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## **“WOMAN ENOUGH” TO WIN? AN ANALYSIS OF SEX TESTING IN COLLEGE ATHLETICS**

### ABSTRACT

*In recent years, dozens of bills restricting the rights of transgender, or trans, individuals have been introduced in state legislatures throughout the country. To date, ten states have successfully passed laws prohibiting trans athletes from competing on teams in accordance with their gender identities. For its athletes, the National Collegiate Athletic Association (NCAA), the United States’ largest intercollegiate athletic organization, has pursued a compromise to balance trans inclusion and fair competition. Established in 2011, the NCAA’s conditionally inclusive policy permits trans women—meaning those who were assigned the sex of male but identify as women—to compete on a women’s team only after undergoing one year of testosterone suppression. This constitutes a form of sex testing, a method long used by sports organizations worldwide to sort athletes into binary men’s and women’s teams. This Article critiques the NCAA’s policy under Title IX, a cornerstone of federal law that prohibits discrimination in educational settings “on the basis of sex.” Although the Supreme Court has yet to define the contours of this protection as it relates to trans student athletes, its recent trans-friendly ruling in the Title VII case *Bostock v. Clayton County, Georgia* may be indicative of a decision on the issue. Further, even without *Bostock*’s logic, the Court may find that in light of modern science, the NCAA’s selective testosterone regulation stands as an improper and overbroad application of Title IX’s competitive skill exception. Looking forward, this Article provides solutions that the NCAA may employ in a revised policy to satisfy Title IX and to champion trans inclusion.*

## I. INTRODUCTION

Lindsay Hecox, a sophomore at Boise State University, is accustomed to her cross-country running skills leading her to the championship podium.<sup>1</sup> She never, however, expected her passion for the sport to cause her to become an activist in the LGBTQIA+ community.<sup>2</sup> Lindsay, along with an estimated 1.4 million adults in the United States,<sup>3</sup> identifies as transgender.<sup>4</sup> Transgender, or trans, is a term used to describe those whose gender identity does not align with the biological sex they were assigned at birth.<sup>5</sup> Trans people are no strangers to receiving disparate treatment because of their gender identities.<sup>6</sup> This issue has gained worldwide attention in athletics, particularly with respect to trans athletes' participation in women's sporting events.<sup>7</sup> This battle is ongoing in the

1. Julie Kliegman, *Idaho Banned Trans Athletes from Women's Sports. She's Fighting Back*, SPORTS ILLUSTRATED (June 30, 2020), <https://www.si.com/sports-illustrated/2020/06/30/idaho-transgender-ban-fighting-back>.

2. *See id.* (discussing how Lindsay "never imagined herself being an activist"); *see* Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html> (highlighting that "LGBTQIA+" represents many kinds of sexual and gender minorities, including lesbian, gay, bisexual, and trans identities, as well as others that "letters and words can't yet describe").

3. ANDREW R. FLORES ET AL., THE WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES 3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>.

4. *See* Kliegman, *supra* note 1 (detailing how Hecox presented as a boy throughout high school but began transitioning to a girl).

As in the NCAA's policy, this Article uses the term *sex* (or *biological sex*) to refer to a person's physical characteristics, such as their reproductive system and external genitalia. PAT GRIFFIN & HELEN CARROLL, NAT'L COLLEGIATE ATHLETIC ASS'N OFF. OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 22 (2011), [https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC\\_TransgenderHandbook.pdf](https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf). *Male* and *female* (or *man* and *woman*, with XY and XX sex chromosomes, respectively) refer to this biological sex. Jill Pilgrim et al., *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495, 505 (2003); Taryn Knox et al., *Transwomen in Elite Sport: Scientific and Ethical Considerations*, 45 J. MED. ETHICS 395, 396 (2019). *Gender* and *gender identity* refer to an individual's self-perception as a man, a woman, or something else. Knox et al., *supra*. When an individual's biological sex matches her gender identity, she is *cisgender* or *cis*. *Id.* Conversely, if an individual's biological sex does not align with her gender identity, she is *transgender* or *trans*. *Id.* Someone who was assigned the sex of male but identifies as a woman is a trans woman, and someone who was assigned the sex of female but identifies as a man is a trans man. *See id.* (discussing the interplay between sex and gender). Some trans people transition, meaning they use medical interventions or lifestyle changes to align more closely their outwardly presentation with their gender identity. *Id.*

5. Gold, *supra* note 2.

6. *See, e.g.*, Kliegman, *supra* note 1 (discussing trans individuals' struggle to be permitted to use the bathroom and locker room that corresponds to their gender identity).

7. *See* Anna North, "I Am a Woman and I Am Fast": What Caster Semenya's Story Says About Gender and Race in Sports, VOX (May 3, 2019, 7:30 AM), <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes> (discussing testosterone

states,<sup>8</sup> especially Idaho, where Lindsay's school is located.<sup>9</sup> On March 30, 2020, Idaho became the first state to police sex-segregated sporting events by passing the Fairness in Women's Sports Act.<sup>10</sup> This law requires any individual whose sex is disputed to undergo a physical exam, chromosome test, or testosterone test in order to be placed on either the men's or women's team.<sup>11</sup> Essentially, if her sex is questioned, Lindsay or any other athlete on the women's team must undergo sex testing to "prove" she is "woman enough" to compete alongside other women.<sup>12</sup>

The hurdles Lindsay faces in seeking to compete in accordance with her gender identity are unfortunately not unique; numerous athletes have also suffered discriminatory harm. For decades, powerful and well-known sports-governing bodies, such as the National Collegiate Athletic Association (NCAA) and the International Olympic Committee (IOC), have employed tests to sort athletes into binary male or female teams.<sup>13</sup> Until late 2021, the most recent test used by the IOC was the blood testosterone test.<sup>14</sup> If an athlete's testosterone levels exceeded a certain limit, she could not compete on the women's team.<sup>15</sup> This precaution was spurred by the concern that an individual's testosterone would cause an intolerable competitive advantage over other women athletes.<sup>16</sup> Recently, the IOC denounced this thinking, rescinded its testosterone testing requirement, and shifted the responsibility of crafting gender-based participation

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testing as a condition for participation as applied to trans cyclist Rachel McKinnon and Olympic runner Caster Semenya, a woman whose sex was questioned).

8. See Peter Hayes, *Transgender Athlete Fight to Heat Up as Legislatures Return*, BLOOMBERG L. (Oct. 7, 2020, 3:01 AM), <https://news.bloomberglaw.com/us-law-week/transgender-athlete-fight-to-heat-up-as-legislatures-return> (describing legislatures' efforts in more than a dozen states to restrict sex/gender criteria for sports teams).

9. Kliegman, *supra* note 1.

10. *Id.*

11. IDAHO CODE § 33-6203(3) (2020).

12. Kliegman, *supra* note 1.

13. GRIFFIN & CARROLL, *supra* note 4, at 13; see Ronald S. Katz & Robert W. Luckinbill, *Changing Sex/Gender Roles and Sport*, 28 STAN. L. & POL'Y REV. 215, 232–33 (2017) (following the IOC's various sex testing methods).

