

# FAIRNESS FOR ALL? THE IMPLICATIONS OF ADOPTING A THIRD- GENDER CATEGORY IN ELITE SPORTS

## INTRODUCTION

On March 18, 2022, the NCAA Women's Division I Swimming and Diving Championships garnered national attention for more than just the record-breaking swims. The second day of competition saw Lia Thomas, the first known openly transgender athlete to compete at the NCAA Championships, beat out a field of Olympians in the 500 yard freestyle.<sup>1</sup> Even though Thomas competed in accordance with the NCAA's transgender-athlete guidelines, and finished nine seconds behind Katie Ledecky's American record,<sup>2</sup> cries of concern and outrage poured in against Thomas from across the nation.<sup>3</sup> Thomas's participation highlights the questions facing elite sports organizations<sup>4</sup> today: who can compete, in what category, and what must athletes do to be eligible.

Elite sports in the modern era are governed by a complex network of private organizations. Within the United States, the Ted Stevens Amateur Sports Act (Sports Act) grants the United States Olympic and Paralympic Committee (USOPC) the power to recognize national governing bodies (NGBs) for any sport that is included on the program of the Olympic,

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1. Dan D'Addona, *2022 NCAA Women's Championships Day 2 Finals: Lia Thomas Wins 500 Freestyle 'It Means the World,'* SWIMMING WORLD MAG. (Mar. 17, 2022, 3:17 PM), <https://www.swimmingworldmagazine.com/news/the-2022-ncaa-womens-championships-day-2-finals-500-freestyle/> [https://perma.cc/5FR2-7RD8]. Thomas beat Erica Sullivan, Emma Weyant, and Brooke Forde, who all competed for Team USA at the 2020 Tokyo Olympics. Peggy Shinn, *Meet the Women on the U.S. Olympic Swim Team*, TEAM USA (June 23, 2021, 11:25 AM), <https://www.teamusa.com/news/2021/june/23/meet-the-women-on-the-us-olympic-swim-team> [https://perma.cc/DV2X-JYW8].

2. For reference, if Ledecky had been racing against Thomas, Ledecky would have finished over half a pool length before Thomas did. At the 2022 NCAA Championships, the difference between first (Thomas) and second (Emma Weyant) was only one-and-a-half seconds. *See 2022 NCAA Division I Women's Swimming & Diving Championships Results*, HY-TEK'S MEET MANAGER 7.0, <https://swimswam.com/wp-content/uploads/2022/03/2022-NCAA-Division-I-Women-Swimming-Diving-Championships-Final-Results.pdf> [https://perma.cc/T3GD-7GJT].

3. *See, e.g.,* Sarah Berman, *Protestors Against Lia Thomas Stand Outside & Attend Women's NCAA Championship*, SWIMSWAM (Mar. 17, 2022), <https://swimswam.com/protestors-against-lia-thomas-stand-outside-attend-womens-ncaa-championship/> [https://perma.cc/4Q9R-CU3F].

4. This Note will focus on elite sports. NCAA Division I Swimming and Diving is a relevant example of the problems facing elite sports in implementing transgender-inclusive participation policies because a majority of swimming All-Americans (the top eight finishers per event at NCAAAs) are USA Swimming National Team Members. *Compare* James Sutherland, *CSCAA Announces 2021-22 NCAA Division I Women's All-Americans*, SWIMSWAM (Mar. 30, 2022), <https://swimswam.com/cscaa-announces-2021-22-ncaa-division-i-womens-all-americans/> [https://perma.cc/PKA8-SVRY], *with* USA SWIMMING, WOMEN'S NATIONAL TEAM 2022-2023 ROSTER, <https://www.usaswimming.org/docs/default-source/national-teamdocuments/rosters/2022-2023-nt-roster-women-final.pdf> [https://perma.cc/7YV6-HR5X].

Paralympic, or Pan-American Games.<sup>5</sup> To be eligible for recognition, an NGB must, among other requirements, be the member of “no more than one international sports federation.”<sup>6</sup> Once recognized as members of their respective international federations (IFs),<sup>7</sup> NGBs are part of the Olympic Movement<sup>8</sup> and receive instruction from the International Olympic Committee (IOC).<sup>9</sup> Outside of IOC guidelines, NGBs are typically given considerable leeway to regulate sports. Professor Dionne L. Koller argues that the federal government’s hands-off approach to regulating sports “has translated into a generous degree of legal insulation for sports leagues, administrators, and regulators, especially in the way that they manage athletes and structure the games.”<sup>10</sup>

The power structure created by the Olympic Charter and the Sports Act grants IFs great influence over the policies within the sporting bodies they oversee in the United States, including how competition will be categorized.<sup>11</sup> Until recently, the separation of elite sports competition into male and female categories had been accepted without controversy. However, as Lia Thomas’s participation in elite swimming demonstrates, “[t]he creation of a separate category for female athletes inevitably leads to a fundamental conundrum—precisely who should be allowed to compete in women’s sports?”<sup>12</sup>

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5. 36 U.S.C. § 220521(a).

6. 36 U.S.C. § 220522(6). After recognition, the USOPC recommends and supports the NGB “to the appropriate international sports federation as the representative of the United States for that sport.” 36 U.S.C. § 220521(c).

7. International Federations, as recognized by the Olympic Charter, are authorized by the International Olympic Committee “to establish and enforce, in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application.” Int’l Olympic Comm., *Olympic Charter*, art. 26.1.1.1 (Oct. 15, 2023), [https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?\\_ga=2.194066413.1313684342.1700191523-214513972.1700191523](https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.194066413.1313684342.1700191523-214513972.1700191523) [https://perma.cc/D7PS-CXV8].

8. “The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism.” Int’l Olympic Comm., *Olympic Movement*, <https://olympics.com/ioc/olympic-movement#:~:text=Olympic-,Movement,by%20the%20values%20of%20Olympism> [https://perma.cc/T93Z-GNV2].

9. Int’l Olympic Comm., *supra* note 7, pmb1. ¶ 7.

10. Dionne L. Koller, *Putting Public Law into “Private” Sport*, 43 PEPP. L. REV. 681, 688 (2016).

11. To use aquatic sports as an example, “[t]he national body governing swimming, open water swimming, diving, high diving, water polo, artistic swimming, and Masters in any country or Sport Country shall be eligible to become a FINA member” under World Aquatics’s constitution. Fédération Internationale de Natation, *FINA Constitution*, C 7 (June 5, 2021). Once a member, an NGB is obliged to comply with World Aquatics’s rules at all times, including directives and decisions of the World Aquatics bodies. *Id.* at C 7–8.

12. Joanna Harper, *Athletic Gender*, 80 LAW & CONTEMP. PROBS. 139, 139 (2017).

In 2022, the IF regulating international aquatic sports, World Aquatics,<sup>13</sup> attempted to answer this question by proposing a third-gender category<sup>14</sup> for all female-identifying athletes whose testosterone levels are too high to compete in the female category.<sup>15</sup> And on July 25, 2023, World Aquatics announced plans to implement such an “open” category in its competitions for all transgender athletes to compete in.<sup>16</sup> World Aquatics announced plans to debut this open category at the Berlin Swimming World Cup 2023, running from October 6–8, 2023.<sup>17</sup>

This Note explores how World Aquatics’s proposed third-gender category would fare under the laws of the United States if implemented by U.S. sports-governing bodies. Part I summarizes the preexisting barriers to elite competition for transwoman athletes and discusses how World Aquatics’s proposal would further eliminate any possibilities for transwoman athletes to compete in line with their gender identity. The practical impacts a third-gender category would have on transwoman athletes’ competition prospects are relevant to framing the discussion around whether a state actor or sports-governing body could, through its respective legal channels, confine transwoman athletes to a third category without impermissibly discriminating against them. The remaining parts explain potential legal challenges that U.S. sports organizations, now

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13. World Aquatics was previously known as Fédération Internationale de Natation. World Aquatics’s “primary mission is to promote and encourage the advancement of Aquatics in all possible aspects, throughout the world.” World Aquatics, *Policy on Eligibility for the Men’s and Women’s Competition Categories*, at 1 (June 19, 2022) [hereinafter *World Aquatics Policy*].

14. World Aquatics uses the term “open” to describe its proposed third category. *Id.* at 9. However, World Aquatics seems to limit participation to only those who cannot conform to the transition requirements specified in the rules. *See id.* Thus, I use the term “third-gender category” synonymously for what World Aquatics calls its “open” category because, in announcing plans to debut this category, what little information provided as of the time of this writing has led commentators to believe that this category will be open to gender non-conforming individuals only; the typical “male” and “female” categories will also remain available for competition. *See, e.g.,* Owen Lloyd, *World Aquatics to Launch Open Category for Transgender Athletes at Swimming World Cup*, INSIDE GAMES (Aug. 16, 2023), <https://www.insidethegames.biz/articles/1139912/world-aquatics-open-category#:~:text=The%20open%20category%20will%20give,allowed%20in%20a%20women's%20race> [https://perma.cc/BH3V-7MV6].

15. *See World Aquatics Policy*, *supra* note 13, at 7–8; *see also infra* Section I.A.

16. Associated Press, *World Aquatics to Include Transgender Swimmers in ‘Open Category,’* ESPN (July 25, 2023, 10:09 AM), [https://www.espn.com/olympics/story/\\_/id/38067880/world-aquatics-include-transgender-swimmers-open-category](https://www.espn.com/olympics/story/_/id/38067880/world-aquatics-include-transgender-swimmers-open-category) [https://perma.cc/AZ7Z-9ZGA].

17. *World Aquatics Debuts Open Category at Berlin Swimming World Cup 2023*, WORLD AQUATICS (Aug. 16, 2023, 9:14 AM), <https://www.worldaquatics.com/news/3636298/world-aquatics-debuts-open-category-at-berlin-swimming-world-cup-2023> [https://perma.cc/9GHJ-H3SM]. How World Aquatics plans to implement this category in practice remains undetermined, as no swimmers signed up to race in the open category at the competition before the registration deadline. World Aquatics Comm’n Dep’t, *Update on the Open Category Competitions at the World Aquatics Swimming World Cup – Berlin 2023*, WORLD AQUATICS (Oct. 3, 2023, 6:45 AM), <https://www.worldaquatics.com/news/3715191/update-on-the-open-category-competitions-at-the-world-aquatics-swimming-world-cup-berlin-2023> [https://perma.cc/4LFQ-B2KQ].

including state governments, will face if they choose to implement a third-gender category. Several states have already taken measures to regulate transgender-athlete participation in women's sports within their borders.<sup>18</sup> Those statutes reaching collegiate sports impact elite athletes on their teams. Because states have already begun regulating transgender participation in scholastic sports,<sup>19</sup> it is not unreasonable to assume they may take further measures to regulate transgender participation in all sporting activities within their borders. Part II focuses on the likely constitutional challenges states will face under the Equal Protection Clause of the Fourteenth Amendment should they try to enact a third-gender category through legislation. Part III discusses what legal challenges may be brought against non-state actor private sports organizations, like NGBs. While authorized by Congress through the Sports Act, neither the USOPC nor NGBs are state actors.<sup>20</sup> Thus, they are not subject to constitutional restraints. This Part explores how transwoman athletes could hold private sports-governing bodies liable: I argue a third-gender category would constitute discrimination under many states' public accommodation statutes.<sup>21</sup> Additionally, specifically for NGBs, instituting a third-gender category would strip an NGB of recognition under the Sports Act. This is because an amateur sports organization, like an NGB, is eligible for recognition only if it "provides an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of . . . sex."<sup>22</sup> By providing a roadmap of a potential legal challenges to a third-gender category in both scenarios, this Note cautions sports regulatory bodies against adopting a third-gender category within elite sports.<sup>23</sup>

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18. See *Hecox v. Little*, 79 F.4th 1009, 1017 n.4 (9th Cir. 2023) (listing the twenty-one states which have taken legislative measures to restrict transgender student participation in sports).

19. Federalism concerns that may be raised by conflicts between state regulation of elite sports and the federal regulatory framework outlined by the Sports Act are beyond the scope of my argument. Thus, for purposes of this Note, I will assume that states have some regulatory power to legislate regarding scholastic sports, but pure regulation of Olympic sports' categorization guidelines is left by Congress to be dictated by the IOC, IFs, and NGBs. See 36 U.S.C. § 220503(3).

20. See, e.g., *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542–47 (1987); *Behagen v. Amateur Basketball Ass'n of the U.S.*, 884 F.2d 524, 530 (10th Cir. 1989) (holding NGBs are at least "nominally private part[ies]" because they are "further removed from congressional action . . . than is the USOC").

21. Many states have public accommodation statutes that prohibit discrimination based on sex or gender identity in public accommodations. See *infra* Section III.A.

22. 36 U.S.C. § 220522(8). All elite athletes, including professionals, who wish to compete in Olympic Movement events are still governed by NGBs. See 36 U.S.C. § 220523(a)(6).

23. A discussion of the significant practical concerns that also caution against adopting a third-gender category to regulate transwomen participation in elite sports is outside the scope of my Note. I will focus solely on the legal challenges such a category may face if adopted in the United States.

## I. TRANSWOMAN ATHLETES IN ELITE SPORT

Transwoman athletes bear the brunt of the “who can compete as a female” conundrum.<sup>24</sup> Yet, outside of sports, transgender women are largely not required to qualify their womanhood.<sup>25</sup> Whether due to lack of resources or social stigma, transgender women are often unable to transition from their sex assigned at birth until after male puberty impacts their biological development.<sup>26</sup> In the context of sports, the potential post-puberty biological advantage transgender women may have over cisgender women has prompted regulation of transgender women’s participation in elite sport.

### A. Barriers to Participation

In the mid-2000s, gender verification in sports shifted from genetic sex testing to hormone testing; scientists settled on testosterone levels as the key to determining the advantage male athletes have over females.<sup>27</sup> Hormonal regulation of testosterone levels is now assumed to come as a price transwoman athletes must pay should they want to compete in line with their gender identity.<sup>28</sup>

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24. See Erin Buzuvis, Sarah Litwin & Warren K. Zola, *Sport Is for Everyone: A Legal Roadmap for Transgender Participation in Sport*, 31 J. LEGAL ASPECTS SPORT 212, 213 (2021).

25. Transgender individuals “are those who have a gender identity that is not fully aligned with their sex assigned at birth.” Am. Psych. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 832 (2015). Nations embrace transgender individuals to a variety of degrees. While transgender individuals are accepted in the United States as equal citizens, acceptance of transgender individuals is not universal. See, e.g., United Nations Office of the High Comm’r for Hum. Rts., *The Struggle of Trans and Gender-Diverse Persons*, UNITED NATIONS, <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons> [https://perma.cc/R4QQ-AM28].

