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Erin Buzuvis

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WHAT'S WRONG WITH THE NCAA'S NEW TRANSGENDER ATHLETE POLICY?

ERIN BUZUVIS*

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INTRODUCTION

In 2022, the NCAA changed its long-standing policy permitting transgender athletes to participate in teams that correspond to their affirmed gender.¹ For twelve years, the NCAA permitted transgender

* Western New England University School of Law.

1. *Board of Governors Updates Transgender Participation Policy*, NAT'L COLLEGIATE ATHLETIC ASS'N (Jan. 19, 2022) [hereinafter NAT'L COLLEGIATE ATHLETIC ASS'N (BD. OF GOVERNORS)], <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> [<https://perma.cc/QX84-BHC7>]. See *infra* Section I.C.

women to participate in women's sports events under NCAA control, so long as they first underwent a year of androgen suppression.² Starting in 2020, however, a political movement to ban transgender women and girls from competing in women's sport, galvanized by backlash against a single collegiate swimmer, has challenged NCAA's inclusive approach.³ Rather than demonstrate leadership and support for rights of transgender women to compete, the NCAA revised its policy⁴ to one that effectively passes responsibility to individual sports' governing bodies, deferring to the eligibility criteria established by sport organizations for transgender women to compete in their respective sports.

After providing historical background on the NCAA's approach to trans inclusion, and a detailed description of the policy it announced in January 2022, this Article critiques the NCAA's new policy on several grounds. First, the policy lacks clarity about the degree to which the NCAA's deference extends. At full implementation (beginning August 2023), the policy's wording raises questions about whether the NCAA would defer to policies that use criteria other than a testosterone limit, and that would operate, not just to postpone an athlete's participation, but exclude them altogether; and other ambiguities and uncertainties arise by virtue of the NCAA's decision to defer to policies that were not developed with this deference in mind. Another set of criticisms arise by virtue of the NCAA's purported justification of its policy as "align[ing] transgender student-athlete participation with the Olympic Movement."⁵ Such alignment is neither necessary nor is it achieved by the NCAA's policy. Finally, the NCAA's deference policy could put NCAA member institutions at risk of excluding more athletes than is warranted as a matter of civil rights protected by Title IX and, for students at state universities, the Equal Protection Clause as well. For these reasons, the NCAA should take back control of its own policy. A sport-specific approach is not necessarily wrong. But eligibility criteria should be set with the unique values and context of NCAA and its educational-institution member institutions in mind. NCAA cannot outsource its navigation of the complexities and diversity of sport and gender; it must take responsibility for establishing and administering its own policies.

2. See *infra* Section I.B.

3. See *infra* Section I.C.

4. NAT'L COLLEGIATE ATHLETIC ASS'N (BD. OF GOVERNORS), *supra* note 1.

5. *Transgender Student Athlete Participation Policy*, NAT'L COLLEGIATE ATHLETIC ASS'N [hereinafter NAT'L COLLEGIATE ATHLETIC ASS'N (TRANSGENDER STUDENT-ATHLETE)], <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> [https://perma.cc/DPM9-3RUV] (last visited Nov. 18, 2022).

I. BACKGROUND ON NCAA POLICIES GOVERNING TRANS ATHLETES

This Part will provide background on the NCAA's approach over time to the question of inclusion of trans athletes, which at first included a rule that deferred to the gender marker on one's state identification, and then became a rule that required trans women to undergo one year of hormone treatment.⁶ This Part will conclude with an examination of the factors that lead to the NCAA's 2022 policy change.

A. Pre-2011

The National Collegiate Athletic Association (NCAA) is a membership organization of primarily United States colleges and universities that provide opportunities for students to compete in intercollegiate athletics.⁷ Institutions compete in one of three divisions, I, II and III.⁸ Each Division has its own legislative body, and a Board of Governors exists to set policies and direction of the association as a whole.⁹

All NCAA divisions operate separate championships for men's and women's sports.¹⁰ If a team has only women on it, it is eligible for the women's championships, but male athletes on a women's team disqualify that team for a women's championship.¹¹ Because of the separation by sex of the NCAA's championships, it had to confront the question of transgender students' eligibility when member institutions began to report the presence of transgender athletes on their teams.¹² An early example was Keelin Godsey, a member of the women's track and field team at Bates College when he came out transgender in 2006.¹³ He continued to participate on the women's team even as Bates recognized his male gender identity, preferred name, and he/him pronouns.¹⁴ It was reported at the time that this

6. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 23 (2011); Marta Lawrence, *Transgender Policy Approved*, NCAA NEWS (Sept. 13, 2011), <https://ncaanewsarchive.s3.amazonaws.com/2011/september/transgender-policy-approved.html> [<https://perma.cc/K56S-VXWR>].

7. *See What Is the NCAA?*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx> [<https://perma.cc/4MVQ-W29P>] (last visited Nov. 18, 2022).

8. *Id.*

9. *Governance*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/sports/2021/2/9/governance.aspx> [<https://perma.cc/T53Y-2D4Z>] (last visited Nov. 18, 2022).

10. *See Buzuvis, supra* note 6, at 2.

11. *See id.* at 23.

12. *See id.* at 23–24.

13. *See id.* at 17.

14. *See id.* at 18.

participation complied with the NCAA's extant guidelines that deferred to the gender marker on one's state identification as the basis for eligibility.¹⁵

B. NCAA's 2011 Policy

The insufficiency of these guidelines focused attention on the need for a more robust and considered policy of inclusion. Then, as now, states take diverse approaches to gender markers on legal identification.¹⁶ Some permit applicants to change their identification based on the affirmation of gender identity, while others impose restrictions and requirements such as surgery.¹⁷ Since any given college competition could involve athletes from multiple states, the possibility existed that athletes similarly situated in terms of their transgender status might be eligible or ineligible just because they happen to hail from different states.¹⁸

In 2006, the NCAA's Office for Inclusion convened a transgender roundtable that brought together experts in medicine, law, sport, for a meeting to generate ideas for a consistent and inclusive policy.¹⁹ One thing that the roundtable participants considered was the need for a distinct policy from that of the International Olympic Committee (IOC).²⁰ In 2003, the International Olympic Committee generated the first policy and charted a course for transgender athletes to compete as their affirmed gender.²¹ Though historic in that regard, it included restrictions that did not need to be replicated for collegiate sport.²² For one, the IOC's policy required athletes' affirmed gender to be legally recognized, a political consideration unrelated to gender and sport.²³ Also, the IOC's policy required an athlete to transition medically with both gender affirming surgery as well as

15. *See id.* at 17–18.

16. *See State-by-State Overview: Rules for Changing Gender Markers on Birth Certificates*, TRANSGENDER L. CTR. (last updated Apr. 2017), <https://transgenderlawcenter.org/resources/id/state-by-state-overview-changing-gender-markers-on-birth-certificates> [<https://perma.cc/X3NN-M36Y>].

17. *See id.*

18. *See* Buzuvis, *supra* note 6, at 24.

19. *Transgender Cases Present Problems for Policy-Makers*, NAT'L CTR. LESBIAN RTS. (Aug. 23, 2022), <https://www.nclrights.org/about-us/press-release/transgender-cases-present-challenges-for-policy-makers> [<https://perma.cc/ZC2Y-9R9P>].

20. *Id.*

21. INT'L OLYMPIC COMM., *IOC Approves Consensus with Regard to Athletes Who Have Changed Sex* (May 18, 2004), <https://olympics.com/ioc/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex-1> [<https://perma.cc/H2RM-AYLM>].

22. *Id.*

23. *Id.*

hormone treatment, even though it is redundant to require both since either will suppress the effect of androgens on the body.²⁴ Given that U.S. college students would have varied access to and desire for surgery,²⁵ retaining the surgery requirement would have resulted in exclusion unjustified by any reason related to sport.²⁶ The IOC's third requirement for a two-year period of hormone treatment prior to eligibility was also criticized for being more exclusionary than necessary.²⁷ Most physical changes that result from androgen blockers occur within a year.²⁸ When creating a policy for college-age students in particular, the difference between one and two years can be meaningful because of the limited time one is eligible to compete.²⁹ A one-year transition, for example, could fit within the time frame of a medical redshirt, which extends the athlete's four years (now ten semesters) of eligibility to account for an interruption for medical necessity.³⁰

With these critiques in mind, and an understanding of its responsibility to create policies relevant to U.S. collegiate athletes and U.S. colleges and universities, the NCAA developed a more inclusive policy than the one governing the Olympics and other competitions controlled by the IOC.³¹ Announced in 2011, the NCAA's policy permitted transgender women to compete after one year of hormone treatment consisting of androgen blockers,³² rejecting the two-year transition period, surgery requirement, and legal recognition imposed

24. See Sheila L. Cavanagh & Heather Sykes, *Transsexual Bodies at the Olympics: The International Olympic Committee's Policy on Transsexual Athletes at the 2004 Athens Summer Games*, BODY AND SOC'Y 1 (2005).

25. Matt Lazzareschi, *Transgender Students and the College Experience*, WELLFLEET STUDENT (Aug. 25, 2022), <https://wellfleetstudent.com/behavioral-health/transgender-students-and-the-college-experience> [https://perma.cc/KGJ4-BY2A].

26. Assoc. Press, *Transgender Athletes Can Now Compete in Olympics Without Surgery*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/26/sports/olympics/transgender-athletes-olympics-ioc.html> [https://perma.cc/AE4Q-UXZW].

27. Cavanagh & Sykes, *supra* note 24, at 77–78.

28. Mary Bridge Children's MultiCare, *A Guide to Feminizing Hormones*, MBCM (Aug. 25, 2022), https://www.marybridge.org/file_viewer.php?id=432&title=Estrogen+Education+Handout-edited+%281%29#:~:text=Androgen%2Dblockers%20work%20by%20blocking,and%20stop%20spontaneous%2Fmorning%20erections [https://perma.cc/B2J8-9CRS].

29. Frankie de la Cretaz, *The IOC Has a New Trans-Inclusion Framework, but Is the Damage Already Done?*, SPORTS ILLUSTRATED (Mar. 23, 2022), <https://www.si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework> [https://perma.cc/2Z9E-D6EQ].

30. See John Infante, *How to Get a Medical Redshirt*, NEXT COLLEGE STUDENT ATHLETE (Aug. 26, 2022), <https://www.athleticscholarships.net/2012/07/17/how-get-medical-redshirt.htm> [https://perma.cc/4UCS-L64A].

31. See Lawrence, *supra* note 6.

32. *Id.*

by the IOC.³³ It also clarified that the requirement for hormone treatment pertained to transgender women, something the IOC's policy seemed to imply with its focus on surgery and hormones, but did not expressly state.³⁴ The NCAA's policy also expressly permitted trans athletes to continue to play women's sport even if they did not personally or publicly identify as female, so long as they had not yet begun to take testosterone to transition physically.³⁵ As for trans men in men's sports, the NCAA acknowledged their eligibility for a therapeutic use exception from the otherwise applicable ban on exogenous testosterone.³⁶ Though referred to as 'guidelines' for member institutions, the NCAA policy automatically applied to the association's own purposes like eligibility for championships, anti-doping bylaws, and requirements for member institutions to sponsor minimum number of men's and women's sports.³⁷ The NCAA's inclusive intentions were belied by its publication soon thereafter of an inclusion handbook authored by two experts and advocates for LGBTQ inclusion in sport.³⁸ The handbook not only encouraged member institutions to adopt the NCAA's eligibility policy, but to follow best practices for inclusion in such contexts as name and pronoun use, locker rooms, uniforms, and travel arrangements.³⁹

C. Post-2011 Developments Leading to Another Policy Change

From the time of the policy's adoption in 2011 until 2021, few examples of transgender NCAA athletes received media attention.⁴⁰ In January 2022, Outsports.com generated a list of thirty-two transgender collegiate (not all them NCAA) athletes, most of whom had only been reported on by Outsports itself.⁴¹ Some of the more high-profile of these athletes include Kye Allums, a member of George Washington University's women's basketball team, who publicly

33. See INT'L OLYMPIC COMM., *supra* note 21.

34. See NAT'L COLLEGIATE ATHLETIC ASS'N OFF. OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (2011), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf [<https://perma.cc/H3LV-X6DQ>].

35. See *id.*

36. See *id.* at 12.

37. See *id.*

38. See *id.* at 2.

39. See NAT'L COLLEGIATE ATHLETIC ASS'N OFF. OF INCLUSION, *supra* note 34, at 15.

40. See Anna Baeth & Anna Goorevich, *How U.S. Politicians Are Using Moral Panics to Sideline Trans Athletes*, SOC'Y PAGES (June 23, 2022), <https://thesocietypages.org/en-gagingsports/2022/06/23/how-u-s-politicians-are-using-moral-panics-to-sideline-trans-athletes> [<https://perma.cc/JNE9-HVKV>].

41. Cyd Zeigler & Karleigh Webb, *These 32 Trans Athletes Have Competed Openly in College Sports*, OUTSPORTS (Apr. 6, 2022, 6:19 PM), <https://www.outsports.com/trans/2022/1/7/22850789/trans-athletes-college-ncaa-lia-thomas> [<https://perma.cc/465Q-PEB3>].

identified as male; Schuyler Bailar, a trans man who competed for Harvard's men's swimming team after transition; and Juniper Eastwood, a trans woman who ran women's cross country at University of Montana after transitioning with hormones for the NCAA-prescribed year.⁴²

One transgender athlete, however, received intense media attention beginning in late 2021—Lia Thomas of the University of Pennsylvania (UPenn) women's swim team.⁴³ Thomas had been a successful swimmer on UPenn's men's team prior to her transition, having posted the sixth fastest time in the men's 1000-yard freestyle as well as having set institutional records and placed second in the Ivy League in three distance swimming events.⁴⁴ Thomas transitioned in her junior year using hormone replacement therapy while continuing to swim on the men's team.⁴⁵ After waiting out the 2020–21 season canceled by the COVID-19 epidemic, Thomas spent her senior year as a member of the women's swim team.⁴⁶ Having begun her transition with hormones in 2019, Thomas exceeded the required one year of hormone treatment that the NCAA required at the time for transgender women to compete in women's sports.⁴⁷ Still, her participation was criticized as she won three events at a national invitational collegiate meet in December 2021.⁴⁸ For example, parents of Thomas's teammates publicly protested Thomas's participation in a letter to the NCAA and Ivy League.⁴⁹ An official for USA Swimming resigned from her role in similar protest,⁵⁰ and high-profile

42. *Id.*

43. See Louisa Thomas, *The Trans Swimmer Who Won Too Much*, NEW YORKER (Mar. 17, 2022), <https://www.newyorker.com/sports/sporting-scene/how-one-swimmer-became-the-focus-of-a-debate-about-trans-athletes> [https://perma.cc/6RSC-NSNE].

