IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

L.E., by his next friends and parents, SHELLEY ESQUIVEL and MARIO ESQUIVEL, Plaintiff, v. BILL LEE, et al., Defendants.	Case No. 3:21-cv-00835 Chief Judge Waverly D. Crenshaw Jr. Magistrate Judge Alistair E. Newbern

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff L.E., by his next friends and parents Shelley Esquivel and Mario Esquivel, respectfully submits the following memorandum of law in support of his Motion for Summary Judgment.

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PRELIMINARY STATEMENT

Plaintiff L.E. is a sophomore at Farragut High School ("FHS"), a public high school in Knoxville, Tennessee. He loves playing golf and wants to try out for the FHS boys' golf team. L.E. is a transgender boy—meaning his male gender identity is inconsistent with the sex he was assigned at birth. Although he lives every aspect of his life as a boy, and his family, his teachers, and his peers regard him as a boy, L.E. is prohibited by law from playing on the FHS boys' golf team. In early 2021, Tennessee enacted into law Senate Bill 228 ("SB 228"), legislation which required that students at public middle and high schools in the State participating on sex-segregated interscholastic sports teams do so consistent with "the student's sex at the time of the student's birth, as indicated on the student's original birth certificate." Tenn. Code Ann. §49-6-310(a). Because L.E. is a transgender boy, SB 228 bars him from participating on the FHS boys' golf team.

L.E. is entitled to summary judgment because there is no genuine dispute of material fact with respect to his claims that his exclusion from the boys' golf team violates his rights under both the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a). SB 228 violates the Equal Protection Clause because discrimination based on sex and transgender status each triggers heightened scrutiny, and Defendants cannot meet their demanding burden of demonstrating that excluding L.E. from the boys' golf team is substantially related to any important government interest. SB 228 violates Title IX because interscholastic sports at Knox County public schools constitute educational programs that receives federal financial assistance, and individuals may not be excluded from such programs on the basis of sex.

The stated rationales for SB 228 relate to average physiological differences between pubertal boys and girls and the purported competitive advantage transgender girls—girls whose female gender identity differs from their sex assigned at birth—have over, and purported safety risks they pose to, cisgender (i.e., not transgender) girls competing in interscholastic girls' sports. These stated justifications for excluding transgender girls from girls' sports have been rejected by every court to confront such exclusionary policies thus far. And regardless, they fail to justify excluding L.E. from participating on the boys' golf team playing against cisgender boys. Applying SB 228 in this way is not substantially related to the stated purposes of the law; indeed, it is so disconnected from its stated purpose that it fails any level of equal protection scrutiny.

BACKGROUND[1]

A. L.E. Is A Transgender Boy

L.E. is a fifteen-year-old boy. PSUMF ¶1. He is a sophomore at FHS, a public high school in Knoxville, Tennessee. PSUMF ¶2. Although he was assigned female at birth, L.E. has a male gender identity. PSUMF ¶¶4-5. Because his sex assigned at birth and his gender identity are incongruent, L.E. is a transgender boy. PSUMF ¶8. In contrast, when an individual's sex assigned at birth is the same as the individual's gender identity, that individual is "cisgender." PSUMF ¶7.

L.E. feels like he has "always been a boy." PSUMF ¶10. He always preferred what are considered boys' clothes and activities, he was anxious about the changes to his body that female puberty would cause, and he expressed a desire for a deeper voice. PSUMF ¶¶11-12. L.E.'s parents were therefore not very surprised when he told them in late 2019, when he was in

[1] Citations to "PSUMF" are to Plaintiff's Statement of Undisputed Material Facts, which was filed along with L.E.'s motion for summary judgment and this memorandum.

seventh grade, that he did not feel like a girl and considered himself a boy. PSUMF ¶¶13-14.

L.E. has experienced significant anxiety as a result of the incongruence between his sex assigned at birth and his gender identity. PSUMF ¶17. In 2020, L.E. saw his pediatrician to discuss his gender identity and discomfort with his sex assigned at birth. PSUMF ¶18. Following consultations with multiple doctors and a mental health care therapist, L.E. was diagnosed with gender dysphoria on January 28, 2021. PSUMF ¶19.[2]

L.E.'s gender dysphoria treatment plan includes "being allowed to … live his life as a boy." PSUMF ¶20. Living in accordance with one's gender identity is referred to as "social transitioning." PSUMF ¶21. L.E began his social transition in 2020. PSUMF ¶20. L.E. legally changed his name from a traditionally feminine one to a traditionally masculine one, PSUMF ¶22, adopted male pronouns, PSUMF ¶23, uses the boys' restroom, PSUMF ¶24, and dresses and grooms himself in traditionally masculine ways, PSUMF ¶25. In addition, L.E. is currently receiving puberty-delaying medications that prevent the development of feminine features inconsistent with his gender identity. PSUMF ¶28. L.E. began this treatment on April 23, 2021, PSUMF ¶ 29, and is scheduled to begin testosterone treatment in October 2022, which will cause him to undergo puberty consistent with his gender identity, PSUMF ¶30.

