ALL-AMERICAN DISCRIMINATION: NORTH CAROLINA AND TRANSGENDER STUDENT-ATHLETES♦

INTRODUCTION

In February of 2016, the City Council of the City of Charlotte, North Carolina passed Ordinance Number 7056, an amendment to the Charlotte City Code that sought to prevent discrimination based upon one's "sexual orientation, gender expression, and gender identity" by ensuring that these characteristics were protected under existing non-discrimination ordinances.[1] Expanding protection of gay, lesbian and transgender persons to businesses and public accommodations (such as restaurants, bars and stores), the city ordinance included a provision that allowed transgender persons to use bathrooms that corresponded to the gender with which they identified.[2] The amendment faced almost immediate backlash as, just a month later, North Carolina's State Legislature called a special session in order to repeal parts of the ordinance.[3] On March 23, 2016, the North Carolina Legislature passed the Public Facilities Privacy and Security Act, or House Bill 2, which Governor Pat McCrory immediately signed it into law.[4]

Part one of House Bill 2 specifically addressed the "bathroom" provision of Charlotte's ordinance.[5] It mandated that every "multiple occupancy" bathroom, locker room, or changing facility "that is designated for student use" be used only according to one's "biological sex."[6] The Bill defined "biological sex" as "the physical condition of being male or female, which is stated on a person's birth certificate."[7] This ensured that transgender persons, irrespective of what legal and/or surgical steps they may have taken to transition, could not use public restrooms, locker rooms, or facilities in accordance with their gender identities.

Part One of House Bill 2 successfully repealed Charlotte's ordinance prior to its actual implementation.[8] Governor McCrory stated

---

1 CHARLOTTE, N.C., CODE OF ORDINANCES 7056 (2016).

2 David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, THE ATLANTIC (Mar. 24, 2016), http://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/.

3 Greg Lacour, *How North Carolina Got Here (Updated)*, CHARLOTTE MAGAZINE (Mar. 30, 2017, 2:29 PM), http://www.charlottemagazine.com/Charlotte-Magazine/April-2016/HB2-How-North-Carolina-Got-Here/.

4 Public Facilities Privacy and Security Act, 2016-3 N.C. Sess. Laws 12 (2016); *see id.*

5 *Id.* at Part I sec. 1.1-1.3 12, 12-14. House Bill 2 contains five parts, the first of which has been colloquially called the "Bathroom Bill." Part II addresses such concerns as minimum wage and child labor protections. Part III removes a state law claim for discrimination in the work force on the basis of race, sex, religion, national origin, etc. Part IV is a severability clause, which purports that, even if one section of the Bill falls, the rest will be safe. Part V addresses the technical questions of the Bill, such as effective date of the Bill.

6 *Id.* at Part I sec. 1.2, N.C. Gen. Stat. §115C-521.2.

7 *Id.*

8 Bruce Ferrell, *Governor McCrory Takes Action to Ensure Privacy in Bathrooms and Locker*

that "overreach and intrusion by the mayor and city council of Charlotte" violated the "basic expectation of privacy," by contravening "common sense and basic community norm by allowing, for example, a man to use a woman's bathroom, shower or locker room."[9] Some were motivated to pass House Bill 2 due to a fear of men entering women's bathrooms and "placing the privacy, safety, and dignity of women, children, the elderly, and others at great risk."[10] Not only did House Bill 2 repeal Charlotte's ordinance, but it also ensured that other cities within the state could not pass their own nondiscrimination ordinances identifying transgender persons as a protected class.[11] Although Governor McCrory's issued an Executive Order in April 2016 that added sexual orientation and gender identity to the list of protected classes with reference to state employees, the text of House Bill 2 remained intact.[12]

Nationwide, lawmakers seek to pass legislation like House Bill 2 that either limits the rights of transgender persons or buttresses existing discriminatory laws, rules or regulations.[13] Perhaps those most adversely affected by these measures are transgender youth. Studies show that transgender youth are already more at risk than cisgender youth when it comes to depression, anxiety, suicidal thoughts, and suicide.[14] These studies also show that this disparity results from victimization of transgender students.[15] Laws like House Bill 2, which perpetuate stigmatization of transgender persons, only amplify this victimization. Laws like House Bill 2 go deeper than the bathroom; they permeate the locker room and influence transgender student participation in extracurricular activities and interscholastic athletics.

Rooms, NORTH CAROLINA NEWS NETWORK (Mar. 24, 2016, 9:32 PM), http://www.ncnn.com/edit-news/9768-governor-mccrory-takes-action-to-ensure-privacy-in-bathrooms-and-locker-rooms-.

[9] *Id*.

[10] *Public Facilities Privacy & Security Act: Hearing on HB 2 Before the House Judiciary Comm. IV, March 21, 2016*, Gen. Assemb. Second Extra Sess. (N.C. 2016) (statement of John Rustin, President, North Carolina Family Policy Council).

[11] *See* Graham, *supra* note 2.

[12] N.C. Exec. Order No. 93 (Apr. 12, 2016) (Governor Pat McCrory's order "To Protect Privacy and Equality").

[13] *See Legislative Tracker: Anti-Transgender* Legislation, FREEDOM FOR ALL AMERICANS, https://www.freedomforallamericans.org/2018-legislative-tracker/legislative-tracker-anti-transgender-legislation/ (last visited Apr. 5, 2018).

[14] *See* Sari L. Reisner, Ralph Vetters, M. Leclerc, Shayne Zaslow, Sarah Wolfrum, Daniel Shumer & Matthew J. Mimiaga, *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center: A Matched Retrospective Cohort Study*, 56 J. OF ADOLESCENT HEALTH 274 (2015); Brian A. Rood , Julia A. Puckett, David W. Pantalone , and Judith B. Bradford, *Predictors of Suicidal Ideation in a Statewide Sample of Transgender Individuals*, 2(3) LGBT HEALTH 270 (2015); Amaya Perez-Brumer, Jack K. Day, Stephen T. Russel, and Mark L. Hatzenbuehler, *Prevalence and Correlates of Suicidal Ideation Among Transgender Youth in California: Findings From a Representative, Population-Based Sample of High School Students*, 56 J. OF THE AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 739 (2017).

[15] *See id.*

The question of transgender student participation in interscholastic athletics is a relatively new one.[16] States differ as to how they define the sex of transgender student-athletes and these differing definitions directly impact whether and how transgender student-athletes can participate in interscholastic sports.[17] Some states have no clear policy on the participation of transgender student-athletes.[18] Some states allow transgender student-athletes to compete according to their gender identities.[19] Some states require hormone therapy in order for a transgender student-athlete to compete according to his or her gender identity.[20] Some states require sex reassignment surgery in order for a transgender student-athlete to compete according to his or her gender identity.[21] Some states require that a student-athlete only compete on a team that aligns with his or her biological sex, which is found on his or her birth certificate, effectively eliminating a transgender student-athlete's ability to compete on a team that matches his or her gender identity.[22] In early 2017, a Texas wrestler named Mack Beggs, a transgender boy, won the Texas state championship after competing against girls.[23] Beggs "want[ed] to compete against boys," but because, "under Texas rules, boys can't compete against girls, and students must compete as the gender marked on their birth certificate[,]" Beggs could only wrestle in the girls' league.[24] North Carolina has similar high school interscholastic athletic rules on the books.[25]

House Bill 2 faced intense political and social backlash, with severe financial repercussions for the state of North Carolina and its public institutions.[26] On August 1, 2017, the Democratic candidate for Governor of North Carolina, Roy Cooper, defeated incumbent Pat McCrory to become the Governor of North Carolina.[27] Governor

16 *See* Malika Andrews, *How Should High Schools Define Sexes for Transgender Athletes?*, N.Y. TIMES (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/sports/transgender-athletes.html.

17 *See id.*; *K-12 Policies*, TRANSATHLETE.COM, https://www.transathlete.com/k-12 (last visited Apr. 5, 2018).

18 *See Know Your Rights: Transgender People and the Law*, ACLU, https://www.aclu.org/know-your-rights/transgender-people-and-law (last visited Apr. 5, 2018). Question 7 asks: "Are there laws that protect transgender students' right to participate in high school and college sports?"

19 *See K-12 Policies*, *supra* note 17.

20 *Id.*

21 *Id.*

22 *Id.*

23 *See* Camila Domonoske, *17-Year-Old Transgender Boy Wins Texas Girls' Wrestling Championship*, NPR (Feb. 27, 2017, 11:44 AM), https://www.npr.org/sections/thetwo-way/2017/02/27/517491492/17-year-old-transgender-boy-wins-texas-girls-wrestling-championship.

24 *See id.*

25 *See K-12 Policies*, *supra* note 17.

26 CHRISTY MALLORY & BRAD SEARS, DISCRIMINATION, DIVERSITY, AND DEVELOPMENT: THE LEGAL AND ECONOMIC IMPLICATION OF NORTH CAROLINA'S HB2 (2016).