44. See Eric Levenson, *How an Ivy League Swimmer Became the Face of the Debate on Transgender Women in Sports*, CNN (Mar. 22, 2022, 1:10 PM), <https://www.cnn.com/2022/02/22/us/lia-thomas-transgender-swimmer-ivy-league/index.html> [https://perma.cc/UJ4K-DECD].

45. *Id.*

46. *Id.*

47. *Id.*

48. David Rieder, *Lia Thomas, Transgender Student from Penn, Swims Fastest Times in Nation; Controversy Brewing*, SWIMMING WORLD (Dec. 7, 2021, 5:38 PM), <https://www.swimmingworldmagazine.com/news/lia-thomas-transgender-swimmer-from-penn-swims-fastest-times-in-nation-controversy-brewing> [https://perma.cc/72DD-N7U2].

49. David Rieder, *Penn Parents Write Letter to NCAA Against Lia Thomas' Participation in Women's Events*, SWIMMING WORLD (Dec. 17, 2021, 9:01 AM), <https://www.swimmingworldmagazine.com/news/penn-swimming-parents-write-letter-to-ncaa-against-lia-thomas-participation-in-womens-events> [https://perma.cc/D6VT-5GMT].

50. Editorial Staff, *USA Swimming Official Resigns in Protest Over Lia Thomas Situation*, SWIMMING WORLD (Dec. 24, 2021, 9:11 AM), <https://www.swimmingworldmagazine.com/news/usa-swimming-official-resigns-in-protest-over-lia-thomas-situation> [https://perma.cc/N4KY-RUDK].

swimmers publicly objected to Thomas competing against women.⁵¹ Though she was not unbeatable—notably coming in sixth place in the 100-meter freestyle in one league meet, behind four cisgender women and one trans man transitioning without hormones⁵²—her success caused many to argue that her participation as a transgender woman is inherently unfair, and the fact that she complied with NCAA policies in existence belied the need for policy change.⁵³ Still, others have pointed out that Thomas did not set a NCAA record in this event, however, and is not dominating women’s swimming in the way that other standouts have.⁵⁴

On January 19, 2022, the NCAA announced a departure from its 2010 policy, timing that may give the appearance that it was reacting swiftly to the outcry against Thomas.⁵⁵ However, the organization had been assessing its 2010 policy for a while, holding a summit in October 2020.⁵⁶ One likely motivation for this reassessment is the successive changes made by the IOC to its own policy.⁵⁷ In 2015, the IOC revised its policy to eliminate any requirement for surgery or legal recognition of the athlete’s affirmed gender, and which replaced the “two years of hormone therapy” requirement with a requirement that the athlete medically lower her testosterone to

51. Editorial Staff, *Olympian Erika Brown: ‘We Cannot Allow Transgender Females to Compete Against Biological Women’*, SWIMMING WORLD (Dec. 29, 2021, 5:49 PM), <https://www.swimmingworldmagazine.com/news/olympian-erika-brown-we-cannot-allow-transgender-females-to-compete-against-biological-women> [<https://perma.cc/DHC3-EF7C>].

52. Joe Kinsey, *Penn’s Transgender Swimmer Lost to Yale’s Transgender Swimmer in a Hotly Contested Women’s Ivy League 100 Meter Race*, OUTKICK (Aug. 23, 2022), <https://www.outkick.com/penn-transgender-swimmer-lia-thomas-beaten-by-yale-transgender-swimmer-izac-henig> [<https://perma.cc/5LUZ-FZQL>].

53. Eric Levenson, *How an Ivy League Swimmer Became the Face of the Debate on Transgender Women in Sports*, CNN (Mar. 22, 2022, 1:10 PM), <https://www.cnn.com/2022/02/22/us/lia-thomas-transgender-swimmer-ivy-league/index.html> [<https://perma.cc/8CG2-CACQ>].

54. Io Dodds, *Critics Accuse Transgender Swimming Star Lia Thomas of Having an Unfair Advantage. The Data Tells a Different Story*, THE INDEPENDENT (May 31, 2022, 4:27 PM), <https://www.independent.co.uk/news/world/americas/lia-thomas-trans-swimmer-ron-desantis-b2091218.html> [<https://perma.cc/P4DE-JHQT>].

55. *E.g.*, Sydney Bauer, *Lia Thomas’ Success Led to New NCAA Transgender Policies. They’re Failing Athletes*, THEM (Feb. 2, 2022), <https://www.them.us/story/lia-thomas-ncaa-transgender-guidelines-confusing-harm-athletes> [<https://perma.cc/ZA8C-PR5T>].

56. NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA GENDER IDENTITY AND STUDENT-ATHLETE PARTICIPATION SUMMIT MEETING SUMMARY (Oct. 5–6, 2020), https://s3.amazonaws.com/ncaaorg/about/ncaa/Report_from_Transgender_Student-Athlete_Participation_Summit.pdf [<https://perma.cc/5A9S-UNK5>].

57. See Frankie De La Cretaz, *The IOC Has a New Trans-Inclusion Framework, but Is the Damage Already Done?*, SPORTSILLUSTRATED (Mar. 23, 2022), <https://www.si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework> [<https://perma.cc/99JY-5D44>].

below a threshold of ten nanomoles per liter of blood serum for a period of at least twelve months prior to competition.⁵⁸ This threshold had first been adopted by World Athletics, the international governing body for track and field in 2011, to determine the eligibility of women with hyperandrogenism.⁵⁹ This policy was withdrawn after a panel of the Court of Arbitration for Sport rejected part of World Athletics' proffered rationale.⁶⁰ Later, in 2018, World Athletics revised its rules to require hyperandrogenic women to meet a lower testosterone threshold of five nanomoles per liter for at least six months prior to the competition, limiting it to middle distance running events (400m to one mile).⁶¹ The next year, World Athletics adopted the same five-nanomole testosterone threshold to govern the eligibility of trans women for women's sports.⁶² While World Athletics took steps to partially replace its ten-nanomole standard for women with hyperandrogenism with a five-nanomole standard, and then extend that five nanomole standard to apply to transgender women as well, the IOC retained its 2015 ten-nanomole standard for transgender women, up until November of 2021.⁶³ At this point, the IOC revoked its ten-nanomole standard and substituted a set of standards, discussed in more detail below, for each sport's governing body to apply in determining the eligibility criteria appropriate for that sport.⁶⁴ Given that the IOC's 2003 policy was a starting point

58. *IOC Rules Transgender Athletes Can Take Part in Olympics Without Surgery*, THE GUARDIAN (Jan. 24, 2016, 8:04 PM), <https://www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery> [<https://perma.cc/9RRQ-9LB7>]; INT'L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM 2 (2015) [hereinafter INT'L OLYMPIC COMM. (CONSENSUS MEETING)], https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf [<https://perma.cc/B5VF-MH42>].

59. See Erin E. Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J. L., GENDER & SOC'Y 29, 38 (2016).

60. See *id.* at 39.

61. *IAAF Introduces New Eligibility Regulations for Female Classifications*, WORLD ATHLETICS (Apr. 26, 2018), <https://www.worldathletics.org/news/press-release/eligibility-regulations-for-female-classification> [<https://perma.cc/QWQ2-5J9K>].

62. WORLD ATHLETICS, ELIGIBILITY REGULATIONS FOR TRANSGENDER ATHLETES (Oct. 1, 2019), <https://www.worldathletics.org/download/download?filename=ace036ec-a21f-4a4a-9646-fb3c40fe80be.pdf&urlslug=C3.5%20-%20Eligibility%20Regulations%20Transgender%20Athletes> [<https://perma.cc/M23R-VUMH>].

63. See Sean Ingle, *Trans Women Should Not Have to Reduce Testosterone, Say New IOC Guidelines*, THE GUARDIAN (Nov. 16, 2021, 4:32 PM), <https://www.theguardian.com/sport/2021/nov/16/trans-women-should-not-have-to-reduce-testosterone-say-new-ioc-guidelines> [<https://perma.cc/XYZZ-Z4QU>]; WORLD ATHLETICS, *supra* note 62.

64. See INT'L OLYMPIC COMM., IOC FRAMEWORK ON FAIRNESS, INCLUSION AND NON-DISCRIMINATION ON THE BASIS OF GENDER IDENTITY AND SEX VARIATIONS 1 (2021) [hereinafter INT'L OLYMPIC COMM. (FRAMEWORK)], <https://stillmed.olympics.com/media>

for consideration as the NCAA developed its 2010 policy,⁶⁵ it is a fair assumption that the IOC's subsequent changes, both adopting and then rejecting a testosterone level policy, would contribute to the NCAA's motivation to reconsider its own policy.

Another factor likely motivating the NCAA was the rising number of state legislatures banning or seeking to ban trans women and girls from competing as women in collegiate and scholastic sports.⁶⁶ Idaho's ban, passed in 2020, which applied to college students, raised questions about how the NCAA would treat its member institutions located in Idaho that would, presumably, comply with state law.⁶⁷ Would the NCAA revoke membership, exclude from championship, or withhold the honor of hosting championships to these schools? Advocates for inclusion were hoping and presumably pushing for such a response, as it would have positioned the NCAA as a powerful ally and provided ammunition to oppose similar bills pending in other legislatures across the country.⁶⁸ While Idaho's ban is currently subject to a preliminary injunction preventing it from taking effect while the courts sort out its constitutionality, eleven other states have passed laws excluding trans women and girls from participating in sports.⁶⁹ In addition to Idaho's ban, eight of these bans apply to college athletes and several go so far as to ban trans women from club and intramural college sports as well as intercollegiate competition.⁷⁰

/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf [https://perma.cc/ZQC6-79ND].

65. See INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58; NCAA *Transgender Policy Background, Resources*, NAT'L COLLEGIATE ATHLETIC ASS'N (Apr. 26, 2021, 2:00 PM), <https://www.ncaa.org/news/2021/4/26/ncaa-transgender-policy-background-resources.aspx> [https://perma.cc/QVK3-U8SJ].

66. *E.g.*, David W. Chen, *Transgender Athletes Face Bans from Girls' Sports in 10 U.S. States*, N.Y. TIMES (May 24, 2022), <https://www.nytimes.com/article/transgender-athlete-ban.html> [https://perma.cc/FFR3-3ZLP].

67. Julie Kliegman, *Idaho Banned Trans Athletes from Women's Sports. She's Fighting Back.*, SPORTS ILLUSTRATED (June 30, 2020), <https://www.si.com/sports-illustrated/2020/06/30/idaho-transgender-ban-fighting-back> [https://perma.cc/35AF-9RQW].

68. See Julie Kliegman, *College Athletes Are Pressuring the NCAA to Take Action Against Anti-Trans Sports Laws. Why Hasn't It?*, SPORTS ILLUSTRATED (June 23, 2021), <https://www.si.com/college/2021/06/23/trans-athlete-ban-ncaa-pressure-daily-cover> [https://perma.cc/N5YB-6GGY].

69. See Katie Barnes, *Alabama to Wyoming: State Policies on Transgender Athlete Participation*, ESPN (June 7, 2022), https://www.espn.com/espn/story/_/id/32117426/state-policies-transgender-athlete-participation [https://perma.cc/325G-65RP] (discussing the states with bans as of now: Alabama, Arkansas, Florida, Idaho, Iowa, Mississippi, Montana, Oklahoma, South Dakota, Texas, Utah, and West Virginia).

70. See *id.* (highlighting that Alabama, Texas, and Utah are the states whose ban applies to K–12 only, excluding college sports. Florida, Idaho, Mississippi, Montana, and West Virginia are the states that include club and intramural sports in their ban).

II. NCAA'S 2022 POLICY

On January 19, 2022, the NCAA Board of Governors approved a new transgender participation policy.⁷¹ The new policy eliminates a standard that applies to all athletes in all NCAA-sponsored programs, and replaces it with a sport-by-sport approach that incorporates deference to whatever policy the national governing body or international federation for that sport has adopted.⁷² In the absence of an international federation policy, previously established IOC policy criteria would be followed—i.e., the ten-nanomole rule.⁷³

The new policy is slated for “full implementation” with the 2023–24 academic year.⁷⁴ At that point, transgender athletes will be required to provide documentation of compliance with the sport-specific testosterone level at various points in time every year: at the beginning of the competition season, again six months later, and, for athletes competing in NCAA championships, again within 4 weeks of championship selection.⁷⁵ At full implementation, athletes will also have to comply with other aspects of the transgender participation policy adopted by their sport including the duration of time prior to competition that compliance with the testosterone threshold must be satisfied (a so-called “length of time” requirement) as well as any potential additional policy requirements the relevant sport organization (i.e., national governing body or international federation) might impose, such as gender-affirming surgery and an amended birth certificate, which are approved by the NCAA’s Committee on Competitive Safeguards and Medical Aspects of Sports.⁷⁶

Until the policy is fully implemented, transgender athletes must continue to comply with and be able to document compliance with the former rule requiring one year of hormone treatment.⁷⁷ In addition, athletes competing in NCAA’s winter and spring championships in 2022 must also document compliance with the sport-specific testosterone limit within four weeks of championship selection.⁷⁸ Phase Two covers the 2022–23 academic year and in addition to the requirements of Phase One, also requires athletes to document

71. NAT’L COLLEGIATE ATHLETIC ASS’N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5.

72. *See id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*; Buzuvis, *supra* note 6.

