

COMMENT

LET THEM PLAY BALL: SEEKING SOLUTIONS TO THE RECENT SPATE OF TRANS SPORTS BANS

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Over the past few years, the national conversation surrounding youth sports centered on efforts to systematically exclude a vulnerable subsection of children from athletics. Transgender youth, particularly transgender girls, have become the targets of laws with innocuous-sounding titles like “Fairness in Women’s Sports” or “The Fairness Act.” As of March 2023, eighteen states have enacted laws regulating K–12 and collegiate athletics. The consequences of these transphobic laws are dire. Numerous studies highlight the disproportionate rates of suicide and adverse mental health among LGBTQ+ youth. However, research indicates that gender-affirming policies have life-saving impacts on transgender, nonbinary, and LGBTQ+ young people.

Action by the federal government has so far proved ineffective at shaping state and local policies through executive orders. While the Supreme Court recently granted a major win to the LGBTQ+ community in *Bostock v. Clayton County*, the Court limited its scope. Ultimately, trans children and their families are subject to a fractured national policy, all while increasingly aggressive state legislators wage war against LGBTQ+ people, particularly children. Anti-trans sports laws violate both Title IX and the Fourteenth Amendment; ensuring the protection of trans youth athletes in the coming years requires challenging anti-trans legislation in courts and enacting federal laws that protect transgender student-athletes, including amending Title IX to embrace an expanded definition of sex.

This Comment describes the current state of trans inclusion in athletics and aims to forge a path forward for policymakers, activists, and allies alike. By analyzing methods for legal changes and barriers to equality at the federal, state, and local levels, this Comment concludes that a simple approach to trans inclusion in sports is not evident. Rather, to achieve greater inclusion and protect the lives of LGBTQ+ youth, policymakers must work for change at the national, state, and local levels to realize true equality for trans children. By prioritizing strategic litigation and reworking federal statutes, advocates have the power to turn the tide on discrimination, avoid health disparities, and defend transgender youth.

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INTRODUCTION

High fives after an excellent pass. Orange slices at halftime. Fans cheering on the sidelines. Building a sense of teamwork and community regardless of the final score. Youth athletics provide these experiences to generations of young people. Now, due to a wave of anti-transgender (trans) legislation, the future of American youth sports may well include panels of medical doctors, mandatory on-file birth certificates, and questions regarding a child’s gender assigned at birth, all before the starting whistle blows.

In state legislatures across the country, elected officials have introduced legislation designed to ban or severely curtail the participation of trans athletes in sports.¹ These bills primarily focus on limiting the

1. See Chris Mosier, *Take Action!*, TRANSATHLETE.COM, <https://www.transathlete.com/take-action> [https://perma.cc/LN3S-XVWZ] (Jan. 28, 2023) (providing an interactive map of current proposed and enacted anti-trans sports bills); see also *Legislative Tracker: Youth Sports Bans*, FREEDOM FOR ALL AMERICANS, <https://freedomforallamericans.org/legislative-tracker/student-athletics> [https://perma.cc/V5H6-P6KL] (last visited Feb. 13, 2023) (providing a web application tracker providing information on current legislation targeting the LGBTQ+ community); *Mapping Attacks on LGBTQ Rights in U.S. State Legislature*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> [https://perma.cc/X9M4-TXXL] (Feb. 10, 2023) (highlighting current state legislation attacking LGBTQ rights).

participation of trans women and girls in women's sports.² As of March 2023, eighteen states have passed these bills and many more continue to make their way to governors' desks across the country.³ Wisconsin is one of these states (and the bill's language closely resembles that of other bills across the nation). Assembly Bills 195 and 196 and Senate Bills 322 and 323 center on preventing trans athletes from participating in sports at youth and collegiate levels.⁴

While anti-trans sports laws represent the current law in a growing minority of states, they have a serious—and potentially deadly—impact on trans and LGBTQ+ youth. Not only do these laws prevent trans youth from receiving the social, physical, and community benefits of participating in athletics, but they can also have negative impacts on health and educational outcomes.⁵ As legal challenges to anti-trans sports laws make their way through the courts, transgender children and their families are left in limbo. While recent executive orders and the Supreme Court's holding in *Bostock v. Clayton County*⁶ provide hope for a uniform national approach that recognizes the rights and humanity of trans Americans,⁷ state-level bills threaten to strip away trans rights. In *Bostock*, the Court found that an employer who fires an individual employee merely for being gay or transgender violates Title VII,⁸ paving the way for more expansive interpretations of discrimination on the basis of sex. However, trans student-athletes currently face uncertainty, as a rapidly increasing number of state legislatures continue to advance anti-trans legislation.

This Comment will outline the origin and structure of many of these bills and closely analyze the Wisconsin versions by diving into the rationale behind the legislation, the national groups involved, and the

2. Trans women are women and trans girls are girls. This Comment will use the terms “transgender” or “trans” to refer to people who have “a gender identity or gender expression that differs from societal expectations based on gender assigned at birth.” WIS. INTERSCHOLASTIC ATHLETIC ASS'N, TRANSGENDER PARTICIPATION POLICY 1 (2018) [hereinafter TRANSGENDER PARTICIPATION POLICY], <https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf> [https://perma.cc/U5A9-YNME]. “Cisgender” refers to individuals who identify with the same gender they were assigned at birth.

3. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans [https://perma.cc/N4XD-DRYP] (Feb. 11, 2023).

4. See Satya Rhodes-Conway, *Madison Common Council Condemns Anti-Trans Bills in State Legislature*, CITY OF MADISON: MAYOR SATYA'S BLOG (June 1, 2021), <https://www.cityofmadison.com/mayor/blog/madison-common-council-condemns-anti-trans-bills-in-state-legislature> [https://perma.cc/5CAM-XQ6X].

5. See *infra* Part I.A (discussing how trans youth benefit from participating in organized, school-sponsored athletics).

6. 140 S. Ct. 1731 (2020).

7. See *id.*

8. *Id.* at 1753.

current legal challenges. This Comment will then turn to potential federal, state, and local solutions to combat these trans sports bans before opining on the most viable options to achieve progress. These anti-trans sports laws violate both Title IX and the Fourteenth Amendment; ensuring the protection of trans youth athletes in the coming years requires challenging anti-trans state legislation in courts and enacting federal legislation that protects trans athletes, including amending Title IX to embrace an expanded definition of sex. While some may see a constitutional amendment, state laws, agency action, or local measures as the solution to these laws, analysis reveals the hurdles that anti-discrimination work faces at these levels. This is a rapidly evolving area of law, where new bills, legislation, and legal challenges continue to spread with no signs of slowing. While this Comment focuses on the anti-transgender sports legislation, many of the arguments apply to other anti-LGBTQ+, specifically anti-trans laws and the struggle for broader anti-discrimination protections.

I. THE PLAYING FIELD: CONTEXTUALIZING THE FIGHT FOR TRANS EQUALITY IN SPORTS

Transgender sports bans do not occur in a vacuum. First, this Comment frames the discussion of this spate of legislation in terms of the impact these laws have on children, which serves to lay out the stakes of continued attacks on transgender youth. Second, understanding the current state of American policy surrounding trans participation in athletics, with Wisconsin as an example, considers how to achieve nondiscrimination policy. Third, an explanation of recent legislative trends highlights the dramatic changes in state policy over the past three years.

A. *Transgender Youth Benefit from Participating in Sports*

When youth participate in sports, they experience positive physiological, social, and emotional benefits. A study from the Center for American Progress (CAP) cited lower rates of obesity, increased self-esteem and self-confidence, improved academic performance, school-based social support, and community connectedness among some of the outcomes of athletic participation.⁹ Researchers studying secondary and

9. SHOSHANA K. GOLDBERG, CTR. FOR AM. PROGRESS, FAIR PLAY: THE IMPORTANCE OF SPORTS PARTICIPATION FOR TRANSGENDER YOUTH 4 (2021), <https://cdn.americanprogress.org/content/uploads/2021/02/09122423/Fair-Play-correction2.pdf> [<https://perma.cc/QYC3-CYRA>] (collecting and analyzing research data from numerous other studies on transgender children and sports).

post-secondary students found that “student-athletes may be at lower risk for anxiety and depression, suicide attempts, and tobacco and illegal drug use.”¹⁰ For vulnerable youth who have experienced “adverse childhood events,” participating in athletics “can be a source of resilience and empowerment, protecting against short- and long-term negative impacts to mental health and well-being.”¹¹ Participating in high school or collegiate athletics can have a lifelong positive effect; evidence shows that participation is associated with higher wages and better jobs.¹²

The types of benefits that sports provide are especially crucial for transgender youth, who face substantially higher risks of depression, suicidal ideation, and suicide attempts than their cisgender peers.¹³ Trans youth and young adults are also substantially more likely to experience bullying, violence, and rejection by peers “against a backdrop of discriminatory policies such as transgender sports bans that serve to legitimize and foster hostile climates.”¹⁴ In a survey from 2017 to 2019, almost forty-four percent of transgender youth had contemplated suicide in the past year, and nearly thirty percent of trans youth had attempted suicide at least once.¹⁵ The absence of community support for trans youth through simple acts like affirming their name, pronouns, and gender identity has “specifically been tied to” mental health deterioration and increased suicidality.¹⁶

In contrast, where transgender youth meet accepting policies, including affirming sports policies, their risk of poor mental health and suicidality decreases.¹⁷ Research by the Trevor Project¹⁸ showed that LGBTQ+ athletes—trans and nonbinary athletes in particular—earned “significantly higher grades than their LGBTQ+ peers who did not participate in sports” and that young LGBTQ+ student-athletes “report[ed twenty] percent lower rates of depressive symptoms than LGBTQ+ nonathletes.”¹⁹ Further, the Human Rights Campaign

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 2.

14. *Id.*

15. *Id.* at 6 fig.1.

16. *Id.* at 7.

17. *Id.* at 2.

18. The Trevor Project is the world’s largest suicide prevention and crisis intervention organization for LGBTQ+ youth. They have platforms that connect LGBTQ+ youth, provide peer support, engage in research and public education, and host a 24/7 counseling program. See more and get involved at *Strategic Plan & Mission*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/strategic-plan> [https://perma.cc/3YRU-JVTP] (last visited Feb. 13, 2023).

