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Josh Lens

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The NCAA's Punts on Transgender Student-Athlete Participation

*Josh Lens, J.D.**

ABSTRACT

The National Collegiate Athletic Association (“NCAA”), which serves as college athletics’s national governing body, states that its basic purposes include supporting and promoting healthy and safe college athletics. It accomplishes this through its stated principles, which include conducting athletics designed to protect, support, and enhance student-athletes’ physical and mental health and its commitment to diversity, equity, and inclusion. These are tall tasks, as half a million student-athletes compete in NCAA-sponsored sports.

The NCAA also enjoys a history of taking strong stances on perceived discrimination. More specifically, the NCAA has used its economic influence to effect changes to state legislation or practices that it finds discriminatory. Recent examples include North Carolina’s so-called “bathroom bill” and Mississippi’s inclusion of the Confederate battle symbol on its state flag.

The NCAA recently had two opportunities to continue this strong anti-discriminatory history when faced with decisions regarding transgender athlete participation. However, in a departure from its past practices, the NCAA effectively punted in both instances, surprising and disappointing many college athletics constituents, including countless student-athletes.

This Article scrutinizes the NCAA’s surprisingly passive response to states’ efforts to ban transgender girls and women from sports participation aligning with their gender identity and its recent revisions to rules regarding transgender student-athlete participation in NCAA sports. The Article’s first Part explores the NCAA’s

*Assistant Professor of Recreation and Sport Management at the University of Arkansas, Fayetteville (J.D., University of Iowa College of Law). In addition to his academic duties, Lens consults for college athletics conferences and university athletics departments regarding legal and NCAA matters. The views this Article expresses are the author’s and not necessarily representative of the University of Arkansas. University of Arkansas School of Law student Sydney Weiskopf contributed extremely valuable research to this Article.

governance, stated goals and missions, and history of strong and effective actions in response to laws, practices, and symbols it finds discriminatory. The second Part analyzes the NCAA's response—or lack thereof—to some states' efforts to prohibit transgender individuals from participating in sports aligning with their gender identity. Part III critiques the NCAA's recent revisions to transgender student-athlete participation eligibility rules, concluding that they effectively amount to a second punt. A brief conclusion follows.

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I. INTRODUCTION

University of Pennsylvania (“Penn”) swimming and diving student-athlete Lia Thomas is currently the most controversial athlete in the United States.¹ As Thomas became one of the most dominant collegiate student-athletes in the country, she found herself in the middle of a national debate and a “real-time Rorschach test for how society views those who challenge conventions.”²

When Thomas, a trans woman,³ began competing on Penn’s women’s swimming and diving team in 2021, anti-transgender activists railed against the National Collegiate Athletic Association (“NCAA”).⁴ While Thomas’s participation on the women’s team complied with NCAA policy effective at the time, detractors felt it was unfair to the competition.⁵

¹ Robert Sanchez, *‘I Am Lia’: The Trans Swimmer Dividing America Tells Her Story*, SPORTS ILLUSTRATED (Mar. 3, 2022), <http://si.com/college/2022/03/03/lia-thomas-penn-swimmer-transgender-woman-daily-cover> [https://perma.cc/74S2-XV2P] (explaining that Thomas’s 2021-22 season was “unlike any in the history of her sport”).

² *Id.*; see also Jo Yurcaba, *Ivy League Swimming Champion Becomes Target of Transphobic Rhetoric*, NBC NEWS (Dec. 16, 2021), <http://nbcnews.com/nbc-out/out-news/ivy-league-swimming-champion-becomes-target-transphobic-rhetoric-rcna9074> [https://perma.cc/G5XU-A4T5] (describing Thomas as “the latest target in the culture-war debate over whether transgender girls and women should be allowed to participate on female sports teams.”).

³ This Article uses the term “transgender” to describe individuals whose gender identity does not match that commonly experienced by those individuals at birth. See Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletes*, 21 SETON HALL J. SPORTS & ENT. L. 1, 10 (2011). Like impactful scholarship before it, this Article’s use of the term transgender is meant as an umbrella term that includes transgender women (who identify as female though they were assigned male at birth based on anatomy), transgender men (who identify as male, though assigned female at birth based on anatomy), and those identifying as something else. See Erin Buzuvis, *Law, policy, and the participation of transgender athletes in the United States*, 24(3) SPORT MGMT. REV. 439, 439–40 [hereinafter *Law, Policy, & Participation*].

⁴ Julie Kliegman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (Jul. 6, 2022), <http://si.com/more-sports/2022/07/06-transgender-athletes-bans-policies-ioc-ncaa> [https://perma.cc/3GLF-ELQK]. Thomas was a member of the men’s team for her first three years at Penn. Yurcaba, *supra* note 2. The NCAA is the national governing body for college athletics and comprised of member universities for which it promulgates rules and regulations. Matthew Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 116 (2008).

⁵ Kliegman, *supra* note 4 (noting that NCAA policy at the time required trans women to undergo a year of hormone therapy in order to compete, which Thomas had done while taking a year off from swimming competitively); see also Sanchez, *supra*

Though her post-transition race times were slower, Thomas built on success she enjoyed while a member of the men's team, setting Penn and Ivy League records while becoming the nation's best female collegiate swimmer.⁶

Thomas's success left her feeling both liberated and besieged.⁷ Assigned the male sex at birth, Thomas felt authentic, and her mental health improved after she transitioned and joined the women's team.⁸ However, her accomplishments drew the right wing's scrutiny, and Thomas became a regular target on Fox News.⁹ Even Thomas's own team grew bitterly divided,¹⁰ with some cheering against her, her coach

note 1 (explaining, "(a) vocal faction wonders, though, whether her participation in women's swimming is fair.").

⁶ Sanchez, *supra* note 1 (stating Thomas "throttled her competition"). After two years of hormone replacement therapy, Thomas described herself as an inch shorter with less strength, making it impossible to retain her former race times in the pool. *Id.* Before she transitioned, Thomas was about ten seconds behind the men's NCAA record for the 500-yard freestyle. Camila Pedrosa, *Former UArizona Athletes Criticize NCAA Over Transgender Swimmer*, CRONKITE NEWS (Mar. 29, 2022), <http://cronkitenews.azpbs.org/2022/03/29/former-uarizona-athletes-criticize-ncaa-over-transgender-swimmer/> [<https://perma.cc/J65N-PR5L>] (citing conversation with Joanna Hoffman, who works with an LGBTQ advocacy group). After transitioning, Thomas was about ten seconds behind the women's record. *Id.* (quoting Hoffman as explaining this means Thomas is a talented, hard-working athlete and "not a case of someone who was failing in men's sports and so then decided to compete in women's sports.").

⁷ Sanchez, *supra* note 1 (explaining that Thomas has largely "walled herself off" from media).

⁸ Amanda McMaster, Henderson Hewes, & Douglas Lantz, *Transgender Swimmer Lia Thomas Speaks Out About Backlash, Future Plans to Compete*, ABC NEWS (May 31, 2022), <http://abcnews.go.com/GMA/News/transgender-swimmer-lia-thomas-speaks-backlash-future-plans/story?id=85068951> [<https://perma.cc/7EXM-UE3M>] (explaining that after she transitioned, Thomas felt "a lot better mentally. . . (and) less depressed.").

⁹ Sanchez, *supra* note 1 (describing Thomas's story as "a right-wing obsession"). "Thomas has faced criticism and verbal attacks from anti-trans groups, conservative media and, reportedly, even two teammates." Yurcaba, *supra* note 2 (noting that some headlines about Thomas's success were accompanied by pre-transition photos of her that used her previous name and male pronouns-practices known as deadnaming and misgendering).

¹⁰ Sanchez, *supra* note 1 ("Those close to the team estimate that Thomas has six to eight adamant supporters, maybe half the team opposes her competing against other women and the rest have steered clear of the debate. An unsigned letter, which the university said represented 'several' Penn swimmers and was released through the school in early February, said Thomas was 'value[d] as a person, teammate and friend' and took aim at the stories circulating about her. 'The sentiments put forward by an anonymous member of our team are not representative of the feelings, values and opinions of the entire Penn team.'").

receiving hateful e-mails, and both Thomas and Penn’s social media handlers turning off comments on social media posts.¹¹

In the midst of Thomas’s season competing on the women’s team, the NCAA altered its policy for transgender student-athlete participation,¹² which some hailed as “a landmark policy of equality in sports as a human right.”¹³ Eschewing its “landmark policy,” the NCAA effectively adopted the USA Swimming policy regarding transgender athlete participation for its swimming and diving student-athletes. For Thomas, this change meant that USA Swimming policy, not the NCAA’s, would dictate whether she could compete in the swimming championships in March 2022.¹⁴ A month before the championships, USA Swimming changed its policy to require trans women to undergo testosterone-suppressing treatment and maintain a level of fewer than 5 nanomoles/liter for 36 months.¹⁵

¹¹ Sanchez, *supra* note 1 (noting that Thomas’s coaches have asked the team to refrain from wearing university gear at times so as to not make themselves targets). After she joined the women’s swimming team, 16 of Thomas’s teammates wrote an anonymous letter to Penn administrators stating that Thomas should not be permitted to compete in NCAA championships because biology provides her an “unfair advantage” over the competition. Noah Zucker, *Transgender Swimmer Lia Thomas Has Unfair Advantage, 16 Penn Teammates Write in Unsigned Letter*, PHILLY VOICE (Feb. 5, 2022), <http://phillyvoice.com/penn-transgender-swimmer-lia-thomas-teammates-letter-ncaa-rules/> [https://perma.cc/55T6-E78]. The anonymous letter came days after another set of teammates anonymously released a letter supporting Thomas. *Id.*

¹² Kliegman, *supra* note 4.

¹³ See Dawn Ennis, *Goodbye Lia Thomas? New NCAA Trans Student-Athlete Policy is ‘Effective Immediately’*, FORBES (Jan. 20, 2022), <http://forbes.com/sites/dawnstaceyennis/2022/01/20/goodbye-lia-thomas-new-ncaa-trans-student-athlete-policy-is-effective-immediately/?sh=495e215a34db> [https://perma.cc/9XQS-J6HG] (lamenting that the NCAA “caved under pressure” to tear its landmark policy up).

¹⁴ Kliegman, *supra* note 4.

¹⁵ *Id.* (noting that when it unveiled its revised policy, USA Swimming said it was not influenced by Thomas’s circumstances). USA Swimming updated its guidelines to be more restrictive in response to the NCAA’s update to its policy. Frankie De La Cretaz, *The IOC Has a New Trans-Inclusion Framework, But is the Damage Already Done?*, SPORTS ILLUSTRATED (Mar. 23, 2022), <http://si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework> [https://perma.cc/F3HQ-Y9PS] (explaining that USA Swimming’s more restrictive guidelines require testosterone levels of 5 nmol/L and 36 months of testosterone-suppressive medication for transfeminine athletes to be eligible to compete in the women’s division). USA Swimming’s policy sets forth two requirements for trans women who are members: “The concentration of testosterone in their blood must be less than 5 nanomoles per liter continuously for at least 36 months before they apply to compete, and they must provide evidence that going through puberty as their sex assigned at birth ‘does not give the athlete a competitive advantage over the athlete’s cisgender female competitors.’” Jo Yurcaba, *USA Swimming Announces New Policy for Elite Transgender Athletes*, MSNBC NEWS

Thomas, however, had undergone thirty-four months of treatment when the championships took place, seemingly rendering her ineligible to swim in the championships.¹⁶ The NCAA ultimately concluded, however, that Thomas could participate despite falling a couple of months short of USA Swimming guidelines after a subcommittee cited “unfair and potentially detrimental impacts” of strictly following the policy.¹⁷ The announcement relieved Thomas.¹⁸ “Far from dominating the competition, Thomas won one race and lost two others” in the championships.¹⁹ Thomas’s win was the first by a known transgender athlete in a United States college swimming championship.²⁰

Thomas’s championship ignited the ongoing national battle over trans-athlete sport participation eligibility,²¹ resulting in even more backlash among right-wing politicians and groups seeking to restrict it.²² For example, Florida’s governor Ron DeSantis issued a proclamation that the runner-up to Thomas, a Floridian named Emma Weyant, was the “rightful holder of the race won by Thomas.”²³ DeSantis explained the

(Feb. 2, 2022), <http://nbcnews.com/nbc-out/out-news/usa-swimming-announces-new-policy-elite-transgender-athletes-rcna14606> [<https://perma.cc/T3YU-RFVX>].

¹⁶ Kliegman, *supra* note 4.

¹⁷ *Id.* Protesting Thomas’s ability to participate in women’s meets, a USA Swimming official resigned. Louisa Thomas, *The Trans Swimmer Who Won Too Much*, THE NEW YORKER (Mar. 17, 2022), <http://newyorker.com/sports/sporting-scene/how-one-swimmer-became-the-focus-of-a-debate-about-trans-athletes> [<https://perma.cc/6WFA-6FCX>].

¹⁸ Sanchez, *supra* note 1. Thomas, who could not see a future for herself prior to coming out, wants to continue training in the pool, has applied to law school, and is interested in pursuing civil rights law so she can advocate for marginalized individuals. *Id.* Her future swimming goals include swimming at Olympic trials. McMaster, *supra* note 8.

¹⁹ Kliegman, *supra* note 4.

²⁰ *Florida Governor Says Trans Swimmer Lia Thomas Was Not ‘Rightful Winner’ of NCAA Title*, THE GUARDIAN (Mar. 23, 2022), <http://theguardian.com/sport/2022/mar/23/ron-desantis-lia-thomas-trans-swimmer-ncaa-title-florida> [<https://perma.cc/MLA4-46RA>] [hereinafter *DeSantis Declaration*].

²¹ Pedrosa, *supra* note 6 (describing Thomas’s victory in the NCAA 500-yard freestyle championship as “the latest salvo in a national debate over transgender athletes”); *see also* Yurcaba, *supra* note 2 (quoting Anne Lieberman, director of policy for an ally group for LGBTQ-inclusive sports policies, as explaining that conversation regarding Thomas is not about sports but rather generally the “fuel for the political fire that is absolutely ravaging trans rights in this country.”). Note, however, that through transgender athletes have participated in sports for decades, the public has only recently began paying greater attention to their participation. Erin Buzuvis et al., *Sport is for Everyone: A Legal Roadmap for Transgender Participation in Sport*, 31(2) J. OF LEGAL ASPECTS OF SPORT, 212, 212.

²² *DeSantis Declaration*, *supra* note 20.

²³ *Id.* Note that the race’s third-place finisher, Thomas’s teammate Erica Sullivan, wrote in an essay for NEWSWEEK that “the real threats to women’s sports

reasoning for his “determination” by claiming that “men should not be competing against women such as Emma Weyant” and that “Florida rejects the NCAA’s efforts to destroy women’s athletics, disapproves of the NCAA elevating ideology over biology, and takes offense at the NCAA trying to make others complicit in a lie.”²⁴ Former University of Arizona swimming and diving student-athletes also weighed in, contending in a letter to the NCAA that Thomas’s participation did “irrevocable damage to a sport that has transformed our own identities for the better.”²⁵ The correspondence also expressed concern that universities could violate Title IX by offering athletically-related financial aid to transgender athletes.²⁶

Many, including the NCAA, would agree that the legal future regarding transgender athlete participation is unclear.²⁷ A case like *Hecox v. Little*,²⁸ where a transgender cross-country athlete is suing Idaho over its state law banning transgender sport participation, the first of dozens like it nationally, could end up in the Supreme Court.²⁹ It is unsettled how

are: sexual abuse and harassment, unequal pay and resources and a lack of women in leadership. Transgender girls and women are nowhere on this list.” *Id.* The National Women’s Law Center’s press secretary, Gillian Branstetter, echoes these thoughts, explaining, “I don’t know that if you were to poll female athletes the participation of people like Lia Thomas would come up very much. There are much bigger issues at hand for female athletes, and people who think that they’re saving women’s sports by putting forward their transphobia have never expressed a single piece of interest in saving women’s sports before.” Yurcaba, *supra* note 2.

²⁴ *DeSantis Declaration*, *supra* note 20 (explaining that “DeSantis’s proclamation has no power to change (the) result” and noting that DeSantis had recently signed into law Florida’s so-called Fairness in Women’s Sports Act banning anyone assigned as male at birth from competing in girls and women’s sports).

²⁵ Pedrosa, *supra* note 6 (noting that 40 former coaches and team members signed the correspondence).

²⁶ *Id.* (quoting the letter as stating, “Opening the door to allow natural born men to acquire precious, life altering financial aid packages . . . defeats the very essence of the flagship legislation.”). Title IX of the Education Amendments of 1972 is a federal statute prohibiting discrimination based on sex in those education programs receiving federal financial institutions. 34 C.F.R. §§ 106.41(a)–(c).

²⁷ See Scott Gleeson, *The NCAA Has Transformed From Pioneer to Pawn in Complex Effort for Transgender Inclusion*, USA TODAY SPORTS (June 7, 2022), <http://msn.com/en-us/sports/more-sports/the-ncaa-has-transformed-from-pioneer-to-pawn-in-complex-effort-for-transgender-inclusion/ar-AAY05qH?ocid=ob-tw-enus-1638995219394> [https://perma.cc/2H6T-3KZR] (quoting NCAA associate director of communications Gail Dent as stating, “We can’t speculate on what the future holds at this point.”).

²⁸ 479 F. Supp. 3d 930 (D. Idaho 2020).

²⁹ Kliegman, *supra* note 4 (citing conversation with Western New England University law professor Erin Buzuvis). In April 2020, Hecox, a transgender woman, sued the state of Idaho, along with a Jane Doe, the American Civil Liberties Union, and the northwestern feminist organization Legal Voice, to challenge the state’s so-called Fairness in Women’s Sports Act. Julie Kliegman, *Idaho Banned Trans Athletes*

Title IX applies to anti-transgender sport participation legislation,³⁰ and it remains possible that President Biden's administration could seek to have Title IX amended to extend its protections to prohibit discrimination on the basis of gender identity and sexual orientation.³¹ Congress could take up the issue.³²

This Article focuses on the NCAA's response to state laws regulating transgender athlete participation and its revisions to its own such policy, both of which provided it with an opportunity to support and protect its transgender student-athletes.³³ The NCAA failed to take advantage of

From Women's Sports. She's Fighting Back, SPORTS ILLUSTRATED (June 30, 2020), <http://si.com/sports-illustrated/2020/06/30/idaho-transgender-ban-fighting-back> [<https://perma.cc/SAL8-R8GT>] (describing Hecox as "on the leading edge of the fight for trans rights in Idaho, and by extension, the United States"). Hecox's suit alleges the Act violates her constitutional rights by permitting discriminatory treatment based on her transgender status. Buzuvis et al., *supra* note 21, at 221. As of this writing, a federal circuit court had granted Hecox an injunction after finding a likelihood of success on her claim's merits. *Id.*

³⁰ Emma Baccellieri et al., *Title IX's Next Frontiers in the Fight for Gender Equality*, SPORTS ILLUSTRATED (June 23, 2022), <http://si.com/college/2022/06/23/title-ix-next-frontiers-gender-equality-womens-sports> [<https://perma.cc/H7Q8-Y5DW>] (noting that both trans activists and legislators who seek to ban trans athletes from sport participation contend that Title IX is in their favor and, "(t)hough Title IX isn't the law in question in the court cases, once they work their way through the system we may gain clarity on what and whom the statute protects."). Note that transgender individuals rarely file Title IX cases. Erin Buzuvis, *On the Basis of Sex*: Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WIS. J.L. GENDER & SOC'Y 219, 236 (2013). The Biden administration desires for transgender athletes to enjoy the protections Title IX provided women at its passing 50 years ago, however. Eddie Pells, *Title IX's Next Battle: The Rights of Transgender Athletes*, ASSOCIATED PRESS (June 19, 2022), <http://apnews.com/article/title-ix-transgender-athletes-rights-9adfe49a8e07f66f07b5e2302bb94730> [<https://perma.cc/C6KP-7EKK>] (explaining that Biden's administration views Title IX's iconic phrasing about discrimination "on the basis of sex" to "include discrimination on the basis of gender identity and sexual orientation").