77. NAT’L COLLEGIATE ATHLETIC ASS’N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5.

78. *Id.*

compliance with sport-specific testosterone at the beginning of their season and again six months later.⁷⁹ During the phases of partial implementation, the sport-specific rules for length of time do not apply, nor do any other aspects of the sport's policy besides the testosterone threshold.⁸⁰

On February 1, 2022, soon after NCAA announced its new policy, USA Swimming announced new eligibility criteria for trans women to compete in elite-level women's swimming competitions.⁸¹ USA Swimming now requires a three-person panel of medical experts to individually evaluate each transgender athlete to determine whether her physical development prior to transition gives her "competitive advantage over her cisgender female competitors."⁸² Athletes subject to the policy must also show that their testosterone levels have been below "5 nanomoles per liter continuously for . . . 36 months."⁸³ However, the policy was announced too late for the 2022 women's swimming championships.⁸⁴ Because Phase One requires athletes to submit proof of compliance with the prevailing testosterone standard within four weeks of championship selection, and this date for swimming was January 31, the NCAA considered USA Swimming's policy revision to have come too late to be given effect in 2022.⁸⁵ For Lia Thomas, the consequence of this decision was that she only had to document compliance with the one-year treatment rule from the 2010 policy and testosterone below the ten-nanomole threshold which applied by virtue of NCAA's incorporation of the IOC's former standard in the absence of a national or international federal policy.⁸⁶ Thomas did go on to win the 500-yard freestyle event at the NCAA championships, though she did not break Katie Ledecky's record for the event.⁸⁷

79. *Id.*

80. *Id.*

81. Matt Bonesteel, *USA Swimming Issues New Policy for Transgender Athletes in Elite Competition*, WASH. POST (Feb. 1, 2022, 4:02 PM), <https://www.washingtonpost.com/sports/2022/02/01/usa-swimming-transgender-policy> [<https://perma.cc/W2DA-PH4K>].

82. *Id.*

83. *Id.*

84. James Sutherland, *NCAA Won't Follow USA Swimming Transgender Policy for 2022 Championships*, SWIM SWAM (Feb. 10, 2022), <https://swimswam.com/ncaa-wont-follow-usa-swimming-transgender-policy-for-2022-championships> [<https://perma.cc/UR58-DMRW>].

85. *Id.*

86. *Id.*

87. Les Carpenter, *Lia Thomas broke no records at the NCAA championships but left plenty of questions*, WASH. POST (Mar. 20, 2022, 10:21 PM), <https://www.washingtonpost.com/sports/2022/03/20/lia-thomas-ncaa-swimming-championships-questions> [<https://perma.cc/XJD4-SXEN>].

III. CRITIQUE OF NCAA'S POLICY

This Part will criticize the NCAA's policy on four grounds. First, the policy is riddled with uncertainties that will undermine its consistent and predictable application. Second, the arbitrariness of the default ten-nanomole rule undermines the credibility of the NCAA's policy as a whole. Third, the NCAA's policy undermines the IOC's approach, even as the NCAA purports to "align" itself with the IOC in this regard. Finally, it puts member institutions at risk of violating the U.S. Constitution's Equal Protection Clause and Title IX.

A. Incorporation of Sport Association Rules Results in Unclear Standard for Many Sports

The NCAA's new policy of deference to rules created by sports organizations lacks clarity and consistency that will leave athletes and other stakeholders uncertain of their eligibility.⁸⁸ The policy defers to the standards developed by the sport's national governing body (NGB), and if the NGB has no policy, then to the sport's international federation (IF), and if the IF has no policy, then to the former IOC policy of ten nanomoles for twelve months prior to competition.⁸⁹ For some sports, deference to the policy of another sport organization raises no problem of clarity. Of the twenty-one NCAA-sanctioned women's sports, seven⁹⁰ are associated with a national governing body and international federation neither of which have any policy at all governing transgender participation.⁹¹ For these sports, NCAA will apply the IOC's former (2015) policy of requiring trans women to show testosterone levels below ten nanomoles per liter of blood serum for twelve months prior to competition.⁹² So for these sports, at least, the rule is clear right now, though changes sport organizations might make in the future could introduce ambiguities.

88. See NAT'L COLLEGIATE ATHLETIC ASS'N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5.

89. *Id.*

90. See NAT'L COLLEGIATE ATHLETIC ASS'N, *Guide for College-Bound Student Athletes* (2021–22), http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/CBSA.pdf [<https://perma.cc/XY8-3DBM>] (discussing basketball, bowling, field hockey, lacrosse, skiing, softball, and water polo).

91. See Julie Kliegman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (July 6, 2022), <https://www.si.com/more-sports/2022/07/06/transgender-athletes-bans-policies-ioc-ncaa> [<https://perma.cc/HA25-ETU4>]; see Nick Selbe, *NCAA Updates Policy on Transgender Athlete Participation*, SPORTS ILLUSTRATED (Jan. 19, 2022), <https://www.si.com/college/2022/01/20/ncaa-updates-transgender-athlete-participation-policy> [<https://perma.cc/RZJ9-54NX>].

92. NAT'L COLLEGIATE ATHLETIC ASS'N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5; INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58.

Four other women's sports are associated with a governing body that has adopted a clear testosterone limit and length of time requirement: cross country, indoor and outdoor track and field (which all have the same national governing body), as well as fencing, have national governing bodies that have adopted a ten-nanomole/twelve-month standard.⁹³ Each organization's policies reference the IOC as the origin of the policy, but refer specifically to a ten-nanomole standard, thus making it clear that even though the IOC has revoked its own policy, the ten-nanomole standard stands on its own.⁹⁴ Tennis's international federation and swimming's national federation have adopted a five-nanomole threshold, which tennis requires for twelve months prior to competition, and which swimming now requires for thirty-six months.⁹⁵ Setting aside any questions about the appropriateness of these rules, ambiguity is not a problem as things currently stand.⁹⁶

In the NCAA's other women's sports, which do not have a policy that is singularly based on a testosterone limit/length of time requirement,⁹⁷ clarity becomes an issue. The NCAA's new policy clearly contemplates deference to testosterone limits and length of time requirements set by other sport organizations.⁹⁸ Even in Phase 3, where the NCAA's policy allows consideration of other policy requirements, those other policy requirements appear to be *in addition* to testosterone and length of time requirement.⁹⁹ But what if a sports organization adopted a restrictive rule that is not based on testosterone at all? Or what if it has a more inclusive rule that expressly or impliedly imposed no medical transition requirements? Would the NCAA defer to that organization's rules? Or would it view them as outside the scope of the deference extended by its policy, leaving it with "no policy" to apply other than the IOC's ten-nanomole/twelve-month rule? It seems like the decisions of whether/which other types of requirements will receive deference is

93. See, e.g., USA FENCING, 2020–2021 ATHLETE HANDBOOK (Mar. 2021), https://capdiv.usafencing.org/forms/20_21_Modified_Athlete_Handbook_03_2021.pdf [<https://perma.cc/N5PJ-9CVX>].

94. See, e.g., *id.*

95. INT'L TENNIS FED'N, ITF TRANSGENDER POLICY 1 (Nov. 8, 2018), <https://www.itftennis.com/media/2163/itf-transgender-policy.pdf> [<https://perma.cc/YY7M-CFDY>]; USA SWIMMING, 19.0 ATHLETE INCLUSION, COMPETITIVE EQUITY, AND ELIGIBILITY POLICY 43 (Feb. 1, 2022), https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules_policies/usa-swimming-policy-19.pdf [<https://perma.cc/SM9S-N77G>].

96. See INT'L TENNIS FED'N, *supra* note 95; USA SWIMMING, *supra* note 95.

97. See NAT'L COLLEGIATE ATHLETIC ASS'N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5.

98. See *id.*

99. See *id.*

up to the NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports, but the criteria this committee will use to make these determinations is unknown.¹⁰⁰

Additional ambiguities arise when considering these policies that are not based on a testosterone limit. Volleyball and beach volleyball are under the aegis of Fédération Internationale de Volleyball, whose rules for gender eligibility defer to the "birth certificate of the player."¹⁰¹ This standard will likely raise questions of whether an amended birth certificate would be considered, or only one's original birth certificate (an interpretation that would exclude trans women categorically). If the NCAA defers to a generous interpretation of "birth certificate" and allows amended birth certificates to qualify, an athlete's eligibility will depend on the state in which they were born.¹⁰² Notably, four U.S. states do not permit transgender people to amend the gender marker on their birth certificates at all, while twelve condition the amendment on the outdated requirement of sex-reassignment surgery.¹⁰³

Golf's international federation also has rules that are inherently unclear.¹⁰⁴ The USGA requires trans women to undergo "gender reassignment surgery" and hormone treatment to achieve appropriate levels "for a sufficient length of time to minimize gender-related advantages."¹⁰⁵ The phrase "sex reassignment surgery" is an outdated label for a broad category of possible surgical interventions that some trans individuals undergo to align their body's function or appearance with their gender identity.¹⁰⁶ (Thus, "gender confirmation" or "gender affirmation" is the preferred way to refer to a surgical intervention of this type.)¹⁰⁷ Surgical interventions for trans

100. *See id.*

101. FÉDÉRATION INTERNATIONALE DE VOLLEYBALL, EVENT REGULATIONS: VOLLEYBALL 11 (Nov. 3, 2020), <https://www.fivb.com/-/media/2020/fivb%20corporate/fivb/legal/event%20regulation/updated/fivb%20event%20regulations%20202020201113clean.pdf?la=en&hash=6406948D18B0915DA35E8DC9725D47AD> [<https://perma.cc/4CJX-J8UB>].

102. *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (MAP) (2022), https://www.lgbtmap.org/equality-maps/identity_document_laws [<https://perma.cc/RA5L-85FW>].

103. *See id.*

104. *International Federations Discuss Consensus on Establishing Rules for Transgender Athletes*, WORLD ATHLETICS (Oct. 31, 2019), <https://worldathletics.org/news/press-release/international-federations-rules-transgender-a> [<https://perma.cc/52Z3-LGPG>].

105. U.S. GOLF ASS'N, GENDER POLICY FOR USGA CHAMPIONSHIPS, <https://champ-admin.usga.org/player/articles/Gender-Policy> (last visited Nov. 18, 2022).

106. LGBTQ CTR., *Terminology*, MONTCLAIR STATE UNIV., <https://www.montclair.edu/lgbtq-center/lgbtq-resources/terminology> [<https://perma.cc/D5KE-M9J3>].

107. *See* Loren S. Schechter, *Gender Confirmation Surgery: An Update for the Primary Care Provider*, TRANSGENDER HEALTH 32 (Jan. 1, 2016); *Gender Affirmation (Confirmation) or Sex Reassignment Surgery*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery> (last visited Nov. 18, 2022).

women may include orchiectomy (removal of the testes), vaginoplasty, breast augmentation, and surgeries to modify one's voice and facial hair.¹⁰⁸ So it is not entirely clear which surgery or surgeries the USGA is referring to. Given the trans community's diverse interest in, and access to, surgical interventions, there is no emerging consensus on what is typical or recommended for all trans women.¹⁰⁹

Rifle's international federation also has a policy that is inherently unclear.¹¹⁰ The International Shooting Sport Federation (ISSF) rule reads as follows: "Any athlete who undergoes sexual reassignment surgery after puberty and wishes to participate in an ISSF Championship must meet the specific conditions and criteria established by the IOC in order to do so."¹¹¹ In addition to using the same ambiguous phrase, sex reassignment surgery, as Golf's policy described above, the ISSF policy does not even expressly impose SRS as a requirement for eligibility: it simply states that those trans women that undergo SRS after puberty must also meet IOC standards.¹¹² Though it seems unlikely to have been the federation's intent, the grammatical structure of this standard suggests that only athletes who have not undergone SRS before puberty are subject to the requirement of adhering to IOC criteria, whereas the rest of them are not subject to such criteria. The redundancy of "after puberty" is also worth noting. Though not necessarily contributing any additional ambiguity, the fact that the ISSF seems to believe that some trans people might undergo a surgical transition before puberty does operate to cast doubt on the credibility and of the policy as a whole. So, with regard to trans women who have not had whatever the ISSF would consider "sexual reassignment surgery," the ISSF could interpret the policy to exclude them altogether,¹¹³ or it could interpret them as having to meet no requirements,¹¹⁴ or it could interpret them as being textually omitted from the policy and therefore being subject to the default 2015 IOC standard of a ten-nanomole limit for twelve months.¹¹⁵

108. See Jae A. Puckett, Peter Cleary, Kinton Rossman, Michael E. Newcomb & Brian Mustanski, *Barriers to Gender-Affirming Care for Transgender and Gender Nonconforming Individuals*, 15 *SEXUALITY RSCH. & SOC. POL'Y* 48, 49 (2018).

109. See *id.* at 48, 50.

110. See INT'L SHOOTING SPORT FED'N, ISSF ELIGIBILITY, ISSF COMMERCIAL RIGHTS AND ISSF SPONSORSHIP/ADVERTISING RULES 122, 125 (2018), <https://www.issf-sports.org/getfile.aspx?mod=docf&pane=1&inst=456&file=ISSF%20Eligibility%20-%20ISSF%20Commercial%20%20Rights%20and%20ISSF%20Sponsorship%20Advertising%20Rules.pdf> [https://perma.cc/JM6L-NKBG].

111. *Id.*

112. *Id.*

113. See *id.*

114. See *id.*

115. INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58.

The national governing bodies for Gymnastics, Rowing, and Soccer have adopted a policy for transgender athletes that is, by default, an inclusive rule that permits gender-identity-based participation without imposing any additional medical transition requirement.¹¹⁶ These policies all carve out exceptions for elite competitions governed by a more exclusive policy.¹¹⁷ But now that all elite organizations have ceded their own policies and deferred to that of the relevant sports organization, where does that leave those exceptions? One reading is that the exceptions disappear, and the default inclusive rule applies to all competitions in that sport.¹¹⁸ Perhaps the NCAA will read this as a policy vacuum and apply the IOC's ten-nanomole/twelve-month rule instead.