19. GOLDBERG, *supra* note 9, at 10 (citing THE TREVOR PROJECT, THE TREVOR PROJECT RESEARCH BRIEF: THE WELL-BEING OF LGBTQ YOUTH ATHLETES (2020),

identified that LGBTQ+ youth athletes “were significantly more likely than those who had never played a sport to ‘always feel safe in [their] classroom,’ as well as significantly less likely to have felt ‘depressed’ or ‘worthless’ in the past week;” students who have previously participated in athletics, but currently did not, were the “most likely to have felt depressed or worthless” and the “least likely to feel safe at school.”²⁰ Although young transgender students are less likely than cisgender students to play sports, the 2017 National School Climate Survey revealed that trans youth who participated in sports “had higher rates of self-esteem and feelings of school belonging and lower rates of depression,” with trans nonbinary students seeing the most improvement.²¹

B. Current Policies on Transgender Inclusion in Sports

While the United States does not have an effective nationwide policy regarding the participation of trans people in sports, many jurisdictions and organizations have developed policies and procedures for the inclusion of trans people. The current state of trans participation in sports is mixed; rules and policies differ based on the level of competition, controlling jurisdiction, and political administrations providing guidance. Since 2004, the International Olympic Committee permits trans athletes to participate in the Olympics, and many professional and recreational leagues within the United States have inclusive policies for trans athletes.²² For collegiate athletes, universities and colleges may set their own policies, but trans athletes are eligible to compete in the National Collegiate Athletic Association championships according to their gender identity.²³

Yet for trans high school athletes, transitions between Presidents Barack Obama, Donald Trump, and Joe Biden led to shifting “interpretations of Title IX” and “a seesawing in federal guidance.”²⁴ The Obama Administration interpreted “sex” in Title IX to prohibit discrimination based on transgender status, but the Trump Administration quickly rescinded the Obama Administration’s guidance,

<https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Youth-Sports-and-Well-Being-Research-Brief.pdf> [<https://perma.cc/Y7KG-F85R>].

20. *Id.* (quoting HUM. RTS. CAMPAIGN FOUND., PLAY TO WIN: IMPROVING THE LIVES OF LGBTQ YOUTH IN SPORTS 25 (2018), <https://assets2.hrc.org/files/assets/resources/PlayToWin-FINAL.pdf> [<https://perma.cc/43BU-XJV6>]).

21. *Id.*

22. *Id.* at 8.

23. *Id.*

24. *See id.*

instead deferring to states and local school districts to establish their own policies.²⁵ On his first day in office, President Biden signed the Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,²⁶ which contains a policy statement that “[c]hildren should be able to learn without worrying about whether they will be denied access to . . . school sports.”²⁷ Nonetheless, states across the nation continue to advance and pass anti-trans sports legislation.²⁸

Many state high school athletic associations—including Wisconsin’s—allow trans student-athletes to participate on sports teams aligning with their gender identity.²⁹ In 2013, the Wisconsin Interscholastic Athletic Association (WIAA) established guidelines³⁰ “committed to ensuring that transgender students have opportunities to participate in WIAA-sponsored athletics.”³¹ To comply with these guidelines and be eligible to play on girls’ teams, trans girls must document a regimen of healthcare-provider-supervised testosterone suppression; if they have not started hormone suppression therapy, they can participate on the boys’ team.³² Transgender boys who have begun hormone therapy are only eligible for boys’ teams, but like the policy for trans girls, trans boys who have not started hormone therapy may still participate on girls’ teams if they choose to do so.³³ WIAA’s Transgender Participation Policy is derivative of existing policies in Washington, Colorado, and the National Collegiate Athletic Association, and it is guided by the following principles: (1) “transgender students have opportunities to participate” in athletics, (2) WIAA member schools shall provide all students with access to athletics without discrimination, policies should be informed by sound medical knowledge, and (3) “[t]he medical privacy of transgender students should be preserved.”³⁴

25. *Id.* at 9.

26. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf> [<https://perma.cc/7NNB-J9WA>].

27. *Id.*

28. See Mosier, *supra* note 1; MOVEMENT ADVANCEMENT PROJECT, *supra* note 3 (depicting in table format eight states that have banned trans kids from participating in sports in 2022 alone).

29. Riley Vetterkind, *Republicans Introduce Legislation to Ban Transgender Girls from Girls Sports*, WIS. STATE J. (Mar. 3, 2021), https://madison.com/wsj/news/local/govt-and-politics/republicans-introduce-legislation-to-ban-transgender-girls-from-girls-sports/article_b3fbf045-ed79-522c-9705-3db9ce27b91a.html.

30. TRANSGENDER PARTICIPATION POLICY, *supra* note 2.

31. Vetterkind, *supra* note 29.

32. *Id.*

33. *Id.*

34. TRANSGENDER PARTICIPATION POLICY, *supra* note 2, at 1.

Guidance from 2013—still accessible on the WIAA website—directs that students should be allowed to participate on a sports team consistent with their gender identity and schools should make case-by-case determinations regarding transgender student participation.³⁵

C. Efforts to Ban Trans Youth, Particularly Trans Girls, from Athletics

In the 2021 to 2022 legislative session, anti-trans sports bills were considered in over thirty states.³⁶ The primary rationale for this type of legislation is the notion that transgender girls have an unfair advantage because—simplistically—testosterone causes physical changes that necessarily and unwaveringly disadvantage the majority of competitors, who are generally cisgender girls.³⁷ At best, this is misguided and lacks scientific validity. Cisgender women and girls can also have elevated testosterone numbers—approximately ten percent of women have polycystic ovary syndrome, which results in higher testosterone levels.³⁸ Further, trans girls on puberty blockers have negligible levels of testosterone.³⁹ In reviewing studies of testosterone levels and athletic performance, researchers have yet to find a “clear, consistent relationship . . . [s]ometimes testosterone is associated with better performance, but other studies show weak links . . . and yet others show testosterone is associated with worse performance.”⁴⁰

As of March 2023, eighteen states have enacted anti-trans sports bans,⁴¹ with Idaho being the first and only state to pass its law in 2020.⁴²

35. WIS. DEP’T OF PUB. INSTRUCTION & WIS. INTERSCHOLASTIC ATHLETIC ASS’N, THE PUPIL NONDISCRIMINATION GUIDELINES FOR ATHLETICS 16 (6th ed. 2013), <https://www.wiaawi.org/Portals/0/PDF/nondiscrimination.pdf> [<https://perma.cc/5LUJ-52HW>].

36. See *Legislation Affecting LGBTQ Rights Across the Country 2021*, ACLU, <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2021> [<https://perma.cc/JTM8-9854>] (Dec. 17, 2021).

37. Jack Turban, *Trans Girls Belong on Girls’ Sports Teams*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls-sports-teams> [<https://perma.cc/EED5-46ZC>].

38. *Id.*

39. *Id.*

40. *Id.* (quoting Katrina Karkazis, a senior visiting fellow and expert on testosterone and bioethics at Yale University).

41. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 3.

42. Fairness in Women’s Sports Act, 2020 Idaho Sess. Laws 967 (codified as amended at IDAHO CODE §§ 33-6201 to 33-6206).

In 2021, the governors of Mississippi,⁴³ Arkansas,⁴⁴ Tennessee,⁴⁵ Alabama,⁴⁶ West Virginia,⁴⁷ Montana,⁴⁸ Florida,⁴⁹ and Texas⁵⁰ signed their state's respective anti-trans sports law.⁵¹ South Dakota's governor took a unique approach, initially vetoing legislation and implementing anti-trans athlete policies through executive orders in 2021 before signing legislation in 2022 building off of her existing executive orders.⁵² In the spring of 2022, eight state legislatures passed the most recent wave of exclusionary transgender athlete participation laws: Iowa,⁵³ Utah (overriding gubernatorial veto),⁵⁴ Oklahoma,⁵⁵ Arizona,⁵⁶ Kentucky (overriding gubernatorial veto),⁵⁷ South Carolina,⁵⁸ Indiana (overriding

43. S.B. 2536, 2021 Leg., Reg. Sess. (Miss. 2021).

44. Fairness in Women's Sports Act, 2021 Ark. Acts 1873 (codified as amended at ARK. CODE ANN. § 6-1-107); S.B. 354, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

45. S.B. 228, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

46. Act of Apr. 23, 2021, 2021 Ala. Legis. Serv. 285 (West); H.B. 391, 2021 Leg., Reg. Sess. (Ala. 2021).

47. Act of Apr. 28, 2021, 2021 W. Va. Acts 1118 (codified as amended at W. VA. CODE § 18-2-25d).

48. Save Women's Sports Act, 2021 Mont. Laws 1475 (codified at MONT. CODE ANN. § 20-7-1305 to -1307).

49. Fairness in Women's Sports Act, FLA. STAT. § 1006.205 (2022).

50. H.B. 25, 2021 Leg., 87th Sess. (Tex. 2021).

51. See MOVEMENT ADVANCEMENT PROJECT, LGBTQ YOUTH: BANS ON TRANSGENDER YOUTH PARTICIPATION IN SPORTS 7 (2023), <https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf> [https://perma.cc/B8Y7-GCBJ] [hereinafter LGBTQMAP].

52. An Act to Protect Fairness in Women's Sports, S.B. 46, 2022 Leg., 97th Sess. (S.D. 2022); see LGBTQMAP, *supra* note 51, at 5, 7; Wyatt Ronan, *Breaking: Human Rights Campaign Slams Texas Governor Greg Abbott for Signing Discriminatory Anti-Transgender Sports Ban into Law*, HUM. RTS. CAMPAIGN (Oct. 25, 2021), <https://www.hrc.org/press-releases/breaking-human-rights-campaign-slams-texas-governor-greg-abbott-for-signing-discriminatory-anti-transgender-sports-ban-into-law> [https://perma.cc/U78D-EW3X]. South Dakota was the first state in 2022 to pass anti-trans legislation when Governor Kristi Noem signed an anti-trans sports bill into law. Kiara Alfonseca, *South Dakota Signs 1st Anti-Transgender Sports Law of 2022*, ABC NEWS (Feb. 4, 2022, 12:06 PM), <https://abcnews.go.com/US/south-dakota-signs-1st-anti-transgender-sports-law/story?id=82672739> [https://perma.cc/9CJN-6ZJM].

53. IOWA CODE § 261I.2 (2023); H.F. 2416, 89th Gen. Assemb., Reg. Sess. (Iowa 2022).

54. Student Eligibility in Interscholastic Activities, 2022 Utah Laws 3901 (codified as amended at UTAH CODE ANN. §§ 52-4-205, 53G-6-901 to -1006); H.B. 11, 2022 Leg., Gen. Sess. (Utah 2022).