27 *See* The New York Times, *North Carolina Governor Results: Roy Cooper Wins*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/elections/results/north-carolina-governor-mccrory-

Cooper ran on a platform in which he pledged to repeal House Bill 2.[28] As such, on March 30, 2017, nearly a year after the passage of House Bill 2, Governor Cooper signed House Bill 142 into law, which technically repealed House Bill 2, but which many called "a 'repeal' in name only."[29] House Bill 142 nullifies the discriminatory 'bathroom' language of House Bill 2, but keeps regulation of bathroom access in the hands of the Legislature *and* prevents any local governments from passing any antidiscrimination ordinances (like the Charlotte Ordinance) until December 2020.[30] Essentially, not only does House Bill 142 return North Carolina to its pre-House Bill 2 status quo, but also to its pre-Charlotte Ordinance status quo. Although the language of House Bill 142 is not overtly discriminatory,[31] it leaves the most vulnerable of transgender persons, transgender students, open to victimization because it denies them protection under existing law.

Transgender students should be able to use bathrooms according to their gender identities. Transgender students should be able to use locker rooms according to their gender identities. Transgender students should be able to participate on sports teams according to the gender identities. Using North Carolina as its lens, this Note will explore the hurdles transgender student-athletes face in the United States. Part One will define what it means to be transgender and the legal issues facing transgender status in the United States. Part Two will discuss the benefits of athletic participation for students, the hardships transgender student-athletes face, and the potential legal protections afforded to transgender student-athletes within the United States under the Fourteenth Amendment and Title IX of the Education Amendments of 1972. Part Three will explore the National Collegiate Athletic Association (NCAA) and high school rules pertaining to transgender student-athlete participation and assess whether these rules violate the Fourteenth Amendment and Title IX. Part Four will analyze House Bill 2 to determine whether it violates the Fourteenth Amendment and Title IX, and, finally, Part Five will assess House Bill 142 itself to determine whether it violates the Fourteenth Amendment and whether it provides a workable resolution to the detrimental impact of House Bill 2.

cooper.

[28] *See A North Carolina That Works For Everyone*, ROY COOPER FOR NORTH CAROLINA, https://www.roycooper.com/issues/jobs/ (last visited Apr. 5, 2018).

[29] *See* An Act to Reset S.L. 2016-3, 2017-4 N.C. Sess. Law; *see* Jason Hanna, Madison Park and Elliott C. McLaughlin, *North Carolina repeals 'bathroom bill,'* CNN (Mar. 30, 2017), https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html.

[30] *See* An Act to Reset S.L. 2016-3, 2017-4 N.C. Sess. Law; *see* Hanna, *supra* note 29.

[31] *See* An Act to Reset S.L. 2016-3, 2017-4 N.C. Sess. Law.

I. TRANSGENDER STATUS IN THE UNITED STATES

A. *Transgender Defined*

The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) defines *gender identity* as "a category of social identity and refers to an individual's identification as male, female, or, occasionally, some category other than male or female."[32] It further defines *transgender* as the "broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender."[33] An individual who was "assigned" the male gender at birth but identifies as female is considered male-to-female, or MTF.[34] Similarly, an individual who was "assigned" the female gender at birth but identifies as male is considered female-to-male, or FTM.[35] The DSM-V speaks of transgender in terms of gender dysphoria, which it defines as a mental disorder that hinges upon the distress transgender persons feel when their physical bodies do not align with their genders.[36] This means that the distress that comes with gender dysphoria is not inherent in being transgender; there are those who are not distressed that their physical bodies do not align with their gender identities.[37]

The DSM previously, in its fourth edition (DSM-IV), included Gender Identity Disorder (GID), which focused wholly on the identity issue at hand, inherently treating the cross-gender identity itself as a disease, further adding to the transgender stigma.[38] A progressive shift from GID to gender dysphoria mirrors that of the American Psychiatric Association's treatment of homosexuality, which was featured in the first edition of the DSM but taken out of the DSM in its second edition, published in 1973.[39]

B. *Important Case Law, Legislation, and Executive Action Affecting Transgender Rights*

Like the gay rights movement, many consider The Stonewall Riots

---

[32] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5, 461 (5th ed. 2013).

[33] *Id.*

[34] *See Start Here*, TRANSATHLETE.COM, http://www.transathlete.com/starthere (last visited Apr. 5, 2018).

[35] *Id.*

[36] *See* Stephanie Pappas, *Mental Health Problems Plague Transgender Kids*, LIVE SCIENCE (Feb. 20, 2012, 9:50 AM), http://www.livescience.com/16110-transgender-teen-mental-health.html.

[37] *See* Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift In Perspective on Gender Identity*, THE HUFFINGTON POST (June 4, 2013, 2:11 PM), http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html.

[38] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-4, at 493-518 (4th ed. 1994).

[39] *See The History of Psychiatry & Homosexuality*, LGBT MENTAL HEALTH SYLLABUS, http://www.aglp.org/gap/1_history/ (last visited Nov. 25, 2016).

the catalytic force that propelled the transgender rights movement forward.[40] But while there have been federal victories within the LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) community,[41] transgender persons have not overtly received protections from any United States Supreme Court rulings or federal statutes.[42] North Carolina passed House Bill 2 during the Obama Administration and, on May 10, 2016, the Department of Justice filed suit against the state of North Carolina "alleging that they are discriminating against transgender individuals in violation of federal law."[43] Additionally, the Obama-era Department of Justice and Department of Education co-authored a guidance letter on May 13, 2016, which it sent to every public school in the United States, that stated:

> Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. The prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status.[44]

The U.S. Department of Justice had positioned itself in the fight against House Bill 2 alongside Lambda Legal, the American Civil Liberties Union (ACLU), the ACLU of North Carolina and Equality North Carolina, who filed suit on behalf of two transgender North Carolinians, Joaquín Carcaño (a University of North Carolina-Chapel Hill employee) and Payton McGarry (a University of North Carolina-Chapel Hill student), and Angela Gilmore, a lesbian and North Carolina

---

[40] *See Stonewall* Riots, HISTORY, https://www.history.com/topics/the-stonewall-riots (last visited Apr. 5, 2018); *see* Laverne Cox, Molly Crabapple, Zackary Drucker, Chase Strangio, Kim Boekbinder & Jim Batt, *Laverne Cox Will Show You the Long, Intense Fight for Transgender Rights*, TIME (Aug. 10, 2017), http://time.com/4894647/trans-transgender-rights-video/.

[41] *See* Lawrence v. Texas, 539 U.S. 558 (2003); Don't Ask Don't Tell Repeal Act of 2010, Pub. L. 111-321, 124 STAT. 3515 (2010); *see* U.S. v. Windsor, 133 S. Ct. 786 (2012); *see* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339 (2017).

[42] *See Federal Case Law on Transgender People and Discrimination*, NAT'L CENTER FOR TRANSGENDER EQUALITY, *https*://transequality.org/federal-case-law-on-transgender-people-and-discrimination (last visited Apr. 5, 2018); *see* Adam Liptak, *Supreme Court Won't Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2017), *https*://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html.

[43] *See* Department of Justice Office of Public Affairs, *Justice Department Files Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals*, THE U.S DEP'T OF JUST.: JUSTICE NEWS (May 9, 2016), https://www.justice.gov/opa/pr/justice-department-files-complaint-against-state-north-carolina-stop-discrimination-against. The Department of Justice had previously sent a letter to Governor McCrory directly addressing House Bill 2 and its incompatibility with Title IX and the Fourteenth Amendment.

[44] *See* Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., and Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, to public schools, https://www.justice.gov/opa/file/850986/download.

Central University law professor.[45]

The success of both cases seemed to hinge on the fate of the Supreme Court's treatment of the United States Court of Appeals, Fourth Circuit ruling in *G. G. v. Gloucester County School Bd.* (hereinafter, *Grimm*).[46] The Fourth Circuit had found that the Virginia School District that refused to allow a female-to-male transgender student to use the bathroom that corresponded with his gender identity violated Title IX of the Education Amendments of 1972.[47] The *Grimm* case focused on the Fourth Circuit's deference to a United States Department of Education letter that included gender identity in the definition of sex discrimination under Title IX.[48] Acting Deputy Assistant Secretary for the Office of Civil Rights with the Department of Education, James A. Ferg-Cadima, had penned the letter in controversy in January of 2015.[49] The letter, directed at all schools that comply with Title IX, outlined compliance procedures and confirmed that, according to the Department of Education and the Department of Justice, Title IX protects students from being discriminated against due to their gender identities.[50] On October 28, 2016, the Supreme Court added the *Grimm* case to its docket, despite a vacancy on the Court left by the sudden passing of Justice Antonin Scalia—and the likelihood of a 4-4 split.[51] The Supreme Court would be ruling on the validity of the Fourth Circuit's deference to the Executive Branch and many thought it might pass judgment as to whether Title IX included gender identity within its definition of sex.[52]

However, shortly after President Donald Trump took office, the Department of Justice and the Department of Education rescinded both the May 2016 guidance letter and the Ferg-Cadima letter issued under the Obama Administration.[53] Issuing its own 'Dear Colleague' letter on

[45] Carcaño v McCrory, 203 F. Supp. 3d 615 (2016); *see Carcaño v. Cooper (formerly Carcaño v. McCrory)*, LAMBDA LEGAL, https://www.lambdalegal.org/in-court/cases/nc_carcano-v-mccrory (last visited Apr. 5, 2018).