NCAA's new policy as applied to ice hockey is another example of this manner of ambiguity, as USA Hockey's policy for trans women's participation in women's hockey requires one year of testosterone suppression therapy for all of its competitive programs, though it recognizes that competitions subject to the jurisdiction of the NCAA and/or IOC would operate under their policies instead.¹¹⁹ Now that neither NCAA nor IOC has a policy of its own, a plausible application of USA Hockey's policy is that its one-year-of-treatment rule now applies to all competitions by virtue of the exception for NCAA rules no longer being applicable.¹²⁰ That said, the NCAA could

116. USA Gymnastics allows transgender and nonbinary athletes “in levels other than [e]lite” to compete without restriction in the gender category with which they identify, and recognizes that “elite” competitions are governed by policies set by the gymnastics international federation and/or the IOC. USA GYMNASTICS, POLICY FOR TRANSGENDER & NON-BINARY ATHLETE INCLUSION 1, 3 (April 2022), https://usagym.org/PDFs/About%20USA%20Gymnastics/transgender_policy.pdf [<https://perma.cc/QXU8-JDH4>]. Yet, the Fédération Internationale de Gymnastique has no policy, and the IOC has revoked its 2015 policy. USA Rowing permits athletes to compete according to their gender identity without medical transition requirements, except that collegiate athletes are expected to comply with NCAA policy and National team athletes are expected to comply with IOC policy—raising questions about what rules apply in the absence of an NCAA or IOC policy. USROWING (@USRowing), TWITTER (June 1, 2021, 12:34 PM), <https://twitter.com/usrowing/status/1399766395144048640> [<https://perma.cc/BLP9-36L9>]. The U.S. Soccer Federation's default rule allows gender-identity-based participation with no medical transition requirements. By its terms, however, the rule excludes professional soccer and the National Team, and college sport is not mentioned at all. U.S. SOCCER FED'N, INC., POLICY MANUAL 1, 55, https://cdn.ussoccer.com/-/media/project/ussf/governance/2022/by-laws/202223_ussf-policies_0430_final.ashx?la=en-us&rev=393ec4e6c61e45b1afd3ed717cef8990&hash=3B1C05186AA62EBE9DDFEFCE70016C87 [<https://perma.cc/HV8Q-V7N3>] (last visited Nov. 18, 2022).

117. USA GYMNASTICS, *supra* note 116; U.S. ROWING ASS'N, POLICY MANUAL 8–11 (June 10, 2020), https://usrowing.org/documents/2020/8/13/USRowing_Policy_Manual_06112020.pdf?id=2355; U.S. SOCCER FED'N, INC., *supra* note 116.

118. *See infra*, USA HOCKEY policy example.

119. USA HOCKEY, USA HOCKEY TRANSGENDER ATHLETE ELIGIBILITY POLICY 1–2 (2019), https://cdn3.sportngin.com/attachments/document/8a0b-1766565/USA_Hockey_Transgender_Athlete_Eligibility_Policy.pdf [<https://perma.cc/EKB9-4AZN>].

120. *Id.*; NAT'L COLLEGIATE ATHLETIC ASS'N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5; INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, at 1.

argue that by revoking its own policy, it left USA Hockey with no policy governing collegiate hockey, thus triggering the application of hockey's international federation policy, which requires compliance with a five-nanomoles threshold for twelve months prior to competition.¹²¹ The NCAA appears to be deferring to the international federation's policy, but it has not provided an explanation for why it assumes that USA Hockey's intent would not be to apply its default one-year-of-treatment rule to NCAA contests and not that its earlier exemption for contests governed by an NCAA rule is no longer applicable.¹²²

B. The Default Rule of Ten Nanomoles Is Arbitrary and Illogical

Given that the NCAA's policy change results in most sports applying a ten-nanomole rule, whether as the default or because that was chosen in the past by a sport organization,¹²³ it is worth to consider the origins of the ten-nanomole rule.

Ten nanomoles of testosterone in blood serum was first proposed by the IAAF—now World Athletics—as a rule to govern the participation of women with hyperandrogenism in track and field events.¹²⁴ The IAAF was not considering transgender women when it created that rule; rather, it was looking for a testosterone cut-off that, excluding any consideration of transgender women, would distinguish between hyperandrogenic and non-hyperandrogenic women.¹²⁵ Non-hyperandrogenic, cisgender women have testosterone in the range of 0.1 to three nanomoles per liter of blood serum.¹²⁶ By selecting

121. INT'L ICE HOCKEY FED'N, TRANS GENDER POLICY OF THE INTERNATIONAL ICE HOCKEY FEDERATION 5 (Jan. 1, 2018), <https://blob.iihf.com/iihf-media/iihfmvc/media/downloads/regulations/2020/transgender-policy-international-ice-hockey-federation.pdf> [<https://perma.cc/VE7X-N64G>].

122. Consider by analogy, that after the Supreme Court invalidated an exception to the Telephone Consumers Protection Act's otherwise applicable ban on robocalls, it then concluded that the general principle of severability applied. Thus, the entire Act remains in force, and now applies in the context that was once exempt. *See Am. Ass'n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019), *cert. granted*, 140 S. Ct. 812 (2020) (No. 19-631, 2020 Term). If the NCAA followed the same logic, it would conclude that the USA Hockey's exemption for contests governed by an NCAA rule is no longer valid (because the NCAA no longer has any rule of its own), but that USA Hockey's policy remains in force and now applies to NCAA contests.

123. *See infra* Section III.C.

124. Buzuvis, *supra* note 59, at 37.

125. *Id.* at 36–37.

126. Katherine Kornei, *This scientist is racing to discover how gender transitions alter athletic performance—including her own*, SCIENCE (July 25, 2018), <https://www.science.org/content/article/scientist-racing-discover-how-gender-transitions-alter-athletic-performance-including> [<https://perma.cc/56GE-97H6>]; Kim Elsesser, *What Makes An Athlete Female? Here's How the Olympics Decide*, FORBES (July 27, 2021, 1:48 PM), <https://www>

a cut-off of ten nanomoles per liter of testosterone, a level believed to be in the typical cisgender male range, and one more than three standard deviations from the mean natural levels of women's testosterone,¹²⁷ the IAAF designed a rule that sought to identify and exclude women with male-like levels of testosterone, not to determine a target for transgender women in transitioning. A cut-off of ten nanomoles may have been designed with the variability of hyperandrogenism in mind, as many hyperandrogenic conditions result in partial or incomplete ability to use the testosterone circulating in one's blood.¹²⁸

The ten-nanomole rule was not designed with transgender women in mind, and it was also suspended after it was challenged in the Court of Arbitration for Sport by a female runner with hyperandrogenism.¹²⁹ The IAAF later responded with a revised rule, more narrowly focused on middle-distance running events, but supported with stronger scientific evidence to support a five-nanomole cut-off for women with hyperandrogenism.¹³⁰

Although the IOC copied the ten-nanomole rule and adopted it as a unified standard for transgender women as well as women with hyperandrogenism, it has since recognized its folly and revoked that rule.¹³¹ Notwithstanding the rule's misplaced application to transgender athletes at the outset, and notwithstanding the IOC's own rejection of it, the NCAA has established it as a default rule that will apply in the absence of other sport organization rules, which as noted above, now includes seven women's sports.

Under the NCAA's former policy, a transgender woman had to demonstrate one year of treatment rather than levels of testosterone in blood serum below a specific level.¹³² One year of treatment with

.forbes.com/sites/kimelsesser/2021/07/27/what-makes-an-athlete-female-heres-how-the-olympics-decide/?sh=d18789d4f9cf [https://perma.cc/XX68-A8G3].

127. David J. Handelsman, Angelica L. Hirschberg & Stephanie Bermon, *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 *ENDOCRINE REV.* 803, 806–07 (2018).

128. Buzuvis, *supra* note 59, at 38.

129. *Chand v. IAAF*, CAS 2014/A/3759, Ct. of Arbitration for Sport at 2, 112 (July 25, 2015), <https://jurisprudence.tas-cas.org/Shared%20Documents/3759-PA.pdf> [https://perma.cc/CM4J-JPZM] (remanding the rule to IAAF to provide stronger scientific support for the premise that hyperandrogenic women have a competitive advantage over non-hyperandrogenic women).

130. WORLD ATHLETICS, *ELIGIBILITY REGULATIONS FOR THE FEMALE CLASSIFICATION 3* (May 1, 2019), <https://www.sportsintegrityinitiative.com/wp-content/uploads/2019/05/IAAF-Eligibility-Regulations-for-the-Female-Classi-2-compressed.pdf> [https://perma.cc/44LD-DZAW].

131. See Jacob Moreton, *IOC Admits Rules on Transgender Athletes Are Not Fit For Purpose*, *RUNNERSWORLD* (Aug. 5, 2021), <https://www.runnersworld.com/uk/news/a37222190/ioc-admits-rules-on-transgender-athletes-are-not-fit-for-purpose> [https://perma.cc/9FMC-2AMF].

132. NAT'L COLLEGIATE ATHLETIC ASS'N OFF. OF INCLUSION, *supra* note 34, at 13.

antiandrogens is generally sufficient to bring a transgender woman's testosterone levels to within the typical range for cisgender, non-hyperandrogenic women—at or under two nanomoles per liter.¹³³ NCAA's former policy, by requiring a meaningful and complete medical transition, effectively ensured that transgender women have testosterone levels well under the threshold that will now apply to most sports.¹³⁴

For this reason, the change from a “one year of testosterone suppression treatment” rule to a rule that additionally requires trans women to test below a threshold of ten nanomoles one year prior to treatment does not do very much to change the reality for trans women athletes in the NCAA.¹³⁵ However, the illogic of adopting that as the default threshold, especially as it has been rejected by the IOC, casts doubt on the soundness of NCAA's policy as a whole, as it introduces the specter of arbitrariness and imprecision.¹³⁶

C. Incorporation of Sport-Specific Rules Conflicts with IOC's Principles

The NCAA's expressed rationale for abandoning the one-year-of-treatment rule in favor of its current policy was to “align[] transgender student-athlete participation for college sports with recent policy changes from the United States Olympic and Paralympic Committee and International Olympic Committee.”¹³⁷ But the NCAA's policy change represents a stark contrast to the IOC's current approach. Beyond a basic similarity between the NCAA's and the IOC's revision, in that both move away from a rule that imposes the same eligibility criteria on all sports, allowing for sport-specific rules that can be more narrowly tailored to the characteristics of a given sport,¹³⁸ the NCAA's policy defies the IOC both in theory and in operation.¹³⁹

133. Lachlan M. Angus, Brendan J. Nolan, Jeffrey D. Zajac & Ada S. Cheung, *A Systemic Review of Antiandrogens and Feminization in Transgender Women*, 94 *CLINICAL ENDOCRINOLOGY* 743, 746 (2021) (review article describing results of one study that showed 12 months of treatment with antiandrogens brought transgender women's testosterone in blood serum to 0.7 ± 1.0 nanomoles or 0.7 ± 0.3 nanomoles depending on the antiandrogen used, another study that showed median testosterone levels of 2.0 and 0.8 nanomoles depending on the treatment, and another that showed median levels after six months at 0.73 and 0.62 nanomoles depending on the treatment).

134. See NAT'L COLLEGIATE ATHLETIC ASS'N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5.

135. See *id.*

136. See Moreton, *supra* note 131.

137. NAT'L COLLEGIATE ATHLETIC ASS'N (BD. OF GOVERNORS), *supra* note 1.

138. See *id.*

139. See *id.*; INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2–3.

When the IOC rescinded its ten-nanomole rule, it replaced it with a framework to guide sport organizations in the creation of their own eligibility requirements.¹⁴⁰ A close examination of the elements in IOC's framework¹⁴¹ raises questions about whether any existing sport organization's rules are consistent with the framework's stated principles. By deferring to sport organizations' standards that do not comply with the IOC's principles,¹⁴² the NCAA's approach defies the IOC's approach rather than aligns with it.

1. *Inclusion*

The first element in IOC's framework is inclusion.¹⁴³ According to IOC, sports should be inclusive, welcoming, and free of harassment for transgender athletes and athletes with sex variants.¹⁴⁴ This element of the framework includes the sentence, “[w]here sports organisations choose to establish eligibility criteria in order to determine the participation conditions . . . in high-level organised sports competitions, these criteria should be established and applied in a manner that respects the principles included in this [f]ramework.”¹⁴⁵ This sentence signals IOC's intention that eligibility criteria is not the norm for sports, it is a narrow exception applied to only “high-level” competitions.¹⁴⁶ Moreover, the IOC signals its expectation, confirmed in more detail in the framework's other elements, that sport organizations should be carefully thinking through whether inclusion and other principles in the framework are receiving due consideration.¹⁴⁷ If the NCAA was genuinely seeking to give effect to the IOC's framework, it would defer only to those sport organizations' policies that can demonstrate an approach that gives meaningful consideration to the goal of inclusion.¹⁴⁸ In the absence of such showing, it would apply a default of inclusion. It would also, at the very least, require NCAA to articulate an argument that its championships, at all three levels and in all sports, are “high-level organised competition” within the meaning of the IOC's language.¹⁴⁹

140. INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, at 1.

141. *See id.* at 2–6.

142. *See, e.g.*, USA GYMNASTICS, *supra* note 116, at Appendix.

143. INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, at 2.

144. *Id.*

145. *Id.* at 3.

146. *Id.* at 1

147. *Id.* at 2.