As a result of these measures, L.E.'s family, peers, and teachers recognize L.E. as male. PSUMF ¶26. Being recognized as male has already benefitted L.E. and significantly lessened his anxiety. PSUMF ¶27. In the words of L.E.'s father, a "weight lifted off [L.E.'s] shoulders" after L.E. began transitioning. PSUMF ¶27.

[2] The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V") classifies clinically significant psychological distress stemming from an incongruence between a person's gender identity and sex assigned at birth as gender dysphoria. PSUMF ¶15.

B. Tennessee's Interscholastic Athletics Policy Before SB 228

Interscholastic sports are one of the extracurricular programs offered at Tennessee public schools. Participation in interscholastic sports, including at the high-school level, "has long-lasting, definitive benefits." PSUMF ¶31. These benefits include the development of resilience, discipline, teamwork, and other life skills that are not taught through academics or in the classroom. PSUMF ¶32. Participation in sports has also been shown to provide psychological benefits, assist in the development of life skills, and increase young people's self-esteem, as well as decrease the likelihood that young people will engage in drug or alcohol abuse. *See* PSUMF ¶¶33-34.

Like many other states, Tennessee has sex-segregated teams for many interscholastic sports. PSUMF ¶35. At the middle and high school levels for Tennessee public schools, many sports (including golf) are divided into boys' and girls' teams, provided there is enough interest at the school to form both teams. PSUMF ¶37-38. Teams in certain sports (such as girls' volleyball or girls' softball) are designated exclusively for girls. PSUMF ¶36. Other sports (e.g., football) are, as a default, not explicitly gender-specific. PSUMF ¶39. Sex-segregated sports teams in Tennessee predated the implementation of SB 228. PSUMF ¶43.

The entities that oversee middle and high school athletics in Tennessee public schools are the Tennessee Secondary School Athletic Association ("TSSAA") and its affiliate the Tennessee Middle School Athletic Association ("TMSAA") (collectively "TSSAA"). PSUMF ¶44. Many schools—including all Knox County schools—are members of the TSSAA and follow TSSAA policies for interscholastic athletics to the extent those policies are not inconsistent with federal, state, or municipal law. *See* PSUMF ¶45. Before SB 228 was signed into law, the TSSAA had a policy governing which team transgender student-athletes could participate on when the student-

athlete's school had both a boys' team and a girls' team ("Prior TSSAA Policy"). PSUMF ¶46. Under the Prior TSSAA Policy, students were allowed "to participate in TSSAA/TMSAA activities in a manner that is consistent with their gender identity, irrespective of the gender listed on the student's record." *Id*.

C. Tennessee Enacts SB 228 Into Law

On February 8, 2021, SB 228 was introduced in the Tennessee Senate. PSUMF ¶48. SB 228's text specifically identified concerns over "girls who compete in interscholastic athletic activity" as a motivation for the legislation. PSUMF ¶49. As written, however, SB 228 covered *any* student seeking to play *any* interscholastic sport. Specifically, the legislation proposed amending Title 49 of the Tennessee Code to specify that "a student's gender for purposes of participation in public middle school or high school interscholastic athletic activity or event must be determined by the student's sex at the time of the student's birth, as indicated on the student's original birth certificate." PSUMF ¶54. SB 228 also directed the "state board of education, each local board of education, and each governing body of a public charter school [to] adopt and enforce policies to ensure compliance with" the law. PSUMF ¶55.

After the bill passed both chambers of the State Legislature, the Governor signed SB 228 into law on March 26, 2021. PSUMF ¶56. The statute took effect in the 2021-2022 school year, PSUMF ¶57, and effectively superseded the Prior TSSAA Policy allowing transgender student athletes' participation consistent with gender identity, PSUMF ¶83. SB 228's main operative provision is now codified at Tenn. Code Ann. §49-6-310(a).

In January 2022, a follow-on bill to SB 228 called Senate Bill 1861 ("SB 1861") was introduced in the Tennessee Senate. PSUMF ¶58. SB 1861, which amends the same chapter of the Tennessee Code as SB 228, permits the Commissioner of the Tennessee Department of

Education ("TDOE") to "withhold a portion of the state education finance funds" if a school district does not comply with SB 228. PSUMF ¶59. The Governor signed SB 1861 on April 22, 2022, PSUMF ¶60, and it went into effect on July 1, 2022, PSUMF ¶61. SB 1861's operative provision is now codified at Tenn. Code. Ann. §49-6-310(b)(1).

D. The State And County Defendants Take Further Steps To Enforce SB 228

Various entities across multiple levels of government in Tennessee have taken, and are taking, steps to enforce SB 228. At the state level, the State Board of Education ("SBOE"), which has primary rulemaking authority over education in Tennessee, PSUMF ¶63, is in the process of developing a rule (the "Funding Rule") that will implement SB 228 and SB 1861, PSUMF ¶69. In its current draft, the Funding Rule will permit TDOE to withhold "state education finance funds" from any Local Education Area ("LEA")—including Knox County—not in compliance with SB 228. PSUMF ¶70.