14. See Knox et al., *supra* note 4 (discussing the rise and use of the testosterone test by the IOC); Les Carpenter, *IOC No Longer Will Determine Transgender Athlete Eligibility by Testosterone Levels*, WASH. POST. (Nov. 16, 2021, 6:57 PM), <https://www.washingtonpost.com/sports/olympics/2021/11/16/ioc-transgender-athlete-policy-changes/>.

15. INT'L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM 2–3 (2015), [https://stillmed.olympic.org/Documents/Commissions\\_PDF\\_files/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDF_files/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf).

16. See Knox et al., *supra* note 4, at 395 (examining whether "elite male athletes have a performance advantage over their female counterparts due to physiological differences").

policies to global governing bodies of individual sports.<sup>17</sup> Although the IOC released trans-friendly guidance, it remains unclear whether organizations will use their new power to promote inclusivity.<sup>18</sup>

Selective testosterone regulation, meaning only some individuals are subject to hormone regulation,<sup>19</sup> still stands as a key component of athletic sex segregation in college sports in the United States. The NCAA governs almost 500,000 college athletes from over 1000 participating colleges and universities.<sup>20</sup> In 2011, the NCAA published a conditionally inclusive policy that allows trans women to compete on a women's team so long as certain testosterone criteria are met.<sup>21</sup> As recently as August 2021, the organization has re-affirmed its commitment to this position.<sup>22</sup> The policy deserves analysis for two reasons. Firstly, the NCAA's competitions frequently serve as stepping stones to prominent athletic events, such as the Olympics.<sup>23</sup> Thus, because some athletes are restricted from participation while they undergo testosterone regulation, the NCAA's policy likely influences certain athletes' prospects after college.<sup>24</sup> Secondly, the United States has federal laws to prevent sex-based discrimination, and a policy of selective testosterone regulation of student athletes may conflict with one such law: Title IX of the Educational Amendments of 1972 (hereinafter "Title IX").<sup>25</sup>

Crafted to expand women's opportunities, Title IX prohibits any federally funded educational program from discriminating against individuals based on

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17. INT'L OLYMPIC COMM., IOC FRAMEWORK ON FAIRNESS, INCLUSION AND NON-DISCRIMINATION ON THE BASIS OF GENDER IDENTITY AND SEX VARIATIONS 1–2, 4 (n.d.), <https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>; Carpenter, *supra* note 14.

18. Bethany Dawson, *Transgender Women Should Not Be Forced to Reduce Their Testosterone Levels to Compete in Women's Olympic Sports, Say New IOC Guidelines*, INSIDER (Nov. 21, 2021, 12:29 PM), <https://www.insider.com/ioc-trans-women-shouldnt-reduce-testosterone-one-to-compete-at-olympics-2021-11>.

19. *See, e.g.*, GRIFFIN & CARROLL, *supra* note 4, at 13 (detailing how only trans women must comply with testosterone suppression).

20. *What Is the NCAA?*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Dec. 26, 2021).

21. GRIFFIN & CARROLL, *supra* note 4, at 13.

22. NAT'L COLLEGIATE ATHLETIC ASS'N BD. OF GOVERNORS, REPORT OF THE NCAA BOARD OF GOVERNORS 2–3 (2021), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec\\_boardgov/AUG2021BOG\\_REPORT.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/AUG2021BOG_REPORT.pdf).

23. At the 2016 Games, three-quarters of Team USA were former college athletes. *Putting Rio Within Reach*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/media-center/feature/putting-rio-within-reach> (last visited Dec. 26, 2021).

24. *Id.* (discussing how college athletes' Olympic prospects "started forming on a college campus [as they] compet[ed] for hundreds of universities around the United States before competing for their countries").

25. *See* Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1283–84 (2018) (highlighting how Title IX may be used to challenge sex segregation in sports).

sex.<sup>26</sup> While this would allow any student athlete to compete on any team regardless of sex, Title IX's regulations permit sex-segregated teams when team selection is based on competitive skill or when the sport involved is a contact sport.<sup>27</sup> Notably, any school that receives federal funds must comply with Title IX,<sup>28</sup> but the NCAA is a sports-governing body, not a federally funded institution.<sup>29</sup> Thus, though the NCAA does not have to comply with Title IX, its federally funded member schools must.<sup>30</sup> Nevertheless, the NCAA values gender equity, and it complies with Title IX on a voluntary basis.<sup>31</sup>

The Supreme Court has yet to interpret the meaning of Title IX's "on the basis of sex" as it relates to trans students in sports, leaving lower courts, federally funded schools, and the NCAA without clear guidance.<sup>32</sup> The Court has, however, recently interpreted similar language in Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") in its *Bostock v. Clayton County, Georgia* decision.<sup>33</sup> Because either this case or an analysis of modern science<sup>34</sup> may be indicative of how the issue will be decided under Title IX, the NCAA can use these sources to re-craft its trans athlete policy. A re-crafted NCAA policy could be an example for high school and Olympic-participating organizations, both of which have faced challenges regarding the inclusion of athletes who fall outside traditionally defined biological male or female boxes.<sup>35</sup>

26. 20 U.S.C. § 1681(a); *see also* Leong, *supra* note 25, at 1257 (discussing the purpose of the creation of Title IX).

27. 34 C.F.R. § 106.41(b) (2020).

28. *Title IX Frequently Asked Questions*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> (last visited Jan. 8, 2021).

29. *What Is the NCAA?*, *supra* note 20.

30. Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 462 (1999).

31. GRIFFIN & CARROLL, *supra* note 4, at 6–7; Linda Greenhouse, *Colleges; N.C.A.A. Triumphs in Civil Rights Suit in Supreme Court*, N.Y. TIMES (Feb. 24, 1999), <https://www.nytimes.com/1999/02/24/sports/colleges-ncaa-triumphs-in-civil-rights-suit-in-supreme-court.html>.

Further, promulgating Title IX-compliant policies is a prudent business decision for the NCAA, as a non-compliant policy could encourage member schools to engage in practices that would incur penalties under Title IX. *See* GRIFFIN & CARROLL, *supra* note 4, at 28 (cautioning that each school should ensure its compliance with applicable laws, including Title IX).

32. *See* Ronald S. Katz, *Insight: Supreme Court LGBT Ruling Leaves Sports Transgender Questions*, BLOOMBERG L. (July 9, 2020, 3:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-supreme-court-lgbt-ruling-leaves-sports-transgender-questions> (discussing unclear guidance regarding Title IX's interpretation as well as the Supreme Court's statement in *Bostock* that the trans-inclusive holding did not address contexts such as athletics).

33. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020).

34. For a discussion of *Bostock* and modern science, *see infra* Part IV.

35. *See, e.g.*, Christie Aschwanden, *Trans Athletes Are Posting Victories and Shaking Up Sports*, WIRED (Oct. 29, 2019, 12:00 PM), <https://www.wired.com/story/the-glorious-victories-of-trans-athletes-are-shaking-up-sports/> (discussing how two trans women runners in high school amassed state championships, spawning a lawsuit and an administrative complaint); North, *supra* note 7.