[46] *See* G. G. v. Gloucester County School Bd., 822 F.3d 709 (2016). North Carolina is within the Fourth Circuit, so those arguing the *Carcaño* case argued that the *Grimm* case already stood for the notion that legislation or policy like House Bill 2 violated Title IX.

[47] *Id.*

[48] Letter from from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education, to Emily T. Prince (Jan. 7, 2015), found at http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf.

[49] *See id.*

[50] *Id.*

[51] Amy Howe, *Court Adds Five New Cases,Including Transgender Bathroom Dispute, to Docket*, SCOTUSBLOG (Oct. 28, 2016 2016 4:44 PM), http://www.scotusblog.com/2016/10/court-adds-five-new-cases-including-transgender-bathroom-dispute-to-docket/.

[52] *Id.*

[53] *See* Rebecca Hersher & Carrie Johnson, *Trump Administration Rescinds Obama Rule On Transgender Students' Bathroom Use*, NPR (Feb. 22,2017, 7:37 PM EST), *https*://www.npr.org/sections/thetwo-way/2017/02/22/516664633/trump-administration-rescinds-obama-rule-on-transgender-students-bathroom-use; *see* Jeremy W. Peters, Jo Becker & Julie

February 22, 2017, the Trump Administration expressed that the Obama-era guidance letters did not "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX," and that "there must be due regard for the primary role of the States and local school districts in establishing educational policy."[54] After the rescission of the Obama-era guidance letters, the Supreme Court remanded the *Grimm* to the Fourth Circuit because the Fourth Circuit's ruling was based on the Obama Administration's interpretation of Title IX.[55] Shortly thereafter, the Fourth Circuit remanded the case to the Eastern District of Virginia.[56] By rescinding the Obama-era guidance letters protecting transgender students, the Trump Administration ensured that the Supreme Court would not hear and decide upon this pressing transgender rights issue.

The Trump Administration Department of Justice dropped its House Bill 2 case against North Carolina on April 14, 2017, after Governor Roy Cooper signed House Bill 142 into law and "repealed" House Bill 2.[57] LGBTQ groups fiercely objected, with James Esseks, the director of the LGBT & HIV Project at the ACLU saying, "The Trump administration may want to use the fake repeal of House Bill 2 as an excuse to further turn their backs on the transgender community, but the rest of us aren't going to give up that easily."[58] Lambda Legal, the American Civil Liberties Union (ACLU), the ACLU of North Carolina and Equality North Carolina reached a settlement with Governor Cooper on October 18, 2017:

> Under H.B. 142, and with respect to public facilities that are subject to Executive Branch Defendants' control or supervision, transgender people are not prevented from the use of public facilities in accordance with their gender identity.

Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html; *see* Letter from Sandra Battle, Acting Assistant Secretary for Civil Rights U.S. Dep't of Education, and T.E. Wheeleer, II, Acting Assistant Attorney General for Civil Rights to public educators (Feb. 22, 2017).

[54] *See* letter from Battle & Wheeler to public educators, *supra* note 53.

[55] *See G.G. v. Gloucester County School Board*, ACLU, https://www.aclu.org/cases/gg-v-gloucester-county-school-board (last visited Apr. 5, 2018); *see* Alison Turner, *BREAKING: U.S. Supreme Court Remands and Vacates Gavin Grimm Case*, HUMAN RIGHTS CAMPAIGN (Mar. 6, 2017), https://www.hrc.org/blog/breaking-united-states-supreme-court-remands-and-vacates-gavin-grimm-case.

[56] *See G.G. v. Gloucester County School Board*, *supra* note 55; *see* Daniel Trotta, *Major U.S. transgender case remanded after student graduates*, REUTERS (Aug. 2, 2017, 3:43 PM), https://www.reuters.com/article/us-usa-court-transgender/major-u-s-transgender-case-remanded-after-student-graduates-idUSKBN1AI2MF.

[57] *See* Mary Kay Mallonee, Daniella Diaz & Laura Jarrett, *DOJ drops lawsuit against North Carolina over 'bathroom bill'*, CNN (Apr. 14, 2017, 12:25 PM), https://www.cnn.com/2017/04/14/politics/north-carolina-bathroom-bill-department-of-justice/index.html.

[58] *See id.*

> The Executive Branch Defendants, in their official capacities, and all successors, officers, and employees are hereby permanently enjoined from enforcing Section 2 of H.B. 142 to bar, prohibit, block, deter, or impede any transgender individuals from using public facilities under any Executive Branch Defendant's control or supervision, in accordance with the transgender individual's gender identity.[59]

While this settlement prevents prosecution against transgender individuals under House Bill 142, it does not address the fact that these individuals still will not have the ability to be protected by antidiscrimination laws.[60]

As recently as March 23, 2018, the Trump Administration has continued to abridge the rights of transgender persons within the United States. After receiving a Memorandum on Military Service by Transgender Individuals conducted by Secretary of Defense, James Mattis,[61] President Trump issued his own memorandum:[62]

> [T]ransgender persons with a history or diagnosis of gender dysphoria – individuals who the policies state may require substantial medical treatment, including medications and surgery – are disqualified from military service except under certain limited circumstances.[63]

Many believe that this policy will ban most transgender persons from serving in the military.[64]

II. TRANSGENDER STUDENT-ATHLETES

A. *The Benefits of Interscholastic Athletic Participation*

Many high school curricula require that students participate in physical education programs in order to graduate. New York State considers physical education a state-required instructional subject.[65] Physical education programs give students countless benefits: "improved physical fitness, skill and motor skills development, self-discipline, student responsibility, moral development, leadership, stress

---

[59] Consent Judgment and Decree at 5, Carcaño v. McCrory, No. 1:16-cv-00236 (M.D.N.C. Mar. 28, 2016).

[60] *See* discussion, *infra* V.A.

[61] Memorandum from James Mattis, Sec'y of Def., to Donald Trump, President of the U.S. (Feb. 2018).

[62] Memorandum from Donald Trump, President of the U.S., to Sec'y of Def. (March 23, 2018).

[63] *See id.*

[64] *See* Jacqueline Klimas & Bryan Bender, *Trump moves to ban most transgender troops*, POLITICO (Mar. 23, 2018, 9:08 PM EST), https://www.politico.com/story/2018/03/23/trump-transgender-troops-ban-483434.

[65] *See Physical Education Requirements*, NYC DEP'T OF ED., http://schools.nyc.gov/Academics/Wellness/WhatWeTeach/PhysicalEducation/PERequirements.htm (last visited Apr. 5, 2018).

reduction, etc."[66] Physical education in public schools leads to a physically healthier student body.[67]

There are many benefits associated with interscholastic athletic participation. Studies have shown that student-athletes are less likely to drop out of school than their non-athlete peers.[68] Studies have found that student-athletes have higher grades than non-athletes and have higher class attendance rates.[69] Studies have shown that student-athletes report fewer mental health and general health problems.[70] Studies have also shown that athletic participation positively impacts higher educational attainment (college and beyond) and wage potential.[71] There are studies that show that participation in sports leads to better grades, stronger commitment to school and family, better self-esteem, better developed relationships, and a stronger commitment to charity work.[72] Additionally, studies show that participation in sports is a deterrent to suicide in American youth because it safeguards against isolation and potential depression.[73]

> Participation in sport had a favorable effect on school attendance, being in the academic track, taking more demanding coursework, time spent on homework, social and academic self-concepts, parental involvement and expectations, educational aspirations during and after school, and pursuing higher education. Participation in sport had many positive effects which were very robust, with no apparent negative effects.[74]

While some student-athletes pursue college sports in order to play professionally, most student-athletes do not reach the professional level.[75] So, what are the benefits of playing sports in college? The NCAA claims that "the experiences of college athletics and the life lessons they learn along the way will help them as they pursue careers in other fields."[76] Those who play competitive sports engage in active