148. *See id.*

149. INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64.

2. *Prevention of Harm*

The framework's next element is prevention of harm.¹⁵⁰ Here the framework requires that “[t]he physical, psychological and mental well-being of athletes should be prioritised when establishing eligibility criteria.”¹⁵¹ This section expressly calls for the well-being of athletes to be taken into account, not just the perceived safety risk to non-transgender women from competing against transgender women and women with sex variants.¹⁵² If the NCAA was interested in aligning with the IOC's approach, it would be making sure that all sport organization policies that it defers to under its new approach were created with the well-being of transgender athletes in mind.¹⁵³ As described in the last section, policies that apply to Golf and Rifle both require, or appear to require, in Rifle's case, “sexual reassignment surgery”—clearly a more invasive, medically risky requirement unnecessary to effect physical changes beyond the scope of those achieved with hormones.¹⁵⁴ There is no evidence the sport organizations that adopted those policies sought to minimize the harm to transgender athletes, or the resulting policy would not have included unnecessary medical requirements.¹⁵⁵

3. *Non-discrimination*

Non-discrimination is the framework's third element.¹⁵⁶ Here the IOC sets a default in favor of allowing athletes to compete “in the category that best aligns with their self-determined gender identity” so long as they meet eligibility criteria developed to be consistent with the framework.¹⁵⁷ Eligibility criteria should not “systematically exclude athletes from competition based upon their gender identity, physical appearance and/or sex variations.”¹⁵⁸ A faithful application of this element would reject any policies that categorically exclude all transgender women, such as Volleyball's birth certificate policy, the policy recently adopted by swimming's

150. *Id.* at 3.

151. *Id.*

152. *Id.*

153. *See id.*

154. U.S. GOLF ASS'N, *supra* note 105; INT'L SHOOTING SPORT FED'N, *supra* note 110, § 4.1.9.

155. *See* U.S. GOLF ASS'N, *supra* note 105; INT'L SHOOTING SPORT FED'N, *supra* note 110, § 4.1.8–9.

156. INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, at 3.

157. *Id.*

158. *Id.*

international federation, FINA—which would receive deference only under NCAA’s approach if it was adopted by USA Swimming¹⁵⁹—and the policy adopted by World Rugby.¹⁶⁰ Women’s rugby is not an NCAA championship sport, but it is considered an emerging sport that could have an NCAA championship in the future, so there is a potential opportunity for NCAA to defer to World Rugby’s exclusionary rule someday.¹⁶¹

4. *Fairness*

Next, the IOC discusses the principle of fairness.¹⁶² In this section of the framework, IOC offers three valid justifications that eligibility criteria can have: (1) no athletes have an “unfair and disproportionate competitive advantage (namely an advantage gained by altering one’s body or one that disproportionately exceeds other advantages that exist at elite-level competition)”; (2) “preventing a risk to the physical safety of other athletes”; and (3) “preventing athletes from claiming a gender identity” for purposes of sport competition that is different from the identity that is “consistently and persistently used.”¹⁶³

In speaking of a “disproportionate” advantage IOC is calling on sport organizations to examine gender-based advantages in the context of “other advantages” such as those attributed to other physical attributes or conditions, resources, and playing conditions.¹⁶⁴ A sports organization that relies on research purporting to identify competitive advantages due to gender-related attributes but that does not contextualize a broader discussion of a level playing field would not adhere to this element of IOC’s framework. Experts have raised concerns about existing gender eligibility rules’ narrow focus on testosterone as the only source of competitive advantage to be regulated in this way.¹⁶⁵ For example, the United Nations Office of the High

159. As of this draft, USA Swimming has said it will review FINA’s policy to determine whether to adopt it as its own. Matthew Futterman, *FINA Restricts Transgender Women From Competing at Elite Level*, N.Y. TIMES (June 22, 2022), <https://www.nytimes.com/2022/06/19/sports/fina-transgender-women-elite-swimming.html> [https://perma.cc/NP3C-PP68].

160. FÉDÉRATION INTERNATIONALE DE VOLLEYBALL, *supra* note 101, at 11; WORLD RUGBY, TRANSGENDER GUIDELINES, <https://www.world.rugby/the-game/player-welfare/guidelines/transgender#SummaryforTransgenderWomen> [https://perma.cc/TUP2-5UGK].

161. NAT’L COLLEGIATE ATHLETIC ASS’N, *Emerging Sports for Women*, <https://www.ncaa.org/sports/2016/3/2/emerging-sports-for-women.aspx> [https://perma.cc/3JFC-NLZK].

162. INT’L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, at 3.

163. *Id.* at 3–4.

164. *See id.* at 1.

165. *See, e.g.*, Lena Holzer, *What Does It Mean to Be a Woman in Sports? An Analysis*

Commissioner for Human Rights criticized World Athletics' five nanomole rule for taking a narrow approach to competitive advantage that focused singularly on testosterone to the exclusion of other natural sources of competitive advantage.¹⁶⁶ Natural sources of competitive advantage can include genetic variations called performance enhancing polymorphisms, which are DNA sequences that are linked to improved athletic attributes, like greater endurance capacity, muscle structure, and blood flow.¹⁶⁷ PEPs are demonstrated to have a more significant impact on athletic ability than many of the traits like bone or lung size that trans women possess—traits that do not themselves necessarily constitute a net advantage when considered in context of a transitioned trans woman's reduced testosterone.¹⁶⁸ Even the author of a study that is frequently cited in support of restrictive rules because it found that trans women retained a

of the Jurisprudence of the Court of Arbitration for Sport, 20 HUM. RTS. REV. 387, 402 (2020) (Chand and Semenya, in their challenges to World Athletics' various rules restricting women with hyperandrogenism, "argued that even if endogenous testosterone would confer an athletic advantage to women athletes—an argument that still lacks consensus among scientists—there is no reason as to why it should be treated categorically differently from other factors creating a competitive advantage. Other genetic characteristics, such as height, good sight and lung capacity, as well as socio-economic factors, like coming from a wealthier country or family and therefore having access to better nutrition and coaches, can equally create a comparative advantage.").

166. See U.N. HUMAN RTS. OFF. OF THE HIGH COMM'R, *Mandates of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Working Group on the Issue of Discrimination Against Women in Law and in Practice*, OL OTH 62/2018 3 (Sept. 18, 2018), https://www.ohchr.org/sites/default/files/Documents/Issues/Health/Letter_IAAF_Sept2018.pdf [<https://perma.cc/3KJG-6N6P>] ("The regulations also appear to have ignored all other natural physical and biological traits as well as social and economic factors that affect sports performance. The lack of evidence that explicitly compares and addresses the impacts of these different factors leads to the conclusion that this may be a targeted and non-objective approach in contravention of non-discrimination standards. It further appears to be counter to the IAAF's goals to pursue fair and meaningful competition."). Given that World Athletics' policy for hyperandrogenism was replicated in its policy for transgender women and copied by many other sport organizations as well, the Office of the High Commissioner for Human Rights' criticism applies equally to extension of that five nanomole rule to transgender women competing in World Athletics' jurisdiction, and more broadly to all sport organizations who, following WA's lead from one point in time or another, have adopted either a ten or five nanomole testosterone-based rule to determine eligibility in women's sports. *Id.*

167. See Safer Aff. ¶ 58, May 26, 2021.

168. As an expert witness in the litigation challenging Idaho's law banning trans women from women's sports put it, "[h]aving larger bones without corresponding levels of testosterone and muscle mass would mean that a runner has a bigger body to propel with less power to propel it." Safer Aff. ¶ 53. The expert also argued that such advantages need to be contextualized by the fact that larger bones and lungs correlate to a person's size, which varies greatly among non-transgender women as well. See *id.* ¶ 58.

running speed advantage after hormone transition,¹⁶⁹ has cautioned that its findings require context, in that the advantage retained by trans women still puts her within the range of running speed attained by cisgender women.¹⁷⁰ To the extent this particular study is offered as support for restrictive rules, it is against the author's own recommendations taking account the limitations of the study: "[d]evelopment of evidence based guidelines for transgender inclusion in elite athletic competition by governing bodies for athletics, such as the IOC and World Athletics, requires further research to define the timing of changes associated with testosterone or oestrogen."¹⁷¹

Given that the NCAA's new policy defers to testosterone-based rules and even adopts one by default, the Association's failure to assess World Athletics' rule, or any other testosterone-based rules to which it would defer in the context of other competitive advantages, defies the IOC's policy altogether. For the NCAA to also justify its policy change with a goal of harmonizing the NCAA's approach with the IOC's defies logic altogether.¹⁷²

Another interesting aspect of this element of the framework is that IOC refers to eligibility criteria for men's and women's sports—a framing that rejects the assumption that women's sports are the only ones that need eligibility criteria for fairness and seemingly seeking to orient governing bodies towards a more even-handed approach.¹⁷³ No sport organization that NCAA's policy defers to has generated or considered gender-based eligibility criteria for men's sports,¹⁷⁴ which calls all existing policies into question under IOC's framework. If the NCAA was adhering to this aspect of the IOC's framework, it would apply skepticism rather than deference to the eligibility policies that are focused on women's sports and not men's.¹⁷⁵

169. See Timothy A. Roberts, *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organizations and Legislators*, 55 BR. J. SPORTS MED. 577, 577 (2021).

170. See Miriam Valverde, *Kansas Senator Leaves Out Context in Claim About Transgender Athletes*, POLITIFACT (Mar. 9, 2021), <https://www.politifact.com/factchecks/2021/mar/09/roger-marshall/kansas-senator-leaves-out-context-claim-about-trans> [<https://perma.cc/Q7VZ-TWNB>] ("While the average transgender woman is still faster than the average cisgender woman after two years on hormones, she is still slower than the top 9% of cisgender women runners, Roberts said."). Roberts's study was also conducted on Air Force servicemembers who were transitioning during their time in the service, generally at an older age than those who would transition during or before a stint in college sports. *Id.*

171. Roberts, *supra* note 169, at 582.

172. See NAT'L COLLEGIATE ATHLETIC ASS'N (BD. OF GOVERNORS), *supra* note 1.

173. See INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, at 2.

174. See, e.g., USA SWIMMING, *supra* note 95, § 3; USA HOCKEY, *supra* note 119, § 2; USA FENCING, *supra* note 93, § 1.1.

175. See INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, at 1.

5. No Presumption of Advantage and an Evidence-Based Approach

The framework's final two elements—"no presumption of advantage" and "evidence-based approach"—can be discussed together.¹⁷⁶ Here IOC warns that athletes should not be excluded based on the presumption of an "unverified, alleged or perceived unfair competitive advantage" due to their sex variations, physical appearance, or transgender status.¹⁷⁷ Only an evidence-based approach can be used to assess competitive advantage.¹⁷⁸ Such evidence should consist of "robust and peer reviewed research" that "demonstrates a consistent, unfair, disproportionate competitive advantage in" the sport and discipline to which the criteria applies and driven by data that corresponds to the athlete group the criteria seeks to regulate.¹⁷⁹ These elements push back on sport organizations that categorically exclude trans women, as well as sport organizations whose policies were copied from that of another sport organization. This guideline would call into question those policies like World Rugby's and FINA's, as well as the long list of sport organizations that adopted a ten- or five-nanomole threshold based on World Athletics' policies without considering data relevant to the sports they oversee.¹⁸⁰ This guideline also calls into question the extension of either threshold adopted for elite international sports and applied to other contexts like education-based sports.¹⁸¹ We do not know the degree to which sport organizations have considered data that corresponds to the athlete group they seek to regulate.¹⁸² Even if so, for such policies to be relevant to NCAA sports, they would have to have been made in consideration of data on college or college-age athletes, rather than elite athletes, or adults who transition at a later age than the typical college athlete.¹⁸³

One final note about the NCAA's "IOC alignment" rationale: even if the NCAA's policy did create alignment with the IOC, there is also a question of whether such alignment is necessary or desirable. The NCAA's President Emmert defended the alignment rationale by pointing out that "[a]pproximately 80% of U.S. Olympians are either current or former college athletes."¹⁸⁴ However, the reverse is

176. *Id.* §§ 5–6.

177. *Id.* § 5.1.

178. *Id.* § 6.1(a).

179. *Id.* § 6.1.

180. *See, e.g.,* WORLD RUGBY, *supra* note 160; Futterman, *supra* note 159; WORLD ATHLETICS, *supra* note 62, § 3.2.2–3.

181. *See* U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, *supra* note 166, at 1, 5.

182. *See* INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, § 6.1.

183. *See* Valverde, *supra* note 170.

184. NAT'L COLLEGIATE ATHLETIC ASS'N (BD. OF GOVERNORS), *supra* note 1.

not true. The percentage of NCAA athletes who compete in the Olympics is minuscule, a fraction of a percent,¹⁸⁵ which means that the IOC's eligibility rules in general are irrelevant to the vast majority of NCAA athletes (and to an even smaller percentage of those athletes who are transgender).¹⁸⁶ Certainly outside the context of gender, the NCAA and the IOC impose different eligibility criteria without problems. For example, the NCAA, but not the IOC, requires that its athletes are students of a member institution and academically eligible to compete; while the IOC, but not the NCAA, requires that athletes be nationals of the country they are representing.¹⁸⁷ Moreover, with respect to the gender eligibility rules at hand, NCAA athletes were not harmed in their bid to become Olympians by the fact that the NCAA's former one-year-of-treatment rule conflicted with the IOC's former ten-nanomole rule, since an athlete that complied with the NCAA's rule would necessarily be eligible under the IOC's. Even in a world where the IOC defers to the standards set by sports' governing bodies, there is no such IF or NGB rule that a NCAA athlete could not comply with in addition to satisfying the requirements of the NCAA's former rule.¹⁸⁸ This final point is offered not to suggest that the IOC's Framework isn't worthy of consideration, but to point out that the NCAA's explanation for its policy change is riddled with inconsistencies that undermine the credibility of the policy as a whole.

