The participation of transgender athletes in sex-based sports has become one of the most politically and culturally fraught issues of our time. As of May 2024, twenty-five states have passed laws or regulations that categorically prohibit transgender women and girls in K-12 schools and/or college from playing sex-based sports with other women and girls. Like so many areas of transgender people’s lives—from access to healthcare to use of public restrooms—participation in sex-based sports is now a legal issue that will be decided by courts. Debate over the proper legal response to the participation of transgender athletes in sex-based sports has focused almost exclusively on sex discrimination law. This Article offers a different but complementary way to address the categorical exclusion of transgender women and girls from sex-based sports based on a source of civil rights that has been noticeably missing from the current debate: disability rights law.

“Gender dysphoria” is the clinically significant distress a transgender person experiences if they are not allowed to live as who they are. For over thirty years, the Americans with Disabilities Act and the Rehabilitation Act have excluded from their protection “gender identity disorders not resulting from physical impairments.” In recent years, numerous federal courts and agencies have interpreted these laws to prohibit discrimination based on gender dysphoria, culminating in the Fourth Circuit’s landmark decision in Williams v. Kincaid in 2022—the first circuit-level case to recognize gender dysphoria as a protected disability under disability rights law. Accordingly, state laws that categorically ban transgender women and girls from playing sex-based sports discriminate based on gender dysphoria in violation of disability rights law.

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INTRODUCTION

We live at a time when the day-to-day activities of transgender people—like accessing healthcare, using a public restroom, or playing sports—have, in the words of author and advocate Paisley Currah, “become matters of great political significance,” the “newest eruption in the culture wars.”\(^1\) Indeed, the participation of transgender athletes in sex-based sports, the topic of this Article, has become one of the most politically and culturally fraught issues of our time, stoking resentment and confounding policymakers.\(^2\) This is unfortunate. So much of the political and cultural energy that could be devoted to celebrating and enhancing sports opportunities for all athletes\(^3\) and ensuring access to medically necessary healthcare and other basic rights for transgender people\(^4\) is being consumed by an unrelenting focus on the highly unique and nuanced issue of how transgender women and girls can best fit into the framework of women’s sports.\(^5\) But here we are.

For nearly two decades, K-12 schools, universities, and state and national athletic associations throughout the United States have responded to transgender athletes’ participation in sports by adopting policies that permit transgender women and girls to compete on women’s and girls’ sports teams, and transgender men and boys to compete on men’s and boys’ sports teams.\(^6\) Some of these

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1. **Paisley Currah**, *Sex Is as Sex Does: Governing Transgender Identity* 23, 144 (2022).
2. *See id.*
3. *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, at 225 (2021) (discussing risks to women’s athletic opportunities, including fewer opportunities to participate in sports and less athletic scholarship funding); *see generally Women’s Sports Found., Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), https://perma.cc/2HPN-YCUS (discussing, inter alia, the gender gap in athletic participation, opportunities, financial support, and media coverage).
4. *See, e.g.*, Bans on Best Practice Medical Care for Transgender Youth, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/466N-7TLU (last updated May 24, 2024) (discussing state laws banning gender transition healthcare for youth and other laws denying rights to transgender people).
6. *See, e.g.*, Erin Buzuvis, What’s Wrong With the NCAA’s New Transgender Athlete
policies are broad, requiring only that a transgender person have undergone social transition.\(^7\) Some require showing that the person does not have an unfair advantage or pose an unacceptable risk to other athletes.\(^8\) Still others impose medical requirements, such as the obligation to undergo hormone therapy for one year prior to participation.\(^9\) These policies, some broad and some more restrictive, acknowledge the reality that, if transgender athletes are categorically prohibited from competing on sex-based sports teams that correspond with their brain sex, most transgender athletes will not compete in sex-based sports teams

\(^7\)See, e.g., CIAC, supra note 6, at 54 (“[T]he school district shall determine a student’s eligibility to participate in a . . . gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season. Accordingly, when a school district submits a roster to the CIAC, it is verifying that it has determined that the students listed on a gender specific sports team are entitled to participate on that team due to their gender identity and that the school district has determined that the expression of the student’s gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics.”)

\(^8\)See, e.g., Mr. PRINCIPALS’ ASS’N, 2021-2022 HANDBOOK 20 (n.d.), https://perma.cc/6M8Q-8DYH (“The G[ender Identity Equity] Committee shall grant the student’s request to participate in accordance with the student’s stated gender identity unless it is convinced that the student’s claim to be transgender is not bona fide or that allowing the student to compete on a single sex team consistent with his or her gender identity would likely give the student athlete an unfair athletic advantage or pose an unacceptable risk of physical injury to other student athletes.”); ILL. HIGH SCH. ASS’N, 2023-2024 HANDBOOK (n.d.), https://perma.cc/C7P6-U95L (considering “advantage”). One state law that bans transgender people from participating in sex-based sports includes an exception that permits such participation when an individualized assessment determines that it is “fair” to permit them to do so. See H.B. 11, 64th Leg., 2022 Sess. (Utah 2022) (establishing a commission to consider whether a student’s participation in sex-based sports would, inter alia, “likely give the student a material competitive advantage when compared to students of the same age competing in the relevant gender-designated activity, including consideration of the student’s previous history of participation in gender-designated interscholastic activities”); see also Roe v. Utah High Sch. Activities Ass’n, No. 220903262, 2022 WL 3907182, at *1 (Utah Dist. Ct. Aug. 19, 2022) (discussing same).

\(^9\)See, e.g., WIS. INTERSCHOLASTIC ATHLETIC ASS’N, TRANSGENDER PARTICIPATION POLICY (n.d.), https://perma.cc/7E9B-7R9E (requiring one year of and/or . . . not[] physical . . . or physiological advantages over genetic females of the same age group”).
at all. To tell a transgender woman or girl that she cannot compete against other women and girls is to tell her that she cannot play, and that she does not belong.\footnote{10} Transgender-inclusive policies seek to avoid the stigma of officially marking transgender athletes as an inferior class undeserving of the opportunity to participate in sports in a safe and supportive environment and to access the myriad benefits that sports provide.\footnote{12} Such policies also avoid placing athletic officials in the uncomfortable position of refereeing who is “female enough” to compete. This line of inquiry has a sordid past: For over fifty years, female athletes have been subjected to a variety of humiliating, unscientific practices requiring them to verify that they are women.\footnote{13} The questioning of athletes’ womanhood also has a deeply troubling racial dimension: historically, Black female athletes have been harmed by racist stereotypes that disparage Black

\footnote{10. See Hecox v. Little, 479 F. Supp. 3d 930, 977 (D. Idaho 2020) (forcing transgender girls to “[p]articipate in sports on teams that contradict one’s gender identity . . . entirely eliminates their opportunity to participate in school sports”); see also id. at 984 (“Proponents’ argument that . . . transgender women are not excluded from school sports because they can simply play on the men’s team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex.”); see also B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542, 564 (4th Cir. 2024) (“[O]ffering [a transgender girl] a ‘choice’ between not participating in sports and participating only on boys teams is no real choice at all.”); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 624 (4th Cir. 2020) (Wynn, J., concurring) (explaining that requiring transgender students to choose between using the wrong restroom or a single stall “is no choice at all because . . . the Board completely misses the reality of what it means to be a transgender boy”).

\footnote{11. Fact Sheet, U.S. Dep’t of Educ., U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams (Apr. 6, 2023), https://perma.cc/WH8K-C8QD (“Preventing students from participating on a sports team consistent with their gender identity can stigmatize and isolate them, and those students may not be able to participate at all if the only other option is to participate on a team that does not align with their gender identity.”).}


\footnote{13. See, e.g., Lindsay Parks Pieper, They Qualified for the Olympics. Then They Had to Prove Their Sex, WASH. POST (Feb. 22, 2018, 6:00 AM EST), https://perma.cc/3QZE-DAHS; Louis J. Elsas et al., Gender Verification of Female Athletes, 2 GENETICS MED. 247, 250 (2000). Attempting to categorize athletes based on external genitals, internal sex organs, chromosomes, and hormones is problematic, given the rich diversity of naturally occurring characteristics that do not fit typical binary notions of female and male bodies—such as individuals with XY sex chromosomes who have genitalia labeled female. See, e.g., Consortium on the Mgmt. of Disorders of Sex Dev., CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD 5-7 (2006), https://perma.cc/MIY3-UTXR (archived May 25, 2024) (recognizing approximately twenty disorders of sex development); see also Buzuvis, supra note 12, at 36-37 (“[S]cientific and medical advances have problematized the use of ‘men’ and ‘women’ as categorical distinctions . . . . The absence of a clear, scientific distinction between men and women further challenges the assumption that an individual has a competitive advantage by virtue of being born male.”).}
women as insufficiently “feminine,” and this invidious pattern continues today.\textsuperscript{14}
In practice, even though Black transgender women and girls comprise a small percentage of transgender athletes,\textsuperscript{15} they have been targeted by individuals and groups seeking to ban transgender girls from school sports.\textsuperscript{16}

Notwithstanding the many good reasons supporting trans-inclusive sports policies, these policies have recently become the targets of a broader, coordinated effort by state governments and private parties to deny healthcare and other services to transgender people.\textsuperscript{17} Since 2020, twenty-five states have responded to trans-inclusive sports policies by passing laws or regulations that categorically prohibit transgender women and girls\textsuperscript{18} in K-12 schools and/or college\textsuperscript{19} from participating in sports at a lower rate than their white counterparts.

14. See, e.g., CURRAH, supra note 1, at 149 (“[W]omen from the Global South . . . are much more likely to emerge from the ‘sex testing’ inflicted on them with their feminality in question than white athletes.”); Maya A. Jones, New Study Examines History of Black Women Fighting to Be Respected as Athletes, ANDSCAPE (June 25, 2018), https://perma.cc/K5TW-8QNB (discussing “[t]he politicization of black women’s bodies that began in slavery [and] has yielded in our day portrayals of black female athletes as alternately mannish or overly sexualized”).

15. See WOMEN’S SPORTS FOUND., supra note 3, at 16 (stating that girls of color participate in sports at a lower rate than their white counterparts).

16. See, e.g., Connecticut High School Transgender Athletes ‘No Longer Want To Remain Silent’ Following Title IX Complaint, HARTFORD COURANT (updated June 20, 2019, 11:49 AM), https://perma.cc/SQ7S-35RD (“I have known two things for most of my life: I am a girl and I love to run . . . . There is no shortage of discrimination that I face as a young black woman who is transgender.” (quoting Andraya Yearwood, one of two Black transgender girls who were sued by non-transgender girls in Soule v. CIAC)).

17. See, e.g., MOVEMENT ADVANCEMENT PROJECT, supra note 4 (discussing state laws banning gender transition healthcare for youth and other laws denying rights to transgender people); B.P.J. v. W. Va. State Bd. Of Educ., 649 F. Supp. 3d 220, 233 (S.D.W. Va. 2023) (“I have no doubt that [West Virginia’s sports ban] aimed to politicize participation in school athletics for transgender students.”); see generally CURRAH, supra note 1, at 23, 29 (stating that “transgender people have become a focus of ire from the conservative movement” and “a specific target of those who traffic in moral panics”).

18. Twenty of the twenty-three laws apply only to transgender women and girls, while only three state laws (Alabama, South Carolina, and Missouri) also apply to transgender men and boys. Compare, e.g., S.B. 1028, 2021 Leg., Reg. Sess. § 12 (Fla. 2021) (“Athletic teams or sports designated for [‘biological’] males, men, or boys may be open to students of the [‘biological’] female sex . . . . Athletic teams or sports designated for [‘biological’] females, women, or girls may not be open to students of the [‘biological’] male sex.”) (emphasis added), with H.B. 391, 2021 Leg., Reg. Sess. § 2(a)(2) (Ala. 2021) (“A public K-12 school may not allow a biological female to participate on a male team if there is a female team in a sport. A public K-12 school may never allow a biological male to participate on a female team.”), S.C. CODE ANN. § 59-1-300 (2022) (same), and MO. REV. STAT. § 163.048 (2023) (stating that no school “shall allow any student to compete in an athletics competition that is designated for the biological sex opposite to the student’s biological sex”). This Article refers to transgender women and girls for the sake of brevity; the disability rights analysis equally applies to transgender men and boys.

19. Utah’s ban does not apply to college students; generally speaking, bans in Tennessee, Kentucky, Wyoming, Florida, and West Virginia do not apply to students in grade four or below. See Bans on Transgender Youth Participation in Sports tbl. 2, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/SLF5-PWFX (click on “Citations”) (last updated Apr. 16, 2024).
playing sex-based sports with other women and girls. twenty-two of these states also ban such participation in higher education. These laws define sex to mean “biological sex” as determined by factors such as one’s “birth certificate issued at the time of birth,”22 “reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.”23 None of the laws make an exception for those who have socially transitioned or undergone hormone therapy.24 In addition to this wave of legislation, non-transgender female athletes in Connecticut have sued the State’s interscholastic athletic association and several member school districts for permitting transgender women and girls to participate in sex-based sports.25 Like so many areas of transgender people’s lives—from access to healthcare to use of public restrooms—participation in sex-based sports is now a legal issue that will be decided by courts.26

Debate over the proper legal response to the participation of transgender athletes in sex-based sports has focused almost exclusively on sex discrimination. For some, the analysis is straightforward: transgender women are women27 and their exclusion from sex-based sports is discrimination on the basis of sex in violation of Title IX or the Equal Protection Clause.28 For others,

20. E.g., Fla. S.B. 1028 § 12 (stating that “athletic teams or sports designated for females, women, or girls may not be open to students of the male sex”).
21. See MOVEMENT ADVANCEMENT PROJECT, supra note 19. Utah’s, Wyoming’s, and Alaska’s policies do not apply to higher education. Id.; see also TRANSATHLETE.COM, supra note 6.
22. E.g., KY. REV. STAT. ANN. § 156.070 (West 2024). The laws of Alabama, Arizona, Arkansas, Mississippi, and Montana do not explicitly state how “biological sex” is to be determined. MOVEMENT ADVANCEMENT PROJECT, supra note 19, at tbl. 3 (discussing “proof” of sex/gender in transition care bans).
23. E.g., IDAHO CODE ANN. §§ 33-6201 to -6206 (West 2024); see also H.B. 11, 64th Leg., 2022 Sess. § 2 (Utah 2022) (determining biological sex based on genetics and anatomy at birth); IND. CODE ANN. §§ 20-33-13-1 to -8 (West 2024); W. VA. CODE ANN. § 18-2-25d (West 2024) (same).
24. See, e.g., Hecox v. Little, 479 F. Supp. 3d 930, 980 (D. Idaho 2020) (discussing the Idaho sports ban’s categorical exclusion of “transgender girls who never undergo male puberty” as a result of “puberty blockers at the start of puberty and gender affirming hormone therapy afterward”); cf. supra notes 6-9 (discussing transgender-inclusive state policies that permit transgender women and girls to play sex-based sports based on social or medical transition).
26. See Hecox, 479 F. Supp. 3d at 944 (“The debate regarding transgender females’ access to competing on women’s sports teams has received nationwide attention and is currently being litigated in both traditional courts and the court of public opinion.”).
28. See Bostock v. Clayton County, 590 U.S. 644, 669 (2020) (concluding that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex” in violation of Title VII); see, e.g., Hecox, 479 F. Supp. 3d at 988 (preliminarily enjoining a transgender sports ban because of a substantial likelihood that the ban violated the Equal Protection Clause); Roe v. Utah High Sch. Activities Ass’n, No. 220903262, 2022 WL 3907182, at *11 (Utah Dist. Ct. Aug. 19, 2022) (preliminarily enjoining a transgender sports ban because of a substantial likelihood that the ban violated the
transgender women may never count as women and, therefore, their exclusion from sex-based sports is not sex discrimination.