TDOE implements SBOE rules and policies and has primary responsibility for overseeing LEA compliance with relevant rules and policies. PSUMF ¶¶65, 67. As part of these efforts, LEAs are required to provide TDOE with reports signaling their compliance with various state laws, including SB 228. PSUMF ¶68. The Funding Rule authorizes TDOE to withhold the state education funding of any LEA that does not comply with SB 228. PSUMF ¶71.

Day-to-day enforcement of SB 228 is primarily done at the county level. PSUMF ¶72. Education policies in Knox County (where FHS is located, PSUMF ¶3) are set by the Knox County Board of Education ("KCBOE"), which is composed of elected members. PSUMF ¶¶73-

74. Knox County Schools ("KCS"), which is led by a Superintendent, is the entity that implements those policies. PSUMF ¶¶76-77.[3]

Following SB 228's enactment, KCBOE in July 2021 revised the Knox County Athletics Policy ("I-171 Policy"). PSUMF ¶78. The new I-171 Policy states that "a student's gender for purposes of participation in middle or high school athletics is determined by the student's sex at the time of the student's birth. A valid original birth certificate must be provided for this purpose." PSUMF ¶79. FHS is obligated to comply with this revised policy. PSUMF ¶80. Any failure to abide by the I-171 Policy would trigger an investigation and, ultimately, "there would be action taken" by KCS. PSUMF ¶81. Although SB 228 motivated the revised I-171 Policy, that revised policy will remain in place unless affirmatively repealed, even if SB 228 itself is no longer operative. PSUMF ¶82.[4]

E. L.E. Is Excluded From The FHS Boys' Golf Team

L.E. has played golf since the summer of 2018. PSUMF ¶84. He started playing at a free golf clinic at a local course, PSUMF ¶85, and after playing for the first time, he began to "really, really love" the sport, PSUMF ¶86. Specifically, L.E. enjoys the amount of focus, skill, and concentration on each shot that golf requires. PSUMF ¶87. Shortly after his introduction to the sport, his parents bought him golf clubs and shoes, PSUMF ¶88, and he began taking lessons, PSUMF ¶89. He took lessons regularly from July 2018 through July 2021, as often as weekly during some periods. PSUMF ¶89. L.E. likes to play golf with his father, usually at various

[3] The terms "State Defendants" and "County Defendants" refer collectively to all Defendants linked to the State of Tennessee and Knox County, respectively. *See* Compl. ¶¶12-16, 18.

[4] Nothing in the record reflects any affirmative repeal of the Prior TSSAA Policy. However, all TSSAA policies are subordinate to state law, PSUMF ¶47, such that SB 228 renders the Prior TSSAA Policy inoperative, PSUMF ¶83.

courses throughout the Knoxville area. PSUMF ¶90. He also tries to go to the driving range a few times a month. PSUMF ¶91.

In seventh and eighth grade, L.E. played on the Farragut Middle School (FMS) girls' golf team. PSUMF ¶92. He was early in his transition at the time and had not yet changed his name or began puberty suppression treatment. PSUMF ¶92. While L.E. loved playing golf and playing on a competitive team, he was embarrassed and angry to have to play on the girls' team because he is "a boy and it [was] awkward to be the only boy playing on a girls' golf team." PSUMF ¶93. L.E. knew himself to be a boy playing on the girls' team and felt that he didn't fit in. PSUMF ¶93. During his eighth-grade golf season, L.E. felt it was essential for him to play on the boys' team when he got to high school, and he has consistently expressed his desire to play on the FHS boys' golf team since. PSUMF ¶94. He feels that playing on the boys' team is important to him because, quite simply, "[he's] a boy." PSUMF ¶95.

Before the passage of SB 228, L.E. was eligible to play on the boys' golf team assuming a successful tryout. PSUMF ¶96. Now, however, SB 228 bars him from the boys' team. PSUMF ¶97. Given his difficult experience on the FMS girls' team and the importance of living as a boy in all aspects of his life to alleviate his gender dysphoria, *supra* p.3, L.E. and his parents feel that the harms of playing on the FHS girls' team far outweigh the benefits. PSUMF ¶100.[5]

After the passage of SB 228, L.E. felt "devastated," "not worthy," and like an "outcast" because he would be unable to play for the boys' golf team. PSUMF ¶101. Playing golf makes

[5] L.E. has not tried out for the boys' golf team because he saw "no point" in doing so if he could not ultimately join the team. PSUMF ¶103. After this suit was filed, County Defendants offered L.E. an opportunity to try out for the FHS boys' golf team, but he rejected that opportunity as "meaningless" because even if otherwise successful, SB 228 precludes him from ultimately joining and playing on the boys' golf team. PSUMF ¶104.

L.E. "really, really … happy," PSUMF ¶102, but if his only option to play interscholastic golf is to play on the girls' golf team, he will not play interscholastic golf, PSUMF ¶102.