This Article critiques the NCAA's current policy regarding sex testing, specifically selective testosterone regulation, and provides solutions that would enable a revised policy to comply with the laws and science that govern the issue. In Part II, the history of sex testing in sports along with the scientific controversy surrounding testosterone regulation is discussed. Part III examines the history of Title IX—a cornerstone of federal anti-discrimination law that applies to selective sex testing in sports—and its implementing regulations as they relate to trans student athletes, along with potential guidance from the Supreme Court's Title VII ruling in *Bostock*. Part IV reviews the NCAA's practice of sex-segregating athletic teams and proposes two paths to trans athletes' inclusion under Title IX. First, extrapolating *Bostock*'s Title VII logic to Title IX would permit trans athletes to participate according to their gender identity. Second, even without *Bostock*'s logic, the NCAA's use of testosterone as a dispositive proxy for competitive skill, rather than judging each athlete's actual skill, is scientifically unsound and unfairly overbroad. To ensure that member schools are complying with Title IX, the NCAA should adopt a formal policy abandoning selective testosterone regulation or abandoning sex segregation.

## II. THE HISTORY OF SEX TESTING IN SPORTS

### A. *The Rise of Sex Testing*

For most of history, “sport” unfailingly meant men’s sport.<sup>36</sup> Although norms have shifted to promote women’s participation in competitive athletics,<sup>37</sup> many teams remain sex-segregated.<sup>38</sup> This stems from the notion that physiological differences between the sexes may grant one sex an advantage in competition over the other, so segregation is necessary to ensure fairness.<sup>39</sup> Athletic programs worldwide have long been concerned that men would masquerade as women to win women’s events.<sup>40</sup> At the European Track and Field Championship in 1966, the first sex verification test was used, requiring all women’s event competitors to parade nude while physicians examined their genitalia.<sup>41</sup> Acknowledging this impropriety, the IOC shifted to employing a mandatory Barr body test for its 1986 Olympic Games, where the chromatin

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36. Joanna Harper, *Athletic Gender*, 80 L. & CONTEMP. PROBS., no. 4, 2017, at 139, 139.

37. Leong, *supra* note 25, at 1258; Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 5 (2011).

38. Buzuvis, *supra* note 37.

39. See Pilgrim et al., *supra* note 4, at 528 (describing how certain sports are not sex-segregated, as sex differences are “irrelevant to athletic performance,” while others are because sex-related differences can affect performance).

40. *Id.* at 509.

41. *Id.*

mass from cheek cells was analyzed to find the Barr body, a hallmark of an XX woman.<sup>42</sup> Years later, a blood draw and a polymerase chain reaction test were used to find the SRY gene on the Y chromosome, a hallmark of an XY man.<sup>43</sup> By 2015, the IOC settled on a policy focused specifically on trans individuals.<sup>44</sup> Trans men were allowed to compete as male without restriction, while trans women could compete as women only if their blood testosterone levels fell below ten nanomoles per liter for at least twelve months prior to competition.<sup>45</sup> In November 2021, the IOC abandoned this policy and shifted the responsibility of governing trans athletes' participation to individual sports organizations.<sup>46</sup> With this new power, each organization can implement a policy of its choosing, such as permitting participation based on gender identity, keeping testosterone regulation, or even prohibiting trans athletes' participation altogether.<sup>47</sup> Although the future of sex testing on the worldwide stage remains uncertain, such policies are rooted in a history of sexism and policing of women's bodies,<sup>48</sup> and they stand as yet another unfair challenge women must overcome in order to compete in elite sports.

In the United States, the issue of sex verification in sports is similarly far from settled. As of January 2022, sixteen states and the District of Columbia permit trans athletes to compete according to their gender identity, but more than thirty states have introduced bills to restrict team membership to birth certificate sex or sex assigned at birth.<sup>49</sup> After the enactment of Idaho's law, similar efforts were successful in Alabama, Arkansas, Florida, Mississippi, Montana, South Dakota, Tennessee, Texas, and West Virginia.<sup>50</sup> Currently, only Idaho requires

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42. *Id.* at 509–10. Today, it is accepted that XX women are not the only individuals who possess Barr bodies. See *X-Inactivation*, KHAN ACAD., <https://www.khanacademy.org/science/high-school-biology/hs-classical-genetics/hs-sex-linkage/a/x-inactivation> (last visited Dec. 26, 2021) (discussing how XXX women have two Barr bodies, and XXY men have one Barr body).

43. Pilgrim et al., *supra* note 4, at 510.

44. IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM, *supra* note 15.

45. *Id.*; Katz & Luckinbill, *supra* note 13, at 233.

46. Carpenter, *supra* note 14; IOC FRAMEWORK ON FAIRNESS, INCLUSION AND NON-DISCRIMINATION ON THE BASIS OF GENDER IDENTITY AND SEX VARIATIONS, *supra* note 17.

47. See Dawson, *supra* note 18 (discussing how some trans athletes fear organizations will ban their participation).

48. Christine Brennan, *Human Rights Group Calls for End to Sex Testing of Female Athletes in Track and Field*, USA TODAY (Dec. 4, 2020, 3:59 PM), <https://www.usatoday.com/story/sports/olympics/2020/12/04/human-rights-group-calls-end-sex-testing-female-athletes/3828335001/> (discussing the racist and sexist ideals underlying sex testing).

49. *K-12 Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> (last visited Jan. 10, 2022).

50. Katie Barnes, *Alabama to Wyoming: State Policies on Transgender Athlete Participation*, ESPN (Oct. 25, 2021), [https://www.espn.com/espn/story/\\_/id/32117426/state-policies-transgender-athlete-participation](https://www.espn.com/espn/story/_/id/32117426/state-policies-transgender-athlete-participation).

any individual whose sex is disputed to undergo sex testing.<sup>51</sup> Further still, some organizations, such as the NCAA, devised a testosterone regulation scheme to balance concerns.<sup>52</sup>

### B. *Why Testosterone Seems to Stick*

The most modern approach to determining sex-segregated team placement hinges on testosterone levels, but there are few peer-reviewed studies on the interaction between hormone therapy and athletic performance.<sup>53</sup> Supporters of this method point to studies showing that after puberty, testosterone causes men to develop more muscle and less body fat than women.<sup>54</sup> Testosterone in men also drives the development of larger lungs, bigger hearts, and increased oxygen-carrying hemoglobin concentrations.<sup>55</sup> Some believe these testosterone-linked changes benefit male athletes by increasing their strength and speed in certain sports,<sup>56</sup> but it may be a disadvantage in others. For example, research indicates that physiological traits in women grant them a competitive edge over men in sports such as swimming and ultradistance running.<sup>57</sup> Further, competitive advantages extend beyond brute strength and speed; coordination, strategy, dedication, and teamwork provide an advantage and are all sex-neutral traits.<sup>58</sup>