55. Save Women's Sports Act, S.B. 2, 58th Leg., 2d Reg. Sess. (Okla. 2022).

56. Save Women's Sports Act, S.B. 1165, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

57. Fairness in Women's Sports Act, S.B. 83, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022).

58. Save Women's Sports Act, H. 4608, 2022 Gen. Assemb., 124th Sess. (S.C. 2022).

gubernatorial veto),⁵⁹ and Louisiana (without governor’s signature)⁶⁰ codified anti-trans sports legislation.⁶¹ These bills are often supported by conservative legal groups.⁶² As the first bill of its kind to be signed into law by the governor, Idaho’s Fairness in Women’s Sports Act paved the way for those that followed. Representative Barbara Ehardt sponsored the Idaho legislation and worked with the Alliance Defending Freedom—a socially conservative legal organization—in drafting the bill, which bans transgender girls and women from playing on women’s high school or collegiate athletic teams.⁶³ The Women’s Sports Act provides that disputes regarding an athlete’s sex will “be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student’s personal health care provider that shall verify the student’s biological sex.”⁶⁴ The determination must only be based on “the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.”⁶⁵ Further, the Act provides protection for educational institutions and defines a civil cause of action for “injunctive relief, damages, and any other relief available under law.”⁶⁶ Much of the language of the Idaho legislation is “identical” to the bill that was introduced, and subsequently passed, in Mississippi.⁶⁷ The Fairness in Women’s Sports Act exemplifies the partisan nature of this debate, passing with nearly all of the Idaho Republican legislators in favor and all the Democrats opposed.⁶⁸

The wave of anti-trans legislation spread to Wisconsin. In March 2021, Republican lawmakers “introduced legislation that would ban transgender girls from participating in girls’ sports at the K–12 and

59. H.B. 1041, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022).

60. Fairness in Womens Sports Act, S.B. 44, 2022 Leg., Reg. Sess. (La. 2022).

61. See LGBTQMAP, *supra* note 51, at 7.

62. Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN POLITICS, <https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html> [<https://perma.cc/DPC8-8X6N>] (Apr. 15, 2021, 9:46 AM).

63. Nathan Brown, *Group that Helped Craft Trans Sports Ban Seeks to Join Court Case*, IDAHO PRESS (May 26, 2020), https://www.idahopress.com/news/local/group-that-helped-craft-trans-sports-ban-seeks-to-join-court-case/article_7d077cc4-59b7-5838-82f8-bc9714de53f1.html [<https://perma.cc/JR6R-WNLD>].

64. IDAHO CODE § 33-6203(3) (2022).

65. *Id.*

66. *Id.* § 33-6205(3).

67. Brown, *supra* note 63; see S.B. 2536, 2021 Leg., Reg. Sess. (Miss. 2021).

68. Brown, *supra* note 63.

colleg[iate] levels.”⁶⁹ Republican Representative Barbara Dittich introduced the “Protecting Women in Sports Act,” which is a two-bill package that would require higher educational institutions and school districts to divide sports into three divisions based on sex, defining “sex” as the sex assigned at birth by a physician.⁷⁰ The groups are boys, girls, and co-ed.⁷¹ If passed, the laws would prohibit people assigned male at birth (AMAB) from participating on a team or in a sport designated for people assigned female at birth (AFAB).⁷² Representative Dittich distinguished “biological females” from “biological males”⁷³ and said that “women’s achievements have once again been put at great risk of loss,” going further to claim that girls were being put in danger of physical injury by competing against trans girls.⁷⁴ Julaine Appling, the executive director of Wisconsin Family Action—a conservative Christian group that campaigns against LGBTQ+ rights—called it “past time” for these bills.⁷⁵ Republic Representative Janel Brandtjen said women “can’t win against men” and the inclusion of trans girls will “ruin women’s sports forever.”⁷⁶ In response, Wisconsin’s LGBTQ+ Caucus called the proposed legislation “cruel and discriminatory” and said, “[w]e must welcome and champion all athletes, regardless of gender identity or expression.”⁷⁷

Senate Bill 322⁷⁸ (SB 322) and its House Bill companion, AB 196⁷⁹ focus on K–12 students and seek to amend Section 118.13(1) of the Wisconsin Statutes and create Section 118.132. Section 118.13(1) is the current antidiscrimination statute relating to public schools.⁸⁰ The proposed changes would designate athletic teams “operated or sponsored by public schools or private schools participating in a parental choice

69. Vetterkind, *supra* note 29.

70. *Id.*

71. *Id.*

72. *Id.*

73. The terms “biological male” and “biological female” are terms that “oversimplify a very complex subject.” A person’s sex is “determined by a variety of factors, not simply genetics.” For a list of terms that convey transphobic connotations and should therefore generally be avoided, see *Terms and Phrases to Avoid*, ALTA. HEALTH SERVS., <https://www.albertahealthservices.ca/assets/info/pf/div/if-pf-div-terms-and-phrases-to-avoid.pdf> [<https://perma.cc/529F-MU9E>] (last visited Feb. 13, 2023).

74. Vetterkind, *supra* note 29.

75. *Id.* Appling also campaigned against gay marriage and worked with conservative lawmakers in 2015 to unsuccessfully regulate trans students’ school bathroom use. *See id.*

76. *Id.*

77. *Id.*

78. S.B. 322, 2021–2022 Leg., 105th Reg. Sess. (Wis. 2021).

79. A.B. 196, 2021–2022 Leg., 105th Reg. Sess. (Wis. 2021).

80. WIS. STAT. § 118.13(1) (2021–22).

program based on the sex of the participants.”⁸¹ Proposed Section 118.132 defines “sex” as “the sex determined at birth by a physician and reflected on the birth certificate,” a definition which is not present in the current Section 118.⁸² The Protecting Women in Sports Act⁸³ specifically targets trans girls’ participation in women’s sports by prohibiting “pupils of the male sex from participating on an athletic team or in an athletic sport that is designated for females, women, or girls.”⁸⁴ Not only does this seemingly innocuous provision deny the existence of trans girls, it deems them “pupils of the male sex,” a status they are unable to change regardless of gender-affirming treatment.⁸⁵

Senate Bill 323⁸⁶ and its counterpart AB 195⁸⁷ target collegiate trans athletes and would amend Wisconsin Statutes Sections 36.12(1) and 38.23(1) and create Sections 36.25(58) and 38.12(15).⁸⁸ The result of these changes would require “each University of Wisconsin institution and technical college” to use the same three designations as SB 322: (1) males or men, (2) females or women, and (3) coed or mixed-sex.⁸⁹ These proposed designations extend not only to intercollegiate teams, but also to intramural and club teams.⁹⁰ Using the same narrow definition of “sex-assigned-at-birth” as the K–12 bill, SB 323 likewise requires a student’s “sex” to be determined by a physician.⁹¹ Again, the bills expressly prohibit trans women from playing on teams designated for females or women under any circumstance.⁹²

Both SB 323 and SB 322 are available for scheduling and could pass in the legislature on party lines.⁹³ However, the bills’ futures remain

81. A.B. 196, 2021–2022 Leg., 105th Reg. Sess. (Wis. 2021).

82. S.B. 322, 2021–2022 Leg., 105th Reg. Sess. (Wis. 2021).

83. Wisconsin lawmakers refer to the anti-trans legislation noted above as the “Protecting Women in Sports Act” even though that language is not included in the Bills themselves. See Jason Calvi & Scott Bauer, *WI Bills Seek to Limit Transgender Athletes, Kindergarten Through College*, FOX 6 MILWAUKEE, <https://www.fox6now.com/news/rep-dittrich-introduces-protecting-women-in-sports-act> [https://perma.cc/RHL8-EAT2] (Mar. 2, 2021, 5:20 PM).

84. S.B. 322, 2021–2022 Leg., 105th Reg. Sess. (Wis. 2021).

85. *Id.*

86. S.B. 323, 2021–2022 Leg., 105th Reg. Sess. (Wis. 2021).

87. A.B. 195, 2021–2022 Leg., 105th Reg. Sess. (Wis. 2021).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. See *Senate Bill 323*, WIS. STATE LEG., <https://docs.legis.wisconsin.gov/2021/related/proposals/sb323.pdf> [https://perma.cc/5UE3-68EP] (last visited Mar. 11, 2023); *Senate Bill 322*, WIS. STATE LEG., <https://docs.legis.wisconsin.gov/2021/related/proposals/sb322.pdf> [https://perma.cc/4CBD-U2FH] (last visited Feb. 13, 2023).

unclear. After conservative legislators introduced the bills in March 2021, Wisconsin's Democratic Governor Tony Evers stated, "[m]y message to Wisconsin's transgender kids and students today is simple: I see you. You are welcome, and you belong."⁹⁴ Governor Evers has thus signaled his opposition to signing these bills into law, which begs the question of whether the Wisconsin legislature has the interest or votes to override the governor's veto.⁹⁵ Prior to March 2022, no trans sports ban was passed by overriding a gubernatorial veto. However, in late March 2022, the Utah legislature overrode Governor Spencer Cox's veto and enacted a bill that would ban young trans athletes from competing.⁹⁶ The Kentucky and Indiana legislatures followed suit, overriding gubernatorial vetoes in April and May 2022, respectively.⁹⁷ As of March 2023, the Wisconsin Legislature has not passed SB 323 or SB 322 nor has it introduced similar legislation in the 2023-2024 legislative session.

D. Brief Overview of Relevant Federal and State Laws

At the federal level, the U.S. Constitution, federal precedent, and congressional legislation protect students from discrimination on a variety of grounds. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person . . . the equal protection of the laws."⁹⁸ Title IX of the Education Amendments of 1972 prohibits sex discrimination: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁹⁹ The Office for Civil Rights (OCR) in the U.S. Department of Education has the authority to enforce civil rights statutes, like Title IX.¹⁰⁰ Regulations from federal agencies accompany each civil rights statute with the goal of uniformly applying civil rights law.¹⁰¹ OCR regulations carry the force of law and can shape the result of cases involving

94. Vetterkind, *supra* note 29.

95. *Id.*

96. Eduardo Medina, *Utah Legislature Overrides Governor's Veto of Transgender Athlete Bill*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/utah-transgender-athlete-ban-override.html> [<https://perma.cc/T2HV-T6N9>]. In a letter explaining his choice to veto the bill, Utah's Republican Governor Cox stated "that he was concerned an outright ban would place the lives of transgender children at risk" and that "[r]arely has so much fear and anger been directed at so few." *Id.*

97. LGBTQMAP, *supra* note 51, at 7.

98. U.S. CONST. amend. XIV, § 1.

99. 20 U.S.C. § 1681(a).