³¹ Julie Kliegman, *The Next Cultural Battle: States Take Aim at Trans Athletes*, SPORTS ILLUSTRATED (Mar. 12, 2021), <http://si.com/college/2021/03/12/states-take-aim-at-trans-athletes> [<https://perma.cc/G3GD-B5QX>] (predicting that Biden could push Congress to amend Title IX to explicitly include gender-based discrimination). This would be significant for pending litigation like *Hecox*, in that it would affirmatively protect transgender athletes instead of relying on the reasoning in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2019) (holding sex discrimination included discrimination based on sexual orientation or transgender status) under Title VII to apply with equal force under Title IX. This would permit the Department of Education's Office of Civil Rights to take enforcement actions against public schools in states with bills noncompliant with federal law. *Id.*

³² Kliegman, *supra* note 4 (speculating that Congress would pass a compromise based on testosterone requirements).

³³ While the author has strong personal feelings regarding transgender athlete participation eligibility shaped by years of working with and around elite student-

these opportunities, however, as “[t]hough Thomas became the most notable trans athlete, she is part of a larger story about how the NCAA has fallen behind in creating a welcome environment for transgender athletes.”³⁴ To explore how the NCAA arrived at—or fell to—this position, Part I describes the NCAA’s governance and the principles on which it operates and details its history of using its economic influence to effect change to policies and symbols it found discriminatory. The next Part critiques the NCAA’s passive reaction to states’ attempts to regulate transgender athlete sports participation, a nonreaction that was especially surprising given the NCAA’s history. Part III analyzes the NCAA’s 2022 revisions to its policy on transgender student-athlete participation, which amounted to another missed opportunity to support its transgender student-athletes. A brief conclusion follows.

II. THE NCAA AND ITS HISTORY OF EFFECTIVE SOCIAL ACTIVISM

The NCAA is the national governing body for college athletics and is comprised of member universities for which it promulgates rules and regulations.³⁵ Perhaps surprising to some, the NCAA also has a history of effectively influencing state politics.³⁶ In order to appreciate this history, it is necessary to understand the NCAA’s governance structure and the missions, principles, and core values that have guided its decision making. Thus, this Part describes these items and then explores some occasions where the NCAA used its economic influence to address scenarios it found discriminatory.

A. *The NCAA & Its Core Values, Missions, & Positions Regarding Inclusion & Discrimination*

The NCAA is “big, national, the focus of media and public attention, and scrutinized by legislators.”³⁷ The NCAA, a private association,

athletes in college athletics, they are not expressed in this Article and he acknowledges “It is easier to decide that there should be policies governing transgender-students’ participation in athletics than it is to decide what those policies should say.” Buzuvis, *supra* note 4, at 29.

³⁴ Gleeson, *supra* note 27.

³⁵ Mitten & Davis, *supra* note 4, at 116.

³⁶ See Daniel McClurg, *Locker Room Politics: The Role of Sports Leagues in Shaping [Anti-]Social Legislation*, 17 VA. SPORTS & ENT. L.J. 82, 82 (2017) (explaining that “Professional and intercollegiate sports leagues, conferences, and organizations play a unique role in society that facilitates their ability to influence legislation and promote social progress.”).

³⁷ Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws that Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 266 (2010). It may surprise many that state

describes itself as “a member-led organization” comprising over 1,000 colleges and universities.³⁸ Division I is the highest division in the NCAA’s three-division structure.³⁹ Nearly half a million student-athletes compete in NCAA athletics every year.⁴⁰

1. NCAA Governance

The NCAA’s governance structure features legislative bodies that include individuals who work at member universities and volunteer to serve.⁴¹ These legislative bodies, along with various committees, govern

legislatures and even United States Congresspeople have shown interest in the NCAA’s regulation of college athletics. Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 506–07 (1995). For example, in March 2022, Congresspeople released a bipartisan bill titled the NCAA Accountability Act of 2021. Dennis Dodd, *With NCAA Enforcement on Its Last Legs, Congress Seeks to Place Limits on Investigations*, CBS SPORTS (Mar. 29, 2022), <http://cbssports.com/college-basketball/news/with-ncaa-enforcement-on-its-last-legs-congress-seeks-to-place-limits-on-investigations/> [<https://perma.cc/4KB5-SVE>]. The bill attempts to streamline the NCAA infractions process through which it enforces its rules, limiting investigations to eight months and reducing the statute of limitations in half to two years. *Id.*

³⁸ *What Is the NCAA?*, NCAA, <http://ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [<https://perma.cc/Y9F9-ULPX>] (last visited June 2, 2022) (providing basic information regarding the NCAA).

³⁹ Glenn M. Wong et al., *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, ARIZ. ST. SPORTS & ENT. L.J. 356, 356 (2015). Division I includes “the largest and best-funded research universities.” Potuto, *supra* note 37, at 259. “When people think about college sports, they most often think about Division I. Its teams are usually the ones broadcast on television, they have the highest profile, and they are frequently subjected to public scrutiny.” *How the NCAA Works: Division I*, NCAA, http://ncaaorg.s3.amazonaws.com/champion-magazine/HowNCAAWorks/D1_HowNCAAWorks.pdt [<https://perma.cc/4EVW-UE49>]. Examples of differences in the three divisions include the disparities in the median size of undergraduate enrollment. The median undergraduate enrollment at Division I member universities is just under 9,000 students. *Our Three Divisions*, NCAA, <http://ncaa.org/sports/2016/1/7/about-resources-media-center-ncaa-101-our-three-divisions.aspx> [<https://perma.cc/LM79-M3R>]. Division II and III member universities have median undergraduate enrollments of 2,428 and 1,740 students, respectively. *Id.* Further, Division I member universities are able to provide multiyear, cost of attendance athletics scholarships, whereas Division II student-athletes receive partial athletics scholarships and Division III student-athletes do not receive athletics scholarships. *Id.* Member universities in each division develop and approve legislation applicable to their division, which are led by university presidents and chancellors. *Id.*

⁴⁰ *Overview*, NCAA, <http://ncaa.org/sports/2021/2/16/overview.aspx> [<https://perma.cc/X5N4-A3Q2>] (last visited Jul. 25, 2022).

⁴¹ *Governance*, NCAA, <http://ncaa.org/sports/2021/2/9/governance.aspx#:~:text=The%20NCAA%20governance%20structure%20consists,and%20set%20Association-wide%20policy> [<https://perma.cc/GRW4-2EUJ>] (last visited Jul. 25, 2022).

the NCAA's divisions and create policy.⁴² Committees also manage respective sport playing rules, run championship events, manage student-athlete health and safety issues, and consider matters impacting women in athletics and opportunities for minorities.⁴³

The Board of Governors ("BOG") is the NCAA's premier governing body.⁴⁴ It features presidents and chancellors from universities in each of the three divisions, along with select leaders from other industries.⁴⁵ The BOG's responsibilities include "leading the NCAA and presiding over issues that affect the entire NCAA membership."⁴⁶ It participates in strategic planning for the NCAA, adopts and implements policies affecting core issues and other NCAA-wide matters, initiates and settles litigation, approves the NCAA's budget, and employs the NCAA president.⁴⁷ The NCAA's national office in Indianapolis employs hundreds of staff members, led by NCAA President Mark Emmert.⁴⁸

Division I has a Board of Directors that sets the overall strategic vision of the division and a Council that serves as the division's primary policy-making body.⁴⁹ In order to include "the student-athlete voice," the Council includes two members of Division I's Student-Athlete Advisory Committee and permits them to vote.⁵⁰

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* Division I's committees oversee "everything from championships administrations and sport oversight to strategic planning and the overall health of Division I." *Division I Governance*, NCAA, <http://naaa.org/sports/2021/2/10/membership-division-i-governance.aspx> [<https://perma.cc/3GET-T96>] (last visited Jul. 25, 2022).

⁴⁵ *Who Are the NCAA Board of Governors*, NCAA, <http://naaa.org/sports/2021/5/26/who-are-the-naaa-board-of-governors.aspx> [<https://perma.cc/WQ5H-HR JW>] (last visited Jul. 25, 2022) (listing BOG members and their current positions). Members from outside college athletics include Grant Hill of the National Basketball Association's Atlanta Hawks and Robert Gates, the former US Secretary of Defense.

⁴⁶ *Id.*

⁴⁷ *Governance*, *supra* note 41.

⁴⁸ *National Office Leadership Team*, NCAA, <http://naaa.org/sports/2016/1/15/national-office-leadership-team.aspx> [<https://perma.cc/3B2R-UZK>] (last visited Jul. 25, 2022). Emmert will step down effective June 2023. *Media Center, NCAA President Mark Emmert Steps Down, Effective June 2023*, NCAA (Apr. 26, 2022), <http://naaa.org/news/2022/4/26/media-center-naaa-president-mark-emmert-steps-down-effective-june-2023.aspx> [<https://perma.cc/G8RN-V2Q>].

⁴⁹ *How the NCAA Works: Division I*, *supra* note 39 (explaining that the Board consists mostly of university presidents and chancellors). *Division I Governance*, *supra* note 44.

⁵⁰ *Id.* (listing ways in which the "student-athlete voice" is captured in Division I's governance structure).

2. NCAA Core Values & Policies Regarding Inclusion & Discrimination

For years, the NCAA has maintained multiple core values and principles that guide its daily operations and decision making. This Part explores those values and principles most relevant to this Article that strongly emphasize student-athlete well-being and inclusion while eschewing discrimination.

The NCAA often reminds that it was founded in 1906 to keep student-athletes safe and that it continues to work to protect them physically and mentally.⁵¹ Further, the NCAA emphasizes its commitment “to providing a fair, inclusive and fulfilling environment for student-athletes.”⁵² Thus, “[a]ll Association-wide governing bodies are charged with upholding and advancing the Association’s core values of fairness, safety and equal opportunity for all student-athletes.”⁵³

The NCAA Constitution operative during the period of time in which it was especially strong in response to matters it perceived as discriminatory also specifically set forth several principles relevant to this Article. Among them is the “Principle of Nondiscrimination,” which requires the NCAA to:

[P]romote an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its governance policies, educational programs, activities and employment policies, including on the basis of age, color, disability, gender, national origin, race, religion, creed or sexual orientation. It is the responsibility of each member institution to determine independently its own policy regarding nondiscrimination.⁵⁴

The Constitution likewise maintained principles of student-athlete well-being, requiring the operation of athletics programs such that they protect and enhance student-athletes’ physical and mental well-being.⁵⁵ This principle required member universities to value cultural diversity and gender equity, protect student-athletes’ health, and provide them with a

⁵¹ See *Mission and Priorities*, NCAA, <http://ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> [<https://perma.cc/753D-76A>] (last visited Jul. 25, 2022).

⁵² *Id.*

⁵³ *Governance*, *supra* note 41.

⁵⁴ NCAA, *2021-22 Division I Manual* § 2.6 (2021), <http://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/FPS7-HVRT>].

⁵⁵ *Id.* § 2.2.

safe environment.⁵⁶ The NCAA also has committed to conduct its activities “in a manner free of gender bias.”⁵⁷

Division I, specifically, sets forth numerous commitments to guide member universities’ drafting and implementation of legislation.⁵⁸ Among them is “The Commitment to Diversity and Inclusion”:

The Division I membership believes in and is committed to the core values of diversity, inclusion and equity, because realization of those values improves the learning environment for all student-athletes and enhances excellence within the membership and in all aspects of intercollegiate athletics. The membership shall create diverse and inclusive environments, promote an atmosphere of respect for and sensitivity to the dignity of every person, and include diverse perspectives in the pursuit of academic and athletic excellence. Member institutions, with assistance from the national office, are expected to develop inclusive practices that foster positive learning and competitive environments for student-athletes, as well as professional development and opportunities for athletics administrators, coaches, and staff from diverse backgrounds.⁵⁹

B. Instances Where the NCAA Exerted Its Economic Influence to Eschew Discrimination

This Part explores situations where the NCAA’s operating principles, core values, and commitments came into play and were tested by scenarios the NCAA found discriminatory. Despite long serving as a lightning rod for criticism, the NCAA has historically shown a commitment to fighting discrimination.⁶⁰ The instances described below illustrate that the NCAA’s efforts have mostly been successful.⁶¹

⁵⁶ *Id.* §§ 2.2.2–2.2.3.

⁵⁷ *Id.* § 2.3.3.

⁵⁸ *Id.* at xiii “Commitments to the Division I Collegiate Model.”

⁵⁹ *Id.*

⁶⁰ McClurg, *supra* note 366, at 84 (citing incidents involving North Carolina, states displaying the Confederate flag, and use of offensive Native American imagery as examples); *see also* Chris Spatola, *Indiana’s ‘Religious Freedom’ Law is the Real March Madness*, THE HILL (Mar. 31, 2015), <http://thehill.com/blogs/pundits-blog/civil-rights/237426-indianas-religious-freedom-law-is-the-real-march-madness/> [<https://perma.cc/48L2-92D3>] (citing the NCAA’s successful opposition to a proposed Indiana state constitutional amendment attempting to confine marriage between a man and a woman as an example of the NCAA’s “history of taking meaningful stances on social issues”).

⁶¹ Greta Anderson, *A Warning and a Price Tag*, INSIDE HIGHER ED (Apr. 14, 2021), <http://insidehighered.com/news/2021/04/14/ncaa-threatens-move-events-out-states-anti-transgender-athlete-legislation> [<https://perma.cc/8TTT-L8HN>] (quoting Ellen Staurowsky, a sports media professor at Ithaca College and national expert on social justice in sport, as stating, “The NCAA has long had considerable power of

Interestingly, the NCAA's leverage to effect social change largely stems from its sizable economic influence, including the fact that it selects host sites for its championship events.⁶² NCAA championship events take place annually throughout the country.⁶³ In order to realize the myriad benefits that accompany serving as a host, cities and regions reapply to host the events despite the work it takes to serve as a host city.⁶⁴

Of all the benefits associated with hosting NCAA championship events, perhaps chief among them is the financial boon cities and regions experience with the influx of fans, media, and consumers from across the country. Most economic experts agree that the economic stimulus that a hosting community receives makes hosting worthwhile.⁶⁵ To the delight of local businesses like restaurants and hotels, hosting NCAA events such as baseball regionals brings people to the local community.⁶⁶ When Tulsa hosted the NCAA men's basketball tournament's second- and third-round games in 2011, for example, the city expected as many as 100,000 visitors for the event.⁶⁷ Beyond the traffic generated by the games themselves, host communities also reap other social benefits including increased

persuasion when it comes to influencing state lawmakers"). For discussion of the reasons for the NCAA's success, see McClurg, *supra* note 366, at 99–100.

⁶² Anderson, *supra* note 61.

⁶³ See Trace Welch, *It Pays to Host: Economic Benefits of Hosting the NCAA Tournament*, FRONT OFFICE SPORTS (Mar. 26, 2015), <http://frontofficesports.com/it-pays-to-host-economic-benefits-of-hosting-the-ncaa-tournament/> [<https://perma.cc/37XS-KF5>].

⁶⁴ *Id.* (citing the planning, coordinated cooperation, and strains on financial and physical resources that host communities undertake in order to fulfill their duties as NCAA championship event hosts).

⁶⁵ Welch, *supra* note 63.

⁶⁶ See Ryan King, *Baseball Regional Brings in Business*, KNWA FOX 24 (June 1, 2017), <http://nwahomepage.com/news/baseball-regional-brings-in-business/729148123/> [<https://perma.cc/9R7R-TVU6>] (stressing that visitors to the community are "unique"); see also Dominic Pe Benito, *Spokane Community Reaps Benefits of Hosting NCAA Tournament*, THE GONZAGA BULLETIN (Apr. 27, 2022), http://gonzagabulletin.com/sports/spokane-community-reaps-benefits-of-hosting-ncaa-tournament/article_6eef54b6-c0c9-11ec-9830-f7732d99af8e.html [<https://perma.cc/K6EJ-A9F>]. When San Diego recently hosted a round of the NCAA men's basketball tournament, its sports commission estimated that half of the tournament's attendees visited from out of town. Alexander Nguyen, *March Madness Brings Economic Boost to San Diego Businesses*, KPBS (Mar. 18, 2022), <http://kpbs.org/news/local/2022/03/17/ncaa-tournament-teams-to-hold-open-practices-at-viejas-arena> [<https://perma.cc/8ARR-J5PY>] (noting that the commission expected the city's hosting of a round of the 2022 tournament to result in an influx of between \$6 and \$10 million into the local economy).

⁶⁷ Jason Notte, *How NCAA Tournament Host Cities Win*, THE STREET (Mar. 9, 2011), <http://thestreet.com/lifestyle/sports/how-ncaa-tournament-host-cities-win-11036215> [<https://perma.cc/9EGY-EX4R>] (noting that these visitors brought in an estimated \$13 million in revenue to the region).

advertising interest from national companies and large youth sports clinics occurring at or around the time of the NCAA championships.⁶⁸ Further, the mere presence of the community on nationally televised games provides cities and regions with free advertising to millions of fans.⁶⁹

A community's involvement with NCAA postseason basketball is especially lucrative. By hosting the Division I men's basketball Final Four, for example, a community can receive as much as \$300 million in revenue, and a city hosting the women's tournament could bring in as much as \$125 million.⁷⁰ Even serving as a first- and second-round NCAA men's basketball tournament host site is lucrative.⁷¹ For example, prior to the cancellation of the 2020 tournament due to the COVID-19 pandemic, Spokane, Washington, was selected to host those rounds.⁷² Spokane's economy missed out on an estimated \$20 million in revenue due to the cancellation.⁷³

Hosting any of the other ninety NCAA championship events can also have a "significant economic impact."⁷⁴ For example, Oklahoma City annually hosts the NCAA softball championship, known as the Women's College World Series.⁷⁵ "College sports are an economic powerhouse in Oklahoma,"⁷⁶ and the Women's College World Series generates over \$20

⁶⁸ See Alex King, "We've Been Hosting NCAA Games for Decades," *How the Tournament Brings Business to Dayton*, DAYTON 24/7 NOW (Mar. 14, 2022), <http://dayton247now.com/news/local/weve-been-hosting-ncaa-games-for-decades-how-the-tournament-brings-business-to-dayton> [https://perma.cc/RMQ7-TAMZ] (citing conversation with Sharon Howard, a member of Dayton's local organizing committee, who estimates the economic impact of hosting men's college basketball tournament games at \$5 million to the community). Host communities benefit when supporters of NCAA championship events seek to advertise in the communities, when youth clinics and fan parties occur in conjunction with the events, and visitors rent event spaces for parties and other functions. Notte, *supra* note 67 (describing the NCAA men's basketball tournament as an "ATM" for host communities).

⁶⁹ See Pe Benito, *supra* note 67 (quoting the VP of Spokane Sports, Ashley Blake, regarding the community serving as a host for the NCAA women's basketball tournament, which resulted in an economic impact of over \$4 million for the community).

⁷⁰ Anderson, *supra* note 61 (citing Staurowsky's comments).