51. *See id.* (noting which state laws were enacted). Compare IDAHO CODE § 33-6203(3) (2020) (requiring sex testing to resolve disputes), with S.B. 2536, 2021, Reg. Sess. (Miss. 2021) (permitting sex testing to resolve disputes), and H.B. 391, 2021, Reg. Sess. (Ala. 2021), and ARK. CODE ANN. § 6-1-107 (2021), and FLA. STAT. § 1006.205 (2021), and H.B. 112, 67th Leg., Reg. Sess. (Mont. 2021), and S.D. Exec. Order No. 2021-06 (2021), and TENN. CODE ANN. § 49-6-310 (2021), and TEX. EDUC. CODE ANN. § 33.0834 (West 2022), and W. VA. CODE R. § 18-2-25d (2021) (none of which include provisions related to settling disputes regarding an individual's sex). Some of these laws have been temporarily blocked by courts. Henry Berg-Brousseau, *Breaking: Human Rights Campaign Urges Texas Governor Abbott to Veto Discriminatory Anti-Trans Sports Ban*, HUM. RTS. CAMPAIGN (Oct. 17, 2021), <https://www.hrc.org/press-releases/breaking-human-rights-campaign-urges-texas-governor-greg-abbott-to-veto-discriminatory-anti-trans-sports-ban> (discussing how laws in Arkansas, Idaho, and West Virginia have faced legal challenges). In Idaho, it was Lindsay's complaint that spurred a court to grant a preliminary injunction against the law. *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 WL 4760138, at \*39 (D. Idaho Aug. 17, 2020). On appeal, the Court of Appeals for the Ninth Circuit did not reach the merits of the case, remanding it for a determination of mootness. *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 WL 4760138, at \*39 (D. Idaho Aug. 17, 2020), *vacating as moot sub nom Hecox v. Kenyon*, No. 20-35815 (9th Cir. June 24, 2021).

52. GRIFFIN & CARROLL, *supra* note 4, at 7–8.

53. Katie Barnes, *The Battle over Title IX and Who Gets to Be a Woman in Sports: Inside the Raging National Debate*, ESPN (June 23, 2020), [https://www.espn.com/espnw/story/\\_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate](https://www.espn.com/espnw/story/_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate).

54. Knox et al., *supra* note 4, at 397.

55. *Id.*

56. *Id.*

57. Leong, *supra* note 25, at 1267–69.

58. *See Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 293 (Mass. 1979) (listing select sex-neutral athletic advantages).

Additionally, factors such as nutrition, access to special trainers, and other biological variations all impact performance.<sup>59</sup> Hence, some see a trans woman's endogenous testosterone level as one of many factors that may fairly affect athleticism, and thus, her participation on a women's team should be permitted.<sup>60</sup> In the midst of this debate, policymakers must draw conclusions from limited, inconclusive data, and unfortunately for trans women athletes, those conclusions often favor some form of sex testing.<sup>61</sup> Sex testing as employed by the NCAA, however, likely violates Title IX.

### III. THE HISTORY OF TITLE IX AND RECENT DEVELOPMENTS

#### A. Title IX

Congress enacted Title IX in 1972.<sup>62</sup> Title IX states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>63</sup> Congress passed Title IX to achieve two goals: "to avoid the use of federal resources to support sexually discriminatory practices in education programs, and to provide individual citizens effective protection against those practices."<sup>64</sup> Although Title IX does not mention athletics on its face, its implementing regulations clarify that it applies to "any interscholastic, intercollegiate, club or intramural athletics offered by a recipient" of federal funds.<sup>65</sup> In the wake of Title IX, women's athletic participation soared. In 1972, fewer than 30,000 women took part in college athletics, but after Title IX's enactment, that number increased to over 190,000 women by 2011.<sup>66</sup> In 2018, the number of women student athletes in the NCAA totaled over 216,000 (forty-four percent of all NCAA college athletes).<sup>67</sup> Title IX's efforts to prevent sex discrimination were clearly

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59. Katz & Luckinbill, *supra* note 13, at 238.

60. Knox et al., *supra* note 4, at 398–99, 401 (noting that there is a wide range of testosterone levels permitted in the women's division as intersex women and women with polycystic ovary syndrome can compete).

61. Barnes, *supra* note 50; e.g., IDAHO CODE § 33-6203(3) (2020).

62. Elaine Chamberlain et al., *Athletics & Title IX of the 1972 Education Amendments*, 19 GEO. J. GENDER & L. 231, 232 (2018).

63. 20 U.S.C. § 1681(a).

64. Ann K. Wooster, Annotation, *Sex Discrimination in Public Education Under Title IX—Supreme Court Cases*, 158 A.L.R. Fed. 563 (1999).

65. 34 C.F.R. § 106.41(a) (2020).

66. NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT FORTY: WORKING TO ENSURE GENDER EQUITY IN EDUCATION 8 (2012), <https://www.ncwge.org/TitleIX40/TitleIX-print.pdf>.

67. Meghan Durham, *Number of NCAA College Athletes Reaches All-Time High*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 10, 2018), <http://www.ncaa.org/about/resources/media-center/news/number-ncaa-college-athletes-reaches-all-time-high>.

successful in opening the field to more women, but there still remained concern that it would not be a level playing field.<sup>68</sup>

While Title IX's regulations provide that any athlete should be allowed on any team, regardless of sex, they also permit teams to be sex-segregated into a men's team and a women's team "where selection for such teams is based upon competitive skill or the activity involved is a contact sport."<sup>69</sup> This leads to two exceptions in which an institution is permitted to operate sex-segregated teams: (1) if the sport in question is a contact sport, which includes "football, basketball and other sports the purpose or major activity of which involves bodily contact;" or (2) if the sport is a non-contact sport where team selection is dictated by "competitive skill."<sup>70</sup> Thus, if the sport is non-contact and team selection is not based on competitive skill, the team must be open to any individual, regardless of sex.<sup>71</sup>

Although the regulations include examples to clarify the meaning of "contact sport," there is no similar explanation of what "competitive skill" means or how to measure it.<sup>72</sup> There is also no interpretation from the courts, so some scholars have said it means that teams should be sex-segregated when "inherent physiological differences" between the sexes would result in members of one sex out-competing members of the other sex for limited roster spots.<sup>73</sup> This interpretation aligns with the regulation's legislative history, which reveals that the competitive skill exception was born out of the worry that without it, school-based sport would be dominated by men at the expense of women.<sup>74</sup> Importantly, Title IX's competitive skill exception is *permissive*, not mandatory, meaning that institutions can opt to have fully co-ed teams.<sup>75</sup>

The concern over cis women's—meaning those women whose biological sexes match their gender identity—displacement in athletics has gained attention as trans athletes excel at opportunities to compete.<sup>76</sup> Institutions are forced to balance concerns regarding fair competition towards cis women with a desire to

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68. See Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 77–78 (2020) (highlighting how preserving sex-segregated sports was "material to Title IX's passage and to congressional approval of its implementing regulations").

69. 34 C.F.R. § 106.41(b).

70. *Id.*

71. Caleb R. Trotter, *Approaching 50 Years: Title IX's "Competitive Skill" Exception to the Prohibition on Single-Sex Sports*, 10 MISS. SPORTS L. REV. 111, 121 (2021).

72. See 34 C.F.R. § 106.41(b) (lacking a description of what competitive skill means).

73. See Trotter, *supra* note 71, at 122 (describing an interpretation of the competitive skill exception); Coleman et al., *supra* note 68, at 81–82 (discussing the fairness rationale underlying the exception's creation).

74. See Coleman et al., *supra* note 68, at 79–80, 98–99 (discussing the concern that immutable biological differences would contribute to a performance gap between the sexes).