100. WIS. DEP'T OF PUB. INSTRUCTION & WIS. INTERSCHOLASTIC ATHLETIC ASS'N, *supra* note 35, at 1.

101. *Id.*

regulatory activity.¹⁰² The Department of Education also publishes guidance and letters of finding for complaints, which further interpret the civil rights statute at issue.¹⁰³ These letters and guidance are not considered binding law, but “they reflect the best legal thinking of the federal government’s civil rights experts.”¹⁰⁴

Wisconsin also has its own law and guidance on discrimination in athletics. In 1985, the Wisconsin Legislature enacted Section 118.13, which prohibits discrimination in public school activities.¹⁰⁵ This statute provides that

[N]o person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person’s sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.¹⁰⁶

Section 118.13 is enforced by the authority of the Wisconsin Department of Public Instruction. Like federal agency regulations, state regulations carry the force of law and aid in determining the result of disputes centered on Wisconsin’s pupil nondiscrimination law.¹⁰⁷

II. GOING ON OFFENSE: AN ANALYSIS OF STRATEGIES FURTHERING EQUALITY

The following centers on different methods of legal and policy solutions to transgender sports bans. Each section will identify several promising, proposed, or currently enacted policies or laws that prevent the discrimination of trans athletes. The discussion will highlight policies that protect specifically trans women and girls, as recent legislative efforts primarily target these children and women. Turning first to solutions that have the potential to achieve a uniform national approach to trans student-athletes, federal responses to trans sports bans could eliminate problems caused by a fragmented national policy. However, they face fluctuating federal policy with ideologically varied presidential administrations and partisan sand traps. Next, statewide solutions can

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*; WIS. STAT. § 118.13(1) (2021–22).

106. § 118.13(1).

107. WIS. DEP’T OF PUB. INSTRUCTION & WIS. INTERSCHOLASTIC ATHLETIC ASS’N, *supra* note 35, at 1–2.

reverse the damage caused by recent trans sports bans in a manner that leads to disparities across states. Ultimately, a state-by-state approach has resulted in nearly twenty states banning trans athletes from playing on teams that align with their gender identity. Still, state-level solutions can bolster existing policies and further the protection of trans youth. Finally, in the few states that have not issued state-wide guidance and in the absence of a strong national policy, school boards, districts, and individual school administrations still have a set of options to implement trans-inclusive athletic participation policies. Due to the dire consequences of these bans, executive or legislative action at the federal level is imperative.

A. Solutions to Trans Sports Bans at the Federal Level

Implementing a nationwide policy regarding the inclusion of trans student-athletes at all levels of competition presents the clearest and cleanest solution to these bans. Replacing the currently fractured and confusing approach with an enforceable national policy would provide all student-athletes with the same standards and would eliminate disparate treatment between the states. Shifting from roughly fifty different state guidelines, policies, and regulations¹⁰⁸ to one national scheme can take multiple forms. A constitutional amendment, executive order, federal legislation, agency regulation, or action by the Supreme Court all have the potential to create a much-needed uniform approach that affirms trans students' participation in athletics. Most importantly, a national solution would provide all trans student-athletes in the United States, regardless of the political ideology of individual state governments, the physical and mental benefits of gender- and identity-affirming participation in sports.

1. CONSTITUTIONAL AMENDMENT

Among the foregoing options for progress, new constitutional amendments offer the broadest protection, but also face severe challenges when viewed as a means to protect trans youth from discrimination in athletics. A constitutional amendment could enshrine transgender equality at the highest level of American law. The U.S. Constitution provides that amendments must be passed by both the House of Representatives and the Senate by a two-thirds majority and ratified by three-fourths of state legislatures.¹⁰⁹ The Equal Rights Amendment

108. While some states have a single policy implemented through state athletic organizations, other states have regimes where individual school boards or even school administrations create transgender student-athlete participation policies. GOLDBERG, *supra* note 9, at 10–11.

109. U.S. CONST. art. V.

(ERA)¹¹⁰ may provide a vehicle for greater constitutional protection for transgender individuals as well as implement its purpose to ensure equality between women and men. However, using the Equal Rights Amendment to protect trans children would likely result in contentious litigation over its application to student athletics.

While some constitutional amendments are tailored to solve specific problems faced by a subsection of Americans, like the Twenty-Third Amendment granting the District of Columbia the right to vote in presidential elections,¹¹¹ most constitutional amendments change broad national policy. For example, past amendments have altered the voting age,¹¹² granted women's suffrage,¹¹³ and authorized a federal income tax.¹¹⁴ In contrast to amendments that alter the lives of most American citizens, an amendment narrowly tailored to address discriminatory and exclusionary transgender athletic policies is challenging to envision within the greater constitutional scheme. For that reason, broader antidiscrimination and equality language focused on the LGBTQ+ community could remedy the specificity problem.¹¹⁵ While a prominent LGBTQ+ advocacy group, Gay and Lesbian Alliance Against Defamation (GLAAD), announced in 2019 that it hoped to build support for a constitutional amendment that would explicitly protect LGBTQ+ people from discrimination.¹¹⁶ Skepticism within the LGBTQ+ community hindered progress and prevented a lasting campaign.¹¹⁷

While governors and federal legislators appear unprepared to coalesce support around an LGBTQ+ or trans-specific amendment, an existing proposed amendment—the ERA—may provide much-needed protections for trans individuals. Progressive activists recently

110. H.R.J. Res. 208, 92d Cong. (1972).

111. U.S. CONST. amend. XXIII.

112. U.S. CONST. amend. XXVI.

113. U.S. CONST. amend. XIX.

114. U.S. CONST. amend. XVI.

115. Brooks Barnes, *Glaad's Bold New Campaign: An L.G.B.T. Constitutional Amendment*, N.Y. TIMES (June 29, 2019), <https://www.nytimes.com/2019/06/29/business/media/glaad-lgbt-constitutional-amendment.html> [<https://perma.cc/EKS2-P5WT>].

116. *Id.*

117. *See id.* Some gay rights leaders saw this amendment as GLAAD going “rogue” and that amending the Constitution is not a realistic way to advance equity given polarized American politics and that these efforts may siphon resources from other priorities. *Id.* GLAAD has since removed information on this campaign from its website. *See* GLAAD, <https://www.glaad.org> [<https://perma.cc/5QDS-GFL5>] (last visited Feb. 13, 2023).

resurrected the ERA, originally drafted in 1923.¹¹⁸ The proposed amendment provides “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”¹¹⁹ Generally focused on the equality between men and women, the ERA has yet to be formalized as an amendment despite much popular support and ratification in thirty-eight states.¹²⁰ Still, the ERA arguably strengthens the position of trans athletes seeking to participate on teams that align with their gender identity.¹²¹

The ERA strives to stop discrimination on the basis of sex.¹²² If ratified, the definition of “sex” will likely define this amendment’s capacity to address trans sports bans. The brief text of the ERA does not define “sex.”¹²³ Thus, it is unclear whether the drafters of the ERA intended to limit “sex” to mean the sex assigned at birth or a more expansive definition including gender identity.¹²⁴ If the ERA were to overcome procedural and timing hurdles and become the twenty-eighth amendment to the Constitution, subsequent litigation would ultimately determine whether transgender individuals were included in the “equality of rights” language. This decision would hinge on whether “sex” as defined in the ERA encompasses and provides legal anti-discrimination protection for transgender individuals. Based on Supreme Court precedent on discrimination of sexual minorities,¹²⁵ the Court has not precluded transgender individuals from bringing discrimination cases on the basis of sex.

The almost century-long history of the ERA highlights the hurdles that amendments—even those backed by popular support—face in ratification. Thirty years have passed since the ratification of the last amendment.¹²⁶ Deep partisan divisions in Congress and statehouses

118. See Roberta W. Francis, *Frequently Asked Questions*, EQUAL RTS. AMEND., <https://www.equalrightsamendment.org/faq> [<https://perma.cc/7S36-5BDU>] (last visited Feb. 13, 2023).

119. H.R.J. Res. 208, 92d Cong. (1972).

120. See Francis, *supra* note 118. This number of state ratification satisfies the Article V requirement for ratification by three-fourths of the states, but not by the ratification deadline set by Congress. *Id.*

121. Courtney M. Hogan, Note, *The Equal Rights Amendment After Bostock: A Means to Expand Constitutional Protections for Sexual Minorities*, 55 GA. L. REV. 1441, 1477–80 (2021).

122. *Id.* at 1441.

123. See H.R.J. Res. 208.

124. See *id.*

125. For a discussion on this litigation, see *infra* Part II.A.5.

126. See *The Twenty-Seventh Amendment*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1700s/The-27th-Amendment> [<https://perma.cc/V79S-T9FL>] (last visited Feb. 13, 2023). The last amendment to be added to the constitution was the Twenty-Seventh Amendment, ratified in May 1992. *Id.*

across the nation do not bode well for an LGBTQ+ rights amendment, despite numerous polls showing sizeable support of LGBTQ+ equal rights.¹²⁷ Further, amending the Constitution has historically taken decades; meanwhile trans youth continue to face a fractured national landscape without security and protection for their ability to participate in school athletics. An executive order may be a faster approach to solve the current fragmented system.

2. EXECUTIVE ORDER

A formal presidential directive or executive order can enact a national policy and does not require bicameralism, presentment, or passage by three-fourths of the states.¹²⁸ With an executive order, the president carries out the duties of the executive branch “by directing the fulfillment of a particular program.”¹²⁹ Because these orders rely on Executive Branch components like administrative agencies to interpret and implement them, executive orders standing alone accomplish little.¹³⁰

When presidents sign executive orders, the agencies are tasked with taking or refraining from certain actions in line with those orders.¹³¹ Recent executive orders by the Biden Administration seem, on their face, to create a national policy, but they lack teeth.¹³² The fight against discriminatory trans sports bans should not rely on executive orders to effect national policy change.

On January 20, 2021, the very day he took office, President Biden signed several executive orders.¹³³ One of these orders was Executive Order 13988: Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.¹³⁴ The order begins with a strong policy statement that “every person should be treated with respect and dignity and should be able to live without

127. See GOLDBERG, *supra* note 9, at 26; *Americans Are Broadly Supportive of a Variety of LGBTQ Rights*, PUB. RELIGION RSCH. INST. (Oct. 30, 2020), <https://www.prii.org/spotlight/americans-are-broadly-supportive-of-a-variety-of-lgbtq-rights> [https://perma.cc/9GFU-GYC7].

128. See John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 335 (2010).

129. *Id.*

130. Matthew Chou, *Agency Interpretations of Executive Orders*, 71 ADMIN. L. REV. 555, 556 (2019).

131. Duncan, *supra* note 128, at 335.

132. See *e.g.*, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021); see also discussion *infra* notes 135–140 and accompanying text.

133. Aishvarya Kavi, *Biden’s 17 Executive Orders and Other Directives in Detail*, N.Y. TIMES, <https://www.nytimes.com/2021/01/20/us/biden-executive-orders.html> [https://perma.cc/D83P-N758] (Apr. 22, 2021).