⁷¹ See Pe Benito, *supra* note 66.

⁷² *Id.*

⁷³ *Id.* (citing Visit Spokane as the source of the amount lost).

⁷⁴ Anderson, *supra* note 61 (citing Staurowsky's comments).

⁷⁵ Associated Press, *NCAA Names Host Sites for Softball Regionals in 3 States with Transgender Athlete Bans*, ESPN (May 16, 2021), http://espn.com/college-sports/story/_/id/31458645/ncaa-names-host-sites-softball-regionals-3-states-transgender-athlete-bans [https://perma.cc/Y6Y3-YDK].

⁷⁶ Molly Hensley-Clancy, *The NCAA Threatened States Over Anti-Transgender Bills. But the Games Went On*, THE WASH. POST (June 3, 2021), <http://washingtonpost.com/sports/2021/06/03/ncaa-championships-transgender-athlete-bills/> [https://perma.cc/34U4-47Y5] (describing events like the softball

million in revenue for Oklahoma City every year.⁷⁷ More broadly, hosting NCAA events generates \$100 million annually for the state of Oklahoma's economy.⁷⁸

Hosting NCAA baseball postseason tournament rounds can likewise be lucrative. A University of Arkansas study revealed that fans visiting its community for a regional baseball tournament spent about \$2 million per day in addition to paying for tickets and in-stadium purchases.⁷⁹

Hosting championship events also can contribute to the local university's on-field success. Since 2000, the hosting university has won over two-thirds of regional baseball tournaments.⁸⁰ In softball, the University of Oklahoma has won numerous national softball championships in the tournament in its home state.⁸¹

The NCAA stages championship events in nearly every state, giving it power and leverage other teams and sports leagues lack.⁸² It traditionally chooses regional sites on or near university campuses for postseason championship tournaments based on a university's performance in that sport, quality of facilities, and financial considerations.⁸³ The NCAA recognizes that a state's inability to host NCAA championship events can

championship in Oklahoma City and baseball's College World Series in Omaha as "economic institutions" that drive local tourism and showcase their cities).

⁷⁷ Associated Press, *supra* note 75 (pointing out that part of this revenue likely stems from the fact that the home state is typically well-represented, as the University of Oklahoma had won numerous national softball championships). According to University of Oklahoma head softball coach Patty Gasso, "Oklahoma City really flourishes off of this college world series." Jason Batacao, *OU Softball: Patty Gasso Addresses New Transgender Athlete Legislation, Which Could Affect Women's College World Series*, *OU DAILY* (Mar. 24, 2022), http://oudaily.com/sports/ou-softball-patty-gasso-addresses-new-transgender-athlete-legislation-which-could-affect-womens-college-world/article_4a5bdfa8-abb0-11ec-8d8b-c30d62a5bf42.html [https://perma.cc/L8M8-6ZQ].

⁷⁸ Paul Myerberg, *NCAA Selects Three States with Transgender Athlete Bans as Regional Hosts for Softball Tournament*, *USA TODAY* (May 17, 2021), <http://usatoday.com/story/sports/college/2021/05/17/ncaa-states-transgender-athlete-bans-host-softball-regionals/5129476001/> [https://perma.cc/W5EW-JDX].

⁷⁹ Eric Olson, *NCAA Reaches a Key Moment as Transgender Laws Multiply*, *ASSOCIATED PRESS* (May 6, 2021), <http://apnews.com/article/laws-baseball-sports-50d9c5613dc6c0b540b90542c7a2bf7d> [https://perma.cc/B7HY-BU7].

⁸⁰ *Id.*

⁸¹ Associated Press, *supra* note 75. When asked about the possibility that the NCAA may move the softball championship from Oklahoma City due to Oklahoma's then-potential passing of an anti-transgender sport participation law, Gasso professed that, "when it comes to these things, it's so out of my control, I don't know enough about it," but emphasized her university's mission of inclusiveness. Batacao, *supra* note 77.

⁸² Hensley-Clancy, *supra* note 76.

⁸³ Associated Press, *supra* note 75 (citing NCAA postseason softball and baseball tournaments as examples).

dramatically impact the state's finances.⁸⁴ Thus, by threatening to withhold hosting privileges from a state due to its politics, the NCAA effectively throws its "economic weight and influence" around.⁸⁵

Further, the inability to host NCAA championships causes a state's reputation to suffer because of the symbolism's magnitude.⁸⁶ The NCAA has enjoyed great success in influencing state lawmakers' policy decisions by taking advantage of this leverage.⁸⁷ Not only has the NCAA used its position to stop "hateful legislation from taking effect," it has even "helped to reverse discriminatory laws on the books" in some cases.⁸⁸ Some notable examples follow.

1. Confederacy Symbols

The only NCAA-sponsored sport with predetermined championship sites is Division I men's basketball.⁸⁹ In 2001, the NCAA announced it would no longer grant predetermined hosting privileges to states with a highly visible presence of the Confederate flag.⁹⁰ The policy did not prohibit states from serving as event hosts for championships awarded

⁸⁴ Anderson, *supra* note 61 (citing comments made by Chase Strangio, deputy director for the American Civil Liberties Union).

⁸⁵ Anderson, *supra* note 61; *see also* Hensley-Clancy, *supra* note 76 (describing the NCAA's "long held enormous economic power with its championships").

⁸⁶ Susan Adams, *The NCAA's Threat to Pull Championships From Anti-LGBTQ States Carries Little Financial Weight*, FORBES (Apr. 14, 2021), <http://forbes.com/sites/susanadams/2021/04/14/the-ncaas-threat-to-pull-championships-from-anti-lgbtq-states-carries-little-financial-weight/?sh=5835026858e9> [<https://perma.cc/HN9W-NNR6>] (quoting Andrew Zimbalist of Smith College and Victor Matheson of the College of the Holy Cross).

⁸⁷ Anderson, *supra* note 61; *see also* Brandon Schlager, *NCAA 'Concerned' About Controversial Religious Freedom Law in Indiana*, SPORTING NEWS (Mar. 26, 2015), <http://sportingnews.com/us/ncaa-basketball/news/ncaa-mark-emmert-indiana-controversial-religious-freedom-act-law-gay-bi-lesbian-transgender-march-madness-final-four/11zoxifmol8tl1vfheld1gpmse> [<https://perma.cc/3WDK-LNMN>] (explaining "The NCAA has used its major sporting events as leverage to take a stance against hot-button political issues in the past").

⁸⁸ Gillian R. Brassil, *NCAA Responds, Tentatively, to Transgender Athlete Bans*, N.Y. TIMES (Apr. 12, 2021), <http://nytimes.com/2021/04/12/sports/ncaabasketball/ncaa-transgender-athletes.html> [<https://perma.cc/FSD6-3LAJ>] (quoting Alphonso David, president of the Human Rights Campaign).

⁸⁹ NCAA, *Report of the NCAA Board of Governors June 19, 2020 Videoconference*, http://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Jun2020BOG_Jun19REPORT.pdf [<https://perma.cc/PA7T-XQWE>] (last visited Dec. 23, 2022) [hereinafter *Board of Governors Report*].

⁹⁰ Eddie Timanus, *NCAA Expands Its Policy on Confederate Flags to All Championships*, USA TODAY (June 19, 2020), <http://usatoday.com/story/sports/college/2020/06/19/ncaa-expands-confederate-flag-policy-championship-events-mississippi/3222212001/> [<https://perma.cc/TK6P-GXJL>].

based on competitive record, ranking, or championship seeding,⁹¹ such as baseball, softball, lacrosse, and women's basketball tournaments.⁹²

At the time the NCAA enacted its policy, Mississippi and South Carolina were the only two states to which it applied.⁹³ In 2015, however, South Carolina stopped flying the flag at its state Capitol and thus complied with the NCAA's policy, leaving Mississippi as the lone state affected by the rule.⁹⁴

In 2020, NCAA President Mark Emmert noted that individuals and groups had implored the NCAA to extend the ban to non-predetermined sites for any state recognizing the Confederate battle flag.⁹⁵ He also described correspondence from current and former student-athletes from Mississippi universities requesting that the BOG expand its policy on Confederate symbols such that it would apply to non-predetermined championship sites.⁹⁶ In 2020, the BOG voted unanimously, effective immediately, to expand the NCAA Confederate Battle Flag Policy to apply to all NCAA championships to cover predetermined and non-predetermined sites.⁹⁷ Emmert explained, "We must do all we can to ensure that NCAA actions reflect our commitment to inclusion and support all our student-athletes. There can be no place within college sports where any student-athlete is demeaned or unwelcome."⁹⁸

The NCAA's policy change and warning pressured Mississippi legislators and its governor to remove the Confederate battle emblem from the state's flag.⁹⁹ Though the flag had survived previous removal attempts, Mississippi politicians responded swiftly to the NCAA's policy and removed the flag from all state buildings.¹⁰⁰ The NCAA's stance and

⁹¹ *Board of Governors Report*, *supra* note 89.

⁹² See Alex Scarborough, *NCAA Extends Policy Banning Championship Events Where Confederate Flag Flown*, ESPN (June 19, 2020), http://espn.com/college-sports/story/_/id/29334498/ncaa-extends-policy-banning-championships-where-confederate-flag-flown [<https://perma.cc/UY72-LTFY>].

⁹³ *Id.*

⁹⁴ *Id.* (noting that South Carolina removed the flag from its Capitol after the murders of nine members of the historically black Emanuel African Methodist Church in Charleston).

⁹⁵ *Board of Governors Report*, *supra* note 89.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Scarborough, *supra* note 92 (explaining the policy would now extend to include all championship sites awarded based on competitive success, such as baseball, softball, lacrosse, and women's basketball).

⁹⁹ Anderson, *supra* note 61. Mississippi had used the flag including the Confederate battle emblem for 126 years. Brassil, *supra* note 88 (noting that Mississippi "(e)lected officials quickly acted to lower and change the flag").

¹⁰⁰ Fabiola Cineas, *Mississippi's Future Lies With Its New State Flag*, VOX (Jul. 1, 2020), <http://vox.com/2020/7/1/21307556/mississippi-state-flag> [<https://perma.cc/RE2L-DLN2>] (noting that the flag had been adopted 126 years prior).

influence on Mississippi politicians exemplify the NCAA's success in influencing change within state politics.¹⁰¹

2. Native American Imagery

In what some thought was a controversial decision,¹⁰² the NCAA Executive Committee announced in 2005 its Native American mascot policy precluding universities “from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames, or imagery at any NCAA championships.”¹⁰³ The policy took effect the following year and prohibits universities with such mascots from hosting NCAA championship events.¹⁰⁴ Then-NCAA President Myles Brand explained that the NCAA objects to athletics departments using racial, ethnic, and national origin references due to NCAA core values regarding cultural diversity, ethical sportsmanship, and nondiscrimination.¹⁰⁵ The policy

¹⁰¹ Anderson, *supra* note 61 (citing Staurowsky's comments).

¹⁰² For example, see Kenneth B. Franklin, *A Brave Attempt: Can the National Collegiate Athletic Association Sanction Colleges and Universities with Native American Mascots?*, 13 J. INTELL. PROP. L. 435, 436 (2006) (explaining the controversy stems from “the broad range of intense opinions surrounding the debate over whether or not sports teams should use (N)ative American imagery”); see also Ryan Fulda, *Is the NCAA Prohibition of Native American Mascots from Championship Play a Violation of the Sherman Antitrust Act*, 31 AM. INDIAN L. REV. 163, 164, 167 (2006). On one side, proponents of regulating use of Native American imagery in college athletics believe the imagery that universities use mocks and degrades Native American customs and reveals ignorance of Native American culture. *Id.* at 167. On the other hand, opponents believe university traditions serve as an honor to Native Americans by portraying them as brave and courageous. *Id.*

¹⁰³ NCAA, *Timeline – 2000s*, <http://ncaa.org/sports/2021/6/14/timeline-2000s.aspx> [<https://perma.cc/WB35-UEZS>] (last visited Dec. 23, 2022) [hereinafter *NCAA Timeline*]. The NCAA Executive Committee consisted of university presidents and chancellors. NCAA, *NCAA News Release: NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events* (Aug. 5, 2005), <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/NCAA%2BExecutive%2BCommittee%2BIssues%2BGuidelines%2Bfor%2BUse%2Bof%2BNative%2BAmerican%2BMascots%2Ba%2BChampionship%2BEvents.html> [<https://perma.cc/57PX-2R98>] [hereinafter *NCAA Release on Native American Mascot Policy*].

¹⁰⁴ *NCAA Timeline*, *supra* note 103. For critique of the policy, see Andre D. Cummings & Seth E. Harper, *Wide Right: Why the NCAA's Policy on the American Indian Mascot Issue Misses the Mark*, 9 U. MD. L.J. RACE RELIG. GENDER & CLASS 135, 135 (2009) (crediting the NCAA for “tackling this divisive issue in an area of consistent debate and contention for the past three decades, (but) the current policy only begins to address the issue and ultimately fails to find a reasonable solution.”).

¹⁰⁵ *NCAA Release on Native American Mascot Policy*, *supra* note 103 (quoting Brand as applauding universities who had taken steps to make changes to their mascots, nicknames, and imagery). The policy evolved from discussions at the NCAA Minority Opportunities and Interest Committee meeting that year. *Id.* The group had

also aims to instill “a sense of community awareness and social integrity in student-athletes.”¹⁰⁶

To be clear, the NCAA does not directly prohibit Native American mascots, nicknames, and imagery, “as that is an institutional matter.”¹⁰⁷ Instead, it prohibits those universities that continue to use them from serving as hosts for NCAA championship events.¹⁰⁸ Thus, the Executive Committee created and provided best practices for universities and athletics departments that elected to continue to use Native American mascots, nicknames, and imagery.¹⁰⁹

Universities affected by the new policy could seek further review through the NCAA governance structure.¹¹⁰ A review committee granted policy exemptions to universities, including Florida State University (Seminoles), Central Michigan University (Chippewas), and the University of Utah (Utes), due mainly to their close connections with their namesake tribes.¹¹¹ However, many universities immediately changed their mascots to comply with the policy, including Southeastern Oklahoma State University’s switch from the “Savages” to the “Savage Storm.”¹¹²

3. Indiana’s “Religious Freedom” Law

In 2015, then-Governor of Indiana Mike Pence signed into law a “Religious Freedom” bill that many feared would effectively permit businesses to deny service to gay and lesbian individuals based on

reviewed the issue for a few years, including taking into account the NCAA Constitution, university self-evaluations, correspondence from the Native American community, and various publications. Franklin, *supra* note 102.

¹⁰⁶ Ian Botnick, *Honoring Trademarks: The Battle to Preserve Native American Imagery in the National Collegiate Athletic Association*, 7 J. MARSHALL REV. INTELL. PROP. L. 735, 737 (2008).

¹⁰⁷ *NCAA Release on Native American Mascot Policy*, *supra* note 103 (quoting Walter Harrison, President of the University of Hartford and chair of the Executive Committee).

¹⁰⁸ *Id.* The policy has received criticism for possibly violating civil rights, First Amendment, trademark, and antitrust laws. Botnick, *supra* note 106, at 737.

¹⁰⁹ *NCAA Release on Native American Mascot Policy*, *supra* note 103.

¹¹⁰ *Id.* (referencing Harrison statement). Eighteen universities continued to use Native American imagery or references at the time, subjecting them to the policy. *Id.* Among them were Florida State University, the University of Utah, and the University of Illinois-Champaign. *Id.*

¹¹¹ Franklin, *supra* note 102. A significant factor for these universities receiving exemptions was their relationship with the respective affected tribes. Fulda, *supra* note 102, at 171. For commentary on the appeals process and its results, see Cummings & Harper, *supra* note 104.

¹¹² McClurg, *supra* note 36, at 87.

religious beliefs.¹¹³ Under it, the state could not create legislation infringing on a person's religious beliefs, with the definition of a person including businesses, associations, and other organizations.¹¹⁴ However, Indiana did not consider the LGBT community a protected class, and many interpreted the bill as a means for businesses and organizations to legally discriminate.¹¹⁵

And if the policy wasn't controversial (and potentially harmful to student-athletes) enough, it was happening in the NCAA's backyard. The NCAA, headquartered in Indianapolis, had a front row seat to the troubling "Religious Freedom" law. With both the Men's and Women's Basketball "Final Four" events occurring in Indianapolis within the following year,¹¹⁶ the NCAA was forced to grapple with the new law's potential impacts on student-athletes. Immediately following Pence signing the bill into law, Emmert released a statement:

The NCAA national office and our members are deeply committed to providing an inclusive environment for all our events. We are especially concerned about how this legislation could affect our student-athletes and employees. We will work diligently to assure student-athletes competing in, and visitors attending, next week's Men's Final Four in Indianapolis are not impacted negatively by this bill. Moving forward, we intend to closely examine the implications of this bill and how it might affect future events as well as our workforce.¹¹⁷

¹¹³ *NCAA's Response to Indiana's 'Religious Freedom' Law is Perfect*, YAHOO! SPORTS (Mar. 26, 2015), <http://sports.yahoo.com/news/ncaa-s-response-to-indiana-s-religious-freedom-law-is-perfect-203433125.html> [<https://perma.cc/64DG-WBB8>] [hereinafter *NCAA's Response*]. Gay marriage was legalized in Indiana the prior year, and activists suspected Republicans pushed the religious freedom law through in response. *Indiana to Clarify 'Religious Freedom' Law*, NEWSWEEK (Mar. 30, 2015), <http://newsweek.com/indiana-clarify-religious-freedom-law-318031> [<https://perma.cc/P79G-AY5A>].

¹¹⁴ Amanda Holpuch, *Indiana Amends Religious Freedom Bill to Put an End to Discrimination*, THE GUARDIAN (Apr. 2, 2015), <http://theguardian.com/us-news/2015/apr/02/indiana-republicans-religious-freedom> [<https://perma.cc/EVY2-J5BL>].

¹¹⁵ *Id.*

¹¹⁶ See *NCAA's Response*, *supra* note 113. "Given logistical issues," the 2015 men's basketball Final Four went on as planned. Jon Solomon, *NCAA Expresses Concern Over Indiana 'Religious Freedom' Law*, CBS SPORTS (Mar. 26, 2015), <http://cbssports.com/college-football/news/ncaa-expresses-concern-over-indiana-religious-freedom-law/> [<https://perma.cc/F2QF-KQX9>] (citing the NCAA's announcement of a three-day Final Four music festival including Imagine Dragons and Weezer as evidence that plans would not change). Spatola, *supra* note 60.

¹¹⁷ *NCAA's Response*, *supra* note 113 (describing Emmert's statement as "a good and bold threat").

Emmert would later express that the law needed “to get fixed,” explaining that the environment it would create would be one in which college athletics would be “very difficult to operate.”¹¹⁸ Despite being locked into a lease through 2060 at \$1 per year in rent,¹¹⁹ Emmert doubled down on his commitment to protecting student-athletes and threatened to relocate NCAA headquarters if the government did not repeal or modify the law.¹²⁰ The coaches of the men’s basketball programs participating in the Final Four supported the NCAA’s position, issuing a joint statement that discrimination should not be tolerated and describing discussions they had with their student-athletes regarding “this sensitive and important issue.”¹²¹

Realizing the impact of the NCAA’s potential departure on the city’s economy, Indianapolis’s Republican mayor broke with Pence and party lines on the bill.¹²² Other Indiana business community and civic leaders voiced opposition to the law,¹²³ and some states moved to prohibit travel to Indiana.¹²⁴ Ultimately, combined with threats from business leaders and

¹¹⁸ Tyler Conway, *Indiana’s Religious Freedom Law Draws Response From Sports World*, BLEACHER REPORT (Apr. 2, 2015), <http://bleacherreport.com/articles/2414281-indianas-religious-freedom-law-draws-response-from-sports-world> [<https://perma.cc/SQC8-4F4F>].