75. 34 C.F.R. § 106.41(b).

76. Aschwanden, *supra* note 35.

be inclusive of trans students.<sup>77</sup> Some appellate courts have found in favor of trans students' Title IX lawsuits challenging sex-based discrimination in the context of bathroom mandates, and the Supreme Court recently denied an appeal to reinstate such a mandate, delivering a major victory to trans students.<sup>78</sup> Sports application should be next. Although President Joseph Biden signed an executive order directing executive agencies to apply *Bostock*'s logic to Title IX's sports regulations, thus permitting students to compete according to their gender identities,<sup>79</sup> states have continued to pass contrary legislation,<sup>80</sup> and the NCAA's policy contains additional testosterone hurdles.<sup>81</sup> As a result, schools are left to decipher the unclear meaning of Title IX's "on the basis of sex" as it relates to trans student athletes, a feat that has yet to be accomplished on the national level.<sup>82</sup>

### B. Applying *Bostock*'s Interpretation of Title VII to Title IX

Congress failed to define "sex" in the final version of Title IX's regulations.<sup>83</sup> With respect to sports, however, the legislative history makes it apparent that "sex" meant biological sex, as legislators were concerned about physiological differences that could lead to a performance gap and safety

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77. See *id.* (judging fairness concerns between the "billions of typical women who cannot compete with men at high levels of sport" and the "very repressed minority in transgender people who only want to enjoy the same things that everybody else does").

78. Denise Lavoie & Mark Sherman, *Supreme Court Won't Revive School's Transgender Bathroom Ban*, ASSOC. PRESS (June 28, 2021), <https://apnews.com/article/us-supreme-court-courts-supreme-courts-government-and-politics-9b4cab4e026d96d8f5492e03260985a>; see, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049–50 (7th Cir. 2017) (holding that a trans male student required to use the women's bathroom can bring a Title IX claim against the school because he was subjected to "different rules, sanctions, and treatment than non-transgender students").

79. Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 25, 2021); 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. 32,637–40 (June 22, 2021) (noting how the U.S. Department of Education, which enforces Title IX, complied with the executive order by stating an intent to widely apply *Bostock*'s logic). The executive order came after the Trump administration had previously rescinded protections for trans people. Pat Eaton-Robb, *Biden Administration Withdraws from Transgender Athlete Case*, ASSOC. PRESS (Feb. 23, 2021), <https://apnews.com/article/connecticut-school-athletics-high-school-sports-lawsuits-william-barr-0d7fa2922b5fa5686a2f5d79ce081481>. Although this order is a heartening move, the rights of trans people should not be dependent on the outcome of an election, so binding precedent is needed.

80. See *supra* note 51 (listing states which have passed laws restricting team membership to sex assigned at birth).

81. GRIFFIN & CARROLL, *supra* note 4, at 13.

82. See Katz, *supra* note 32 (discussing the lack of guidance surrounding Title IX's statutory interpretation).

83. See 34 C.F.R. § 106.2 (giving definitions for certain words, but not "sex"). Congress approved and finalized the regulations in 1975. Coleman et al., *supra* note 68, at 81.

concerns.<sup>84</sup> Even so, because the regulations themselves lack textual clarification,<sup>85</sup> the interpretation of Title IX has been left up to the judiciary. To inform their Title IX decisions, courts have often looked to Title VII cases.<sup>86</sup> While Title IX protects individuals from sex-based discrimination in educational settings, Title VII does so in the employment context.<sup>87</sup> Although not dispositive of how the Supreme Court would interpret Title IX, the Title VII case *Bostock* may be indicative of a potential decision on the issue.<sup>88</sup> In *Bostock*, in deciphering the meaning of Title VII's "because of . . . sex," the Court tested whether sex discrimination occurred by judging if, had the biological sex of the employee been different, the decision to discharge would have also differed.<sup>89</sup> Like Title IX's sports regulations, Title VII's legislative history indicates that "sex" meant a binary biological distinction,<sup>90</sup> but the Court found that Title VII's language unambiguously prohibits discrimination against those who are homosexual or trans.<sup>91</sup> Setting clear precedent, the Court stated that under Title VII, "[i]t is impossible to discriminate against a person for being homosexual *or transgender* without discriminating against that individual based on sex."<sup>92</sup>

Expectedly, this holding was met with opposition. In his dissent, Justice Samuel Alito worried that the Court's reasoning could require cis women to compete against those who have biological advantages stemming from either their sex assigned at birth or hormones taken to transition to male.<sup>93</sup> Although the Court disclaimed making any decision on the issue through *Bostock*,<sup>94</sup> it clearly stated that policy consequences cannot cause the judiciary to "neglect the

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84. Coleman et al., *supra* note 68, at 79–80.

85. Both Title IX and its implementing regulations fail to clearly define the meaning of "sex" as it relates to trans individuals. 20 U.S.C. § 1681; 34 C.F.R. § 106.41.

86. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (declaring Title VII "the most appropriate analogue when defining Title IX's substantive standards"); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017) (explaining "[a]lthough not as often as some of our sister circuits, this court has looked to Title VII when construing Title IX").

87. 42 U.S.C. § 2000e-2(a) (declaring it an unlawful practice for an employer to discriminate against an individual based on sex).

88. *See Katz, supra* note 32 (discussing the important decision the Supreme Court will have to make in interpreting Title IX in light of *Bostock*).

89. *See Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020) (explaining the Court's test that determines whether sex-based discrimination occurred).

90. *Id.* at 1738–39.

91. *See id.* at 1750 ("One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the [defendant] employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.").

92. *Id.* at 1741 (emphasis added).

93. *Id.* at 1779–80 (Alito, S., dissenting).

94. *Bostock*, 140 S. Ct. at 1753.

promise that all persons are entitled to the benefit of the law's terms."<sup>95</sup> The dispute regarding trans women athletes is ongoing in courts, and because Title VII is often used to interpret Title IX, the Court may employ similar logic to promote gender inclusive teams, thus making a case like Lindsay's as precedent-setting for Title IX as *Bostock* was for Title VII.<sup>96</sup>

#### IV. REVISING THE NCAA'S POLICY

In Title IX lawsuits regarding the inclusion of trans women student athletes, the central conflict is whether prohibiting the trans athletes' inclusion discriminates against them, or whether permitting inclusion discriminates against cis women competitors.<sup>97</sup> As it stands, the NCAA's policy acts as a stopgap decision that attempts to appease both sides' advocates by offering a conditionally inclusive policy.<sup>98</sup> As a reminder, the NCAA's policy permits a trans woman to participate on a women's team only if she undergoes a year of testosterone suppression.<sup>99</sup> If she does not undergo the suppression, she cannot compete on the women's team without changing its status to that of a mixed team.<sup>100</sup> In contrast, an unmedicated trans man athlete can compete on either the men's or women's team without changing the team's status to mixed, but if he undergoes testosterone treatment, he is ineligible for the women's team.<sup>101</sup> As the saying goes, however, "a friend to all is a friend to none,"<sup>102</sup> and the NCAA's stopgap policy that attempts to appease both sides promotes discriminatory practices that violate Title IX. Because federally funded member schools must comply with the NCAA's principles as a condition of participation,<sup>103</sup> the policy encourages schools' noncompliance with Title IX, so it should be revised.