134. 86 Fed. Reg. 7023 (Jan. 25, 2021).

fear, no matter who they are or whom they love” and states explicitly that children should not worry about denial of access to school sports, locker rooms, or bathrooms while at school.¹³⁵ It then lays out the legal basis for these principles, which are rooted in the Equal Protection Clause of the Constitution, Title VII of the Civil Rights Act, and the landmark Supreme Court ruling in *Bostock v. Clayton County*.¹³⁶ This order instructed “the head of each agency” to “review all existing orders, regulations, guidance documents, policies, programs, or other agency actions” that may be inconsistent with the policy outlined in the first part of the order.¹³⁷

On its face, Executive Order 13988 signified an important victory for trans Americans and their allies because it stated the Biden Administration’s policy “to prevent and combat discrimination on the basis of gender identity” and to fully enforce “laws that prohibit discrimination on the basis of gender identity or sexual orientation.”¹³⁸ Agencies like the Department of Health and Human Services issued notifications of interpretation and enforcement consistent with the order.¹³⁹ However, this order had a diminished impact because it only controlled the actions of the executive branch. By seeking compliance and calling on agency heads, Executive Order 13988 addresses executive departments and can only indirectly affect individuals.¹⁴⁰ Due to the nature of executive orders, it lacked the capability to change state or state agency interpretations of sex discrimination.

Another executive order specifically acknowledged the role of the Department of Education in the Biden Administration’s policy on transgender students.¹⁴¹ President Biden signed Executive Order 14021: Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity on March 8, 2021.¹⁴² The order notes the impact of federal financial assistance to educational institutions and the guarantee of protection from discrimination on the basis of sex, codified in part by Title IX of the Education Amendments of 1972.¹⁴³ This order requires the Secretary of Education to review existing agency actions that may be inconsistent with the Biden Administration’s policy and to “*consider* taking additional

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See, e.g.*, Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984 (May 25, 2021).

140. *See* Duncan, *supra* note 128, at 336.

141. Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 11, 2021).

142. *Id.*

143. *Id.*

enforcement actions, as appropriate and consistent with applicable law” to enforce that policy.¹⁴⁴ The limiting phrase “*consider* taking additional enforcement actions”¹⁴⁵ does not *require* the Secretary of Education to *do* anything or take enforcement actions. Without more, this executive order lacks clear language mandating the nation’s schools conform with its interpretation. The language in Executive Order 14021 signals the discretionary nature of this enforcement power—meaning the agency need not take any actions against states with discriminatory laws.

On June 22, 2021, the Department of Education issued its Notice of Interpretation, which clarifies that Title IX prohibits discrimination based on sexual orientation and gender identity, but has yet to earmark national school funding towards implementing trans-inclusive policies.¹⁴⁶ Notices of Interpretation are examples of interpretive rules which often clarify definitions but do not change an individual’s legal duties or consequences.¹⁴⁷ Importantly, interpretive rules do not require the agency to go through the public notice and comment period and do not have the force of law required to effect change.¹⁴⁸

While the Biden Administration took important steps in signing Executive Orders 13988 and 14021, their impacts, or lack thereof, are exemplified by the reality that most of the trans sports bans became law after Biden signed Executive Order 13988.¹⁴⁹ Further, Executive Order 14021 failed to create a sufficient threat to educational funding to cause state legislatures to abandon their discriminatory laws. President Biden’s 2021 Executive Orders did not seem to shape actions of state lawmakers, but they did demonstrate the importance of trans-inclusive policies for LGBTQ+ Americans, tipping the metaphorical seesaw back towards anti-discriminatory trans athlete policies in the Executive Branch.¹⁵⁰

Congress and the American public may not welcome a president’s political and policy agenda implemented through executive orders. Lawmaking is the role of Congress; presidents can create policies to aid

144. *Id.* (emphasis added).

145. *Id.* (emphasis added).

146. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021).

147. See *Interpretive Rule*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/interpretive%20rule> [<https://perma.cc/EH6X-VGHQ>] (last visited Feb. 13, 2023).

148. *Memorandum for Committee on Regulation (Rules on Rulemaking)*, ADMIN. CONF. OF THE U.S. (Nov. 25, 2020), <https://www.acus.gov/memorandum/memorandum-committee-regulation-rules-rulemakings-revised-final-11-25-2020> [<https://perma.cc/HU4R-3U62>]; *Interpretive Rule*, *supra* note 147.

149. See *supra* notes 42–62 and accompanying text.

150. See Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

in executing the laws, but it is solely the job of the legislature to legislate.¹⁵¹ For example, when former President Trump initiated a travel ban from mostly Muslim countries to the United States, broad public outrage and legal challenges swiftly followed.¹⁵² While letting trans kids play on sports teams that align with their gender identity has popular support,¹⁵³ it remains a highly polarizing issue.¹⁵⁴ An executive order that attempts to legislate or requires schools to have inclusive policies to receive federal funding would likely foment public indignation, especially in states where trans sports bans are law.¹⁵⁵

Subject to judicial scrutiny,¹⁵⁶ executive orders can continue the “seesawing” of presidential policy with each change in presidential administration. As thoroughly illustrated in the history of Executive Order 13769,¹⁵⁷ also referred to as the “Muslim ban” or “travel ban,” federal courts have power to issue injunctions to keep the orders from going into effect.¹⁵⁸ In the case of the travel ban, legal challenges and appellate court rulings resulted in three versions of the policy prior to the Supreme Court upholding it.¹⁵⁹ The next presidential administration can easily walk back a policy created through the fragile means of executive orders. While Congress cannot simply overturn executive orders, it can remove funding through legislation and pass other laws serving as

151. U.S. CONST. art. I–II.

152. *A License to Discriminate: Trump’s Muslim & Refugee Ban*, AMNESTY INT’L U.K. (Oct. 6, 2020, 6:12 AM), <https://www.amnesty.org.uk/licence-discriminate-trumps-muslim-refugee-ban> [https://perma.cc/JV55-R29H].

153. GOLDBERG, *supra* note 9, at 17–18.

154. Currently, transgender children are not a clearly protected class while religious groups are. The analysis of the Muslim Ban serves to highlight executive order procedure and is not a comparison of protected classes.

155. The national response to President Trump’s Executive Order highlights the varied responses to executive orders in a hyper-polarized United States. *See, e.g.*, Leila Rafei & Ashoka Mukpo, *The Enduring Harms of Trump’s Muslim Ban*, ACLU (Jan. 19, 2021), <https://www.aclu.org/news/immigrants-rights/the-enduring-harms-of-trumps-muslim-ban> [https://perma.cc/458Q-NTGS]; Frank Witsil, *Reactions to Supreme Court Travel Ban Ruling Reflect America’s Divide*, DETROIT FREE PRESS, <https://www.freep.com/story/news/local/michigan/2018/06/26/supreme-court-travel-ban-trump/734308002> [https://perma.cc/V247-2PY3] (June 26, 2018, 8:03 PM).

156. Professor Duncan notes that in some ways, executive orders can sidestep traditional avenues of review and describes the limited history of courts overturning executive orders. Duncan, *supra* note 128, at 337. A notable, historical incidence of this was the Supreme Court’s decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, the Court struck down an executive order calling for the federal government to seize steel mills without congressional approval. *Id.* at 583, 588–89.

157. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

158. *See Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> [https://perma.cc/X277-RS5H] (last visited Feb. 13, 2023).

159. *Id.*

roadblocks to carrying out the order.¹⁶⁰ Only the current president has the power to overturn an executive order and does so by creating a new executive order to that end.¹⁶¹ Ultimately, the strongest argument against the efficacy of an executive order on trans student-athlete inclusion is the lackluster role existing Executive Orders 13988 and 14021 have had in shaping policy. Namely, these orders have fallen flat in the face of anti-trans state legislation.

3. FEDERAL LEGISLATION

Congress can establish firm national policies regarding the inclusion of transgender student-athletes on teams consistent with their gender identity. New legislation or amending Title IX can achieve this goal. Amending Title IX may be more practicable than creating novel legislation. However, the House of Representatives recently passed the Equality Act, which may present a way forward, leaving Title IX as currently written.¹⁶²

With inoperably stark partisan divides in the 116th Congress,¹⁶³ any meaningful legislation, let alone legislation affirming the equality of trans people, seems unlikely. As exemplified in other legislation that has support from the American people in terms of public opinion but flounders and dies in Congress, both the Republican and Democratic parties show no interest in aiding the other's agenda by passing legislation.¹⁶⁴ The question of political capital and timing impact which matters garner enough congressional attention to draft legislation.

Title IX of the Higher Education Amendments of 1972¹⁶⁵ protects against sex discrimination in federally funded education and remains central to the debates around allowing trans student-athletes, particularly trans women, to participate on the team that best aligns with their gender identity.¹⁶⁶ The key flaw with applying Title IX directly to trans students

160. *What Is an Executive Order?*, AM. BAR. ASS'N (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/ [<https://perma.cc/SY8T-ZY8Y>].

161. *Id.*

162. H.R. 5, 117th Cong. (as passed by House, Feb. 25, 2021).

163. *See, e.g.*, Susan Milligan, *How Partisan Politics Threatened Even Must-Pass Legislation in Congress*, U.S. NEWS (Oct. 1, 2021, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2021-10-01/how-partisan-politics-threatened-even-must-pass-legislation-in-congress> (highlighting the disconnect and stark partisan divides in Congress).

164. *Id.*

165. 20 U.S.C. §§ 1681–88.

166. *See* Martin D. Edell & Yara Kass-Gergi, *Making the Roster: Conflicting Title IX Interpretations Present Challenges for Transgendered Athlete Participation*, NAT'L L. REV. (June 25, 2021), <https://www.natlawreview.com/article/making-roster->

in sports comes from the lack of a concrete definition of “sex” for the purpose of Title IX. If the definition of “sex” remains ambiguous, then ambiguous results naturally follow. Congress modeled Title IX after both Title VI and VII of the Civil Rights Act of 1964. As such, the Supreme Court often interprets Title IX in the context of these other statutes.¹⁶⁷ To remove uncertainty about the extent that Congress intended discrimination on the basis of “sex” to include discrimination on the basis of gender identity and sexual orientation, Congress can amend Title IX to explicitly say so, or formally codify that Title IX shall be interpreted consistent with Title VII of the Civil Rights Act of 1964.¹⁶⁸

The Equality Act¹⁶⁹ could remedy the fractured national policy and protect trans youth, but without filibuster reform it lacks enough support in the Senate to become law.¹⁷⁰ This Act “incorporates the *Bostock* decision into an expansive definition of sex and modifies the statutory language of anti-discrimination statutes.”¹⁷¹ The Equality Act is Congress’s attempt to apply Executive Order 13988 by resolving the meaning of “sex” in Title IX.¹⁷² President Biden strongly “urge[d] Congress to swiftly pass this historic legislation,”¹⁷³ but since being passed by the House in February 2021,¹⁷⁴ it has stalled in the Senate.¹⁷⁵

conflicting-title-ix-interpretations-present-challenges-transgendered
[<https://perma.cc/S4YK-5FKP>].