LEGAL STANDARD

A party is entitled to summary judgment when it "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A mere scintilla of evidence or some metaphysical doubt as to a material fact is insufficient to forestall summary judgment." *Babcock & Wilcox Co. v. Cormetech, Inc.*, 848 F.3d 754, 758 (6th Cir. 2017). Instead, "[a] genuine dispute of material fact exists if a reasonable [factfinder]—viewing the evidence in favor of the nonmovant—could decide for the nonmovant." *Blanchet v. Charter Commc'ns, LLC*, 27 F.4th 1221, 1226 (6th Cir. 2022).

ARGUMENT

I. SB 228, AS APPLIED TO L.E., VIOLATES THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause bars any state or local government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1; *see American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 287 (6th Cir. 2009) (the Equal Protection Clause "applies to local governments"). "The Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.'" *Andrews v. City of Mentor*, 11 F.4th 462, 473 (6th Cir. 2021). "'[O]nce disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers.'" *Dixon v. University of Toledo*, 702 F.3d 269, 278 (6th Cir. 2012).

As explained below, applying SB 228 to L.E. violates his rights under the Equal Protection Clause. Applying SB 228 to exclude L.E. from the FHS boys' golf team

discriminates against him based on transgender status and sex. This triggers heightened scrutiny because all sex classifications are evaluated under heightened scrutiny, and classification on the basis of transgender status bears all indicia of a suspect classification. Barring L.E. from the boys' golf team not only fails to substantially further an important government interest, it fails to rationally further any legitimate governmental interest at all. In light of a factual record utterly devoid of evidence to support this discrimination against L.E., a reasonable factfinder could only conclude that, as applied to L.E., SB 228 violates the Equal Protection Clause.[6]

A. SB 228 Discriminates Against L.E. Because He Is A Transgender Boy

SB 228 provides that Tennessee public secondary school students may only compete on interscholastic athletic teams consistent with their sex assigned at birth. Although L.E. identifies as a boy, SB 228 renders him ineligible to compete on the FHS boys' golf team. As witnesses for both the State and County Defendants confirmed, this ineligibility rests solely on the fact that L.E.'s sex assigned at birth was female, not male. *See* PSUMF ¶98. L.E.'s cisgender boy classmates, by contrast, are eligible to compete on the boys' golf team, solely because they were assigned male at birth. *See* PSUMF ¶99. The requirement to reference L.E.'s sex assigned at birth in determining which team he is eligible to compete on constitutes differential treatment on the basis of sex. *Infra* pp.12-13. And because an incongruence between one's sex assigned at birth and gender identity "is closely correlated with being" transgender, SB 228 "is … directed toward [transgender] persons as a class," *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring), *quoted in Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010).

[6] The arguments in this Part apply equally to the revised I-171 Policy, which violates the Equal Protection Clause for the same reasons as SB 228.

SB 228's disparate treatment of L.E. is discriminatory because L.E. is "similarly situated in all material respects" to his cisgender boy peers, *Loesel v. City of Frankenmuth*, 692 F.3d 452, 462 (6th Cir. 2012) (internal citations omitted). The record in this case unambiguously reflects that L.E. "expresse[s] his male identity in all aspects of his life." *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020). These expressions include going by a typically masculine name, using male pronouns, grooming and dressing as a boy, and using male restrooms. *Supra* p.3. L.E's teachers and peers at school all regard and treat him as a boy. *Id.* "The overwhelming thrust of everything in the record," accordingly, "is that [L.E. is] similarly situated to other boys." *Grimm*, 972 F.3d at 610; *accord B.P.J. v. West Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347, 353-354 (S.D. W. Va. 2021) (transgender female student-athlete "is not most similarly situated with cisgender boys; she is similarly situated to other girls"). Yet unlike cisgender boys, L.E. is barred from the FHS boys' golf team, solely because he is a transgender boy assigned the sex of female at birth, while his cisgender peers were assigned the sex of male at birth. Defendants, therefore, must justify this differential treatment.

B. SB 228's Exclusion Of L.E. From The Boys' Golf Team Is Subject To Intermediate Scrutiny

The application of SB 228 to exclude L.E. from the boys' golf team is subject to intermediate scrutiny. This elevated review of SB 228 is required both because classifications on the basis of transgender status are classifications on the basis of sex, and because transgender individuals are, at the least, a quasi-suspect class.[7]

[7] The applicable level of scrutiny is a "purely legal question," *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 828-829 (1st Cir. 2020), amenable to resolution on summary judgment.

1. Transgender status classifications inherently classify based on sex

It is black-letter law that "discriminatory classifications based on sex" are subject to "intermediate scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Discrimination on the basis of transgender status constitutes sex discrimination for two independent reasons.

