Rao, *supra* note 178, at 257.

188. See Barbash, *supra* note 134 (interviewing lawyer who opposes Obama Administration’s interpretation of “sex” in Title IX in Illinois case). For a discussion of the Illinois case, *Students and Parents for Privacy v. United States*, see *supra* note 116.

189. Barbash, *supra* note 134.

opponents are arguing that individuals' use of a bathroom should be determined by the sex recorded on their birth certificate, just as some athletic policies mandate the same for determining access to sports teams.<sup>190</sup> Therefore, challenging an athletic policy under Title IX depends on courts deferring to or adopting the EEOC's interpretation of Title VII in *Macy* that treats gender identity as an individual's sex.<sup>191</sup>

## 2. *Discrimination on the Basis of Gender Identity Is Sex Discrimination Theory*

In a context where gender identity is treated as an individual's sex, transgender student-athletes on the interscholastic level should be allowed to participate on the sports team that is consistent with their gender identity.<sup>192</sup> Title IX regulations permit federally funded schools to "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."<sup>193</sup>

While the plaintiff states in *Texas v. United States* are not concerned about their school districts' policies on transgender athletes, they should be.<sup>194</sup> These states misinterpreted the 2016 joint statement's language as "basically leav[ing] intact Title IX regulations allowing schools to restrict athletic teams to members of one biological sex."<sup>195</sup> While Title IX allows sex-segregated teams in some circumstances, the statement interprets Title IX to prohibit sex-segregated athletic policies "that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity)."<sup>196</sup> Unlike the traditional sex stereotyping theory, this approach properly focuses on a student-athlete's status as transgender

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190. *See id.* (reporting on interview with Alliance Defending Freedom Lawyer).

191. For a discussion of the DOJ, DOE, and EEOC's interpretations of Title IX and Title VII, see *supra* notes 161–163 and accompanying text.

192. For a discussion of the DOJ, DOE, and EEOC's interpretation of the word "sex" to include gender identity, see *supra* notes 162–163 and accompanying text.

193. 34 C.F.R. § 106.41. The contact sports listed in the regulation include "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact." *Id.*

194. *See* Amended Complaint at 22, *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex. June 15, 2016) (describing joint statement's language on athletics).

195. *Id.*

196. DEAR COLLEAGUE LETTER, *supra* note 1, at 3.

compared to students who share the same *gender identity*.<sup>197</sup> Where discrimination based on gender identity is per se sex discrimination, state policies that require a student to play on the same sports team as the gender on their birth certificate, or require hormones and other treatment would not survive a Title IX challenge.<sup>198</sup> Indeed, the DOJ clarified that “[a] school may not require transgender students to have a medical diagnosis, undergo any medical treatment, or produce a birth certificate or other identification document before treating them consistent with their gender identity.”<sup>199</sup>

### 3. *Debunking Fairness and Safety Concerns*

To be sure, athletic policies can still maintain “age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.”<sup>200</sup> This, however, does not justify a policy that requires transgender students to take hormones or undergo other medical procedures, such as gender reassignment surgery.<sup>201</sup> For one thing, the World Professional Association for Transgender Health (WPATH), which produces Standards of Care for people with gender dysphoria, strongly recommends that sex-reassignment surgery “should not be carried out until patients reach the legal age of majority.”<sup>202</sup> In addition, puberty-suppressing hormones, which can be very helpful to some

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197. See Rao, *supra* note 178, at 266–67 (discussing why per se discrimination approach is better than sex stereotyping theory).

198. For a discussion of state policies that require a birth certificate or hormones and other treatments, see *supra* notes 88–92 and accompanying text.

199. U.S. DEP’T OF JUSTICE, *supra* note 13. The DOJ and DOE joint statement provides that once a student notifies a school that they hold “a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student’s gender identity.” DEAR COLLEAGUE LETTER, *supra* note 1, at 2.

200. DEAR COLLEAGUE LETTER, *supra* note 1, at 3.

201. For a comprehensive discussion of puberty suppression hormones and gender reassignment surgery, see generally WPATH, *supra* note 34.