167. See Sarah W. Keller, Comment, *Battle of the Sexes: Disagreement About the Definition of Sex in Title IX and the Need for Judicial Review*, 28 VA. J. SOC. POL’Y & L. 135, 143–44 (2021).

168. This would incorporate the *Bostock* decision, which held that sex discrimination includes discrimination of transgender people in the workplace. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

169. H.R. 5, 117th Cong. (as passed by House, Feb. 25, 2021).

170. While the Bill passed the House, there is no guarantee of passage in the Senate. See Jarrell Dillard, *House Passes LGBTQ-Rights Bill; Faces Long Odds in Senate*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2021-02-25/house-passes-lgbtq-rights-bill-that-faces-longer-odds-in-senate> [<https://perma.cc/CA2D-SBHV>] (Feb. 25, 2021, 5:46 PM). To end debate on proposed legislation and proceed to a vote, known as “cloture,” three-fifths of the Senate must agree to end the filibuster, known as “cloture.” S. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. No. 116-1, r. XXII.2, at 20–21 (2020).

171. Keller, *supra* note 167, at 140. See also Equality Act, H.R. 5, 117th Cong. (as passed by House, Feb. 25, 2021).

172. See Keller, *supra* note 167, at 140.

173. Presidential Statement on Lesbian, Gay, Bisexual, and Transgender Rights Legislation, 2021 DAILY COMP. PRES. DOC. 152 (Feb. 19, 2021).

174. See Danielle Kurtzleben, *House Passes the Equality Act: Here’s What It Would Do*, NPR, <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do> [<https://perma.cc/L7LF-3PL8>] (Feb. 25, 2021, 4:39 PM).

175. See Mike DeBonis, *The Push for LGBTQ Civil Rights Stalls in the Senate as Advocates Search for Republican Support*, WASH. POST (June 20, 2021, 6:00 AM),

Republicans gained control of the House in January 2023,¹⁷⁶ and their newly proposed legislation “reflect[s] a broader push . . . to curb the rights of transgender student athletes.”¹⁷⁷ In March 2023, the U.S. House Education and Workforce Committee passed a bill blocking trans student-athletes—specifically trans girls—from playing on teams “consistent with their gender identity.”¹⁷⁸ The bill, H.R. 734,¹⁷⁹ never uses the word “transgender” yet clearly targets transgender children by amending Title IX “to provide that for purposes of determining compliance with [Title IX], sex shall be recognized based solely on a person’s reproductive biology and genetics at birth.”¹⁸⁰ Under Section 2 of H.R. 734, recipients of federal funding violate Title IX if they “operate[], sponsor[], or facilitate[] athletic programs or activities” that allow someone assigned male at birth to play on a girls’ team.¹⁸¹

Proponents of H.R. 734 and its vocal opponents have starkly differing views of the purpose of this bill.¹⁸² Republican Committee Chair Virginia Foxx of North Carolina suggested it represented a “commitment to America,”¹⁸³ and Republican Representative Bob Good of Virginia used religion to justify the transphobic bill.¹⁸⁴ Meanwhile, Democratic Representative Raúl M. Grijalva of Arizona remarked “this is about scapegoating in a cultural war a group of trans kids and criminalizing their existence, . . . we are mired in this cultural war . . . and trans kids

https://www.washingtonpost.com/politics/senate-lgbtq-equality-act/2021/06/19/887a4134-d038-11eb-a7f1-52b8870bef7c_story.html.

176. See Dierdre Walsh, *Republicans Turn to 2023 with Narrow House Majority*, NPR (Dec. 31, 2022, 7:58 AM), <https://www.npr.org/2022/12/31/1146453695/republicans-turn-to-2023-with-narrow-house-majority> [<https://perma.cc/PE5B-5LAF>].

177. See Ariana Figueroa, *National Ban on Transgender Athletes in Girl’s Sports Passed by U.S. House Panel*, NEBRASKA EXAMINER (Mar. 9, 2023, 12:38 PM), <https://nebraskalexaminer.com/2023/03/09/national-ban-on-transgender-athletes-in-girls-sports-passed-by-u-s-house-panel> [<https://perma.cc/9PWF-QFBF>].

178. See *id.*

179. Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118th Cong. (2023).

180. *Id.* at § 2.

181. *Id.*

182. See Figueroa, *supra* note 177.

183. Committee on Education & the Workforce Democrats, *Full Committee Markup* at 0:40, YOUTUBE (Mar. 8, 2023), <https://www.youtube.com/live/hhLiIDBrx00?feature=share>.

184. To hear Representative Good’s remarks in full, see *id.* at 30:41. See also Figueroa, *supra* note 177. (quoting Representative Good, “God does not make mistakes . . . He creates us perfectly unique as individuals, and all of us are either immutably male or immutably female”). H.R. 734 pertains to federal education funding and secular public schools, so reasoning rooted in personal religious convictions falls short of justifying congressional legislation.

. . . become mere collateral damage.”¹⁸⁵ Democratic Representative Pramila Jayapal of Washington powerfully framed the impact of H.R. 734 when she introduced an amendment to change the title from the “Protection of Women and Girls in Sports Act of 2023” to “The Stigmatizing Vulnerable Children Act.”¹⁸⁶ While this bill may pass the House, it does not currently have a senate sponsor and will likely die in the slimly-Democratic majority Senate.¹⁸⁷

While the Biden Administration, through executive orders, has signaled that the federal government already interprets discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity, a future administration could refuse to follow suit. If Congress rejected H.R. 734 and instead amended Title IX to protect transgender girls or passed the Equality Act, present and future executives would be forced to interpret and implement the laws as written. Although passing legislation poses significant challenges, trans youth need the added protection of anti-discrimination laws that specifically apply to them. Congress should honor President Biden’s commitment to equality, as evidenced in Executive Order 13988, by making such changes.

4. FEDERAL ADMINISTRATIVE AGENCY ACTIONS AND RULINGS

Federal agencies play a large role in shaping the federal government’s approach to interpreting and implementing federal law. Agencies may act as either a tool for enforcing equitable policies or as a weapon used against transgender student athletes seeking to participate on teams that align with their gender identity. While crucial to conducting investigations into alleged violations and discrimination, agencies and their policies face drastic changes in position as presidential administrations change. The president tightly controls executive agencies, with officers removeable at will by the president.¹⁸⁸ This close relationship ensures that executive agencies implement and interpret statutes consistent with the desires of the presidential administration,¹⁸⁹ but it can lead to considerable seesawing as administrations change.¹⁹⁰

185. See Committee on Education & the Workforce Democrats, *supra* note 183, at 38:00 to 39:03.

186. *Id.* at 2:11:42 to 2:14:39.

187. See Figueroa, *supra* note 177.

188. See U.S. CONST. art. II, § 2, cl. 2; *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191–92 (2020).

189. See *Myers v. United States*, 272 U.S. 52, 132–35 (1926); *Seila Law*, 140 S. Ct. at 2197–98.

190. Compare Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,178 (May 19, 2020) (codified at 34 C.F.R. pt. 106) (stating in a Trump Administration Department

The Department of Education bears the primary responsibility to establish policy and coordinate most federal assistance to educational programs and systems throughout the U.S.¹⁹¹ Accordingly, the Department of Education is the agency best positioned to shape a national approach to trans student-athletes involved in school sports.¹⁹² Within the Department, the Office for Civil Rights (OCR) “enforces civil rights laws to protect all students from unlawful discrimination and harassment based on race, color, national origin, sex, disability, and age.”¹⁹³ This protection extends to students who are “lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, and individuals who identify their sexual orientation or gender identity in other ways (LGBTQI+).”¹⁹⁴ The OCR aims to “ensure equal access to education . . . through vigorous enforcement of civil rights” in American schools¹⁹⁵ and students may file a complaint with OCR if they believe they have faced discrimination in school based on gender identity or sexual orientation.¹⁹⁶

The Department of Education should use its regulatory power to leverage educational funding and potentially withhold federal funds from states who violate this policy. While doing so would garner backlash from some states, there is some precedent for it in *South Dakota v. Dole*,¹⁹⁷ which held that the government could condition receipt of federal funds on the state taking certain actions.¹⁹⁸ In *Dole*, the federal government required the state of South Dakota to change its drinking age to receive federal highway funds.¹⁹⁹ Though *Dole* focused on Congressional spending power, it seems a logical extension that the

of Education-implemented regulation that, “Title IX and its implementing regulations include provisions that presuppose sex as a binary classification”), *with* Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (“All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.”), *and* Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021) (“[A]ll students should be guaranteed an educational environment free from discrimination on the basis of sex, . . . including discrimination on the basis of sexual orientation or gender identity. . . . [T]his guarantee is codified, in part, in Title IX . . .”).

191. See *An Overview of the U.S. Department of Education*, U.S. DEP’T EDUC. (Sept. 2010), <https://www2.ed.gov/about/overview/focus/what.html> [https://perma.cc/J2NQ-QG56].

192. See *id.*

193. *Resources for LGBTQI+ Students*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/lgbt.html> [https://perma.cc/G5UH-7YMD] (Aug. 4, 2022).

194. *Id.*

195. *Id.*

196. *Id.*

197. 483 U.S. 203 (1987).

198. *Id.* at 206, 212.

199. *Id.* at 205–06.

Department of Education can impose limits on federal funding provided to states. For example, only about seven percent of Wisconsin's education funding comes from the federal government,²⁰⁰ so even withholding the entirety of this portion does not seem "coercive," and therefore unconstitutional.²⁰¹ However, using the power of the purse and agencies to influence state behavior is a temporary fix subject to the administration's ever-changing whims.

5. FEDERAL LITIGATION AND COURT DECISIONS

While costly and time-intensive, litigation in federal courts has produced several wins for the LGBTQ+ community. Legal arguments drawn from these past successes provide a strong basis for challenging trans sports bans in court. Litigating these bans may offer the best path forward, but outcomes are unpredictable, take many years to achieve, and plaintiffs may not wish to bear the financial and emotional costs.