¹¹⁹ Spatola, *supra* note 60.

¹²⁰ Conway, *supra* note 118.

¹²¹ *Id.* (quoting joint statement issued by John Calipari of the University of Kentucky, Tom Izzo of Michigan State University, Bo Ryan of the University of Wisconsin, and Mike Krzyzewski of Duke University).

¹²² Solomon, *supra* note 116 (describing Indianapolis mayor Greg Ballard’s stance). Securing the NCAA’s headquarter’s location in Indianapolis, while costly financially, paid off by providing momentum to the city’s economic turnaround and helping change its future. Dan Matheson, *How the NCAA Helped Transform Indianapolis*, COLLEGE AD (May 3, 2017), <http://collegead.com/how-the-ncaa-helped-transform-indianapolis> [<https://perma.cc/9A5P-7JBH>]. The NCAA’s relationship with Indianapolis includes a guarantee of a major collegiate sporting event in the city annually, including the men’s basketball Final Four every five years. *Id.* With this cycle in place, Indianapolis has become the nation’s leader in hosting Final Fours, with the events bringing in nearly \$200 million to the local economy. *Id.* In all, the NCAA’s current arrangement with Indianapolis and Indiana projects to lead to more than \$1 billion in economic impact. *Id.*

¹²³ Tom Cook, Tom LoBianco, & Doug Stanglin, *Indiana Governor Signs Amended ‘Religious Freedom’ Law*, USA TODAY (Apr. 2, 2015), <http://usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/> [<https://perma.cc/C39C-UQTK>] (citing Angie’s List, for example, whose headquarters is in Indianapolis, after it put a planned expansion of its campus on hold upon the passing of the original law).

¹²⁴ Holpuch, *supra* note 114. San Francisco, Seattle, and the state of Connecticut were among those banning official travel to Indiana. *Indiana to Clarify ‘Religious Freedom’ Law*, *supra* note 113. The University of Connecticut’s men’s basketball staff did not travel to Indianapolis for the men’s basketball Final Four out of a show of support for the state’s position on Indiana’s law. Conway, *supra* note 118. Likewise,

financial institutions, opposition to the bill spurred Republicans to reconsider the law.¹²⁵

Within weeks, Pence signed into law the so-called Religious Freedom Restoration Act, which revised the maligned Religious Freedom Act.¹²⁶ Under the compromise legislation, the Restoration Act could not be used as a legal defense to discriminate against customers based on their sexual orientation or gender identity.¹²⁷ An amendment to the Act also clarified that it does not authorize a provider to refuse service to members of the public based on race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or military service.¹²⁸

When it became apparent that Indiana would revise its law, Emmert stated:

We are very pleased the Indiana legislature is taking action to amend Senate Bill 101 so that it is clear individuals cannot be discriminated against. NCAA core values call for an environment that is inclusive and non-discriminatory for our student-athletes, membership, fans, staff and their families. We look forward to the amended bill being passed quickly and signed into law expeditiously by the governor.¹²⁹

Thus, like its policy regarding the Confederate flag, the NCAA's actions concerning Indiana's Religious Freedom Law serve as an example of the NCAA effectively using its economic influence to alter state policy that it found discriminatory.

University of Southern California athletics director Pat Haden announced he would not visit Indianapolis for a College Football Playoff committee meeting out of respect for his gay son. *Id.*

¹²⁵ Cook, *supra* note 123 (noting that Republican leaders defended the law by explaining they never believed it authorized discrimination). At the time, some considered the flap over the religious freedom law to be the “biggest political crisis” of Pence’s career. *See, for example, German Lopez, How Indiana’s Religious Freedom Law Sparked a Battle Over LGBT Rights, VOX (Apr. 2, 2015),* <http://vox.com/2015/3/31/8319493/indiana-rfra-lgbt> [<https://perma.cc/A32C-NEQA>].

¹²⁶ Cook, *supra* note 123 (noting Pence continued to stand by the law despite criticism, citing “misconceptions promulgated by the media”).

¹²⁷ *Id.* (explaining that government officials and business leaders reached a compromise on the law, marking the first occasion any protections against discrimination were extended to gay and lesbian individuals in Indiana law).

¹²⁸ Holpuch, *supra* note 114 (noting that Angie’s List’s CEO described the change as “insufficient” since it did not fully repeal the Act).

¹²⁹ Conway, *supra* note 118.

4. North Carolina's "Bathroom Bill"

In 2016, just five years before it altered its transgender student-athlete participation policy to Lia Thomas's detriment midseason, the NCAA "made good on its threat to pull championship events out of North Carolina in response to the state's 'bathroom bill,' which essentially required transgender people to use restrooms according to their sex at birth and not their gender identity."¹³⁰ The subject legislation, House Bill 2 ("HB2"), titled "An Act to Provide For Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations" passed in March 2016.¹³¹ HB2 required providers to designate multiple occupancy bathrooms and changing facilities for use according to individuals' biological sex.¹³² Thus, the bill prohibited transgender individuals—regardless of any legal or surgical steps they may have taken to transition—from using public restrooms, locker rooms, or facilities aligned with their gender identities.¹³³ Inevitably, HB2 treated transgender students differently.¹³⁴

Immediately the highest profile issue in North Carolina when it passed, HB2 likewise gained national attention.¹³⁵ Reaction against HB2 "was immediate and wide ranging."¹³⁶ The NCAA jumped into the fray and, citing its "commitment to fairness and inclusion," relocated all seven previously awarded championship events from the state in the 2016–17 academic year.¹³⁷ The BOG made the move due to North Carolina's

¹³⁰ Olson, *supra* note 79. HB2 addressed more than just restrooms – it was a sweeping anti-civil rights measure that undermined antidiscrimination laws that included sexual orientation or gender identity and prohibited new local laws from doing so. Mark Dorosin, *North Carolina's H.B.2: A Case Study in LGBTQ Rights, Preemption, and the (Un)Democratic Process*, 122 W. VA. L. REV. 783, 784 (2020) (explaining that HB2 was "mischaracterized as 'the bathroom bill'").

¹³¹ H.B. 2, 2016 Gen. Assemb., Extra Session 2 (N.C. 2016).

¹³² *Id.* The bill defined "biological sex" as "the physical condition of being male or female, which is stated on the person's birth certificate." Public Facilities Privacy and Security Act, 2016-3 N.C. Sess. Laws 12 (2016) at Part I.

¹³³ Jessica Rosen, *All American Discrimination: North Carolina and Transgender Student-Athletes*, 36 CARDOZO ARTS & ENT. L.J. 861, 862 (2018).

¹³⁴ *Id.* at 885.

¹³⁵ Dorosin, *supra* note 130, at 785 (explaining that HB2 forced North Carolina and the country to consider how, among other things, political processes address, or fail to address, civil rights expansion for historically marginalized groups).

¹³⁶ *Id.* at 802 (describing reactions including cities like New York, Seattle, San Francisco, and West Palm Beach, Florida, as well as the State of New York, banning publicly funded travel to North Carolina).

¹³⁷ NCAA, *NCAA to Relocate Championships from North Carolina for 2016-17*, (Sept. 12, 2016), <http://ncaa.org/news/2016/9/12/ncaa-to-relocate-championships-from-north-carolina-for-2016-17.aspx> [<https://perma.cc/QV4A-Q2BW>] [hereinafter

“cumulative actions . . . concerning civil rights protections,” adding that NCAA championships and events must promote an inclusive atmosphere for student-athletes, coaches, administrators, and fans.¹³⁸ North Carolina laws, however, made “it challenging to guarantee that host communities can help deliver on that commitment if NCAA events remained in the state.”¹³⁹ Emmert explained, “We believe in providing a safe and respectful environment at our events and are committed to providing the best experience possible for college athletes, fans and everyone taking part in our championships.”¹⁴⁰

The NCAA went on to explain how North Carolina’s “dynamic” differed from other states:

- North Carolina laws invalidate any local law that treats sexual orientation as a protected class or has a purpose to prevent discrimination against lesbian, gay, bisexual or transgender individuals.
- North Carolina has the only statewide law that makes it unlawful to use a restroom different from the gender on one’s birth certificate, regardless of gender identity.
- North Carolina law provides legal protections for government officials to refuse services to the LGBT community.
- Five states plus numerous cities prohibit travel to North Carolina for public employees and representatives of public institutions, which could include student-athletes and campus staff. These states are New York, Minnesota, Washington, Vermont and Connecticut.¹⁴¹

Thus, the BOG’s decision to remove events from North Carolina was “consistent with the NCAA’s long-standing core values of inclusion, student-athlete well-being and creating a culture of fairness.”¹⁴² The loss

NCAA Relocates Championships from NC]. The NCAA’s move was a “monumental statement of solidarity.” Christin Flynn Lal, XVI JOURNAL OF HEALTH & BIOMEDICAL LAW 231, 260 (2020).

¹³⁸ *NCAA Relocates Championships from NC*, *supra* note 137.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* The University of Albany, in accordance with New York Governor Andrew Cuomo’s travel ban to North Carolina, canceled sporting events against universities including Duke University and the University of North Carolina, Chapel Hill. Rosen, *supra* note 133, at 885. Likewise, the University of Vermont canceled a women’s basketball game against the University of North Carolina due to concerns over HB2. *Id.*

¹⁴² *NCAA Relocates Championships from NC*, *supra* note 137 (quoting then BOG chair and Georgia Institute of Technology president G.P. “Bud” Peterson).

of the ability to host championships within the state jeopardized hundreds of millions of dollars in revenue for North Carolina.¹⁴³

Perhaps most notably, in what Karen Weaver, a former college coach and athletics administrator and current faculty member at the University of Pennsylvania, characterized as “a bold step,” the NCAA took away Greensboro, North Carolina’s ability to host first- and second-round tournament games in the 2017 men’s basketball championship tournament.¹⁴⁴ In doing so, the NCAA “drew a bright line” to illustrate its stance on North Carolina’s law.¹⁴⁵ This blow to HB2 supporters was “politically damaging . . . given the central role of college basketball in the state.”¹⁴⁶ North Carolina has been described as the center of the college basketball universe, with it being the only state with multiple universities that have won men’s basketball national championships.¹⁴⁷ Notably, North Carolina had hosted NCAA men’s basketball tournament games in twenty-nine of the previous thirty years.¹⁴⁸ The NCAA doubled down on its threat, announcing that if North Carolina failed to repeal HB2 by the end of March 2016, the state would be ineligible to host any championship events for the next five years which would have resulted in an economic impact of half a billion dollars.¹⁴⁹

After the NCAA switched first- and second-round men’s basketball tournament games from Greensboro, North Carolina, to Greenville, South

¹⁴³ Associated Press, *‘Bathroom Bill’ to Cost North Carolina \$3.76 Billion*, CNBC (Mar. 27, 2017), <http://cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html> [<https://perma.cc/4PTL-6VLR>].

¹⁴⁴ Olson, *supra* note 79.

¹⁴⁵ 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), <http://si.com/college/2021/06/23/trans-athlete-ban-ncaa-pressure-daily-cover> [<https://perma.cc/WN9F-85MQ>] (contrasting the NCAA’s responses to states’ anti-transgender sport participation legislation and North Carolina’s so-called “bathroom bill”).

¹⁴⁶ Dorosin, *supra* note 130, at 804 (describing the NCAA’s actions as more impactful than the National Basketball Association pulling the 2017 All-Star Game out of Charlotte).

¹⁴⁷ See David Glenn, *State of North Carolina: Center of College Basketball Universe and Historically More than UNC and Duke*, THE ATHLETIC (Mar. 20, 2019), <http://theathletic.com/877538/2019/03/20/state-of-north-carolina-center-of-college-basketball-universe-and-historically-more-than-unc-and-duke> [<https://perma.cc/9K4P-C7UU>] (noting that the University of North Carolina, Chapel Hill, Duke University, and North Carolina have won men’s basketball national titles, while other universities in the state such as Wake Forest University have also enjoyed success in the sport).

¹⁴⁸ McClurg, *supra* note 36, at 85.

¹⁴⁹ Dorosin, *supra* note 130, at 809.

Carolina, and before the NCAA could relocate any more events,¹⁵⁰ North Carolina lawmakers abruptly “retreated” from the “controversial law” in the face of “economic pressure.”¹⁵¹ After the legislature “scrambled” to repeal the bathroom law and approve a bill reversing their prior law to accommodate the NCAA’s ultimatum, Democratic Governor Roy Cooper signed it.¹⁵² The reversal resulted from the state losing key NCAA events and the subsequent economic damage.¹⁵³

While it felt North Carolina’s compromise legislation was “far from perfect” because it did not fully repeal HB2, the NCAA believed it sufficient for nondiscriminatory championships to occur in the state.¹⁵⁴ Thus, the NCAA would permit previously awarded championships to

¹⁵⁰ Olson, *supra* note 79. The NCAA’s threat to relocate additional events “had added motional heft” at the time, as the University of North Carolina was preparing to play in the Final Four. Mark Berman & Amber Phillips, *North Carolina Governor Signs Bill Repealing and Replacing Transgender Bathroom Law Amid Criticism*, THE WASH. POST (Mar. 30, 2017), <http://washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-sav-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/> [https://perma.cc/A3AB-VCUG]. “In an interesting twist of fate, the NCAA relocated the first two rounds of the 2017 Men’s Basketball Tournament from North Carolina to Greenville, South Carolina. In the second round, the University of South Carolina beat heavily favored Duke University, which caused some to speculate whether Duke would have been upset if the game had been played in North Carolina.” McClurg, *supra* note 36, at 87.

¹⁵¹ Berman & Phillips, *supra* note 150 (explaining that the NCAA’s threat caused possible repeal efforts to gain steam). The Associated Press estimated the state’s enactment of HB2 would cost it over \$3.7 billion in lost business over a dozen years, partly due to the NCAA relocating events outside the state. Associated Press, *supra* note 143. Thus, the timing of HB2’s repeal was no coincidence, as explained by Republican Rep. Carl Ford, who stated, “if we could have props in here, I would take a basketball covered in money and roll it down the middle aisle there, because that’s what this is about – money and basketball.” McClurg, *supra* note 36, at 86.

¹⁵² Berman & Phillips, *supra* note 150 (noting civil rights advocates opposed the new law’s ban on local governments from passing measures to protect LGBT individuals). Prior to its passage, the NCAA had assured North Carolina politicians the new law was satisfactory. Dorosin, *supra* note 130, at 804. House Bill 142, signed a year after HB2 passed, nullified HB2’s discriminatory bathroom language but kept regulation of bathroom access with the legislature and precluded local governments from passing antidiscrimination ordinances. Rosen, *supra* note 133, at 865.

¹⁵³ Jason Hanna, Madison Park, and Elliott C. McLaughlin, *North Carolina Repeals ‘Bathroom Bill’*, CNN (Mar. 30, 2017), <http://cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html> [https://perma.cc/6TFY-VHGZ] (quoting GLAAD). Republican state representative Bert Jones, who had voted against the bill’s repeal, suggested that the state replace banners outside of its Legislative Building with an NCAA flag. McClurg, *supra* note 36, at 84.

¹⁵⁴ *NCAA Board of Governors’ Position on HB2 Repeal*, NCAA (Apr. 4, 2017), <http://ncaa.org/news/2017/4/4/ncaa-board-of-governors-position-on-hb2-repeal.aspx> [https://perma.cc/N36X-42U8] (explaining that the new legislation “meets the minimal NCAA requirements”).

occur in North Carolina in the 2017–18 academic year and would consider hosting additional championships in the state, although North Carolina would have to submit additional documentation demonstrating protection from discrimination.¹⁵⁵ The BOG cautioned, however, that if its expectations of a discrimination-free environment were not met, it would not hesitate to take further action.¹⁵⁶

Like its responses to states that prominently featured Confederacy symbols, Native American imagery, and Indiana's so-called Religious Freedom Act, the NCAA's use of its economic leverage in response to HB2 effectively altered practices or policy that the NCAA found discriminatory. The NCAA's commitment to its core values and principles regarding diversity, inclusion, and student-athlete well-being would be put to the test again in 2020 when some state legislatures began concerning themselves with, of all things, transgender athlete sport participation.¹⁵⁷ And unfortunately, despite its strong stance in support of transgender individuals in response to HB2, the NCAA reacted passively, at best, in the face of political opposition when presented with two subsequent opportunities to support transgender student-athletes.

III. FIRST PUNT: THE NCAA'S PASSIVE RESPONSE TO STATE LAWS PROHIBITING TRANSGENDER GIRLS AND WOMEN FROM PARTICIPATING IN SPORTS ALIGNING WITH THEIR GENDER IDENTITY

As illustrated, the NCAA has a history of effectively influencing state policy and other actions that it finds discriminatory. This Part scrutinizes the NCAA's, frankly, dismal reaction to a situation that provided it with an opportunity to take a strong stance on state legislation which the NCAA described as "harmful" to some of its student-athletes and in conflict "with

¹⁵⁵ *Id.* (explaining that North Carolina's new law restored it to "a landscape similar to other jurisdictions presently hosting NCAA championships"). A month after North Carolina passed HB2, the BOG adopted a new process through which potential hosts must answer an antidiscrimination questionnaire. McClurg, *supra* note 36, at 84.

¹⁵⁶ *NCAA Board of Governors' Position on HB2 Repeal*, *supra* note 154 (noting North Carolina provided the NCAA assurances that it would be able to enact inclusive policies through contracts "with communities, universities, arenas, hotels, and other service providers").

¹⁵⁷ Katie Barnes, *Young transgender athletes caught in middle of states' debates*, ESPN (Sept. 1, 2021), https://www.espn.com/espn/story/_id/32115820/young-transgender-athletes-caught-middle-states-debates [<https://perma.cc/3NH9-UGRH>] ("But what was once the domain of the state [high school athletic] associations has been making its way to statehouses.").

the NCAA's core values of inclusivity, respect and the equitable treatment of all individuals."¹⁵⁸

A. Background on State Legislation Prohibiting Transgender Girls and Women From Participating in Sports Aligning With Their Gender Identity

At most levels of sports, participation is segregated by sex.¹⁵⁹ This decision is often ascribed to inherent biological differences between men and women and is intended to protect women's athletic opportunities.¹⁶⁰

Young people are increasingly coming out as transgender, many of whom wish to pursue athletic opportunities for the same reasons as others.¹⁶¹ Sports participation, regardless of one's gender, generally benefits individuals, perhaps even more so for transgender youth already at an increased risk of teasing, bullying, and harassment.¹⁶²

The United States has no uniform law or policy regulating transgender athlete sport participation.¹⁶³ Thus, one of sports' and societies' most polarizing issues over the last few years has been participation of transgender athletes.¹⁶⁴ More specifically, "the question

¹⁵⁸ NCAA Statement Regarding Idaho Transgender Law, NCAA (June 11, 2020), <http://ncaa.org/news/2020/6/11/ncaa-statement-regarding-idaho-transgender-law.aspx> [<https://perma.cc/5DBZ-5JJ7>].

¹⁵⁹ Rosen, *supra* note 133, at 872. "Over the years, society has justified the exclusion of girls from boys' sports and vice versa with concerns about safety, fairness, and social stigma." Buzuvis, *supra* note 3, at 7.

