EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

RILEY GAINES, *et al.*, *Plaintiffs*, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*, *Defendants*, and NATIONAL WOMEN'S LAW CENTER, [*Proposed*] *Intervenor-Defendant*.	No. 1:24-cv-01109-MHC May 6, 2024

[PROPOSED] INTERVENOR-DEFENDANT NATIONAL WOMEN'S LAW CENTER'S MOTION TO DISMISS

Proposed Intervenor-Defendant National Women's Law Center ("NWLC") hereby moves this Court to dismiss the Complaint ("Compl."), ECF No. 1, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7) for, respectively, lack of jurisdiction, failure to state a claim, and failure to join an indispensable party. Accompanying this motion is a memorandum of law.

Dated: May 6, 2024

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RULE 7.1 CERTIFICATE OF COMPLIANCE WITH L.R. 5.1

Pursuant to Local Rule 7.1D, I hereby certify that this brief has been prepared in Times New Roman, 14-point font, one of the font and point selections approved by this Court in Local Rule 5.1C.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
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CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

RILEY GAINES, *et al.*,
Plaintiffs,
v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Defendants,
and

NATIONAL WOMEN'S LAW CENTER,
[*Proposed*] *Intervenor-Defendant*.

No. 1:24-cv-01109-MHC

May 6, 2024

[PROPOSED] INTERVENOR-DEFENDANT NATIONAL WOMEN'S LAW CENTER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6), AND 12(b)(7)

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Intervenor-Defendant National Women's Law Center ("NWLC") hereby moves to dismiss the Complaint ("Compl."), ECF No. 1, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7) for lack of jurisdiction, failure to state a claim, and failure to join a necessary party.

INTRODUCTION

Plaintiffs are several cisgender women who believe women who are transgender (whom Plaintiffs offensively call "males") should be prohibited from participating in women's sports. They seek to represent a nationwide class of "future, current, or past [National Collegiate Athletic Association] [("]NCAA["")] women's athletes who have competed or may compete against [women who are transgender] or who have shared or may share a locker room, shower, or restroom with a [woman who is transgender] by virtue of the NCAA's Transgender Eligibility Policies." Compl. ¶ 561. And Plaintiffs seek nationwide relief prohibiting transgender women from competing in NCAA events, banning them from women's locker room, shower, and restroom facilities, and invalidating all of their NCAA records.

Plaintiffs' sprawling 155-page Complaint is subject to dismissal on multiple grounds, both procedural and substantive. First, the Complaint is an impermissible "shotgun" pleading. Second, it fails to allege that any Plaintiff has standing to seek injunctive relief. Third, the Complaint identifies only one transgender woman (Sadie Schreiner) who might plausibly compete against any Plaintiff (Track Athlete A) in

the future, but fails to—indeed, cannot—join Ms. Schreiner, thus requiring severance and dismissal of Track Athlete A's claims.

Fourth, and most fundamentally, Plaintiffs' claims on the merits reflect a profound misunderstanding of both Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") and the Fourteenth Amendment. Whereas some courts have disagreed about whether Title IX and the Fourteenth Amendment *require* that women who are transgender be allowed to participate on women's teams and use women's restroom and locker room facilities, no court has ever held —as Plaintiffs here claim—that Title IX and the Fourteenth Amendment *prohibit* transgender women from participating in such activities. Plaintiffs' unprecedented arguments are meritless and should be dismissed.

BACKGROUND

Transgender women have been competing on sports teams alongside cisgender women for decades, in accordance with the regulations of sporting organizations and the antidiscrimination laws of many states. *See* Brief of Amici Curiae States at 19-21, *Soule ex rel. Stanescu v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34 (2d Cir. 2023) (en banc) (No. 21-1365).

In 2010, the NCAA adopted a policy allowing transgender women to participate in women's sports after one year of gender-affirming hormone therapy. Compl. App. A at 2. Since the adoption of that policy, a handful of transgender

women have participated in NCAA sports. Compl. ¶¶ 14, 541, 552 (identifying only five transgender women, only some of whom competed post-season).

At the March 2022 NCAA swimming and diving championships held at Georgia Tech, Lia Thomas won first place in the women's 500-yard freestyle swimming, becoming the only transgender woman to win an NCAA Division I title. *Id.* ¶ 471. During the same competition, Ms. Thomas placed eighth out of eight in the women's 100 freestyle and tied for fifth place in the women's 200 freestyle. *Id.* ¶ 507. Ms. Thomas graduated in 2022 and no longer participates in NCAA sports.