202. *Id.* at 21; see also G.G. ex rel. Grimm v. Gloucester Cty. School Bd., 822 F.3d 709, 715 n. 1 (4th Cir. 2016) (stating that the American Medical Association and the American Psychological Association recognize WPATH’s Standards of Care as authoritative), *cert. granted in part*, 137 S.Ct. 369 (2016), and *vacated, remanded*, 2017 WL 855755 (Mar. 6, 2017). . It should be noted that on March 6, 2017, the Supreme Court vacated the Fourth Circuit’s ruling in *Grimm*, and remanded it back to the Fourth Circuit “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.” Gloucester Cty. School Bd. v. G.G. ex rel. Grimm, 2017 WL 855755 (Mar. 6, 2017). For a discussion of gender dysphoria, see WPATH, *supra* note 34, and accompanying text.

adolescents, are a major decision adolescents, their families, and health care professionals must carefully consider, and may not be appropriate for all gender non-conforming adolescents.<sup>203</sup> It is inappropriate for school policies to require student-athletes to take hormones to play on the same sports team as the gender with which they identify because it is an intimate and significant decision, and would still exclude transgender students who choose not to go through with the suppression.<sup>204</sup>

The concerns of those opposing transgender participation in athletics is exemplified by the Minnesota Child Protection League (“CLP”), a conservative non-profit organization who took exception to the Minnesota State High School Leagues decision to allow transgender student-athletes to play on the same sports team with which they identify.<sup>205</sup> In response to the decision, the CLP purchased advertisements that read, “A male wants to shower beside your 14-year-old daughter. Are YOU okay with that?” and “THE END OF GIRLS’ SPORTS? Her dreams of a scholarship shattered, your 14-year-old daughter just lost her position on an all-girl team to a male . . . and now she may have to shower with him.”<sup>206</sup> A CLP spokeswoman presented her organizations concerns, as she stated that

Depending on the age, some [youth athletes] will be sexually assaulted through the naked presence of the other gender. Some will be mercilessly bullied. Some will be raped. And all will be forced to deny the obvious—the logic, science and attributes of each biological gender.<sup>207</sup>

While individuals have a legitimate constitutional privacy interest in bodily integrity, outrageous claims such as these only perpetuate negative stereotypes of transgender individuals.<sup>208</sup>

Opponents of transgender youth athletes playing on the sports team they identify with, like the Minnesota CLP, express safety concerns and argue that transgender athletes born male have an unfair

203. See WPATH, *supra* note 34, at 17–18 (discussing the process of considering puberty-suppressing hormones).

204. See *id.* at 19 (describing the criteria that must be met before adolescents should receive puberty suppressing hormones).

205. Wong, *supra* note 31, at 9.

206. *Id.*

207. Andy Birkey, *MN Child Protection League: Trans-Inclusive Policy Will Result in ‘Rape’*, COLUMN (Nov. 18, 2014), <http://thecolu.mn/14666/mn-child-protection-league-trans-inclusive-policy-will-result-rape> [<https://perma.cc/J47R-SNP3>].

208. For a discussion of constitutional privacy in bathrooms and locker rooms, see *supra* notes 137–142 and accompanying text.

advantage if they play in a female league.<sup>209</sup> While courts have expressed concerns about “preserv[ing] opportunities for female athletes”, fear of “a sudden male influx or domination” in female sports is over-exaggerated.<sup>210</sup> In fact, several courts have rejected the argument that biological males have an unfair advantage over females or that biological females are at a disadvantage to males.<sup>211</sup> In *Brendan v. Independent School District 742*,<sup>212</sup> the Eighth Circuit Court of Appeals ruled that a school district’s policy that excluded female high school students from playing on boys’ sports teams violated the Equal Protection Clause.<sup>213</sup> The girls were excluded from non-contact sports, and the schools did not have girls’ teams for these sports.<sup>214</sup> The court rejected the defendants’ contention “that women are incapable of competing with men in non-contact sports,” and noted that factors that have nothing to do with physical