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95. *Id.* at 1751, 1753.

96. *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 WL 4760138, at \*2, \*17 (D. Idaho Aug. 17, 2020) (discussing how the court will ultimately have to decide whether Idaho's Fairness in Women's Sports Act violates Title IX). The application of *Bostock* to Title IX would impact far more than sports for LGBTQIA+ people. For a discussion of this effect in the health care sphere, see Hiba B. Al-Ramahi, *The Impact of Bostock v. Clayton County on Access to Health Care for LGBTQ Persons*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 485, 485–508 (2022).

97. See JARED P. COLE, CONG. RSCH. SERV., TITLE IX'S APPLICATION TO TRANSGENDER ATHLETES: RECENT DEVELOPMENTS 3 (2020) (outlining arguments regarding trans student athletes).

98. See GRIFFIN & CARROLL, *supra* note 4, at 13 (permitting inclusion only after testosterone requirements are met).

99. *Id.*

100. *Id.*

101. *Id.*

102. See, e.g., TAYLOR SWIFT, *CARDIGAN* (Republic Records 2020) (repeating the popular saying).

103. *Membership*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/who-we-are/membership> (last visited Dec. 26, 2021).

A. *The NCAA's Policy Is Discriminatory Under Bostock*

If courts continue to extrapolate the holdings from Title VII cases such as *Bostock* to apply to Title IX cases' interpretation of sex discrimination,<sup>104</sup> Title IX could soon be read to classify disparate treatment based on sex to include discrimination against trans individuals.<sup>105</sup> If courts follow *Bostock*, the test for the inclusion of trans athletes under Title IX would be: "If the athlete were assigned a different biological sex at birth, would the discrimination have occurred?"<sup>106</sup> If it would not have occurred but for the individual's sex assigned at birth, it is sex discrimination.<sup>107</sup> Under this test, trans women athletes receive disparate treatment from the NCAA on two fronts. The first occurs because if the trans woman athlete had been assigned the biological sex of female at birth, she would not have to undergo a year-long process of testosterone regulation in order to compete on the women's team.<sup>108</sup> On the second front, trans women athletes experience discrimination when compared to trans men athletes.<sup>109</sup> If the athlete were assigned female at birth but identified as a man (trans man), he could immediately compete on the team in accordance with his gender identity, no hormone regulation needed; this is a stark difference compared to the process trans women must undergo to compete according to their gender identity.<sup>110</sup> Thus, under the current policy, only trans women are categorically penalized for seeking to participate on the team that aligns with their gender identity; cis women, cis men, and trans men can all compete on the team that aligns with

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104. *E.g.*, *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (declaring Title VII "the most appropriate analogue when defining Title IX's substantive standards").

105. *See Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 WL 4760138, at \*17 (D. Idaho Aug. 17, 2020) (discussing how the Office for Civil Rights' anti-trans inclusive ruling in a Connecticut high school case is "of questionable validity" in light of the Court's recent holding in *Bostock*).

106. *See Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020) (explaining the Court's test to determine whether sex-based discrimination occurred).

107. *See id.* (deciding that if an individual assigned male at birth was penalized for having traits or performing actions that she would not be penalized for if she was assigned the sex of female at birth, sex-based discrimination occurred under Title VII).

108. *See GRIFFIN & CARROLL, supra* note 4, at 12–13 (setting forth conditions for participation applicable to trans women athletes but explaining no similar regulation applicable to cis women athletes).

109. *See id.* at 13 (detailing different standards for trans athletes' competition alongside the team of their gender identity, with one set of testosterone rules for trans women and no similar rules for trans men).

110. *Id.*

their gender identities without testosterone regulation.<sup>111</sup> Thus, the NCAA's treatment of trans women constitutes sex discrimination under *Bostock*.<sup>112</sup>

Some have argued that Title IX differs from *Bostock*'s Title VII because it allows sex-segregated teams in certain circumstances, so the question is not *whether* a trans woman athlete can compete but rather on *which* team she can compete.<sup>113</sup> Yet, in *Hecox*, the court assessed the argument that trans women could simply compete on the men's team without restriction, finding that it is similar to claiming that laws that prevent gay marriage are not discriminatory because homosexual individuals could simply marry someone of a different sex.<sup>114</sup> The *Hecox* court found that both Ninth Circuit precedent and the Supreme Court in *Bostock* rejected this logic, so it granted a preliminary injunction against Idaho's law, noting that Lindsay was likely to succeed on the merits of her claims.<sup>115</sup> With *Bostock*'s approach in mind, trans advocates have strong ground to successfully argue that the NCAA's policy is discriminatory as it requires trans women to undergo testosterone regulation to compete on the women's team.<sup>116</sup>

#### B. *The NCAA's Policy Is Discriminatory Independent of Bostock*

Although advocates may use *Bostock* to show that the NCAA's selective testosterone regulation policy is discriminatory, there is another path to victory. As mentioned, Title IX's implementing regulations allow sex-segregated teams when segregation is based on competitive skill.<sup>117</sup> The NCAA's policy of using testosterone regulation to sort trans athletes to either male or female teams is entirely based on this exception.<sup>118</sup> This is apparent as trans women athletes'

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111. *See id.* (discussing testosterone regulation only in the context of trans women). The condition that a trans woman's testosterone must be suppressed for a year in order to compete on the women's team is a penalty because of the potential dangers and costs incurred by exogenous hormone treatment, as well as the year of athletic participation the trans women sacrifice, which can affect future competitive prospects. Tara Santora, *Ignored by Doctors, Transgender People Turn to DIY Treatments*, UNDARK (June 29, 2020), <https://undark.org/2020/06/29/transgender-diy-treatments/> (discussing the unclear risks and costs of hormone treatment); *see Putting Rio Within Reach*, *supra* note 23 (discussing how college athletes' Olympic prospects begin developing as they compete on their college teams).

112. *See Bostock*, 140 S. Ct. at 1741 (outlining the textualist logic applied to trans individuals' disparate treatment and concluding that sex discrimination occurs if the individual would not have received different treatment if she had been classified as the opposite sex at birth).

113. Katz, *supra* note 32.

114. *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 WL 4760138, at \*35 (D. Idaho Aug. 17, 2020).

115. *Id.* at \*35, \*39.

116. *See COLE*, *supra* note 97, at 4 (noting how in *Bostock*, the Court recognized that its decision would have implications regarding trans rights outside the employment context but left that decision to lower courts).

117. 34 C.F.R. § 106.41(b) (2020).

118. *See GRIFFIN & CARROLL*, *supra* note 4, at 7–8 (discussing competitive equity concerns).

restrictions are not applicable to only contact sports—and thus the policy does not fall under the contact sports exception—but rather, it applies to all NCAA sports, including non-contact ones.<sup>119</sup> Notably, the NCAA hosts men’s and women’s teams for a wide assortment of both contact sports, such as basketball, and non-contact sports, such as swimming.<sup>120</sup> By using testosterone as a dispositive proxy for competitive skill in every sport, the NCAA overapplies this exception. Because the NCAA’s policy relies on unsound science and overbroad generalizations to deliver disparate treatment to trans women, it should be revised.