Ms. Thomas's success sparked a vocal backlash from certain quarters, and, some athletic organizations, including the NCAA, subsequently adopted policies making it more difficult for transgender women to participate. Compl. App. A at 2. As of August 1, 2023, transgender women were permitted to participate in NCAA sports only if they documented they have lowered their level of circulating testosterone beneath a certain threshold set by the governing body for a particular sport (e.g., below 5 nmol/L for USA Swimming). *See id.* at 2, 13.[1]

Plaintiff Riley Gaines is a former NCAA athlete who tied with Ms. Thomas for fifth place in the women's 200 freestyle at the 2022 NCAA swimming and diving

[1] As of August 1, 2024, transgender women must show they meet all the criteria of the relevant governing body, including lowering circulating testosterone beneath a particular threshold continuously for a particular length of time (e.g., for 36 months for USA Swimming). *See* Compl. ¶ 254; Compl. App. A at 2.

championships. Compl. ¶ 471. The other Plaintiffs in the case are:

- Four cisgender women who also participated in the March 2022 NCAA women's swimming and diving championships but who never competed against Ms. Thomas; they object to the fact that she was allowed to use the women's locker room at the championships. *See id.* ¶¶ 209, 373, 384, 395.

- Reka Gyorgy, a cisgender woman also participated in the March 2022 NCAA women's swimming and diving championships claims her school would have placed higher than 23rd place at the championships absent Ms. Thomas' participation. *See id.* ¶ 516.

- Six cisgender women from the swim team at Roanoke College who objected when a transgender woman wanted to join the school team, ultimately leading the transgender woman to abandon her attempt to participate. *See id.* ¶ 540.

- "Track Athlete A," a cisgender woman who competes in Division III track and field and placed behind a transgender woman—Ms. Schreiner—at the March 2024 All Atlantic Regionals in the 200-meter dash. *See id.* ¶ 541.

- A cisgender volleyball player who previously competed against a transgender girl in high school; now plays volleyball at a Division II school; and is worried she may play against the same transgender woman if she is also recruited to play on a college volleyball team at a Division II school. *See id.* ¶¶ 548–50.

- Two other cisgender women at Division I schools who compete in soccer, tennis, and track and field, and are concerned they may have to compete against hypothetical transgender women in the future. *See id.* ¶¶ 552–54.

Together, Plaintiffs collectively allege the NCAA's past and current policies regarding the participation of transgender women (and their enforcement by the State Defendants[2]) violate Title IX of the Education Amendments of 1972 and the Fourteenth Amendment. *Id.* ¶¶ 91–111, 582–637. Plaintiffs also seek to represent a

[2] *See* ECF No. 31 at 1 & n.1 (listing State Defendants).

nationwide class of "future, current, or past NCAA women's athletes who have competed or may compete against [transgender women] or who have shared or may share a locker room, shower, or restroom with a [transgender woman] by virtue of the NCAA's Transgender Eligibility Policies." Compl. ¶ 561. Plaintiffs seek, among other things: (i) an injunction against the NCAA and the State Defendants preventing them from enforcing the NCAA's policy allowing women who are transgender to participate in women's sports; (ii) an injunction requiring the NCAA to alter athletic records to invalidate the records of women who are transgender and "reassign" their titles to cisgender women; (iii) an injunction against the NCAA and the State Defendants prohibiting them from allowing transgender women to use women's locker room, shower, or restroom facilities; and (iv) damages. *Id.* at 152-154 (Prayer for Relief).

ARGUMENT

I. The Complaint Is an Impermissible "Shotgun Pleading."

For three reasons, the Complaint should be dismissed as a "shotgun pleading." *See Barmapov v. Amuial*, 986 F.3d 1321, 1324, 1329–30 (11th Cir. 2021); *Smith v. Bell*, No. 23 Civ. 2091, 2023 WL 9107304, at *3 (N.D. Ga. Nov. 30, 2023).

First, the Complaint contains "multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint." *Smith*,

2023 WL 9107304, at *3 (citation omitted). *See* Compl. ¶¶ 582, 621, 629.

Second, the Complaint does not "separat[e] into a different count each cause of action or claim for relief." *Smith*, 2023 WL 9107304, at *3 (citation omitted). In particular, Count II combines claims under Title IX and the Equal Protection Clause, rendering it vague at best. *See* Compl. at 148–49.