26. See *infra* Section II.C.2.b.

27. Ashley J. Bassett et al., *The Biology of Sex and Sport*, J. BONE & JOINT SURGERY REVS., Mar. 2020, at 6; see also Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 74 (2017) (“Although other factors are influential, the average 10–12% performance gap between non-doped elite male and elite female athletes is almost entirely attributable to the bimodal and non-overlapping production of testosterone, including to these testosterone-driven attributes.”).

28. The United Nations has starkly criticized attempts by IAAF (now World Athletics) to classify female athletes based on their testosterone levels. The UN called World Athletics’s plans “unnecessary, humiliating, and harmful.” See *Caster Semenya: United Nations Criticises ‘Humiliating’ IAAF Rule*, BBC (Mar. 25, 2019), <https://www.bbc.com/sport/athletics/47690512> [https://perma.cc/DVS7-ZJWF]. In fact, Caster Semenya received a favorable ruling in the European Court of Human Rights which held that Switzerland violated the European Convention on Human Rights “by failing to protect Semenya’s [sic] right to non-discrimination (Art. 14) taken together with the right to private life (Art. 8).” Lena Holzer, *The European Court of Human Rights in the Caster Semenya Case: Opening a New Door for Protecting the Rights of Persons with Variations of Sex Characteristics and Human Rights in Sports*, OPINIOJURIS (Aug. 4, 2023), <https://opiniojuris.org/2023/08/04/the-european-court-of-human-rights-in-the-caster-semenya-case-opening-a-new-door-for-protecting-the-rights-of-persons-with-variations-of-sex-characteristics-and-human-rights-in-sports/> [https://perma.cc/HF6S-QTCM]. Yet, World Athletics announced it will still implement its testosterone suppression requirements in light of

Even as hormone regulation technology and social norms develop, the IOC and IFs continue to confront basic issues of how to categorize athletes while respecting their dignity and gender identity. In elite sports, the IOC instructs IFs to independently determine eligibility criteria for athletes who do not fit within traditional binary gender distinctions.<sup>29</sup> Each sport's specific regulations focus on outlining the requirements for non-cisgender female-identifying athletes to compete in the female category of their respective sports.<sup>30</sup> Because most IFs are currently grappling with how to allow transwoman athletes to compete in female-gender categories, this Note will focus on the problems facing elite transwoman athletes.<sup>31</sup>

### *B. The Male Advantage Thesis*

Regulation of transwoman athletes in sports largely stems from the unproven assumption that those who are assigned male at birth have an innate biological advantage that prevents cisgender women from ever competing against them. This thesis has been reinforced over decades of segregating sports into a binary: males compete versus males and females compete versus females. The gender binary is so central to sports that some anti-transwomen-in-women's-sports advocates think sports cannot survive without it.<sup>32</sup> This Note will not endeavor to argue about whether maintaining

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the ruling, and most IFs require transwoman athletes to regulate their testosterone levels to compete in the female category. *See id.*; *infra* note 30 and accompanying text. Additionally, transition treatments typically include suppressing testosterone. *See* Cécile A. Unger, *Hormone Therapy for Transgender Patients*, 5 *TRANSLATIONAL ANDROLOGY & UROLOGY* 877, 879–80 (2016). Thus, this Note assumes that some form of testosterone suppression will be required when regulating transwoman athlete participation in the female sports category.

29. Int'l Olympic Comm., *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, at 2.

30. *See World Aquatics Policy*, *supra* note 13, at 7–8 (requiring transgender women to transition before Tanner Stage 2 or the age of twelve and to maintain testosterone levels of 2.5 nmol/L or lower post-transition); World Athletics, *Eligibility Regulations for Transgender Athletes*, art. 3B (Mar. 23, 2023) (requiring same); Int'l Tennis Fed'n, *ITF Transgender Policy*, at 1 (Aug. 10, 2023) (requiring transgender women to maintain testosterone levels of 5 nmol/L for a period of twelve months to compete in the female category). For a comprehensive list of IF policies, see *International Federations*, TRANSATHLETE.COM, <https://www.transathlete.com/international-federations#:~:text=Transgender%20women%20are%20only%20eligible,or%20lower%20since%20age%2012> [https://perma.cc/FGV7-QUSV].

31. Any policy proposals discussed would also apply to intersex athletes who are sometimes barred from competition due to their inability to conform with certain gender policies. *See* Basset et al., *supra* note 27, at 6 (discussing how individuals with hyperandrogenism and differences of sex development (DSD) or other intersex traits were most impacted in their eligibility to compete at the onset of hormone testing in elite sports based on their heightened testosterone levels).

32. *See, e.g.,* Nancy Hogshead-Makar, *Sex Matters: Why Transgender Athletes Must Not Compete Against Biological Females*, SWIMMING WORLD MAG. (Feb. 12, 2022, 3:39 PM), <https://www.swimmingworldmagazine.com/news/sex-matters-why-transgender-athletes-must-not-compete-against-biological-females/> [https://perma.cc/D5ZE-GRDV].

the gender binary in sports is normatively good policy.<sup>33</sup> However, a scientific debunking of the male advantage thesis as it has been extended to transwoman athletes will be necessary for our discussion of why a state could not (or, at least, should not) relegate transwoman athletes to a third-gender category.

### 1. *The Thesis Defined*

The gender binary in sports originated because of what scholar Claire F. Sullivan calls the “advantage thesis.”<sup>34</sup> Proponents of the male advantage thesis argue that differences between the sexes cause “persons assigned male at birth to possess physical prowess over persons assigned female at birth,” which prevents male and female assigned-at-birth athletes from fairly and safely competing together.<sup>35</sup> As will be discussed further, this “advantage thesis” largely justifies the modern practice by most sports organizations to separate their competitions by sex.<sup>36</sup> And over time, separate categories have revealed that male athletes are more adept than female athletes.<sup>37</sup> However, scholars are beginning to reject that this success is innate in an athlete’s maleness. For example, Professor McNamarah posits that “arguments supporting trans-exclusionary sports bans bring together the sweeping assumptions about women’s physical capabilities.”<sup>38</sup> Yet, “[p]hysiology alone . . . does not predict athletic performance.”<sup>39</sup> And advantage depends on the specific sport,<sup>40</sup> so a categorical relegation to a new category—i.e., an effective ban on transwomen competing in women’s sport—is unsubstantiated. When addressing these few assumptions, arguments for a third-gender category already begin to crack, even before looking at science.

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33. The Ninth Circuit has found that the binary does not violate the Equal Protection Clause, at least in some circumstances. *See, e.g., Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131–32 (9th Cir. 1982). Scholars have begun to untangle the assumption that maintaining the binary is acceptable in any circumstance. For an argument that sex segregation in sports need not be absolute and that athletic categorization should be primarily focused on inclusion, see generally Tracy Turner, *Dismantling the Cage of Binary Sports*, 67 ST. LOUIS U. L.J. 41 (2022).

34. Claire F. Sullivan, *Gender Verification and Gender Policies in Elite Sport: Eligibility and “Fair Play,”* 35 J. SPORT & SOC. ISSUES 400, 401–02 (2011).

35. Chan Tov McNamarah, *Cis-Woman-Protective Arguments*, 123 COLUM. L. REV. 845, 881 (2023).

36. *See infra* Section II.C.2.a.

37. *See infra* notes 142–43 and accompanying text.

38. McNamarah, *supra* note 35, at 870.

39. *Id.* at 887 (quoting Erin E. Buzuvis, *Challenging Gender in Single-Sex Spaces: Lessons from a Feminist Softball League*, 80 LAW & CONTEMP. PROBS. 155, 164 (2017)).

40. *See infra* Section II.C.1.

## 2. *The Ninth Circuit's Take on the Science*

Scientific studies clearly show that the male advantage thesis cannot be successfully applied when assessing whether transwoman athletes can compete in women's sports without destroying safe and competitive opportunities for ciswoman athletes. States have tried to rely on scientific studies to support their respective "fairness in women's sports" acts.<sup>41</sup> In at least one instance, however, courts have already rejected these studies as lacking a scientific basis for their findings and warping existing research. In assessing whether the District Court of Idaho abused its discretion in preliminarily enjoining Idaho's Act, the Ninth Circuit affirmed the district court's conclusion that the plaintiffs were likely to succeed on the merits of their equal protection claim.<sup>42</sup> In so doing, the Ninth Circuit picked apart each of the scientific experts relied upon by the State to try to justify its categorical ban on transwoman athletes competing in scholastic sports. For example, the court rejected the State's expert, who had testified to the effect that "hormone therapy suppression did not eliminate all of the physiological advantages that an individual experiences through male puberty," because "the majority of the studies he cited discussed the average differences between male and female athletes in general, not the difference between transgender and cisgender women athletes."<sup>43</sup> Similarly, the court discredited studies that the state legislature relied on in passing the statute:

For example, one of the studies was altered after peer review to remove its conclusions regarding transgender athletes, and, as Idaho admits, that "study and its findings were not based specifically on transgender athletes." The legislature also relied on a study by Professor Coleman, who personally urged Governor Little to veto the bill because the legislature misinterpreted her work.<sup>44</sup>

## 3. *Scientific Community's Views at Large*

A broader survey of scientific evidence bolsters the Ninth Circuit's findings: today, scientific research cannot conclusively support the proposition that transwoman athletes have an insurmountable, innate

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41. See *infra* note 44 and accompanying text.

42. *Hecox v. Little*, 79 F.4th 1009, 1052 (9th Cir. 2023).

43. *Id.* at 1031.

44. *Id.* Additionally, Elizabeth A. Sharrow has collected data on at least five state legislatures that relied on a study that has yet to be peer reviewed, positing that natural testosterone advantages cannot be diminished through hormone suppression treatment, to justify their "fairness in women's sports" bills. See Elizabeth A. Sharrow, *Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy*, 10 LAWS 1, 14 (2021). The Ninth Circuit rejected the use of a study like the one reviewed by Sharrow to justify Idaho's Act. *Hecox*, 79 F.4th at 1030–31.

advantage over ciswoman athletes that would justify eliminating them from women's sports. First, almost all major sports bodies require transwoman athletes to undergo testosterone-suppressing treatment before they can compete in the female category.<sup>45</sup> Thus, studies that support the *male* advantage thesis, without analyzing the impacts of testosterone suppression on *transwomen*, are not accurately tailored to assess whether transwoman athletes possess a retained insurmountable advantage.<sup>46</sup> And, while it is true that testosterone-suppressing treatment cannot alter skeletal changes resulting from endogenously produced testosterone,<sup>47</sup> testosterone treatment does decrease circulating testosterone, thus resulting in reduced lean body mass, muscle cross-sectional area, and muscular strength.<sup>48</sup>

Studies also support the methodological flaws noted by the Ninth Circuit. In its comprehensive literature review of transgender athlete participation in elite sport, E·Alliance found that the limited studies available which assess transgender athletes' capabilities are flawed. First, studies available compare transgender women to cisgender men, not to cisgender women, to assess retained advantage.<sup>49</sup> This assumes that transgender women are most comparable to cisgender men, when data shows that neither pre-testosterone nor post-testosterone-suppression transgender women can be compared to cisgender men because of differences in baseline height and weight.<sup>50</sup> Additionally, studies show that testosterone levels, as one biological marker

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45. See *supra* note 30.

46. In order to accurately assess any performance advantage retained by transwomen, E·Alliance advises that studies "must compare the observed reduction in [lean body mass, cross-sectional area], and strength with height-adjusted cis women and not cis men" because the advantage transwomen retain must be compared against their potential competitors who are ciswomen, not cismen. E·ALLIANCE, *TRANSGENDER WOMEN ATHLETES AND ELITE SPORT: A SCIENTIFIC REVIEW* 20 (2021), <https://www.cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-scientificreview-e-final.pdf> [<https://perma.cc/X6CH-DQEH>].

47. See Timothy A. Roberts, Joshua Smalley & Dale Ahrendt, *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organisations and Legislators*, 55 BRIT. J. SPORTS MED. 577, 581 (2021) (noting that, while study observed decrease in strength among transwomen engaged in testosterone suppression, "exposure to testosterone during puberty results in sex differences in height, pelvic architecture and leg bones in the lower limbs that confer an athletic advantage to males after puberty" which "do not respond to changes in testosterone exposure among post-pubertal adults"); Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, INT'L J. ENV'T RSCH. & PUB. HEALTH, July 26, 2022, at 6.

48. See Joanna Harper, Emma O'Donnell, Behzad Sorouri Khorashad, Hilary McDermott & Gemma L. Witcomb, *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin? Systematic Review with a Focus on the Implications for Sport Participation*, 55 BRIT. J. SPORTS MED. 865, 872 (2021) ("Longitudinal and cross-sectional studies identify that hormone therapy in transwomen decreases muscle cross-sectional area, lean body mass, strength and haemoglobin levels, with noted differences in the time course of change.").

49. E·ALLIANCE, *supra* note 46.

50. *Id.* at 20.

among many, are not sufficient to predict sporting success.<sup>51</sup> Yet, studies largely assume testosterone causally links to performance without providing a basis for use of that metric over other factors like lean body mass or strength.<sup>52</sup> Lastly, E·Alliance found that sedentary transwomen appear to be firmly within the normal distribution of lean body mass, cross-sectional area, and muscular strength in cisgender women, suggesting “no residual effect on these traits exist once variations in height, weight, participation rates and social factors are accounted for.”<sup>53</sup> Thus, the scientific evidence does not come close to conclusively showing that transwoman athletes have an innate competitive advantage.<sup>54</sup>

### C. World Aquatics’s 2022 Proposal

World Aquatics proposed a novel method to maintain its traditional binary categories while allowing transgender athletes the opportunity to compete, allowing transwoman athletes to compete in the women’s category<sup>55</sup> as long as they can prove to World Aquatics’s satisfaction that they have not experienced any part of male puberty beyond Tanner Stage two<sup>56</sup> or before age twelve, whichever is later.<sup>57</sup> Yet, those transwoman athletes who do not transition at this early age would “not meet the

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51. *Id.* at 16 (citing Stéphane Bermon et al., *Serum Androgen Levels in Elite Female Athletes*, 99 J. CLINICAL ENDOCRINOLOGY & METABOLISM 4328 (2014)).

52. *Id.* at 22. Sports governing bodies universally employ this assumption in dictating the hormone-regulation requirements transwoman athletes must meet in order to compete. *See supra* note 28 and accompanying text.