¹⁶⁰ Rosen, *supra* note 133, at 872. *See* Buzuvis et al., *supra* note 21, at 233 (explaining that, because girls have long been excluded and marginalized from sport, protection is warranted but inclusion of transgender girls will/would not undermine it).

¹⁶¹ Erin E. Buzuvis, *Including Transgender Athletes in Sex-Segregated Sport*, in *SEXUAL ORIENTATION AND GENDER IDENTITY IN SPORT: ESSAYS FROM ACTIVISTS, COACHES, AND SCHOLARS* 23, 27 (George B. Cunningham ed., 2012) (explaining it is fun to both be part of a team and connect with teammates).

¹⁶² *Id.* at 25 (noting that teasing, bullying, and harassment can negatively impact a student's attendance, grades, well-being, and mental health).

¹⁶³ *Law, Policy, & Participation*, *supra* note 3, at 448 (explaining, "(i)nstead there is a patchwork of both public and private law that has direct or arguable bearing on legality of policies that restrict or condition participation by transgender athletes.").

¹⁶⁴ Kliegman, *supra* note 4 (identifying transgender athletes' rights and whether authorities permit transgender women to compete in women's sports as some of the most polarizing issues); *see also* Pells, *supra* note 30 (describing the politics of transgender sports as "one of the sharpest dividing points in American culture" like abortion rights and gun control). "Transgender athletes are controversial because their existence disrupts essentialist and binary ideas about sex that are reflected in the historical and contemporary organization of sport." Buzuvis, *supra* note 3, at 3. At least one expert contends that the presumptions that sex is binary and that sports must

of whether and on what conditions a transgender athlete should participate in sex-specific sports according to their gender rather than their sex has been a challenging one.”¹⁶⁵

That the issue has achieved national prominence is unsurprising, as sports occupy a unique, sentimental space in United States culture, with nearly everyone having some connection.¹⁶⁶ Further, sports and cultural issues have long been inseparable,¹⁶⁷ and sports are a vehicle for social change.¹⁶⁸

Because most sports provide separate participation opportunities for male and female athletes, and this binary structure is believed to account for sex-based differences in performance between male and female participants, many sports organizations default to requiring transgender people to participate in the category corresponding to their birth-assigned sex, regardless of whether they identify with it.¹⁶⁹ Politicians inserted themselves into the fray. In 2020, the Idaho legislature passed its so-called “Fairness in Women’s Sports Act,” giving rise to a wave of states passing, or attempting to pass, “strikingly similar” legislation apparently aimed at protecting women’s sports from transgender athlete domination.¹⁷⁰

be segregated by sex are myths. Erin E. Buzuvis, *Caster Semenya and the Myth of a Level Playing Field*, 6 THE MODERN AMERICAN 36, 36 [hereinafter *Myth*].

¹⁶⁵ *Law, Policy, & Participation*, *supra* note 3, at 439.

¹⁶⁶ Kliegman, *supra* note 31 (pointing out that anti-transgender sport participation bills “center on sports”).

¹⁶⁷ *Id.* (citing Muhammad Ali’s anti-Vietnam War stance, Title IX’s implementation, and Colin Kaepernick protesting police brutality as examples of occasions where sports and cultural issues intersected).

¹⁶⁸ Buzuvis et al., *supra* note 21, at 212 (suggesting that sport should be leveraged as such a vehicle). In this way, it is fair to wonder whether sports’ traditional exclusion of transgender women has perpetuated the assumption that they are unable to effectively compete against someone whose body is more physiologically male. *Law, Policy, & Participation*, *supra* note 3, at 441.

¹⁶⁹ *Law, Policy, & Participation*, *supra* note 3, at 440. The United States legal system has largely ceded the issue of transgender inclusion in sports to the private associations governing them. *Id.* at 442.

¹⁷⁰ Dan Avery, *State Anti-Transgender Bills Represent Coordinated Attack, Advocates Say*, NBC NEWS (Feb. 17, 2021), <http://nbcnews.com/feature/nbc-out/state-anti-transgender-bills-represent-coordinated-attack-advocates-sayn1258124> [<https://perma.cc/8N6D-MHFE>] (quoting tennis legend Martina Navratilova, Olympic track star and NBC Sports analyst Sanya Richards-Ross, and Duke law professor Doriane Lambelet Coleman). Note some of Lia Thomas’s own teammates’ parents anonymously wrote correspondence to Penn and the NCAA asking them to rule Thomas ineligible to compete in women’s competitions in order to uphold “the integrity of women’s sports.” Sanchez, *supra* note 1. More broadly, “Reading the arguments made on behalf of such laws, one might get the mistaken impression not only that Republican legislators place a great value on women’s sports but also that trans women are a conquering horde, swarming the leaderboards.” Thomas, *supra* note 17.

Lawmakers, mostly Republican, have adopted and supported bills nationwide that argue that transgender athletes have an unfair advantage over their cisgender peers.¹⁷¹ In 2021, for example, sixty bills passed in thirty-one states contending that transgender female athletes should not compete in high school girls' sports.¹⁷² Former President Trump has "cheered on" legislators as they introduce and attempt to pass the legislation.¹⁷³

Sports governing bodies generally design policies that promote fairness in competition and, preferably, inclusion.¹⁷⁴ However, individuals external to the transgender community often create trans sports participation eligibility policies.¹⁷⁵ When doing so, whether explicitly or implicitly, these individuals often prioritize cisgender competitors' feelings, which likely include feeling threatened by competing against a transgender individual.¹⁷⁶

In fact, this includes many of the lawmakers who have introduced or supported the bills that would ban transgender girls from competing on girls' sports teams.¹⁷⁷ In nearly every instance, a bill's sponsor(s) could

¹⁷¹ Kliegman, *supra* note 4. "LGBTQ advocates say (the numerous bills) is an organized assault by conservative groups." Avery, *supra* note 170. This Article defines cisgender women as those whose gender identity matches the sex they were assigned at birth. See Pells, *supra* note 30. Concerns that male-to-female transgender athletes will enjoy an unfair competitive advantage are based on assumptions like transgender women not being "real" women, being born with a male body provides a transgender woman an unfair advantage over non-transgender women, and that men may consider pretending to be transgender to compete against women. Rosen, *supra* note 133, at 873.

¹⁷² Gleeson, *supra* note 27 (referencing a USA TODAY investigation finding that most of the proposed state bans were not based on empirical evidence).

¹⁷³ Kliegman, *supra* note 31 (quoting Trump when he expressed support for Mississippi's bill, "Women's sports as we know it will die" if policies permit transgender women and girls to compete).

¹⁷⁴ De La Cretaz, *supra* note 15.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (explaining that trans eligibility policies typically exclude or police trans individuals).

¹⁷⁷ David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, ASSOCIATED PRESS (Mar. 3, 2021), <http://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [<https://perma.cc/F8HP-6TU7>] (citing Tennessee House Speaker Cameron Sexton's concession that there may not actually be any transgender athletes participating in middle or high school sports; however, a bill excluding them from sport participation was "necessary so the state could be 'proactive'"). Perhaps lawmakers felt the need to step in and regulate transgender athlete participation because "sport organizations have only recently begun to formalize policies addressing the inclusion of transgender athletes in sex-segregated sport." Buzuvis, *supra* note 3, at 21. The International Olympic Committee ("IOC") created the first policy permitting transgender athletes to participate in a manner

not cite a single example in their own state or locale where trans participation led to problems.¹⁷⁸ For example, South Carolina Rep. Ashley Trantham acknowledged she could not identify any transgender athletes competing in the state and had proposed the ban to prevent potential future problems.¹⁷⁹ Without the ban, Trantham opined, “the next generation of female athletes in South Carolina may not have a chance to excel.”¹⁸⁰ Likewise, Southern District of West Virginia Judge Joseph R. Goodwin explained when granting a preliminary injunction against enforcement of that state’s law barring transgender women and girls from participating on school sports teams matching their gender identity, he had “been provided with scant evidence that this law addresses any problem at all, let alone an important problem.”¹⁸¹

The question of whether a sports contest is fair is an ideal emotional battleground for a political wedge issue.¹⁸² “[S]cience on transgender athletes is new and evolving,”¹⁸³ and there simply is not enough relevant research to conclusively determine what science says about trans athletes and fair competition.¹⁸⁴ For one thing, there simply are not many known

consistent with their newly assigned sex. *Id.* Before the IOC policy, most organizations required athletes to participate with individuals of their sex assigned at birth. *Id.*

¹⁷⁸ Crary & Whitehurst, *supra* note 177.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Bianca Quilantan, *Judge Halts West Virginia Law Targeting Transgender Athletes*, POLITICO (Jul. 21, 2021), <http://politico.com/news/2021/07/21/judge-halts-west-virginia-law-targeting-transgender-athletes-500494> [<https://perma.cc/5KKP-SPX5>] (providing rationale for determining the plaintiff had “a likelihood of success in demonstrating that this statute is unconstitutional as it applies to her and that it violates Title IX.”). The plaintiff, an eleven-year-old seeking to try out for her school’s girls cross country team, contended that the law discriminated on the “basis of sex” and “transgender status,” thus violating the Fourteenth Amendment’s Equal Protection Clause and Title IX. *Id.*

¹⁸² Kliegman, *supra* note 31.

¹⁸³ McMaster, *supra* note 8.

¹⁸⁴ Kliegman, *supra* note 4; *see also* Pells, *supra* note 30 (pointing out that “extensive research is still generally lacking on elite athletics and virtually nonexistent when it comes to determining whether, say, a sophomore transgender girl has a clear advantage over her cisgender teammates”). At best, research conflicts. Kliegman, *supra* note 31; *see also* Ray Sanchez, *NCAA’s ‘Sport-by-Sport Approach to Transgender Participation’ Stirs Debate*, CNN (Jan. 23, 2022), <http://cnn.com/2022/01/22/sport/ncaa-lia-thomas-transgender-policy/index.html> [<https://perma.cc/6DZE-YVWR>] (explaining “. . .there is heated debate in the scientific community as to whether androgenic hormones like testosterone are useful markers of athletic advantage”). In a British Journal of Sports Medicine December 2020 study, for example, researchers concluded transgender women were faster and could complete more pushups and sit-ups for two years following starting testosterone blockers. Avery, *supra* note 170. On the other hand, one researcher found that eight transgender

transgender athletes competing in sports, so data comparing their performance with cisgender peers is limited.¹⁸⁵ In fact, only thirty-two transgender athletes have competed openly in collegiate athletics.¹⁸⁶ Thus, Dr. Eric Vilain, a pediatrician and geneticist who studies sex differences in athletes, has concluded that laws regulating transgender athlete participation are not based on science but instead “target women who have either a different biology . . . or simply look different.”¹⁸⁷ The fact is that athletes, regardless of whether they are transgender or cisgender, have different advantages over other competitors, including size, strength, ability, speed, and endurance.¹⁸⁸ Seen as more “natural,” these competitive advantages are rarely questioned or used to exclude individuals from participating in women’s sports.¹⁸⁹

women distance runners did not enjoy more competitive race times after they transitioned and competed against women. Yurcaba, *supra* note 2 (describing study by Joanna Harper, a Loughborough University Ph.D. student who conducts transgender athletes performance analysis). Further, research suggests skills that contribute to athletic talent like motor skills, coordination, and form are learned, as opposed to innate. Buzuvis, *supra* note 3, at 37. Consider also scientific research on the variability of sex, which suggests that the sex-segregated, binary competition model is imperfect. *Id.* at 36.

¹⁸⁵ Steve Price, *Do Transgender Athletes Have a Competitive Advantage Over Cisgender Athletes?*, CBS8 (Nov. 8, 2021), <http://cbs8.com/article/news/verify-do-transgender-athletes-have-an-advantage-over-cisgender-athlete/509-74cdd673-df9c-4cb0-b899-3a08f1cd16b5> [<https://perma.cc/E79N-AWWM>] (citing conversation with Dr. Jack Turban, a Stanford University School of Medicine psychiatrist who works with trans youth).

¹⁸⁶ Meghan Brink, *Protections for Trans Athletes in Title IX Proposal Still Unknown*, INSIDE HIGHER ED (Jul. 5, 2022), <https://www.insidehighered.com/news/2022/07/05/title-ix-transgender-athletes-be-considered-separately#:~:text=Under%20the%20new%20guidance%2C%20which,the%20sport%20they%20compete%20i>n [<https://perma.cc/5WPE-RCWM>] (describing the proportion of transgender athletes in sports as “miniscule” and even smaller in college sports).

¹⁸⁷ Tinbete Ermyas & Kira Wakeam, *Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says*, NPR (Mar. 18, 2021), <http://npr.org/2021/03/18/978716732/wave-of-new-bills-says-trans-athletes-have-an-unfair-edge-what-does-the-science-s> [<https://perma.cc/4ZEB-VJC6>] (citing Vilain’s determination that there are no good faith reasons to limit transgender women’s sports participation, especially in high school sports).

¹⁸⁸ Kliegman, *supra* note 4 (quoting Harper). “Sex is already a rough and imperfect proxy for athletic ability, so its rigid application is unnecessary to promote objectives like fairness and safety.” *Law, Policy, & Participation*, *supra* note 3, at 449. For example, high school and college teams may include freshman and senior athletes, and swimmer Michael Phelps was born with unusually long arms, large feet, and broad shoulders, all of which gave him advantages in the pool. Buzuvis et al., *supra* note 21, at 234.

¹⁸⁹ Buzuvis, *supra* note 161, at 8 (explaining “Women come in many shapes and sizes. If we wouldn’t exclude a woman from sport because she was born with a tall body, or a strong body, or other attributes that might provide an asset on the field, then

Meanwhile, the theorized advantage transgender women may have over cisgender women draws the ire of the political right, who allege that it risks the sanctity of women's sports. The fact of the matter, however, is that this criticism is theoretical and has not been supported by the limited transgender women who have competed in women's sports. In fact, transgender women athletes have *not* dominated women's sports.¹⁹⁰ No transgender athlete has ever won an Olympic medal, for example.¹⁹¹ Vilain points to transgender women's lack of on-field success as evidence that any sex-based physiological differences are negated during competition.¹⁹²

Even if sex-based physiological differences provided a persuasive basis for excluding transgender athletes from participating in sports aligned with their identified sex, hormone-based transitions reduce or eliminate competitive advantages.¹⁹³ Physiological differences between sexes manifest from men's higher testosterone levels and women's higher estrogen levels.¹⁹⁴ Science associates these higher levels of male hormone testosterone with better performance only in a very small number of athletic endeavors: 400-meter dashes, 800-meter runs, hammer throw, and pole vault.¹⁹⁵ When transitioned women receive synthetic estrogen and anti-androgens, their concentration of testosterone and estrogen is similar to physically born women.¹⁹⁶ Hormone treatment likewise produces a

it is not necessary either to exclude a woman because she was born with a male body.”). “Sorting athletes by sex does not necessarily sort them by physical characteristics that are considered relevant to sport. . . . An approach more narrowly tailored to producing a level playing field would sort athletes by physical characteristics, much the same way sports like wrestling group athletes by weight.” *Myth*, *supra* note 164, at 3.

¹⁹⁰ Kliegman, *supra* note 4 (noting that the media sensationalizes the few stories where transgender athletes experience dominance); *see also* Yurcaba, *supra* note 2 (quoting Harper as explaining that trans women “aren’t taking over NCAA sports and are still underrepresented”). Further, there is no reliable way to determine whether individual transgender women athletes have an unfair advantage from being born with a physiologically male body. *Law, Policy, & Participation*, *supra* note 3, at 441–42.

¹⁹¹ Buzuvis et al., *supra* note 21, at 213.

¹⁹² Ermyas & Wakeam, *supra* note 187.

¹⁹³ Buzuvis, *supra* note 3, at 38. Consider now-former Division II track and field male-to-female transgender athlete CeCe Telfer. *See* Dawn Ennis, *Exclusive: NCAA Champion CeCe Telfer Says ‘I Have No Benefit’ By Being Trans*, OUT SPORTS (June 3, 2019), <http://outsports.com/2019/6/3/18649927/ncaa-track-champion-cece-telfer-transgender-athlete-fpu-trans-testosterone> [<https://perma.cc/SS9F-5G8Y>]. Both Telfer and her coach witnessed firsthand how hormone suppression treatment negatively affected Telfer's performance by causing her to lose muscle, weight, and explosiveness as her race times decreased. *Id.*

¹⁹⁴ Buzuvis, *supra* note 3, at 38.

¹⁹⁵ Ermyas & Wakeam, *supra* note 187.

¹⁹⁶ Buzuvis, *supra* note 3, at 38.

masculinizing effect in transitioned men.¹⁹⁷ To the extent that hormonal differences between competitors would significantly impact outcomes, hormone treatments commonly undergone by transgender athletes help ameliorate the issue.

Regardless of any technical impact on competition levels in respective sports, criticism of permitting transgender athletes to participate in sports aligning with their gender identity may be missing a major point. Critics of these types of laws contend that sports participation is about more than wins and losses. Accepting transgender athletes in sports reduces stereotypes and discrimination in other areas.¹⁹⁸ Sports participation positively impacts a person's development,¹⁹⁹ and teaches life skills a classroom cannot replicate.²⁰⁰ Beyond its obvious physical benefits, sports participation positively affects mental health.²⁰¹ Excluding transgender individuals from sports participation denies them the significant benefits sports provide in developing an individual's identity (including in formative years).²⁰² Likewise, forcing transgender athletes to play on teams according to their sex assigned at birth rather than the gender they identify restricts their ability to belong to their community and be their authentic selves.²⁰³ Transgender youth are already at an increased risk of suicide and self-harm than cisgender peers.²⁰⁴ They're subject to ridicule on Fox news, from their local legislatures, and often times from their own peers. Sports are a powerful community builder, and perhaps well-suited for transgender individuals to build strong, supportive relationships with peers. The evidence shows that when faced with gender-exclusive sports policies, transgender youth are even more likely

¹⁹⁷ *Id.* at 40.

¹⁹⁸ Kliegman, *supra* note 29 (referencing Buzuvis study); *see also* *Law, Policy, & Participation*, *supra* note 3, at 441 (explaining that inclusion of transgender people in sports contributes to greater society's acceptance and inclusion).

¹⁹⁹ Buzuvis, *supra* note 21, at 214 (noting that limiting access precludes "the overwhelmingly positive impact sports can have on the long-term success, mentally and physically, of the participant.").

²⁰⁰ *Id.* at 214 (citing sports' contribution to notable character traits like leadership, teamwork, dedication when faced with adversity, and the pursuit of a common goal as such skills).

²⁰¹ Price, *supra* note 185 (quoting Dr. Turban).

²⁰² Buzuvis, *supra* note 21, at 214.

²⁰³ *Id.* at 230. For example, after she came out and joined the women's team, Thomas said she could "swim as (her) authentic self." Yurcaba, *supra* note 2 (quoting Thomas as stating she felt "trapped" in her body when she swam on the men's team, for which her mental health suffered); *see also* Thomas, *supra* note 17. Transitioning and swimming on the women's team made Thomas "happy" and true to herself. Gleeson, *supra* note 27 (quoting Thomas as explaining that she did not transition to have an advantage).

²⁰⁴ Kliegman, *supra* note 29.

to experience negative mental health effects, including suicidality.²⁰⁵ Thus, critics of anti-transgender sport participation laws argue that society should value transgender athletes' human dignity over outcomes of sports events.