As Paisley Currah has written, “sex is not a thing, a property, or a trait, but the outcome of decisions backed by legal authority. And its meaning changes based on the context in which it is used.” Sex discrimination law asks, and will one day definitively answer, an extraordinarily important and difficult question: What does “sex” mean in the context of transgender athletes? Stated another way, are transgender women “women enough” to participate in women’s sports? This Article notes that question but does not attempt to answer it. Instead, this Article offers a different but complementary way to address the categorical exclusion of transgender women and girls from sex-based sports based on a source of civil rights that has been noticeably missing from the current debate: disability rights law. Although this area of the law brings with it difficult questions of its own, it is helpful to the conversation.

Gender dysphoria is the clinically significant distress experienced by transgender people who cannot live consistent with their brain sex. Since 2017, many people with gender dysphoria have secured protection under the Americans with Disabilities Act of 1990 (ADA) and its predecessor, Section 504 of the Rehabilitation Act (Rehabilitation Act), despite decades-old language excluding various transgender-related conditions. In 2022, in the landmark case of Williams v. Kincaid, the Fourth Circuit Court of Appeals became the first

Utah constitution’s counterpart to the federal Equal Protection Clause); A.M. ex rel. E.M. v. Indianapolis Pub. Schs., 167 F. Supp. 3d 950, 970 (S.D. Ind. 2022) (preliminarily enjoining a transgender sports ban because of a substantial likelihood that the ban violated Title IX), appeal dismissed sub nom. A.M. ex rel. E.M. v. Indianapolis Pub. Schs., No. 22-02332, 2023 WL 371646 (S.D. Ind. Jan. 19, 2023); see also 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) (codified at 34 C.F.R. pt. 106) (stating that the proposed regulation’s requirement that sex-related criteria for athletic participation be substantially related to achieving an important educational objective is “informed by case law interpreting the Equal Protection Clause, which requires public schools to demonstrate that any sex-based classification they seek to impose is substantially related to the achievement of an important governmental objective”).

29. See, e.g., A.M., 617 F. Supp. 3d at 963 (defending sports bans on the grounds that they prohibit “biological males” from playing “girls’ sports”); WORLD ATHLETICS, ELIGIBILITY RESTRICTIONS FOR TRANSGENDER ATHLETES 7 (2023), https://perma.cc/4UFF-PLK3 (prohibiting women, including transgender women, from participating in track and field competitions if they “have experienced any part of male puberty”).


31. CURRAH, supra note 1, at 39.

32. See infra notes 70-71 and accompanying text.

33. See infra notes 151-53 and accompanying text.
federal appellate court to address whether disability rights laws like the ADA and the Rehabilitation Act apply to transgender people who are discriminated against based on gender dysphoria.\textsuperscript{34} Answering that question in the affirmative, the Fourth Circuit joined the overwhelming majority of district courts that have extended disability discrimination protections to people with gender dysphoria.\textsuperscript{35} On June 30, 2023, in his dissent from the Supreme Court’s denial of certiorari in Williams, Justice Alito acknowledged the salience of disability rights law in this context, noting that the ADA’s protection of gender dysphoria means that “[c]educational institutions that sponsor girls’ or women’s athletic competitions, and facilities that host such events, may be sued [under disability rights laws] if they exclude any individual who identifies as female.”\textsuperscript{36}

Through its prohibition on disparate treatment and reasonable modification mandate, disability rights law focuses on the failure to account for individual differences.\textsuperscript{37} It asks what is essential to sex-based sport and what can be changed, and whether a modification for one individual will fundamentally alter the nature of the sport for all others.\textsuperscript{38} Disability rights law therefore provides a helpful lens through which to view workable policy solutions to the categorical exclusion of transgender women and girls from sex-based sports, ranging from full inclusion and conditional inclusion based on testosterone suppression, to case-by-case determinations that balance the value of sex-separation with disability rights law’s commitment to the integration of people with disabilities whom, according to the ADA, “society has tended to isolate and segregate.”\textsuperscript{39} Although fairness and advantage are important to the reasonable modification inquiry, scrutiny of blanket prohibitions is required.

Disability rights law thus expands the conversation beyond fairness and advantage to something equally important: ensuring people with myriad health conditions can “fully participate in all aspects of society.”\textsuperscript{40} Asking whether transgender women are “women enough” for purposes of sex-based sports

\begin{itemize}
\item \textsuperscript{34} Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022).
\item \textsuperscript{35} Id. at 779-80.
\item \textsuperscript{36} Kincaid v. Williams, 143 S. Ct. 2414, 2418 (2023) (Alito, J., dissenting).
\item \textsuperscript{37} See 42 U.S.C. §§ 12132, 12182 (ADA Titles II and III); 29 U.S.C. § 794(a) (Rehabilitation Act).
\item \textsuperscript{38} See, e.g., 42 U.S.C. §§ 12131-32 (prohibiting discrimination against an individual with a disability who, “with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity”).
\item \textsuperscript{39} 42 U.S.C. § 12101(a)(2); see also id. § 12101(a)(5) (“Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, . . . or other opportunities.”); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553 (2008) (“[I]n enacting the ADA, Congress recognized that . . . people with physical or mental disabilities are frequently precluded from [fully participating in all aspects of society] because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.”).
\item \textsuperscript{40} 42 U.S.C. § 12101(a)(1).
\end{itemize}
matters, but, as disability rights law teaches, so too does asking which modification will help an individual participate while ensuring that all women and girls are able to benefit from the opportunities that sports offer. The latter question is one that disability rights law forces us to squarely confront, and it is undoubtedly one worth asking.

This Article explores disability rights law’s important contributions to the debate over the participation of transgender women and girls in sex-based sports, and the additional and important layer of legal protection that it offers to transgender people. The first two Parts of this Article provide context for this discussion: Part I briefly surveys some points of agreement regarding our national fascination with sports generally, and with sex-based sports specifically;41 and Part II considers transgender status and its relationship to the diagnosis and treatment of gender dysphoria.42 Parts III and IV analyze why categorical sports bans discriminate against people with gender dysphoria in violation of the ADA and the Rehabilitation Act and also address various counterarguments.43 Part V offers some concluding remarks.44

I. COMMON GROUND

To understand why transgender athletes’ participation in sex-based sports is so divisive, it is first helpful to survey some common ground. To begin with, there is no denying that the rules of sports are “wholly arbitrary, entirely contingent, and—to anyone unfamiliar with any given sport—frankly bizarre.”45 The size of bases, height of hoops, circumference of balls, and width of nets; the number of swings allowed, points awarded, players required, and rounds played; the distance between bases, goals, and starting and finish lines—none were preordained.46 Rules that attempt to “level the playing field” among athletes by eliminating certain advantages seem more coherent but they, too, are arbitrary because they control for some advantages but not others. For example, while all or at least most sports prohibit athletes from cheating and impose fouls or other sanctions for unfair acts, only a small subset of sports, such as weightlifting, boxing, wrestling, and rowing, classify players based on the advantage of weight.47 And no mainstream sport controls for other physical characteristics

41. See infra Part I.
42. See infra Part II.
43. See infra Parts III-IV.
44. See infra Part V.
45. Dionne L. Koller, Putting Public Law Into “Private” Sport, 43 PEPP. L. REV. 681, 728-29 (2016); see also Jeffrey Standen, Foot Faults in Crunch Time: Temporal Variance in Sports Law and Antitrust Regulation, 41 PEPP. L. REV. 349, 379 (2014) (observing that “[a]ll sports rules are ultimately arbitrary. They have no meaning or purpose apart from the game itself,” and contrasting the rules of sport with the rule of law).
46. See Standen, supra note 45, at 355-56; see, e.g., MLB Passes Major Rule Changes for 2023 Season, SPORTS ILLUSTRATED (Sept. 9, 2023), https://perma.cc/GC6F-KXMR.
such as height, wingspan, or jumping ability.\textsuperscript{48} Sports likewise do not control for a host of other advantages unrelated to physical characteristics, such as “access to skills-building opportunities at earlier ages, access to facilities and coaching, [and] greater funding for programs and teams in certain privileged communities.”\textsuperscript{49} And, as the Supreme Court has observed, no sport can control for “pure chance,” such as “changes in the weather” or “[a] lucky bounce.”\textsuperscript{50} In short, some amount of arbitrariness is baked into sports.

Despite this arbitrariness, or perhaps because of it, people care deeply about sports and there is widespread agreement that sports are a social good.\textsuperscript{51} For athletes at all levels, sports provide a host of physical and mental health benefits,\textsuperscript{52} and for scholastic athletes, in particular, sports foster academic achievement; help athletes manage social pressures; teach valuable social skills such as leadership, courage, communication, collaboration, discipline, resilience, and sportsmanship; and provide the foundation for building emotional maturity and lasting friendships.\textsuperscript{53} For spectators, moreover, from proud parents to season ticket-holders, sports provide a seemingly endless source of entertainment—what Judge Richard Posner has called an “innate delight” in “hierarchies of height, strength . . . , agility, physical coordination, beauty, [and] brilliance” as old as civilization itself.\textsuperscript{54}

There is also widespread agreement that sports participation by women, in particular, is a social good.\textsuperscript{55} This has not always been the case. Until the turn of the twentieth century, participation in sports, particularly competitive sports, was considered dangerous to women’s physical and mental health or otherwise ill-suited for women.\textsuperscript{56} Today, the opposite is true, with advocates and experts championing the physical, psychological, and sociological benefits of sports for women, including a correlation between sports participation and reduced risk of unintended pregnancy, better grades in school, higher graduation rates, reduction

\textsuperscript{48} See, e.g., Rule No. 1: Court Dimensions—Equipment, NBA OFFICIAL, https://perma.cc/E4ZW-KVFK (archived May 25, 2024); see also David J. Handelsman, Angelica Hirschberg & Stephane Bermon, Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance, 39 ENDOCRINE REV. 803, 805 (2018) (noting that “other sports where height is an advantage (e.g., basketball, jockeys) do not have height classifications”).

\textsuperscript{49} WIAA Toolkit, supra note 6, at 17.

\textsuperscript{50} PGA Tour, Inc. v. Martin, 532 U.S. 661, 687 (2001) (“[P]ure chance may have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from the enforcement of the walking rule.”).

\textsuperscript{51} See Buzuvis et al., supra note 3, at 224 (“[P]articipating in youth and scholastic sports serves as a critical development tool in the mental and physical wellbeing of all members of society.”).

\textsuperscript{52} See id. at 214.

\textsuperscript{53} See, e.g., Buzuvis, supra note 12, at 43-47; accord Griffin & Carroll, supra note 12, at 6.


\textsuperscript{56} See id. at 1258.
in the risk of breast cancer and osteoporosis, higher levels of confidence and self-esteem and lower levels of depression, positive body image and higher states of psychological well-being, and success in a highly competitive workplace.\(^{57}\)

Furthermore, there is significant—although by no means universal—agreement that sex separation is vital to sports, and to women’s sports in particular.\(^{58}\) While social norms and gender stereotypes account for some level of support for sex-based sports,\(^{59}\) they do not account for all of it. Some women and girls, for example, want to compete separately from men and boys because they are focused on what are often called “podium opportunities,” namely, winning and placing.\(^{60}\) They point to evidence showing that, if men and women (or girls and boys) play in combined categories, it is the unusual woman or girl who gets a podium spot.\(^{61}\) Not all athletes play for these podium spots; some play to be run-of-the-mill players while reaping the physical, mental, and social benefits of participation. But even among these players, some women and girls do not want to compete with men and boys because of the social ostracization they have experienced and sometimes still experience.\(^{62}\) Consider co-ed teams of five-year-olds where boys will not pass the ball to girls. Still others do not want to compete with men or boys because they perceive themselves to be at a disadvantage because of physical differences. Even if that perception is incorrect and a woman or girl could be among the top performers, there is a demoralization factor for some women and girls based on real or perceived sex-based physical differences.\(^{63}\)


\(^{58}\) See Woman’s Sports Found., Issues Related to Girls and Boys Competing With and Against Each Other in Sports and Physical Activity Settings (n.d.), https://perma.cc/EJY3-K9ES (discussing the importance of women’s sports given “girls’ past and continued discrimination and under-representation in athletics”). Some believe that sex separation is never appropriate for a variety of reasons, including that: sex is not binary (i.e., sex separation excludes those who are non-binary or intersex); sex separation reinforces “assumptions of women’s athletic inferiority” and other gender stereotypes (e.g., tennis’s requirement that women play the best out of three sets while men play the best out of five sets; gymnastics rules that mandate or encourage “short skirts, tight leotards, highly styled hair, and heavy makeup”); and sports are arbitrarily designed around male physical characteristics and that, if sports are redesigned, there would be no need for sex-based sports. Leong, supra note 55, at 1277-78 (critiquing the reasons supporting women’s sports). A more moderate position is that sex separation is appropriate in only a narrow set of certain circumstances, such as elite-level competitive sports in which “testosterone provides an advantage.” See id. at 1283. In all other contexts, the argument goes, sports should be integrated. Id.

\(^{59}\) See Leong, supra note 55, at 1277-80

\(^{60}\) See Handelsman et al., supra note 48, at 803 (“The main justification [for sex-separated elite sports] is to allow women a chance to win . . . .”).

\(^{61}\) Id. at 805 (stating that “[i]f sex classification were eliminated,” open or mixed competitions involving “explosive strength and power” and height “would be dominated almost exclusively by men”).

\(^{62}\) WOMEN’S SPORTS FOUND., supra note 3 (discussing a survey of girls in which “nearly one-third (32%) reported that sometimes boys made fun of them or made them feel uncomfortable while they practiced”).

\(^{63}\) See Kathleen Megan, Transgender Sports Debate Polarizes Women’s Advocates, CT
Given the widespread agreement about the importance of sports generally, and sex separation in sports more specifically, it is not surprising that transgender athletes’ participation in sex-based sports is so hotly contested. In a 2022 Pew Research Poll, 58% of survey respondents favored policies that require transgender athletes to “compete on teams that match the sex they were assigned at birth.” As with other “culture war” issues involving transgender people, from access to transition healthcare to use of public restrooms, conservative legislators in state after state have predictably seized on transgender athletes’ participation in sex-based sports as a political issue, passing laws banning such participation to energize their voters.