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209. See Buzuvis, *supra* note 76, at 37–38 (identifying this argument and addressing whether science supports it); Lauren Steele, *Chris Mosier on Making History as First Trans Member of Team USA*, ROLLING STONE (Aug. 2, 2016), <http://www.rollingstone.com/sports/features/chris-mosier-first-trans-team-usa-member-w432272> [<https://perma.cc/42EC-W29L>] (reporting famous MMA fighter Ronda Rousey has spoken out against allowing transgender women compete to in female sports). Rousey conveyed her opposition to Fallon Fox, a transgender female MMA athlete, stating that “[s]he can try hormones, chop her pecker off, but it’s still the same bone structure a man has. It’s an advantage. I don’t think it’s fair.” *Id.* (quoting Ronda Rousey’s interview with newspaper *The Australian*). For more on Fallon Fox, see Ziegler & Huntley, *supra* note 70, at 471–72.

210. Buzuvis, *supra* note 76, at 8; *Gomes v. R. I. Interscholastic League*, 469 F. Supp. 659, 666 (D. R.I. 1979), *vacated on other grounds*, 604 F.2d 733 (1st Cir. 1979). Compare *Attorney General v. Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d 284, 296 (Mass. 1979) (noting that “to immunize girls’ teams totally from any possible contact with boys might well perpetuate a psychology of ‘romantic paternalism’ inconsistent with such development and hurtful to it in the long run,” and holding interscholastic association’s rule barring boys from trying out for girls teams violated Massachusetts’s Constitution), and *Gomes*, 469 F.Supp. at 666 (stating there was no evidence that allowing high school male to play on all-female volleyball team would lead to more males joining team), with *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1130–31 (9th Cir. 1982) (disagreeing with *Attorney General v. Massachusetts Interscholastic Athletic Association* and stating that “athletic opportunities for women would be diminished” because “due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team”), and *Forte v. Bd. of Ed. North Babylon Union Free Sch. Dist.*, 431 N.Y.S.2d 321, 324 (N.Y. Sup. Ct. 1980) (stating New York Public High School Association’s regulation excluding males from girls’ teams “promotes the aim of Title IX to prevent the take-over of all girl teams by members of the opposite sex who already have a disproportionate advantage in overall athletic opportunities”).

211. See *Skinner-Thompson & Turner*, *supra* note 150, at 277 (discussing concerns about unfair competition).

212. 477 F.2d 1292 (8th Cir. 1973).

213. See *id.* at 1302 (holding policy in violation of Equal Protection).

214. See *id.* at 1294 (describing how girls were denied from playing on boys’ tennis, cross-country running, and cross-country skiing teams).

capacity, like “coordination, concentration, agility and timing play a large role in achieving success” in non-contact sports.<sup>215</sup> Additionally, the Massachusetts Supreme Court held that a state statute excluding boys from participation on girls’ teams violated the state’s constitution, and noted that “[c]lassification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo archaic and overbroad generalizations.”<sup>216</sup> Even in contact sports, such as football, courts have rebuffed safety concerns for female athletes and have generally echoed the sentiment that “[a]ny notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality.”<sup>217</sup> Moreover, given the unfortunate stigma and harassment that transgender students all too frequently receive, it is unlikely that boys will disingenuously identify as transgender just to play on girls’ sports teams.<sup>218</sup>

Science and social factors also inform the debate over competitive advantages and disadvantages.<sup>219</sup> One study of transitioned athletes concluded that “to date there is really no concrete evidence to support or refute that transitioned men or women would compete at an advantage as compared with physically born men

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215. *Id.* at 1300. Indeed, Chris Mosier, a transgender male athlete, finished twenty-sixth out of forty-seven men at the 2016 Sprint Duathlon World Championship in Spain. See Rodriguez, *supra* note 71.

216. Attorney General v. Mass. Interscholastic Athletic Ass’n, 393 N.E.2d 284, 293 (Mass. 1979) (internal quotations and citations omitted). For a further discussion of courts’ concerns over males overtaking female sports teams, see *supra* note 210 and accompanying text.

217. Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977) (holding rule barring females from participation in soccer violated Equal Protection). See also Force by Force v. Pierre City R-VI Sch. Dist., 570 F. Supp. 1020 (W.D. Mo. 1983) (stating that restricting thirteen-year-old girl from playing on boys football team over safety concerns exemplifies “overly paternalistic attitude about females”) (internal quotations omitted); Leffel v. Wis. Interscholastic Athletic Ass’n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (“[T]he exclusion of girls from all contact sports in order to protect female high school athletes from an unreasonable risk of injury is not fairly or substantially related to a justifiable governmental objective in the context of the fourteenth amendment.”); Nat’l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 36–37 (N.J. Super. Ct. App. Div. 1974) (stating that “girls of ages 8–12 are not as a class subject to materially greater hazard of injury while playing baseball than boys of that age group”).

218. For a discussion of the discrimination and harassment that transgender individuals face, see *supra* notes 39–45 and accompanying text.

219. See Ziegler & Huntley, *supra* note 70, at 474–77 (describing studies about differences between men and women in sports); Buzuvis, *supra* note 76, at 37–38 (describing social conditions and historical stereotypes attached to males and females).

and women.”<sup>220</sup> However, differences in testosterone and estrogen levels, along with the observation that, on average, “[m]en are taller, have greater muscle mass, less body fat, greater aerobic and anaerobic capacity, greater lung capacity, and greater strength than women” lend to the conclusion that, on average, men outperform women in physical activities.<sup>221</sup> While the biological differences between males and females have played a major role in shaping the policies of sports leagues and organizations, like the NCAA and International Olympic Committee (IOC), it is suspect that there would be unfair advantages to transgender youth athletes, at least in middle school.<sup>222</sup> Prior to puberty, “hormonal levels do not differ significantly between the sexes.”<sup>223</sup> Furthermore, social conditions and stereotypes may have a more significant impact on the traditional notion that males are more athletic than females than biological factors.<sup>224</sup> Historically, while girls face obstacles to their athletic development from “negative, stereotype-driven feedback,” “men and boys have enjoyed centuries of preferential treatment, including encouragement, validation, opportunity, and incentive, not to mention the tailoring of sport to suit men’s physical and socially constructed characteristics.”<sup>225</sup>

#### IV. CONCLUSION

The future of transgender interscholastic athletes’ participation on sports teams consistent with their gender identity relies on current litigation concerning transgender access to bathrooms under Title IX.<sup>226</sup> If the DOJ and DOE reinstate, and courts accept,

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220. Michaela Devries, *Do Transitioned Athletes Compete at an Advantage or Disadvantage as Compared with Physically Born Men and Women: A Review of the Scientific Literature*, CANADIAN ASS’N FOR THE ADVANCEMENT OF WOMEN AND SPORT AND PHYSICAL ACTIVITY (2008), at 14, available at [http://www.caaws.ca/e/wp-content/uploads/2013/02/Devries\\_lit\\_review2.pdf](http://www.caaws.ca/e/wp-content/uploads/2013/02/Devries_lit_review2.pdf) [<https://perma.cc/585D-FTP5>].

221. Ziegler & Huntley, *supra* note 70, at 474–75; see also Devries, *supra* note 220, at 4 (“Typically, men outperform women by 11–18% on the type of activity. Additionally, there is a 5–37% difference in world record times between men and women for a variety of sporting events.”).

222. For a discussion of the IOC and NCAA policies concerning transgender athletes, see *supra* notes 76–77 and accompanying text.

223. TRANSGENDER LAW & POLICY INSTITUTE, GUIDELINES FOR CREATING POLICIES FOR TRANSGENDER CHILDREN IN RECREATIONAL SPORTS 2 (2009), available at [http://media.wix.com/ugd/2bc3fc\\_6cd03b8e19147c71c0153c81e96babcb.pdf](http://media.wix.com/ugd/2bc3fc_6cd03b8e19147c71c0153c81e96babcb.pdf) [<https://perma.cc/GSH2-XB8L>].

224. See Buzuvis, *supra* note 76, at 37–38 (describing social conditions and historical stereotypes attached to males and females).

225. *Id.* at 38.