53. *Id.* at 24. E·Alliance does not cite any like comparisons between elite transwoman athletes and elite cisgender athletes. So, we are left to infer that these sedentary-focused studies will track onto elite athletes. Additionally, we should not be alarmed that these studies account for height or weight because, in many elite sports, cisgender women compete against other cisgender women who may outweigh them by fifty pounds or be up to a foot taller than them. *See infra* Section II.C.1.

54. If anything, the science shows that transwomen who have received twelve months of hormone therapy lose performance advantages. Roberts et al., *supra* note 47, at 580–81. However, any conclusion on the best policy proposal regarding testosterone suppression to allow transwomen to compete is beyond the scope of this Note. This scientific evidence is relevant to the legal framework of my argument insofar as it shows that a state could not justify separating transwomen from the female category on fairness or safety grounds because the state’s fairness and safety concerns are unsubstantiated. *See infra* Section II.D.

55. If they so choose, transgender women are permitted under World Aquatics’s policy to continue competing in the male category. *See World Aquatics Policy*, *supra* note 13, at 8–9. However, this option does not negate World Aquatics’s policy’s affront to transwoman athletes’ desires to compete in line with their gender identity. Thus, it does not provide a solution to the problem of inclusion.

56. *See id.* at 4 (“Tanner Stage 2 denotes the onset of puberty. The normal time of onset of puberty ranges from 8 to 13 years old in females, and from 9 to 14 years old in males.”).

57. *Id.* at 7. World Aquatics’s 2022 Policy regarding hormone regulation has been codified in its Competition Regulations. *See World Aquatics, Competition Regulations*, at 11–12 (Feb. 21, 2023).

applicable criteria for the . . . women’s category.”<sup>58</sup> These athletes would be relegated to a proposed third “open category . . . in which an athlete who meets the eligibility criteria for that event would be able to compete without regard to their sex, their legal gender, or their gender identity.”<sup>59</sup>

World Aquatics states that its policy will ensure equal opportunity of men and women in sport, competitive fairness and physical safety, and the development of the sport and its popular appeal.<sup>60</sup> In announcing World Aquatics’s plan to implement a third-gender category in competition, World Aquatics President Husain Al-Musallam said, “It was very important that we protected fair competition for our female athletes . . . . But you have heard me say many times there should be no discrimination. Nobody should be excluded from our competitions.”<sup>61</sup> Swim England has followed in World Aquatics’s footsteps and created what it labels as an “open” category “for athletes with a birth sex of male, trans or non-binary . . . and any other competitor not eligible for the female category.”<sup>62</sup> While the policy is now in effect, more details about its implementation have yet to be revealed.

In granting transgender athletes this avenue to compete, both World Aquatics and Swim England fail to recognize that transgender athletes want to compete in *their* gender-identity category. While we still do not know the details of how World Aquatics (or Swim England) plans to implement its “open” category, it effectively closes off any avenue for transgender athletes to compete in line with their gender identity by relegating *all* transwoman athletes to a third category.<sup>63</sup> The 2022 proposal has been criticized by the transgender-athlete community as “the very definition of ‘separate but

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58. *World Aquatics Policy*, *supra* note 13, at 9. It is unclear from World Aquatics’s rules if these women would be able to compete in the female category without transitioning before puberty even if they were able to reduce their testosterone levels to be within the “normal range” for women via hormone treatments.

59. *Id.* World Aquatics has not yet provided detailed information regarding how the open category will be implemented. It describes the unveiling of the category at the Berlin Swimming World Cup 2023 as a “pilot project” with “only one requirement: meeting a specific event qualification time over the last ten years.” World Aquatics Comm’n Dep’t, *Final Days to Apply for the Open Category Competitions at the World Aquatics Swimming World Cup – Berlin 2023*, WORLD AQUATICS (Sept. 27, 2023, 4:40 PM), <https://www.worldaquatics.com/news/3702709/final-days-to-apply-for-the-open-category-competitions-at-the-world-aquatics-swimming-world-cup-berlin-2023> [https://perma.cc/7P9Y-6E4H].

60. *World Aquatics Policy*, *supra* note 13, at 1.

61. Associated Press, *supra* note 16.

62. Neil Shefferd, *Swim England Creates Open Category in Update to Transgender Policy*, INSIDE GAMES (Apr. 3, 2023), <https://www.insidethegames.biz/articles/1135534/swim-england-transgender-policy> [https://perma.cc/2EHL-R453].

63. On its application form, World Aquatics forbids participants in the open category at the Berlin Swimming Open from also competing in either the male or female category of the competition. World Aquatics, *Registration Form World Aquatics Swimming World Cup – Berlin (GER) 2023 Open Category* (2023), <https://resources.fina.org/fina/document/2023/09/21/0e9ba62f-dd33-41a8-abf5-2e79194d698c/2023-09-15-SWC-2023-Berlin-GER-Open-Category-Registration-Form.pdf> [https://perma.cc/D98Z-MYLR].

equal' and an extreme indignity to the women affected."<sup>64</sup> While normative arguments may guide gut instincts as to whether elite transwoman athletes should ever be allowed to compete in the female category, this Note primarily focuses on discounting the legal merits of World Aquatics's proposed "solution" to including transwoman athletes in elite sport.

Our merits discussion begins with state actors.<sup>65</sup> If a state actor relegated transwoman athletes to a third-gender category, the state would fail to give those athletes an equal opportunity to compete in sports as the Constitution requires. Thus, we turn to the likely confrontation between a state's hypothetical third-gender category and the Equal Protection Clause of the Fourteenth Amendment.

## II. STATE ACTORS: EQUAL PROTECTION CHALLENGES

The Equal Protection Clause of the Fourteenth Amendment forbids a state from denying "to any person within its jurisdiction the equal protection of the laws."<sup>66</sup> In this Part, I will argue that current equal protection jurisprudence will allow a successful attack on a state-implemented third-gender category for transwoman athletes by explaining how such a challenge would play out. For the purposes of this Note, I will presume any enacted third-gender category proposal would adopt World Aquatics's condition that transwoman athletes can compete in the women's category so long as they have not experienced male puberty "beyond Tanner Stage 2 or before age 12, whichever is later."<sup>67</sup> Thus, if transwoman athletes do not meet these standards, they may either compete in the male category or in "any open events," but they may not compete in the female category.<sup>68</sup>

Before discussing the merits of any equal protection challenge to a third-gender category, and any rationales a state may use to justify it, it is important to recognize the limits upon the regulatory scope of a third-gender category like World Aquatics's. While elite sports have been left largely privatized and unregulated by state or federal involvement,<sup>69</sup> recently, the issue of transwomen participation has sparked legislation from some states within the interscholastic arena.<sup>70</sup> Even the federal government is beginning to try to govern gender classification in scholastic sport. The U.S. House of

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64. Simon Evans, 'Open Category' Proposal Faces Questions over Fairness and Viability, REUTERS (June 23, 2022, 12:02 PM), <https://www.reuters.com/lifestyle/sports/open-category-proposal-faces-questions-over-fairness-viability-2022-06-23/> [<https://perma.cc/8KZR-5PRC>].

65. See *supra* note 20.

66. U.S. CONST. amend. XIV, § 1, cl. 3.

67. *World Aquatics Policy*, *supra* note 13, at 7; see also *supra* note 57 and accompanying text.

68. *World Aquatics Policy*, *supra* note 13, at 9.

69. The Sports Act federally charts the USOPC to have exclusive jurisdiction over matters relating to the Olympic Movement. See 36 U.S.C. §§ 220502, 220503(3).

70. See *supra* note 18 and accompanying text.

Representatives passed a bill that would restrict the ability of transgender athletes to compete according to their gender identity.<sup>71</sup> The U.S. Department of Education has proposed a change to its Title IX regulations on transgender students' eligibility to compete in their preferred-gender category.<sup>72</sup> Once published, the new regulation would make complete bans on transgender students competing in scholastic sports a violation of Title IX while also allowing states more leeway to prevent transwoman athletes from competing in their preferred gender category at the more elite levels, like in intercollegiate sports.<sup>73</sup>

States remain the dominant governmental actors attempting to limit transwomen's participation in women's sports. States regulating transgender athlete participation at the scholastic level have largely done so under the guise of "fairness" for women's sports competition.<sup>74</sup> The state interest in regulating state-sponsored public-school activity is much stronger than any state interest in regulating mostly privately run elite sporting activities. It will be helpful to compare arguments made in cases challenging state regulation of transgender individuals in the scholastic context. However, it is crucial to recognize that under intermediate scrutiny, if the state can allege an important-enough interest, the state must provide enough evidence to justify regulating in support of that interest within *elite sports* specifically.<sup>75</sup> Thus, this Part will explore the contours of equal protection jurisprudence as it applies to gender or sex regulations before delving into the merits of challenging a state-implemented third-gender category.

### *A. Principles of Equal Protection Jurisprudence*

Although the Equal Protection Clause was adopted to eradicate racial discrimination,<sup>76</sup> it has been successfully used by litigants to challenge other discriminatory government classifications. Federal courts adjudicate equal protection challenges under three tiers of scrutiny—strict scrutiny, intermediate scrutiny, or rational basis review.<sup>77</sup> Which level of scrutiny the

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71. See H.R. 734, 118th Cong. (2023). The bill has yet to pass the Senate.

72. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (Apr. 13, 2023) (to be codified at 34 C.F.R. pt. 106).

73. *Id.*

74. For example, Idaho's currently enjoined transgender participation ban is entitled the "Fairness in Women's Sports Act." IDAHO CODE § 33-6203 (2020).

75. See *infra* note 169. Because any regulation would be in the context of elite sport, Title IX does not apply. See 20 U.S.C. § 1681(a) ("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 . . . ." (emphasis added)).

76. See *The Slaughter-House Cases*, 83 U.S. 36, 67–69 (1872).

77. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 645 (20th ed. 2019).

Court applies to the challenge depends on the suspect nature of the classification.<sup>78</sup> For example, because classifications based on race “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy,” they are reviewed under strict scrutiny.<sup>79</sup> Most laws do not pass this demanding standard.<sup>80</sup> Conversely, classifications receive rational basis review when courts do not believe fundamental rights or suspect classifications are at issue.<sup>81</sup> In this most lenient standard, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>82</sup> This standard provides the government substantial leeway in regulating based on non-suspect classifications.<sup>83</sup>

The Court has recognized that, between these two extremes, certain quasi-suspect classes are subjected to intermediate (or heightened) scrutiny. “Sex is only *quasi*-suspect because . . . the Supreme Court has recognized ‘inherent differences’ between the biological sexes that might provide appropriate justification for distinctions . . .”<sup>84</sup> Any quasi-suspect classification “must serve important governmental objectives and must be substantially related to achievement of those objectives” to survive a constitutional attack.<sup>85</sup>

### *B. Transgender-Status Discrimination: What Level of Scrutiny Applies?*

While the tiers of scrutiny framework is well established, the Court has not delineated clear guidelines on how it determines which classification receives which level of scrutiny.<sup>86</sup> Lower courts are left to sift through “a mixture of criteria to determine suspectness, creating an analytical muddle,

78. Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 541–42 (2016).

79. See Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 137 n.9 (2011) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)); *id.* at 137 (discussing requirements for classification to receive strict scrutiny).

80. Under strict scrutiny, “the government must demonstrate a compelling purpose for the distinction drawn and prove that such a classification is necessary to achieve that purpose.” *Id.*

81. See Barry et al., *supra* note 78, at 542.

82. *Cleburne*, 473 U.S. at 440.

83. For example, in *FCC v. Beach Communications, Inc.*, the Supreme Court applied rational basis review to evaluate an equal protection challenge to franchising requirements under an FCC order. See 508 U.S. 307 (1993).

84. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–08 (4th Cir. 2020) (emphasis in original) (footnote omitted) (citation omitted) (quoting *United States v. Virginia*, 518 U.S. 515, 534 (1996)). The Supreme Court has used the terms “gender” and “sex” interchangeably in applying intermediate scrutiny. See generally *Virginia*, 518 U.S. at 531–58.

85. *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *Virginia*, 518 U.S. at 531 (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”).

86. Strauss, *supra* note 79, at 138.

and the boundary line between suspect classes and non-suspect classes is drawn in a haphazard way.”<sup>87</sup> Thus, where the Supreme Court has not affirmatively applied a level of scrutiny to a specific classification, lower courts are left to decide how to adjudicate constitutional challenges.

Transgender classifications currently stand in this limbo. While the Supreme Court held in *Bostock v. Clayton County* that under Title VII transgender discrimination constitutes discrimination on the basis of sex, the Court has not addressed a *constitutional* challenge to transgender discrimination.<sup>88</sup> In fact, the Supreme Court has failed to recognize any new suspect classifications in recent years, even when it has been confronted with the opportunity to do so for sexual orientation.<sup>89</sup> With the Supreme Court implicitly disfavoring the creation of new suspect classifications, the circuit courts have had to create other avenues to apply heightened scrutiny to gender-based classifications. The circuits that have adjudicated equal protection challenges to transgender classifications have justified applying intermediate scrutiny<sup>90</sup> to transgender classifications either by finding that transgender classifications are quasi-suspect<sup>91</sup> or by analogizing classifications based on transgender status to classifications based on gender or sex.<sup>92</sup> The remainder of this Part will survey those circuit court decisions. It will show that, under either rationale, a state regulation creating a third-gender category in elite sports should be reviewed under intermediate scrutiny.

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87. Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIA. L. REV. 107, 141 (1990).

88. See 140 S. Ct. 1731, 1741 (2020). Title VII is not coterminous with the Equal Protection Clause. See Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008 CATO SUP. CT. REV. 53, 53. However, the Court’s decision in *Bostock*, compounded with the more specific decisions of circuit courts to review transgender-status discrimination like gender discrimination, supports the inference that a future transgender-status challenge reviewed by the Supreme Court would be reviewed under intermediate scrutiny.

89. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632–33 (1996) (declining to treat homosexual individuals as a suspect class because the law at issue so clearly discriminates against a single group as to have no relation to the stated reasons for regulating “that the amendment seems inexplicable by anything but animus toward the class it affects”); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding, without applying traditional tiers of scrutiny framework, “that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character”).

90. Existing Supreme Court precedent does not support the potential application of strict scrutiny to transgender classifications. See *Karnoski v. Trump*, 926 F.3d 1180, 1199–200 (9th Cir. 2019) (holding that Supreme Court precedent requires “something more than rational basis review” to scrutinize transgender classifications (citing *United States v. Virginia*, 518 U.S. 515, 532–33 (1996))). Thus, the only debate concerns whether rational basis or intermediate scrutiny will be applied.

91. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

92. See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Karnoski*, 926 F.3d 1180; *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022).