Third, the Complaint "mixes claims by multiple plaintiffs against multiple defendants[]" without specifying which Plaintiffs are bringing which claims against which Defendants and for which form of relief. *Perry v. Ryan*, No. 22 Civ. 2752, 2023 WL 2403889, at *3 (M.D. Fla. Mar. 8, 2023); *accord Doe I v. City of Pelham, Ala.*, No. 07 Civ. 478, 2010 WL 11614151, at *4 (N.D. Ala. Apr. 13, 2010) (noting that shotgun complaint "d[id] not state, where appropriate, which Plaintiffs are linked to particular counts, but lump[ed] them all together with the cavalier use of the word 'Plaintiffs'"); *see* Compl. ¶¶ 582, 620, 621, 628, 629, 637 (referring collectively to "Plaintiffs" in each Count of the Complaint); *id.* at 152–54 (referring collectively to "Plaintiffs" in Prayer for Relief).

II. Plaintiffs Lack Standing for Injunctive Relief.

Virtually all of Plaintiffs' claims for injunctive relief should be dismissed under Rule 12(b)(1) for lack of standing.[3] "[S]tanding is not dispensed in gross;

[3] The only exceptions are that Track Athlete A's claims, which should be dismissed pursuant to Rule 12(b)(7), and Ms. Gaines's claim for injunctive relief with respect to alteration of records, which should be dismissed pursuant to Rule 12(b)(6).

rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). That remains true even when a plaintiff seeks to bring a class action. "It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) (internal quotation marks omitted). "Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Id.* (internal quotation marks omitted).[4]

A. Plaintiffs Lack Standing for Injunctive Relief Regarding Transgender Women's Participation in Future NCAA Competitions.

The Complaint fails to allege any Plaintiff has standing to pursue injunctive relief regarding the participation of transgender women in NCAA sports, or, by extension, to seek injunctive relief on behalf of a class. To support standing for injunctive relief, an alleged injury must be "actual or imminent, not conjectural or hypothetical," and a future injury must either be "certainly impending," or there must be a "substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*,

[4] Because this Rule 12(b)(1) motion is a "facial attack" on Plaintiffs' standing, "the Court proceeds as if it were evaluating a 12(b)(6) motion." *Parson v. Ga. Dep't of Nat. Res.*, No. 20 Civ. 328, 2021 WL 2043960, at *1 (S.D. Ga. May 21, 2021).

573 U.S. 149, 158 (2014) (cleaned up). For allegations of future injury, the Eleventh Circuit has imposed "a 'high standard,' which demands 'a robust judicial role in assessing [the] risk' of harm" occurring. *Banks v. Sec'y, Dep't of Health & Hum. Servs*., 38 F.4th 86, 94–95 (11th Cir. 2022). Plaintiffs fail to make that showing.

First, with the sole exception of Track Athlete A, none of the Plaintiffs plausibly alleges a substantial risk of competing against a transgender woman at an NCAA event in the future. Indeed, many Plaintiffs appear to be *former* NCAA athletes. *See* Compl. ¶¶ 116–20. The Complaint alleges some Plaintiffs are currently NCAA athletes who fear they may someday compete with a transgender woman. *See* Compl. ¶¶ 550, 553. But none, other than Track Athlete A, can identify a non-hypothetical transgender woman in NCAA athletics against whom they compete.

To find standing under these circumstances, the Court would have to accept a "speculative chain of possibilities": that a hypothetical, currently unknown transgender woman would (i) qualify to participate in an NCAA women's sport, (ii) participate in the same sport as one of the Plaintiffs, (iii) participate in the same NCAA division as one of the Plaintiffs, and (iv) outperform the Plaintiff. *See Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 (2013). Article III requires more. *See Soule by Stanescu v. Conn. Ass'n of Sch., Inc.*, No. 20 Civ. 201, 2021 WL 1617206, at *5 (D. Conn. Apr. 25, 2021), *vacated and remanded on other grounds sub nom.*, *Soule*, 90 F.4th 34 (rejecting standing based on such a chain of

possibilities).

Thus, except for Track Athlete A, Plaintiffs' claim for injunctive relief regarding the future participation of transgender women in NCAA competition should be dismissed for lack of standing. Track Athlete A's claims are independently subject to dismissal under Rule 12(b)(7). *See supra* n.4; *infra* p. 14-15. This leaves no Plaintiff with standing to raise these claims for injunctive relief.

B. Plaintiffs Lack Standing for Injunctive Relief Regarding the Use of Locker Room, Shower, and Restroom Facilities.

The Complaint likewise fails to allege any Plaintiff has standing to seek injunctive relief regarding transgender women's future use of locker room, shower, and restroom facilities, or to represent a class seeking such relief. None of the Plaintiffs allege they are at any risk of having to share locker room, shower, or restroom facilities with a transgender woman in the future.