First, as the Supreme Court recently explained, "it is impossible to discriminate against a person for being … transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1741 (2020). This is because if a transgender individual is treated worse than a cisgender individual with the same gender identity, that disparate treatment is ultimately rooted in the individuals' sex assigned at birth. To illustrate the point, the Court gave an example of "an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female." *Id.* "If the employer retains an otherwise identical employee who was identified as female at birth," the Court explained, "the individual employee's sex plays an unmistakable … role in the" disparate treatment. *Id.* at 1741-1742; *accord Schroer v. Billington*, 577 F. Supp. 2d 293, 306-307 (D.D.C. 2008) (discrimination against transgender individuals is sex discrimination under Title VII, just as discrimination against religious converts violates Title VII, as "[d]iscrimination 'because of religion' easily encompasses discrimination because of a *change* in religion").

Under *Bostock*'s reasoning, L.E.'s sex assigned at birth undoubtedly drives the disparate treatment against him. Again, L.E. is ineligible for the boys' golf team at FHS because he was assigned female at birth. Had he been assigned male at birth, and otherwise had the exact same gender identity as he has now, L.E. would be eligible to play on the boys' golf team. It follows that SB 228's transgender classification by definition entails consideration of sex. The Fourth, Seventh, and Eighth Circuits have each held that for purposes of the Equal Protection Clause,

transgender-status classifications constitute sex discrimination subject to intermediate scrutiny. *Grimm*, 972 F.3d at 608; *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051-1052 (7th Cir. 2017); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 669-670 (8th Cir. 2022). This Court should follow those well-reasoned opinions and hold the same here.[8]

SB 228 also constitutes sex discrimination because it improperly relies on sex stereotypes. Under Title VII, "making employment decisions based on sex stereotyping, i.e., the degree to which an individual conforms to traditional notions of what is appropriate for one's gender, is actionable discrimination." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006). The Sixth Circuit has extended this sex stereotyping prohibition to "claim[s] of sex discrimination grounded in the Equal Protection Clause," *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004), and transgender status discrimination has been held unlawful because "[t]here is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender nonconformity," *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576-577 (6th Cir. 2018), *aff'd on other grounds in Bostock*. Given these binding precedents, discrimination on the basis of transgender status constitutes sex discrimination under the Equal Protection Clause and must therefore satisfy intermediate scrutiny.

[8] *Bostock* is fully applicable here even though it involved an employment-discrimination claim under Title VII of the Civil Rights Act of 1964, 140 S.Ct. at 1754, because "discrimination claims brought under the Equal Protection Clause us[e] the same test applied under Title VII," *Boxill v. O'Grady*, 935 F.3d 510, 520 (6th Cir. 2019).

2. Transgender people constitute, at the least, a quasi-suspect class

The application of SB 228 to L.E. is also subject to heightened scrutiny for the independent reason that transgender people constitute, at the least, a quasi-suspect class. Classifications "treating members of a quasi-suspect class differently from other persons trigger intermediate scrutiny." *Ondo v. City of Cleveland*, 795 F.3d 597, 608 (6th Cir. 2015). "The Supreme Court uses certain factors to decide whether a new classification qualifies as a quasi-suspect class." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013). As numerous courts have recognized, "it is apparent that transgender persons constitute a quasi-suspect class." *Grimm*, 972 F.3d at 610-611 (so holding and citing over a half-dozen cases holding the same).

The first factor courts consider is whether the targeted group has, "[a]s a historical matter, … been subjected to discrimination." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Empirically, "[t]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." *Grimm*, 972 F.3d at 611-612 (citation omitted) (referencing extensive data showing anti-transgender discrimination).

Next, courts ask whether the classification in question "bears '[any] relation to the individual's ability to participate in and contribute to society.'" *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). Transgender status does not hinder a person's ability to contribute to society. As the Fourth Circuit explained: "Seventeen of our foremost medical, mental health, and public health organizations agree that being transgender implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *Grimm*, 972 F.3d at 612 (internal quotation marks omitted). It is therefore unsurprising that

courts regularly conclude that "transgender people are no less capable of contributing value to society than other people." *Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020).

Third, courts look to whether the group in question "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a distinct group." *Lyng*, 477 U.S. at 638. Transgender people share the defining characteristic of having a gender identity that differs from the sex assigned to them at birth. *See* PSUMF ¶8. And because "gender identity is a fundamental and core component of human identity," PSUMF ¶6, "it would be inappropriate to require [anyone] to change it to avoid discrimination," *Love v. Beshear*, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014). As the Fourth Circuit has recognized, transgender people satisfy this factor because "being transgender is not a choice." *Grimm*, 972 F.3d at 612.

Finally, courts examine whether the class is "a minority or politically powerless." *Lyng*, 477 U.S. at 638. Transgender people are less than one percent of the population and, even given their small numbers, they are "underrepresented in every branch of government." *Grimm*, 972 F.3d at 613-614. Moreover, transgender people have recently faced a wave of legislation targeting them for unequal treatment, both in Tennessee and throughout the United States. PSUMF ¶¶117-120. These facts, in concert with the longstanding history of discrimination just mentioned, confirm that "[t]ransgender people … ha[ve] not yet been able to meaningfully vindicate their rights through the political process." *Grimm*, 972 F.3d at 613.