D. NCAA's Policy Puts Member Institutions at Risk of Litigation and Liability

By requiring member institutions who may be state actors to adhere to eligibility criteria that is irrational and more exclusive than necessary, the NCAA is making them targets for Equal Protection

185. See NAT'L COLLEGIATE ATHLETIC ASS'N, *NCAA Student-Athletes at the 2020 Summer Olympics* (July 22, 2021), <https://www.ncaa.com/news/ncaa/article/2021-07-21/ncaa-student-athletes-2020-summer-olympics> [https://perma.cc/57CE-3K2B] (reporting that "[m]ore than 1,000" NCAA athletes competed at the 2020 Olympics in Tokyo); see also NAT'L COLLEGIATE ATHLETIC ASS'N, *Estimated probability of competing in college athletics* (Mar. 2, 2015), <https://www.ncaa.org/sports/2015/3/2/estimated-probability-of-competing-in-college-athletics.aspx> [https://perma.cc/B882-B8WE] (reporting that "[m]ore than 480,000" students are NCAA athletes: 1200/480,000 amount to 0.25 percent).

186. See Chris Mosier, *As elite sports think again about trans participation, our only demand is for fairness*, THE GUARDIAN (June 29, 2022, 8:10 PM), <https://www.theguardian.com/commentisfree/2022/jun/29/sports-trans-participation-transgender-women-swimming> [https://perma.cc/C5GX-FDL3].

187. INT'L OLYMPIC COMM., OLYMPIC CHARTER R. 41 (Aug. 8, 2021).

188. For example, if the NCAA retained its one-year-of-treatment rule, and USA Swimming required testosterone levels below five nanomoles for thirty-six months, a NCAA swimmer who wanted to qualify for the Olympics and who qualifies under USA Swimming's rule to bid for the Olympics would necessarily also comply with the NCAA's former rule requiring one year of treatment. See USASWIMMING, *supra* note 95, § 6(c)(ii).

claims.¹⁸⁹ Additionally, member institutions who accept federal funding could be at risk of liability under Title IX depending on how the OCR decides to apply its general interpretation of Title IX as protective of the rights of transgender students.¹⁹⁰

1. *Equal Protection*

The Equal Protection Clause requires courts to apply heightened scrutiny to the decisions of states and state actors to categorize citizens on the basis of sex or transgender status.¹⁹¹ As a preliminary matter, it is necessary to note that the NCAA is not a state actor;¹⁹² however, many of its member institutions are state actors by virtue of being state universities.¹⁹³ Therefore, any policy of the NCAA that contravenes the Equal Protection Clause creates a Hobson's choice for all public universities: violate students' constitutional rights or forgo membership in the NCAA.¹⁹⁴ The only tenable conclusion, therefore, is for the NCAA to conform its policies to comply with the Constitution.¹⁹⁵ It is also necessary to clarify that the current trend for federal courts is to apply heightened scrutiny to cases involving discrimination against transgender athletes; either as an interpretation of such discrimination as one involving "sex" and/or after concluding that discrimination targeting one's transgender status is worthy of heightened scrutiny in its own right.¹⁹⁶

Thus, the question at hand is whether the NCAA's policy, by incorporating policies of other sport organizations that place unjustified restrictions on participation by transgender athletes, would survive the heightened scrutiny applied to categorizations based on sex and gender. When applied, heightened scrutiny requires an

189. See Erin Buzuvis, Sarah Litwin & Warren K. Zola, *Sport Is for Everyone: A Legal Roadmap for Transgender Participation in Sport*, 31 J. LEGAL ISSUES IN SPORT 212, 220 (2021).

190. See *id.* at 239–40.

191. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020); *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011).

192. See *NCAA v. Tarkanian*, 488 U.S. 179, 196 (1988).

193. See Josephine R. Potuto, *NCAA As State Actor: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 35 (2012).

194. See *id.* at 23.

195. See *id.* at 8 (“A private actor NCAA cannot act in ways that pose credible litigation risk to its state actor member institutions simply because it is immunized from liability. State actor status is irrelevant in this calculus. Once an NCAA bylaw or policy is identified as constitutionally suspect if enforced by a state university member, even a private actor NCAA necessarily will conform.”).

196. See, e.g., *Grimm*, 972 F.3d at 607; *Karnoski*, 926 F.3d at 1200; *Whitaker*, 858 F.3d at 1051; *Glenn*, 663 F.3d at 1316–17.

“exceedingly persuasive” justification for singling out transgender people for different treatment.¹⁹⁷ The law must promote “important governmental objectives” rather than address a hypothetical problem.¹⁹⁸ Moreover, the discriminatory means employed must be “substantially related” to the objectives, not one that relies on “overbroad generalizations” and the different talents, capacities, or preferences of different gender categories.¹⁹⁹

Courts applying the Equal Protection doctrine are interested in the rationale between the objective of the policy and the means employed.²⁰⁰ In other Equal Protection cases about women’s sports outside the context of transgender rights, courts have accepted two justifications as sufficiently important to justify segregation: preserving athletic opportunities for girls and women, and safety.²⁰¹ However, courts have also rejected that sex-separation in sports serves those interests, where safety concerns were based only on “generalized assumptions about the differences between males and females regarding physical strength,”²⁰² where they were not consistently applied to athletes of all genders, and where a safety risk was not proven to exist beyond the risk that is inherent in the sport itself (and which is tolerated for members of the opposite sex).²⁰³ In terms of preserved opportunities, one recent court accepted in theory that girls’ sports could be justified by a need to “remedy past discrimination” against the group being protected, but rejected that boys could be excluded where there was no evidence that girls’ opportunities were being displaced.²⁰⁴

Two lower courts have recently had the opportunity to apply Equal Protection doctrine in litigation challenging state bans on transgender girls’ and women’s participation in girls and women’s sports.²⁰⁵ In *Hecox v. Little*, the U.S. District Court for the District

197. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

198. *Id.*

199. *Id.*

200. *See id.*

201. *See Erin E. Buzuvis, Attorney General v. MIAA at Forty Years: A Critical Examination of Gender Segregation in High School Athletics in Massachusetts*, 25 *TEX. J. C.L. & C.R.* 1, 5 (2019).

202. *See, e.g., Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996); *Force ex rel. Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1030 (W.D. Mo. 1983).

203. *See, e.g., Adams*, 919 F. Supp. at 1504.

204. *D.M. v. Minn. State High Sch. League*, 917 F.3d 994, 1002 (8th Cir. 2019). *See also Buzuvis, supra* note 201, at 5 (explaining that *Att’y Gen. v. Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d 284, 296 (Mass. 1979) held that prohibiting boys from playing on girls’ teams was more exclusionary than necessary to protect girls’ and women’s athletic opportunities, though the Massachusetts constitution requires stricter scrutiny of sex-based classification than the U.S. Constitution’s Equal Protection Clause).

205. *See Hecox v. Little*, 479 F. Supp. 3d 930, 944 (D. Idaho 2020); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 353 (S.D.W.Va. 2021).

of Idaho granted a preliminary injunction to enjoin Idaho's law banning trans girls and women from women's sports in the inter-scholastic and collegiate context.²⁰⁶ The court examined the rationale provided by the state legislature in its application of heightened scrutiny.²⁰⁷ The legislature purported to enact the ban in order to promote sex equality by protecting athletic opportunities for female athletes to compete and vie for college scholarships.²⁰⁸ The state's argument was that transgender women displaced cisgender women from these opportunities.²⁰⁹ The court found this rationale unpersuasive, citing a lack of evidence to support this displacement theory.²¹⁰ Even as the state pointed to examples of transgender women who were successful in their sports, the court distinguished between opportunity to win and opportunity to compete.²¹¹ At one point in particular, it rejected the state's claim that a trans athlete's victory over cisgender women evidenced displacement (“[a]nd, losing to Eastwood at one race did not deprive the [i]ntervenors from the opportunity to compete in Division I sports, as both continue to compete on the women's cross-country and track teams with ISU.”)²¹² Here, and elsewhere in the analysis, the court found the state's “displacement” rationale undermined by the fact that the examples offered by the state involved transgender athletes who did well but did not perform outside the range of performance in which cisgender women perform.²¹³ It also rejected the legislature's claim that “transgender women and girls have an ‘absolute advantage’ over non-transgender girls” in part because the legislature relied on a study that was later altered during peer review to remove the findings that the legislature had relied upon.²¹⁴

206. *Hecox*, 479 F. Supp. 3d at 988.

207. *Id.* at 974–75.

208. *Id.* at 978.

209. *Id.* at 976.

210. *Id.* at 977.

211. *Id.* at 979.

212. *Hecox*, 479 F. Supp. 3d at 979.

213. *Id.* (“Specifically, during the entire legislative debate over the Act, the only transgender women athletes referenced were two high school runners who compete in Connecticut, and who were, notably, also defeated by cisgender girls in recent races.”).

214. *Id.* at 981. The study, published in the *Journal of Clinical Endocrinology and Metabolism*, also contained a caveat that it “is important to recognize that we only assessed proxies for athletic performance . . . it is still uncertain how the findings would translate to transgender athletes.” See Anna Wiik, Tommy R. Lundberg, Eric Rullman, Daniel P. Andersson, Mats Holmberg, Mirko Mandić, Torkel B. Brismar, Olof Dahlquist Leinhard, Setareh Chanpen, John N. Flanagan, Stefan Arver & Thomas Gustafsson, *Muscle Strength, Size, and Composition Following 12 Months of Gender-Affirming Treatment in Transgender Individuals*, 105 J. CLINICAL ENDOCRINOLOGY & METABOLISM 247 (Mar. 1, 2020).

In distinguishing Idaho's law banning trans women and girls from women's sports from policies restricting boys from playing girls' sports (which have been upheld against Equal Protection challenges), the court pointed out several distinguishing factors: (1) that, unlike boys, girls and women who are transgender have, like women generally, historically been discriminated against in general and in sports;²¹⁵ (2) that boys excluded from girls' sports have other athletic opportunities to pursue, while transgender girls do not have meaningful opportunities;²¹⁶ (3) that due to the vastly different population sizes, the risk of boys displacing girls' opportunities in sports was much higher than the risk of trans girls displacing cisgender girls' opportunities;²¹⁷ and (4) that trans women and girls who suppress testosterone are differently situated physiologically than cisgender boys and thus pose less of a concern for competitive imbalance.²¹⁸ In fact, to this last point, the court credited expert testimony to the effect that "physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression."²¹⁹

In the second case, the federal district court in West Virginia preliminarily enjoined a law that, like Idaho's, banned trans girls and women from competing according to their gender as applied to the plaintiff, an eleven-year-old trans girl.²²⁰ However, because this case only challenged the law's application to the eleven-year-old plaintiff in this case, the court's Equal Protection analysis was not as robust as in *Hecox*.²²¹ As the state argued that a total ban on transgender girls was necessary due to the physiological effects of testosterone (which does not differ for boys and girls until puberty), such arguments could not justify the application of the law to this plaintiff who had not and would not experience the masculinizing effects of puberty.²²²

Though no court has considered the NCAA's present policy, the courts' approach to gender and sports cases generally, give some basis to predict the grounds on which Equal Protection challenges are more likely to be successful. First of all, the NCAA's purported rationale would have to be squared away with the recognized "important" state interests of preserving opportunities and safety.²²³ In its

215. *Hecox*, 479 F. Supp. 3d at 977.

216. *Id.*

217. *Id.* at 977–78.

218. *Id.* at 978.

219. *Id.* at 979.

220. *B.P.J.*, 550 F. Supp. 3d at 358.

221. *Id.* at 353–56.

222. *Id.* at 355.

223. Buzuvis, *supra* note 201, at 5.

published justification, the NCAA's policy purports to "preserve[] opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete" and "align[] transgender student-athlete participation for college sports with [the Olympic Movement]." ²²⁴ Some of this explanation—the safety and fairness part—overlaps with the important state interests for which there is precedent. ²²⁵ Notably, however, the NCAA also purports to include transgender women among those for whom it wishes to seek to preserve opportunities. ²²⁶ As the court did in *Hecox*, the NCAA itself appears to recognize that transgender women's athletic opportunities should be protected just as any other woman's.

Next, the NCAA will have to demonstrate that its policy, where it operates to exclude trans women, is doing so to serve those purposes and with no more exclusion than necessary. As the *Hecox* court noted, there is little evidence that the inclusion of trans women displaces other women from competing. ²²⁷ According to *Hecox*, the fact that a trans woman might be good and beat cisgender women is not tantamount to evidence of displacement. ²²⁸ Even if other courts attempted to distinguish the *Hecox* court's observations that trans women athletes have not exceeded the performance range of cisgender women, they would have no such basis to do so at this time. ²²⁹ Even Lia Thomas, despite the concerns about her, did not dominate women's swimming in a groundbreaking way. ²³⁰ The NCAA's policy is even less likely to promote a safety rationale, since this would not at all be relevant in any of the non-contact sports, and since there is no such evidence of a genuine safety risk within the contact sports that is particularly attributable to trans women. ²³¹ Given that courts look for the safety rationale to be consistently applied, ²³² the NCAA would need to persuasively argue that trans women pose a higher risk of safety than other women of similar size and strength who are allowed to play.

224. NAT'L COLLEGIATE ATHLETIC ASS'N (BD. OF GOVERNORS), *supra* note 1.

225. See INT'L OLYMPIC COMM. (FRAMEWORK), *supra* note 64; Shayna Medley, *(Mis)interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports*, 45 N.Y.U. REV. L. & SOC. CHANGE 673, 719 (2022).

226. NAT'L COLLEGIATE ATHLETIC ASS'N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5 ("The resulting sport-by-sport approach preserves opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete.").

227. *Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020).

228. *Id.*

229. *Id.* at 980.

230. Carpenter, *supra* note 87.

231. See NAT'L COLLEGIATE ATHLETIC ASS'N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5.

232. *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 350, 356 (S.D. W. Va. 2021).