Six plaintiffs, who are now *former* NCAA athletes, allege they used the same locker rooms as Ms. Thomas while competing at the 2022 nationals at Georgia Tech, but "[p]ast exposure to [alleged] illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Williams v. Reckitt Benckiser LLC*, *RB*, 65 F.4th 1243, 1255 (11th Cir. 2023) (alterations incorporated). In the absence of any allegation these Plaintiffs will continue to participate in NCAA events or experience the complained-of conduct, they—like all the Plaintiffs—lack standing to pursue injunctive relief.

C. Plaintiffs Lack Standing to Alter Athletic Records for Any Plaintiff Other than Ms. Gaines and Track Athlete A.

Finally, although the Complaint seeks injunctive relief to "render invalid and reassign and revise" NCAA athletic records affected by competition with transgender women, *see* Compl. at 153, only three Plaintiffs allege they have any records in need of alteration. Ms. Gaines alleges she should be designated as the sole fifth-place finisher instead of having to share that spot with Ms. Thomas. *See id.* ¶ 517. Ms. Gyorgy alleges the Virginia Tech team would have placed higher absent Ms. Thomas' participation. *See id*. ¶ 516. And Track Athlete A alleges she would have placed higher in the March 3, 2024, All Atlantic Regional Championship absent the participation of Ms. Schreiner. *See id.* ¶ 541. Because Ms. Gaines, Ms. Gyorgy, and Track Athlete A are the only Plaintiffs who have alleged any records in supposed need of alteration, the remaining Plaintiffs' claims for injunctive relief with respect to athletics records should be dismissed.

III. Track Athlete A's Claims Must Be Severed and Dismissed for Failure to Join an Indispensable Party.

Track Athlete A's claims should be severed and dismissed under Rule 12(b)(7) for failure to join an indispensable party, Ms. Schreiner. As observed, *supra* Section II.A, Track Athlete A is the only Plaintiff who alleges she will compete against a non-hypothetical transgender woman—Ms. Schreiner—in the future. Yet, despite identifying Ms. Schreiner by name and seeking injunctive relief that would

bar her from participating in NCAA sports and nullify her NCAA accomplishments, the Complaint fails to join Ms. Schreiner as a party. Because Ms. Schreiner is a required party to Track Athlete A's claims, and joinder is not feasible because the Court lacks personal jurisdiction and venue over Ms. Schreiner, Track Athlete A's claims must be severed and dismissed pursuant to Rule 12(b)(7).

"[A] failure to join a party under Rule 19 is a ground for a Rule 12(b) motion to dismiss" under Rule 12(b)(7). *English v. Seaboard Coast Line R. Co.*, 465 F.2d 43, 44 n.1 (5th Cir. 1972). In ruling on a Rule 12(b)(7) motion, the court first considers whether the third party is "required" under Rule 19(a)(1). Second, if the party is required, the court assesses whether joinder is feasible. Third, if joinder is infeasible, the court decides whether the case can fairly proceed without that party or must be dismissed. *See Steusloff v. Finelli*, No. 23 Civ. 207, 2024 WL 470251, at *2 (N.D. Ga. Jan. 2, 2024). If the case cannot proceed fairly without that party, the absent party is considered indispensable. *Id.* (citation omitted).

A. Ms. Schreiner Is a Required Party for Track Athlete A's Claims.

Ms. Schreiner is a required party under Rule 19(a)(1)(B)(i) because she has an interest in the action and resolving the action in her absence may "as a practical matter impair or impede [her] ability to protect that interest." Fed. R. Civ. P. 19(a)(1)(B)(i). First, the Complaint seeks to bar the NCAA from allowing transgender women, including Ms. Schreiner specifically, to participate on women's

sports teams, whereas Ms. Schreiner has an interest in continuing to participate in NCAA Division III track and field. Second, Plaintiffs seek to require the NCAA to "render invalid and reassign and revise all awards" won by transgender women while competing in a women's event. Compl. at 153. Such relief would directly implicate Ms. Schreiner, who this year won an NCAA conference title at the Liberty League Championships in the 200 meter and finished second in the 400 meter.[5] Ms. Schreiner and other transgender athletes "have an ongoing interest in litigating *against* any alteration of their public athletic records," *Soule*, 90 F.4th at 49 (emphasis in original). Resolving the action in Ms. Schreiner's absence would impede her ability to protect those interests. *See Delta Med. Sys. v. Dre Health Corp.*, No. 21 Civ. 1687, 2021 WL 6752169, at *4 (N.D. Ga. Nov. 8, 2021).