C. The Application Of SB 228 To L.E. Fails Intermediate Scrutiny

To satisfy intermediate scrutiny, "the government must prove that (1) [the challenged] classification serves 'important governmental objectives,' and (2) the classification is 'substantially and directly related' to the government's objectives." *Vitolo v. Guzman*, 999 F.3d 353, 364 (6th Cir. 2021). The burden of proving that SB 228 satisfies this "demanding" standard

"rests entirely on the" Defendants. *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 533 (1996); *see Cole v. City of Memphis*, 839 F.3d 530, 539 n.6 (6th Cir. 2016). Accordingly, Defendants "must present affirmative evidence on [that] critical issue[] sufficient to allow a [factfinder] to return a verdict in [their] favor" in order to survive summary judgment. *Guarino v. Brookfield Tp. Trs.*, 980 F.2d 399, 403 (6th Cir. 1992). In addition, Defendants' "justification must be genuine, not hypothesized or invented post hoc." *VMI*, 518 U.S. at 533. Finally, because L.E. brings an as-applied challenge, Defendants must prove that excluding *him specifically from the FHS boys' golf team* is substantially related to important governmental interests. *See Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1361 (6th Cir. 1992).

The legislative text of SB 228 asserts that the law furthers two government interests: ensuring that cisgender female student-athletes at Tennessee public secondary schools have "opportunities to compete at higher levels [and] college recruiting and scholarship opportunities," PSUMF ¶¶50-51; and ensuring that interscholastic girls' sports were conducted safely, as there was concern that "injury to girls" may result "if girls participate in contact sports with boys," PSUMF ¶52. *See* PSUMF ¶49; *see also* PSUMF ¶53 (the State referencing this text as "provid[ing] some governmental interests"). Even assuming, *arguendo*, the preservation in girls' interscholastic sports of competitive fairness and safety are important governmental interests, applying SB 228 to exclude L.E. from the boys' golf team is not substantially related to furthering those interests. Indeed, excluding a transgender boy such as L.E. from the boys' golf team has no plausible relationship—let alone a substantial one—to the alleged interests underlying SB 228; such exclusion has no impact on either opportunities for or the safety of cisgender girls, and there is no safety issue in a non-contact sport like golf.

The purported interest in ensuring opportunities for cisgender girls to compete and win scholarships in interscholastic sports embodies the fundamental disjunction between SB 228's ends and its means as applied to L.E. The State's concern here is that transgender girls allegedly have inherent physiological advantages that make them more likely than cisgender girls to get limited slots on interscholastic teams and more likely to win interscholastic prizes, championships, and scholarships. PSUMF ¶¶49-50. Even assuming, *arguendo*, that these concerns about transgender girls are well-founded (and they are not, *B.P.J.*, 550 F. Supp. 3d at 355-356 (statute barring transgender girls from competing on interscholastic girls' sports teams likely fails intermediate scrutiny); *Hecox v. Little*, 479 F. Supp. 3d 930, 978-986 (D. Idaho 2020) (same)), barring L.E. from the boys' golf team does nothing to increase the athletic opportunities for cisgender girls because L.E. would not be competing with cisgender girls. And as the State Defendants' purported expert on this interest acknowledged, his report did not discuss "competitive advantages that transgender boys have against non transgender boys in athletics." PSUMF ¶112; *see* PSUMF ¶111.

Excluding L.E. from the boys' golf team is even more disconnected from the asserted interest in the safety of female athletes. SB 228's legislative text specifically referenced a concern over "injury to girls if girls participate in contact sports with boys." PSUMF ¶52. Not only does L.E. not seek to participate in a sport with girls, but the sport in which he seeks to participate—golf—is considered a non-contact sport, PSUMF ¶115. The State's own expert on the supposed safety risks of transgender students participating on sports teams explained that his opinions do not apply to transgender boys or non-contact sports. PSUMF ¶¶114, 116. Keeping

L.E. off the boys' golf team would thus do nothing to increase the safety of cisgender girls participating in interscholastic sports.[9]

The overbreadth of SB 228's categorical ban on transgender student-athletes participating on teams consistent with their gender identity is further evidenced by the fact that Tennessee imposes a stricter and more exclusive policy than even the world's most elite athletic bodies. The International Olympic Committee ("IOC"), for example, has allowed transgender athletes to participate in accordance with their gender identity in elite Olympic level competitions for almost 20 years. PSUMF ¶105. And although the IOC updated this policy in 2021 to delegate the development of transgender athlete eligibility rules to individual sports' governing bodies, PSUMF ¶106, no policy categorically barring transgender athletes (let alone just transgender males) from participating on teams consistent with their gender identity has been adopted, PSUMF ¶107. Transgender athletes are likewise not categorically barred from participating on teams consistent with their identity in events run by the National Collegiate Athletic Association, the organization which oversees elite college sports nationwide. PSUMF ¶¶108-110. The fact that fairness and safety do not necessitate categorical bans of transgender athletes even at the highest levels of global sport underscores SB 228's constitutional infirmity.