---

[66] *See Physical Education In Schools – Nothing Is More Important*, PHIT AMERICA, http://www.phitamerica.org/PE_In_School.htm (last visited Nov. 26, 2016).
[67] *Id.*
[68] *See* Jilann M. Bush, *The Effect of Extracurricular Activities on School Dropout*, ILL. WESLEYAN U. PSYCHOL. HONORS PROJECTS 16 (2003).
[69] *See* Herbert W. Marsh & Sabina Kleitman, *School Athletic Participation: Mostly Gain With Little Pain*, 25 J. OF SPORT & EXERCISE PSYCH. 205, 207 (2003).
[70] *See id.*
[71] *See id.* at 208.
[72] Morgan Shell, Note, *Transgender Student-Athletes in Texas School Districts: Why Can't The UIL Give All Students Equal Playing Time?*, 48 Tex. Tech L. Rev. 1043, 1053 (2016).
[73] *Id.*
[74] *See* Marsh & Kleitman, *supra* note 69.
[75] *Estimated probability of competing in professional athletics*, NCAA (last updated Mar. 10, 2017), http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics.
[76] *See id.*

leadership development, which helps to create opportunities to succeed "on the biggest court of all. . . Life."[77] The NCAA boasts that those who play college sports graduate at higher rates than those who do not.[78] Other benefits include the connection between fitness, health and longevity as well as the inevitable opportunity to receive a well-rounded education and lasting memories.[79]

With all the benefits that come from being an active student, or student-athlete, it follows that denying someone an opportunity to participate on a team because of his or her gender identity denies that person the opportunity to obtain the aforementioned benefits. Additionally, suicide is a large problem within the transgender community; more than 40% of transgender individuals have attempted suicide.[80] If being a part of a team can deter suicide, it follows that denying a transgender individual the right to participate on the team that coincides with his or her gender identity has an incredibly adverse effect. Some argue that these "athletic programs affiliated with educational institutions have a responsibility. . . to look beyond the value of competition to promote broader educational goals of participation, inclusion, and equal opportunity."[81] This devotion to inclusion, according to some, should apply to both college and high school level programs.[82]

B. *Unfair Competition and Safety Concerns*

At most levels of play, sports are segregated by sex. This is usually attributed to the inherent biological differences between men and women. In a 2010 study performed by the *Journal of Sports, Science & Medicine*, authors found that "sex" was a "major determinant of athletic performance through the impact of height, weight, body fat, muscle mass, aerobic capacity or anaerobic threshold as a result of genetic and hormonal differences."[83] In short, the results of their study indicated that "women will not run, jump, swim or ride as fast as men."[84]

Therefore, there is an anxiety that MTF transgender athletes who

---

[77] *See The value of college sports*, NCAA, http://www.ncaa.org/student-athletes/value-college-sports (last visited Apr. 5, 2018).

[78] *Student-Athletes: Want to Play College Sports?*, NCAA, http://www.ncaa.org/student-athletes/future (last visited Apr. 5, 2018).

[79] *See id.*

[80] *See* Brynn Tannehill, *The Truth About Transgender Suicide*, THE HUFFINGTON POST (last updated Nov. 14, 2016), http://www.huffingtonpost.com/brynn-tannehill/the-truth-about-transgend_b_8564834.html.

[81] *See* PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 12 (Oct. 4, 2010)

[82] *Id.*

[83] Valérie Thibault et al., *Women and men in sport performance: The gender gap has not evolved since 1983*, 9 J. OF SPORTS SCI. & MED. 214, 214 (2010).

[84] *Id.*

wish to participate on teams according to their gender identities will bring unfair competition to the sports fields and courts:[85]

> These concerns are based on three assumptions: one, that transgender girls and women are not "real" girls or women and therefore not deserving of an equal competitive opportunity; two, that being born with a male body automatically gives a transgender girl or woman an unfair advantage when competing against non-transgender girls and women; and three, that boys or men might be tempted to pretend to be transgender in order to compete in competition with girls or women. [86]

Conversely, there are some who are worried that allowing females to participate in male sports would "subject them to risk of physical harm."[87] Therefore, the same logic would extend to allowing FTM transgender athlete participation in male sports. Fear of unfair competition and risk of safety are two of the biggest impediments to allowing transgender athletes to play on a team according to their gender identities. These impediments are clear in the case of Texas high school wrestler, Mack Beggs; although his participation on the girl's team as a FTM transgender athlete conformed to the current laws of his State and municipality, both of his state championship victories were scrutinized and criticized as unfair competition.[88]

C. *Potential Legal Protections*

Protections for transgender students and student-athletes hinge upon how courts around the nation choose to classify gender identity. A conflicting myriad of city ordinances, state laws, executive action, court decisions, high school policies and NCAA policies demonstrate that to understand the basic rights of transgender student-athletes under Title IX and the Equal Protection Clause, an analysis of how the courts treat Title IX is warranted.

1. Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 states that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

---

85 *See* GRIFFIN & CARROLL, *supra* note 81, at 14.

86 *Id.*

87 Erin E. Buzuvis, Note, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. OF SPORTS & ENT. L. 1, 7 (2011).

88 *See* Ryan Young, *Texas Transgender Wrestler Mack Beggs Wins Second Straight Title, Draws Mixed Reactions*, YAHOO! SPORTS (Feb. 26, 2018 12:48 AM), https://sports.yahoo.com/texas-transgender-wrestler-mack-beggs-wins-second-straight-title-draws-mixed-reactions-054852085.html.

discrimination under any education program or activity receiving Federal financial assistance. . . ."[89]

Although there is not much case law regarding Title IX and transgender individuals, the courts have recognized that certain cases involving Title VII of the 1964 Civil Rights Act apply to budding Title IX and transgender litigations.[90] "[C]ourts generally apply standards established under Title VII regarding what constitutes discrimination to guide their interpretation in Title IX cases."[91] These cases have extended the definition of "sex" under Title VII of the Civil Rights Act; "courts have held that subjecting an individual to sex stereotyping may constitute sex discrimination in appropriate circumstances."[92] Perhaps the most pertinent Title VII precedent to discuss is the 1988 Supreme Court case, *Price Waterhouse v. Hopkins*.[93] In *Price Waterhouse*, the plaintiff, Ann Hopkins, claimed she was denied a promotion to partnership because her employer engaged in sex stereotyping against her.[94] More specifically, she alleged that Price Waterhouse partners discriminated against her because she did not act as they thought a woman should:

> One partner described her as "macho" . . .advised her to take a class at charm school. . .in order to improve her chances for partnership, Thomas Beyer [a Price Waterhouse partner] advised, Hopkins should "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.[95]

The Court found that this form of sex stereotyping constituted discrimination "because of sex" under Title VII.[96] It would follow that one who is technically not 'gender conforming' and does not act in the way in which his or her perceived sex should act, and is treated adversely because of this, has been discriminated against "because of the sex." It would not be outlandish to extend this treatment to Title IX. In fact, in the Obama-era U.S. Department of Education and Justice Department's "Dear Colleague" letter, the Departments stated that "[c]ourts rely on Title VII precedent to analyze discrimination 'on the basis of sex' under Title IX."[97]

There have been a few court decisions that have discussed the protection of transgender individuals in school settings under Title IX.[98]

---

[89] *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2013).
[90] *See* THE U.S. DEP'T OF JUST., TITLE IX LEGAL MANUAL (2015).
[91] *Id.*at IV (D) (2).
[92] *Id.* at IV (D)(2)(c).
[93] *See* Price Waterhouse v. Hopkins, 490 US 228 (1989).
[94] *Id.* at 235–36.
[95] *Id.* at 235.
[96] *See* Civil Rights Act of 1964, 78 Stat. 241; *see id.* at 258.
[97] *See* Letter from Lhamon and Gupta to public schools, *supra* note 44.
[98] Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student*

For example, "the court in Doe v. Brimfield Grade School held that "[d]iscrimination because one's behavior does not conform to stereotypical ideas of one's gender can amount to actionable discrimination based on sex" and held that harassment of a young boy based on his perceived femininity was actionable under Title IX."[99] Additionally, cases dealing with sexual harassment of transgender individuals have led to recourse for said individuals under Title IX.[100] The Obama Administration Department of Education's "Dear Colleague" letter that included transgender individuals within Title IX's protective umbrella, explains that "conduct [that] was based in part on the student's failure to act as some of his peers believed a boy should act" would be actionable under Title IX.[101] There was also a study done in 2013 by the Departments of Education and Justice that investigated a Southern California school district after it failed to allow a FTM transgender student to use the bathrooms and locker rooms according to his gender identity.[102] The NCLR (National Center for Lesbian Rights) filed a complaint against the school district and the school district settled after the Departments found no factual basis for the discrimination.[103] The school district and the NCLR reached a settlement and the district agreed to allow the FTM transgender student to use the facilities according to his gender identity.[104]

In 2017, the Seventh Circuit ruled in favor of including discrimination against transgender students under the umbrella of sex discrimination under Title IX.[105] In *Whitaker v. Kenosha Unified School District*, the Seventh Circuit devoted part of its reasoning to the sex stereotyping logic of *Price Waterhouse*.[106] In *Whitaker*, an FTM transgender student sued his school district for requiring him, a "biological female," to use the women's restroom.[107] The School District argued that the *Price Waterhouse* sex stereotyping reasoning should not apply because the policy was "not based on whether the student behaves, walks, talks, or dresses in a manner that is inconsistent with any preconceived notions of sex stereotypes."[108] However, the

Athletes, 28 Wis. J. L. Gender & Soc'y 271, 283 (2013).