B. Ms. Schreiner Cannot Be Joined in this Action.

Joinder is not feasible when a court lacks personal jurisdiction over a non-party or venue is not proper. *See* Fed. R. Civ. P. 19(a)(1); *Tick v. Cohen*, 787 F.2d 1490, 1493–94 (11th Cir. 1986) ("Limitations on service of process, subject matter jurisdiction, and venue . . . may bar joinder in some cases."); *Cooley v. First Data Merch. Servs.*, No. 19 Civ. 1185, 2020 WL 13526633, at *3 (N.D. Ga. Feb. 7, 2020)

[5] *See* Karleigh Webb, *Trans Sprinter Sadie Schreiner races for NCAA DII title and history*, OUTSPORTS (Mar. 8, 2024), https://www.outsports.com/2024/3/8/24088020/12adie-schreiner-trans-athlete-sprinter-ncaa-diii-rochester/.

(joinder not possible absent personal jurisdiction).

Joining Ms. Schreiner is not feasible. First, Ms. Schreiner is not "subject to service of process" of the Court because she resides in Rochester, New York.[6] The "bulge service" rule for joining third parties allows service only within "100 miles from where the summons was issued," Fed. R. Civ. P. 4(k)(1)(B); *see Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 417 n.5 (5th Cir. 1979), and Rochester is more than 100 miles from Georgia. Nor is Ms. Schreiner "subject to the jurisdiction of a court of general jurisdiction" in Georgia. Fed. R. Civ. P. 4(k)(1)(A). Georgia's long-arm statute is limited to Georgia and actions "affecting specific real property or status, or in any other proceeding in rem." Ga. Code Ann. § 9-11-4(f)(2).

Moreover, even if personal jurisdiction were not a barrier, the Complaint fails to allege any facts establishing venue for Track Athlete A's claims in this district. *See* 28 U.S.C. § 1391. Track Athlete A raced against Ms. Schreiner at Nazareth University in Rochester (in the Western District of New York), and the spring 2024 NCAA Division III championships in track and field will take place in Myrtle Beach (in the District of South Carolina).[7] Accordingly, Ms. Schreiner cannot be joined.

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[6] *See 2023-24 Women's Track & Field Roster: Sadie Rose*, RIT ATHLETICS, https://ritathletics.com/sports/womens-track-and-field/roster/sadie-rose/17578 (last accessed on May 6, 2024). Intervenor-Defendant requests that this Court judicially notice the location of Ms. Schreiner's residence. Fed. R. Evid. 201(b).

[7] *See* ALL-ATLANTIC REGION TRACK & FIELD CONFERENCE, https://www.aartfc.org/ (last visited May 6, 2024) (noting that the All-Atlantic Region Track and Field

C. Track Athlete A's Claims Cannot Continue in Ms. Schreiner's Absence.

Where joinder of a necessary party is not feasible, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Here, all four of Rule 19(b)'s "closely interrelated" factors, *Tick*, 787 F.2d at 1494, favor dismissal of Track Athlete A's claims.

First, a judgment rendered in Ms. Schreiner's absence would prejudice her right to compete in NCAA Division III track and field and to retain her NCAA records. *See Quinn v. Powell*, No. 21 Civ. 3163, 2024 WL 1395153, at *6 (N.D. Ga. Mar. 31, 2024) (granting 12(b)(7) dismissal where non-party's property rights would be prejudiced by a judgment rendered in the non-party's absence).

The second and third factors also demonstrate any judgment rendered in Ms. Schreiner's absence would prejudice her and be inadequate. *Tick,* 787 F.2d at 1495 (considering the second and third factors together). Any relief afforded to Track Athlete A could not be tailored to lessen or avoid any prejudice to Ms. Schreiner.

Conference Championships were hosted at Nazareth University); *Championships: Division III Men's & Women's Outdoor Track & Field*, NCAA, https://www.ncaa.org/sports/2013/11/4/division-iii-men-s-and-women-s-outdoor-track-and-field.aspx (last visited May 6, 2024) (indicating that the NCAA Division III championships in track and field will take place in Myrtle Beach, South Carolina). The Court may take judicial notice of these facts because they are "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (b)(2).

Track Athlete A explicitly seeks to bar Ms. Schreiner from competing in the NCAA and nullify her athletic records. *See Steusloff*, 2024 WL 470251, at *7. Moreover, judgment rendered in Ms. Schreiner's absence would be inadequate for similar reasons; the broad relief Track Athlete A seeks makes it "difficult to envision any conceivable way to fashion a meaningful judgment which will not affect the absent [non-party's] interests." *Tick*, 787 F.2d at 1495.