226. For a discussion of transgender bathroom litigation, see *supra* notes 97–118 and accompanying text.

the Obama administration's position that a student's gender identity is treated as a student's sex under Title IX, then exclusive interscholastic athletic policies will violate Title IX.<sup>227</sup> Relying on a sex stereotyping theory alone to challenge exclusive policies will be extremely difficult.<sup>228</sup> Despite court rulings in opposition to the Obama administration's interpretation of Title IX, two federal courts deferred to the interpretation.<sup>229</sup>

Ultimately, the current transgender litigation should conclude that the Obama administration's interpretation of Title IX is valid, and the DOJ and DOE should readopt its interpretation.<sup>230</sup> Such a conclusion is consistent with the interpretation of "sex" under Title VII precedent.<sup>231</sup> A sex stereotyping challenge of state interscholastic athletic policies may be difficult to sustain.<sup>232</sup> Finding that gender identity is included in "sex" is attune to Congress's Title IX objectives "to avoid the use of federal resources to support discriminatory practices . . . [and] to provide individual citizens effective protection against those practices."<sup>233</sup> Furthermore, safety and fairness concerns are not enough to justify discrimination of transgender student-athletes.<sup>234</sup> Therefore, courts should clearly reaffirm that discriminatory practices against transgender students and student-athletes is illegal and unacceptable under Title IX.<sup>235</sup>

Because of how polarizing the issue has become, some have called for the Supreme Court to make a final ruling on the interpretation of Title IX.<sup>236</sup> In an amicus curiae brief, however, the

227. For a discussion of why exclusive interscholastic policies would violate Title IX, see *supra* notes 192–199 and accompanying text.

228. For a discussion of why challenging exclusive interscholastic policies under a sex stereotyping theory would be difficult, see *supra* notes 175–191 and accompanying text.

229. For a discussion of federal district courts in Ohio and Wisconsin that deferred to the 2016 statement's interpretation, see *supra* note 146 and accompanying text.

230. For a discussion of the DOJ and DOE 2016 interpretation of Title IX, see *supra* note 127 and accompanying text.

231. For a discussion of the interpretation of "sex" under Title VII, see *supra* notes 150–167 and accompanying text.

232. For a discussion of sex stereotyping theory, see *supra* notes 175–191 and accompanying text.

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

234. For a discussion of such fairness and safety concerns, see *supra* notes 200–225 and accompanying text.

235. For a discussion of discrimination on the basis of gender identity as sex discrimination, see *supra* notes 192–199 and accompanying text.

236. See, e.g., Lyle Denniston, *Is the Supreme Court Ready to Take on Transgender Rights?*, CONST. DAILY (June 2, 2016), <http://blog.constitutioncenter.org/2016/06/is-the-supreme-court-ready-to-take-on-transgender-rights/> [https://perma.cc/9J6B-8FDX] (quoting Judge Niemeyer of the Fourth Circuit who wanted Supreme

ACLU urged the Supreme Court not to grant certiorari to *Grimm* because it is “the wrong case at the wrong time.”<sup>237</sup> Although the Supreme Court originally elected to review the case, the Court eventually decided to vacate the Fourth Circuit’s judgment and remand the case “for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.”<sup>238</sup>

Transgender athletes and the LGBTQ community have brought much needed awareness of transgender issues to the national stage.<sup>239</sup> Indeed, the transgender community has made positive strides in several recent legal and administrative decisions.<sup>240</sup> Despite these efforts, discrimination and violence plague the transgender community, and transgender individuals, including youth,

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Court to review issue). Judge Niemeyer, who dissented in *Grimm* and disagreed with the DOJ and DOE’s 2016 interpretation of the word “sex” in Title IX, stated “[t]he momentous nature of the issues . . . deserves an open road to the Supreme Court to seek the court’s controlling construction of Title IX for national application.” *Id.*

237. Brief for the ACLU as Amicus Curiae at 3, *G.G. ex rel. Grimm v. Gloucester Cty. School Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S.Ct. 369 (2016), and *vacated, remanded*, 2017 WL 855755 (Mar. 6, 2017), available at [https://www.aclu.org/sites/default/files/field\\_document/no\\_16-273\\_gloucester\\_county\\_school\\_board\\_v\\_gg\\_brief\\_in\\_opposition.pdf](https://www.aclu.org/sites/default/files/field_document/no_16-273_gloucester_county_school_board_v_gg_brief_in_opposition.pdf) [<https://perma.cc/3FPB-26EX>].