[99] *Id.* at 280.

[100] *Id.*

[101] *See* Letter from Lhamon and Gupta to public schools, *supra* note 44.

[102] *See* Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, Arthur Zeidman, Dir., U.S. Dep't of Educ., to Dr. Joel Shawn, Superintendent, Arcadia Sch. Dist., (July 24, 2013); Rebecca Klein, *Arcadia Unified School District to Treat Transgender Teens Equally*, THE HUFFINGTON POST (last updated Feb. 2, 2016), http://www.huffingtonpost.com/2013/07/25/arcadia-transgender-teen-settlement-school-district-_n_3653126.html.

[103] *See* Rebecca Klein, *supra* note 102.

[104] *Id.*

[105] *See* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017).

[106] *Id* at 1047-48.

[107] *Id.* at 1039, 1048.

[108] *Id.* at 1048.

Court found this argument too narrow and stated that: "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."[109] District Courts around the country are following suit and interpreting sex discrimination under Title IX as including gender identity.[110] Therefore, Title IX may offer legal protection to transgender students and student-athletes.

2. The Equal Protection Clause of the Fourteenth Amendment

There are arguably three different tiers of an Equal Protection clause analysis.[111] Basically, the Supreme Court has different levels of scrutiny depending on the protected class that is involved in litigation.[112] Statutes that are based on race will be viewed under a lens of strict scrutiny.[113] Statutes that are based upon sex are historically subjected to a heightened form of scrutiny.[114] Statutes that are based upon no protected class are subjected to a rational review.[115] These designations are important because they define the level of relation of a state actor's means in relation to the ends. For example, under strict scrutiny, a state's statute must be narrowly tailored to address a "compelling government interest."[116] Under heightened scrutiny, a state's legislation must be substantially related to an important objective in order to be ruled constitutional.[117] Under mere rational review, a state's legislation must be rationally related to the state's goal.[118] It follows that the stricter the standard of review, the harder it is for a

[109] *Id.*

[110] *See* M.A.B. v. Bd. of Educ. of Talbot County, No. GLR-16-2622, 2018 U.S. Dist. LEXIS 40346 (D. Md. March 12, 2018) (holding that prohibiting a transgender boy from boys' locker room based on transgender status is a Title IX sex-discrimination claim as well as a gender-stereotyping claim); A.H. ex rel. Handling v. Minersville Area Sch. Dist., No. 3:17-CV-391, 2017 U.S. Dist. LEXIS 193622 (M.D. Pa. Nov. 22, 2017) (holding that excluding a transgender girl from girls' school restrooms states a sex discrimination claim under Title IX and the Equal Protection Clause of the Constitution).

[111] *See* Shell, *supra* note 72.

[112] Krista D. Brown, *The Transgender Student-Athlete: Is There A Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?,* 25 MARQ. SPORTS L. REV. 311, 318–20 (2014).

[113] *See* Korematsu v. U.S., 323 U.S. 214 (1944). *Korematsu* was the first case to firmly establish the strict scrutiny standard. The Court held in favor of the U.S. government's decision to send Japanese Americans into internment camps even after applying strict scrutiny to Executive Order 9066.

[114] *See* Craig v. Boren, 429 U.S. 190 (1976). Finding an Oklahoma statute that increased the drinking age for males to 21 and kept the drinking age for females at 18 unconstitutional, the Court applied an intermediate form of scrutiny.

[115] *See* U.S. v. Carolene Products Co., 304 U.S. 144 (1938). This seminal case developed the concept of ration basis review.

[116] *See Strict scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Apr. 5, 2018).

[117] *See Intermediate Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Apr. 5, 2018)).

[118] *See Rational Basis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis (last visited Apr. 5, 2018)).

state's law to be constitutional.

It is not clear how the transgender population would be characterized or what level of scrutiny a court would use in order to determine the discriminatory nature of certain legislation. If a court were to use the same logic expressed in a Title IX analysis and equate transgender discrimination with sex discrimination, then a heightened form of scrutiny would apply.[119] This is the approach the Seventh Circuit in *Whitaker* takes when analyzing Whitaker's Equal Protection claim.[120] In *Whitaker*, the School District argues that transgender status is not a protected class and, therefore, cannot find protection under the Equal Protection Clause.[121] The Court states, however, that:

> [T]his case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny. It is enough to [say] that, just as in *Price Waterhouse*, the record for the preliminary injunction shows sex stereotyping . . . [t]his policy is inherently based upon a sex-classification and heightened review applies.[122]

But, if a court were to not extend this *Price Waterhouse* logic to Equal Protection Clause jurisprudence, a transgender individual would have to prove that transgender persons are a protected class in order to receive some level of scrutiny higher than rational basis review.

Transgender individuals have not been considered part of a protected class historically, but the *Obergefell* decision and the advancement of the LGBTQ cause show that a shift may be possible in the future.[123] Historically, the Court uses certain factors in order to determine what level of protection a class deserves:

Specifically, courts have considered whether: (1) the class has endured a history of discrimination; (2) the class lacks political power; (3) members of the class share an obvious and immutable characteristic that renders them susceptible to discrimination; and (4) the trait that stigmatizes the class bears no relationship to its members' ability to contribute to or perform in society.[124]

i. *Discrimination*

The transgender group, as a part of the LGBTQ community, has

---

119 *See* Craig, 429 U.S. 190.

120 *See* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1051–52 (7th Cir. 2017).

121 *See id.*, at 1051.

122 *Id.*

123 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015). The Court extended the fundamental right of marriage to same-sex couples. Although this case was decided primarily on substantive due process grounds, it is a fundamental pro-LGBTQ rights case at the Supreme Court level.

124 *See* Darren Lenard Hutchinson, *"Not Without Politcalwithout Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 978 (2014).

faced much prejudice historically.[125] As targets of hate crimes, high rates of anxiety, depression, and suicide, and subject to discrimination in the workplace and other facets of life, transgender individuals have faced much persecution.[126] There is no question that this group has been and continues to be a disenfranchised class.

ii. *Political Power*

The political powerlessness doctrine extends from the famous Supreme Court case, *U.S. v. Carolene Products*, specifically footnote four.[127] The Court questioned "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities[.]"[128]As a minority group, the LGBTQ community inevitably does not have much political power. According to a 2015 study on transgender rights, policy, and public opinion, the authors write that "[p]owerlessness may then be understood as a systematic lack of policies reflecting a group's interests relative to other groups."[129] To assess political powerlessness, it is important to track legislation, policy and public opinion:

> [I]t reveals a persistent bias, at both the state and federal levels, in an anti-gay direction. At the state level, most pro-gay policies do not become likely to be adopted until they are backed by more than a majority of the population. In fact, it typically takes close to two-thirds support before half of a suite of pro-gay policies are passed. Similarly, at the federal level, most members of Congress need more than majority support among their constituents before they become willing to cast a pro-gay vote.[130]

The transgender community has historically been powerless in the political process.[131]

iii. *Immutable Characteristics*

The next question is more complicated because it involves the

125 *See* Reisner, et. al, *supra* note 14; *see* Rood, *supra* note 14.
126 *See id.*
127 *See* U.S. v. Carolene Products. Co., 304 U.S. 144, 152–53, n.4 (1938).
128 *Id.*
129 *See* Andrew R. Flores, Jody L. Herman & Christy Mallory, *Transgender inclusion in state non-discrimination policies: The democratic deficit and political powerlessness*, RES. & POL. 3 (2015).
130 *See* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1576 (2015). For the sake of brevity, the author referred to all members of the LGBTQ community as 'gay.'
131 However, in November of 2017, Virginia elected the first openly transgender legislator, Danica Roem. *See* Jesse Byrnes & Josh Delk, *First openly transgender state legislator elected in Virginia*, HILL (Nov. 7, 2017, 8:20 PM EST), http://thehill.com/homenews/campaign/359271-first-openly-transgender-state-legislator-elected-in-virginia.

status of transgender classification itself, namely whether this trait is one determined at birth.[132] In this case, it is important to return to the DSM-V's definition of gender dysphoria, in which it defines transgender as a "the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender."[133] There is a debate about the genetic nature of sexual orientation and gender identity which factors into the determination of immutability.[134] While there have been no definitive studies, many researchers believe that, like with homosexuality, gender identity is genetic, "though, as with most traits involving identity, there is some environmental influence."[135] However, many people believe that being transgender is a choice and is, thus, not immutable.

iv. *Contribution to Society*

Perhaps the easiest prong to discuss, the fact that a person's gender identity does not align with his or her biological sex does not affect that person's ability to contribute to society in any way.

It is clear that the transgender community could be viewed as containing all of the characteristics of a historically protected class. If a court views transgender status as such, it could apply a heightened level of scrutiny to discriminatory legislation under an Equal Protection Clause analysis.

III. RULES PERTAINING TO TRANSGENDER STUDENT-ATHLETE PARTICIPATION

As education and diversity inclusion is an important part of NCAA and K-12 participation in athletics – namely, these are *student*-athletes – diversity and inclusion are an important part of the NCAA and certain states' policies regarding transgender athlete participation.