II. TRANSGENDER STATUS AND GENDER DYSPHORIA

To understand how sports bans harm people with gender dysphoria, it is first necessary to understand transgender identity and the medical condition of gender dysphoria. As the Supreme Court has stated, a transgender person is someone “who was identified as [one sex] at birth but who now identifies as a [different sex].” Although there is not a definitive explanation for what determines how a person identifies with respect to gender, biological factors, including sexual differentiation in the brain, play a significant role in the development of gender identity (also referred to as “brain sex”). Despite the lack of a definitive
explanation for how gender identity is established, research has shown gender identity to be deep-seated and impervious to external influences.68

Being able to live consistent with one’s gender identity is central to mental health and well-being, not being allowed to do so is destabilizing.69 “Gender dysphoria” is the clinical term for the distress a transgender person experiences if they are not allowed to live as who they are.70 Gender dysphoria is a rare but serious medical condition: If left untreated, it can result in debilitating depression, anxiety, and for some people, suicidality and death.71 As the Fourth Circuit has noted, “For many years, mental health practitioners attempted to convert transgender people’s gender identity to conform with their sex assigned at birth, which did not alleviate dysphoria, but rather caused shame and psychological pain.”72 These gender identity conversion practices are now considered to be unethical and “a form of violence.”73 According to internationally-recognized, consensus-based medical standards, the treatment for gender dysphoria is gender transition—the process through which a transgender person lives in congruence with their brain sex.74 What any given person needs

While the genitalia of the human embryo become differentiated as male or female during the 12th week of fetal development, the gender identity portion of the brain differentiates around the 16th week. If there is a hormonal imbalance during this four-week period, gender identity may not develop along the same lines as the genitalia.”); see also Williams v. Kincaid, 45 F.4th 759, 771 n.7 (4th Cir. 2022) (“[R]ecent medical research suggests ‘that [gender dysphoria] diagnoses have a physical etiology, namely, hormonal and genetic drivers contributing to the in utero development of dysphoria.’” (quoting Doe v. Mass. Dep’t of Corr., No. 17-cv-12255, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018))); id. (collecting studies supporting a genetic basis for sexual differentiation of the brain in utero, contributing to the development of gender dysphoria).


69. See, e.g., Eli Coleman et al., Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, 23 INT’L J. TRANSGENDER HEALTH S1, S5 (2022) (“[P]roviding clinical guidance to health care professionals to assist transgender and gender diverse (TGD) people in accessing safe and effective pathways to achieving lasting personal comfort with their gendered selves with the aim of optimizing their overall physical health, psychological well-being, and self-fulfillment.”).

70. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5, at 451 (5th ed. 2013); see also Kadel, 12 F.4th at 427; Grimm, 972 F.3d at 594-95.

71. See AM. PSYCHIATRIC ASS’N, supra note 70, at 454-55; see also Grimm, 972 F.3d at 595.

72. Grimm, 972 F.3d at 595; accord Kadel, 12 F.4th at 427 (“Just like being cisgender, being transgender is natural and is not a choice.” (quoting Grimm, 972 F.3d at 594)).


74. See Coleman et al, supra note 69, at S5, S18 (providing evidence-based standards to guide health care professionals in providing gender-affirming medical treatment to transgender and gender diverse people, and stating that “[t]here is strong evidence demonstrating the benefits in quality of life and well-being of gender-affirming treatments, including endocrine and surgical procedures, properly indicated and performed as outlined by
to do to undergo gender transition is unique and tied to their individual circumstances. The range of treatments included as part of gender transition includes counseling, social transition, medications, and/or surgeries.

Social transition describes the process by which a transgender person takes non-pharmaceutical or non-surgical steps to live congruent with their gender identity. For a transgender boy, it means living fully as a boy. For a transgender girl, it means living fully as a girl. Often, social transition is used to refer to a person’s use of name or pronouns, what a person wears, or how they interact with their community, including family. But there is more to social transition than these discrete steps. Properly understood, social transition is the process by

the Standards of Care (Version 8), in TGD people in need of these treatments"; see also Hembree et al., supra note 67, at 3872 (providing evidence-based standards to guide endocrinologists in providing gender-affirming medical treatment to transgender and gender diverse people, and concluding that persons who receive transition care as recommended “will derive, on average, more benefit than harm”); AM. PSYCHIATRIC ASS’N, supra note 70, at 451 (stating that “many [individuals with gender dysphoria] are distressed if the desired physical interventions by means of hormones and/or surgery are not available”) (emphasis added); see also Grimm, 972 F.3d at 595 (“Fortunately, we now have modern accepted treatment protocols for gender dysphoria.”) (citing WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (7th ver. 2011)).

75. See, e.g., Coleman et al., supra note 69, at S45 (“[A]n individualized approach to clinical care is considered both ethical and necessary.”).

76. See id. at S175 (“Psychological interventions, including psychotherapy, offer effective tools and provide context for the individual, such as exploring gender identity and its expression, enhancing self-acceptance and hope, and improving resilience in hostile and disabling environments.”) (citing Emmie Matsuno & Tania Israel, Psychological Interventions Promoting Resilience Among Transgender Individuals: Transgender Resilience Intervention Model (TRIM), 46 COUNSELING PSYCH. 632 (2018)).

77. Compare id. at S39, S60, S76 (discussing social transition in adults, adolescents, and children with gender dysphoria), with id. at S256 (summarizing criteria for hormonal and surgical treatments for adults and adolescents with gender dysphoria).

78. Id. at S107 (“Social transition is the process of [transgender and gender diverse] persons beginning and continuing to express their gender identity in ways that are authentic and socially perceptible. Often, social transition involves behavior and public presentation differing from what is usually expected for people assigned a given legal gender marker at birth. . . . Research indicates social transition and congruent gender expression have a significant beneficial effect on the mental health of TGD people.”); accord Hembree et al., supra note 67, at 3877.

79. See Coleman et al., supra note 67, at S76 (stating that social transition “can include one or more of a number of different actions . . . including:

- Name change;
- Pronoun change;
- Change in sex/gender markers (e.g., birth certificate; identification cards; passport; school and medical documentation; etc.);
- Participation in gender-segregated programs (e.g., sports teams; recreational clubs and camps; schools; etc.);
- Bathroom and locker room use;
- Personal expression (e.g., hair style; clothing choice; etc.);
- Communication of affirmed gender to others (e.g., social media; classroom or school announcements; letters to extended families or social contacts; etc.)”).
which a transgender person surmounts the barriers that prevent them from being able to live fully, continually, and authentically as who they are.\textsuperscript{80} It is not just about taking steps to show others in the world who they are—although this is important. It is about taking those steps to manifest who they are and to become integrated within the community and accepted for who they are.\textsuperscript{81} This experience of a person socially living as who they are is routine for most non-transgender people for whom there are not typically barriers to living as their gendered selves. For example, non-transgender women who fit social stereotypes are unquestionably included within programs and facilities designed for women or girls.\textsuperscript{82} The same is not always true for transgender women or girls.

Other components of gender transition include a range of medical interventions—namely, medications and surgery—that alleviate gender dysphoria by bringing one’s body into conformity with one’s brain sex.\textsuperscript{83} Children (pre-pubertal youth) are not eligible for medications or surgery as part of gender transition.\textsuperscript{84} After the onset of puberty, transgender adolescents (youth who have initiated puberty) with gender dysphoria may be prescribed puberty-blocking medication that prevents them from continuing to undergo puberty according to their birth sex and “develop[ing] permanent physical characteristics that conflict with their gender identity.”\textsuperscript{85} For example, a transgender girl who receives puberty-blocking medication will “not experience the physical changes caused by high levels of testosterone, such as male muscular development.”\textsuperscript{86} Likewise, a transgender boy who receives puberty-blocking medication will “not experience breast development, menstruation, or widening of the hips,” among the many other physical changes that adolescents experience as they move into adulthood.\textsuperscript{87} Later in adolescence, transgender youth may be prescribed hormone therapy, which allows their bodies to go through the puberty that matches who they are.\textsuperscript{88} For example, a transgender girl who receives hormone therapy “would


\textsuperscript{81}. See id.

\textsuperscript{82}. See id. at 146-51 (discussing barriers to transgender people’s access to sex-based sports and public restrooms).


\textsuperscript{84}. Coleman et al., supra note 69, at $110 (“Hormone therapy is not recommended for children who have not begun endogenous puberty.”); \textit{id.} at $128 (“This chapter describes surgery and postoperative care recommendations for [transgender and gender diverse] adults and adolescents.”).

\textsuperscript{85}. Roe, 2022 WL 3907182, at *2; see also Coleman et al., supra note 69, at $64 (“[P]uberty blockers should not be implemented in prepubertal gender diverse youth.”).

\textsuperscript{86}. Roe, 2022 WL 3907182, at *2.

\textsuperscript{87}. Id.

\textsuperscript{88}. Hembree et al., supra note 67, at 3883-84 (stating that “[c]urrently available data from transgender adolescents support treatment with sex hormones starting at age 16 years,” but “recogniz[ing] that there may be compelling reasons to initiate sex hormone treatment
have levels of testosterone and estrogen that fall within the same range as other girls,” and would also experience physical changes that non-transgender girls experience in puberty.  

Surgical treatment to change one’s primary and/or secondary sex characteristics—such as chest or breast surgery, hysterectomy, and genital surgery—may also be an appropriate and medically necessary treatment for some transgender people. Although many transgender adults pursue these surgical interventions, they are rarely indicated for transgender adolescents.

III. THE DISABILITY RIGHTS ANALYSIS: COVERED ENTITIES & QUALIFIED INDIVIDUALS WITH DISABILITIES

ADA Titles II and III and the Rehabilitation Act ensure that people with medical or mental health conditions have an equal opportunity to participate in sports, including sex-based sports. These laws apply on equal terms to transgender people: they collectively prohibit public and private schools and universities, and state and national athletic associations, from denying people with gender dysphoria the opportunity to participate in sex-based sports.

Generally speaking, in order to prevail under these disability rights laws, a person must establish that: (A) the statute applies to the defendant, i.e., the defendant is a covered entity; (B) the plaintiff falls within the protection of the statute, i.e., they are a qualified individual with a disability; and (C) the plaintiff was subjected to discrimination by reason of their disability. This Part discusses the first two requirements; Part IV discusses the discrimination requirement.
A. Covered Entities

1. ADA Title II and the Rehabilitation Act

ADA Title II and the Rehabilitation Act prohibit “public entity[ies]” and recipients of federal funding, respectively, from discriminating on the basis of disability in regard to the “services, programs, or activities” they offer. Given the similarities between the two laws, “[t]he law developed under section 504 of the Rehabilitation Act is applicable to Title II of the ADA.”

Public K-12 schools and universities are without question “public entities” for purposes of Title II of the ADA. They, together with virtually all private universities and many private K-12 schools, are also recipients of federal funding—such as special education grants pursuant to the Individuals with Disabilities Education Act or financial assistance from the U.S. Department of Agriculture’s National School Lunch and Breakfast Programs in the K-12 context, and federal student aid in the university context—for purposes of the Rehabilitation Act. Likewise, state and national athletic associations are

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96. 42 U.S.C. § 12132 (stating, in relevant part, that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity”); 29 U.S.C. § 794(a) (stating, in relevant part, that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

97. Helen L. v. DiDario, 46 F.3d 325, 330 n.7 (3d Cir. 1994); see also Bragdon v. Abbott, 524 U.S. 624, 632 (1998) (stating that Congress required courts “to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act”) (citing 42 U.S.C. § 12201(a)); Frederick L. v. Dep’t of Pub. Welfare, 364 F.3d 487, 491 (3d Cir. 2004) (“We have construed the provisions of the [Rehabilitation Act] and the ADA in light of their close similarity of language and purpose.”).


99. Off. for C.R., supra note 98 (discussing the Rehabilitation Act’s application to public K-12 schools and universities, “[v]irtually all private colleges and universities . . . because they receive federal financial assistance by participating in federal student aid programs,” and private K-12 schools that receive federal financial assistance); see, e.g., Off. of Non-Public Educ., U.S. Dep’t of Educ., Frequently Asked Questions —General Issues Related to Nonpublic Schools (2019), https://perma.cc/BU6A-GYMY (stating that “if a private school otherwise receives federal financial assistance, including a grant or subgrant of federal funds to administer a federal education program, the school would then be considered a recipient” of federal financial assistance and would be subject to disability and other antidiscrimination laws”); Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 452-53 (5th Cir. 2005) (holding that the Rehabilitation Act was applicable to a private university that received federal financial aid); Russo v. Diocese of Greensburg, No. 09-cv-01169, 2010 WL 3656579, at *3 (W.D. Pa. Sept. 15, 2010) (holding that the Rehabilitation Act was applicable to a private high school that received federal financial assistance from the Department of Agriculture’s National School Lunch and Breakfast Programs); Hunt v. St. Peter Sch., 963 F. Supp. 843, 849 (W.D. Mo. 1997) (same); Sandison v. Mich. High Sch. Athletic Ass’n, 863 F. Supp. 483, 485 & n.6
recipients of federal funding for purposes of the Rehabilitation Act because they receive federal financial assistance either directly or indirectly through their member school districts, which delegate to [the association] a portion of their responsibilities for regulation of interscholastic activities. Furthermore, to the extent that a state athletic association is an agency or instrumentality of the state created by state statute, it is also a public entity for purposes of Title II of the ADA.

Additionally, sports programs offered by public K-12 schools and universities and by private K-12 schools and state and national athletic associations that receive federal funding are “services, programs, or activities” under Title II of the ADA and/or the Rehabilitation Act. As the Third Circuit concluded in Yeskey v. Pennsylvania Department of Corrections, these terms “were intended to be all-encompassing”; they “appl[y] to anything” that a public entity or federal funding recipient does.

(E.D. Mich. 1994) (holding that the Rehabilitation Act was applicable to public school districts that received federal financial assistance in the form of grants pursuant to the Individuals with Disabilities Education Act), rev’d in part on other grounds, 64 F.3d 1026 (6th Cir. 1995).

100. Compare Sandison, 863 F. Supp. at 487 (finding that “[t]he schools and corresponding buildings or facilities in which the [high school athletic association] carries out all of its functions (interscholastic athletic competitions and tournaments) receive federal assistance,” and that “[t]he coaches of the teams which participate in the competitions sponsored by the [high school athletic association] are school district employees,” and holding that therefore the high school athletic association, “although . . . not a direct recipient of federal funding,” was “subject to the Rehabilitation Act because it receives federal funds indirectly”); and Pottgen v. Mo. State High Sch. Activities Ass’n, 857 F. Supp. 654, 663 (E.D. Mo. 1994) (concluding that a high school athletic association was “a ‘federally-assisted program’ within the meaning of the Rehabilitation Act, as it receives federal funds indirectly through its members, which delegate to it a portion of their responsibilities for regulation of interscholastic activities”), rev’d on other grounds, 40 F.3d 926 (8th Cir. 1994), with NCAA v. Smith, 525 U.S. 459, 469 (1999) (denying the NCAA’s motion for summary judgment in a Rehabilitation Act suit because “there are genuine questions of material fact as to whether the NCAA receives federal funds through the [National Youth Sports Program Fund]”); see also Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1212 (9th Cir. 1984) (holding that the defendant was not “beyond the scope of the Rehabilitation Act simply because” the federal financial assistance allegedly received was indirect).


102. 42 U.S.C. § 12131(1) (defining “public entity” to mean “any State or local government” and “any department, agency . . . or other instrumentality of a State or States or local government”); see also Sandison, 863 F. Supp. at 487 (holding that a state high school athletic association was “an agency or other instrumentality of the state” under Title II because its “creation, existence, and authority are mandated by state statute”).