The NCAA’s policy is scientifically flawed because it is not a foregone conclusion that unsuppressed testosterone gives trans women athletes such a blanket competitive advantage in every sport over cis women so as to justify their exclusion.<sup>121</sup> Moreover, the NCAA relies on inconclusive science to support its use of testosterone regulation as a proxy for competitive skill, rather than determining team placement based on each athlete’s actual skill.<sup>122</sup> The NCAA’s guidance document itself acknowledges that the science available in 2011 was at most suggestive.<sup>123</sup> As this Article goes to print, science is still divided, and there has been no conclusive study of trans athletes’ abilities after hormone suppression.<sup>124</sup> Further, studies largely assess proxies for athletic performance, such as muscle mass and strength.<sup>125</sup> But as the Massachusetts Supreme Court noted in its decision to invalidate a statute designed to prevent

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119. *See id.* at 7–8, 13 (containing no provisions for trans athletes for specific sports but rather indicating that the testosterone regulation policy applies “for the purposes of NCAA competition” in general). While possible safety concerns underlying the contact sports exception are outside the scope of this Article, courts—along with the NCAA—seem to have assumed that all non-contact sports fall under the competitive skill exception to justify men’s and women’s teams. Trotter, *supra* note 71, at 128.

120. *Statistics*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/championships/statistics?division=d1> (last visited Dec. 26, 2021).

121. Katz & Luckinbill, *supra* note 13, at 235 (describing how the NCAA’s policy acknowledges that the science behind testosterone’s impact on competitive skill is not conclusory).

122. *See* GRIFFIN & CARROLL, *supra* note 4, at 13 (introducing a policy that categorizes trans women athletes based on whether or not they received hormone suppression treatment). The NCAA uses testosterone as a proxy to determine competitive skill and not as a proxy to determine biological sex itself because the policy allows trans men to compete alongside cis men with no regard for their testosterone levels. *Id.* If testosterone was a proxy for determining biological sex (i.e., anyone with a certain testosterone level qualifies as a man, not a woman), trans men would need to take exogenous testosterone in order to qualify for the men’s team.

123. *Id.* (quoting Dr. Eric Vilain, who said “[r]esearch suggests that androgen deprivation and cross sex hormone treatment in male-to-female transsexuals reduces muscle mass”); *see also* Katz & Luckinbill, *supra* note 13, at 235.

124. Anna Wiik et al., *Muscle Strength, Size, and Composition Following 12 Months of Gender-Affirming Treatment in Transgender Individuals*, 105 J. CLIN. ENDOCRINOLOGY & METABOLISM e805, e812 (2020).

125. *E.g., id.*

boys from competing on a girls' team, athletic results are the combined product of skills such as coordination, concentration, strategy, technique, and form, all of which are sex-neutral characteristics.<sup>126</sup> Additionally, the notion that testosterone grants a competitive advantage in *every* sport is flawed, as research indicates that women's physiological traits, such as a higher percentage of body fat and shorter average stature, grant an edge over men in some sports, such as distance swimming and gymnastics.<sup>127</sup> The NCAA explicitly recognizes this, acknowledging that "what counts as a competitive advantage may shift dramatically depending on the sport. What is an advantage in one context may be a disadvantage in another."<sup>128</sup> Despite this, the NCAA persists in incorrectly using testosterone as a dispositive proxy for competitive skill in all sports.

In failing to rely on individuals' actual skill when creating teams, the NCAA's policy instead relies on overbroad generalizations regarding trans women. The NCAA prefaces its inclusion policy by stating that trans women have a wide range of physical characteristics, and "[a] male-to-female transgender woman may be small and slight, even if she is not on hormone blockers or taking estrogen. It is important not to overgeneralize."<sup>129</sup> The NCAA also states that assuming all males are taller, stronger, and automatically more skilled in a sport than all females is inaccurate.<sup>130</sup> Despite these sentiments cautioning against overgeneralizations, the NCAA's policy in fact overgeneralizes as it prohibits *all* trans women from competing on a women's team until after a year of testosterone suppression and from competing on a women's team at all if suppression is refused.<sup>131</sup> The current policy is based on sweeping assumptions about the differences between trans and cis athletes' bodies, as all trans women must submit to testosterone regulation to compete on the women's team, while no cis women need to provide evidence related to their natural testosterone levels.<sup>132</sup>

In prior cases, courts have ruled against the use of broad generalizations regarding the differences between the sexes' athletic abilities. For example, the Massachusetts Supreme Court held that "[c]lassification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo 'archaic and overbroad generalizations.'"<sup>133</sup> Further, federal circuit courts

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126. Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, 293 (1979).

127. Leong, *supra* note 25, at 1267–68 (describing swimming advantages); Knox et al., *supra* note 4, at 399 (describing gymnastics advantages).

128. GRIFFIN & CARROLL, *supra* note 4, at 32 n.4.

129. *Id.* at 7.

130. *Id.*

131. Katz & Luckinbill, *supra* note 13, at 235.

132. See GRIFFIN & CARROLL, *supra* note 4, at 13 (detailing trans women's requirements for competition but no similar requirements for cis women).

133. Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, 293 (1979) (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

have recognized that trans individuals can bring a Title IX claim under the theory of sex-stereotyping, meaning they experienced sex-based discrimination because they do not conform to stereotypes of the sex that they were assigned at birth.<sup>134</sup> In this context, trans women could challenge the sex-based stereotype that all trans women maintain a blanket competitive advantage in every sport if they do not undergo testosterone suppression.<sup>135</sup>

In sum, the NCAA's policy on trans athletes is discriminatory and should be altered to reflect current understanding instead of overbroad generalizations. Remember, without either the contact sports exception or the competitive skill exception, Title IX requires sex-mixed teams.<sup>136</sup> Accordingly, inclusivity is the basis of Title IX, and the competitive skill exception should not be broadly interpreted to undermine this goal.<sup>137</sup> Thus, a revised NCAA policy that encouraged a narrow reading of the competitive skill exception in line with Title IX's underlying objective presents an opportunity for thoughtful leadership<sup>138</sup>—leadership that may echo the NCAA's previous protection of trans rights. For example, after North Carolina instituted a 2016 law requiring people to use the bathroom of the sex indicated on their birth certificate, the NCAA pulled seven championship games out of the state, explaining that the law violated the organization's commitment to inclusivity.<sup>139</sup> Although trans advocates have called for similar measures in response to current restrictive state laws, the NCAA has displayed a reluctance to act.<sup>140</sup>

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134. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048–49 (7th Cir. 2017) (describing how the Eleventh, Sixth, and Seventh Circuits reason that trans people can suffer from non-conformance to sex-based stereotypes).

135. See GRIFFIN & CARROLL, *supra* note 4, at 13 (requiring the suppression of every trans woman's testosterone levels in order to compete on the women's team in every sex-segregated sport).

136. 34 C.F.R. § 106.41(b) (2020).

137. See Trotter, *supra* note 71, at 111–12 (noting Title IX's dictate and cautioning that a careless interpretation of exceptions can lead to limiting students' athletic opportunities based on stereotypes and assumptions).