### 1. *Transgender Classifications as a Quasi-Suspect Class*

In *United States v. Virginia (VMI Case)*, Justice Ginsburg explained that sex classifications are only “quasi-suspect” because of inherent physiological differences between males and females.<sup>93</sup> The Fourth Circuit extended that principle to transgender classifications in *Grimm v. Gloucester County School Board*,<sup>94</sup> where it applied a four-factor suspect class test<sup>95</sup> considering: 1) whether the class has been historically subject to discrimination; 2) whether the class has a defining characteristic that impacts its ability to contribute to society; 3) whether the class can be defined as a discrete group based on immutable characteristics; and 4) whether the class is a minority lacking political power.<sup>96</sup> After analyzing each factor, the Fourth Circuit found that transgender individuals constitute a quasi-suspect class.<sup>97</sup> If the Supreme Court similarly applied this four-factor test, any classification based on transgender status would receive intermediate scrutiny without an inquiry into the substance of the regulation.

Conversely, the Sixth Circuit declined to extend quasi-suspect-class status to transgender individuals in *L.W. v. Skrametti*.<sup>98</sup> In *Skrametti*, the Sixth Circuit stayed the district court’s order preliminarily enjoining enforcement of Tennessee’s law that blocks gender-affirming care for transgender minors. In rejecting the plaintiff’s argument that “the act amounts to transgender-based discrimination, violating the rights of a quasi-suspect class,” the Sixth Circuit recognized that quasi-suspect status has not yet been granted to transgender classifications by either the Supreme Court or

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93. 518 U.S. 515, 533–34 (1996).

94. 972 F.3d at 611. The Fourth Circuit also would have subjected the policy at issue to intermediate scrutiny because Grimm was subjected to sex discrimination when he failed to conform to the sex stereotype promulgated by his school’s bathroom policy. *Id.* at 608. For a more detailed analysis as to why transgender classifications are quasi-suspect, see Barry et al., *supra* note 78, at 551–67.

95. These factors are derived from the notorious *Carolene Products* footnote four. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for correspondingly more searching judicial inquiry.”); cf. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (questioning the utility of the *Carolene Products*’s factors). This test is not universally adopted. As mentioned above, courts are inconsistent in their methodology when determining “suspectness.” Still, courts frequently use some combination of these factors in determining whether a class is suspect or not. See Strauss, *supra* note 79, at 146.

96. *Grimm*, 972 F.3d at 611.

97. First, based on evidence provided by amici, the Fourth Circuit found that “[d]iscrimination against transgender people takes many forms.” *Id.* Second, “[b]eing transgender bears no such relation” to the ability to contribute to society. *Id.* at 612. Third, “being transgender is not a choice.” *Id.* And lastly, transgender people make up less than a tenth of a percent of the U.S. adult population and are underrepresented in every branch of government. *Id.* at 613.

98. 73 F.4th 408 (6th Cir. 2023).

the Sixth Circuit.<sup>99</sup> Looking at the Supreme Court's history of (not) granting new suspect classifications, the Sixth Circuit held it was unlikely that the Court would do so for transgender classifications because the Court had failed to recognize any new constitutionally protected suspect class in over forty years. The Sixth Circuit found that the Supreme Court's prudence would be well exercised in this context because "[g]ender identity and gender dysphoria pose vexing line-drawing dilemmas for legislatures."<sup>100</sup> Ultimately, the Sixth Circuit analyzed the gender-affirming care ban under rational basis review, found the government had a rational basis for the ban, and stayed the district court's injunction.<sup>101</sup>

Over the last year, the prevalence of state-enacted gender-affirming care bans for transgender minors vaulted the topic of transgender equal protection claims to the forefront of legal and political discussions. Through its analysis, the Sixth Circuit created a circuit split with the Fourth on whether transgender status should be recognized as constitutionally protected, requiring heightened scrutiny. Only the Supreme Court can remedy this split. However, other avenues, as discussed by other circuits, still exist through which regulations on the basis of transgender status can receive heightened scrutiny review. A discussion of those bases continues below.

## 2. *Transgender Status as a Classification on the Basis of Sex*

Even if transgender classifications are not deemed "quasi-suspect," the Supreme Court would apply intermediate scrutiny if a transgender classification regulated based on sex.<sup>102</sup> In doing so, the Court may rely on one of the two non-exclusive rationales used by the lower courts to determine that transgender classifications regulate based on sex. First, if transgender classifications facially discriminate on the basis of sex, they will receive intermediate scrutiny review. Second, the lower courts have applied intermediate scrutiny to transgender classifications because they

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99. *Id.* at 419. Instead of applying heightened scrutiny based on any of the reasons discussed below, the Sixth Circuit held that "[u]ntil that changes, rational basis review applies to transgender-based classifications." *Id.* The Sixth Circuit distinguishes *Skrametti* from its own precedent, *Smith v. City of Salem*, by asserting that *Smith* "was an employment case, it involved an adult, and it concerned 'sex stereotyping,' not whether someone's body is male or female." *Id.* at 420. While the Sixth Circuit attempts to limit *Smith* to its facts, there is a cognizable argument that rejecting gender-affirming care is inherently sex stereotyping because it requires individuals to maintain the stereotypical biological traits of the sex they were born with. It also inherently preferences gender enhancing care over procedures that may limit feminine or masculine traits. As seen in the analysis below, the Sixth Circuit should not have dismissed binding precedent so quickly. See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

100. *Skrametti*, 73 F.4th at 420.

101. *Id.* at 420–22.

102. See *supra* notes 84–85 and accompanying text.

constitute gender-based stereotyping under the Supreme Court's *Price Waterhouse v. Hopkins* precedent.<sup>103</sup> If a court determines that transgender classifications are facially discriminatory against transgender individuals or inherently gender stereotyping (or both), intermediate scrutiny should apply.<sup>104</sup>

*a. Facially Discriminatory Policies*

Where policies facially regulate transgender status, circuit courts have applied heightened scrutiny. In *Karnoski v. Trump*, the Ninth Circuit held that a policy barring transgender individuals from serving in the military due to “gender dysphoria” facially regulates transgender status and must be subject to an intermediate standard of review.<sup>105</sup> Assuming that discrimination against transgender status equated to discrimination on the basis of sex, the Ninth Circuit ruled that the *VMI Case*’s intermediate scrutiny test applied to evaluate the constitutional validity of the military service ban.<sup>106</sup> Most recently in *Brandt v. Rutledge*, the Eighth Circuit held that a policy prohibiting medical professionals from providing gender-affirming care to minors discriminates on the basis of sex “[b]ecause the minor’s sex at birth determines whether or not the minor can receive certain types of medical care under the law.”<sup>107</sup> Thus, heightened scrutiny must be applied.<sup>108</sup>

*b. Gender Stereotyping*

Three circuits have applied intermediate scrutiny to transgender classifications because they constitute gender stereotyping. The Sixth Circuit was the first to apply gender-stereotyping reasoning to transgender

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103. See 490 U.S. at 251 (holding gender stereotyping in employment decisions is sex-based discrimination under Title VII); see also *Craig v. Boren*, 429 U.S. 190, 213 n.5 (1976) (Stevens, J., concurring).

104. Of course, there are earlier cases where courts declared that transgender discrimination is not discrimination based on sex. However, as explained by Professors Barry, Farrell, Levi, and Vanguri, those cases are from statutory, rather than constitutional, challenges. See Barry et al., *supra* note 78, at 573 n.430 (citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982)). And those decisions have since been overruled by the Supreme Court. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

105. *Karnoski v. Trump*, 926 F.3d 1180, 1199–201 (9th Cir. 2019). Recently, the Ninth Circuit reaffirmed that discrimination on the basis of transgender status is subject to heightened scrutiny. See *Hecox v. Little*, 79 F.4th 1009, 1039 (9th Cir. 2023).

106. *Karnoski*, 926 U.S. at 1199–201. The test outlined in the *VMI Case* applies to classifications based on gender. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996). “Gender” is used coterminously with “sex” by the Court to refer to classifications based on sex. See *supra* note 84.

107. *Brandt v. Rutledge*, 47 F.4th 661, 669 (8th Cir. 2022). Arkansas’s law, Act 626, was permanently enjoined by the Eastern District of Arkansas. See *Brandt v. Rutledge*, No. 4:21-CV-00450, 2023 WL 4073727 (E.D. Ark. June 20, 2023).

108. *Brandt*, 47 F.4th at 670.

classifications. In *Smith v. City of Salem*, it held that employment discrimination based on gender non-conformity assumes certain traits are innately associated with one gender and not the other, constituting discrimination based on gender stereotypes and requiring review under heightened scrutiny.<sup>109</sup> Both the Eleventh and Seventh Circuits relied on the Sixth Circuit's reasoning in *Smith* and the Supreme Court's decision in *Price Waterhouse* to justify applying heightened scrutiny to transgender classifications as discrimination based on gender stereotyping.<sup>110</sup> In *Glenn v. Brumby*, the Eleventh Circuit held that, because transgender individuals inherently do not conform to the stereotypes of their sex assigned at birth, discrimination based on gender non-conformity is discrimination based on gender-based behavioral norms.<sup>111</sup> The Seventh Circuit followed suit in *Whitaker v. Kenosha Unified School District*,<sup>112</sup> affirming a preliminary injunction allowing the plaintiff, a transgender male, to use the school bathroom correlating to his gender identity because "the School District's policy cannot be stated without referencing sex. . . . This policy is inherently based upon a sex-classification and heightened review applies."<sup>113</sup>

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These decisions neatly justify why a constitutional challenge to a state policy implementing a third-gender category in elite sports would require intermediate scrutiny. A policy like World Aquatics's inherently regulates on the basis of sex because the implementing state would have to dictate which characteristics count as "female" for a female competitor and "male" for a male competitor. Thus, distinctions are made based on an athlete's sex at birth. Additionally, this delineation promotes a state-sponsored ideal of what is required for someone to be "female" or "male" to compete in those respective categories, thereby associating certain innate characteristics with one gender but not the other. This is gender-stereotyping, which requires heightened review.

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109. 378 F.3d 566, 576 (6th Cir. 2004) ("Individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment.").

110. For a more detailed discussion on how transgender classifications are grounded in sex stereotypes, see Barry et al., *supra* note 78, at 568–69.

111. 663 F.3d 1312, 1316–17, 1319 (11th Cir. 2011). While the transgender litigant in *Adams ex rel. Kasper v. School Board of St. Johns County* received a less-favorable result than the litigant in *Glenn*, the equal protection claim was still reviewed under heightened scrutiny. *See* 57 F.4th 791, 801 (11th Cir. 2022).

112. 858 F.3d 1034, 1048 (7th Cir. 2017) ("By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.").

113. *Id.* at 1051. Any argument that the stereotyping is done to accommodate bona fide salient differences would not preclude an application of heightened scrutiny. The government would make that argument to justify the regulation under heightened scrutiny. *See infra* Section II.C.

Regardless of which rationale prevails, it seems likely that the Supreme Court will follow the consensus of the circuits and apply intermediate scrutiny to transgender classifications.<sup>114</sup> Thus, a third-gender category challenged under the Equal Protection Clause would be reviewed under this framework. The following Section details the next step of the equal protection analysis: applying intermediate scrutiny.

### *C. Intermediate Scrutiny Applied*

The remainder of the equal protection inquiry is inherently fact specific. Under intermediate scrutiny, the government must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievements of those objectives.’”<sup>115</sup> The government must provide an “exceedingly persuasive” justification which “must be genuine, not hypothesized or invented *post hoc* in response to litigation.”<sup>116</sup> Thus, a court must first consider the veracity of the proffered governmental interest before assessing whether the statutory framework is substantially related to that interest.<sup>117</sup>

This Section will evaluate the salience of two important interests that World Aquatics offered to justify its third-gender category: first, protecting the safety of cisgender female athletes (the “safety rationale”); and second, protecting the integrity of women’s sports (the “fairness rationale”). I rely on the interests put forth by World Aquatics because no state has adopted a third-gender category mandate as of this writing. These rationales mirror those used by states to justify regulating scholastic sports’ gender classifications.<sup>118</sup>

To survive intermediate scrutiny, a state must be able to establish a relevant substantial interest in order to move to the second step of the inquiry: whether the means of regulating sufficiently support the stated

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114. See *supra* notes 90–92 and accompanying text.

115. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)); see also *Craig v. Boren*, 429 U.S. 190, 197 (1976); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

116. *Virginia*, 518 U.S. at 533.

117. There are limitations on an equal protection challenge. When bringing a challenge, a litigant can allege the statute is facially unconstitutional or unconstitutional as applied. A facial attack, which is strongly disfavored by the law, is only successful where any application of the statute would be unconstitutional. See Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657–58 (2010). A litigant alleges an as-applied challenge when a statute, even if generally constitutional, is unconstitutional when applied to the litigant because of the litigant’s circumstances. *Id.* at 657. The outcome of a third-gender-category challenge will likely depend upon whether a litigant brings a facial or as-applied challenge because sports-specific characteristics may make certain government interests more salient in one sport than others. See *infra* Section II.C.1.

118. See *supra* note 18.

important interest.<sup>119</sup> If the state cannot establish an important interest worth regulating, then the inquiry ends, and the regulation is deemed unconstitutional under the Equal Protection Clause. Thus, something must serve as a relevant state interest for the state to even have the opportunity to justify the regulation itself in court. Here, I will endeavor to prove that two possible state interests—the safety rationale and fairness rationale—are insufficient state interests.<sup>120</sup> If I am right, then a court’s inquiry would end there. However, for the sake of completeness, the following Section will assume that a court would find one of these interests compelling enough in order for us to explore whether a third-gender category is an adequate means to achieve that interest (I will argue it is not). But first, we must scrutinize a state’s purported safety rationale or fairness rationale.

### *1. Safety Rationale*

Any state argument that relegating transwoman athletes to a third-gender category protects the safety of cisgender female athletes is grounded in the assumption that transgender women have an innate physical advantage that will endanger cisgender women.<sup>121</sup> While scientific studies do show a marginal retention in strength among transwoman athletes who have undergone hormone treatments, such studies do not show any additional safety risk that these retained strength benefits may impose upon cisgender female athletes above and beyond those they already face in contact-sports competition.<sup>122</sup> When considering the safety concerns *between* individual women competitors within the female sports category, they are far less evident than the media may make them seem.

First, any safety rationale for a third-gender category in *non-contact* sports is easily rejected because there is no risk of contact between athletes. Swimmers and track athletes compete in separate lanes;<sup>123</sup> gymnasts compete individually on the competition floor. Even if we consider open-road non-contact sports like distance running or cycling, there is no

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119. *Hecox v. Little*, 79 F.4th 1009, 1027–28 (9th Cir. 2023).