Finally, Track Athlete A "would suffer minimal prejudice if the Court were to dismiss [her claims] because" she has no claims against the State Defendants, and the Western District of New York is an "alternative forum [] that will allow all required parties to join." *Steusloff*, 2024 WL 470251, at *6. Accordingly, Track Athlete A's claims should be severed and dismissed.

IV. The Complaint Fails to State a Claim for Which Relief Can Be Granted.

Unlike other matters percolating through the courts, this case is not about whether Title IX or the Equal Protection Clause *require* that women's sports teams or women's facilities be accessible to transgender women. In those cases, the Fourth, Seventh, and Ninth Circuits have correctly held that categorically excluding transgender people from restrooms or sports teams consistent with their gender identity violates Title IX, the Equal Protection Clause, or both. *See B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020); *A.C. by M.C. v. Metro. Sch. Dist. of*

Martinsville, 75 F.4th 760 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024) (same); *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023), *withdrawn pending amendment*, 2024 WL 1846141 (9th Cir. Apr. 29, 2024). By contrast, the Eleventh Circuit erroneously held in *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 816 (11th Cir. 2022) (en banc), that Title IX defines sex as "biological sex," and that 34 C.F.R. § 106.33, a regulation allowing schools to designate separate restrooms on the basis of sex, allows schools to exclude transgender students from the restrooms consistent with their gender identity.[8]

Even assuming *Adams*'s vitality, however, and even assuming that *Adams*'s reasoning applies to sports, the question in this case is entirely different from the one in *Adams*. The question presented here is not whether Title IX or the Constitution *allows* Defendants to exclude transgender women from sex-separated teams and facilities consistent with their gender identity. It is whether Title IX or the Constitution *requires* Defendants to exclude such students. No court has ever accepted such arguments, and for good reason—they are wrong and unsupported. Plaintiffs have failed to state a claim for relief under either Title IX or the Fourteenth

[8] The Department of Education has now issued new Title IX regulations disagreeing with *Adams* and clarifying that 34 C.F.R. § 106.33 does not allow sex separation that inflicts more than *de minimis* harm, and specifically does not allow transgender students to be excluded from restrooms or locker rooms consistent with their gender identity. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33802, 33820 (Aug. 1, 2024 (to be codified at 34 C.F.R. pts. 106.10, 106.31(a)(2)).

Amendment, and their claims must therefore be dismissed.[9]

A. Title IX Does Not Prohibit Transgender Women from Participating on Women's Teams.

Count I of the Complaint is based on a fundamentally flawed premise: that, under Title IX, "[s]eparate athletic teams for women are how women are provided equal athletic opportunity in sport." Compl. ¶ 600. To the contrary, sex-separated teams are *one* way schools may seek to provide equal athletic opportunity; they are not a required strategy to meet Title IX's equal opportunity mandate. Thus, even assuming for argument's sake that inclusion of transgender women on women's teams could be taken to mean these track teams were no longer "sex-separated"—an assumption that Intervenor-Defendant strongly disputes—Plaintiffs could not state a claim under Title IX.

Instead of addressing athletics in the text of Title IX, Congress passed a separate provision directing the predecessor to the Department of Education to promulgate regulations "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." *See* Pub. L. 93-380, Title VIII, Sec. 844, August 21, 1974, 88 Stat. 612. The agency did so in 1975. Far from mandating sex-separated teams, those regulations establish a "[g]eneral" rule

[9] "To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

prohibiting schools from "provid[ing] . . . athletics separately" on the basis of sex. 34 C.F.R. § 106.41(a) (emphasis added). Subsection (b) of the regulations then carves out an exception to that general prohibition, stating that "a recipient *may* operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 106.41(b) (emphasis added). Subsection (b) only mandates "[W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited," members of the "excluded sex" must be allowed to try out for the team unless it is a contact sport. 34 C.F.R. § 106.41(b). Subsection (c) of the regulation further requires schools to provide "equal athletic opportunity," listing factors for recipients to consider when determining whether "equal athletic opportunity" is available, but does not identify sex separation as a relevant factor for consideration. *Id.* § 106.41(c).

Thus, as numerous courts have acknowledged, Title IX's governing regulations are "purposely permissive and flexible on [allowing sex-separated teams], rather than mandatory." *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981) (striking high school athletic association rule mandating sex separation for all teams as inconsistent with Title IX); *Force by Force v. Pierce City R-VI Sch. Dist.*, 570 F.