Further, many argue that transgender athlete bans attempt to address a nonexistent scenario:

In reality, trans women are grossly underrepresented at high levels of all sports, particularly in the winners' circles. Based on simple demographics, one would expect there to be a few thousand trans athletes in the NCAA. Instead, openly transgender collegiate athletes are disproportionately rare.²⁰⁶

Likewise, of the fifteen million individuals attending United States public high schools, a 2019 CDC study estimates that less than two percent identify as transgender, a smaller percentage of which are athletes.²⁰⁷ A 2017 Human Rights Campaign survey indicates that less than fifteen percent of transgender boys and girls participate in sports.²⁰⁸ Still, we lack a reliable count of the number of trans athletes competing in high school or college athletics,²⁰⁹ as neither the NCAA nor most state high school athletics associations collect that information.²¹⁰ The states that do collect it reveal minimal numbers: five current students in Kansas and nine in

²⁰⁵ *Id.*

²⁰⁶ Thomas, *supra* note 17. See also Crary & Whitehurst, *supra* note 177 (citing conversation with Shannon Minter, legal director of the National Center for Lesbian Rights and prominent trans-rights attorney explaining that the bills regulating transgender athlete participation “address a threat that doesn’t exist.”); Quilantan, *supra* note 181 (noting Judge Goodwin’s conclusion that the plaintiff would not take away athletics opportunities from other girls because “transgender people make up a small percentage of the population.”).

²⁰⁷ Pells, *supra* note 30. When trans individuals do not participate in sports, “a vicious cycle is created” where self-worth, confidence, and physical and mental health suffer instead of grow. Buzuvis et al., *supra* note 21, at 232. Thomas, for example, initially delayed hormone therapy out of fear of jeopardizing her swimming career; however, once she came out and transitioned, “(s)he was determined to hold on to that part of herself that was a competitive swimmer.” Thomas, *supra* note 17.

²⁰⁸ Pells, *supra* note 30.

²⁰⁹ Crary & Whitehurst, *supra* note 177. “In reality, trans women are grossly underrepresented at high levels of all sports, particularly in the winners’ circles.” Thomas, *supra* note 17. In explaining that trans women are underrepresented in the NCAA student-athlete population, Harper explains that trans women make up about one percent of the overall population. Yurcaba, *supra* note 2. There are over 200,000 women who participate in NCAA sports every year. *Id.* If trans women were proportionally represented in NCAA athletics, there should be 2,000 trans women participating, but Harper believes there are less than 100. *Id.*

²¹⁰ Crary & Whitehurst, *supra* note 177.

Ohio over a recent five-year span.²¹¹ Thus, “[i]f trans athletes have physical advantages, it appears these have been overwhelmed, so far, by social, legal, financial, and other disadvantages.”²¹²

Politicians and activists also regularly invoke Title IX to justify prohibiting transgender athletes from sports participation.²¹³ At its core, the dispute is whether allowing transgender athletes competing as female is in keeping with the inclusive spirit of Title IX or if it infringes upon the space Title IX carved out for female athletes.²¹⁴ Advocates for trans inclusion in sports contend that Title IX champions their position, “arguing that banning trans athletes from competing in their gender category is textbook discrimination on the basis of sex.”²¹⁵ The Biden administration agrees that discrimination based on gender identity constitutes discrimination based on sex and thus violates Title IX *for college students* and proposed new Title IX rules to that effect.²¹⁶ The proposed rules did not extend to protect transgender athletes, however; instead, a separate rule-making process will occur that will evaluate extending Title IX protections to sports.²¹⁷ Tea leaves indicate the administration disfavors bans on transgender athletes’ sports participation, as they cite a West Virginia case that concluded the state’s ban on female transgender athletes’ sports participation violated both Title IX and the Equal Protection Clause.²¹⁸ Lawmakers in (mostly conservative) states with bans already contend transgender girls and women usurp athletic opportunities and scholarships from cisgender women and create an unlevel playing field.²¹⁹ Thus, legislators in favor of trans athlete bans argue that the bans protect Title IX.²²⁰

²¹¹ *Id.*

²¹² Thomas, *supra* note 17.

²¹³ Baccellieri, *supra* note 30.

²¹⁴ Pells, *supra* note 30 (lamenting that “(c)onsensus is nowhere in sight, and the fights are piling up”).

²¹⁵ Baccellieri, *supra* note 30. Activists and experts are anxious that legalized discrimination in sports would serve as an entry point to denial of more basic rights. Kliegman, *supra* note 29 (explaining that defining transgender individuals as different and “other” would help provide a way to deny them other rights).

²¹⁶ Brink, *supra* note 186 (describing the Biden administration’s June 2022 proposed Title IX rules).

²¹⁷ *Id.* (noting the separate rule-making process for sports will be the first of its kind in the Education Department’s history).

²¹⁸ *Id.* (citing West Virginia case *BPJ v. West Virginia*).

²¹⁹ Baccellieri, *supra* note 30. At least some legal experts believe these arguments are “merely a distraction from outward discrimination.” See Buzuvis et al., *supra* note 21, at 213.

²²⁰ Baccellieri, *supra* note 30 (pointing out that trans athletes were “not on most women’s sports advocates’ or the general public’s radars in 1972” when Title IX passed).

The foregoing illustrates that the topic of transgender athlete sport participation is prominent in both United States politics and society. Because sports and culture often intersect, it was only a matter of time before the NCAA would face the issue. The next Part scrutinizes the NCAA's handling of the issue.

B. The NCAA's Response, or Lack Thereof, to State Laws Regulating Transgender Athlete Sport Participation

On March 30, 2020, the eve of the International Transgender Day of Visibility, Idaho's Republican Governor Brad Little signed a law prohibiting transgender girls and women from participating in girls and women's sports in the state.²²¹ Idaho's ban applied to women's sports at the youth, high school, and college levels.²²² Under it, sports competitors could contest girls and women's biological sex, essentially forcing them to prove they are a girl or woman.²²³ Individuals found to not be "female" would be unable to participate in sports with girls and women.²²⁴

Within months, over 500 student-athletes teamed up to direct correspondence to the NCAA Bid Selections Committee, imploring it to remove championships from Idaho due to its passage of House Bill 500.²²⁵ The student-athletes who signed the correspondence urged the NCAA to

²²¹ Kliegman, *supra* note 29.

²²² Kliegman, *supra* note 4.

²²³ Kliegman, *supra* note 29 (noting that the Idaho law provided athletes with three options through which they could verify that they are a girl or woman for purposes of the legislation: a test showing their natural hormone levels fall within a certain range, a genetic test confirming XX chromosomes, or a physical exam by a physician confirming female genitalia). The so-called "Fairness in Women's Sports Act" requires that "biological sex" is the sole determinant for inclusion on public schools and universities' athletics teams. Avery, *supra* note 170; *see also* IDAHO CODE § 33-6203. Evaluating such criteria requires invasive examination and testing that reveals extremely personal health information like someone's genetic makeup. Buzuvis et al., *supra* note 21, at 219-20. Sex verification has historically been employed to detect men attempting to fraudulently compete as women. Buzuvis et al., *supra* note 21, at 234.

²²⁴ Kliegman, *supra* note 29.

²²⁵ Joanna Hoffman, *500+ Student Athletes Call on NCAA to Stand With Trans Athletes*, ATHLETE ALLY (June 10, 2020), <http://athleteally.org/student-athletes-ncaa-idaho/> [<https://perma.cc/B8GG-4UVA>] (including signatures of student-athletes from universities including Washington University in St. Louis, Harvard University, Cornell University, Princeton University, New York University, University of Washington, University of Michigan, Duke University, UCLA, Ohio State University, Yale University, Dartmouth College, Florida State University, University of Virginia, Southern Methodist University, University of Florida, Fordham University, University of Pennsylvania, Boston University, University of Connecticut, Stanford University, University of Georgia, University of Arizona, University of Oregon, University of Iowa, and University of California, Davis).

lead by adopting “diverse, inclusive and accepting policies and practices,” pointing out that it had previously done so by withholding championships from North and South Carolina when those states would not provide an inclusive and equitable environment.²²⁶ The correspondence suggested that this was a similar opportunity for the NCAA to “stand on the right side of history.”²²⁷ The student-athletes explained that “participating in college sports has changed – and for some, saved – [their] lives,” and it would be impossible to hold safe and inclusive championships in Idaho.²²⁸ Further, failing to withhold championships from Idaho “contradicts the NCAA’s core values, [its] own policies and guidance, and implicitly endorses Idaho’s discriminatory law.”²²⁹

1. NCAA Warnings & Threats

The NCAA responded with a statement describing Idaho’s law as “harmful to transgender student-athletes” and in conflict “with the NCAA’s core values of inclusivity, respect and the equitable treatment of all individuals.”²³⁰ The release went on to describe BOG policy requiring host sites to show how they will provide safe, healthy, and discrimination-free environments that safeguard participants’ dignity.²³¹ The statement also reiterated the NCAA’s “clear expectation that all NCAA student-athletes will be welcomed, treated with respect, and have nondiscriminatory participation wherever they compete.”²³² While the statement hinted at the possibility of removing or not awarding championship events from Idaho, the COVID-19 pandemic temporarily rectified the issue, forcing cancellations of events scheduled to occur in the state.²³³

Within a year, legislators in over twenty states introduced bills like Idaho’s.²³⁴ While bills awaited Mississippi and South Dakota’s governors’

²²⁶ *Id.* (describing “anti-LGBTQ discrimination in North Carolina” and placement of a Confederate flag on South Carolina’s state house grounds).

²²⁷ *Id.* (describing Idaho’s legislation, House Bill 500, as setting “a dangerous precedent” that “explicitly and illegally discriminates”).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *NCAA Statement Regarding Idaho Transgender Law*, *supra* note 158.

²³¹ *Id.*

²³² *Id.*

²³³ Kliegman, *supra* note 145.

²³⁴ Zoe Christen Jones, *545 College Athletes Urge NCAA to Pull Championships From States That Ban Transgender Athletes*, CBS NEWS (Mar. 12, 2021), <http://cbsnews.com/news/anti-trans-legislation-ncaa-championships-athlete-demands/> [<https://perma.cc/26VC-6NVC>]. The Human Rights Campaign has referred to 2021 as “the worst anti-transgender state legislative session on record.” Wyatt Ronan, *Human Rights Campaign & Athlete Ally Call on NCAA to Include Non-*

signatures in March 2021, many of these same student-athletes followed up with a similar letter, this time directed to Emmert and the BOG.²³⁵ The correspondence expressed extreme frustration and disappointment with the NCAA's silence regarding states that were close to passing legislation akin to Idaho's, given "the dangers of hosting events in states that create a hostile environment for student athletes."²³⁶ The letter argued that the legislation's enforcement would require "policing and bullying of all student athletes who do not meet stereotypes of gender, and could empower any person to force any student athlete to undergo invasive physical exams or hormone tests in order to 'prove' their gender."²³⁷ As a consequence of these laws, the student-athletes contended women could not feel safe and supported if forced to compete in states with such legislation.²³⁸ Ironically, the NCAA's public silence came despite its claim that it prioritizes student-athletes' safety and well-being.²³⁹ Thus, the student-athletes requested that the NCAA voice opposition to the bills and only hold championships in states promoting inclusivity.²⁴⁰ Some professional athletes and transgender allies and advocates joined the call for the NCAA to withdraw championships from states considering anti-transgender legislation.²⁴¹

Discrimination Language & Enforceable Protections for Transgender Athletes in New Constitution, HUMAN RIGHTS CAMPAIGN (Nov. 12, 2021), <http://hrc.org/press-releases/human-rights-campaign-athlete-ally-call-on-ncaa-to-include-non-discrimination-language-enforceable-protections-for-transgender-athletes-in-new-constitution> [https://perma.cc/9NA3-FLXT]. Anti-transgender sport participation laws in Arkansas, Mississippi, and West Virginia covered college sports teams in addition to high school. Olson, *supra* note 79.

²³⁵ Julie Kliegman, *Nearly 550 College Athletes Demand NCAA Pull Championships From States With Anti-Trans Sports Legislation*, SPORTS ILLUSTRATED (Mar. 10, 2021), <http://si.com/college/2021/03/10/ncaa-petition-anti-trans-legislation> [https://perma.cc/54AX-Q73P] (stating that student-athletes from at least 85 universities signed the correspondence).

²³⁶ See Joanna Hoffman, *500+ Student Athletes to NCAA Leadership: Speak Out for Trans Athletes*, ATHLETE ALLY (Mar. 10, 2021), <http://athleteally.org/student-letter-ncaa-hb500/> [https://perma.cc/27RB-LHU6].

²³⁷ *Id.* Rebekah Bruesehoff, a 14-year-old trans athlete describes having their gender tested as "[I]nvasive, embarrassing. I don't want others to go through that." Crary & Whitehurst, *supra* note 177.

²³⁸ Hoffman, *supra* note 236 (pointing out that the legislation permits questioning of women student-athletes' identity and integrity).

²³⁹ *Id.*

²⁴⁰ *Id.* (arguing that the NCAA must take action if it sought to uphold its "self-professed ideals of keeping college sports safe and promoting the excellence of physical and mental well being for student-athletes.")

²⁴¹ Lorenzo Reyes, *Athletes, Advocates Call on NCAA to Pull Competition From States With Anti-Trans Bills*, USA TODAY (Apr. 9, 2021), <http://usatoday.com/story/sports/college/2021/04/09/advocates-call-ncaa-pull-competition-states-anti-trans-bills/7156895002/> [https://perma.cc/6DNZ-XVG7].

Around this time, Emmert authored correspondence voicing displeasure with anti-transgender sport participation legislation but omitting clear action items against states considering or passing it.²⁴² Emmert’s letter described the legislation as “harmful to transgender student-athletes and [conflicting] with the NCAA’s core values of inclusivity, respect and the equitable treatment of all individuals.”²⁴³ Emmert also noted that the BOG requires sites hosting NCAA championships to “outline how they will create an environment that is free of discrimination.”²⁴⁴

In April 2021, the BOG released a statement stating it “firmly and unequivocally supports the opportunity for transgender student-athletes to compete in college sports.”²⁴⁵ The Board’s release went on to describe its “clear expectation . . . that all student-athletes will be treated with dignity and respect” and stated it was “committed to ensuring that NCAA championships are open for all who earn the right to compete in them.”²⁴⁶ The Board, as it did five years prior with North Carolina, went on to warn legislators contemplating anti-transgender sport participation legislation:

When determining where championships are held, NCAA policy directs that only locations where hosts can commit to providing an environment that is safe, healthy and free of discrimination should be selected. We will continue to closely monitor these situations to determine whether NCAA championships can be conducted in ways that are welcoming and respectful of all participants.²⁴⁷

The warning set “the stage for a political fight with multiple states.”²⁴⁸ At the time, thirty states were considering passing anti-transgender sport participation legislation and were thus at risk of losing the ability to host

²⁴² *Id.* (listing Women’s National Basketball Association head coach Cheryl Reeve, professional women’s basketball player Napheesa Collier, and former NCAA champion and transgender athlete CeCe Telfer among those joining the call).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Media Center, *NCAA Board of Governors Statement on Transgender Participation*, NCAA (Apr. 12, 2021), <http://ncaa.org/news/2021/4/12/ncaa-board-of-governors-statement-on-transgender-participation.aspx> [https://perma.cc/3NE6-YC2P] (describing its commitment as “grounded in (its) values of inclusion and fair competition”).

²⁴⁶ *Id.*

²⁴⁷ Media Center, *supra* note 245.

²⁴⁸ Kate McGree, *As Texas Legislature Considers Anti-Trans Bills, NCAA Announces it Will Not Hold Events in States That Discriminate Against Trans Students*, THE TEXAS TRIBUNE (Apr. 12, 2021), <http://texastribune.org/2021/04/12/ncaa-transgender-laws-texas-legislature/> [https://perma.cc/KMP2-UJ3W].

NCAA championship events if they followed through with implementing the legislation.²⁴⁹ For example:

- Texas legislators had introduced six bills targeting transgender individuals' sports participation, two of which would affect college athletes.²⁵⁰ Fort Worth and San Antonio, Texas, were scheduled to host 2022 men's March Madness tournament games.²⁵¹
- Similarly, a Republican lawmaker in Florida had proposed a bill requiring a health official to examine an athlete's "reproductive anatomy" to resolve any dispute over an athlete's biological sex.²⁵² Under the NCAA's threat, the bill could have jeopardized the city of Tampa's ability to host the 2023 men's ice hockey Frozen Four, the 2023 Division I women's volleyball national championships, the 2025 women's Final Four, and men's basketball first and second round tournament games in 2026.²⁵³ These events would be among dozens Florida was scheduled to host through May 2026.²⁵⁴
- Likewise, an Oklahoma House panel's advancement of the so-called "Save Women's Sports Act" that would preclude transgender athletes from participating on girls' and women's sports teams at public schools and universities jeopardized

²⁴⁹ Scott McDonald, *30 States Could Lose NCAA Championship Sites if They Ban Transgender Athletes*, NEWSWEEK (Apr. 12, 2021), <http://newsweek.com/30-states-could-lose-ncaa-championship-sites-if-they-ban-transgender-athletes-1583081> [<https://perma.cc/VPX8-QJU8>].

²⁵⁰ McGree, *supra* note 248. Two Texas republican legislators introduced the two bills that would affect college student-athletes. *Id.* Rep. Valoree Swanson described the bill she introduced, HB 1458, as "about fairness and common sense," stating that she would not "abandon" female Texas athletes. *Id.* She further proclaimed, "Biological males are free to compete in sports in Texas, but not in sports exclusively for girls." *Id.* Note many consider it offensive to refer to trans women and girls as "biological males." Kliegman, *supra* note 29.

²⁵¹ McGree, *supra* note 250 (noting Texas had already hosted the NCAA women's basketball tournament).

²⁵² McDonald, *supra* note 249 (describing State Rep. Kaylee Tuck's House Bill 1475). One media member described the bill as "part of a national push by Christian conservative groups" and "one of the most divisive bills making its way through the Legislature this year." Kirby Wilson, *If Florida Transgender Sports Bill Passes, NCAA Says it Could Pull Championships*, TAMPA BAY TIMES (Apr. 12, 2021), <http://tampabay.com/news/florida-politics/2021/04/12/if-florida-transgender-sports-bill-passes-ncaa-says-it-could-pull-championships/> [<https://perma.cc/9DD4-S3TL>].

²⁵³ McDonald, *supra* note 249 (describing hosting of NCAA championships as a revenue booster for metropolitan areas and cities).

²⁵⁴ Wilson, *supra* note 252.

the state's ability to host numerous scheduled NCAA championship events.²⁵⁵ Among the events at risk was the Women's College World Series, which had long been held in Oklahoma City.²⁵⁶ In fact, the NCAA and Oklahoma City had contracted for the city to serve as host until 2035.²⁵⁷

Given the NCAA's threat, states that passed anti-transgender sport participation legislation not only risked facing costly litigation like the *Hecox* case but also losing out on revenue from hosting NCAA championship events as previously described.²⁵⁸

At least one governor was aware of, and affected by, the ramifications of the NCAA taking away a state's hosting privileges. When he announced he would either sign or let a bill become law that banned transgender women from participating in women's sports, West Virginia Governor Jim Justice hesitated at applying the prohibition to college sports, stating, "[i]t concerns me that we may miss out on a really important sporting event that could come to West Virginia."²⁵⁹ Likewise, the threat of losing the Women's College World Series and other NCAA championship events cautioned and hung over the efforts of Oklahoma's Republican lawmakers.²⁶⁰ In fact, the NCAA's threat to withhold championship events "appeared to stop [Oklahoma's] bill cold in the Oklahoma Senate, according to multiple state Republicans."²⁶¹

In Arkansas, which already had passed its law prohibiting transgender women from participating in women's school sports at all levels, the state's flagship university, the University of Arkansas, Fayetteville, had submitted bids to host 2022 regional and super regional tournaments in both baseball and softball.²⁶² If the NCAA acted on its

²⁵⁵ Jenni Carlson, *As Oklahoma Considers Transgender Sports Law, NCAA Issues Warning That Could Threaten WCWS*, THE OKLAHOMAN (Apr. 12, 2021), <http://oklahoman.com/story/sports/2021/04/12/oklahoma-considers-transgender-sports-law-ncaa-issues-warning/7196159002/> [https://perma.cc/685Y-RKDP] (explaining that the biggest impact of the NCAA following through on its threat would fall on women's sports).