103. See, e.g., Noel v. N.Y.C. Taxi & Limousine Comm’n, 687 F.3d 63, 68 (2d Cir. 2012) (“[T]he phrase ‘services, programs, or activities’ has been interpreted to be ‘a catch-all phrase that prohibits all discrimination by a public entity.’” (quoting Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997))); Hason v. Med. Bd. of Cal., 279 F.3d 1167, 1172-73 (9th Cir. 2002) (“[T]he ADA’s broad language brings within its scope anything a public entity does.”); Johnson v. City of Saline, 151 F.3d 564, 570 (6th Cir. 1998) (“[T]he word ‘activities,’ on its face, suggests great breadth and offers little basis to exclude any actions of a public entity.”); accord Doe v. Mass. Dep’t of Corr., No. 17-cv-12255, 2018 WL 2994403, at *8 (D. Mass. June 14, 2018).

104. 118 F.3d 168, 170-71 (3rd Cir. 1997) (broadly interpreting the Rehabilitation Act
2. ADA Title III

Title III of the ADA prohibits discrimination on the basis of disability in public accommodations operated by private entities.\(^{105}\) Title III defines “public accommodation” to mean a private entity that is engaged in commerce and that falls within one of twelve broad types of businesses enumerated under the ADA.\(^{106}\) This list explicitly includes a “secondary, undergraduate, or postgraduate private school, or other place of education,” as well as a “stadium, or other place of exhibition or entertainment; . . . an auditorium, convention center, . . . or other place of public gathering; [and] . . . a gymnasium, . . . or other place of exercise or recreation.”\(^{107}\)

According to the Supreme Court, the definition of public accommodation is “comprehensive” and “should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled.”\(^{108}\) This broad interpretation is consistent with the ADA’s broad remedial purpose, which is to “invoke the sweep of Congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.”\(^{109}\) and with the ADA’s legislative history, which indicates Congress’s intent that “[t]he term ‘public accommodation’ . . . [be] defined very broadly” to “include much of the private sector.”\(^{110}\) Indeed, Title III’s broad coverage was part of a compromise struck by the bill’s chief sponsors in the Senate, who agreed to limit Title III’s remedies to injunctive relief “in exchange for an expansive list of commercial entities covered by the statute.”\(^{111}\)

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\(^{105}\) 42 U.S.C. § 12132.

\(^{106}\) Id. § 12181(7).

\(^{107}\) Id. § 12181(7)(C), (D), (J), (L).

\(^{108}\) PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (discussing Title III’s “broad mandate” and “sweeping purpose”).

\(^{109}\) 42 U.S.C. § 12101(b); see also ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(a)(1), 122 Stat 3553, 3553 (2008) (“[I]n enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act ‘provide a clear and comprehensive national mandate to eliminate discrimination against individuals with disabilities’ and provide broad coverage.”).

\(^{110}\) See S. REP. No. 101-116, at 97 (1989) (stating that “public accommodation” under Title III of the ADA “includes not only businesses covered by Title II of the 1964 Civil Rights Act,” but also “retail stores, service establishments, and other elements of the private sector”); see also PGA Tour, Inc., 532 U.S. at 674–75 (“Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals . . . After thoroughly investigating the problem [of discrimination against people with disabilities], Congress concluded that there was a compelling need for a clear and comprehensive national mandate to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life . . . . In the ADA, Congress provided that broad mandate.”); 28 C.F.R. pt. 36, app. C (2019) (stating that the ADA’s “representative examples of facilities within each [of the twelve categories] are not [exhaustive]”).

Private K-12 schools and universities are public accommodations under Title III. See, e.g., Regents of Mercersburg Coll. v. Republic Franklin Ins. Co., 458 F.3d 159, 165 (3rd Cir. 2006) (stating that a private secondary and college preparatory boarding school was a “‘place of education,’ and, accordingly, a ‘public accommodation’ under [ADA Title III]”); accord Guckenberger v. Bos. Univ., 974 F. Supp. 106, 133 & n.24 (D. Mass. 1997) (holding that a private university was a “public accommodation” under ADA Title III).

B. Qualified Individual with a Disability

In order to claim the protection of Titles II and III of the ADA and the Rehabilitation Act, one must be an “individual with a disability.”42 U.S.C. §§ 12132 (ADA Title II); accord 42 U.S.C. § 12182(a) (ADA Title III); 29 U.S.C. § 794(a) (Rehabilitation Act).

114. 42 U.S.C. §§ 12132 (ADA Title II); accord 42 U.S.C. § 12182(a) (ADA Title III); 29 U.S.C. § 794(a) (Rehabilitation Act).

115. 42 U.S.C. § 12131; 29 U.S.C. § 794(a). In contrast to ADA Title II and the Rehabilitation Act, ADA Title III does not require that an individual be “qualified” to receive the goods and services of a place of public accommodation. See 42 U.S.C. § 12182.
1. Qualified

A student with gender dysphoria who seeks to participate in sex-based high school or college sports is a “qualified individual” for purposes of ADA Title II and the Rehabilitation Act.116 To be a “qualified individual,” a person with a disability must meet a public entity’s “essential eligibility requirements,” with or without the aid of reasonable accommodations.117 “[A]n individual does not need to satisfy non-essential program requirements” to be qualified.118 According to the U.S. Department of Justice, “[t]he ‘essential eligibility requirements’ for participation in many activities of public entities” are exceedingly minimal.119 “Whether a specific requirement is ‘essential,’” moreover, “will depend on the facts of the particular case.”120 As numerous circuit courts have concluded, a requirement is “essential” only if “the nature of the program would be fundamentally altered without it.”121 Stated another way, a requirement is not essential if the purpose of the program could be achieved without the requirement.122 That is the case here: the only essential eligibility requirement

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117. 42 U.S.C. § 12131(2) (ADA Title II); 28 C.F.R. § 35.104 (2024) (DOJ regulations implementing ADA Title II); see also 28 C.F.R. § 42.540(l) (2024) (DOJ regulations implementing the Rehabilitation Act).
119. U.S. Dep’t. of Just., The Americans With Disabilities Act: Title II Technical Assistance Manual II-3.7200, https://perma.cc/HH3B-HR2L (archived May 25, 2024) (“[M]any programs and activities of public entities do not have significant qualification requirements.”); see also 28 C.F.R. pt. 35, app. B, at 35.104 (2024) (“[M]ost public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only ‘eligibility requirement’ for receipt of such information would be the request for it.”); accord Vance v. City of Maumee, 960 F. Supp. 2d 720, 728 (N.D. Ohio 2013) (citing DOJ guidance).
120. U.S. Dep’t of Just., supra note 119, at II-3.7200.
121. Mary Jo C. v. N.Y. State & Loc. Ret. Sys., 707 F.3d 144, 158 (2d Cir. 2013); see also Shaikh, 739 Fed. Appx. at 220 (same); Mary Jo C., 707 F.3d at 158 (“[E]ssential eligibility requirements are those requirements without which the ‘nature’ of the program would be ‘fundamentally altered.’” (quoting DOJ regulations)); Washington v. Ind. High Sch. Athletic Ass’n, 181 F.3d 840, 850 (7th Cir. 1999) (concluding that the essentialness inquiry should be “whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change”); Singh v. Prasifka, No. B302113, 2021 WL 4932347, at *4 (Cal. Ct. App. Oct. 22, 2021) (“A program eligibility requirement which could discriminate against the disabled may be deemed essential only if the program’s purposes could not be achieved without the requirement.” (quoting Fry v. Saenz, 120 Cal. Rptr. 2d 30, 35 (Cal. Ct. App. 2002))); U.S. Dep’t of Just., supra note 119, at II-8.2000 (“[P]olicies or practices must be modified, unless they are necessary for the operation or provision of the program, service, or activity.”).
122. See Mary Jo C., 707 F.3d at 158, 161 (stating that “some relatively minor eligibility requirements, even if set by statute, will not be deemed essential because they will not be necessary to prevent the fundamental alteration of the program’s nature,” and rejecting “the district court’s view that the ADA’s reference to ‘essential eligibility requirements’ necessarily refers to each and every formal legal eligibility requirement imposed for participation in a public program or benefit”); see also Singh, 2021 WL 4932347, at *5 (“[A]n eligibility requirement is not ‘essential’ if a ‘reasonable accommodation’ to the requirement would enable the person to qualify for the benefit.... Accordingly, the ‘reasonableness’ of an
for participation in K-12 or college sports is that one be enrolled in K-12 or college, respectively. As discussed in Subpart B.1.a below, a rule that prohibits participation in sex-based sports based exclusively on assigned birth sex, thereby categorically excluding transgender women and girls from women’s and girls’ teams, is not essential to sex-based sports. Such a rule can be modified on a case-by-case basis to include transgender athletes without fundamentally altering sex-based sports’ commitment to competitive fairness.

2. Disability

For nearly two decades, proving “disability” under the ADA was overly burdensome and inconsistent with Congress’s intent in passing the ADA. Several Supreme Court decisions had “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.” After a Congressional course correction, this is no longer the case. As amended by the ADA Amendments Act of 2008, the ADA’s definition of disability is to be “construed in favor of broad coverage.” Specifically, the three-prong definition protects any person: (1) with a physical or mental impairment that substantially limits—or that would, when considered in its active state and without regard to treatment, substantially limit—a major life activity or bodily function; (2) who has a “record of”—that is, a history of—“such an impairment”; or (3) who is “regarded as having such an impairment,” which is defined to mean being subjected to discrimination based on a real or perceived physical or mental impairment regardless of whether it substantially limits a major life activity. In sum, a person is protected by the ADA if they are treated negatively based on a real or perceived medical condition—regardless of how limiting that condition may be.

123. See, e.g., NCAA Eligibility Requirements for Student-Athletes, NCSA COLLEGE RECRUITING, https://perma.cc/G5R7-PMYL (archived May 25, 2024) (requiring that a college athlete have graduated high school, successfully complete a requisite number of college courses, and be certified as an amateur); CONN. INTERSCHOLASTIC ATHLETIC CONФ., RULES OF ELIGIBILITY: WHAT EVERY STUDENT-ATHLETE AND PARENT SHOULD KNOW 2-3 (n.d.), https://perma.cc/3RCZ-XM8L (requiring that an athlete “be a bona fide student” of a member school, and limiting eligibility to “eight consecutive semesters[] or four consecutive years”). Schools often impose age and academic requirements but these are not essential; numerous courts have held that schools must reasonably modify such requirements. See infra note 262 and accompanying text.

124. See infra notes 219-50.

125. See infra notes 219-50.


128. Id. § 12102(1)(A)-(C), (3)(A), (4)(D)-(E)(i).

129. See id. § 12102(3)(A) (prohibiting discrimination “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity”).
protected if they have or once had a medical condition that would, in the absence of treatment, be substantially limiting.130 The Rehabilitation Act explicitly incorporates the ADA’s definition of disability, as amended.131

Gender dysphoria easily meets this definition of “disability” under the ADA. Before explaining why this is the case, some context is important.

a. The ADA’s “Social Model” of Disability

The word “disability” is commonly associated with medical conditions that severely restrict a person’s bodily functioning.132 That is how “disability” is defined in the Social Security Act, which provides financial assistance to people with medical conditions who cannot work because of those conditions.133 By contrast, under the ADA—which provides protection from discrimination, not financial assistance—“disability” is defined very differently.134 The reason that the two laws define disability so differently is because the goals of the laws are so different. The purpose of this provision of the Social Security Act is to provide financial support for people with health conditions that limit their ability to work.135 The purpose of the ADA is to remove social barriers for people who are able to “fully participate in all aspects of society”—those who can work, participate in government programs, and patronize businesses—but who are prevented from doing so not because of their health condition but because of the bias or prejudices that others hold in relation to it.136

In contrast to the “medical model” of disability reflected in laws like the Social Security Act, the ADA embodies the “social model” of disability, which holds that people are “disabled” not by the functional limitations imposed by their health conditions, but rather by society’s negative reactions—prejudice, stereotypes, and societal neglect—toward those conditions.137 Barriers to full

132. See, e.g., Chai R. Feldblum, Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?, 21 BERKELEY J. EMP. & LAB. L. 91, 140 (2000) (“In the area of disability, the instinctive understanding displayed by most courts is that ‘disability’ is synonymous with ‘inability to work or function,’ and that people with disabilities are significantly different from the norm.”).
133. See 42 U.S.C. § 423(d)(1)(A) (“The term ‘disability’ means . . . inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”).
137. See Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 283, 284 (1987) (stating that “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment,”
participation for people with disabilities, the model holds, lie not with the individual, but rather with society’s unfair treatment of the individual who is regarded as somehow broken, abnormal, or defective.\textsuperscript{138} The ADA’s legislative history is replete with appalling instances of such mistreatment: a New Jersey zoo keeper who refused to admit children with Down’s Syndrome because he feared they would upset the chimpanzees, operators of an auction house who attempted to remove a woman with polio because she was deemed to be “disgusting to look at,” a woman with arthritis who was denied a job at a college because the college trustees believed that “normal students shouldn’t see her,” a child with cerebral palsy who was excluded from public school because his teacher claimed that his physical appearance “produced a nauseating effect” on his classmates; a man with AIDS who was forced by police to remain in his car overnight as neighbors peered at him through the car’s windows; and fully-registered people with disabilities who were turned away from voting booths because they did not look sufficiently “competent” to vote.\textsuperscript{139}

Gender dysphoria, like many other stigmatized health conditions, is (and should be) protected by disability rights law.\textsuperscript{140} Stigma and bias toward gender dysphoria—not gender dysphoria itself—“disable” people with the condition,

and that “an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment”; id. at 284 (“[T]he basic purpose of [disability rights law] is to ensure that [individuals with disabilities] are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.”); H.R. Rpt. No. 101-485, pt. 2, at 41 (1990) (“The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools, being denied employment opportunities, and being deemed an ‘unfit parent.’” (quoting testimony of Arlene Mayerson of the Disability Rights Education and Defense Fund)); see also ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553 (2008) (“[I]n enacting the ADA, Congress recognized that... people with physical or mental disabilities are frequently precluded from [fully participating in all aspects of society] because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.”); Samuel R. Bagenstos, Subordination, Stigma, and “Disability,” 86 VA. L. REV. 397, 427-30, 437 (2000) (discussing the medical and social models of disability); Mary Crossley, Disability Kaleidoscope, 74 NOTRE DAME L. REV. 621, 654 (1999) (“[T]he disadvantaged status of persons with disabilities is the product of a hostile (or at least inhospitable) social environment, not simply the product of bodily defects.”).

138. See Bagenstos, supra note 137, at 427, 444 (discussing the social model of disability as a response to the “medical/pathological paradigm” of disability, which “stigmatizes people with disabilities, by defining them as something less than normal” or “defective in mind or body”); see also Levi & Klein, supra note 135, at 89 (discussing the social model of disability as a motivation for antidiscrimination provisions of disability law); see also Kevin Barry, Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights, 31 BERKELEY J. EMP. & LAB. L. 203, 211-12 (2010) (same).