[9] The safety rationale fails for the additional reason that boys and girls are allowed to play together on some contact sports teams at Tennessee secondary schools. *Supra* p.4. One such example of a coed contact sport team is FHS's football team, which had a cisgender female player during the 2021 season. PSUMF ¶40. This female student-athlete played on the offensive line, a "high-contact" role that often involves tackling and being tackled by other players. PSUMF ¶41. FHS's principal testified that he had no concerns about this female student-athlete's safety. PSUMF ¶42. Given that the State of Tennessee is comfortable allowing cisgender girls to participate in football with boys—a contact sport that notoriously poses serious safety risks, *see In re Nat'l Football League Players' Concussion Injury Litig.*, 962 F.3d 94, 97 (3d Cir. 2020)—there is no basis to rely on safety concerns to keep transgender boys off boys' teams, especially in non-contact sports like golf.

D. The Application Of SB 228 To L.E. Cannot Survive Rational Basis Review

The application of SB 228 to exclude L.E. from the boys' golf team cannot survive even rational basis review. *See Cleburne*, 473 U.S. at 440 (laws not subject to heightened scrutiny still must "rationally relate[] to a legitimate state interest" in order to "be sustained"). Applying the law to L.E. "is so far removed from [the] particular justifications" put forth in support that it is "impossible to credit them," *Romer v. Evans*, 517 U.S. 620, 635 (1996). Quite simply, Defendants have provided no interest, let alone a legitimate one, in excluding L.E. from the boys' golf team.

II. SB 228, AS APPLIED TO L.E., VIOLATES TITLE IX

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). To prevail on his Title IX claim, L.E. must prove: "(1) that he was excluded from participation in an education program 'on the basis of sex'; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused him harm." *Grimm*, 972 F.3d at 616. The two other courts to address whether a categorical ban of transgender students (in those cases, transgender girls) from interscholastic athletic teams violates Title IX both held the statutes in question likely unlawful. *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, 2022 WL 2951430, at *11 (S.D. Ind. July 26, 2022), *appeal pending* No. 22-2332 (7th Cir.); *B.P.J.*, 550 F. Supp. 3d at 356-357. SB 228 likewise violates Title IX as applied to L.E.[10]

[10] The arguments in this Part equally apply to the revised I-171 Policy, which violates Title IX for the same reasons as SB 228.

A. SB 228 Excludes L.E. From The FHS Boys' Golf Team On The Basis Of Sex

Title IX's implementing regulations unambiguously confirm that the statute's prohibition on sex discrimination applies to "interscholastic … athletics." 34 C.F.R. §106.41(a); 45 C.F.R. §86.41(a). SB 228's exclusion of L.E. from the FHS boys' golf team therefore bars him from "an[] education program or activity," 20 U.S.C. §1681(a).

L.E's exclusion is "on the basis of sex," 20 U.S.C. §1681(a). Both State and County Defendants acknowledge that L.E. would be eligible for the boys' golf team but for the fact that he is transgender. *Supra* p.10. And as explained above, discrimination on the basis of transgender status constitutes sex discrimination, both because (as the Supreme Court held in *Bostock*) as a definitional matter it is impossible to discriminate on the basis of transgender status without discriminating on the basis of sex, and because (as the Sixth Circuit held in *Smith*) transgender status discrimination impermissibly implicates sex stereotypes. *Supra* Part I.B.1. Although *Bostock* and *Smith* arose in the employment discrimination context, *supra* pp.12-13, the Sixth Circuit "look[s] to the Title VII landscape for guidance" when "crafting [the] framework for analyzing Title IX claims," *Chisholm v. St Marys City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 349-350 (6th Cir. 2020); *see also id.* at 351 (recognizing "Title IX's prohibition on sex stereotyping"); *Grimm*, 972 F.3d at 616 (holding *Bostock* applicable to Title IX); *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (same).

The fact that, under SB 228, L.E. is eligible to participate on the girls' golf team does not excuse this discriminatory treatment. For one, cisgender boys—the group with whom L.E. is similarly situated, *supra* p.11—are not forced to choose between participating on a girls-only team or foregoing participation in interscholastic sports entirely the way L.E. is. That differential treatment contravenes Title IX. *See Grimm*, 972 F.3d at 618 ("Unlike the other boys,

he had to use either the girls' restroom or a single-stall option. In that sense, he was treated worse than similarly situated students.").

Moreover, playing on the girls' golf team is, in actuality, not an option for L.E. Given L.E.'s embarrassing, uncomfortable, and angering experience playing for the FMS girls' golf team, *supra* p.8, it is not surprising that he has no desire to "be the only boy playing on a girls' golf team," PSUMF ¶93. In fact, doing so would require L.E. to act contrary to his treatment plan for gender dysphoria—which calls for him to be allowed to live as a boy in all aspects of his life. *Supra* p.3. As L.E. explained, if he had to play on the girls' team in order to play interscholastic golf, he would not play (and, indeed, has not played) interscholastic golf. *Supra* pp.8-9. Accordingly, SB 228 categorically excludes him from the benefits of competing in interscholastic golf.