120. The Ninth Circuit has held that the interest of promoting sex equality (i.e., the fairness rationale) is an important state interest. *See Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982). Thus, in *Hecox v. Little*, the Ninth Circuit’s analysis began with scrutinizing the “means” used to regulate transwoman athletes’ participation in Idaho sports because the first step of the inquiry was predetermined by Ninth Circuit precedent. 79 F.4th at 1028–35.

121. It is undeniable that performance advantages of male-at-birth athletes over cisgender female athletes are well documented. *See infra* Section II.C.2.a. However, our inquiry must center on whether any advantages transwoman athletes may have over cisgender female athletes create a heightened risk to the safety of cisgender female athletes when they compete against transwoman athletes.

122. *See supra* notes 47–48 and accompanying text.

123. Additionally, warm up areas are already mixed gender where both male and female events are held at the same venue, so there can be no added safety risk from allowing transwoman athletes to compete, regardless of in which category they do so.

heightened risk of a collision injury simply because a cisgender woman is competing next to a transgender woman.

Safety concerns may seem to be more rational if a third-gender policy is applied to contact sports. But that is not true upon a closer look. Female athletes already compete against other female athletes that are bigger, taller, or stronger than they are simply because everyone is unique. We celebrate athletes who have innate biological advantages in sport, even if that can make them more dangerous in contact sports. As the director of the Center for Genetic Medicine Research at Children's National Hospital in Washington, D.C. has remarked, "Even if transgender athletes retain some competitive advantages, it does not necessarily mean that the advantages are unfair, because all top athletes possess some edge over their peers."<sup>124</sup> So, to meet their burden of showing an important interest, proponents of a third-gender category would need to show some heightened, unreasonable risk that necessitates state intervention in regulating within the "female" gender category in elite competition.<sup>125</sup>

That "heightened risk" cannot be shown via examples of sports injuries to cisgender women caused by transgender women competitors. In fact, few examples of these injuries during competition can be found.<sup>126</sup> An example cited by many advocates who wish to keep transgender women out of female sports is the 2014 knockout of Tamikka Brents by transgender MMA fighter Fallon Fox. Fox fractured Brents's orbital bone, forcing the fight to a halt in just over two minutes.<sup>127</sup> An example like this seems to make the safety threat to cisgender female athletes competing with transgender women more tangible.<sup>128</sup> Yet, while it is undeniable that the Fox/Brents

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124. Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women's Sports? There Are Two Almost Irreconcilable Positions*, N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html> [https://perma.cc/7T5B-SN7X].

125. If studies were available to show that sports injuries increase based on contact between cisgender female athletes and transwoman athletes, this argument would be stronger. However, the lack of a proven danger created by biological advantage retained by transwoman athletes weakens any causal link states may try to argue exists between relegating transwoman athletes to a third-gender category and promoting the safety of cisgender female athletes. *See supra* notes 47–48 and accompanying text.

126. Chris Mosier, *As Elite Sports Think Again About Trans Participation, Our Only Demand Is for Fairness*, GUARDIAN (June 29, 2022, 8:10 AM), <https://www.theguardian.com/commentisfree/2022/jun/29/sports-trans-participation-transgender-women-swimming> [https://perma.cc/U2N4-MQLM] (discussing fear that new policies adopted will not be based on science or facts but instead drawn from overexaggerated media narratives).

127. Bhavesh Purohit, *When Transgender Fighter Fallon Fox Broke Her Opponent's Skull in MMA Fight*, SPORTSKEEDA (Sept. 30, 2021, 9:15 AM), <https://www.sportskeeda.com/mma/news-when-transgender-fighter-fallon-fox-broke-opponent-s-skull-mma-fight> [https://perma.cc/9J82-SCNE].

128. *See* Peyton MacKenzie, *Transgender Women Should Not Compete Against Biological Women*, LIBERTY CHAMPION (Jan. 24, 2022), <https://www.liberty.edu/champion/2022/01/transgender-women-should-not-compete-against-biological-women/> [https://perma.cc/Q7SC-K2DD] (highlighting "deeper problem" of safety concerns raised by allowing transgender athletes to compete with biological female athletes); Frank Mir & Terry Schilling, *Not a Fair Fight: Our Athlete Daughters Shouldn't Have*

fight shows the danger MMA athletes face when they step into the ring, we have no evidence that Brents could not have obtained that same injury in a fight against a cisgender woman.<sup>129</sup> And more recent instances of injuries like the one sustained by Brents in her fight with Fox are difficult, if not impossible, to find.

But still, advocates against transwomen's participation in women's sports will try to combine stories of sports injuries with cherry-picked studies showing that males do have a post-puberty biological advantage over females<sup>130</sup> to argue that allowing transwomen to compete with cisgender women will increase the likelihood of injury they already face in sport. In reality, these arguments can be easily discredited. Any concerns about the safety of the *sport itself* would exist regardless of whether a cisgender woman faced a transwoman athlete or a cisgender athlete. Again, cisgender women are already expected to compete on teams with cisgender women who may have biological advantages over them, and there is no clear evidence that *all* transwoman athletes would have such innate skeletal advantages to make the sport as it exists more dangerous. And even then, testosterone treatments required by most governing bodies exist to help reduce lean body mass, muscle cross-sectional area, and muscular strength.<sup>131</sup> With such reductions, a transwoman competitor poses no more risk of injury to any of her fellow competitors than a ciswoman competitor if there were a collision on the field of play. While testosterone suppression may not *completely* eliminate the innate biological advantages transwoman athletes have, physical advantages are suppressed to a degree that makes competition safer for all involved.<sup>132</sup>

The lack of scientific evidence justifying proposed safety concerns, the lack of examples of injury, and the decreased advantage sustained following gender-affirming hormone treatment each undermine the safety rationale as an important interest. Thus, the safety rationale cannot justify a state-

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to *Compete with Transgender Women*, USA TODAY (Feb. 26, 2021, 2:06 PM), <https://www.usatoday.com/story/opinion/2021/02/25/transgender-women-unfair-playing-field-for-girls-column/6813749002> [<https://perma.cc/7BK7-MAMH>] (using incident of injury in a 2013 boxing fight between a cisgender woman and transgender woman to exemplify fears of allowing their daughters to compete against transwoman athletes who transitioned post-puberty).

129. Orbital fractures are a common MMA injury. In their empirical study, Michael J. Flitsos and colleagues found that approximately seventy percent of MMA injuries were to the eye area, and approximately fourteen percent of those were orbital bone fractures. See Michael J. Flitsos et al., *Prevalence, Patterns, and Characteristics of Eye Injuries in Professional Mixed Martial Arts*, 15 CLINICAL OPHTHALMOLOGY 2759, 2762 (2021).

130. See *infra* note 143 and accompanying text.

131. See *supra* note 48.

132. See *supra* note 30 and accompanying text.

implemented third-gender category in elite sport.<sup>133</sup> If a state third-gender category is to survive, it needs a different justification. So, we turn to a second purported rationale for a third-gender category: preserving the fairness of women's sports.

## 2. *Fairness Rationale*

Many states regulate transgender participation in *public-school* sports to “preserve” the fairness of female sports. States may have more regulatory power in the scholastic space than they do in elite sports, thus diminishing the weight of a fairness rationale that sufficed for public school regulation when applied to elite sports.<sup>134</sup> Thus, to discern why a state may be able to regulate the intricacies of the female category in *elite* sports, it is worth first exploring the root of sports’ binary gender classifications as it relates to fairness. This will allow us to understand why states attempt to regulate sport-participatory classifications to preserve fairness in the first place. From there, this Section will discuss impacts that state regulations have on transgender athletes as citizens meant to be protected by the laws of their state. It is contradictory to justify a policy that is intrinsically unfair to transgender women by removing them from the female sports category only to maintain fairness for cisgender women. Lastly, this Section will use a recent case in the Connecticut public-school system to show additional reasons a “fairness rationale” may, but ultimately should not, be sustained under the first prong of intermediate scrutiny.

### a. *The Origins of the Sports Gender Binary*

The gender binary in sports originated from the exclusion of women from male athletics.<sup>135</sup> “The ‘maleness’ of sport[s] derived from a gender ideology which labeled aggression, physicality, competitive spirit, and athletic skill as masculine attributes necessary for achieving true manliness.”<sup>136</sup> Thus, elite sports as a domain was reserved for men through the early decades of the twentieth century, so the invention of “[t]he

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133. Even if safety qualified as an important government objective, “it does not bear a substantial relationship to the practice of excluding all and only girls, including those who would face no more safety risk than the average boy.” Erin Buzuvis, *Law, Policy, and the Participation of Transgender Athletes in the United States*, 24 SPORT MGMT. REV. 439, 448 (2021).

134. See *supra* note 18.

135. For example, Baron Pierre de Coubertin, the founder of the IOC, refused to add women to the Olympics in 1912 because “[a] Female Olympics would be inconvenient, uninteresting, un-aesthetic and not correct. The true Olympic hero is . . . the individual male adult.” Sylvain Ferez, *From Women's Exclusion to Gender Institution: A Brief History of the Sexual Categorisation Process Within Sport*, 29 INT'L J. HIST. SPORT 272, 273 (2012).

136. Susan K. Cahn, *From the “Muscle Moll” to the “Butch” Ballplayer: Mannishness, Lesbianism, and Homophobia in U.S. Women's Sport*, 19 FEMINIST STUD. 343, 344 (1993).

women's sports category [was] the result of the historical exclusion of women from competitive sport."<sup>137</sup>

As discussed previously, the exclusion of women from elite sports is grounded in the assumption that "all males (born or 'made') have a physical advantage over all females (born or 'made')." <sup>138</sup> This "advantage thesis" provides the basis for using the sex dichotomy in sports to preserve opportunities for elite female athletes to achieve financial gain and fame, but its inception is based on little other than historical exclusion <sup>139</sup> and generalized biological differences between male and female athletes. <sup>140</sup> Because the gender dichotomy was not originally about science, it is not well justified at this point. Therefore, a state would need to develop concrete scientific proof of an insurmountable transwoman-athlete advantage to justify further regulation within what was, at its inception, a binary founded upon historically assumed distinctions and discrimination.

Yet, as discussed above, scientific proof cannot concretely show that transwoman athletes have an insurmountable advantage at the elite level. <sup>141</sup> Of course, trends in a wide variety of sports clearly show that men are more athletically adept than women. For example, in 2017 alone, over 15,000 men and boys in both the 100 meters and 400 meters races outperformed each event's reigning women's Olympic, World, and U.S. Champion's best time. <sup>142</sup> It is true that differences in testosterone levels between men and women produce innate biological advantages for males. <sup>143</sup> However, we are not comparing men and women. As will be discussed below, transgender women do not, and will not, have the same physical advantages as male

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137. E·ALLIANCE, *supra* note 46, at 34.

138. Sullivan, *supra* note 34, at 402.

139. Through the nineteenth century, women's athletic endeavors were limited and criticized due to the belief that each human had a fixed amount of energy, and it would be hazardous for women to engage in physically arduous activities, especially while menstruating. See Richard C. Bell, *A History of Women in Sport Prior to Title IX*, SPORT J. (Mar. 14, 2008), <https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/> [<https://perma.cc/Y9S3-VQPR>]. When women gained access to sport, it was primarily within their own category. *Id.* Since then, the rationale for separate gender categories in sports has rested on fairness grounds, regardless of whether this categorization is the best mechanism for instituting "fair play." Sullivan, *supra* note 34, at 402.

140. "On average, men perform better than women in sport; however, no empirical research has identified the specific reason(s) why." Bethany Alice Jones, Jon Arcelus, Walter Pierre Bouman & Emma Haycraft, *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 SPORTS MED. 701, 713 (2017).

141. See *supra* Section I.B.

142. See Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE L. CTR. FOR SPORTS L. & POL'Y (2022), <https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/> [<https://perma.cc/L63U-AVZ6>].

143. "[A]ll developing embryos become feminized unless masculinizing influences [androgens] come into play at key times during gestation.' . . . Testicular production of testosterone is primarily responsible for the difference in male and female testosterone levels, both during development and throughout the individual's lifetime." Coleman, *supra* note 27, at 71–72 (footnotes omitted).

athletes once they undergo hormone treatment.<sup>144</sup> Additionally, while categorizing athletics by gender does create a greater opportunity for women to be competitive, we have no evidence that state regulation of transwoman athletes' participation is necessary to preserve that opportunity.<sup>145</sup> Even if fairness concerns have historically justified the gender binary in elite sports, there is little evidence to suggest that the *state* has an interest in further regulating competition categories, especially in the context of elite sport. And even if the historical binary justifies further state regulation within categories at the surface level, investigating the impacts of such regulation on transwoman athletes diminishes the state interest in fairness.

*b. Impact of Third-Gender Categories on Transwoman Athletes*

If a state determines that certain individuals who identify as women cannot compete as women, the state is depriving those individuals of fair treatment under the law.<sup>146</sup> By trying to promote the fairness of women's sports, a state is forced to deprive transgender women of fair competitive opportunities. Additionally, this type of regulation in effect subdivides women into those deemed female enough and those not: a state justifies regulating which women compete in the "female" category and which compete in the "third-gender" category to "protect the integrity of women's sports" by defining who gets to be a true female and who is "other."<sup>147</sup> Yet, medically, transgender women treated via testosterone suppression for at least a year experience decreases in muscle mass and hemoglobin levels, the latter of which typically falls within the normal biological-female range.<sup>148</sup> Additionally, it is well established within the medical community that transgender women are women.<sup>149</sup> By relegating transgender athletes to a

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144. See *infra* Section II.D.1.

145. "There is no firm basis available in evidence to indicate that trans women have a consistent and measurable overall performance benefit after 12 months of testosterone suppression." E·ALLIANCE, *supra* note 46, at 9.

146. See *supra* Section II.A.

147. It is true that sports have typically been categorized using language referencing biological sex. However, "[i]n sport, the terms 'sex'/'gender', 'male'/'man' and 'female'/'woman' are often conflated by commentators, some sport academics and sport organisations." Irena Martinková, Taryn Knox, Lynley Anderson & Jim Parry, *Sex and Gender in Sport Categorization: Aiming for Terminological Clarity*, 49 J. PHIL. SPORT 134, 135 (2022). This includes World Aquatics, who refers to categories in terms of gender but refers to athletes in terms of sex. *Id.* (referring to World Aquatics by its previous name, FINA). Thus, we should be careful to avoid overexaggerating the importance of sports categories using the term "female" over "woman" when discussing who should be allowed to compete in the traditional binary categories.