²⁵⁶ *Id.* (describing Oklahoma City as "the longstanding home to the Women's College World Series").

²⁵⁷ *Id.* (noting it was "unknown how or if the NCAA could terminate the contract").

²⁵⁸ Anderson, *supra* note 60 (noting that taxpayers would bear litigation costs).

²⁵⁹ *Id.* (quoting Justice as going on to explain that he believed "the benefits of it outweigh the bad part of it").

²⁶⁰ Hensley-Clancy, *supra* note 76.

²⁶¹ *Id.* (explaining that LGBTQ advocates finally felt as though they could breathe).

²⁶² Evin Demirel, *Asa Hutchinson Admonishes NCAA for "Punitive Approach" that Could Hurt Arkansas Baseball*, BEST OF ARKANSAS SPORTS (Apr. 12, 2021), <http://bestofarkansassports.com/arkansas-baseball-threatened-by-ncaa-asa->

threat, the state would lose the ability to host those tournaments, along with future events in track and field, gymnastics, and golf.²⁶³ Arkansas Governor Asa Hutchinson stated he was disappointed “to see the NCAA take this punitive approach,” going on to opine that “[s]ports does not need to disenfranchise a state just because it passes a law that the NCAA finds objectionable.”²⁶⁴ Hutchinson, pointing out that several states already passed anti-transgender sport participation bans similar to Arkansas’s, predicted that the NCAA would ultimately fail to follow through on its warning.²⁶⁵

Other politicians were unfazed by the NCAA’s warning. Chris Latvala, a Republican who chaired Florida’s House Education and Employment Committee, said the NCAA had too much to lose by refraining from hosting NCAA championship events in the state.²⁶⁶ Latvala commented, “The NCAA cares about one thing and it is not student-athletes. It is money. They are not going to boycott Florida.”²⁶⁷

2. Push Comes to Shove

Notably lacking from the NCAA’s warning to state legislatures, however, was an unequivocal statement that it would withhold championship events from states enacting or considering anti-transgender sport participation legislation.²⁶⁸ Further, the NCAA’s hands-off approach and “carefully calibrated statements” responding to the laws do not explicitly condemn or take action against them.²⁶⁹ In fact, an NCAA spokesperson acknowledged shortly after the BOG’s statement that the Board would continue “to monitor the situation and [had] not made final

hutchinson/ [https://perma.cc/9US8-UDG8] (citing report of Andrew Hutchinson of HawgBeat.com).

²⁶³ *Id.*

²⁶⁴ *Id.* (noting Hutchinson had received criticism, including from former President Trump, for vetoing an additional bill banning hormone therapy and other treatments for people under eighteen).

²⁶⁵ *Id.*

²⁶⁶ Wilson, *supra* note 252.

²⁶⁷ *Id.*

²⁶⁸ Brassil, *supra* note 88; *see also* Hensley-Clancy, *supra* note 76 (describing the NCAA’s actions as walking “a careful tightrope”). Karen Weaver, a former college field hockey coach and athletics administrator who currently is a faculty member at the University of Pennsylvania, characterized the NCAA’s statement as “wishy washy as you can get.” Olson, *supra* note 79 (explaining that the NCAA’s statement was “carefully worded” because the NCAA was attempting to not take a political stance during a tenuous time).

²⁶⁹ Kliegman, *supra* note 145 (contrasting the NCAA’s responses to anti-transgender sport participation legislation and North Carolina’s so-called “bathroom bill” five years prior).

decisions about the future of championships.”²⁷⁰ The NCAA had “reached a delicate moment: It [had to] decide whether to punish states that have passed laws limiting the participation of transgender athletes by barring them from hosting its softball and baseball tournaments.”²⁷¹

In May 2021, just a month following its warning, the NCAA announced dozens of potential host sites for initial rounds of that summer’s baseball and softball championship tournaments.²⁷² Among them, possible host universities were located in four states—Alabama, Arkansas, Mississippi, and Tennessee—all of which had passed laws requiring athletes to participate in interscholastic sports aligning with the sex determined at their birth.²⁷³ Ironically, universities in three of those states ordinarily would have been shoo-ins to serve as regional hosts in the postseason baseball tournament based on their on-field success.²⁷⁴ When asked to comment on the fact that states with legislation regulating transgender sport participation could serve as hosts, an NCAA spokesperson offered no comment other than referring questions to the BOG’s earlier statement.²⁷⁵ Mac McCorkle, Duke University professor of public policy, explained, “[t]his is kind of where the rubber meets the road for the NCAA.”²⁷⁶

Sure enough, when the NCAA announced its 2021 softball tournament field, game locations would include sites in Alabama, Arkansas, and Tennessee, all three of which had passed anti-transgender sport participation laws.²⁷⁷ The NCAA’s decision to move forward with

²⁷⁰ Brassill, *supra* note 88 (quoting Michelle Hosick e-mail to The New York Times).

²⁷¹ Olson, *supra* note 79.

²⁷² Associated Press, *NCAA Eyes Host Sites in States With Anti-Transgender Laws*, YAHOO! (May 14, 2021), <http://yahoo.com/video/ncaa-eyes-host-sites-states-175104165.html> [<https://perma.cc/7KS2-CMN8>].

²⁷³ *Id.* (listing the potential host sites as the University of Alabama, University of Arkansas, Southern Mississippi University, Mississippi State University, the University of Tennessee, and Vanderbilt University). Arkansas and Mississippi’s laws also applied to collegiate athletes. *Id.*

²⁷⁴ Olson, *supra* note 79 (noting that the University of Arkansas, Vanderbilt University, Mississippi State University, and the University of Tennessee were ranked highly at the time and had submitted bids to serve as hosts).

²⁷⁵ Associated Press, *supra* note 272 (identifying Stacey Osburn as the spokeswoman).

²⁷⁶ Olson, *supra* note 79.

²⁷⁷ Scott McDonald, *3 States with Anti-Trans Laws to Host Softball Regionals Despite NCAA Threat*, NEWSWEEK (May 16, 2021), <http://newsweek.com/3-states-anti-trans-laws-host-softball-regionals-despite-ncaa-threat-1591962> [<https://perma.cc/MJ3E-JU3Y>] (describing the NCAA’s choice to award host sites to the three states as “a stark contrast from the NCAA’s stance” the prior month); *see also* Myerberg, *supra* note 78 (characterizing participation of transgender athletes as “the latest front in the ongoing political debate over inclusivity and discrimination on

awarding host sites to locations in those states did not go unnoticed by current and former student-athletes. For example:

- Earlham College field hockey student-athlete CJ Johnson, who is nonbinary, expressed their belief that the NCAA's support for people like them has wavered in the face of anti-transgender sport participation legislation:

It feels like we're being erased. It almost feels like you're being backstabbed, because it's like you commit yourself to this organization and you absolutely love it. You put your heart and your soul into sports, right? And then they just make decisions that backstab your people, your identity, your community.²⁷⁸

- A graduating trans track and field student-athlete at a New England university, speaking anonymously, felt that events in states with anti-transgender sport participation legislation would be less physically and mentally safe.²⁷⁹
- Washington University in St. Louis runner Aliya Schenck described the NCAA's actions as inadequate and its statements as "full of hot air."²⁸⁰
- Former student-athlete Jen Fry, who has consulted for the NCAA on diversity issues, was dismayed at the NCAA's missed opportunity to show how accountability and allyship should look.²⁸¹
- Dozens of trans and nonbinary current and former student-athletes wrote correspondence to the NCAA protesting that it designated softball tournament host sites in affected states

the basis of gender identity or sexual orientation, which has unfolded along highly partisan lines"). Softball tournament host sites were predetermined in part based on the locale's capability of satisfying the NCAA Covid-19 Medical Advisory Group's guidelines. Myerberg, *supra* note 78.

²⁷⁸ Kliegman, *supra* note 145.

²⁷⁹ *Id.* (quoting the student-athlete as describing events occurring outside states with the legislation as "a safer environment, just like literally physically safer and also just mentally less toxic"). Limiting access to sport participation "can have disastrous effects on the physical and mental health of those blocked from sports." Buzuvis et al., *supra* note 21, at 214.

²⁸⁰ Kliegman, *supra* note 145 (noting that Schenck helped organize the correspondence to the NCAA that hundreds of student-athletes signed).

²⁸¹ *Id.* (quoting Fry as stating, "They're in such a prime location to show like, 'This is what accountability looks like. This is what allyship looks like. And they didn't do it right.'").

and seeking NCAA action to help keep trans athletes safe.²⁸² The letter described its authors as a “deeply disappointed and hurt” group that the NCAA “claimed to support” a month prior in its statement threatening to withhold hosting privileges from states with transgender athlete bans.²⁸³ Nebraska Wesleyan University swimming and track and field student-athlete Dani Wheeler, who signed the letter, stated, “It would be a great benefit to me and to other transgender athletes to know that the NCAA will always have our backs, even if it’s changing the location of a tournament or a championship to show their support.”²⁸⁴

The NCAA’s decision likewise agitated advocacy groups,²⁸⁵ who feared that the NCAA’s awarding of championship events to states with transgender athlete bans could open the door to yet another wave of similar state legislation.²⁸⁶ And these fears proved true. After the NCAA awarded regional softball championships to three states with the bans, “Oklahoma Republicans immediately began to revive efforts to pass [their] bill, arguing that the NCAA had reversed its position.”²⁸⁷ A Republican legislator from Florida tweeted gleefully about the NCAA ending its “boycott” of Florida and congratulating Florida State University for being chosen as a women’s softball regional site.²⁸⁸ A couple of weeks later, Florida signed an anti-transgender sports participation bill into law.²⁸⁹ Within two years of Idaho becoming the first state to pass legislation restricting trans girls and women from participating in sports aligned with

²⁸² *Id.* (including the NCAA’s response that the laws are concerning and it is “tracking them and their pending effective dates closely”).

²⁸³ Julie Kliegman, *Current and Former Transgender College Athletes Pressure NCAA on Stance*, SPORTS ILLUSTRATED (May 26, 2021), <http://si.com/college/2021/05/26/current-former-transgender-college-athletes-pressure-ncaa-stance> [https://perma.cc/FBS6-AWUG] (noting that student-athletes from universities including Duke University, the University of Michigan, Michigan State University, and Colorado State University signed the letter).

²⁸⁴ *Id.* (quoting the letter as pointing out that the NCAA’s “actions speak louder than (its) words”).

²⁸⁵ Myerberg, *supra* note 78 (explaining that local and national groups had sought a more forceful stand against transgender discrimination from the NCAA).

²⁸⁶ Hensley-Clancy, *supra* note 76 (describing opponents of the legislation as fearing the NCAA blunted one of their “best weapons to fight discriminatory legislation”).

²⁸⁷ *Id.* (explaining that Republican Rep. Justin Humphrey pushed a bill through the Criminal Justice Committee as a last-minute maneuver).

²⁸⁸ Hensley-Clancy, *supra* note 76 (quoting Rep. Chris Latvala’s tweet and noting that DeSantis signed Florida’s bill into law shortly after the NCAA’s decision on the first day of Pride month).

²⁸⁹ Kliegman, *supra* note 145.

their gender identity as opposed to their biological sex,²⁹⁰ over a dozen other states had imposed similar transgender sports bans.²⁹¹

After public statements condemning state laws prohibiting transgender girls and women from participating in sports aligning with their gender identity, the NCAA has been notably silent and inactive.²⁹² To student-athletes counting on the NCAA to continue its mission of protecting student-athletes by stepping in, as it had in the past in response to discriminatory laws, the silence is deafening. While some believe that the NCAA still has time to take a stance,²⁹³ experts are skeptical that the NCAA will eventually take meaningful action on anti-transgender sport participation laws.²⁹⁴ At a time when “the NCAA has become increasingly irrelevant” and is balancing numerous other substantial issues,²⁹⁵ many states have enacted, or likely will enact the laws.²⁹⁶ If the NCAA starts telling states with trans-discriminatory laws that they cannot host championships, not only will there be few states from which it can choose, some believe that the universities in states with bans could leave the NCAA.²⁹⁷ At a time when some feel the NCAA is “fractured” and may soon encounter/need “drastic change,”²⁹⁸ the NCAA is likely extra

²⁹⁰ Kliegman, *supra* note 235.

²⁹¹ See Kiara Alfonseca, *Oklahoma, Arizona Sign Transgender Sports Bans Into Law*, ABC NEWS (Mar. 30, 2022), <http://abcnews.go.com/US/oklahoma-arizona-sign-transgender-sports-bans-law/story?id=83767504> [<https://perma.cc/B98E-N7A9>] (listing Oklahoma, Arizona, Alabama, Arkansas, Florida, Iowa, Mississippi, Montana, South Dakota, Tennessee, Texas, Utah, and West Virginia as other states that prohibit trans students from participating in sports aligning with their gender identity). A few states have—or vaguely permit—bans on trans boys and men from participating in sports. Kliegman, *supra* note 4 (noting that most anti-trans legislators do not consider transmasculine athletes to be “a threat” to men’s sports like they fear transfeminine athletes are to women’s sports).

²⁹² Gleeson, *supra* note 27 (quoting Cathryn Oakley, state legislative director and senior counsel for the Human Rights Campaign).

²⁹³ Kliegman, *supra* note 145 (citing statement of Mosier).

²⁹⁴ *Id.*

²⁹⁵ Joe Moglia, *Has the NCAA Lost Its Grip?*, FORBES (Mar. 31, 2022), <http://forbes.com/sites/joemoglia/2022/03/31/has-the-ncaa-lost-its-grip/?sh=357f8e333080> [<https://perma.cc/D4QT-LAL4>] (citing the NCAA’s perceived failure to implement “smart and clear Name, Image, and Likeness rules”). Kliegman, *supra* note 145 (citing COVID-19 protocols as an example).

²⁹⁶ *Id.* (contrasting North Carolina’s so-called “bathroom bill” scenario, in which the NCAA had only one state to consider).

²⁹⁷ For example, see Gleeson, *supra* note 27 (quoting Cyd Zeigler, co-founder of Outsports.com and an LGBTQ advocate, as describing the possibility of some universities leaving the NCAA as “(o)ne of the elephants in the room”).

²⁹⁸ Ross Dellenger, *The Fight Over the Future of College Sports is Here: ‘It Needs to Implode’*, SPORTS ILLUSTRATED (Jan. 20, 2022), <http://si.com/college/2022/01/20/ncaa-future-power-5-football-basketball-money> [<https://perma.cc/MK2B-F9TH>].

sensitive. Further, the political climate is one in which the nation is so polarized, leaving organizations more hesitant to weigh in on potentially divisive political issues such as transgender athlete sports participation, which Republicans seek to make a wedge.²⁹⁹

IV. SECOND PUNT: THE NCAA'S REVISED TRANSGENDER STUDENT-ATHLETE PARTICIPATION GUIDELINES

After the NCAA took a passive and lackluster response to state anti-transgender sport participation laws, it revised its long-standing transgender student-athlete participation rules in 2022. This section scrutinizes the revisions.

A. *The NCAA's 2010 Transgender Student-Athlete Participation Rules*

To appreciate the NCAA's 2022 revisions to its transgender student-athlete participation rules, it is necessary to understand the original version of these rules.

In 2010, the NCAA's Office of Inclusion created a handbook titled "NCAA Inclusion of Transgender Student-Athletes" to provide direction to member universities about ensuring that transgender student-athletes receive fair, respectful, and legal access to sports teams.³⁰⁰ The handbook reads like a roadmap, first emphasizing the NCAA's appreciation for inclusivity, next explaining the importance of athletics programs on campuses, and then detailing the value of inclusion within those programs before setting forth rules on transgender student-athlete participation.

At its outset, the handbook explains that "[a]s a core value, the NCAA believes in and is committed to diversity, inclusion and gender equity among its student-athletes, coaches and administrators" and that it seeks "to establish and maintain an inclusive culture that fosters equitable

²⁹⁹ Kliegman, *supra* note 145 (describing anti-transgender sport participation legislation as more nuanced and covertly anti-transgender compared to the North Carolina bill); *see also* Kliegman, *supra* note 29 (explaining that "sports are the next frontier" for politicians seeking "a potent wedge issue"). "The NCAA has been trying to avoid pissing off the powers that be so much that they've lost so many people's trust by not going one way or the other on an issue like this." Gleason, *supra* note 27 (quoting Zeigler).

³⁰⁰ NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes*, 2 (Aug. 2011), http://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.files.usr.com/ugd/2bc3fc_4a135824fab462183c71357c93a99b4.pdf. [<https://perma.cc/SUT6-QRRR>]. The NCAA created and implemented its policy after consulting with students, medical experts, and people from the LGBTQ community. Thomas, *supra* note 17.

participation for student-athletes”³⁰¹ It recognizes that diversity and inclusion advance student-athletes’ learning environments,³⁰² and states that “[a]ll stakeholders in NCAA athletics programs will benefit from adopting fair and inclusive practices enabling transgender student-athletes to participate on school sports teams.”³⁰³

The handbook’s Introduction next explains why athletics programs are integral to the college experience.³⁰⁴ Athletics participation can positively affect physical, social, and emotional well-being and can provide student-athletes with lessons regarding self-discipline, teamwork, success, and failure.³⁰⁵ The handbook acknowledges, however, that few athletics departments, administrators, or coaches were prepared to fairly and effectively address transgender individuals’ sports participation.³⁰⁶ Thus, it provides best practice and policy guidance and recommendations for athletics departments.³⁰⁷ It additionally encourages the creation and implementation of campus policies accounting for the fact that “gender is a core part of everyone’s identity.”³⁰⁸

Further, the handbook describes the value of inclusion in sport participation, explaining that when:

[P]articipants are committed to fair play, inclusion, and respect, student-athletes are free to focus on performing their best in athletic competition and in the classroom. This climate promotes the well-being and achievement potential of all student-athletes This respect for difference will be invaluable to all student-athletes as they graduate.³⁰⁹

Thus, the handbook sets forth guiding principles on which athletics departments should create policy.³¹⁰ These principles include providing transgender student-athletes equal opportunity for sports participation, preserving the integrity of women’s sports, and compliance with state and

³⁰¹ NCAA Office of Inclusion, *supra* note 300, at Office of Inclusion page.

³⁰² *Id.*

³⁰³ *Id.* at 8 (explaining that inclusive policies permit university and athletics leaders to fulfill their commitment to establishing an environment conducive to students thriving, developing their full potential, and learning how to interact with individuals from diverse populations).

³⁰⁴ *Id.* at 4.

³⁰⁵ *Id.*

³⁰⁶ *Id.* (explaining that most athletics departments lacked policies governing transgender student-athlete participation).

³⁰⁷ *Id.* at 2.

³⁰⁸ *Id.* at 5 (explaining “that gender is more complex than our society generally understands.”).