140. See Kevin Barry & Jennifer Levi, Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights, 127 YALE L.J.F. 373, 387 (2017) (“Because the ADA was intended to redress prejudice associated with stigmatized medical conditions, people who experience such prejudice ought to pursue these protections, not avoid them.”).
entitling them to protection under the ADA.\textsuperscript{141}

b. Gender Dysphoria is a Disability Under the ADA

Gender dysphoria is both a physical and mental impairment as those terms are defined by the ADA. It is a “physical . . . impairment” for ADA purposes—that is, a “physiological condition” that affects the body\textsuperscript{142}—because it derives from an atypical interaction of sex hormones and the developing brain, which results in a person being born with circulating hormones inconsistent with the person’s brain sex.\textsuperscript{143} As the U.S. Department of Justice has concluded, “the burgeoning medical research underlying [gender dysphoria] points to a physical etiology.”\textsuperscript{144} Gender dysphoria is also a “mental impairment” for ADA purposes: it is defined by the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-5) as the distress associated with “the incongruence between one’s experienced [or] expressed gender and assigned gender.”\textsuperscript{145}

A person who has gender dysphoria satisfies the first prong of the definition of disability: when considered in its active state and absent medical treatment, gender dysphoria substantially limits major life activities like interacting with others, eating, sleeping, concentrating, communicating, and engaging in self-care.\textsuperscript{146} Without care, gender dysphoria can result in depression, anxiety, suicidality, and death.\textsuperscript{147}

Similarly, under the second prong of the definition of disability, a person who has been diagnosed with gender dysphoria has a “record of” a substantially limiting impairment and is therefore protected by the ADA, even if they have successfully treated the condition.\textsuperscript{148} Lastly, and importantly, a person who is denied services or benefits based on gender dysphoria has necessarily been subjected to discrimination based on a physical or mental impairment and is therefore protected under the broad “regarded as” prong of the definition of disability.\textsuperscript{149}

\begin{footnotesize}
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\item[141] See supra notes 138-39 and accompanying text (discussing the social model of disability).
\item[142] 28 C.F.R. § 36.105(b)(1)(i) (2024) (defining “physical . . . impairment” to mean a “physiological . . . condition . . . affecting one or more body systems,” including “neurological . . . and endocrine”).
\item[143] See infra note 159 and accompanying text.
\item[145] AM. PSYCHIATRIC ASS’N, supra note 70, at 452.
\item[147] See supra notes 70-71 and accompanying text (discussing gender dysphoria).
\item[148] 42 U.S.C. § 12102(1)(B); see 29 C.F.R. § 1630.2(k) (2024).
\item[149] 42 U.S.C. § 12102(3)(A) (“An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental
\end{enumerate}
\end{footnotesize}
c. The ADA’s Definition of Disability Does Not Exclude Gender Dysphoria

Some defendants have argued that a person with gender dysphoria is barred from claiming the protection of the ADA and Rehabilitation Act because the statutes explicitly exclude from the definition of disability “gender identity disorders not resulting from physical impairments.” As the Fourth Circuit and numerous district courts have held, and as the U.S. Department of Justice, Equal Employment Opportunity Commission, and Department of Health and Human Services have consistently concluded for nearly a decade, the ADA and Rehabilitation Act do not categorically exclude gender dysphoria. No circuit
court has held to the contrary. Gender dysphoria is fundamentally different from the “obsolete diagnosis” of gender identity disorder, which “pathologized the very existence of transgender people” by focusing on cross-gender identification; its “essential feature” was “an incongruence between assigned sex . . . and gender identity.” Gender dysphoria “differs dramatically from that of the now-rejected diagnosis of ‘gender identity disorder’”: it “concerns itself primarily with distress and other disabling symptoms, rather than simply being transgender.” “The DSM-5 itself emphasizes this distinction, explaining that the gender dysphoria diagnosis ‘focuses on dysphoria as the clinical problem, not identity per se.’”

Even if “gender identity disorders” were to be interpreted to include gender dysphoria despite the textual and substantive differences, gender dysphoria would “fall[] within the ADA’s safe harbor for ‘gender identity disorders . . . resulting from physical impairments’.” According to the EEOC and Department of Justice, “physical impairment” refers to “[a]ny physiological disorder or condition . . . affecting one or more body systems, such as neurological . . . and endocrine.” As the Fourth Circuit concluded, “the need for hormone therapy may well indicate that [the plaintiff’s] gender dysphoria has some physical basis,” as does recent medical research pointing to “hormonal and genetic drivers contributing to the in utero development of dysphoria.”

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152. See Williams v. Kincaid, 45 F.4th 759, 766 (4th Cir. 2022) (stating that whether the ADA’s exclusion for “gender identity disorders not resulting from physical impairments” applies to gender dysphoria “constitutes a question of first impression for the federal appellate courts” and answering the question in the negative).

153. Id. at 767, 769 (“[W]hile the older DSM pathologized the very existence of transgender people, the recent DSM-5’s diagnosis of gender dysphoria takes as a given that being transgender is not a disability and affirms that a transgender person’s medical needs are just as deserving of treatment and protection as anyone else’s.”); see also Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 611 (4th Cir. 2020) (“[B]eing transgender was pathologized for many years. As recently as the DSM-3 and DSM-4, one could receive a diagnosis of transsexualism or gender identity disorder, indicat[ing] that the clinical problem was the discordant gender identity.”).

154. Williams, 45 F.4th at 767-68.

155. Id. at 769; see also id. at 769 n.5 (“Even if there are similarities between the now-obsolete definition of gender identity disorder and the DSM-5’s definition of gender dysphoria, the diagnosis of gender identity disorder referred to in § 12211(b) no longer exists. As we have explained, the differences between these two diagnoses are not merely semantic or the result of ‘linguistic drift.’ Equating the two is like equating the now-obsolete diagnosis of hysteria with the modern diagnosis of general anxiety disorder simply because they share a common diagnostic criterium.”).

156. Williams, 45 F.4th at 770.


158. Williams, 45 F.4th at 771 & n.7 (quoting Doe v. Mass. Dep’t of Corr., No. 17-cv-12255, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018)); see also id. at 771 n.7 (citing medical studies “concluding that the causal mechanism of [gender dysphoria] is unknown, but the importance of biological influences via genes and hormones is clear,” and “support[ing] the hypothesis that gender dysphoria has a polygenic basis, involving interactions among multiple genes and polymorphisms that may alter the sexual differentiation of the brain in utero, contributing to the development of gender dysphoria in transgender women”); see also
If there were any doubt that the ADA and Rehabilitation Act do not exclude gender dysphoria, the doctrine of constitutional avoidance resolves the matter.\textsuperscript{159} As the Fourth Circuit concluded, interpreting the ADA and Rehabilitation to exclude gender dysphoria “would discriminate against transgender people as a class, implicating the Equal Protection Clause of the Fourteenth Amendment.”\textsuperscript{160} Such a sweeping interpretation would be subject to, and fail, heightened scrutiny because there is no legitimate reason to exclude transgender people from the law’s protection, much less an important or compelling one.\textsuperscript{161} And where, as here, the basis for the exclusion is “discriminatory animus toward transgender people,” the exclusion would fail under any level of review because “a bare . . . desire to harm a politically unpopular group . . . cannot constitute a legitimate governmental interest.”\textsuperscript{162} Interpreting the ADA and Rehabilitation Act to

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Doe v. Yunits, 15 Mass. L. Rptr. 278, 282 n.6 (Mass. Super. Ct. 2001) (“In light of the remarkable growth in our understanding of the role of genetics in producing what were previously thought to be psychological disorders . . . all or some gender identity disorders [may] result ‘from physical impairments’ in an individual’s genome.”); Second Statement of Int. of the United States at 3, Blatt v. Cabela’s Retail, Inc., No. 5:14-cv-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017) (“[T]he burgeoning medical research underlying [gender dysphoria] points to a physical etiology.”).

159. Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (“[I]t is a cardinal principle’ of statutory interpretation . . . that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’”) (citation omitted).

160. Williams, 45 F.4th at 772.

161. See id. at 772-73 (“In part because of the long history of discrimination against transgender people, we have held that intermediate scrutiny applies to laws that discriminate against them. . . . [T]o survive intermediate scrutiny, the state must provide an exceedingly persuasive justification for the law. . . . [Defendant] falls far short of establishing [an] exceedingly persuasive justification for the exclusion—in fact, she has not even attempted to offer one.”) (citations omitted).

162. Id. at 773 (“[W]e see no legitimate reason why Congress would intend to exclude from the ADA’s protections transgender people who suffer from gender dysphoria. The only reason we can glean from the text and legislative record is “a bare . . . desire to harm a politically unpopular group, which] cannot constitute a legitimate governmental interest.” (quoting Romer v. Evans, 517 U.S. 620, 634 (1996)); see also Doe, 2018 WL 2994403, at *7-8 (“The pairing of gender identity disorders with conduct that is criminal or viewed by society as immoral or lewd raises a serious question as to the light in which the drafters of this exclusion viewed transgender persons. . . . It is virtually impossible to square the exclusion of otherwise bona fide disabilities with the remedial purpose of the ADA, which is to redress discrimination against individuals with disabilities based on antiquated or prejudiced conceptions of how they came to their station in life. . . . The court is of the view that, to the extent that the statute may be read as excluding an entire category of people from its protections because of their gender status, such a reading is best avoided. See Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (arguing that the Constitution, properly interpreted, ‘neither knows nor tolerates classes among citizens’).”); accord Doe v. Pa. Dep’t of Corr., 2021 WL 1583556, at *11-12 (W.D. Pa. Feb. 19, 2021) (holding that the plaintiff had “plausibly alleged facts that may place their gender dysphoria outside of the statutory exclusion” based, in part, on “the constitutional issues that would arise if the Court were to adopt the [defendant’s] categorical approach to the exclusion”); Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 134-35 (E.D. Pa. 2020); Blatt, 2017 WL 2178123, at *4.
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IV. THE DISABILITY RIGHTS ANALYSIS: DISCRIMINATION

To prevail under the ADA and Rehabilitation Act, a plaintiff must establish not only that the defendant is a covered entity and that the plaintiff is a qualified individual with a disability, but also that the plaintiff was subjected to discrimination by reason of their disability.

In passing the ADA, Congress acknowledged the persistent and pervasive history of "isolat[ion] and segregat[ion]" of people with disabilities, the "inferior status" that people with disabilities, as a group, occupy in our society, and the "various forms of discrimination" that they experience—from outright intentional exclusion, to more subtle forms of discrimination, such as overprotective rules, exclusionary qualification standards, and the failure to modify obstructive existing practices. Accordingly, ADA Title II and the Rehabilitation Act broadly prohibit public entities and federal funding recipients, respectively, from "exclud[ing]" a person "from participation in" or "deny[ing]" the benefits of a "public service, program, or activity" based on disability, or otherwise subjecting a person to discrimination based on disability. Title III of the ADA similarly prohibits discrimination on the basis of disability in regard to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" provided by a place of public accommodation.

Laws that categorically prohibit transgender women and girls from playing sex-based sports with other women and girls discriminate based on gender dysphoria in violation of ADA Titles II and III and the Rehabilitation Act in two primary ways. First, they are intentionally discriminatory and, second, they constitute a failure to reasonably modify assigned-sex policies. Although these

163. See Williams, 45 F.4th at 773 ("Because ‘a construction of the statute . . . by which [this constitutional] question may be avoided’ is readily available, we reject a reading of § 12211(b) that would exclude gender dysphoria from the ADA’s protections.") (citation omitted).

164. See supra notes 96-114 and accompanying text (discussing disability rights law’s application to schools, universities, and athletic associations).

165. See supra notes 115-64 and accompanying text (discussing disability rights law’s requirement that a plaintiff have a disability).

166. 42 U.S.C. § 12101(a)(5)-(6); see also ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553 (2008) ("[I]n enacting the ADA, Congress recognized that . . . people with physical or mental disabilities are frequently precluded from [fully participating in all aspects of society] because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers."); Barry & Levi, supra note 139, at 26-34 (discussing prejudice, stereotypes, and neglect targeted by the ADA and the Rehabilitation Act).


169. See, e.g., Fulton v. Goord, 591 F.3d 37, 43 (2d Cir. 2009) (discussing theories of discrimination available under the ADA and the Rehabilitation Act); Nunes v. Mass. Dep’t of
two theories of discrimination are closely intertwined in the context of athletics (i.e., both implicate the waiver of non-essential eligibility requirements for sports participation), it is instructive to examine them separately.

A. Sports Bans Intentionally Discriminate Against Women and Girls with Gender Dysphoria by Prohibiting Them from Playing Sports with Other Women and Girls and Also from Transitioning, Which Is Key to Mitigating the Effects of Gender Dysphoria.

Under ADA Titles II and III and the Rehabilitation Act, intentional discrimination includes: (i) outright denying an individual the opportunity “to participate in or benefit from a good, benefit, or service on the basis of disability; (ii) affording an individual the opportunity to participate in or benefit from a good, service, program, or activity that is “not equal to”—or “different or separate from”—that afforded to individuals without disabilities, or that is “not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others”; and (iii) violating the ADA’s integration mandate, which requires entities to provide goods, services, and benefits “in the most integrated setting appropriate.”

According to the Supreme Court, the “unjustified segregation” of people with disabilities “perpetuates unwarranted assumptions” that people with disabilities are “incapable or unworthy of participating in community life” on the same terms as those without disabilities, and also “severely diminishes the everyday life activities of [such] individuals, including . . . social contacts, . . . educational advancement, and cultural enrichment.”

The ADA’s integration mandate is particularly important in the context of sports bans. A key insight of the ADA is that many programs and activities core to community life rest on presumptions about how most bodies function and that people whose bodies function differently than the norm can and should be integrated into daily life—either with no adjustments at all or with modest

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Corr., 766 F.3d 136, 144-45 (1st Cir. 2014) (same); Henrietta D. v. Bloomberg, 331 F.3d 261, 274-76 (3d Cir. 2003) (same); see also Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1316 n.3 (11th Cir. 2009) (stating that the Rehabilitation Act and the ADA are governed by “the same standards” and therefore are evaluated “interchangeably”); accord Radaszewski ex rel. Radaszewski v. Maram, 383 F.3d 599, 607 (7th Cir. 2004).


171. Olmstead, 527 U.S. at 600-01; see also J.S., III ex rel. J.S. Jr. v. Hous. Cnty. Bd. of Educ., 877 F.3d 979, 986-87 (11th Cir. 2017) (applying the Supreme Court’s reasoning in Olmstead, which involved institutional confinement, to the “exclu[sion] and isolat[ion] of a student] from his classroom and peers on the basis of his disability”); Helen L. v. DiDario, 46 F.3d 325, 333, 335 (3rd Cir. 1995) (“[T]he ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled . . . . The ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them.”).
adjustments that do not change the key features of those programs or activities. The ADA strives to integrate people formerly excluded from society by requiring programs and activities to interrogate presumptions that operate to exclude people whose bodies function slightly outside the norm in order to ensure that people who do not need to be excluded can be included.

Sports bans intentionally discriminate based on gender dysphoria in violation of the ADA and the Rehabilitation Act. Specifically, they categorically prohibit women and girls with gender dysphoria from: (a) participating in sex-based sports with other women and girls, and (b) treating their gender dysphoria through transition, which is key to mitigating the effects of gender dysphoria.