The most recent of the central cases regarding sex discrimination, *Bostock v. Clayton County*,²⁰² contains a strong statement on transgender rights. *Bostock* concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of sex.²⁰³ However, it rested its conclusion not on Title IX, which applies to educational institutions, but rather on Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment.²⁰⁴ The *Bostock* Court could have made a broader statement about sex discrimination in all contexts of the Civil Rights Act of 1964, but it specified that the holding strictly applied to Title VII and did not extend further.²⁰⁵ This narrow holding leaves open the question of whether this broader understanding of sex discrimination including discrimination on the basis of being trans violates Title IX.

Several appellate courts have expanded the *Bostock* reasoning to Title IX,²⁰⁶ and the Seventh Circuit, if presented with a case involving an

200. *State/Federal Aid and Grant Programs*, WIS. DEP'T PUB. INSTRUCTION, <https://dpi.wi.gov/sfs/aid/overview> [<https://perma.cc/VU2N-47TF>] (last visited Feb. 14, 2023).

201. *Cf. Dole*, 483 U.S. at 211 (holding that leveraging just five percent of a state's highway funds was not coercive). *But cf. NFIB v. Sebelius*, 567 U.S. 519, 581–85 (2012) (plurality opinion) (discussing that potentially removing up to one hundred percent of a state's Medicare funding is coercive).

202. 140 S. Ct. 1731 (2020).

203. *See id.* at 1742.

204. *See id.*

205. *See id.* at 1753.

206. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–17 (4th Cir. 2020); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020).

anti-trans sports policy, would likely hold the same.²⁰⁷ The Fourth and Eleventh Circuits applied *Bostock's* interpretation of sex discrimination to Title IX and reasoned that *Bostock* granted trans people equal protection under the law.²⁰⁸ Similarly, state courts in Nevada have used the same expansive reasoning,²⁰⁹ but not all courts adopt this reasoning. For example, the District of Minnesota reasoned that “[t]he fact that [the plaintiff] has to rely on Title VII in arguing that she has a cause of action under Title IX highlights the problem with her argument: Title VII and Title IX are different statutes that use different language.”²¹⁰ Subsequent litigation will illuminate the legal arguments linking *Bostock*, Title VII, and Title IX to the relatively recent legislative phenomena of trans sports bans.

Several plaintiffs have already begun to challenge trans sports bans. In Idaho, a college runner sought an injunction so she could try out for her school’s cross country team, and the district court issued a preliminary injunction to keep Idaho’s law from going into effect.²¹¹ The drafters of these anti-trans bills intended that they reach the Supreme Court and thus anticipated legal challenges.²¹²

Another suit, *B.P.J. v. West Virginia State Board of Education*,²¹³ brought in West Virginia by an eleven year old transgender girl, challenged the new law banning trans girls from playing on girls’ teams by narrowly defining “girl” and “women.”²¹⁴ After first issuing a preliminary injunction to prevent the law from going into effect, the district court judge ultimately ruled that West Virginia’s ban on trans athletes playing girls sports is constitutional and does not violate Title

207. *Cf. Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017) (accepting a “Title IX claim under a sex-stereotyping theory” in a case involving a school policy that prevented a trans boy from using the boys’ bathroom).

208. *See Grimm*, 972 F.3d at 616–19; *Adams*, 968 F.3d at 1305–08; *see also* Keller, *supra* note 167, at 139 n.16.

209. *See Clark Cnty. Sch. Dist. v. Bryan*, 478 P.3d 344, 354 (Nev. 2020) (extending *Bostock's* analysis of Title VII to Title IX and holding “that Title IX’s prohibition of discrimination ‘on the basis of sex’ likewise encompasses discrimination against homosexual or transgender individuals”).

210. *Du Bois v. Bd. of Regents of the Univ. of Minn.*, 439 F. Supp. 3d 1128, 1138 (D. Minn. 2020).

211. *See Hecox v. Little*, 479 F. Supp. 3d 930, 943–46, 988 (D. Idaho 2020).

212. For an informative podcast on *Hecox v. Little* and conservative legislative and legal movement behind the Idaho law, see *The Anti-Trans Hate Machine: A Plot Against Equality, It’s Not Really About Sports*, TRANSLASH (June 2021), <https://open.spotify.com/episode/2nNBBnXXeKweXFG31Ophk6>.

213. 550 F. Supp. 3d 347 (S.D. W. Va. 2021).

214. *See id.* at 351–53.

IX.²¹⁵ Under both an equal protection analysis using intermediate scrutiny and constitutional compliance with Title IX, the court found that there was an insufficient record of legislative animus and that because trans girls are biologically male, they are not similarly situated to biological females.²¹⁶

After losing in the District Court, the plaintiff B.P.J. appealed to the Fourth Circuit.²¹⁷ In late February 2023, the Fourth Circuit granted her “motion for an injunction pending appeal” and stayed the district courts order²¹⁸—allowing B.P.J. to try out for the girl’s track and field team at her middle school.²¹⁹ Now, West Virginia is asking the Supreme Court to reverse the Fourth Circuit’s injunction and allow the state to enforce their trans sports ban.²²⁰ Notably, the Alliance Defending Freedom—the group that drafted the first trans sports ban in Idaho—represents a former collegiate athlete who intervened in the case on behalf of the state.²²¹ As of early March 2023, the Supreme Court has yet to signal whether it will grant certiorari.

In contrast to the district court decision in *B.P.J.*, a federal appellate court recently ruled in favor of Connecticut’s inclusive trans sports policy. In *Soule v. Connecticut Association of Schools Inc.*,²²² the Second Circuit upheld a district court’s dismissal of a lawsuit filed by cisgender high school girls who claimed that Connecticut’s trans-inclusive sports policy violated their civil rights.²²³ Here, the court found that there was no claim for damages under Title IX because there was no clear notice that the Connecticut policy violated Title IX.²²⁴ By looking to *Bostock* and other courts of appeals decisions concerning Title IX protections for transgender students, the *Soule* court bolstered its decision to toss out the legal challenge.²²⁵ The Second Circuit concluded:

215. See *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2023 WL 111875, at *2, *10 (S.D. W. Va. Jan. 5, 2023).

216. See *id.* at *4, *6–10.

217. Plaintiff-Appellant B.P.J.’s Reply in Support of Motion for Stay Pending Appeal, *B.P.J. v. West Virginia Bd. of Educ.*, No. 23-1078 (4th Cir. Feb. 17, 2023).

218. Order, *B.P.J. v. West Virginia Bd. of Educ.*, No. 23-1078 (4th Cir. Feb. 22, 2023) (construing and granting B.P.J.’s motion as a “motion for injunction pending appeal”).

219. See Plaintiff-Appellant B.P.J.’s Reply in Support of Motion for Stay Pending Appeal, *supra* note 217.

220. See Devan Cole, *West Virginia Asks Supreme Court to Let It Enforce State’s Anti-Trans Sports Ban*, CNN (March 10, 2023, 11:04 AM) <https://www.cnn.com/2023/03/10/politics/transgender-sports-ban-west-virginia-supreme-court/index.html> [<https://perma.cc/4C87-7B4H>].

221. See *id.*

222. 57 F.4th 43 (2d Cir. 2022).

223. See *id.* at 47.

224. See *id.* at 54.

225. See *id.* at 55–56.

[A]lthough these cases from our sister circuits do not address the exact issue of participation of transgender athletes on gender specific sports teams, *such authority nonetheless establishes that discrimination based on transgender status is generally prohibited under federal law*, and further supports the conclusion that the CIAC and its member schools lacked clear notice that the Policy violates Title IX.²²⁶

Given *Soule's* strong statement of Title IX protections for transgender student-athletes, this case will likely form the foundation for legal challenges to the anti-trans sports bans. Although the state athletic association policy in this case was inclusive rather than discriminatory, the outcome should remain the same: trans students' participation on teams that align with their gender identity does not violate Title IX.

The conservative majority on the Supreme Court poses a risk to those hoping the Court will extend its holding in *Bostock* to the context of Title IX and therefore render these discriminatory and exclusionary statutes inconsistent with federal law. Since the 2020 *Bostock* decision, Justice Ruth Bader Ginsberg's seat went to Justice Amy Coney Barrett, shifting the ideological balance of the court in the conservative majority's favor.²²⁷ Although Justice Stephen Breyer retired, his successor Justice Ketanji Brown Jackson is also a liberal justice.²²⁸ If the Supreme Court agrees to hear a case arising out of a circuit split based on laws like the ones in West Virginia, Idaho, or the policy in Connecticut, the outcome of the decision will likely depend on Justice Barrett. Justice Neil Gorsuch authored the *Bostock* opinion,²²⁹ so he would likely extend the application of sex discrimination from Title VII to Title IX despite being conservative.²³⁰ Justice Samuel Alito,²³¹ joined by Justice Clarence

226. *Id.* at 56 (emphasis added).

227. See Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [<https://perma.cc/VX2H-YNQC>].

228. See Dan Mangan & Kevin Breuninger, *Ketanji Brown Jackson Sworn in as Supreme Court Justice, Replacing Stephen Breyer*, CNBC, <https://www.cnbc.com/2022/06/30/supreme-court-justice-ketanji-brown-jackson-sworn-in-replaces-breyer.html> [<https://perma.cc/L7CW-ZADQ>] (June 30, 2022, 2:31 PM).

229. See Oriana Gonzalez & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS, <https://www.axios.com/2019/06/01/supreme-court-justices-ideology> [<https://perma.cc/K3SF-7CDL>] (June 24, 2022).

230. See *id.* at 1737.

231. Justice Alito criticized the majority for legislating and revising Title VII to better reflect the current values of society. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (Alito, J., dissenting).

Thomas, along with Justice Brett Kavanaugh,²³² authored dissenting opinions in *Bostock*.²³³ These three justices are unlikely to be persuaded by *Bostock*'s same logic applied to a different set of facts: trans athletes hoping to participate on teams that coincide with their gender identity.

6. JUSTICE BARRETT'S APPOINTMENT

As a former Seventh Circuit judge,²³⁴ Justice Barrett may be persuaded by the logic in *Whitaker By Whitaker v. Kenosha Unified School District*.²³⁵ Here, the Seventh Circuit upheld a preliminary injunction granted by the district court to allow a trans boy to continue using the boys' bathroom after a school policy prevented him from doing so.²³⁶ One factor that distinguishes *Whitaker* from trans sports bans is that the policy at issue in *Whitaker* was unwritten and not supported by enacted state law.²³⁷ Plaintiffs who wish to challenge trans sports bans should note that the Seventh Circuit's decision to uphold the preliminary injunction was likely persuaded by highlighting for the court the real harms imposed upon trans children by these policies.²³⁸ Another promising indicator of litigation serving as a path forward is that the Supreme Court did not take up any of the so-called bathroom bills, the previous right-wing attack on trans people.²³⁹

B. State Solutions to Prevent Anti-Trans Discrimination in Athletics

While a federal solution would achieve a policy applicable to all student-athletes, gridlock in Congress and mercurial executive branch policies make a national policy a high hurdle to clear. States provide large portions of education funding. For example, Wisconsin provides a breakdown of where schools typically receive funding: state aid represents about forty-five percent of funding compared to approximately seven percent provided by federal funding.²⁴⁰ Because so much funding

232. Justice Kavanaugh argued that, as written, Title VII does not prohibit such discrimination. *Id.* at 1823–24 (Kavanaugh, J., dissenting).