The NCAA's policy is most similar to the Idaho law enjoined in *Hecox* where the NCAA incorporates a categorical ban on transgender women's participation. At present, none of the sports organizations that defer to the NCAA ban trans women outright, though this would change if USA Swimming adopts FINA's approach or if rugby becomes a championship sport.²³³ Yet, even as the NCAA policy stands now, the application of Rifle, Golf, or USA Swimming's policies as a state actor to exclude a transgender student, would raise Equal Protection concerns.²³⁴ USA Swimming would have to overcome the inferences likely drawn by the timing of its policy in the midst of a public controversy around a swimmer, Lia Thomas, who could not have been excluded by a shorter transition period than three years.²³⁵ Volleyball's birth certificate policy, even as applied to amended birth certificates, likely excludes more transgender athletes than can be justified by legitimate concerns about fairness and safety, since the requirements to change one's birth certificate differ by state and many states impose criteria, like surgery, that mimics the effects of other, less-invasive hormone treatments, because it seemingly fails to make exceptions for trans women who transitioned before puberty, which was unconstitutional in the West Virginia case.²³⁶ Golf's policy, which expressly requires surgery, and Rifle's policy, which appears to require surgery as well, are vulnerable for excluding on wider grounds than can be justified by the stated rationale.²³⁷

In *Hecox*, the court distinguished Idaho's ban from the state's former rule that required testosterone suppression for one year, and from the NCAA's similar former rule.²³⁸ This suggests that courts would consider more favorable policies that impose (reasonable and justifiable) length-of-treatment requirements that do not operate to exclude athletes from participation. The NCAA had such a policy in place, and to some extent, it still does, by virtue of the fact that any sports organization with a testosterone cut off of ten or five nanomoles that must be maintained for one year prior to competition, operate to a similar effect, since one year of hormone treatment generally reduces one's testosterone levels to below five nanomoles.²³⁹ In the end, what makes the NCAA's policy constitutionally vulnerable

233. WORLD RUGBY, *supra* note 160.

234. *See supra* discussion on Rifle, Golf, and USA Swimming's policies.

235. Sutherland, *supra* note 84.

236. *Supra* Section III.A (discussing volleyball's birth certificate policy).

237. *Id.* (discussing the U.S. Golf Association and USA Rifle surgery policies).

238. *Hecox v. Little*, 479 F. Supp. 3d 930, 947 (D. Idaho 2020).

239. *Supra* Part II (discussing the NCAA's former rule requiring one year of hormone treatment).

is its purported and anticipated deference to sports organizations that exclude athletes beyond constitutional limits for reasons that are not supported by any important state interest.

2. Title IX

Title IX does not apply to the NCAA directly,²⁴⁰ but like the Equal Protection Clause, it does apply to NCAA member institutions (by virtue of their status as federal-funding recipients) in ways that effectively constrain the NCAA.²⁴¹ And though the details of its application to athletic participation policies are not yet clear, it is clear Title IX is an emerging source of transgender rights.²⁴²

After *Bostock v. Clayton County*, civil rights law with provisions banning sex discrimination necessarily ban discrimination targeting an individual's transgender status, which is now conclusively understood as a subset of sex discrimination.²⁴³ To be sure, the Court's opinion in *Bostock* expressly avoided any application to athletics and the case's employment context is not directly applicable to situations where individuals are segregated by sex.²⁴⁴ Still, there is appellate and district court precedent for Title IX's application to transgender students in sex-segregated contexts.²⁴⁵ For example, Title IX has been used in several cases to protect the rights of transgender students to use bathroom and locker room facilities that correspond to their

240. *NCAA v. Smith*, 525 U.S. 459, 459 (1999).

241. For example, after examples of gender inequality were reported at the 2021 NCAA basketball championships, inequalities that would clearly violate Title IX if applied, the NCAA engaged in efforts to remedy those inequalities, rather than invoke the exemption in *NCAA v. Smith*. See Maggie Mertens, *The Title IX Loophole That Hurts NCAA Women's Teams*, THE ATLANTIC (Apr. 1, 2021), <https://www.theatlantic.com/culture/archive/2021/04/march-madness-could-spark-title-ix-reckoning/618483> [https://perma.cc/RY37-28PC]. The NCAA received pressure from Congress to honor the "spirit" of Title IX (regardless of whether the law applied as a technical matter). The fact that the NCAA's practices also put member institutions at risk of Title IX violations also likely played a role. *Id.*

242. *Id.*

243. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1755 (2020).

244. *Id.* at 1753 ("The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind."). Indeed, there is a difference, as the employer in *Bostock* excluded a transgender employee from employment altogether. Justice Gorsuch appears to argue, or least suggest the possibility, that excluding a transgender person from access to facilities or programs that are restricted by sex is discrimination (or at least, not the same kind of discrimination that was settled in *Bostock*). See *id.*

245. See Medley, *supra* note 225, at 716.

gender identity rather than their birth-assigned sex.²⁴⁶ These cases are indirectly relevant to athletics because sex-segregated facilities involve the same legal posture as sex-segregated athletics.²⁴⁷ In the context of sex-segregated facilities, it is possible for a defendant to argue that the transgender person is not being excluded because of their gender identity, but because of their birth-assigned sex, which is otherwise legally excluded.²⁴⁸ But the bathroom cases clarify that this different posture is not an obstacle to transgender rights under Title IX. When properly framed, the exclusion of a trans boy from the boys' locker room (for example) is sex discrimination not because the trans boy's female-sex-assigned-at-birth, but because that exclusion is part of wider exclusion of transgender students from the ability to use facilities that are consistent with their gender identities—a right that cisgender students enjoy, and that transgender students are denied.²⁴⁹

So far, one case has applied Title IX to transgender students' rights in the athletic context, *B.P.J. v. West Virginia State Board of Education*, discussed above for its Equal Protection analysis.²⁵⁰ Citing both *Bostock* and the Fourth Circuit precedent, *Grimm v. Gloucester School District*, which held that Title IX protected a transgender student's right to use the bathroom that corresponded to his gender identity, the court in *B.P.J.* confirmed that the plaintiff's exclusion from girls' athletics would violate Title IX.²⁵¹ Noting that cisgender students and transgender boys are permitted to participate in athletics that best fit their gender identity, but the plaintiff and all transgender girls are not, the court concluded that this amounts to differential treatment that targets a class of people, transgender girls, so defined by characteristics involving their gender and sex.²⁵² The court then confirmed that "discrimination" had occurred, which the court defined as differential treatment that operated on the

246. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–50 (7th Cir. 2017); *Adams v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1320–25 (M.D. Fla. 2018) (appeal still pending in Eleventh Circuit due to reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021)); *Evancho v. Pine-Ridgeland Sch. Dist.*, 237 F. Supp. 2d, 273–74 (W.D. Pa. 2017); *Highland Local Sch. Dist. v. Dep't of Educ.*, 208 F. Supp. 3d 850, 865–71 (S.D. Ohio 2016).

247. *Medley*, *supra* note 225, at 716 ("Just as banning transgender students from school facilities amounts to unlawful sex discrimination, so too does banning trans students from school sports.").

248. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), Appellant's Br., pp. 36–37.

249. *Id.*

250. *B.P.J.*, 550 F. Supp. 3d 347, 356–57.

251. *Id.* at 356 (stating that the law could not exclude B.P.J. from a girls' athletics team without referencing her "biological sex" as defined in the statute; "[h]er sex remains a but-for cause' of her exclusion under the law.").

252. *Id.* at 356–57.

plaintiff in a harmful manner.²⁵³ Discrimination occurred because the school district's policy resulted in the plaintiff's exclusion from the girls' team.²⁵⁴

Under the *B.P.J.* court's approach, a policy that singles out transgender athletes for differential treatment that harms them would violate Title IX. The NCAA's former policy required trans women to transition for a year with hormones.²⁵⁵ While this did single out transgender athletes for a requirement that cisgender athletes did not have to meet, the NCAA could have plausibly argued this is not discrimination, or at least that it is distinguishable from the discrimination that operates to exclude athletes altogether, as did the West Virginia law challenged in *B.P.J.*²⁵⁶ To be sure, trans women are diverse and not everyone desires a hormone transition.²⁵⁷ And it must be acknowledged that state legislatures and governors are erecting legal obstacles that will make it harder to access necessary medical care, especially for trans youth.²⁵⁸ Those who do not or cannot transition with hormones would be excluded by even the NCAA's former rule.²⁵⁹ Still, it is increasingly common for trans women to seek hormone therapy at increasingly younger ages.²⁶⁰ Compared to policies that outright exclude trans women from participation, policies that require a year of treatment, which can be completed without impinging on one's eligibility period, are relatively less discriminatory.²⁶¹ These policies

253. *Id.*

254. *Id.* at 357 (citation omitted) (quoting *Grimm*, 972 F.3d at 618) (“The final question is whether the law unlawfully discriminates against B.P.J. In the Title IX context, discrimination ‘mean[s] treating that individual worse than others who are similarly situated.’ . . . Here, as I have stated above, B.P.J. will be treated worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity.”).

255. *See infra* Part I (discussing NCAA policy history).

256. *See infra* Section I.B.

257. *Id.*

258. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2175 (Apr. 12, 2021), <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors> [<https://perma.cc/77RB-7ZJ3>]; Jo Yurcaba, *Texas governor calls on citizens to report parents of transgender kids for abuse*, NBC NEWS (Feb. 23, 2022, 4:52 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/exas-governor-calls-citizens-report-parents-transgender-kids-abuse-rcna17455> [<https://perma.cc/E6J7-FD75>].

259. *See infra* Section I.B.

260. Matthew C. Leinung & Jalaja Joseph, *Changing Demographics in Transgender Individuals Seeking Hormonal Therapy: Are Trans Women More Common Than Trans Men?*, 5 TRANSGENDER HEALTH 241, 242–43 (2020) (increasing rates of hormone treatment); Puckett et al., *supra* note 108, at 51, 55–56 (stating that eighty percent of trans women in the study had pursued hormone treatment).

261. All three NCAA divisions allow medical exceptions to the otherwise applicable ten semesters of eligibility and can apply it to allow a transgender athlete to transition

are less likely to result in exclusion, and more likely to be consistent with the choice that the athlete would have made by the time they are college-age, for reasons other than sports.²⁶² The NCAA could have therefore plausibly defended its former policy as not overly burdensome so as to amount to discrimination.

The NCAA's current policy defers to many hormone level policies, whether ten or five nanomoles, that must be maintained for only one year prior to competition.²⁶³ These are in a similar category as the NCAA's former policy in terms of the risk of harm and exclusion because as noted above, one year of hormone treatment generally results in testosterone levels within the typical range for a cisgender women, below three nanomoles.²⁶⁴ So, with the exception of the frequency of testing and documentation, an athlete is similarly situated under these policies as under the NCAA's former policy.²⁶⁵ However, the NCAA's policy allows for the possibility that in some sports, a transition period longer than one year might be required, as USA Swimming has already adopted a three-year period.²⁶⁶ On a spectrum of inclusive to exclusive, a policy with a three-year transition requirement in the context of a college education that typically lasts four years, requiring three years of transition instead of one is far more likely to exclude trans women, as opposed to include them subject to conditions.²⁶⁷ And other sports, as discussed above, have even more problematic and exclusionary policies.²⁶⁸ Deference

for one year without losing eligibility. See NAT'L COLLEGIATE ATHLETIC ASS'N, SEASONS OF COMPETITION: 10-SEMESTER/15-QUARTER RULE 14.2 (2017), <https://web3.ncaa.org/lstdbi/search/bylawView?id=21670> [<https://perma.cc/76GH-3GMR>]. All three NCAA divisions allow medical exceptions to the otherwise applicable 10 semesters of eligibility and can apply it to allow a transgender athlete to transition for one year without losing eligibility. Division II expressly confirms that medical redshirt policy applies to transitioning trans women. See DIVISION II BYLAWS ("14.2.2.3 Transgender Female Exception. A member institution may approve a two-semester or three-quarter extension of the 10-semester/15-quarter period of eligibility for a transgender female (male to female) student-athlete who uses two semesters or three quarters while completing one calendar year of testosterone suppression treatment or surgical intervention.").

262. Jae A. Puckett et al., *Gender Variations, Generational Effects, and Mental Health of Transgender People in Relation to Timing and Status of Gender Identity Milestones*, 9 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY, no. 2, 165, 166 (2022); Jae A. Puckett, *Trans Youth Are Coming Out and Living in Their Gender Much Earlier Than Older Generations*, THE CONVERSATION (Apr. 26, 2021), <https://theconversation.com/trans-youth-are-coming-out-and-living-in-their-gender-much-earlier-than-older-generations-156829> (stating that the median age for one's first gender affirming care for Gen Z is seventeen, suggesting that a minimal medical transition requirement applicable to college-age athletes is not as likely to operate as an outright exclusion as it would have for earlier generations).

263. See *supra* Part II (discussing the NCAA's 2022 policy).

264. See *supra* Section III.B.

265. *Id.*

266. See *supra* Section III.A (discussing USA Swimming's policy).

267. See *supra* Section III.A.

268. *Id.*

to these policies is likely to run afoul of Title IX, in the analysis of the *B.P.J.* decision.²⁶⁹

CONCLUSION

“Women’s sports” is a complicated idea. There are generalized physical differences between those assigned male at birth and those assigned female, owing to which, athletes assigned female may often find athletic participation to be more meaningful, engaging, and fun when they do not have to compete with or against men.²⁷⁰ But let’s not oversimplify. Women’s “inferior” athleticism is also socially constructed, by women’s historic exclusion from dominant sporting practices, the fact that these assumptions became dominant in an effort to define and delineate masculinity, and by the enduring double standard that places men’s sports at the center of the universe.²⁷¹ Now layer onto this complexity the complexity of sex and gender: there is no gender binary, for starters, and even among the categories of male and female we now understand that the labels we initially proposed for individuals based on visual inspection must give rise to more meaningful criteria that emerge as we look beyond the surface and give priority to individual autonomy and identity.²⁷² And then layer onto *that* the diversity of *sports*, and *sport*. Sports are different from each other, with different objectives and rules of play that make some sports better suited and attractive to some individuals than others. And sport: the existential questions for sport are different in different contexts: scholastic sport has distinct aims and purposes; as does professional, Olympic, and of course, collegiate sport.²⁷³

Given all this complexity, it is no wonder that sports organizations, including the NCAA, are struggling to define women’s sports. But given all this complexity, it should also be clear that this exercise involves more than just a simple line drawing.²⁷⁴ It makes little sense for the NCAA, with its unique values and purposes, to defer to lines drawn by others. The NCAA, which operates in the educational context, should be more inclusive than elite and Olympic sports, which do not exist to impart life lessons or build character or develop emerging adults, or support students’ academic pursuits.²⁷⁵ At the same time, they might be more restrictive than elementary and secondary schools. For better or worse, college sports are a hybrid

269. *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 356–57 (S.D.W. Va. 2021).