³⁰⁹ *Id.* at 9. A discriminatory environment “can negatively affect all men and women who participate in athletic competition.” *Id.* at 15.

³¹⁰ *See id.* at 10.

federal laws protecting students from discrimination based on gender identity.³¹¹

The handbook sets forth some suggested best practices and guidelines which contain language relevant to this Article:

- A best practice directed to coaches reads, “If you are aware of discriminatory or harassing behavior from opposing teams or spectators based on the perceived or actual gender identity or expression of a student-athlete, talk to the opposing coach and ask your director of athletics to talk with the opposing school’s athletic director.”³¹²
- Likewise, a best practice for student-athletes states, “If taunting or harassment from spectators or opponents occurs during competition, take the approach that these actions are never acceptable for any reason including taunting or harassment based on gender identity or expression. Make your coaches aware of discriminatory or harassing behavior and ask them to arrange a meeting with the opposing school’s director of athletics to address this behavior.”³¹³
- The handbook’s “Additional Guidelines for Transgender Student-Athlete Inclusion” advises university leaders, athletics directors, and coaches to notify opponents before competitions regarding expectations for the treatment of transgender student-athletes on and off the field.³¹⁴

The handbook warns that members of an athletics department who threaten to withhold athletics opportunities or harass students due to their gender identity or expression are subject to discipline, which could include discharge or university expulsion.³¹⁵ The handbook criticizes sex verification tests, explaining they “have been misused to humiliate and unfairly exclude women with intersex conditions.”³¹⁶

³¹¹ *Id.*

³¹² *Id.* at 17.

³¹³ *Id.* at 18.

³¹⁴ *Id.* at 21.

³¹⁵ *Id.* at 23.

³¹⁶ *Id.* at 8. The handbook explains that people with intersex conditions are born with physically mixed or atypical bodies with respect to sexual characteristics like chromosomes, internal reproductive organs, and genitalia. *Id.* at 23. Given this strong language regarding sex verification testing, it is especially surprising the NCAA did not take strong action regarding state laws regulating transgender athlete participation, some of which subject participants to the testing.

The handbook then sets forth the NCAA policies on transgender student-athlete participation.³¹⁷ Among them was a provision permitting transgender male student-athletes with medical exceptions for treatment with testosterone to participate only on a men's team.³¹⁸ Transgender female student-athletes treated with testosterone suppression could continue to participate on a men's team but could participate on a women's team only after completing a calendar year of the treatment.³¹⁹

While the NCAA is often criticized as reactionary and slow to change, experts found the 2010 policy inclusive,³²⁰ believing it "was thoughtful and direct when describing the need to address transgender student participation at the college level."³²¹ Others described the policy as "progressive," as it ultimately permitted transgender student-athletes to participate on the team and use facilities aligning with their gender identities.³²² This led some to describe the NCAA as a pioneer during a "novel time."³²³ However, this inclusive, progressive, and perhaps pioneering stance and the strong language and positions taken regarding inclusivity in the 2010 handbook make it even more surprising that the NCAA failed to act meaningfully in response to state anti-transgender sport participation laws a decade later.

B. The NCAA's 2022 Revisions to Its Transgender Student-Athlete Participation Policy

Though the NCAA's 2010 policy regarding transgender student-athlete participation was inclusive and progressive, the NCAA refrained from taking meaningful action a decade later when states began infringing on the ability of transgender individuals to participate on sports teams aligning with their gender identity. The NCAA's (lack of) response in 2021 to state anti-transgender sport participation laws upset many of the student-athletes for whom the NCAA took responsibility to protect.³²⁴

³¹⁷ The NCAA's policy's application was technically limited to NCAA-run championships. *Law, Policy, & Participation*, *supra* note 3, at 442.

³¹⁸ NCAA Office of Inclusion, *supra* note 300, at 13.

³¹⁹ *Id.* (quoting Dr. Eric Vilain as explaining that the treatment reduces muscle mass, rendering a year of hormone therapy an appropriate transitional time before participation on a women's team).

³²⁰ Buzuvis, *supra* note 161, at 6 (comparing the NCAA's 2011 policy to the IOC's policy).

³²¹ Buzuvis et al., *supra* note 21, at 245.

³²² See Rosen, *supra* note 133, at 880.

³²³ See Gleeson, *supra* note 27 (noting that a George Washington University basketball student-athlete was the first openly transgender Division I student-athlete at the time and competed on the university's women's team).

³²⁴ The NCAA frequently reminds that it was founded in 1906 to keep student-athletes safe and that it continues to work to protect them physically and mentally. See

This Part explores the NCAA's revisions the following year to its policy on transgender student-athlete participation and its effects on student-athletes.

When the NCAA made significant changes to its Constitution in January 2022, its revised version lacked nondiscriminatory policy language included in prior constitutions for the first time in a quarter century.³²⁵ Further, the revisions to the Constitution provided more power to universities and the athletics conferences to which they belong.³²⁶ Advocacy groups worried that the lack of anti-discriminatory language, coupled with leaving enforcement of nondiscrimination protections to universities, would result in a patchwork system that would leave some student-athletes unprotected, depending on where they play their games.³²⁷

Contemporaneous to the new Constitution, the BOG adopted a new “sport-by-sport approach to transgender participation that preserves opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete.”³²⁸ The new NCAA policy

Mission and Priorities, NCAA, <http://ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> [<https://perma.cc/QHJ5-7QJC>] (last visited Dec. 23, 2022).

³²⁵ Wyatt Ronan, *Human Rights Campaign Condemns NCAA For Failure to Take Responsibility, Unresponsiveness in Calls to Protect LGBTQ+ Athletes*, HUMAN RIGHTS CAMPAIGN (Jan. 21, 2022), <http://hrc.org/press-releases/human-rights-campaign-condemns-ncaa-for-failure-to-take-responsibility-unresponsiveness-in-calls-to-protect-lgbtq-athletes> [<https://perma.cc/Q4MH-YYH3>] (noting that 18 advocacy groups had urged the NCAA to reinstate and strengthen its new constitution's nondiscrimination policy to better protect LGBTQ+ athletes, women, and athletes of color). The revised Constitution is less than half of the length of its predecessor, reducing it from 43 to 18 ½ pages. Andy Berg, *NCAA Board, Members Approve New Constitution*, ATHLETIC BUSINESS (Jan. 20, 2022), <http://athleticbusiness.com/operations/governing-bodies/article/15287621/ncaa-board-members-approve-new-constitution> [<https://perma.cc/9WC3-QLHY>]. Under the new Constitution, the three divisions may revise rules, and individual universities and conferences will have more power. *Id.*

³²⁶ Brigid Kennedy, *Advocacy Organizations Urge NCAA to Include Nondiscrimination Protections in Constitution*, THE WEEK (Jan. 20, 2022), <http://theweek.com/culture/sports/1009208/advocacy-organizations-urge-ncaa-to-include-nondiscrimination-protections-in> [<https://perma.cc/BEM5-X5JL>].

³²⁷ *Human Rights Campaign Correspondence to NCAA Board of Governors* (Jan. 19, 2022), <http://hrc-prod-requests.s3-us-west-2.amazonaws.com/Letter-to-NCAA-Board-of-Governors.pdf> [<https://perma.cc/E5NX-EETG>] (explaining that the political climate gave the groups “little hope that non-discrimination and fair treatment are principles that will be consistently upheld by state laws, or that state policies are even trending in the right direction”).

³²⁸ Media Center, *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022), <http://ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> [<https://perma.cc/C4T2-LXHS>] [hereinafter *BOG Updates Transgender Participation Policy*]. Though the policy was immediately effective, there were three implementation phases, with the policy becoming fully implemented on August 1, 2023. Sport Science Institute,

aligns with United States Olympic and Paralympic Committee and International Olympic Committee (“IOC”) policies on transgender athlete participation:

Like the Olympics, the updated NCAA policy calls for transgender participation for each sport to be determined by the policy for the national governing body of that sport If there is no NGB policy for a sport, that sport’s international federation policy would be followed. If there is no international federation policy, previously established IOC policy criteria would be followed.³²⁹

Thus, instead of a uniform policy that would apply to all student-athletes regardless of sport,³³⁰ the NCAA will instead utilize a sport-by-sport approach under which each sport’s national governing body determines transgender participation eligibility.³³¹ If that sport’s national governing body lacks a policy, the rules of the sport’s international federation or IOC policy would apply.³³² John DeGioia, BOG chair and Georgetown University’s president, explained:

We are steadfast in our support of transgender student-athletes and the fostering of fairness across college sports. It is important that NCAA member schools, conferences and college athletes compete in an inclusive, fair, safe and respectful environment and can move forward with a clear understanding of the new policy.³³³

Emmert noted that eighty percent of United States Olympians are current or former student-athletes, and the new policy provided consistency and

Transgender Student-Athlete Participation Policy, NCAA, <http://ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> [https://perma.cc/23D4-D76R] (last visited Mar. 9, 2023). The BOG also “urged the divisions to allow for additional, future eligibility if a transgender student-athlete loses eligibility based on the policy change, provided they meet the newly adopted standards.” *Id.*

³²⁹ *BOG Updates Transgender Participation Policy*, *supra* note 328. For analysis on whether the NCAA’s updated participation policy actually aligns with the IOC’s, *see* Ennis, *supra* note 13.

³³⁰ Katie Barnes, *NCAA Updates Policy on Transgender Participation, To Let Each Sport Set Eligibility Requirements*, ESPN (Jan. 20, 2022), http://espn.com/college-sports/story/_/id/33105305/ncaa-updates-policy-transgender-participation-let-sport-set-requirements [https://perma.cc/R3GL-8HV3].

³³¹ Adia Robinson, *NCAA Criticized for Changing Policy on Transgender Athletes*, ABC NEWS (Jan. 21, 2022), <http://abcnews.go.com/Sports/ncaa-criticized-changing-policy-transgender-athletes/story?id=82380905> [https://perma.cc/4JXS-VSWQ].

³³² *Id.*

³³³ *BOG Updates Transgender Participation Policy*, *supra* note 328.

strengthened the relationship between college athletics and the Olympics.³³⁴

When the NCAA announced its new transgender sport participation eligibility policy, the NCAA's Office of Inclusion and Sport Science Institute also released the Gender Identity and Student-Athlete Participation Summit Final Report.³³⁵ This report is meant to assist member universities in "support[ing] an inclusive environment that promotes and develops the mental and physical health of transgender and non-binary student-athletes in collegiate sport."³³⁶ The report summarized an October 2020 summit that included various constituents and which, among other things, sought to identify potential updates for the NCAA's 2010 policy on the inclusion of transgender student-athletes.³³⁷

The report lists several foundational statements for NCAA governance groups to consider.³³⁸ Among them was a statement directed to NCAA committees and governance meant "to improve inclusion and/or wellbeing for [transgender and gender nonbinary] student-athletes" suggesting review of, and update to, relevant NCAA policies and materials to "uphold NCAA core values around student-athlete inclusion, wellbeing, and fairness."³³⁹ Notably, another statement directed to the same groups recommended consideration of "competitive equity in women's sport as part of all policy reviews and updates."³⁴⁰

The NCAA's 2010 policy regarding transgender athlete participation was hailed as "progressive."³⁴¹ However, the NCAA's revised 2022 policy essentially amounts to a punt, pushing eligibility guidelines to each sport's national governing body.³⁴²

³³⁴ *Id.* (quoting Emmert).

³³⁵ *See* Sport Science Institute, *supra* note 328.

³³⁶ *Id.*

³³⁷ *NCAA Gender Identity and Student-Athlete Participation Summit*, 1 (Oct. 5-6, 2020), http://s3.amazonaws.com/ncaaorg/about/ncaa/Report_from_Transgender_Student-Athlete_Participation_Summit.pdf [<https://perma.cc/8J37-9QGW>]. The summit included representatives from NCAA member universities and external industry, as well as subject matter experts. *Id.* at 1.

³³⁸ *Id.* at 3.

³³⁹ *Id.* at 5-6.

³⁴⁰ *Id.* at 5.

³⁴¹ Rosen, *supra* note 133, at 880.

³⁴² Sanchez, *supra* note 1; *see also* Valerie Moyer, *An NCAA Policy on Trans Athletes Shouldn't Take Sport Out of Young Athletes' Lives*, GLOBAL SPORT MATTERS (Mar. 22, 2022), <http://globalsportmatters.com/science/2022/03/22/ncaa-policy-trans-athletes-participation-inclusion/> [<https://perma.cc/9S3W-WUXU>] (stating "The association appears to be punting on its governing responsibilities in order to avoid criticism and controversy."). Others referred to the NCAA's policy as passing the buck or playing a game of hot potato. For example, *see* Ennis, *supra* note 13.

The revised policy also upset advocates on both sides of the issue.³⁴³ Sentiments from those in favor of transgender student-athletes having the ability to participate in sports aligning with their gender identity included:

- Former student-athletes found the 2022 policy to be more “reactive,” resulting in a “major regression” in safety and inclusivity in college athletics.³⁴⁴
- Among other complaints, advocates for trans inclusion criticized the NCAA for caving to criticism and creating a policy that both sets different standards for trans athletes and will prove difficult to enforce.³⁴⁵
- Trans participation advocates also believed the revised policy increased restrictions on transgender student-athletes and rolled back progress while inflicting undue harm to a statistically small, already-marginalized group.³⁴⁶
- Others wondered why the NCAA needed to alter its policy at all, believing its previous version worked well.³⁴⁷

³⁴³ See Jo Yurcaba, *NCAA's New Trans Athlete Guidelines Sow Confusion Amid Lia Thomas Debate*, NBC NEWS (Jan. 21, 2022), <http://nbcnews.com/nbc-out/out-news/ncaas-new-trans-athlete-guidelines-sow-confusion-lia-thomas-debate-rcna13073> [https://perma.cc/HZ6B-S7K3] (explaining that advocates on each side contended the new policy lacked clarity and could provide difficult to enforce); see also Sanchez, *supra* note 184 (noting that the new policy “has come under fire by observers on the various sides of a highly charged debate over participation in college sports.”). At the very least, the NCAA could have better communicated the possibility of policy change and now should clarify the policy to address the backlash it has received. Diaz, *infra* note 349 (citing Fischer’s comments).

³⁴⁴ Gleeson, *supra* note 27 (citing Telfer’s worries).

³⁴⁵ Yurcaba, *supra* note 343 (quoting trans advocate and duathlete Chris Mosier and Lieberman).

³⁴⁶ Moyer, *supra* note 342 (explaining the new policy implemented a new requirement for consistent testing).

³⁴⁷ Robinson, *supra* note 331 (quoting Mosier as stating, “This was absolutely a missed opportunity for the NCAA. The NCAA has been using a policy for over 10 years now, and it’s been working quite well.”). Harper lamented, “. . .it’s clear that they haven’t entirely thought everything out.” Sanchez, *supra* note 184. Note that as recently as March 2022, Emmert wrote that the NCAA had no plans to change its transgender student-athlete participation rules. John Lohn, *NCAA President Mark Emmert Says Governing Body Will Continue to Allow Transgender Participation*, SWIMMING WORLD (Mar. 28, 2022), <http://swimmingworldmagazine.com/news/ncaa-president-mark-emmert-says-governing-body-will-continue-to-allow-transgender-participation/> [https://perma.cc/827G-8VCV].

- Some speculated that political influence, as opposed to student-athlete well-being, spurred the policy change.³⁴⁸
- Some worried about the NCAA's ability to enforce this more "conservative" policy.³⁴⁹
- Others complained that the 2022 policy evidenced a lack of leadership from NCAA officials and left college athletics lacking clear guidance.³⁵⁰

Examples of criticism from those in favor of restricting transgender student-athlete participation in alignment with their sex assigned at birth, on the other hand, included:

- An advocate for a "girls and women in sports" group was discouraged that the NCAA did not prioritize fairness and safety ahead of inclusion.³⁵¹
- The College Swimming & Diving Coaches Association of America publicly claimed that it supported Thomas but described the revised policy as "[N]ot a solution. The NCAA's previous policy on transgender participation, while pioneering, was outdated and yesterday's decision is a missed opportunity to lead this important discussion."³⁵²

Fairness and safety, if they were lacking, do not have to come at the expense of inclusion, however. And what of fairness and safety to transgender individuals? Emory University student-athlete Jay Jones, who

³⁴⁸ Gleeson, *supra* note 27 (citing conversation with attorney and sports rights consultant Ricky Volante, who described universities often having Republican support bases to appease).

³⁴⁹ Nuria Diaz, *NCAA to Allow National Governing Bodies to Decide Transgender Athlete Policy*, THE GW HATCHET (Feb. 7, 2022), <http://gwhatchet.com/2022/02/07/ncaa-to-allow-national-governing-bodies-to-decide-transgender-athlete-policy/> [<https://perma.cc/WR6Y-EZX3>] (citing comments by Susan Cahn, a University of Buffalo professor of history who has studied gender in sports).

³⁵⁰ *Id.* (citing comments of Mia Fischer, an associate professor of women's and gender studies and the chair of the LGBTQ+ Faculty Assembly Committee at the University of Colorado, Denver).

³⁵¹ Yurcaba, *supra* note 343 (quoting Nancy Hogshead-Makar, a former Olympic champion swimmer). "The new NCAA policy sounds a lot like the old one, Hogshead-Makar explained. Ennis, *supra* note 13. She went on to opine that the NCAA "failed women by not prioritizing fairness." *Id.* One national media member was quick to point out "(w)hat Hogshead-Makar did not say: Trans women are women." *Id.*

³⁵² Robinson, *supra* note 331 (noting that the Coaches Association sought for the NCAA to an additional qualifying spot for the championships that year).

identifies as trans, perhaps said it best, explaining that the new policy “[S]ends the message that [trans] inclusion, despite incessant attacks on trans humanity, is not worth a stance. Having access to recreation and athletics should not be up for debate, and giving each sport’s national governing body the option to exclude trans people is unacceptable.”³⁵³ Thus, the NCAA’s punt to each sport’s national governing body upset individuals on both sides of the debate. This criticism from both sides leads to many questions and confusion regarding the NCAA’s 2022 transgender student-athlete participation eligibility policy. What of multi-sport transgender student-athletes, for example? What if the governing bodies for their sports have conflicting policies? Further, if the NCAA so willingly punted twice on the issue at the expense of inclusion, what is next? A third category of participants (men’s, women’s, and transgender student-athletes)?

V. CONCLUSION

After it departed from its history of strong stances in response to actions it perceived as discriminatory, including against transgender individuals, when it failed to take meaningful action in response to state laws regulating transgender athlete sports participation, the NCAA’s 2022 revisions to its transgender student-athlete participation policy likewise left many constituents dissatisfied. Most importantly, many of the student-athletes whom the NCAA has taken responsibility to protect and for whom it has pledged to provide safe playing environments free from discrimination are hurt and feel shunned by the NCAA and, in another departure from past practices, are left to wonder whether the NCAA is pacifying politicians at their expense.

Lia Thomas serves as an example. While Thomas dealt admirably with the struggles she faced, future transgender student-athletes are no better off because of them. Thus, “[t]hough Thomas became the most notable trans athlete, she is part of a larger story about how the NCAA has fallen behind in creating a welcome environment for transgender athletes.”³⁵⁴

³⁵³ Katie Bartlett, *Emory Students Respond to NCAA’s New Transgender Student Athlete Policy*, THE EMORY WHEEL (Feb. 2, 2022), <http://emorywheel.com/emory-students-respond-to-ncaas-new-transgender-student-athlete-policy/> [https://perma.cc/Q77G-C68R].

³⁵⁴ Gleeson, *supra* note 27.