148. See Harper et al., *supra* note 48, at 870–71.

149. Every person has a gender identity, which cannot be altered voluntarily or ascertained immediately after birth. COLT MEIER & JULIE HARRIS, AM. PSYCH. ASS'N, FACT SHEET: GENDER

third-gender category, a state would be telling them that they are not “woman” enough to compete. This type of justification “undermines their autonomy to identify as members of the gender with which they desire to participate.”<sup>150</sup> When a state’s purported rationale further marginalizes an already historically discriminated-against class of individuals, such a rationale can hardly ever be an important government interest.<sup>151</sup> This is especially true in sport, where history shows no clear rationale for sex-categorization other than that it is what has always been done since women began competing in elite sport.

Again, this Note does not argue for or against the removal of the gender binary from sports. What we are focusing on is a drop in a much larger bucket; very few transwoman athletes compete in elite sports, but *how* they get to compete is incredibly important to their autonomy as women. And, as a historically marginalized group, a state should view preserving fairness for transwoman athletes as just as important as preserving fairness for ciswoman athletes. This is not about reinventing women’s sports. I only suggest that, if a state wants to regulate to preserve fairness in women’s sports, they must consider the fairness interests of *all* women. Yet, the gender binary in sports was founded upon outdated notions of female incapacity.<sup>152</sup> Should a state truly be able to regulate sports categorization further than the original binary simply because of knowledge that differences in athletic performance between *male* (not transgender) and female athletes still exist?<sup>153</sup> In an area as privatized as elite sport, where

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DIVERSITY AND TRANSGENDER IDENTITY IN CHILDREN 1, <https://www.apadivisions.org/division-44/resources/advocacy/transgender-children.pdf> [<https://perma.cc/A998-4H9B>]; see also Jason Rafferty, *Gender Identity Development in Children*, HEALTHYCHILDREN.ORG (May 11, 2022), <https://healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx> [<https://perma.cc/Q7Y3-GQL3>]. “[B]eing transgender is not a choice.” *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020).

150. Buzuvis, *supra* note 133, at 441.

151. A state should be particularly wary when trying to regulate transgender individuals because many suffer from gender dysphoria. Gender dysphoria is characterized by extreme mental health impacts resulting from the incongruence between an individual’s gender identity and sex assigned at birth. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 451–53 (5th ed. 2013). One of the critical methods of treatment is social transition, which requires living one’s life in accord with one’s gender identity. A third-gender category can limit the ability of transgender athletes to socially transition, thus worsening the mental health ramifications of gender dysphoria. A government policy negatively impacting a class of citizens to this extent can hardly further an important government interest. For further discussion on the impact of transgender athlete marginalization on gender dysphoria, see Mary E. Dubon, Kristin Abbott & Rebecca L. Carl, *Care of the Transgender Athlete*, 17 *CURRENT SPORTS MED. REPS.* 410, 415–16 (2018).

152. See *supra* notes 138–40 and accompanying text; *infra* Section II.D.2.

153. See *supra* Introduction and *infra* Section II.C.2.c for discussions about the checkered track record of elite or nearly-elite transwoman athletes’ winning streaks.

state governments have only recently started regulating,<sup>154</sup> a state should not be able to regulate women's sports on fairness grounds without promoting the interests of *all* of the women it represents.

*c. Why Policies Are Being Challenged: Between a Rock and a Hard Place*

A recent Connecticut case<sup>155</sup> exemplifies the difficulties that sports administrative bodies face when balancing the competitive opportunities for cisgender and transwoman athletes. In *Soule v. Connecticut Association of Schools*, the plaintiffs contended that the Connecticut Interscholastic Athletic Conference policy violated Title IX.<sup>156</sup> The policy allows high school students to compete on gender specific athletic teams consistent with their gender identity (even if different from their sex assigned at birth).<sup>157</sup> When they initially appeared before the three-judge panel, the plaintiffs argued that the policy deprives cisgender athletes of a chance to be champions and the records-of-results could affect prospects at future employment.<sup>158</sup> However, all three plaintiffs beat the transwoman athletes they competed against at least once, showing that transwoman athletes do not have some insurmountable performance advantage, even without testosterone treatment.<sup>159</sup>

While this case was filed under Title IX by private individuals arguing against transwomen participation in the female category, states could use the arguments raised by the plaintiffs to provide some additional support for a governmental "fairness" rationale in the elite context. These two arguments (deprivation of a chance to be champions and lost employment) may be especially relevant in elite sports where participants are professional athletes. Thus, being deprived of a "chance to be champions" (by losing to a transwoman athlete) may very well be detrimental to a cisgender female's

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154. See Koller, *supra* note 10, at 685 (discussing the lack of law enacted to regulate sports). States have recently begun regulating in areas aimed at sports health and safety, such as in the concussion context. See *id.* at 683; *supra* note 18 and accompanying text.

155. *Soule v. Conn. Ass'n of Schs.*, 57 F.4th 43 (2d Cir. 2022). The Second Circuit reheard this case en banc *sua sponte*. See *Soule v. Conn. Ass'n of Schs.*, No. 21-1365, 2023 WL 8656832 (2d Cir. Dec. 15, 2023). The en banc court vacated and remanded the panel opinion to the district court on procedural grounds. *Id.* at \*1–2. Specifically, the en banc court found that the plaintiffs had adequately pled an Article III injury-in-fact. *Id.* Any references to the Second Circuit panel opinion do not take that opinion as authoritative. Rather, I only use the arguments put forth by the parties before the panel as demonstrative. See *infra* note 160 and accompanying text.

156. *Soule*, 2023 WL 8656832, at \*3.

157. *Id.* at \*2.

158. *Soule*, 57 F.4th at 47, 49. The Second Circuit panel did not rule on the merits, instead dismissing the case because the plaintiffs lacked standing. *Id.* at 49–51. The court vacated this result en banc, finding the plaintiffs did have standing to assert their claims. *Soule*, 2023 WL 8656832, at \*1.

159. See *Soule*, 57 F.4th at 48.

employment prospects.<sup>160</sup> This is especially evident in individual sports like swimming or track and field. Elite individuals are selected for international travel teams based on placement in competition.<sup>161</sup> Thus, states may argue they are protecting the fair opportunity for women to compete for national team spots and preserving equal employment opportunities between male and female athletes.

This argument is easily dismissed. Any plaintiff claiming “lost opportunities” would have to prove that they would have *won* regardless of who they competed against. Yet, there can only be one winner. Sports are competitive; unless it is a one-person race, someone has to lose. There is no reason that cisgender athletes cannot be competitive with transgender athletes.<sup>162</sup> And whether the plaintiff loses to a transgender or cisgender competitor, she still loses. Losing is part of the risk of playing sports, so it should not be actionable.

Additionally, while this rationale protects the rights of cisgender athletes, it does not prevent the state from depriving transwoman athletes of the right to compete and gain employment opportunities.<sup>163</sup> If transwoman athletes are forced into a third category, there will be no meaningful, equal opportunity for them to compete for spots on international team rosters at

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160. I recognize I am combining the two rationales proffered by the plaintiffs before the Second Circuit panel in *Soule*. I do this because deprivation of a “chance to be champions” in this context would fail as it did in *Soule* because all athletes are being given the opportunity to compete. *Cf. McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295–96 (2d Cir. 2004). The plaintiffs’ theory of injury evolved before the en banc court. *See Soule*, 2023 WL 8656832, at \*33 n.2 (Chin, J., dissenting). Rather than arguing simply that they had been deprived of a “chance to be champions,” the plaintiffs argued that they were denied “equal athletic opportunities and loss of publicly recognized titles and placements in track and field competitions.” *Id.* at \*5 (internal quotation marks omitted). Under this newly evolved theory, the Second Circuit held plaintiffs had standing. *Id.* at \*10.

161. In swimming, a country can send their top two athletes in each individual event to the Olympics, so long as they achieve the Olympic Qualification Time. *See* Sean McAlister, *How to Qualify for Swimming at Paris 2024. The Olympics Qualification System Explained*, INT’L OLYMPIC COMM. (Oct. 1, 2022, 6:24 AM), <https://olympics.com/en/news/how-to-qualify-for-swimming-at-paris-2024> [https://perma.cc/7UKE-EX63]. In track and field, the top three athletes from a country may qualify for individual Olympic events. Sean McAlister, *How to Qualify for Athletics at Paris 2024. The Olympics Qualification System Explained*, INT’L OLYMPIC COMM. (Dec. 20, 2022, 4:19 AM), <https://olympics.com/en/news/how-to-qualify-paris-2024-athletics-qualification-system-explained> [https://perma.cc/VR54-FN7N].

162. *See Soule*, 57 F.4th at 48–49 (recounting win/loss record of plaintiffs against transgender competitors); 2022 NCAA Division I Women’s Swimming & Diving Championships Results, *supra* note 2.

163. Historically, athletes competing outside “mainstream” athletic competitions have not received the same opportunities as athletes in the traditional sports paradigm. For example, Paralympic athletes only recently received equal pay for medaling at the Paralympics. *See Paralympians to Earn Equal Payouts as Olympians in the USA*, INT’L PARALYMPIC COMM. (Sept. 24, 2018), <https://www.paralympic.org/news/paralympians-earn-equal-payouts-olympians-usa> [https://perma.cc/Z43Z-QAGJ].

all.<sup>164</sup> Unless a third-gender category is equally competitive and can give its participants the same opportunities at all levels of competition, a state third-gender policy inherently restricts transwoman athletes' opportunities in order to preserve cisgender female athletes' opportunities.

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This Section has shown that the rationales states use to justify regulating transgender participation in scholastic sports are not sufficient to support state regulation of transgender participation in elite sport. However, even if a court finds that a state has an important interest in regulating transgender participation in elite sports via a third-gender category, the state still must prove that a third-gender category is a sufficiently related means to implement that interest under intermediate scrutiny.<sup>165</sup> It is to this prong of equal protection analysis we now turn.

#### *D. Substantial Relation*

Even if regulating to protect the safety or fairness of women's sports were important-enough government interests, the means adopted are not substantially related to either of those interests. For a state to justify a third-gender category, the state would need to rationalize regulating even more invasively than based on physiological differences between men and women<sup>166</sup> because a third-gender category inherently regulates *between* those who identify as women. Intermediate scrutiny does not require that the government adopt the least-restrictive means to achieve its end.<sup>167</sup> However, a "substantial relation" does necessitate a strong connection between the means employed and the purported end.<sup>168</sup>

Courts prefer an empirical showing that the complained-of problem would likely be remedied by the adopted regulation.<sup>169</sup> Thus, the studies

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164. It is undeniable that in elite sports, coming in third rather than second can cost an athlete a trip to the Olympics. However, while the focus of this Note is not concerned with the practical drawbacks of a third-gender category, if transwoman athletes are forced into a third category, there will be no meaningful, equal opportunity for them to compete for Olympic spots at all. *See infra* Section III.B.

165. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 200–02 (1976) (finding statistics presented by the state were not substantially related to its proffered important interest).

166. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607–08 (4th Cir. 2020) (first citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985); and then citing United States v. Virginia, 518 U.S. 515, 534 (1996)).

167. *See Virginia*, 518 U.S. at 573 (Scalia, J., dissenting).

168. "A remedial decree, this Court has said, must closely fit the constitutional violation . . ." *Id.* at 547 (majority opinion).

169. *See Craig*, 429 U.S. at 200–01 (finding inaccurate or weak statistical evidence insufficient to sustain a substantial relation to the traffic safety rationale for different drinking ages between men and

surveyed in analyzing whether a state could even regulate in support of a safety or fairness interest will also be important to discover whether the means chosen to address those interests (here, a third-gender category) is actually substantially related to that interest. By utilizing studies discussed above, I will show that science cannot sufficiently link any purported benefits of a third-gender category to sustaining the safety or fairness of women's sports in a way that satisfies intermediate scrutiny.

### 1. *The Fatality of Lack of Scientific Consensus*

At best, the science shows that transwoman athletes do not retain an innate, insurmountable advantage. At worst, the science is too inconclusive to justify intruding on the rights of a historically marginalized group. Various scholars have reached differing conclusions as to the performance benefits retained by transwoman athletes post-hormone treatment. For example, some conclude that “[c]urrently, there is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition.”<sup>170</sup> Yet others find sustained strength retention after a year of hormone therapy, even if cardiovascular benefits are nullified.<sup>171</sup> This lack of consensus in empirical research indicates how problematic it would be for a state to rest its third-gender category on science as a means of justifying its purported interests.

### 2. *Why Advantage Still Isn't Sufficient*

Metastudies<sup>172</sup> like E·Alliance's reveal that current science does not support the conclusion that transwoman athletes retain an *overwhelming* competitive advantage post-testosterone suppression. Studies cited by E·Alliance do acknowledge that strength benefits may linger, even after three years of testosterone suppression.<sup>173</sup> Yet, they also confirm that twelve

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women); *Grimm*, 972 F.3d at 614 (finding no substantial relation existed to government actor's purported goal where the government presented no evidence justifying state's privacy concerns for regulating transgender individual's choice of bathroom); *Hecox v. Little*, 79 F.4th 1009, 1030 (9th Cir. 2023) (affirming district court's finding of no substantial relationship to purported goals of ensuring equality and opportunities for female athletes in Idaho where government provided no empirical evidence to support its interest in instituting a transwoman athlete ban in scholastic sports).

170. Jones et al., *supra* note 140, at 701; *see also* E·ALLIANCE, *supra* note 46, at 5 (“Available evidence indicates trans women who have undergone testosterone suppression have no clear biological advantages over cis women in elite sport.”).

171. *See* Harper et al., *supra* note 48, at 870, 872; Roberts et al., *supra* note 47, at 579.

172. A metastudy, like a meta-analysis, “is a quantitative, formal, epidemiological study design used to systematically assess previous research studies to derive conclusions about that body of research.” AB Haidich, *Meta-Analysis in Medical Research*, 14 HIPPOKRATIA 29, 29 (2010).

173. *See* E·ALLIANCE, *supra* note 46, at 24–26 (citing Harper et al., *supra* note 48, at 872; Roberts et al., *supra* note 47, at 579).

months of testosterone suppression reduces transwoman athletes' endurance advantages over cisgender female athletes.<sup>174</sup> Thus, even if strength advantages linger, we must focus on whether a third-gender category is a sufficiently narrow approach to addressing any fairness or safety interests a state may have regarding transwomen participation in elite sports.