Supp. 1020, 1024–25 (W.D. Mo. 1983) (holding that Title IX did not require sex separation for contact sports and "simply takes a neutral stand on the subject"); *cf. Gordon v. Jordan Sch. Dist.*, No. 21-4044, 2023 WL 34105, at *4 (10th Cir. Jan. 4, 2023) (emphasis in original) ("[J]ust because the Constitution *permits* separate teams for girls and boys doesn't mean that the Constitution *requires* separate teams."). Indeed, courts have long recognized that allowing girls to play on boys' teams, and vice versa, can sometimes be necessary to provide equal athletic opportunity under Title IX or the Fourteenth Amendment.[10]

That same flexibility is found in the Department of Education's Intercollegiate Athletics Policy, which is the only regulatory document specifically addressing when a school is required to provide sex-separated teams. *See* Title IX of the Education Amendments of 1972: A Policy Interpretation, at § VII.C.4.b(3), 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation]; *See Berndsen v. N.D. Univ. Sys.*, 7 F.4th 782, 789 (8th Cir. 2021) (discussing 1979 Policy Interpretation § VII.C.4)). The 1979 Policy Interpretation states, "[W]here an institution sponsors a team in a particular sport for members of one sex, it may be required *either* to permit the excluded sex to try out for the team *or* to sponsor a

[10] *See, e.g.*, *D.M. by Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019) (injunction allowing boys to compete on girls' competitive dance team); *Bednar v. Neb. Sch. Activities Ass'n*, 531 F.2d 922, 923 (8th Cir. 1976) (injunction allowing girl to compete on boys' cross-country team).

separate team for the previously excluded sex." 1979 Policy Interpretation § VII.C.4 (emphases added). Sex-separated teams in non-contact sports such as swimming and track and field are required only if, among other things, "[m]embers of the excluded sex do not possess sufficient skill to be selected for a single integrated team or to compete actively on such a team if selected." *Id.* § VII.C.4.b(3); *see Brooks v. State Coll. Area Sch. Dist.*, 643 F. Supp. 3d 499, 508 (M.D. Pa. 2022) (concluding "Merely allowing female athletes to show up for co-ed tryouts is not enough to satisfy Title IX," where school created a mixed hockey team but "none of those slots were offered to interested females" after tryouts).

Thus, Plaintiffs cannot state a claim under the 1979 Policy Interpretation, unless they can show they do not possess sufficient skill "to be selected for a single integrated team or to compete actively" on a mixed team. 1979 Policy Interpretation § VII.C.4.b(3). Even under Plaintiffs' faulty assumption that a transgender woman's participation on a woman's team is an "integrated team," Plaintiffs fail to plausibly allege the denial of effective accommodation under this standard. Any argument Plaintiffs and other cisgender girls were unable to "be selected for" the team or to "compete actively" on a team with women who are transgender is belied by facts incorporated in the Complaint itself. Ms. Gaines not only competed actively against Ms. Thomas but *tied* with her for fifth place (behind four cisgender women). Compl. ¶¶ 484–87.

Plaintiffs have also failed to allege the type of systemic imbalance necessary to support a Title IX claim based on lack of "participation opportunities." *See* 1979 Policy Interpretation § VII.C.5.a.[11] A claim based on "participation opportunities" is assessed at the aggregate level based on a school's athletic program as a whole, rather than on any one particular individual's ability to compete on a given team in a given event. *See, e.g.*, *Thomas v. Regents of Univ. of Cal.*, No. 19 Civ. 6463, 2020 WL 3892860, at *9 (N.D. Cal. July 10, 2020) (effective accommodation claim regarding "systemwide imbalance in athletic opportunities for women"); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117, 1125 (M.D. Ala. 1997) ("Only when the institution, in a broad-spectrum inquiry, is first found to be in violation of Title IX in one of the respects earlier outlined, does the question of individual or group causes-of-action for relief properly arise."). By contrast, the sporadic success of a handful of transgender women does not come close to establishing the systemwide imbalance to support such a claim. *Cf. Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020), *aff'd*, 79 F.4th 1009 ("It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to

[11] Under the 1979 Policy Interpretation, a covered entity must either provide (1) "participation opportunities for male and female students . . . in numbers substantially proportionate to their respective enrollments," (2) show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex," or (3) show "that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program." *Id.*

compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women.").

In short, the plain text of Title IX says nothing about athletics; the plain text of 34 C.F.R. § 106.41 permits sex-separated sports in specific circumstances but imposes no requirement of sex separation; and the plain text of the 1979 Policy Interpretation requires sex-separated teams if, and only if, women lack the ability to be "selected for" or "compete actively" on a mixed team. No court has ever held these provisions require funding recipients to exclude transgender women, and multiple courts have held categorical exclusions of transgender women violate Title IX or the Equal Protection Clause.