138. See *id.* at 122 (noting the apparent vacuum surrounding an interpretation of the reaches or applicability of the competitive skill exception). The NCAA is a behemoth in the world of American sports, so it serves as an influential industry leader. See Steve Berkowitz, *NCAA Reports Revenues of More than \$1 Billion Dollars in 2017*, USA TODAY (Mar. 7, 2018, 7:53 PM), <https://www.usatoday.com/story/sports/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002/> (discussing the NCAA's \$1.1 billion revenue in 2017).

139. Elisha Fieldstadt & Associated Press, *NCAA Pulls Seven Championships Out of North Carolina over HB2*, NBC NEWS (Sept. 13, 2016, 9:10 AM), <https://www.nbcnews.com/feature/nbc-out/ncaa-pulls-seven-championships-out-north-carolina-over-hb2-n647386>.

140. Gillian R. Brassil, *N.C.A.A. Responds, Tentatively, to Transgender Athlete Bans*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/04/12/sports/ncaabasketball/ncaa-transgender-athletes.html>; *Board Receives Equity Report, Reaffirms Transgender Participation*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 3, 2021), <https://www.ncaa.org/about/resources/media-center/news/general-board-receives-equity-report-reaffirms-transgender-participation>

C. *Abandon Testosterone Regulation or Abandon Sex Segregation*

The NCAA's policy was crafted to honor Title IX's goal of ensuring fair competition, but since a court is likely to find its policy discriminatory either under *Bostock* or its overbroad application of the competitive skill exception, it should be revised. One solution is that the NCAA abolishes testosterone regulation and encourages schools to promote fully inclusive teams based on gender identity. There is legal support for this, as Title IX generally prohibits sex-segregated teams,<sup>141</sup> but it is likely to face challenges as there is concern about cis women's opportunities to succeed in sports.<sup>142</sup>

The NCAA could alternatively abolish testosterone regulation and employ a narrow reading of the competitive skill exception to justify sex-segregated teams. Rather than use testosterone as a proxy for skill in every sport, the NCAA should interpret the competitive skill exception as each athlete's *actual* skill. This would permit trans women to show that they have no automatic blanket advantage over cis women, so they should be included on the women's team. Some may argue that certain trans women are incredibly skilled and should thus be excluded,<sup>143</sup> but the inevitability of their success would be judged on a case-by-case basis, rather than presumptive generalizations.

If the NCAA, however, remains committed to the idea that testosterone is a direct indicator of competitive skill, another solution is to sort athletes onto teams based on the testosterone levels of each athlete, regardless of gender identity. This division would resemble divisions based on sex-neutral characteristics, such as weight divisions in boxing and weightlifting.<sup>144</sup> This abolishes sex segregation entirely, thus permitting an NCAA member school to skirt a Title IX challenge. Yet, it still presents challenges as such a radical change would eschew tradition.<sup>145</sup> Some bioethical and physiological experts have advocated for a more nuanced, algorithmic approach,<sup>146</sup> which may gain support as it echoes societal perceptions of testosterone-linked differences.<sup>147</sup> An

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("[T]he NCAA intends to conduct its championships as they were awarded but will require all hosts to reaffirm their commitment to ensure a nondiscriminatory and safe environment for all college athletes.").

141. 34 C.F.R. § 106.41(a) (2020).

142. *E.g.*, *Bostock v. Clayton Cnty.*, Ga., 140 S. Ct. 1731, 1779–80 (2020) (Alito, S., dissenting).

143. *See* Aschwanden, *supra* note 35 (discussing two trans women runners' high number of championships).

144. Knox et al., *supra* note 4, at 401.

145. Heath Fogg Davis, *Why Testosterone Ranges Should Replace Sex-Segregation in Title IX Sports*, GENDER POL'Y REP. (Aug. 22, 2017), <https://genderpolicyreport.umn.edu/why-testosterone-ranges-should-replace-sex-segregation-in-title-ix-sports/>.

146. Knox et al., *supra* note 4, at 401.

147. The pervasiveness of this perception is seen as even the Supreme Court recognized "[p]hysical differences between men and women . . . are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

algorithm, however, would likely be difficult to generate and require consideration of many competitive factors, such as hemoglobin levels, maximal oxygen uptake, and bone strength.<sup>148</sup> Whichever decision the NCAA makes, the current policy is an unfair and discriminatory compromise that cannot stand without revision.<sup>149</sup>

## V. CONCLUSION

Sports have long been sex-segregated, and women have long been subjected to sexist and intrusive sex verification procedures. Today, sports-governing bodies such as the NCAA have settled on testosterone regulation as a way to ensure fair competition during women's events. Despite the history of this practice and the divided science,<sup>150</sup> a close reading of Title IX and its regulations, informed by the recent trans-friendly decision in *Bostock*, lead to the conclusion that selective testosterone regulation discriminates against trans women based on sex. Further, even if a court declines to extend *Bostock* to Title IX, trans advocates may succeed in arguing that the NCAA is improperly employing Title IX's competitive skill exception. By using testosterone as a proxy for competitive advantage, the NCAA judges athletes based on their presumed skill, rather than their actual skill. To satisfy Title IX and to set an example for other sporting behemoths, the NCAA should abandon selective testosterone regulation or abandon sex segregation. Although it recently re-affirmed its decade-old policy, the NCAA has echoed calls for more scientific research with a stronger focus on these gender-related issues, an undertaking that indicates a willingness to re-examine current thinking.<sup>151</sup> Whatever decision the NCAA makes, advocates hope that it will uphold inclusivity as trans athletes

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148. Knox et al., *supra* note 4, at 401.

149. Revision is also needed as the NCAA may be sending a discouraging message to trans men. By setting different standards for trans men versus trans women, the NCAA implies that trans men's success in sports against cis men is negligible and/or unexpected, while trans women's success is almost inevitable, so it must be guarded against. See GRIFFIN & CARROLL, *supra* note 4, at 13 (setting different trans inclusion standards). Further, the NCAA's policy fails to address intersex or nonbinary competitors, but a new policy could. Catherine Jean Archibald, *Transgender and Intersex Sports Rights*, 26 VA. J. SOC. POL'Y & L. 246, 258–65 (2019).

150. Katz & Luckinbill, *supra* note 13, at 235.

151. NAT'L COLLEGIATE ATHLETIC ASS'N BD. OF GOVERNORS, *supra* note 22, at 6 (re-affirming the 2011 policy); *NCAA Summit Focuses on Gender Identity, Student-Athlete Participation*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 29, 2020), <https://www.ncaa.org/about/resources/media-center/news/ncaa-summit-focuses-gender-identity-student-athlete-participation> (discussing how a summit on gender identity highlighted the “glaring lack of research and available data related to transgender and nonbinary athletes” and noting that similar summits have kickstarted other necessary research, such as the NCAA's partnership with the Department of Defense to conduct a comprehensive study of concussions).

share a common goal: as Lindsay so simply puts it, “I just want to be part of my school team.”<sup>152</sup>

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152. Lindsay Hecox, *Anti-Trans Laws Are Preventing Trans Women from Playing on Women’s Sports Teams*, TEEN VOGUE (May 14, 2020), <https://www.teenvogue.com/story/anti-trans-law-women-sports>.

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