Taryn Knox, Lynley Anderson, and Alison Heather, three sports and medical ethics experts, rely on the concept of "tolerable unfairness" to argue that retained advantages should not bar transwoman athletes from competing in their preferred gender-identity category.<sup>175</sup> Many aspects of sports already embrace certain "tolerable unfairnesses" such as socioeconomic factors or biological advantages.<sup>176</sup> Thus, allowing transgender women to compete in order to fully embrace their gender identity, regardless of any sustained biological advantages, can just be added to the list of preexisting "tolerable unfairnesses."<sup>177</sup> If anything, a third-gender category is not best situated to support a state's fairness or safety goals. Even with the understanding that, to survive intermediate scrutiny, a state does not need to employ the least-restrictive means possible to implement its policy objectives, a third-gender category is too obstructive of transwoman athletes' rights when viewed in light of other "unfairnesses" the sports world already tolerates. This argument further compounds on the lack of evidence a state could present that any safety concerns or unfairness to ciswoman athletes would be resolved by relegating transgender women to a third-gender category.

Additionally, recent actions taken in conservative states to prevent minors from receiving gender-affirming care would foreclose any avenue (in those states) for a transgender woman to compete in the female category. World Aquatics mandates pre-puberty transition<sup>178</sup> to compete in the female category because scientific consensus has built around the understanding that differences in biological ability between male and female individuals generate after puberty.<sup>179</sup> Yet, transwoman athletes in Texas would be

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174. See Harper et al., *supra* note 48, at 870; Roberts et al., *supra* note 47, at 579 (finding that endurance advantage declined after twelve months, but some advantage persisted after two years).

175. Taryn Knox, Lynley C. Anderson & Alison Heather, *Transwomen in Elite Sport: Scientific and Ethical Considerations*, 45 J. MED. ETHICS 395, 399 (2019); see also McNamara, *supra* note 35, at 884–86 (describing a hypothetical to explain the confusion surrounding why, like unfairnesses, "some biological advantages are allowable and others are not").

176. Knox et al., *supra* note 175, at 399.

177. Andria Bianchi counters this argument by saying that transgender women's advantage in sports is "intolerably" unfair because no cisgender woman can achieve the same advantage because of doping rules. See generally Andria Bianchi, *Transgender Women in Sport*, 44 J. PHIL. SPORT 229 (2017). However, in sports some women can never achieve the innate biological advantages of their cisgender female competitors, like height or wingspan.

178. *World Aquatics Policy*, *supra* note 13, at 7.

179. See generally David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017).

barred from women's competition if the state adopted a third-gender category because transwoman athletes could not transition pre-puberty due to Governor Abbott's latest directive to the Texas Department of Family and Protective Services, which classifies medical treatments for transgender adolescents as "child abuse" under state law.<sup>180</sup> Thus, the criteria articulated by World Aquatics exacerbate equal protection problems. Without the ability to transition, an elite transwoman athlete is effectively foreclosed from the opportunity to compete in line with her gender identity. It is hard to imagine how a third-gender category could sufficiently serve a state's "fairness" rationale under intermediate scrutiny when it creates such unfair results.

Two logical conclusions must be adopted if we are to agree that a third-gender category does not survive the second prong of intermediate scrutiny. First, empirical evidence cannot justify regulating transgender participation in sports because there is no conclusive evidence showing that transwoman athletes retain an insurmountable competitive advantage post-testosterone suppression. Second, even if the remaining advantage were a heightened concern, it cannot be substantially related to a policy in which a state determines that certain women do not deserve to compete in line with their gender identity. While state interests may suffice to allow regulation of gender categorization in sport, this Part has shown that those interests do not justify relegating transgender women to a third-gender category. Thus, any state-sponsored third-gender category would fail to survive constitutional attack.

But what about non-state actors? As previously discussed, elite sports in the United States are largely privatized.<sup>181</sup> Part III explores the legal challenges that private sporting bodies, like NGBs, will face if they attempt to adopt a third-gender category.

### III. PRIVATE SPORTING BODIES AND THE LAWS THEY FACE

#### A. *Public Accommodation Laws*

The federal government and each of the fifty states have their own public accommodation statutes. Broadly, these statutes prohibit discrimination

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180. Letter from Greg Abbott, Governor of Tex., to Hon. Jaime Masters, Comm'r, Texas Dep't of Fam. and Protective Servs. (Feb. 22, 2022). *But see* Alene Bouranova, *Explaining the Latest Texas Anti-Transgender Directive*, BU TODAY (Mar. 3, 2022), <https://www.bu.edu/articles/2022/latest-texas-anti-transgender-directive-explained/> [<https://perma.cc/PPD4-UP7S>] (detailing legal challenges mounted to Abbott's directive).

181. *See supra* notes 5–10 and accompanying text.

against certain classes of individuals in places of public accommodation.<sup>182</sup> Currently, twenty-four states and the District of Columbia prohibit discrimination based on gender identity. Albeit using different language, each of these states defines “public accommodation” to include sporting arenas (some more explicitly than others).<sup>183</sup> Because a third-gender category inherently discriminates on the basis of sex,<sup>184</sup> if private sporting bodies adopt third-gender categories and proceed to host competitions at areas of public accommodation, transwoman athletes may sue under state public accommodation laws where applicable. In fact, transwoman athletes have already successfully used these statutes to remedy discrimination against them.

In 2021, Jaycee Cooper filed a lawsuit against USA Powerlifting (USAPL) and USA Powerlifting Minnesota (USAPL MN) alleging sex and sexual orientation discrimination in violation of the Minnesota Human Rights Act.<sup>185</sup> Ms. Cooper, a competitive women’s powerlifter and

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182. “All states with a public accommodation law prohibit discrimination on the grounds of race, gender, ancestry and religion.” *State Public Accommodation Laws*, NAT’L CONF. STATE LEGISLATURES (June 25, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [https://perma.cc/U98Y-6VJY]. The federal government’s public accommodation statute does not protect individuals from discrimination based on gender identity. *See* 42 U.S.C. § 2000a(a). Thus, this Section focuses purely on state law.

183. California, Connecticut, Delaware, Iowa, New Mexico, Vermont, and Virginia broadly define public accommodations as any place serving the general public. *See* CAL. CIV. CODE § 51(b) (West 2016) (applying to “all business establishments of every kind whatsoever”); CONN. GEN. STAT. § 46a-63(1) (2023); DEL. CODE ANN. tit. 6, § 4502(19) (2022); IOWA CODE § 216.2(13) (2019); N.M. STAT. ANN. § 28-1-2(H) (2023); VT. STAT. ANN. tit. 9, § 4501(1) (2023); VA. CODE ANN. § 2.2-3904(A) (2021).

Colorado, Washington D.C., Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Washington directly include sporting arenas (some specifically enumerating places like swimming pools and gymnasiums) in their definitions of “public accommodations.” *See* COLO. REV. STAT. § 24-34-601(1) (2021), *invalidated by* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023); D.C. CODE § 2-1401.02(24) (2023); HAW. REV. STAT. § 489-2 (2019); 775 ILL. COMP. STAT. 5/5-101 (2018); ME. STAT. tit. 5, § 4553(8) (2023); MD. CODE ANN., STATE GOV’T § 20-301 (LexisNexis 2019); MASS. GEN. LAWS ch. 272, § 92A (2016); MICH. COMP. LAWS § 37.2301(a) (2023); NEV. REV. STAT. § 651.050 (2021); N.H. REV. STAT. ANN. § 354-A:2(XIV) (2018); N.J. STAT. ANN. § 10:5-5(1) (2020); N.Y. EXEC. LAW § 292(9) (McKinney 2023); OR. REV. STAT. § 659A.400(1) (2022); 43 PA. CONS. STAT. § 954(1) (1997); 11 R.I. GEN. LAWS § 11-24-3 (2023); WASH. REV. CODE § 49.60.040(2) (2020).

Minnesota and Wisconsin define public accommodations to include any place of recreation. *See* MINN. STAT. § 363A.03 (2023); WIS. STAT. § 106.52 (2016).

In some circumstances, states’ public accommodation statutes have come under the Supreme Court’s fire. *See, e.g., 303 Creative*, 600 U.S. at 603 (holding Colorado’s public accommodations enforcement provision unconstitutional as applied to force wedding website creator to create websites which would violate her religious beliefs). But because the policies regulating sports categorization do not present a clear First Amendment challenge (or, even if they did, they would not likely be reviewed as expressive speech), cases like *303 Creative* do not weaken the argument presented here.

184. *See supra* Section II.B.

185. MINN. STAT. § 363A.11 (2023).

transgender woman, alleges she was denied the opportunity to compete based on her transgender status.<sup>186</sup> Ms. Cooper alleges:

Defendants USAPL and USAPL MN discriminated against Ms. Cooper in public accommodations by denying her application to compete because she is a transgender woman, by subsequently enacting a policy categorically banning transgender women from USAPL competitions, and by organizing, promoting, and executing sanctioned powerlifting meets in Minnesota at which transgender women were categorically barred from competing.<sup>187</sup>

Because powerlifting competitions are held in a place of recreation, Minnesota's public accommodation statute applies to prevent discrimination against transgender athletes in competition.<sup>188</sup>

As of this writing, the Minnesota trial court ruled on Ms. Cooper's and USAPL's cross motions for summary judgment.<sup>189</sup> The court granted Ms. Cooper's motion for summary judgment in part, holding that "USAPL's policy constitutes both public accommodation discrimination and discrimination in trade or business."<sup>190</sup>

The evil the [Minnesota Human Rights Act] prohibits lies in being seen as something other, in being separated, and in being segregated, either physically or by being treated differently. . . . Just as it does not matter that one may be able to purchase a beer at a saloon other than one that refuses service to people of color, it does not matter that Cooper could compete somewhere else or as someone else.<sup>191</sup>

The court found that the undisputed evidence showed that exclusion in athletics would be extremely harmful to Ms. Cooper.<sup>192</sup> And the court noted,

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186. Complaint at 1, 21, Cooper v. USA Powerlifting, No. 62-CV-21-211 (Minn. Dist. Ct. Jan. 12, 2021) [<https://perma.cc/ZD9S-PK6Q>].

187. *Id.* at 21.

188. See MINN. STAT. § 363A.03 (2023). Individuals looking to use public accommodation statutes for recourse must look to the precedent of their respective jurisdiction to understand how public accommodation laws may apply to them. I focus on Ms. Cooper's suit and Minnesota's public accommodation law only to show that these statutes can and will serve as a tool for transwoman athletes to challenge any adopted third-gender category. For a discussion of the scope and application of state public accommodation laws, see generally Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–86 (1978).

189. Order Granting in Part and Denying in Part Plaintiff's and Defendants' Motions for Summary Judgment, Cooper v. USA Powerlifting, No. 62-CV-21-211 (Minn. Dist. Ct. Feb. 27, 2023) [<https://perma.cc/D44A-U9N5>].

190. *Id.* at 18.

191. *Id.* at 21.

192. *Id.* at 22 ("In other words, separation and segregation of transgender persons in athletics is harmful in the act of exclusion and is also harmful by the failure to include which could greatly benefit those involved.").

without weighing the evidence, that “[t]he record is completely devoid of any effort USAPL may have made to even understand, much less address, the physical or psychological harms of exclusion or the benefits of inclusion.”<sup>193</sup> Additionally, the court did not find relevant that USAPL gave Ms. Cooper other avenues to compete; instead, the court held that “[b]y denying Cooper the right to participate in the female category, the category consistent with her self-identification, USAPL denied her the full and equal enjoyment of the services, support, and facilities USAPL offered its members.”<sup>194</sup> Under Minnesota law, Ms. Cooper “must also show a sufficient causal relationship between the discrimination and her protected status.”<sup>195</sup> And the court found that was easily satisfied because “USAPL’s decision begins and ends with but one factor – Cooper’s protected status as a transgender woman.”<sup>196</sup> Thus, “the undisputed facts establish USAPL discriminated against Cooper in public accommodation ‘because of’ her sex and sexual orientation.”<sup>197</sup>

The court definitively established liability “for both Cooper’s public accommodation and business discrimination claims.”<sup>198</sup> State-specific exceptions only saved USAPL from summary judgment on the public accommodation claim. However, the court granted Ms. Cooper’s motion for summary judgment on Minnesota’s unique business discrimination statute because it could not find that USAPL had any lawful business purpose for discriminating against Ms. Cooper.<sup>199</sup> Transgender athletes are uniquely situated to sue NGBs in Minnesota because of Minnesota’s permissive business discrimination statute, but Ms. Cooper still succeeded in proving that USAPL discriminated in public accommodations as well. It is up to USAPL at trial to “meet its burden of showing that restricting Cooper’s participation to the male category is ‘necessary to preserve the unique character’ of the programs or events USAPL sanctions or sponsors.”<sup>200</sup> Thus, Ms. Cooper’s case shows that transgender athletes may use state public accommodation statutes to protect themselves from discriminatory policies like third-gender categories.

Other athletes have also used public accommodation statutes to fight categorical bans on transwoman-athlete participation in sports. “In 1977, a lower state court in New York ruled that the U.S. Tennis Association had violated state non-discrimination law when it implemented a chromosome

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193. *Id.* at 23.

194. *Id.*

195. *Id.* at 24.

196. *Id.* at 25.

197. *Id.* at 29.

198. *Id.* at 30.

199. *Id.* at 36.

200. *Id.* at 33.

test for the purpose of excluding Renee Richards from the women's draw of the U.S. Open."<sup>201</sup> Since Richards's case, there had yet to be another successful plaintiff remedying discrimination against transgender athletes until Christina Ginther sued the Independent Women's Football League.<sup>202</sup> Christina Ginther, a transgender woman, joined an all-female football league in 2016.<sup>203</sup> When her team found out she is transgender, the football league discriminated against her in violation of the Minnesota Human Rights Act.<sup>204</sup> Ginther sued, and a jury awarded her \$20,000.<sup>205</sup> The more frequently private sporting organizations discriminate against transwoman athletes, the more useful these statutes will become in fighting discrimination. The successes of athletes like Cooper, Richards, and Ginther create a path forward for transwoman athletes should NGBs or other private sports organizations adopt a third-gender category.

Proponents of third-gender categories may argue that public accommodation laws should not apply to sports because competitions are not always open to the public. It is general knowledge that most elite sporting competitions require qualification to be able to compete. Yet, the above examples show that transwoman athletes have challenged discriminatory policies based on their inability to participate even at the highest level of sport, where qualification would be required.<sup>206</sup> Additionally, it is well accepted by both state and federal courts that, because sporting organizations use public accommodations for their events, those discriminated against in violation of the respective public accommodation statute have standing to sue.<sup>207</sup> Thus, these arguments cannot withstand the law as it exists.

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201. Buzuvis, *supra* note 133, at 446.