A. *NCAA Rules*

The NCAA does not require surgery in order for a transgender athlete to compete according to his or her gender identity. However, the NCAA does require that male-to-female transgender athletes complete

132 *See* Jeannie Suk Gersen, *A New Phase of Chaos on Transgender Rights*, NEW YORKER (Mar. 13, 2017), https://www.newyorker.com/news/news-desk/a-new-phase-of-chaos-on-transgender-rights.

133 *See* DSM-V, *supra* note 32.

134 *See* Gersen, *supra* note 132.

135 Katherine J. Wu, *Between the (Gender) Lines: the Science of Transgender Identity*, HARV. U.: BLOG, SPECIAL EDITION: DEAR MADAM/MISTER PRESIDENT 4 (Oct. 25, 2016), http://sitn.hms.harvard.edu/flash/2016/gender-lines-science-transgender-identity/; *see* Milton Diamond, *Transsexuality Among Twins: Identity Concordance, Transition, Rearing, and Orientation*, 14 INT. J. OF TRANSGENDERISM 24 (2013).

"one calendar year of testosterone suppression treatment."[136] The NCAA also allows a female-to-male transgender athlete, "who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism," to compete on a men's team.[137] The NCAA issued a handbook in 2011 regarding transgender inclusion, citing a commitment to "diversity, inclusion and gender equity among its student-athletes, coaches and administrators."[138] Within the handbook, the NCAA has included a section on the legal status of transgender persons, citing Title IX and the Equal Protection Clause of the Fourteenth Amendment as federal protections.[139] The handbook also references states that have enacted laws in order to prevent discrimination on the basis of sexual orientation or gender identity,[140] states that have prohibited discrimination against sexual orientation only,[141] and states in which courts have interpreted sex discrimination to encompass gender identity discrimination.[142]

The handbook also contains a section with guidelines pertaining to access to facilities such as changing areas, toilets, and showers:[143]

> Transgender student-athletes should be able to use the locker room, shower, and toilet facilities in accordance with the student's gender identity. Every locker room should have some private, enclosed changing areas, showers, and toilets for use by any athlete who desires them. When requested by a transgender student-athlete, schools should provide private, separate changing, showering, and toilet facilities for student's use, but transgender students should not be required to use separate facilities.[144]

Overall, the NCAA has a progressive policy, as it ultimately allows transgender student-athletes to play on the team that aligns with their gender identities and requests that transgender student-athletes be able to use the facilities that coincide with their gender identities as

---

136 *See College Policies*, TRANSATHLETE.COM, https://www.transathlete.com/policies-college (last visited Apr. 5, 2018).

137 He is no longer eligible to play on a women's team, though. NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13, NAT'L COLLEGIATE ATHLETIC ASS'N: OFF. OF INCLUSION (2011), *available at* https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

138 *Id.* at 6.

139 *Id.* at 28.

140 California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

141 Connecticut, Delaware, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.

142 California, Connecticut, Florida, Massachusetts, New Jersey, New York, and Pennsylvania.

143 *See* NCAA *Inclusion of Transgender Student-Athletes*, *supra* note 137, at 20.

144 *Id.*

well.[145]

B. *High School Rules*

High school and middle school athletic transgender policies differ per state and municipality. Some states have more inclusive policies that do not require surgical procedures or hormones (or hormone suppression) for transgender athletes to compete according to their gender identities.[146] Some states, like the NCAA, require a certain amount of hormone regulation.[147] Some states do not have a transgender policy in place at all,[148] while other states either require transitional surgery or mandate that participation depend upon a young athlete's sex that is stated on his or her birth certificate.[149]

Some states have notably nondiscriminatory regulations when it comes to transgender student-athlete participation. For example, California allows student-athletes to participate on whatever team aligns with their gender identity.[150] The California model also invites the student-athlete or the school district to appeal any decisions through a clear-cut, outlined appeal process.[151] This directly contrasts with more discriminatory states that do not allow participation based upon gender identity and do not give any process for appealing.[152] There are some states that have no policy towards when it comes to participation by transgender student-athletes.[153] Some states, including New York, decide upon transgender athlete participation by using a case-by-case analysis method.[154]

The North Carolina High School Athletic Association (NCHSAA), in its 2015-2016 handbook for student participation, has determined that "[a] student's gender is determined by the gender noted on his or her certificate of birth."[155] It also states that a man cannot participate on a

---

145 *Id.*

146 *See K-12 Policies*, *supra* note 17.

147 *Id.*

148 *Id.*

149 *Id.*

150 GUIDELINES FOR GENDER IDENTITY PARTICIPATION, CAL. INTERSCHOLASTIC FED'N (2017-2018), *found at* http://www.cifstate.org/governance/constitution/Guidelines_for_Gender_Identity_Participation.pdf.

151 *Id.*

152 *See K-12 Policies*, *supra* note 17.

153 Arkansas, Delaware, Hawaii, Indiana, Louisiana, Mississippi, Montana, North Dakota, South Carolina, Tennessee, Utah, and West Virginia.

154 *See K-12 Policies*, *supra* note 17.

155 SECTION 1: STUDENT REQUIREMENTS FOR INTERSCHOLASTIC ATHLETIC PARTICIPATION 19, N.C. HIGH SCH. ATHLETIC ASS'N (2013). The author tried to access the most recent NCHSAA handbook (2017-2018) and found that the NCHSAA no longer displayed its entire handbook to the general public, but only an abridged version which left out its interpretation of a student's gender. This change was made after the controversy of House Bill 2. According to the website, Transathlete.com, the NCHSAA still has these policies in place. Therefore, the author will

women's team in any sport under any circumstances. Additionally, if a woman is to participate on a men's team when there is a women's team in that sport, the women's team will have to forfeit all playoff participation.[156] North Carolina has one of the most discriminatory schemes for participation, as it prohibits transgender persons from participating on teams according to their gender identities.[157]

1. Title IX Analysis

Any school that receives federal funding must comply with Title IX.[158] According to a 2013-2014 study, "[f]ederal funding…accounts for about 10 percent of funding" for North Carolina public schools.[159] Therefore, North Carolina public schools implementing the NCHSAA rules would be subject to a Title IX analysis.

A student-athlete wishing to bring a challenge against the NCHSAA rules would find most success in following the *Price Waterhouse*[160] logic espoused in the *Whitaker* case from the Seventh Circuit. As discussed above, a student could argue that these policies, and the school's compliance with these policies, directly targets him or her because he or she does not conform to typical gender norms. The student could then argue that this form of sex stereotyping is synonymous with sex discrimination and, thus, in violation of Title IX.

2. Equal Protection Clause Analysis

A successful Equal Protection claim would depend on whether a court chooses to extend the *Price Waterhouse*[161] logic to its constitutional analysis, like the Seventh Circuit does in *Whitaker*.[162] However, a court could also find that the NCHSAA rules violate the Equal Protection Clause by classifying transgender persons as a suspect class that deserves heightened scrutiny.

If a court decides to extend the *Price Waterhouse* sex stereotyping logic, then a transgender student-athlete contesting the constitutionality of the NCHSAA rules would receive heightened scrutiny according to Supreme Court precedent.[163] As stated above, the test for heightened scrutiny is that the policy must be substantially related to an important

analyze these policies accordingly.

156 *Id.*

157 *See K-12 Policies*, *supra* note 17.

158 *See* 20 U.S.C. §§ 1681-88 (2013).

159 *See* Kris Nordstrom, *Financing Education in North Carolina: A Budget and Tax Guide* 10 (N.C. JUST. CTR. 2017), http://www.ncjustice.org/sites/default/files/NCJC_education%20finance%20primer%20021917.pdf.

160 *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

161 *Id.*

162 *See* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1048 (7th Cir. 2017).

163 *See* Craig v. Boren, 429 U.S. 190 (1976).

objective.[164] It is likely that a school district would argue that there are safety and fair competition concerns, but the court would need to find that this policy that does not allow transgender student-athletes to compete on the teams that correspond with their gender identities is substantially related to this objective. A North Carolina School District might find this argument difficult, as the NCHSAA policy, unlike other state policies, offers no alternative. Other states allow for hormone therapy or gender reassignment surgery,[165] while North Carolina mandates that transgender student-athletes' genders are determined by what is stated on their birth certificates.[166] If a Court were to decide that transgender persons should constitute a protected class under the Equal Protection Clause, this would, again, activate a heightened level of scrutiny with which to review the policies.[167]

IV. HOUSE BILL 2

Although House Bill 2 has been repealed, under the present environment, it is not outlandish to presume that other comparable legislation will make its way into state law. As stated above, legislation like House Bill 2 only adds to the stigmatization of transgender persons. As this Note has focused on transgender students and, more specifically, transgender student-athletes, it is important to view House Bill 2 through this lens, as legislation which, when paired with other discriminatory policies (like the NCHSAA rules), functions to keep transgender student-athletes from participating on teams according to their gender identities.