B. KCBOE And SBOE Constitute Recipients Of Federal Financial Assistance

Both KCBOE and SBOE are liable for violating L.E.'s Title IX rights because they constitute recipients of federal financial assistance. Indeed, KCBOE expressly admits as much. PSUMF ¶75.

As for SBOE, the fact that it does not itself receive federal funding does not shield it from Title IX liability. TDOE indisputably *does* receive federal funding. PSUMF ¶66. And SBOE indisputably exercises supervisory authority over public schools in Tennessee, including over TDOE. *See* Tenn. Code. Ann. §49-1-302; PSUMF ¶¶62-65. As the TDOE Commissioner explained, TDOE must follow SBOE policy. PSUMF ¶¶63-64.

A party's status as a recipient of federal financial assistance under Title IX is a question of "substance" over "form." *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994). In *Horner*, the Sixth Circuit held that a state school board which did not itself

receive federal funding but nonetheless sat "at the … helm" of a state education department that did receive federal funding was itself "subject to Title IX." *Id.* Key to the court's conclusion was that the state board, "[p]ursuant to state statute, … *controls and manages*, on behalf of the Department, the state's schools and all programs conducted in the schools." *Id.* As just explained, the same dynamic exists in Tennessee between TDOE and SBOE.

C. L.E. Is Harmed By SB 228's Improper Discrimination

"[D]iscrimination has harmful consequences no matter what its form," *Preferred Properties, Inc. v. Indian River Estates, Inc.*, 276 F.3d 790, 800 (6th Cir. 2002), and there is no dispute of material fact as to the harm SB 228 has caused L.E. As a general matter, singling out transgender people on the basis of their transgender status stigmatizes and isolates them from their peers. PSUMF ¶16. Moreover, SB 228 has deprived L.E. of the educational and social benefits that other students obtain from participating in school sports by prohibiting him from playing on the FHS boys' golf team for the last two years and, if left to stand, it will continue to deprive him of those benefits. As numerous witnesses for both L.E. and the various Defendants have acknowledged, students participating in interscholastic sports accrue numerous benefits, including discipline, accountability, and social and emotional development. *Supra* p.4. And L.E. has felt and continues to feel the loss of these benefits particularly acutely because golf "really, really makes him happy," PSUMF ¶102, and being unable to try out for the boys' team just because he is transgender makes him feel like "an outcast," PSUMF ¶¶101.

III. L.E. Is Entitled To Permanent Injunctive Relief

In addition to issuing a declaratory judgment that SB 228 violates L.E.'s rights under the Equal Protection Clause and Title IX, Compl. Prayer for Relief ¶1, this Court should permanently enjoin Defendants from enforcing SB 228 and the revised I-171 policy against L.E,

id. ¶2. To receive a permanent injunction, L.E. "must demonstrate that [he] has suffered irreparable injury, there is no adequate remedy at law, 'that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted,' and that it is in the public's interest to issue the injunction." *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006). Each factor favors L.E.

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). As explained in Part I, SB 228 and the revised I-171 Policy impair L.E.'s rights under the Equal Protection Clause as a matter of law. Defendants' violation of Title IX, *see* Part II, also inflicted "irreparable harm" on L.E. by "den[ying him] the opportunity to join [his] school['s] sports team[] because of [his] sex." *B.M. ex rel. Bao Xiang v. Minnesota State High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019). This is especially so because he "cannot get [the upcoming] season back," and "[w]ithout injunctive relief … [he] will be prevented from competing next year[, his last year of eligibility,] as well." *Id.* Similarly, monetary damages cannot make L.E. whole from the unlawful denial of an opportunity to participate in the unique, "temporally isolated opportunities," of high school sports, *id.*

As for the balance of equities and public interest, those "factors merge" because the Defendants here are all government entities. *R.K. ex rel. J.K. v. Lee*, 575 F. Supp. 3d 957, 978 (M.D. Tenn. 2021) (Crenshaw, C.J.). "And [because] no cognizable harm results from stopping unconstitutional conduct, … 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Vitolo*, 999 F.3d at 360. Defendants' violation of L.E.'s equal protection rights is accordingly "dispositive" as to these factors. *Id.* The same is true of Defendants' violation of L.E.'s Title IX rights. *See Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222

(6th Cir. 2016) ("'[T]he overriding public interest l[ies] in the firm enforcement of Title IX.'" (brackets in *Dodds*)). This is especially true given that, without an injunction, L.E. will miss out on a chance to experience the numerous undisputed benefits of interscholastic sports. *Supra* p.4. Permanent injunctive relief is therefore warranted as a matter of law.

CONCLUSION

For the foregoing reasons, L.E.'s motion should be granted, and this Court should enter summary judgment in his favor on all claims.

Dated: October 7, 2022

Respectfully submitted,

/s/ Alan Schoenfeld

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, a true and correct copy of the foregoing Joint Motion for Protective Order was served on the below counsel for Defendants, via the Court's ECF/CM system.

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