1. Prohibiting Participation in Sex-Based Sports

Sports bans intentionally deny transgender women and girls “the opportunity to participate in or benefit from” playing sex-based sports alongside their peers and instead afford them only “an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.” Because transgender people are the only people who experience gender dysphoria—i.e., those with gender dysphoria are necessarily transgender—sports bans intentionally discriminate based on gender dysphoria. Unlike their peers

172. See, e.g., 42 U.S.C. § 12101(a)(2), (5); see also 136 CONG. REC. 13058-59 (June 6, 1990) (statement of Sen. Harkin) (reading comments from advocacy organizations stating that “the ADA offers promise that [people with disabilities] will no longer be shunned and isolated because of the ignorance of others”).


176. See Williams v. Kincaid, 45 F.4th 759, 773 (4th Cir 2022) (stating that gender dysphoria is “very closely connected to transgender identity”); see infra notes 178-81 and accompanying text (discussing intentional discrimination).
without gender dysphoria, women and girls with gender dysphoria must either not participate in sex-based sports at all, or compete in sex-based sports in the “wrong” sex category (i.e., women and girls with gender dysphoria must compete in men’s and boys’ sports)—something no other students are required to do. Such differential treatment—relegating transgender women and girls to play on sex-based teams with athletes whose brain sex is different from theirs, or to no team at all—also flies in the face of the ADA’s requirement that public entities administer their programs “in the most integrated setting appropriate.”

By categorically prohibiting the participation of women and girls with gender dysphoria in sex-based sports, sports bans fail to provide “meaningful access to a benefit” in violation of the ADA and the Rehabilitation Act. Numerous cases support this conclusion, including those striking down zoning laws targeting people taking methadone, laws prohibiting schools from implementing universal mask policies, and court policies excluding jurors who are blind.


179. See Alexander v. Choate, 469 U.S. 287, 301 (1985); see also id. at 302 (holding that a state law did not violate the Rehabilitation Act because it was “neutral on its face” and did not “invoke criteria that have a particular exclusionary effect on” people with disabilities, distinguishing between people based on a “test, judgment, or trait that [people with disabilities] as a class are less capable of meeting or less likely of having”).

180. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (holding that a dentist’s blanket rule prohibiting in-office treatment of people with HIV could be challenged under the ADA); New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 304 (3d Cir. 2007) (holding that a Pennsylvania zoning law that “facially singles out methadone clinics, and thereby methadone patients, for different treatment, thereby render[s] the statute facially discriminatory”); id. at 301 (stating that “a statute that facially discriminates against disabled individuals” faces a “skeptical inquiry under the ADA and Rehabilitation Act”); Rodde v. Bonta, 357 F.3d 988, 997-98 (9th Cir. 2004) (holding that the closure of a hospital providing “rehabilitative services and treatment for complex and disabling medical conditions, such as paralysis and conditions associated with severe diabetes” likely violated the ADA because it “would deny certain disabled individuals meaningful access to government-provided services because of their unique needs, while others would retain access to the same class of services”); id. at 997 (stating that the closure of a hospital “that provides services disproportionately required by the disabled and available nowhere else in the County [wa]s simply not [a . . . facially neutral reduction] of services”); Thompson v. Davis, 295 F.3d 890, 898 (9th Cir. 2002) (holding that Title II of the ADA prohibited the parole board from “categorically excluding a class of disabled people from consideration for parole because of their disabilities”); Henderson v. Bodine Aluminum, Inc., 70 F.3d 958, 960-61 (8th Cir. 1995) (holding that the plaintiff was likely to succeed on the merits of her claim that her employer-sponsored health plan and insurance providers discriminated based on disability in violation of the ADA by covering high-dose chemotherapy for certain cancers while denying it for breast cancer); ARC of Iowa v. Reynolds, 559 F. Supp. 3d 861, 879–80 (S.D. Iowa 2021) (holding that the plaintiffs were likely to prevail on their claim that a state statute prohibiting local school districts from implementing universal mask policies violated the ADA and the Rehabilitation Act by denying
2. Prohibiting Medically Necessary Transition

Sports bans also discriminate in another, less obvious, way. The goal of gender transition, the treatment for gender dysphoria, is to ensure that a transgender girl or woman can live and be embraced as a girl or woman in all aspects of her life, including at school. In the context of sex-based sports, gender transition includes ensuring women and girls who are transgender can be included on women’s and girls’ teams, just as non-transgender women and girls are. By denying women and girls with gender dysphoria the opportunity to participate in appropriate sex-based sports, sports bans interfere with the goals of gender transition and exacerbate a person’s gender dysphoria.

The consequences of interfering with and undermining a transgender person’s transition are significant. Barring people with gender dysphoria from

the benefits of in-person learning to disabled children who were at increased risk of severe illness or death from COVID-19; Doe v. Mass. Dep’t of Corr., No. 17-cv-12255, 2018 WL 2994403, at *8 (D. Mass. June 14, 2018) (holding that an inmate with gender dysphoria stated a claim for disparate treatment because “she was assigned to a men’s prison by virtue of her gender assignment at birth and denied access to facilities and programs that would correspond with her gender identification”); Concerned Parents v. City of West Palm Beach, 846 F. Supp. 986, 992 (S.D. Fla. 1994) (holding that the City’s elimination of recreational programs for disabled individuals while continuing to provide recreational programs serving people without disabilities “denie[d] the Plaintiffs of an equal access to recreational services” in violation of the ADA); Galloway v. Superior Ct., 816 F. Supp. 12, 16-19 & n.5 (D.D.C. 1993) (rejecting “the assumption that visual observation is an essential function or attribute of a juror’s duties,” and holding that the categorical exclusion of blind people from juries violated the Rehabilitation Act and the ADA based, in part, on a lack of evidence that visual capacity is an essential function of a juror that cannot be reasonably modified in individual cases, laws in ten states forbidding the exclusion of blind jurors, and no similar exclusion of deaf jurors); see also U.S. Dep’t of Just., supra note 119, at II-3.2000-3000, -3.5100 (stating that discrimination would include the “blanket exclusion” of people “who use wheelchairs from participating in county-sponsored scuba diving classes” because of the belief that such people “cannot swim well enough to participate,” the refusal “to admit an individual to a city council meeting that is open to the public merely because the individual is deaf,” a requirement that applications to participate in a government program be filed “in a second-floor office of a building without an elevator” that is inaccessible to people who use wheelchairs, or “the use of printed information alone” that is inaccessible to people with vision impairments).

181. See supra notes 74-91 and accompanying text (discussing transition).

182. See supra notes 78-82 and accompanying text (discussing social transition); see also Coleman, supra note 69, at S76 (“A social transition process can include one or more of a number of different actions consistent with a child’s affirmed gender, including: . . . [p]articipation in gender-segregated programs (e.g., sports teams; recreational clubs and camps; schools; etc.) . . . .”) (citation omitted).

183. See Monroe v. Baldwin, 424 F. Supp. 3d 526, 545-47 (S.D. Ill. 2019) (finding that “[s]ocial transition is ‘an important component of medical treatment,’” and granting a preliminary injunction ordering prison officials “to immediately . . . cease the policy and practice of depriving gender dysphoric prisoners of medically necessary social transition, including by mechanically assigning housing based on genitalia and/or physical size or appearance,” and to “develop a policy to allow transgender inmates medically necessary social transition, including individualized placement determinations”); Doe, 2018 WL 2994403, at *8 (holding that an incarcerated woman with gender dysphoria stated a claim that the State violated the ADA and the Rehabilitation Act by denying her access to social transition, namely, gender-appropriate housing, showering, strip-searches, and name and pronoun usage).
treat their condition, as these laws do, exacerbates the condition—stigmatizing people with gender dysphoria as dangerous, inviting prejudice and harassment against them, and putting them at risk for “anxiety, depression, suicidal ideation, suicide attempts, and substance use.” As the U.S. District Court for the District of Idaho concluded, “[p]articipating in sports on teams that contradict one’s gender identity ‘is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.’” Not surprisingly, interfering with gender transition also undermines students’ academic success. Schools, universities, and sports associations cannot make educational benefits “available only under conditions that are dangerous,” or otherwise unequal, to people with disabilities. By erecting barriers to the health of people with gender dysphoria, sports bans “subject [people with gender dysphoria] to discrimination and limit them in their enjoyment of the ‘right[s], privilege[s], advantage[s] and opportunit[ies]’ that schools provide to others.”

3. Counterarguments

This Subpart considers several counterarguments to a disparate-treatment challenge to sports bans and why they are not persuasive.

184. Coleman et al., supra note 69, at S52 (“Rejection by family, peers, and school staff (e.g., intentionally using the name and pronoun the youth does not identify with, not acknowledging affirmed gender identity, bullying, harassment, verbal and physical abuse, poor relationships, rejection for being TGD, eviction) was strongly linked to negative outcomes, such as anxiety, depression, suicidal ideation, suicide attempts, and substance use.”).


186. See Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 597 (4th Cir. 2020) (discussing the impact of exclusionary bathroom policies on health outcomes and academic success, and noting that “harassment of transgender students is . . . correlated with academic success: students who experienced greater harassment had significantly lower grade point averages”); see also AM. PSYCH. ASS’N & NAT’L ASS’N OF SCH. PSYCHS., RESOLUTION ON GENDER AND SEXUAL ORIENTATION DIVERSITY IN CHILDREN AND ADOLESCENTS IN SCHOOLS (updated Feb. 2015), https://perma.cc/VH33-NRGF (stating that “gender and sexual orientation diverse children and adolescents who are victimized in school are at increased risk for,” inter alia, “poor academic outcomes, such as [a] high level of absenteeism, low grade point averages, and low interest in pursuing post-secondary education”).

187. ARC of Iowa v. Reynolds, 559 F. Supp. 3d 861, 879 (S.D. Iowa 2021) (enjoining a state law banning universal masking, and concluding that “Defendants appear to be failing to make school programs, services, and activities ‘readily accessible’ to disabled students . . . by making in-person learning at schools available only under conditions that are dangerous to children with disabilities.”); see 42 U.S.C. § 12182 (prohibiting unequal benefits); 28 C.F.R. § 35.130(b)(1) (2024) (same); cf. M.F. ex rel. Ferrer v. N.Y.C. Dep’t of Educ., 582 F. Supp. 3d 49, 60, 65 (E.D.N.Y. 2022) (ordering schools to hire a sufficient number of nurses to administer insulin to children with diabetes on field trips, and to “train all bus drivers and bus attendants who transport children with diabetes to administer glucagon in emergency situations”).

188. 28 C.F.R. § 35.130(b)(1)(vii) (2024); see 42 U.S.C. § 12182(a).
a. Sports Bans Discriminate Based on Gender Dysphoria

One might argue that sports bans do not discriminate on the basis of gender dysphoria because they do not literally use the words “gender dysphoria.” This argument is without merit for two reasons. First, sports bans prohibit transgender people from participating in sex-based sports. Transgender people are the only people who experience gender dysphoria, and these laws target transgender people as a group and individually. Such bans allow all women and girls who have never experienced, and never would experience, gender dysphoria—i.e., non-transgender women and girls—to play sports with other women and girls. And they exclude only transgender women and girls—those who have experienced gender dysphoria or would if they cannot be who they are—from playing on girls’ teams. Second, sports bans prohibit transgender athletes from transitioning, which is the treatment for gender dysphoria. For both of these reasons, sports bans discriminate based on gender dysphoria—denying athletes with gender dysphoria participation on sex-based teams and access to treatment for the condition.

b. Intent is Immaterial or, Alternatively, Easily Demonstrated

One might also argue that sports bans are not motivated by an intent to discriminate against people with gender dysphoria. This argument fails for three reasons. First, sports bans are facially discriminatory: on their face, i.e., through the use of assigned-sex requirements, they categorically prohibit the group of women and girls who experience, or have experienced, gender dysphoria from participating in sex-based sports. No other women or girls are similarly prohibited. When a law or policy is facially discriminatory, intent is immaterial—“the absence of a malevolent motive does not convert a facially

189. See supra notes 17-24 and accompanying text (discussing sports bans).

190. See Williams v. Kincaid, 45 F.4th 759, 773 (4th Cir. 2022) (stating that gender dysphoria is “very closely connected to transgender identity” (quoting Amended Complaint at 9, Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022))); see also Christian Legal Soc. v. Martinez, 561 U.S. 661, 672, 689 (2010) (holding that a student group’s exclusion of students based on “homosexual conduct” facially discriminated against gay students as a class); see also Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring) (noting that “homosexual conduct . . . is closely correlated with being homosexual”). Although “not all transgender people experience gender dysphoria,” Statement of Int. of the United States at 4, Doe v. Ga. Dep’t of Corr., No. 1:23-cv-5578, 2024 WL 1962021 (N.D. Ga. Apr. 17, 2024), all people who experience (or would, without treatment, experience) gender dysphoria are transgender. Therefore by excluding transgender people, sports bans necessarily exclude all people who have experienced—or would, without treatment, experience—gender dysphoria.

191. See supra notes 74-77 and accompanying text (discussing treatment for gender dysphoria).

192. See, e.g., New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 304 (3d Cir. 2007) (holding that a Pennsylvania zoning law that “facially singles out methadone clinics, and thereby methadone patients, for different treatment, thereby render[s] the statute facially discriminatory”); id. at 301 (stating that “a statute that facially discriminates against disabled individuals” faces a “skeptical inquiry under the ADA and Rehabilitation Act”).
discriminatory policy into a neutral policy with a discriminatory effect.”¹⁹³

Second, even absent facial discrimination, intentional discrimination is evident in the statements of legislators, who have characterized the participation of transgender women and girls on women’s and girls’ sports teams as a “threat” to sports, and in the effect of such laws, which is the exclusion of one group—transgender people—from participation in sex-based sports.¹⁹⁴ Such discrimination is also evident in state legislatures’ departures from normal procedures in passing such laws, such as Iowa’s rush to pass a sports ban amidst a national shutdown of schools due to the Covid-19 pandemic, as well as in the “striking” lack of evidence of a legitimate nondiscriminatory purpose.¹⁹⁵ Legislators’ purported concerns about “support[ing] sex equality, provid[ing] opportunities for women, or increas[ing] access to college scholarships,”¹⁹⁶ moreover, do not withstand scrutiny: they are not based in fact and are instead pretexts for excluding people with gender dysphoria.¹⁹⁷

Third, even if the deliberate denial of participation in sex-based sports and access to medically necessary treatment for women and girls with gender dysphoria were not considered direct evidence of disparate treatment, such a denial constitutes circumstantial evidence of intentional discrimination that is without a legitimate, non-discriminatory basis for the reasons discussed above.¹⁹⁸

c. Sports Bans Exclude Women and Girls with Gender Dysphoria

One might also argue that sports bans do not discriminate based on gender dysphoria because people with gender dysphoria can still participate in sex-based sports with those whose birth sex is the same as their own.¹⁹⁹ Rather than treating

¹⁹³. UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991); see Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 735 (9th Cir. 1999) (“[F]acially discriminatory laws present per se violations of [Title II].”). Subjective intent is also irrelevant to failure-to-accommodate claims, Punt v. Kelley Servs., 862 F.3d 1040, 1048 (10th Cir. 2017) (reviewing cases).


¹⁹⁵. See id. at 982, 984.

¹⁹⁶. Id. at 983.