202. See *Ginther v. Enzuri Grp., LLC*, No. A19-1303, 2020 WL 5888024 (Minn. Ct. App. Oct. 5, 2020).

203. See Mary Lynn Smith, *Jury's Award to Transgender Woman After Rejection by Football Team Is a Minnesota First*, STAR TRIB. (Dec. 21, 2018, 10:17 PM), <https://www.startribune.com/jury-s-award-to-transgender-woman-rejected-by-football-team-is-a-minnesota-first/503365442> [<https://perma.cc/T3SH-PTVR>].

204. Ginther specifically sued under the business discrimination section of the Minnesota Human Rights Act. *Ginther*, 2020 WL 5888024, at \*1; see also MINN. STAT. § 363A.17(3) (2023). She argued that the team discriminated against her based on her "sexual orientation." *Ginther*, 2020 WL 5888024, at \*1.

205. *Ginther*, 2020 WL 5888024, at \*2.

206. Cooper was barred from competing at the Minnesota State Bench Press Championships and Minnesota Women's Championship. Complaint, *supra* note 186, at 14.

207. See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001) (holding golfer could sue the PGA Tour under the ADA to challenge its prohibition on the use of golf carts because, by using public golf courses, the PGA Tour availed participants of the protections of Title III, which governs public accommodations); *Matthews v. Nat'l Collegiate Athletic Ass'n*, 179 F. Supp. 2d 1209, 1223 (E.D. Wash. 2001) (holding NCAA participants could sue under Title III because, by using athletic playing fields and exerting control over who may access athletic arenas, the NCAA's operations necessarily employ public

Even the strongest critics of transwomen's participation in elite female sports cannot deny that the applicability of these statutes prevents discrimination against transgender athletes in elite sports. Nancy Hogshead-Makar, an Olympic gold medalist, is a strong advocate for excluding transwoman athletes from women's sports. In a public statement to a Florida news outlet, Hogshead-Makar said, "I agree that trans women are women for all purposes, meaning the classroom and the employment and family law and *public accommodations*, et cetera. But when it comes to sport, you cannot deny biology and facts."<sup>208</sup> Yet, because twenty-four states prohibit discrimination against transgender individuals in public accommodations, Hogshead-Makar's statement is inherently contradictory.

Transgender women must be given an equal opportunity to compete when competitions are held at public accommodations where applicable law exists.<sup>209</sup> A third-gender category is not an equal opportunity. Transgender women are severely underrepresented in sports and a third category implicitly tells transgender women that they are not "woman enough" to be seen as female in sports. This is inherently discriminatory.

Even if an NGB or private sporting body decided to create a third-gender category, it would not be able to use public accommodations to run its competitions in twenty-four states.<sup>210</sup> While this Note will not address the practicalities of implementing a third-gender category at length, it is worth describing the difficulties national organizations would face in implementing such a category under conflicting state laws. Take USA Swimming as a hypothetical. USA Swimming hosts a variety of meets targeted at elite-level professional athletes. For example, its "Pro Swim Series" consists of four swim meets where top competitors earn prize money for winning events and setting records.<sup>211</sup> These competitions are rarely held in the same state. Thus, if USA Swimming hosted a Pro Swim Series stop in California, California's public accommodation law would prohibit USA

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accommodations); M.U. *ex rel.* Kelly U. v. Team Ill. Hockey Club, Inc., 2022 IL App (2d) 210568, ¶ 39 (holding that by using the hockey rink at issue, an undisputed public accommodation, Team Illinois opened itself up to suit under Illinois's civil rights act).

208. Julie Kliegman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (July 6, 2022) (emphasis added), <https://www.si.com/more-sports/2022/07/06/transgender-athletes-bans-policies-ioc-ncaa> [<https://perma.cc/9HQT-S93Y>].

209. For a general example, the federal public accommodation statute states, "[a]ll persons shall be entitled to the full and equal enjoyment" of public accommodations. 42 U.S.C. § 2000a(a). While this statute does not prohibit discrimination in public accommodations based on gender identity or sex like the state statutes listed above, it does show that unequal access to public accommodations is discrimination under a public accommodation statute.

210. See *supra* note 183 and accompanying text.

211. See Matthew de George, *USA Swimming Announces 2023 Schedule, with Pro Swim Series Stop at New ISHOF Pool*, SWIMMING WORLD (July 13, 2022, 5:05 AM), <https://www.swimmingworldmagazine.com/news/usa-swimming-announces-2023-schedule-with-pro-swim-series-stop-at-new-ishof-pool/> [<https://perma.cc/T4EA-JXJ5>].

Swimming from implementing a third-gender category at the competition if it were held at a public pool.<sup>212</sup> By contrast, if USA Swimming hosted a stop in Texas, USA Swimming could in theory relegate any elite transwoman competitors who do not comply with USA Swimming's transition guidelines to compete in a third-gender category.<sup>213</sup> Thus, participatory guidelines would be different throughout the series, disrupting the continuity of the Pro Swim Series competition. Even putting the practical impossibilities of this hypothetical scenario aside, implementing a third-gender category, even in a state with no protective public accommodation law, would jeopardize USA Swimming's ability to serve as the NGB for swimming under the Sports Act. It is to these federal law implications we now turn.

### *B. The Risk of Failing to Qualify as an NGB*

As previously discussed, elite sports in the United States is governed almost entirely by NGBs under the Sports Act.<sup>214</sup> In order for an organization to qualify for recognition as an NGB, and thus be able to participate in the Olympic movement, the NGB must "provide[] an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of . . . sex."<sup>215</sup> If a private sports organization like USA Swimming tried to create a third-gender category at its elite competitions, the organization would inherently be discriminating on the basis of sex.<sup>216</sup> It would therefore lose its status as an NGB.

NGBs have the power to govern amateur sports in the United States,<sup>217</sup> coordinate national and international championship competitions,<sup>218</sup> and recommend individuals to compete for the United States at the Olympic, Paralympic, and Pan-American Games.<sup>219</sup> They *must* "allow an amateur athlete to compete in any international amateur athletic competition

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212. See CAL. CIV. CODE § 51(b) (West 2016).

213. Texas does not have a public accommodation statute. See *State Public Accommodation Laws*, *supra* note 182. This hypothetical assumes the current guidelines USA Swimming has implemented regarding transgender athlete participation, which require a transgender female to maintain a testosterone concentration of less than 5 nmol/L for a period of at least thirty-six months. See USA SWIMMING, OPERATING POLICY MANUAL 61 (Sept. 11, 2023), [https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules\\_policies/usa-swimming-policy-19.pdf](https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules_policies/usa-swimming-policy-19.pdf) [<https://perma.cc/F36U-VEWM>].

214. See *supra* notes 5–6 and accompanying text.

215. 36 U.S.C. § 220522(8).

216. See *supra* Section II.B.

217. 36 U.S.C. § 220523(a)(3).

218. 36 U.S.C. § 220523(a)(5).

219. 36 U.S.C. § 220523(a)(6).

conducted by any organization or person,”<sup>220</sup> “provide equitable support and encouragement for participation by women” where sports are gender segregated,<sup>221</sup> and encourage meaningful participation for disabled athletes.<sup>222</sup> While NGBs may “determin[e] eligibility standards for participation in competition,”<sup>223</sup> the Sports Act explicitly requires NGBs to provide equitable support in order to protect and promote equal opportunities for all athletes, regardless of ability. If the NGB which has historically undertaken these duties fails to comply with the equal opportunity requirements of § 220522(a)(8), there would be a power void in that sport until a new body existed to fill the infrastructure as required by the Sports Act. Until then, U.S. sports would suffer at the national and international level. This is because the Sports Act does not allow the United States to send athletes to the Olympic Games in a sport without an NGB to select those athletes.<sup>224</sup> Thus, both policymakers and private sporting bodies must ask, “Is it really worth relegating transwoman athletes to a separate category to preserve some faint ‘fairness’ or ‘safety’ interest when it risks destroying that sport’s infrastructure throughout the country and on the international stage?” The analysis provided throughout this Note should caution that the answer to that question is a resounding “no.”

### CONCLUSION

When Erica Sullivan arrived at the 2022 NCAA Women’s Swimming and Diving Division I Championships, she and her teammates at the University of Texas at Austin were eager to put their hard work throughout the season on display. While Sullivan and her teammates surely delivered on that expectation,<sup>225</sup> Sullivan left the meet feeling as though the record-breaking swimming had been overshadowed by certain swimmers and protestors turning the meet into a political statement.<sup>226</sup>

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220. 36 U.S.C. § 220524(a)(5).

221. 36 U.S.C. § 220524(a)(6).

222. 36 U.S.C. § 220524(a)(9).

223. 36 U.S.C. § 220523(a)(5).

224. 36 U.S.C. § 220523(a)(6); *see also* 36 U.S.C. § 220503(3) (“The purposes of the [IOC] are . . . to exercise exclusive jurisdiction, directly or through constituent members of committees, over . . . *all matters* pertaining to United States *participation* in the Olympic Games . . . .” (emphasis added)).

225. The University of Texas Women’s Swimming and Diving team finished second overall at the national meet. This was the team’s best finish since 1994. *Women’s Swimming and Diving Finishes Second at NCAA Championships*, U. TEX. ATHLETICS (Mar. 19, 2022), <https://texassports.com/news/2022/3/19/womens-swimming-and-diving-womens-swimming-and-diving-finishes-second-at-ncaa-championships.aspx#:~:text=ATLANTA%20%E2%80%93%20Texas%20Women's%20Swimming%20and,Longhorns%20best%20finish%20since%201994> [https://perma.cc/V4UG-ZWDR].

226. Zoom Interview with Erica Sullivan, Univ. Tex. at Austin (Feb. 7, 2023) (transcript and recording on file with author).

Erica Sullivan is no stranger to stiff competition. As an Olympic silver medalist and member of the USA Swimming National Team since she was seventeen,<sup>227</sup> Sullivan's athletic prowess is incredibly impressive. Yet, Sullivan did not come home undefeated in individual competition at the 2022 NCAA Championships. Sullivan was the runner-up in the women's 1650-yard freestyle and placed third in the 500-yard freestyle behind fellow Olympic silver medalist Emma Weyant in second and Lia Thomas in first.<sup>228</sup> Sullivan remembers nothing extraordinary about the race.<sup>229</sup> She was in first-place contention until about the halfway mark and finished less than three seconds off the winning time.<sup>230</sup>

While happy with her swims and her team's success, Sullivan's experience at the 2022 NCAA Championships was tainted by the political backlash surrounding a photograph taken out of context following the 500-yard freestyle race.<sup>231</sup> Conservative news outlets circulated a photo of Thomas standing alone on the podium after the 500-yard freestyle, while Sullivan and her Tokyo Olympics teammates (Emma Weyant and Brooke Forde) took a group photo standing on the third-place podium.<sup>232</sup> These outlets reported that the three women were protesting Thomas's inclusion in the competition.<sup>233</sup> However, both Sullivan and Forde have since denied allegations that this photo was taken in protest, revealing that the photo was posted out of context.<sup>234</sup> It is this, and not her achievements in the pool, that colors her memories from the Championships.<sup>235</sup>

Sullivan, an avid supporter of LGBTQ+ access in sport,<sup>236</sup> is not surprised by the third-gender category proposal put forth by World Aquatics in 2022.<sup>237</sup> In fact, Sullivan says she wouldn't even be surprised if USA

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227. Sullivan finished second at the Tokyo Olympic Games in the women's 1500-meter freestyle. *Id.*

228. James Sutherland, *2022 Women's NCAA Championships: Results and Records Summary*, SWIMSWAM (Mar. 22, 2022), <https://swimswam.com/2022-womens-ncaa-championships-results-records-summary/> [<https://perma.cc/NWA5-ZVLT>].

229. See Zoom Interview with Erica Sullivan, *supra* note 226.

230. See Sutherland, *supra* note 228.

231. See Reuters Fact Check, *Fact Check-Women's Swimming Contest Photo Shared 'Out of Context', Says Pictured Athlete*, REUTERS (Mar. 22, 2022, 12:34 PM), <https://www.reuters.com/article/factcheck-sport-swimming/fact-check-womens-swimming-contest-photo-shared-out-of-context-says-pictured-athlete-idUSL2N2VP1XH> [<https://perma.cc/LH3L-HJB5>].

232. *Id.*

233. *Id.*

234. *Id.*

235. Sullivan revealed how infuriating it was to see right-wing media and even people she knows personally share that photo, especially those who knew she would never protest Thomas's inclusion in the Championships. Dealing with the aftermath took away from her accomplishments in the pool. Zoom Interview with Erica Sullivan, *supra* note 226.

236. See *id.*

237. See *id.*

Swimming adopted such a category to keep donors happy.<sup>238</sup> However, Sullivan would find any implementation of a third-gender category incredibly problematic for transgender representation and disrespectful of modern social developments.<sup>239</sup> Sullivan's greatest fears over the implementation of a third-gender category at any level stem from the harassment that transgender individuals face in society at large.<sup>240</sup> She worries that the implementation of a third-gender category will give transphobic individuals a soap box to tout discriminatory rhetoric.<sup>241</sup> Sullivan denounces any "fairness" justification for subjugating transwomen to separate treatment in elite sports because "the fairness cause to save women's sports is just another tactic to fit the transphobic narrative."<sup>242</sup> The fact that a state or private actor would choose to open up transgender athletes to a new arena for harassment is "terrifying."<sup>243</sup>

What elite athletes think about a third-gender category should be part of the conversation surrounding legislative proposals to regulate transgender participation in sports. In fact, many athletes, including Sullivan, would argue that the moral and public policy implications of such a proposal should be reason enough to avoid adopting a third-gender category.<sup>244</sup> While perspectives like Sullivan's are crucial to any political debates, the bottom line as shown throughout this Note is a legal one. Regardless of any perspective on whether regulating transgender participation in elite sports is normatively good or not, the specific third-gender-category proposal as outlined by World Aquatics could not stand against U.S.—state or federal—law.

This is true whether adopted by a state or private actor. As shown in Part II, a state-sponsored third-gender category would fall to a Fourteenth Amendment challenge, whether offered under a "safety" or "fairness" rationale. And in Part III, we clearly see that a private actor adopting a third-gender category would face legitimacy problems under state and federal law. Thus, even if a sports-governing body believed implementing a third-gender category in elite sports was a good policy objective, the legal challenges to such a plan should prevent its adoption.

The debate about how transgender women should compete in elite sports is live and contentious in American society. Some strongly advocate for inclusion with no limits. Others caution against any opportunity for transgender women, especially, to compete in line with their gender

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238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *See id.*

identity. Regardless of where one's beliefs fall on this topic, a third-gender category cannot serve as a practical solution to the "fairness in women's sports" debate that has arisen in elite athletics, at least not under the laws of the United States.

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