233. *Id.* at 1754 (Alito, J., dissenting); *id.* at 1822 (Kavanaugh, J., dissenting).

234. See The National Law Review Editorial Team, *Justice Amy Coney Barrett's Potential Impact on the Supreme Court—President Biden's Reaction*, NAT'L L. REV. (Jan. 24, 2021), <https://www.natlawreview.com/article/justice-amy-coney-barrett-s-potential-impact-supreme-court-president-biden-s> [<https://perma.cc/WT3C-GJ4R>].

235. 858 F.3d 1034 (7th Cir. 2017).

236. See *id.* at 1039.

237. See *id.*

238. See *id.* at 1041–42, 1045–46.

239. See Bianca Quilantan, *Supreme Court Passes on Transgender Bathroom Challenge*, POLITICO, <https://www.politico.com/news/2021/06/28/supreme-court-transgender-rights-496710> [<https://perma.cc/277K-3JEN>] (June 28, 2021, 10:40 AM).

240. See *State/Federal Aid and Grant Programs*, *supra* note 200.

comes from states,²⁴¹ they can exert pressure on schools to comply with their policies by threatening to withhold funding.

If state legislatures can enact these discriminatory statutes and policies, it follows that they can change the same policies. Further, state statutes can replace trans-exclusive language with gender-identity-affirming language. However, passing inclusive statutes is hardly a practicable solution in states with the same composition of legislative control where trans sports bans passed. As the partisan divide shifts, anti-discrimination statutes may become viable options in more states. Where there is support for such policies from legislators and the public, statehouses must act to formalize protection for trans youth in law.

California law provides an example of a state statute that codifies a gender-inclusive, school-sport-participation policy.²⁴² Assembly Bill 1266 (AB 1266), titled Pupil Rights: Sex-Segregated School Programs and Activities, amended California Education Code Section 221.5(f), which reads, “[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.”²⁴³ This statute still contains flaws—for instance, using the gendered pronouns of “his” and “her”—but on balance it makes a clear and forceful statement of the law allowing all Californian youth to participate on teams that align with their gender identity.²⁴⁴ As AB 1266 was passed in 2013 and went into effect in 2015,²⁴⁵ it provides nearly a decade of proof demonstrating that including trans youth does not upend K–12 athletic competitions to unfairly advantage trans girls.²⁴⁶ The California law serves as a model for other states seeking to explicitly include trans students when enforcing civil rights.

241. See Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUCATION DATA INITIATIVE, <https://educationdata.org/public-education-spending-statistics> [https://perma.cc/M68R-BXRX] (June 15, 2022).

242. See CAL. EDUC. CODE § 221.5 (West 2022).

243. A.B. 1266, 2013 Leg., Reg. Sess. (Cal. 2013) (emphasis added).

244. See EDUC. § 221.5.

245. *School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions*, CAL. DEP’T OF EDUC., <https://www.cde.ca.gov/re/di/eo/faqs.asp> [https://perma.cc/VG84-CHTA] (Sept. 16, 2021).

246. This reflects the primary argument that proponents of trans sports ban laws advance: trans girls participating on girls’ teams fundamentally and unfairly disadvantages cisgender girls. See, e.g., Scott Bauer, *Wisconsin Assembly Approves Transgender Sports Ban*, AP NEWS (June 16, 2021), <https://apnews.com/article/wi-state-wire-wisconsin-sports-government-and-politics-438b0da16b4a527edee244c6a7b02ba8> [https://perma.cc/3MXF-7BJE] (providing arguments for these bills based in “fairness” and “inclusion”).

In contrast to California, Wisconsin state law, as currently enacted, does not explicitly provide for the protection of transgender students in the statute prohibiting pupil discrimination, but the law provides the basis for a trans inclusive policy.²⁴⁷ Wisconsin State Statutes Section 118.13(1) mandates that no student may be denied participation in an extracurricular or recreational policy because of the student’s characteristics, including, sex or sexual orientation, but does not include any language about gender identity.²⁴⁸ School boards are directed to “develop written policies and procedures to implement” the nondiscrimination statute, but again, this statute makes no explicit mention of transgender or gender-diverse students.²⁴⁹

To remedy the gap in this statute, the Wisconsin legislature can take a number of actions. First, it could simply add the words “gender identity” to the list of protected types of people. That sexual orientation is already included in the statute provides hope and space for the addition of this other term. Second, it could provide a definition at the beginning of the statute chapter of the definition of “discrimination because of sex” as referring to the discrimination between women and men but also to discrimination based on a person’s gender identity rather than merely the sex assigned at birth. Language from President Biden’s aforementioned Executive Orders²⁵⁰ can prove helpful here. Specifically, the definition could read: “Because of sex—this phrase includes the traditional distinctions between those assigned male and female at birth, but also ‘covers discrimination on the basis of gender identity and sexual orientation.’”²⁵¹ Third, the legislature could revise the statute to more closely mirror California’s by explicitly stating that students “shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with [their] gender identity, irrespective of the gender listed on the [student’s] records.”²⁵² Any one of these changes would both correct the statutes and protect the rights of transgender students in Wisconsin. However, the political divide in the legislature may prove too high a bar.

Given Wisconsin’s identity as a swing state,²⁵³ it seems unlikely that those in the legislature will change course and pass transgender inclusive

247. See WIS. STAT. § 118.13(1) (2021–22).

248. *Id.*

249. See § 118.13(2)(a).

250. See Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021); Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

251. See Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

252. See CAL. EDUC. CODE § 221.5 (West 2022).

253. See Megan Woolard, *Wisconsin’s Importance as a Swing State*, MARQUETTE WIRE (Oct. 27, 2020), <https://marquettewire.org/4041783/news/wisconsins-importance-as-a-swing-state> [https://perma.cc/K4EC-ND9U].

statutes. Redistricting maps to favor Republicans has resulted in the hyper-polarization of the Wisconsin state government, pitting the Democratic governor against the Republican-controlled state legislature.²⁵⁴ The legislature is unlikely to grant the governor a “win” by passing a law consistent with California’s AB 1266 or by adding “gender identity” to the list of protected student characteristics in Wisconsin State Statutes Section 118.13(1).

C. Municipal- and School District-Level Solutions

Municipal-level solutions face challenges in the form of state- and federal-law preemptions.²⁵⁵ As a result, municipal- and district-wide rules and guidelines can only serve as solutions when not at odds with a higher level in the hierarchy of law.²⁵⁶ Even when not preempted, different policies across a single state lead to a fractured and fragmented approach within a single state. For those states without inclusive guidelines or trans sports bans, having anti-discrimination policies can prevent the harm resulting from excluding transgender student-athletes from sports.

In several states, the lack of a statewide policy for transgender sports participation results in individual schools making their own regulations, rules, and decisions.²⁵⁷ In Alaska, Georgia, Hawaii, Kansas, and Pennsylvania, for example, individual school judgment “creates confusing scenarios” where transgender student-athletes in the same school district can “face entirely different regulations when attempting to participate in accordance with their gender identity.”²⁵⁸

In the absence of statewide guidelines from either the state legislature or the state interscholastic athletic association, school districts and individual schools should take steps to ensure that trans youth are allowed to participate on teams that align with their gender identity.

254. See Patrick Marley, *Split Between Wisconsin Democrats and Republicans on Redistricting Reform Appears to Be Widening*, MILWAUKEE J. SENTINEL, (June 1, 2021, 6:00 AM), <https://www.jsonline.com/story/news/politics/2021/06/01/wisconsins-partisan-divide-redistricting-reform-widening/5253359001> [https://perma.cc/Q2EW-EP5J].

255. See *Preemption*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/preemption> [https://perma.cc/9VMK-XHHM] (last visited Mar. 2, 2023).

256. *Id.*

257. See GOLDBERG, *supra* note 9, at 10; Katie Barnes, *Alabama to Wyoming: State Policies on Transgender Athlete Participation*, ESPN (June 7, 2022), https://www.espn.com/espn/story/_/id/32117426/state-policies-transgender-athlete-participation [https://perma.cc/CAN4-WDK2] (providing an up-to-date list of states that have passed anti-trans inclusion legislation).

258. GOLDBERG, *supra* note 9, at 10; see Barnes, *supra* note 257 (providing an overview of national policies current through October 25, 2021).

Inclusive policies demonstrate to trans youth that they are welcome, affirmed, and a valuable part of the community. Ultimately, while it is important to demonstrate support of trans youth, local policies are not a solution to discriminatory state laws, rather they are patches to be used in the absence of guidance.

CONCLUSION

Protecting trans children—particularly young trans women and girls—from anti-trans sports participation laws requires a multifaceted approach. The current levels of partisanship and tribalism in Congress present serious hurdles for achieving a cohesive national approach to youth sports in the imminent future. However, the mental health crisis among trans youth highlights the benefits all LGBTQ+ children gain from being in an educational environment with supportive policies.²⁵⁹ With childrens' lives at stake, policymakers have incredible motivation to enact nondiscrimination policies that include the LGBTQ+ community, even in the face of partisan obstacles.

Federalism and deference to state laws, policies, and guidance created the current broken system. While some lawmakers have changed laws to reflect broader inclusion of trans youth, the recent trends point towards increasing legislative efforts to further marginalize transgender youth. In states that have not codified an expansive definition of sex, local organizing aided by national groups should target implementing these changes.

At the municipal and local levels, policies can have a definite impact on the youth in their community but leave the overall state approach fractured. Myriad local policies within the wider context of disparate state policies ranging from full inclusion to total bans heightens the confusion and uncertainty for trans youth. Challenging anti-trans legislation as a violation of Title IX of the Education Amendments of 1972 (Title IX) in federal courts and enacting federal legislation and policies that protect trans athletes is imperative. Strategic litigation and the promulgation of new anti-discriminatory policies may provide a path to better protecting trans youth and allowing them to thrive. America's youth learn to live and thrive in our schools and on sports teams. In an era characterized by political infighting, a staggering mental health crisis, and pandemic-related isolation, this is no time for a seventh-inning stretch; policymakers must step off the sidelines and work to let all youth play ball.

259. *See supra* Part I.A.

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