270. *See Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996).

271. INT’L OLYMPIC COMM. (FRAMEWORK), *supra* note 64, at 4.

272. *Id.* at 2–3.

273. Lawrence, *supra* note 6.

274. *See supra* Introduction.

275. *See id.*

of an educational model and a commercial one, which elevates the stakes of winning to a higher degree than what is and ought to be the case in K–12.²⁷⁶

How can NCAA engage with all this complexity in a way that is true to its own values? As a starting point, it could restore its “one year of testosterone suppression treatment” standard as the default rule for all sports. A testosterone-based default, whatever the limit, not only pretends that that inclusion is a question that science can solve, but also assumes it is one that has been solved already.²⁷⁷ In contrast, a one year of treatment rule aligns with common transition goals among trans women and operates to postpone, but not exclude, trans athletes from competing.²⁷⁸

If the NCAA wants to consider sport-specific criteria, it should invite governing bodies to propose new criteria for the NCAA to consider substituting for the default rule. It can then consider those proposals using criteria that are consistent with its mission and purpose. Given that the NCAA purports to believe much of what the IOC affirms in its framework, it would not be unreasonable for the NCAA to borrow criteria from the framework, and consider any proposed criteria on the basis of whether it is based on sound evidence specific to the sport in question and a population similar in age and ability to college athletes, consider the question of athletic advantage in context, and scrutinize fairness questions in both men’s and women’s sports. Such an approach would mitigate the risk of legal liability as well, since it provides a roadmap to narrow tailoring that the Equal Protection Clause requires and minimizes the degree to which such policies materially disadvantage transgender athletes.²⁷⁹ Such an approach would demonstrate value-driven leadership that helps both athletes and society accept and appreciate the diversity and complexity of both sports and gender.

276. Lawrence, *supra* note 6.

277. NAT’L COLLEGIATE ATHLETIC ASS’N (TRANSGENDER STUDENT-ATHLETE), *supra* note 5.

278. *Id.*

279. Grimm v. Gloucester Sch. Bd., 279 F. Supp. 3d 586, 593 (4th Cir. 2020).

APPENDIX

SUMMARY OF NGB/IF POLICIES ON TRANSGENDER
ATHLETES' ELIGIBILITY

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|------------------|--|--|--|
| Basketball | USA Basketball, no policy | Fédération Internationale de Basketball, no policy | IOC 2015 Policy (ten nanomoles/twelve months) ²⁸⁰ |
| Beach Volleyball | USA Volleyball, no policy | Fédération Internationale de Volleyball, Event Regulations 6.1.2 ²⁸¹ | FIVB Event Regulation 6.1.2, "birth certificate of the player" ²⁸² |
| Bowling | USA Bowling Congress, no policy | International Bowling Federation, no policy | IOC 2015 Policy (ten nanomoles/twelve months) ²⁸³ |
| Cross Country | USA Track & Field, expressly adopted IOC's 2015 policy ²⁸⁴ | World Athletics policy, five nanomoles/twelve months ²⁸⁵ | USATF's policy expressly incorporates the IOC policy of ten nanomoles/twelve months ²⁸⁶ |

280. INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2.

281. FÉDÉRATION INTERNATIONALE DE VOLLEYBALL, *supra* note 101, at 11 ("Gender must be attested by the national federations through the birth certificate of the player. Players may be required to present a valid Gender Verification Certificate and/or submit themselves to a medical examination in case of doubt based on medical evidence.").

282. *Id.*

283. INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2.

284. USA TRACK & FIELD, *USATF Statement Regarding Transgender/Transsexual Policy* (Feb. 5, 2019, 9:16 PM), <https://www.worldathletics.org/download/download?filename=ace036ec-a21f-4a4a-9646-fb3c40fe80be.pdf&urlslug=C3.5%20-%20Eligibility%20Regulations%20Transgender%20Athletes> [http://perma.cc/QW6D-V5X2].

285. WORLD ATHLETICS, *supra* note 130, at 7–8.

286. USA TRACK & FIELD, *supra* note 284; *see also* INT'L OLYMPIC COMM. (CONSENSUS

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|--------------|--|--|--|
| Fencing | USA Fencing, has incorporated all provisions of IOC's 2015 policy ²⁸⁷ | Fédération Internationale d'Esgrime | USA Fencing (ten nanomoles/twelve months) ²⁸⁸ |
| Field Hockey | USA Field Hockey, no policy | Fédération Internationale de Hockey, no policy | IOC 2015 Policy (ten nanomoles/twelve months) ²⁸⁹ |
| Golf | US Golf Association, has Gender Policy for USGA Championships ²⁹⁰ | | USA Golf policy requires "gender reassignment surgery" and hormone treatment to achieve "appropriate levels" and "for a sufficient length of time to minimize gender-related advantages." ²⁹¹ |

MEETING), *supra* note 58, at 2.

287. USA FENCING, *supra* note 93, at 89–90.

288. *Id.* at 90.

289. INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2.

290. U.S. GOLF ASS'N, *supra* note 105.

291. *Id.*

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|------------|--|--|---|
| Gymnastics | USA Gymnastics, Policy for Transgender and Nonbinary Athletes ²⁹² | Fédération Internationale de Gymnastique, no policy | Unclear. USA Gymnastics policy defers to IOC and FIG policy for purposes of elite competition. However, it does not expressly incorporate IOC's policy ²⁹³ and FIG has no policy. Is USAG's policy a policy of no restriction, requiring NCAA to defer to an inclusive rule, or is it considered the absence of a policy, to which NCAA substitutes the 2015 IOC policy? |

292. USA GYMNASTICS, POLICY FOR TRANSGENDER & NON-BINARY ATHLETE INCLUSION 3 (Apr. 2022), https://usagym.org/PDFs/About%20USA%20Gymnastics/transgender_policy.pdf [<https://perma.cc/QXU8-JDH4>] ("Eligibility for transgender and non-binary athlete participation at USA Gymnastics' Elite level will be governed by all applicable policies and criteria required by its governing bodies: The International Olympic Committee (IOC), International Gymnastics Federation (FIG), and U.S. Olympic and Paralympic Committee (USOPC).").

293. *See id.*

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|------------|--|--|--|
| Ice Hockey | USA Hockey Transgender Athlete Eligibility Policy ²⁹⁴ | International Ice Hockey Federation Eligibility Conditions for Transgender Athletes ²⁹⁵ | Unclear, as USA Hockey's policy specifically defers to the NCAA and IOC policies where applicable, and does not appear to contemplate the reverse deference. For its own competitive programs, which are defined and do not include NCAA, USA Hockey requires only one year of testosterone suppression therapy ²⁹⁶ |
| Lacrosse | USA Lacrosse, no policy | World Lacrosse, no policy | IOC 2015 Policy (ten nanomoles/twelve months) ²⁹⁷ |

294. See USA HOCKEY, *supra* note 119, at 1.

295. INT'L ICE HOCKEY FED'N, *supra* note 121, at 6–7.

296. USA HOCKEY, *supra* note 119, at 1–2.

297. INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2.

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|-------|--|--|---|
| Rifle | USA Shooting, no policy | International Shooting Sport Federation rule 4.1.9 ²⁹⁸ | Unclear, ISSF's policy refers to the IOC's rule, presumably the ten-nanomole rule, but also expressly applies only to those transgender athletes who have surgically transitioned. The eligibility status of transgender athletes who have not had "sexual reassignment surgery" is unclear. ²⁹⁹ |

298. INT'L SHOOTING SPORT FED'N, *supra* note 110, at 125 ("Any athlete who undergoes sexual reassignment surgery after puberty and wishes to participate in an ISSF Championship must meet the specific conditions and criteria established by the IOC in order to do so. The request to participate in ISSF Championships after sexual reassignment surgery must be made by the athlete to the ISSF Medical Committee prior to competing and the ISSF Medical Committee and other experts shall determine whether or not the IOC criteria has been met.").

299. *Id.*

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|--------|--|--|--|
| Rowing | U.S. Rowing Association Gender Identity Policy | World Rowing Federation | U.S. Rowing Association Gender Identity policy permits athletes to compete according to their gender identity without additional transition requirements, except that collegiate athletes are expected to comply with NCAA policy and National Team athletes are expected to comply with IOC policy. Now that NCAA policy points back at U.S. Rowing's policy, the applicable rule for collegiate participation in unclear. ³⁰⁰ |

300. See US ROWING (@USRowing), *supra* note 116; see also INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2.

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|----------|--|--|--|
| Skiing | US Ski and Snowboard Association, no policy | Fédération internationale de Ski, no policy | IOC 2015 Policy (ten nanomoles/twelve months) ³⁰¹ |
| Soccer | US Soccer Federation, Inclusion Policy ³⁰² | Fédération Internationale de Football Association, no policy | Unclear. USSF's Inclusion Policy expressly governs "gender-based amateur teams" and allows participation based on gender identity without medical transition requirements. Professional and National Teams are expressly excluded; collegiate participation is not mentioned. ³⁰³ |
| Softball | USA Softball, no policy | World Baseball Softball Confederation, no policy | IOC 2015 Policy (ten nanomoles/twelve months) ³⁰⁴ |

301. INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2.

302. U.S. SOCCER FED'N, INC., *supra* note 116, at 55.

303. *Id.*

304. INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2.

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|-------------------|--|---|--|
| Swimming & Diving | USA Swimming Athlete Inclusion, Competitive Equity, and Eligibility Policy ³⁰⁵ | Fédération Internationale de Natation, Policy on Eligibility ³⁰⁶ for the Men's and Women's Competition Categories (bans transgender women unless they transitioned before age twelve) ³⁰⁷ | USA Swimming policy required expert evaluation and five nanomoles/thirty-six months ³⁰⁸ |

305. USA SWIMMING, *supra* note 95 (“As a condition of eligibility [for elite events], the athlete must satisfy the Elite Athlete/Event Fairness Panel that: (i) From a medical perspective, the prior physical development of the athlete as a [m]ale, as mitigated by any medical intervention, does not give the athlete a competitive advantage over the athlete’s cisgender [f]emale competitors. (ii) In addition to other relevant factors considered by the Panel in (i) above, it shall be presumed that the athlete is not eligible unless the athlete demonstrates that the concentration of testosterone in the athlete’s serum has been less than 5 nmol/L (as measured by liquid chromatography coupled with mass spectrometry) continuously for a period of at least thirty-six (36) months before the date of Application. This must include at a minimum three (3) separate blood tests within the past three hundred sixty-five days (365) days preceding the Application, with the last test conducted within ninety (90) days prior to the athlete’s Application. This presumption may be rebutted if the Panel finds, in the unique circumstances of the case, that the criteria set forth in (i) above has been satisfied notwithstanding the athlete’s serum testosterone results (*e.g.*, the athlete has a medical condition which limits the bioavailability of the athlete’s free testosterone).”).

306. FÉDÉRATION INTERNATIONALE DE NATATION, POLICY ON ELIGIBILITY FOR THE MEN’S AND WOMEN’S COMPETITION CATEGORIES 43 (June 2022), <https://resources.fina.org/fina/document/2022/06/19/525de003-51f4-47d3-8d5a-716dac5f77c7/FINA-INCLUSION-POLICY-AND-APPENDICES-FINAL-.pdf> [<http://perma.cc/4Q67-DW7W>].

307. *Id.* at 7.

308. USA SWIMMING, *supra* note 95, at 43.

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|------------------------|--|--|---|
| Tennis | US Tennis Association, no policy | International Tennis Federation Transgender Policy ³⁰⁹ | ITF Transgender Policy requires five nanomoles/ twelve months ³¹⁰ |
| Track & Field, indoor | USA Track & Field Statement Regarding Transgender/ Transsexual Participation ³¹¹ | World Athletics | USATF's policy expressly incorporates the IOC policy of ten nanomoles/ twelve months ³¹² |
| Track & Field, outdoor | USA Track & Field Statement Regarding Transgender/ Transsexual Participation ³¹³ | World Athletics | USATF's policy expressly incorporates the IOC policy of ten nanomoles/ twelve months ³¹⁴ |
| Volleyball | USA Volleyball, no policy | Fédération Internationale de Volleyball, Event Regulations 6.1.2 ³¹⁵ | FIVB Event Regulation 6.1.2, "birth certificate of the player" ³¹⁶ |

309. INT'L TENNIS FED'N, *supra* note 95, at 1.

310. *Id.*

311. USA TRACK & FIELD, *supra* note 284.

312. *See id.*

313. *Id.*

314. *See id.*

315. FÉDÉRATION INTERNATIONALE DE VOLLEYBALL, *supra* note 101, at 11 ("Gender must be attested by the national federations through the birth certificate of the player. Players may be required to present a valid Gender Verification Certificate and/or submit themselves to a medical examination in case of doubt based on medical evidence.").

316. *Id.*

| | National Governing Body: Does the NGB have a policy on Transgender Athletes' Eligibility? | International Federation: Does the IF have a policy on Transgender Athletes' Eligibility? | Policy that NCAA defers to/Policy Summary |
|------------|--|--|--|
| Water Polo | USA Water Polo, no policy | FINA Water Polo World League, no policy | IOC 2015 Policy (ten nanomoles/twelve months) ³¹⁷ |

317. INT'L OLYMPIC COMM. (CONSENSUS MEETING), *supra* note 58, at 2.