¹⁹⁷. See id. at 978-79, 982 (stating that “the legislative record reveals no history of transgender athletes ever competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, . . . no evidence to suggest a categorical bar against transgender female athlete’s [sic] participation in sports is required in order to promote ‘sex equality’ or to ‘protect athletic opportunities for females’ in Idaho; and] . . . no evidence . . . to suggest that the Act will increase scholarship opportunities for girls”); see also id. at 984 (“[T]he Act was motivated by a desire for transgender exclusion, rather than equality for women athletes.”).

¹⁹⁸. See supra note 174 (discussing proof of disparate treatment through direct and circumstantial evidence); supra note 197 (discussing lack of support for legislators’ purported concerns about “support[ing] sex equality, provid[ing] opportunities for women, [and] increas[ing] access to college scholarships”).

¹⁹⁹. See Hecox, 479 F. Supp. 3d at 984 (noting the defendants’ argument that “transgender women are not excluded from school sports because they can simply play on the men’s team”).
people with gender dysphoria differently, the argument goes, sports bans treat everyone the same, that is, consistent with their assigned birth sex. This argument is wrong: as a matter of law, sports bans subject women and girls with gender dysphoria to different terms of participation in sport. All athletes—except women and girls with gender dysphoria—have the opportunity to play on sex-based teams consistent with their gender identity. The opportunity denied women and girls with gender dysphoria is the opportunity to compete with other women and girls; the fact that they are permitted to compete with men and boys is irrelevant.

d. Women and Girls with Gender Dysphoria Pose No “Direct Threat” to Others

Lastly, in defense of a categorical ban, a state may attempt to invoke the ADA’s “direct threat” defense, which permits an entity to prohibit an individual from participating in or benefiting from the services, programs, or activities of that entity “when that individual poses a direct threat to the health or safety of others.” Women and girls with gender dysphoria, the argument goes, pose a direct threat to the safety of others participating in sex-based sports given physical differences between male and female physiques. This defense, which a defendant bears the burden of proving and which requires a demanding showing, is unavailing in defense of a categorical ban on athletes with gender dysphoria.

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200. See Alexander v. Choate, 469 U.S. 287, 301 (1985) (“The [government] benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled.”); see also id. at 301 n.21 (citing with approval the Government’s statement that “[a]n indiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is ‘collapsed’ into one’s definition of what is the relevant benefit” (quoting Brief for the United States as Amicus Curiae at 29 n.36, Alexander v. Choate, 469 U.S. 287 (1985))); Nat’l Fed’n of the Blind v. Lamone, 813 F.3d 494, 504 (4th Cir. 2016) (“The logic of Alexander further suggests that we should proceed cautiously to avoid defining a public program so generally that we overlook real difficulties in accessing government services.”).

201. 28 C.F.R. § 35.139 (2024); see also 42 U.S.C. § 12182(b)(3).

202. See Buzuvis, supra note 12, at 7 (“Over the years, society has justified the exclusion of girls from boys’ sports and vice versa with concerns about safety.”); see also Hannah Stocker, Comment, He’s The Woman: Calling For Dissolution Of Discriminatory Policies In High School Athletic Associations Under the ADA, 2017 MICH. ST. L. REV. 927, 964 (2018) (discussing sports associations’ argument that “women have a higher risk of injury when competing on teams with men, due to the differences between the male and female physique”).

203. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (holding that a dentist who refused to treat a patient with HIV in his office “had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession”); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 78 (2002) (holding that the “direct threat” provision of Title I of the ADA, concerning employment discrimination, was an affirmative defense); Dadian v. Village of Wilmette, 269 F.3d 831, 841 (7th Cir. 2001) (holding that the defendant had the burden of proving to demonstrate that the plaintiff posed a direct threat to the safety of others); accord Dudley v. Hannaford Bros., 333 F.3d 299, 307 (1st Cir. 2003); Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997).

dysphoria.

A “direct threat” is “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.” As the Supreme Court has stated, “[b]ecause few, if any, activities in life are risk free . . . the ADA do[es] not ask whether a risk exists, but whether it is significant.” Furthermore, the existence or nonexistence of a significant risk may not be based “on mere speculation, stereotypes, or generalizations about individuals with disabilities”; rather, it must be based on:

an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

States cannot meet their burden of demonstrating that a woman or girl with gender dysphoria poses a direct threat to the safety of other participants in sex-based sports for a number of reasons. First, laws that prohibit all people with gender dysphoria from participating in all sex-based sports necessarily violate the requirement that the “direct threat” inquiry must be individualized. A once-size-fits-all sports ban directly contradicts this principle.

Sept. 30, 2019 (citing Doe v. County of Centre, 242 F.3d 437, 449-51 (3rd Cir. 2001)).

205. 42 U.S.C. § 12182(b)(3); see also 28 C.F.R. §§ 35.104, 36.104 (2024).


207. 28 C.F.R. § 35.130(h) (2024); see, e.g., Doe, 242 F.3d at 448 (“A person with a disability must not be excluded . . . based on stereotypes or fear. Nor may a decision be based on speculation about the risk or harm to others. Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case . . . . The purpose of creating the ‘direct threat’ standard is to eliminate exclusions which are not based on objective evidence about the individual involved.”) (emphasis omitted) (quoting H.R. REP. No. 101-485, pt. 3, at 45 (1990)) (collecting cases)); 28 C.F.R. pt. 35, app. B, at 35.104 (2024) (“The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence.”); 28 C.F.R. pt. 36, app. C, at 36.208 (2024) (same); see also id. (“[A]ny eligibility or safety standard established by a public accommodation must be based on actual risk, not on speculation or stereotypes.”).

208. 28 C.F.R. § 35.139(b) (2024) (emphasis added); id. § 36.208(b) (same); see also Bragdon, 524 U.S. at 649-55 (concluding that determination of a direct threat “must be based on medical or other objective evidence,” and conducting a rigorous and individualized inquiry into the risk of HIV transmission from patient to dentist); accord School Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287-88 (1987) (holding that an “individualized inquiry” into the risk that a plaintiff with a record of tuberculosis would transmit the disease was “essential if § 504 [of the Rehabilitation Act] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks”).

209. 28 C.F.R. § 35.139(b) (2024); id. § 36.208(b).
Second, assuming that the participation of an individual with gender dysphoria in a particular sport poses some risk to others, that risk must be significant, as determined by current medical evidence or other objective evidence. In the sports context, that standard cannot be met. For starters, there is no risk—let alone a significant one—in sports that do not involve physical contact, such as track and field, gymnastics, cycling, swimming, rowing, sailing, and volleyball. Furthermore, even in sports where there is physical contact, science suggests that the risk of injury is not significant; indeed, recent systematic peer-reviewed reviews of research have found no evidence that trans people are more likely than other participants to cause injury to their opponents. Suggestions to the contrary are based not on science or other objective criteria, but instead on “prejudice, stereotypes, [and] unfounded fear” about people with gender dysphoria. Indeed, the physical characteristics that create the purported risk—size, strength, and speed—are not unique to transgender female athletes; many non-transgender women are tall, strong, and fast but sports bans notably do not ban their participation.

Finally, although it is exceedingly difficult to imagine a situation in which a person with gender dysphoria posed an objectively significant risk to others in a sex-based sport, an entity could not prohibit the participation of such a person outright. Instead, the entity would have an obligation to make reasonable modifications to “mitigate the risk” of that person’s participation. Part IV.B discusses what such reasonable modifications might look like.

For all of these reasons, a categorical ban on the participation of all people with gender dysphoria across all sex-based sports cannot be justified by the “direct threat” defense.

4. Holding that Sports Bans Intentionally Discriminate Based on

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210. See 28 C.F.R. § 35.139(b) (2024); id. § 36.208(b); see also supra notes 206-09 and accompanying text.

211. See, e.g., Joint Academic Letter to All Board Members at World Rugby and Member Unions (Aug. 31, 2020), https://perma.cc/P4DX-ERFA (citing studies finding “no evidence that transgender people pose a safety risk to others”); Buzuvis, supra note 12, at 7-8 & nn.29-30 (“[C]ourts considering the constitutionality of exclusionary policies in Little League Baseball and other sports have largely rejected the safety rationale because it is rooted in broad generalizations about the physical differences between boys and girls and because ostensible concerns about safety are not promoted when stronger, larger girls are excluded and weaker, smaller boys are allowed to play.”) (collecting cases); cf. Saint v. Neb. Sch. Activities Ass’n, 684 F. Supp. 626, 629 (D. Neb. 1988) (holding that a school’s prohibition of the female plaintiff from competing on the men’s wrestling team likely violated equal protection because the school’s evidence of the “potential for injury” to the plaintiff “contain[ed] nothing more than generalized statements applicable to typical school-age females in the population at large,” and the school did not similarly “prohibit weak male students from wrestling”).

212. Arlene, 480 U.S. at 287; see, e.g., 28 C.F.R. pt. 35, app. B, at 35.104 (2024); see also Joint Academic Letter, supra note 211 (“There currently is very little peer-reviewed science that has collected data on trans women athletes, and [trans-exclusive] guidelines rely on assumptions about trans women’s bodies.”).

213. 28 C.F.R. § 35.139(b) (2024); id. § 36.208(b).
Disability Does Not Undermine Sex-Based Sports

Concluding that sports bans are intentionally discriminatory does not threaten the separation of sports based on sex-based physical characteristics. Schools and athletic associations remain free to categorically exclude non-transgender men and boys from women’s and girls’ sports. They also remain free to exclude women and girls with gender dysphoria from participating in women’s and girl’s sports on an individualized basis, such as where the individual athlete poses a direct threat or has an actual advantage in a competitive sport. What schools and athletic associations cannot do is categorically exclude women and girls from participating in women’s and girls’ sports because they are women or girls with gender dysphoria.

B. Sports Bans Constitute a Failure to Make Reasonable Modifications to Permit Women and Girls with Gender Dysphoria to Participate in Sex-Based Sports.

ADA Titles II and III and the Rehabilitation Act require making “reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” As the Supreme Court has made clear, “To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.” By prohibiting women and girls with gender dysphoria from participating in sex-based sports without exception—that is, without individualized consideration for whether their inclusion would

214. See supra Part IV.A (arguing that sports bans intentionally discriminate against women and girls with gender dysphoria).

215. See supra notes 206-09 and accompanying text (discussing direct threat).

216. See infra Part IV.B (discussing individualized circumstances in which a birth sex requirement need not be waived for a person with gender dysphoria).

217. See supra Part IV.A.


219. PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001) (emphasis added); see also Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 605-07 & n.16 (1999) (holding that the ADA’s reasonable modification mandate required a fact-specific analysis of whether placement of persons with mental disabilities in community settings rather than in institutions would fundamentally alter the State’s mental health program, “taking into account the resources available to the State and the needs of others with mental disabilities”).
fundamentally alter the character of a sports program—such bans necessarily violate disability rights laws’ reasonable modification mandate.\textsuperscript{220}

1. No Fundamental Alteration

A state may avoid liability if it can “demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”\textsuperscript{221} In PGA Tour, Inc. v. Martin, the Supreme Court determined that a fundamental alteration to a professional sports program may occur when a modification of a rule alters an “essential” aspect of the sport, or when a modification “that has only a peripheral impact” on the sport nonetheless gives an athlete with a disability “an advantage over others.”\textsuperscript{222} In that case, the Court held that waiving the PGA Tour’s “walking rule” for an individual golfer with a disability was a reasonable modification that did not result in a fundamental alteration.\textsuperscript{223} According to the Court, walking is not essential to golf; rather, “the
essence of the game [is] shotmaking." Furthermore, to the extent that the purpose of the walking rule was to "inject the element of fatigue into the skill of shot-making," permitting an individual golfer with a physical disability to use a golf cart did not frustrate this purpose, thereby giving the golfer an advantage, because he "easily endur[ed] greater fatigue even with a cart than his able-bodied competitors do by walking." 

As discussed below, a birth sex requirement is not essential to competitive sex-based sports because not all people with a male birth sex have an advantage in all such sports. An individualized inquiry is required to determine whether waiving a birth sex rule to permit an athlete with gender dysphoria to participate in such sports would give the athlete an advantage over others. A birth sex requirement is also not essential to non-competitive sex-based sports because advantage is irrelevant.

a. For Competitive Sports, the Birth Sex Requirement is not "Essential" and Must Be Waived Where Excluding a Transgender Athlete Cannot Be Justified

Birth sex per se is not an essential feature of competitive sex-based sports. Even in sports which are predicated on competitive fairness, birth sex "is not a legitimate accurate proxy for athletic performance." 

Generally speaking, post-pubertal boys and men produce fifteen to twenty times more testosterone than people assigned female at birth, which contributes over time to "larger and stronger bones, greater muscle mass and strength, and higher circulating hemoglobin" resulting in enhanced aerobic capacity. But

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224. Id. at 683. The Court in PGA Tour, Inc. suggested that “changing the diameter of the hole from three to six inches might be . . . a [fundamental] modification” to the game of golf. Id. at 682; see also Kuketz v. Petronelli, 821 N.E.2d 473, 479–80 (D. Mass. 2005) (holding that allowing for more than one bounce in racquetball was a fundamental alteration); Ass’n for Disabled Ams., Inc. v. Concorde Gaming Corp., 158 F. Supp. 2d 1353, 1367 (S.D. Fla. 2001) (explaining that changing the positioning of the players or the boundaries of the playing surface in craps was a fundamental alteration).

225. PGA Tour, Inc., 532 U.S. at 686 (quoting Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1250 (D. Or. 1998)); id. at 690; see also id. at 672, 690 (“To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality. . . . The purpose of the walking rule is . . . not compromised in the slightest by allowing Martin to use a cart.”).

226. Cf. id. at 688.


228. Roe, 2022 WL 3907182, at *8 (quoting Clark v. Ariz. Interscholastic Athletic Ass’n, 695 F.2d 1126, 1129 (9th Cir. 1982)).

229. Handelsman et al., supra note 48, at 805 (“[A]fter puberty men produce 20 times
importantly, the driver of those differences is testosterone, not birth sex. Transgender women and girls who have not undergone puberty (due to their young age or taking puberty suppressants) or who have undergone hormone therapy do not experience elevated testosterone levels and, thus, do not obtain the athletic advantage associated with their birth sex.230

Additionally, even athletes with elevated levels of testosterone “may simply have no discernable advantage” depending on a host of other potentially relevant factors, such as the nature of the particular sport in which the athlete chooses to participate.231 Fencing, rock climbing, and shooting are obvious examples of sports in which testosterone confers no advantage,232 but the same may be true for team sports like volleyball and rowing where a single outstanding player does not necessarily confer a substantial advantage on a team.233 Other relevant factors include the athlete’s “age [and] the [athlete]’s athletic ability or history of success in the sport.”234 Transgender women, for example, display a great deal of

more testosterone than women, resulting in circulating testosterone concentrations 15-fold higher in children or women of any age.”); see also B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ., 98 F.4th, 542, 560 (4th Cir. 2024) (stating that “both sides cited authorities agreeing that the driver of the most significant sex-based differences in athletic performance is differing levels of circulating testosterone” beginning with puberty); Hecox v. Little, 79 F.4th 1009, 1023 (9th Cir. 2023) (“[C]irculating testosterone is the ‘one [sex-related] factor that a consensus of the medical community appears to agree’ actually affects athletic performance.” (quoting Hecox, 479 F. Supp. 3d at 984 (D. Idaho 2020))); CONN. STATE DEP’T OF EDUC., CONNECTICUT PHYSICAL FITNESS ASSESSMENT THIRD GENERATION: TEST ADMINISTRATOR’S MANUAL 2019-20, at 12 (2019), https://perma.cc/3HNH-D44T (“[D]ifferences in cardiac function and body composition between adolescent boys and adolescent girls result in adolescent boys, as a general rule, having a higher aerobic capacity than adolescent girls.”).