An analysis of House Bill 2 and like legislation differs from the analysis of NCHSAA rules because House Bill 2 and like legislation would directly affect the NCAA. To discuss the impact that the passage of such legislation, one need only look at the aftermath of passing House Bill 2.

After North Carolina passed House Bill 2, the National Collegiate Athletic Association, citing its "commitment to fairness and inclusion" decided, in September of 2016, to pull several championships from North Carolina in 2016 and 2017, including the Division I Women's Soccer Championship, Division I Men's Basketball Championship, Division I Women's Golf Championships, and more.[168] The NCAA Board cited several discriminatory factors that led to this decision: that North Carolina is home to "the only statewide law that makes it

164 *See id.*; *see also Intermediate Scrutiny*, *supra* note 117.
165 *See K-12 Policies*, *supra* note 17.
166 *See* N.C. HIGH SCH. ATHLETIC ASS'N, *supra* note 155.
167 *See* U.S. v Carolene Products Co., 304 U.S. 144, 152–3 n.4 (1938).
168 Press Release, Nat'l Collegiate Athletic Ass'n (NCAA), NCAA to relocate championships from North Carolina for 2016-2017 (Sept. 12, 2016, 6:10 PM) (on file with the NCAA).

unlawful to use a restroom different from the gender on one's birth certificate, regardless of gender identity," and that House Bill 2 invalidates local ordinances that seek to include sexual orientation/gender identity as a protected class.[169]

The NCAA also referred to several states' public travel bans to North Carolina, claiming that these travel bans could apply to student-athletes and college officials and coaches. New York, Minnesota, Washington, Vermont, Connecticut, and California issued such travel bans.[170] Individual universities that were part of the NCAA also boycotted traveling to North Carolina due to House Bill 2.[171] The University of Albany, complying with New York Governor Andrew Cuomo's travel ban to North Carolina, canceled its men's basketball game against Duke University and a private university in North Carolina, as well as its field hockey games against both Duke University and the University of North Carolina - Chapel Hill.[172] Additionally, the University of Vermont canceled its women's basketball matchup against the University of North Carolina due to "concerns over the HB2 law."[173]

The Atlantic Coast Conference, the conference in which public schools, University of North Carolina - Chapel Hill and North Carolina State University, and private schools, Duke University and Wake Forest University, compete within the NCAA, decided to move "all neutral-site conference championship games out of North Carolina" due to House Bill 2 in September of 2016.[174]

North Carolina lost an estimated "more than $395 million" due to boycotts of House Bill 2.[175] The departure of the NCAA and ACC championship events lost the state "an estimated $91 million in revenue."[176]

House Bill 2 mandated that students use restrooms, locker rooms,

169 *See id.*

170 *Id.*

171 *See* Michael Addady, *California Halts All State-Funded Travel to North Carolina*, FORTUNE (Sept. 28, 2016, 5:07 PM), http://fortune.com/2016/09/28/california-north-carolina/.

172 *Albany game at Duke canceled over North Carolina HB2 Law*, SPORTS ILLUSTRATED (July 13, 2016), http://www.si.com/college-basketball/2016/07/13/albany-duke-canceled-governor-andrew-cuomo-north-carolina-bathroom-law.

173 Chip Patterson, *Women's basketball game at North Carolina canceled over HB2 'bathroom bill:' The University of Vermont women's basketball team canceled a game in Chapel Hill over HB2*, CBS SPORTS (Aug. 25, 2016), http://www.cbssports.com/college-basketball/news/womens-basketball-game-at-north-carolina-canceled-over-hb2-bathroom-bill/.

174 Andrea Adelson, *ACC moving neutral-site championship games out of North Carolina due to HB2*, ESPN (Sep. 15, 2016), http://www.espn.com/college-football/story/_/id/17547270/acc-moving-neutral-site-championship-games-north-carolina-due-hb2.

175 Mark Abadi, *North Carolina has lost a staggering amount of money over its controversial 'bathroom law,'* BUS. INSIDER (Sep. 21, 2016, 3:22 PM), http://www.businessinsider.com/north-carolina-hb2-economic-impact-2016-9.

176 *Id.*

and other facilities according to the sex on their birth certificates.[177] It inevitably treated differently those students who are transgender, as those students do not identify with what is listed on their birth certificates. Additionally, if those students have undergone sex-change surgery, it brings into question the legality of using the bathroom according to their biological sexes, which would, in fact, conform with their gender identities. Even if students have not undergone sex-change surgery, forcing them to use gender neutral bathrooms or bathrooms according to their birth certificates could cause stress and discomfort, and would aid in the anxiety surrounding gender dysphoria.[178]

A. *Title IX Analysis*

As discussed above, any school that receives federal funding is subjected to compliance with Title IX.[179] As such, a Title IX analysis of House Bill 2 and other legislation like it would most likely be brought by a transgender student or faculty member of a school that complies with the legislation in question (much like *Carcaño*).[180] A Title IX analysis of House Bill 2 would look like a Title IX analysis of the NCHSAA rules. If a court were to decide that the *Price Waterhouse* sex stereotyping logic applies to transgender persons, it is likely that it would find that schools that comply with legislation like House Bill 2 are in violation of Title IX.[181]

B. *Equal Protection Clause of the Fourteenth Amendment*

Additionally, an Equal Protection Clause analysis of House Bill 2 would look much like the analysis of the NCHSAA rules. Again, this would depend upon how a Court chooses to define transgender status and transgender discrimination. If a Court were to extend the *Price Waterhouse* line of jurisprudence to its Equal Protection Clause analysis, it could find for heightened scrutiny.[182] Additionally, if a Court were to find that transgender persons should comprise a protected class in the eyes of the Constitution, a Court could apply heightened scrutiny. This heightened scrutiny would involve analyzing House Bill 2 and like legislation to determine if its means are substantially related to its ends. According to the legislative history of House Bill 2, it is likely that North Carolina would have argued that House Bill 2 is a measure meant

177 *See* Public Facilities Privacy and Security Act, 2016-3 N.C. Sess. Laws 12 (2016).
178 *See* Skinner-Thompson & Turner, *supra* note 98, at 283; *see* DSM-V, *supra* note 32, at 461.
179 *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2013).
180 Carcaño v McCrory, 203 F. Supp. 3d 615 (2016).
181 *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017).
182 *See Whitaker*, 858 F.3d 1034; *see Price Waterhouse*, 490 U.S. 228.

for the protection of women, children, and privacy in general.[183] It is unclear as to how the Court would rule, but an individual challenging legislation like this would have a better chance of winning a suit if the Court applied heightened scrutiny.[184]

C. *Substantive Due Process*

Substantive due process case law is littered with the language of what constitutes a "fundamental right" worth protecting under the Fourteenth Amendment.[185] In *Obergefell*, the Court ruled that gay and lesbian couples had a fundamental right to marry.[186] Justice Kennedy's oft-quoted majority opinion contains a few ideas that are relevant to future LGBTQ litigation, namely that "a first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[187] He speaks about the importance of protecting the intimate choices that an individual should have the right to make. [188]

While no fundamental right to privacy is listed in the Constitution and the Court has never ruled that such a fundamental right to privacy in its broadest sense exists, there is substantive due process precedent that a more liberal court could read as extending to the issue at bar.[189] For example, in the landmark 2003 case, *Lawrence v. Texas*, Justice Kennedy wrote:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life . . . The petitioners are entitled to respect for their private lives . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government.[190]

One who is transgender and who does not identity with his or her

183 *See generally Hearing on HB 2*, *supra* note 10.

184 If not heightened scrutiny, it is rational basis review in which government just has to prove its means are rationally related to its ends. *See* U.S. v. Carolene, 304 U.S. 144 (1938).

185 *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

186 *Id.*; Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (Jun. 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html.

187 *See Obergefell*, 135 S. Ct. at 2599.

188 *Id.*

189 *See The Right of Privacy*, EXPLORING CONST. CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html (last visited Apr. 5, 2018).

190 *See* Lawrence v. Tex., 539 U.S. 558, 574 (2003).

sex on his or her birth certificate faces a tough choice in this country, especially in states like North Carolina: either live according to his or her gender identity and face discrimination and scrutiny, or live with the discomfort and anxiety of conforming to his or her biological sex. If one chooses to live as he or she identifies, it is "an intimate and personal choice" that is "central to personal dignity and autonomy," arguably deserving of protection under the Due Process Clause of the Fourteenth Amendment.[191] House Bill 2 directly impedes one's ability to live as he or she identifies, denying transgender individuals access to facilities according to gender identity.[192]

The reason a court might find a substantive due process appealing is because it does not make transgender individuals a protected class as a whole; basically, this expansion of *Lawrence* principles is not overtly broad.[193] Restrooms, locker rooms, and other facilities are inherently private, so denying a person access to the facilities with which he or she identifies could arguably deny said person access to this privacy.[194] Therefore, a substantive due process claim is appropriate as a challenge to the constitutionality of House Bill 2.