B. Title IX and the Fourteenth Amendment Do Not Bar Transgender Women from Using Women's Facilities.

Neither Title IX nor the Fourteenth Amendment allows schools to exclude transgender students from restrooms and locker facilities consistent with their gender identity—much less requires them to do so, as Plaintiffs contend in Count II. Compl. at 148–49. As to Title IX, the Eleventh Circuit in *Adams* held 34 C.F.R. § 106.33 creates a regulatory "carveout" allowing schools to separate restrooms and locker rooms based on sex designated at birth. 57 F.4th at 811. But, as already noted, that purported regulatory "carveout" no longer exists: the Department of Education has now issued new Title IX regulations clarifying that 34 C.F.R. § 106.33 does not allow transgender students to be excluded from restrooms or locker rooms that are

consistent with their gender identity. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33802, 33820. And even if *Adams* were still controlling, the regulatory "exception is permissive—Title IX does not require that an institution provide separate privacy facilities for the sexes." *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018). "[J]ust because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020).

Nor do Title IX athletics regulations require sex-separated locker rooms. The 1979 Policy Interpretation provides that in determining whether schools provided equal athletic opportunity, the enforcement agency will consider a list of factors, including the "[p]rovision of locker rooms, practice and competitive facilities." 34 C.F.R. § 106.41(c)(7). The 1979 Policy Interpretation further clarifies claims related to locker rooms are "equal treatment" claims, and that a school may be liable for denial of equal treatment "[i]f comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability," for "members of both sexes." *See* 1979 Policy Interpretation § VII(B)(2). For example, schools violate Title IX when "the quality, size and location of the locker rooms were better for male athletes than female athletes." *Ollier v.*

Sweetwater Union High Sch. Dist., 858 F. Supp. 2d 1093, 1111 (S.D. Cal. 2012). Plaintiffs have alleged nothing of the kind.[12]

C. Plaintiffs Do Not Have a Fundamental Right to Exclude Transgender Women from Women's Facilities.

Plaintiffs' Count III—that substantive due process requires exclusion of transgender women from women's facilities—also fails to allege a constitutional violation, much less a "clearly established" right to overcome qualified immunity. Courts have consistently rejected "a privacy right to avoid any risk of being exposed briefly to opposite-sex nudity by sharing locker facilities with transgender students in public schools." *Parents for Priv.*, 949 F.3d at 1224; *Boyertown*, 897 F.3d at 531 ("[W]e decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no court has ever done so.").

To be sure, the Eleventh Circuit has recognized a "right to bodily privacy," noting that "most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993). But the fundamental right to bodily privacy does not extend beyond

[12] Plaintiffs also have not alleged any other basis for a Title IX violation or a denial of equal protection, such as a hostile environment. "[T]he use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender." *Parents for Priv.*, 949 F.3d at 1229.

situations "involving certain compelled nudity." *Padgett v. Donald*, 401 F.3d 1273, 1281 (11th Cir. 2005); *see Mitchell v. Stewart*, 608 F. App'x 730, 735 (11th Cir. 2015) ("[I]ndividuals maintain a right to bodily privacy, in particular the right not to have their genitals exposed to onlookers.").[13]

The Complaint fails to allege any forced or involuntary nudity for a substantive due process claim under these precedents, and the Complaint concedes Plaintiffs were able to change in stalls or a separate storage area. *See* Compl. ¶¶ 381, 388–89, 413. Plaintiffs allege that those alternatives were uncomfortable and inconvenient for them, but the solution to that problem is not an injunction excluding transgender students. It is for school institutions to provide better privacy options "for any student who does not feel comfortable being in the confines of a communal restroom or locker room." *Boyertown*, 897 F.3d at 531. While Plaintiffs object to sharing a group locker room with a transgender woman, their right to bodily privacy can be fully accommodated with the option to change in private shower stalls or single-user facilities. *See id.* at 530.

CONCLUSION

For all these reasons, the Complaint should be dismissed.

[13] *Adams* held schools can *choose* to protect a broader "privacy interest" in "using the bathroom away from the opposite sex." *Adams*, 57 F.4th at 804. But that does not mean they are constitutionally *required* to do so as a matter of substantive due process. The constitutional right to bodily privacy is narrower and limited to compelled nudity.

Dated: May 6, 2024

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RULE 7.1 CERTIFICATE OF COMPLIANCE WITH L.R. 5.1

Pursuant to Local Rule 7.1D, I hereby certify that this brief has been prepared in Times New Roman, 14-point font, one of the font and point selections approved by this Court in Local Rule 5.1C.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
Nneka Ewulonu

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

This 6th day of May, 2024.

/s/ Nneka Ewulonu
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