230. Roe, 2022 WL 3907182, at *8 (“Before puberty, boys have no significant athletic advantage over girls. Many transgender girls—including two of the plaintiffs in this case—medically transition at the onset of puberty, thereby never gaining any potential advantages that the increased production of testosterone during male puberty may create. Other transgender girls may mitigate any potential advantages by receiving hormone therapy,” (citations omitted)).

231. See id.

232. See Leong, supra note 55, at 1266, 1268-69.

233. See NCAA OFF. INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 32 n.4 (2011), https://perma.cc/HGV2-M6R9 (“[W]hat counts as a competitive advantage may shift dramatically depending on the sport. What is an advantage in one context may be a disadvantage in another.”); see also Leong, supra note 55, at 1266 (“[I]n some instances some female athletes perform as well or better than male athletes at particular endeavors.”).

234. Roe, 2022 WL 3907182, at *8; see also id. (stating that “allowing [the plaintiff] to compete on a school swim team with other girls does not pose unfairness” because, inter alia, “[the plaintiff] is one of the smallest girls on her private swim team [and] while other girls on her team have qualified for regional swimming events, [the plaintiff] has not”); Dennin v. Conn. Interscholastic Athletic Conf., Inc., 913 F. Supp. 663, 669 (D. Conn. 1996) (holding that a waiver of the age eligibility rule “would not alter the nature of the swimming program” for a student who was, inter alia, “always the slowest swimmer in the pool[,] and . . . not a [s]afety risk to himself or others”); H.B. 11, 64th Leg., 2022 Sess. § 8 (Utah 2022) (requiring consideration of whether a student will have “a material competitive advantage when compared to students of the same age competing in the relevant gender-designated activity,
physical variation, just as there is a great deal of natural variation in physical size and ability among non-transgender women. Not all transgender women “are unusually tall and have large bones and muscles. . . . A male-to-female transgender girl may be small and slight, even if she is not on hormone blockers or taking estrogen.” Such variation is particularly prevalent among youth “who are still developing physically and who therefore display a significantly broader range of variation in size, strength, and skill than older youth and adults.”

Birth sex requirements are not essential to competitive sports because they categorically exclude those without elevated levels of testosterone—namely, transgender women and girls who have not undergone puberty or have “mitigate[d] any potential advantages by receiving hormone therapy.” They also categorically exclude those who, even if they experience elevated testosterone levels, may have no discernable athletic advantage for a host of other reasons, such as the nature of the particular sport or the athlete’s age or athletic ability. An individualized assessment is therefore required to determine if an individual with gender dysphoria in fact has an athletic advantage in a competitive sport. The Supreme Court’s decision in PGA Tour, Inc. waiving the PGA’s walking rule, together with numerous lower court decisions waiving age- and semester-eligibility rules, strongly suggest that the outcome of this

including consideration of the student’s previous history of participation in gender-designated interscholastic activities”).

236. Griffin & Carroll, supra note 12, at 15; cf. Buzvis, supra note 12, at 35-36 (discussing “generalized physiological differences between men and women” and noting that “these are average differences, not categorical distinctions. In the context of sports, this means that a male athlete competing in women’s sport is not necessarily going to be the tallest, leanest, most muscular individual on the team”).
239. See id.
240. 532 U.S. at 685 (“The walking rule . . . is not an essential attribute of the game [of golf] itself.”); id. at 690 (“Even if the [walking] rule does serve the purpose of subjecting golfers to fatigue, it is an uncontested finding . . . that Martin ‘easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.’ The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to fundamentally alter the tournament.” (quoting Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1252 (D. Or. 1998))).
individualized inquiry will be waiver of birth sex requirements for people with gender dysphoria in many cases. So, too, does the viability and ongoing robustness of sex-based sports programs in the 25 states and the District of Columbia that currently permit transgender women and girls to play alongside other women and girls.\(^\text{242}\)

b. For Non-Competitive Sports, the Birth Sex Requirement Is Not “Essential” and Can Be Waived for All Transgender Athletes

For non-competitive sports and sports in which competition is secondary to health, fitness, and the development of athletic and social skills (e.g., intramural, freshman, and junior varsity sports), the reasonable modification analysis is even more straightforward. There is no fundamental alteration in waiving birth sex rules for non-competitive sports because competitive fairness is not an essential feature of these sports; indeed, any athletic advantage conferred by birth sex is wholly irrelevant or secondary.\(^\text{243}\) What is essential to these sports is participation and skill development, which are furthered, not undermined, by the inclusion of transgender women and girls on women’s and girls’ teams.\(^\text{244}\)

c. Holding That Birth Sex Requirements Are Not Essential and Can


\(^\text{242}\). See Hecox v. Little, 479 F. Supp. 3d 930, 981-82 (D. Idaho 2020) (noting that, at the time of the decision, “every other state in the nation permit[ted] women and girls who are transgender to participate under varying rules”); Galloway v. Superior Ct., 816 F. Supp. 12, 16-19 & n.5 (D.D.C. 1993) (holding that the categorical exclusion of blind people from juries violated the Rehabilitation Act and the ADA based, in part, on the existence of laws in ten states forbidding the exclusion of blind jurors); cf. PGA Tour, Inc., 532 U.S. at 685 (rejecting the sports association’s argument that its walking rule was essential based, in part, on the fact that the association permitted golf carts to be used by non-disabled golfers] in several of its tournaments other than the one in question); Mary Jo C. v. N.Y. State & Loc. Ret. Sys., 707 F.3d 144, 160 (2d Cir. 2013) (rejecting the State’s argument that the filing deadline for disability retirement benefits was essential based, in part, on the fact that the State “already waives or extends the filing deadline . . . for certain classes of individuals . . . . The fact that the State itself waives the deadline in the enumerated circumstances strongly suggests that the filing deadline is not ‘essential.’”); Bingham, 24 F. Supp. 2d at 1116 (D. Or. 1998) (waiving the eight-semester eligibility rule based, in part, on evidence “that a similarly situated student was nonetheless granted a waiver of the Eight Semester Rule”).

\(^\text{243}\). See Buzuvis, supra note 12, at 54-55 (discussing non-competitive sports).

\(^\text{244}\). See id. at 50-54 (discussing the benefits of non-competitive sports).
Be Waived Does Not Undermine Sex-Based Sports

Concluding that birth sex is not an essential attribute of either competitive or non-competitive sports and can be waived on a case-by-case basis does not threaten the separation of sports based on sex-based physical characteristics. Rather, it accepts such separation but requires modifications for people with gender dysphoria when the modifications would not fundamentally alter the nature of the sport, such as when competitive advantage does not matter to the sport or the athlete with gender dysphoria has no material advantage.245

Just as the PGA Tour may continue to maintain its categorical walking rule for golfers without disabilities,246 schools and athletic associations may continue to categorically exclude non-transgender men and boys from women’s and girls’ sports; they need only reasonably modify these rules for people with gender dysphoria. Such a result is neither discriminatory nor unfair toward those without disabilities. Unlike women and girls with gender dysphoria, non-transgender men and boys who wish to compete against women and girls are not entitled to the protection of disability law because they do not have a disability.247 People without gender dysphoria are not protected by disability law on that basis.248 Additionally, unlike women and girls with gender dysphoria, non-transgender men and boys have a ready alternative to competing against women and girls: they can compete against other men and boys. By contrast, sports bans eliminate the opportunity for women and girls with gender dysphoria to participate in sex-based sports.249

2. Waivers of Birth Sex Rules Are Reasonable and Necessary, and Consideration of Such Requests Does Not Amount to an Undue Burden

According to the Supreme Court, a “reasonable” modification is one that is “reasonable on its face, i.e., ordinarily or in the run of cases,” “feasible,” or “plausible.”250 This is a “relatively low bar,” requiring merely “a facially

245. See supra notes 238-45 and accompanying text (discussing reasonable modifications to birth sex requirements).
247. See supra notes 129-32 and accompanying text (discussing the ADA’s definition of disability).
248. See 42 U.S.C § 12201(g) (“Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”).
249. See Hecox v. Little, 479 F. Supp. 3d 930, 977 (D. Idaho 2020) (observing that a sports ban’s “categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports . . . while the men . . . ha[ve] generally equal athletic opportunities”).
reasonable request." Additionally, a modification is “necessary” if it permits a person to fully and equally benefit from the service.

Waiving the birth sex rule for athletes with gender dysphoria is facially reasonable: indeed, half of the country imposes no such rule in the first place. Furthermore, schools and athletic associations have procedures in place to waive eligibility rules to permit athletes with and without disabilities to participate, and they routinely consider and grant such waivers. Such waivers are also necessary because they permits athletes with gender dysphoria to participate in sex-based sports; without a waiver, they are unable to do so.

The fact that an individualized inquiry may impose an administrative burden on schools, universities, and athletic associations, moreover, does not render modifications to assigned-sex rules “unduly burdensome.” The Supreme Court stated in *PGA Tour, Inc.*, although “[t]he ADA admittedly imposes some administrative burdens on the operators of places of public accommodation that could be avoided by strictly adhering to general rules and policies,” Congress intended this result. “[N]owhere in [the ADA’s prohibition of discrimination by public accommodations] does Congress limit the reasonable modification requirement only to requests that are easy to

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252. *See*, e.g., Baughman v. Walt Disney World Co., 685 F.3d 1131, 1135-36 (9th Cir. 2012) (holding that a “necessary” modification is one that makes a person’s experience “less onerous and more akin to that enjoyed by [non-disabled] . . . patrons,” and holding that the use of a Segway at Disneyland was a necessary accommodation because it was more comfortable and dignified than the scooters and wheelchairs that Disneyland provided); accord D.L. ex rel. A.L. v. Walt Disney Parks & Resorts US, Inc., 900 F.3d 1270, 1296 (11th Cir. 2018) (holding that a necessary modification is one that “provide[s] disabled guests with a ‘like experience’” to guests without disabilities (quoting Argenyi v. Creighton Univ., 703 F.3d 441, 449 (8th Cir. 2013)); Argenyi, 703 F.3d at 451 (holding that a necessary modification is one that provides a person with a disability “meaningful access” or an equal opportunity to gain the same benefit as a person without a disability); *see also* *PGA Tour, Inc.*, 532 U.S. at 682 (stating, in dicta, that a modification is necessary if the person would be unable to access the benefit without the accommodation); U.S. Dep’t of Just., supra note 119, at II-3.4400, .6100 (stating that public entities’ modifications to programs must “provide an opportunity for . . . [an] individual [with a disability] to benefit” from the program, and must “ensure that otherwise eligible individuals are not denied needed benefits”).

253. *See supra* note 242 and accompanying text (discussing the twenty-five states with no birth sex requirement).

254. *See infra* note 262 and accompanying text.

255. *See* Hecox v. Little, 479 F. Supp. 3d 930, 977 (D. Idaho 2020) (explaining that forcing transgender girls to “[p]articipat[e] in sports on teams that contradict one’s gender identity . . . entirely eliminates their opportunity to participate in school sports”).

256. 42 U.S.C. § 12182(b)(2)(A)(iii); *see infra* notes 258-62 and accompanying text.

257. 532 U.S. at 690-91 (“[S]urely, in a case of this kind, Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.”).
evaluate.”

Given the extraordinarily small number of people with gender dysphoria, requests for modifications will be correspondingly few. Furthermore, many schools, universities, and athletic associations already conduct individualized inquiries into whether students—both with and without disabilities—should receive waivers for certain eligibility rules (for example, rules governing the transfer of a student from one school to another). Requiring such an inquiry for people with gender dysphoria seeking to participate in sex-based sports is not a significant additional burden.

V. CONCLUSION

Like so many areas of transgender people’s lives—from access to healthcare to use of public restrooms—the participation of transgender athletes in sex-based sports has become one of the most politically and culturally fraught issues of our time, stoking resentment and confounding policymakers. Although debate over the proper legal response to the participation of transgender athletes in sex-based sports has focused on sex discrimination law, disability rights law should also

258. Id. at 690 n.53.

259. See Jody L. Herman, Andrew R. Flores & Kathryn K. O’Neill, Williams Inst., How Many Adults and Youth Identify as Transgender in the United States?, at 1 (2022), https://perma.cc/VQ4U-B9HS (stating that there are approximately 1.3 million transgender adults and approximately 300,000 transgender youth aged 13 to 17 living in the United States); see also AM. PSYCHIATRIC ASS’N, supra note 70, at 454 (5th ed. 2013) (detailing the prevalence of gender dysphoria).

260. Cf. PGA Tour, Inc., 532 U.S. at 690 n.53 (“[I]n the three years since he requested the use of a cart, no one else has sued the PGA, and only two other golfers . . . have sued the USGA for a waiver of the walking rule.”); Washington v. Ind. High Sch. Athletic Ass’n, 181 F.3d 840, 852 (7th Cir. 1999) (“The record indicates that Mr. Washington is the only student athlete to seek a waiver because of a learning disability in more than a decade. The few case-by-case analyses that the [defendant] would need to conduct hardly can be described as an excessive burden.”).

261. See, e.g., Washington, 181 F.3d at 852 (“The [defendant] already conducts individualized inquiries into whether student athletes with physical impairments should receive a waiver; requiring such an analysis in disability cases will not be a significant additional burden.”); Cruz ex rel. Cruz v. Pa. Interscholastic Athletic Ass’n, 157 F.Supp.2d 485, 500 (E.D. Pa. 2001) (“[I]n light of the other waivers which the [sports association], through district committees, routinely considers, namely transfer and 8 term waivers (some of which require the determination of athletic intent), and in view of the apparent ability of the [sports association] to make what must be very difficult decisions in those waiver cases, I do not believe that an age waiver rule would put an undue burden on the [sports association].”); Dennin v. Conn. Interscholastic Athletic Conf., Inc., 913 F. Supp. 663, 669 & n.1 (D. Conn. 1996) (finding no undue burden based, in part, on the fact that the association “has in place a waiver mechanism for eligibility requirements. There is no limitation on which rules are waivable. . . . In fact, transfer waivers are routinely considered. The presence of this mechanism weakens [defendant’s] argument that case-by-case consideration of waivers constitutes an undue burden’’); id. at 669 (“[Defendant] is not required to grant waivers to all students who fail to meet the age requirement. However, it would be required under the Rehabilitation Act to give the disabled individual consideration, including to [the plaintiff], as he falls within the Act. The holding of this case only affects [the defendant’s] consideration of the disabled, not its consideration of all students failing to meet the age requirement.”).
inform the debate. State laws that categorically ban transgender women and girls from playing sex-based sports discriminate based on gender dysphoria in violation of the Americans with Disabilities Act and Rehabilitation Act. Such a result does not mean that public and private entities must permit all transgender women and girls to play all sex-based sports; rather, such entities must permit such participation when doing so would not fundamentally alter the nature of the sport. Disability rights law thus expands the conversation beyond fairness and advantage to something equally important: the full participation of people with myriad health conditions in all aspects of society.