238. *Gloucester Cty. School Bd. v. G.G. ex rel. Grimm*, 2017 WL 855755 (Mar. 6, 2017). The DOE and DOJ’s February 22, 2017 *Dear Colleague* letter states that the DOJ and DOE are withdrawing the policy statements made by the Obama administration in its May 13, 2016 *Dear Colleague Letter*. See DEAR COLLEAGUE LETTER, *supra* note 16.

239. For a discussion of transgender and other LGBTQ athletes, see *supra* notes 62–75 and accompanying text.

240. See Hayley Miller, *16 Inspirational Voices for LGBTQ Equality in 2016: President Barack Obama*, HRC (Dec. 30, 2016), <https://www.hrc.org/blog/16-inspirational-voices-for-lgbtq-equality-in-2016-president-barack-obama> [<https://perma.cc/KZN9-98HN>] (reporting that President Obama appointed the first transgender White House staffer); Richard Sisk & Bryant Jordan, *Pentagon Lifts Ban on Transgender Troops Serving Openly in Military*, MILITARY.COM (June 30, 2016), <http://www.military.com/daily-news/2016/06/30/pentagon-lifts-ban-transgender-troops-openly-serving-military.html> [<https://perma.cc/X47T-QL6Z>] (reporting that the Department of Defense has decided to allow transgender soldiers to serve openly in military); Corinne Segal, *Oregon Court Rules that ‘Nonbinary’ is a Legal Gender*, PBS (June 11, 2016, 3:27 PM), <http://www.pbs.org/newshour/rundown/oregon-court-rules-that-nonbinary-is-a-legal-gender/> [<https://perma.cc/CHF7-NUXQ>] (reporting that an “Oregon circuit court has ruled that a resident can change their legal gender to “nonbinary,” a gender identity that is neither male nor female”); see Emanuella Grinberg, *Boy Scouts Open Membership to Transgender Boys*, CNN (Jan. 31, 2017, 10:18 AM), <http://www.cnn.com/2017/01/30/us/boy-scouts-transgender-membership/> [<https://perma.cc/E4CU-D3MX>] (reporting on Boy Scouts of America’s decision to allow transgender boys become members). The Boy Scout of America’s new policy eliminates a birth certificate requirement and calls for “membership in Cub Scouts and Boy Scouts [to] be based on the gender indicated on an application.” *Id.*

too often turn to suicide.<sup>241</sup> The DOJ and DOE released their 2016 joint statement to clarify that transgender students are protected under Title IX, and to “ensure that our young people know that whoever they are or wherever they come from, they have the opportunity to get a great education in an environment free from discrimination, harassment, and violence.”<sup>242</sup> When addressing the rights of transgender students, courts, legislators, and policy makers should accept the Obama administration’s interpretation of Title IX in order to uphold the purposes of Title IX.<sup>243</sup> Supporting this interpretation and inclusive policies for transgender interscholastic athletes can go a long way to fostering support for transgender youth and to erase the stigma associated with identifying as transgender.<sup>244</sup> Indeed, some state high school athletic associations responded to the DOJ and DOE’s 2016 Joint Letter.<sup>245</sup> Society at large would be better off if we heard more stories about youth like Jake Hofheimer, and fewer stories about transgender youth committing suicide.<sup>246</sup>

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241. For a discussion of discrimination and violence against transgender individuals, see *supra* notes 33–45 and accompanying text.

242. U.S. DEP’T OF JUSTICE, *supra* note 13 (quoting Secretary of Education John B. King Jr.).

243. For a discussion of the objectives of Title IX, see *supra* note 233 and accompanying text.

244. See Buzuvis, *supra* note 76, at 54–56 (discussing benefits of inclusive policies).

245. For a discussion of such responses, see *supra* notes 94–95 and accompanying text.

246. For a discussion of Jake Hofheimer, a transgender student-athlete in California, and instances of transgender youth suicide, see *supra* notes 2–12 and accompanying text.

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