However, a substantive due process claim would not extend to the narrow concept of allowing transgender athlete participation in the state. Basically, it would be difficult to claim that there is a fundamental right for a transgender individual to participate or play on a team that corresponds with his or her gender identity. So, even though there could be a successful substantive due process argument against House Bill 2 regarding transgender use of restrooms according to their gender identities, it is likely that this particular argument would be nonexistent against the NCHSAA rules that mandate students participate in athletics according to the sex on their birth certificates.

V. HOUSE BILL 142

North Carolina repealed House Bill 2 with the passage of House Bill 142, as indicated by Section 1 of House Bill 142.[195] Section 2 of House Bill 142 preempts any regulation of restrooms and locker rooms by state agencies, boards of education, and departments.[196] This essentially leaves the power of regulation in the hands of the State Legislature. Sections 3 and 4 of House Bill 142 read as follows:

191 *See id.*

192 *See* Public Facilities Privacy and Security Act, 2016-3 N.C. Sess. Laws 12 (2016).

193 *See Lawrence*, 539 U.S. at 574.

194 *See* Scott Skinner-Thompson, *Bathroom Bills and the Battle Over Privacy*, SLATE (May 10, 2016, 7:30 AM), http://www.slate.com/blogs/outward/2016/05/10/in_the_battle_over_bathroom_privacy_transgender_people_s_needs_matter_more.html.

195 *See* An Act to Reset S.L. 2016-3, 2017-4 N.C. Sess. Law.

196 *See id.*

> **SECTION 3.** No local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations.
>
> **SECTION 4.** This act is effective when it becomes law. Section 3 of this act expires on December 1, 2020.

Though someone looking at House Bill 142 might laud it for repealing the discriminatory House Bill 2, Sections 3 and 4 of the Bill are potentially discriminatory in and of themselves in that they disallow any local municipalities and cities from passing ordinances or laws similar to that of the Charlotte ordinance, which prompted the creation of House Bill 2.[197] It is not likely that House Bill 142 can be challenged as a violation of Title IX.[198] However, there is an argument that House Bill 142 can be challenged as violating the Equal Protection Clause due to the Supreme Court's "political process" doctrine.[199]

A. *Equal Protection Clause of the Fourteenth Amendment*

Although the "political process" doctrine, under the Fourteenth Amendment jurisprudence, has only been applied by the Supreme Court in the case of race discrimination, the logic behind the doctrine arguably extends to House Bill 142 and its effort to prevent municipalities and cities from passing nondiscrimination ordinances.[200] The premise of the "political process" doctrine is that "[t]he majority may not suppress the minority's right to participate on equal terms in the political process." Justice Sotomayor, in her dissenting opinion in the 2014 case, *Schuette v. Coalition to Defend Affirmative Action*, explores the history of the "political process" doctrine as it applies to race discrimination.[201] There is a question as to how powerful the "political process" doctrine is after the *Schuette* decision, as the Supreme Court decided not to apply the "political process" doctrine to strike down a Michigan referendum which sought to effectively eliminate affirmative action.[202] However, some have posited that the logic and goals behind the "political process" doctrine could, in fact, extend to LGBTQ discrimination:[203]

---

197 *See* CHARLOTTE, N.C., ORDINANCE 7056 (2016).

198 Consent Judgment and Decree, Carcaño v. McCrory, No. 1:16-cv-00236-TDS-JEP (M.D.N.C. Mar. 28, 2016).

199 *See* Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014); Hunter v. Erickson, 393 U.S. 385 (1969); Seattle Sch. Dist. v. Wash., 633 F.2d 1338 (9th Cir.1980).

200 *See Schuette*, 134 S. Ct. 1623; *see Hunter*, 393 U.S. 385; *see Seattle Sch. Dist.*, 633 F.2d 1338.

201 *See Schuette*, 134 S. Ct. 1623 (Sotomayor, J., dissenting).

202 *Id.* at 1643; *see* Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOKLYN L. REV. 1015, 1043 (2016).

203 *See* Day & Weatherby, *supra* note 202, at 1041.

> [T]he doctrine is not totally irrelevant to the constitutionality question for legislative acts such as Hester's Law. In theory, government action such as Hester's Law is exactly the type of government restructuring that the political process doctrine was designed to prevent, because it disenfranchises the LGBT community from obtaining beneficial legislation.[204]

"Hester's Law" is officially titled Senate Bill 202.[205] It is an Arkansas law that, like North Carolina's House Bill 142, was designed to prevent any local governments from passing nondiscrimination ordinances protecting characteristics *not* protected by state law, i.e. gender identity.[206] Only a few courts have considered the "political process" doctrine as it applies to LGBTQ discrimination,[207] and the Supreme Court has never applied it to anything other than race,[208] but, like Arkansas's Senate Bill 202, North Carolina's House Bill 142 can be considered, at its core, an "anti-nondiscrimination" law. North Carolina passed House Bill 2 as a direct response to the Charlotte ordinance.[209] North Carolina passed House Bill 142 to repeal House Bill 2, but House Bill 142 did not repeal House Bill 2's arguably most invidious Section, the one that preempted local municipalities from passing nondiscrimination ordinances.[210] Therefore, House Bill 142 can be considered a "statewide initiative[s] that block[s] local efforts to expand nondiscrimination protection to the LGBT community."[211]

Further analysis of this argument is contingent on the Supreme Court's eventual consideration of LGBTQ individuals as a protected class.[212] If and when this occurs, courts may be able to view laws like House Bill 142 with heightened scrutiny and strike them down.

CONCLUSION

Transgender student-athletes face challenges unique to the transgender community as a whole. Statewide policies, like the NCHSAA, under the guise of fair competition and safety, dictate discriminatory measures in order to prevent transgender student-athletes

---

204 *Id.*

205 2015 Ark. S.B. No. 202, Ark. 90th Gen. Assemb.

206 *See Arkansas Senate Bill 202 (2015)*, BALLOTPEDIA, https://ballotpedia.org/Arkansas_Senate_Bill_202_(2015) (last visited Apr. 5, 2018).

207 *See* Day & Weatherby, *supra* note 202, at 1041.

208 *See id.*

209 *See* discussion, *supra* Introduction.

210 *See* Day & Weatherby, *supra* note 202; *see* Public Facilities Privacy and Security Act, 2016-3 N.C. Sess. Laws 12 (2016); *see* An Act to Reset S.L. 2016-3, 2017-4 N.C. Sess. Law.

211 *See* Day & Weatherby, *supra* note 202, at 1054.

212 *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The Court decided *Obergefell* on substantive due process grounds. The Court has been reluctant to extend protected class status to the LGBTQ community.

from competing on teams that correspond with their gender identities.[213] Participating in interscholastic athletics provides students with tangible benefits and denying transgender student-athletes the right to play according to their gender identities denies them these benefits.[214] Of course, some will argue that some states will allow transgender student-athletes to play according to their biological sexes, so they are not denied an opportunity to play,[215] but forcing transgender student-athletes to do so will contribute to stigmatization, harassment, and controversy.[216] Discriminating against student-athletes because of their gender identities should be considered a form of sex discrimination under Title IX and under the Equal Protection Clause. Therefore, rules like the NCHSAA rules, which directly discriminate against transgender student-athletes, should be considered violations of Title IX and the Equal Protection Clause.

Additionally, laws like House Bill 2, which, when viewed in conjunction with rules like the NCHSAA rules, aid in the stigmatization and discrimination of transgender persons and should be struck down in violation of Title IX and the Equal Protection Clause. Similarly, laws like House Bill 142, which inhibit anti-discrimination protections, aid in the stigmatization and discrimination of transgender persons and deny them remedies within the political process, should therefore be struck down under the Equal Protection Clause as well. While the current administration and the United States Congress may not be considering any executive action, guidance, or legislation to protect transgender persons, the country's reaction to House Bill 2 and recent pro-LGBTQ Court decisions might indicate a favorable shift in the near future.[217]

Jessica Rosen[*]

213 *See* N.C. HIGH SCH. ATHLETIC ASS'N, *supra* note 155; *see K-12 Policies*, *supra* note 17.
214 *See* discussion *supra* section II.A.
215 *See* Domonoske, *supra* note 23.
216 *See id.*
217 *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *see* discussion, *supra* Section IV.

[*] Executive Editor, CARDOZO ARTS & ENT. L.J. VOL. 36, Benjamin N. Cardozo School of Law (2018); B.A., English Literature, Washington University in St. Louis (2014). I would like to thank Professor Interdonato for her zealous help throughout this process. I would also like to thank Gow Mosby, Matthew LoBello, and the Vol. 35 and Vol. 36 Editorial Boards for their support and dedication to *AELJ*. To BIDZ—thank you for the laughter. To my siblings—Jason, Meryl, Dana, Ashlie, Henry and Jay—thank you for the love. And to my parents—Mimi and Jamie—thank you for the world.