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Can the Rationale Behind Idaho's Fairness in Women's Sports Act Justify Banning Transwomen from Women's Competitions in General Including Beauty Pageants?

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ABSTRACT

The inclusion of transgender females in women's competitions has evoked political and judicial discussions in many countries as the citizens in general weren't prepared to witness a biological male who has scientifically restructured himself as a female in competitions designed for cisgender women. Consequently, a string of laws was passed in the US attempting to ban transwomen from women's sports. The same was challenged under the Equal Protection Clause of the 14th Amendment which promotes equality to all genders but permits discrimination if the discrimination in question pursues an important governmental interest. Idaho's Fairness in Women Sports Act which is one of the first legislations to categorically ban transwomen athletes from participating in female sports attempts to justify the ban based on the rationale that non-restrictive participation to women's sports competitions is a violation of women's right to equality as it permits transwomen to take advantage of their physiology and reduce the competition success rate of ciswomen, which would not have been the case if the latter is allowed to compete in their own category. The statute is currently facing an injunction after being challenged for violating the Equal Protection Clause of the US Constitution. The US supreme court is yet to deliberate and make the landmark decision of whether the said ban is unconstitutional, thus unenforceable. This article examines the rationale used for justifying the ban imposed under the Fairness in Women's Sports Act and argues that if the same is declared as constitutionally valid, there would be far reaching consequences which goes beyond restricting transwomen from women's sports as the same rationale, if argued adequately will potentially be able to place constitutionally valid restrictions on transwomen from competing in women's competitions in general including beauty pageants.

I. INTRODUCTION

Transwomen's participation in both international and national competitions has become a

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common norm which acts in the guise of all inclusion policies. Both judiciary and legislature are currently tasked with the difficulty in assessing how law can address the all-inclusive policies which indeed is a potential threat towards women who identify themselves as biological females.

The existing sources, both primary and secondary, have dedicated much attention to determining the legality of transwomen participation in national and international athletics. However, the legality of transwomen participation in other competitions including beauty pageants is yet to be decided. Ironically, transwomen participation in beauty pageants was never questioned before a court of law since the all-inclusive policies adopted by competition organizers managed to not trigger the trans community from starting human rights proceedings. However, many cases are pending before US courts deliberating on the legality of transwomen inclusion and exclusion policies pertaining to women's sports.

This article first examined the difference between athletic and modelling competitions to evaluate the difference between the two forms of competitions. This was followed by an analysis of the justification used by the Idaho's Fairness in Women Sports Act for banning trans community from female sports competitions which is currently facing an injunction against the challenge brought under the Equal Protection Clause of the 14th Amendment for violating the US Constitution. The rationale behind the ban will be evaluated to determine if the same can be used to justify banning transwomen from participating in modelling competitions or women's competitions in general designed for cisgender women if in case the same is declared constitutional by the US Supreme Court.

II. EVALUATING THE DIFFERENCE BETWEEN ATHLETIC AND MODELLING COMPETITIONS

One of the commonalities between athletics and modelling competitions would be the competitive nature involved in both assignments. Except for the described common element and among other things, both types of competitions are focused on assessing completely different attributes of individuals. As for athletics sports, the beauty or public speaking skills of an athlete are never taken into consideration in determining the best performer. Contrastingly, in modelling competitions, the more aesthetically pleasing the individual is, the chances of winning would be greater. Furthermore, physical strength and endurance, which most athletes consider to be elements of importance to win a competition, has no relevance in assessing the winner of a modelling competition. As such, the stark difference between the said types of competitions is obvious and requires no further deliberations.

However, given the fact that both categories fall within the common umbrella of competitions, it can't be entirely said that both fall into alien categories which could never be intertwined with shared common features. A few examples would be the competitive nature, naming one individual as the best amongst the rest and competition rules. For the purposes of this article, the most prominent common attribute between both types of competitions would be the rules governing the competition which are susceptible to legal challenges by affected parties.

III. CURRENT POLICIES BANNING TRANS COMMUNITY FROM FEMALE SPORTS COMPETITIONS

Both athletic sports competitions and beauty pageants are regulated by rules set out by the organizers of the competition. Recently, many sports associations have faced lawsuits for both permitting² and not permitting³ transgender females from participating in sports confined to cisgender women. Ironically, till to date none of the transgender female models acted against modelling competitions for excluding them and cisgender women too never questioned why transgender women should be allowed to compete with them in a beauty pageant before a court of law. The closest when beauty pageant organizers were closer to being sued occurred in 2012⁴, when the organizers of Miss Universe pageant was threatened with legal action for their decision to exclude a Canadian contestant for being a transwoman. However, since the organizers reversed their decision, the matter did not end up for deliberations before a court of law.

Torrent of laws⁵ have being passed during the past few years banning transgender women from participating in female sports. The proponents of this advance the arguments that if the ban is not maintained, transwomen participation will negatively impact the fairness of sports as male physiology confers a competitive advantage to transwomen over cisgender women. Transwomen generally challenges these laws under the Equal Protection Clause of the 14th Amendment and Title IX of Education Amendments Act 1972.⁶

(A) Justification for discriminating transwomen from female beauty pageants

Challenges brought by transgender females under the Equal Protection Clause demands equal opportunity to participate in sports confined to cisgender women on the basis that as much as

² Education Week, <https://www.edweek.org/policy-politics/lawsuit-over-a-transgender-school-sports-policy-revived-by-federal-appeals-court/2023/12> (last visited, October 10, 2024)

³ League of Women Voters, <https://www.lwv.org/legal-center/hecox-v-little> (last visited October 10, 2024)

⁴ BBC News, <https://www.bbc.com/news/world-us-canada-17605165> (last visited October 10, 2024)

⁵ New Democracy Map, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (last visited October 12, 2024)

⁶ *ibid*

their cisgender counterparts they too should be given an opportunity to participate in sports. However, this does not mean discriminating transwomen is an impossibility under the Equal Protection clause, as the law permits discrimination based on biological gender provided the government furthers an important government interest by the discrimination in question.⁷

In *Hecox v Little*, a challenge was brought against the Idaho's Fairness in Women Sports Act by a transwoman and a cisgender woman alleging that the Act violates Equal Protection clause under the 14th Amendment for discrimination caused against transwomen and the masculine looking cisgender women.⁸ The justification for said discrimination advanced by the state was that discrimination was a necessity as otherwise the important governmental interests of promoting equality in women's sports was to get hampered. However, the district court viewed the participation of transwomen in female sports as too negligible to count as a potential threat towards damaging equal opportunity for women in female sports. Nevertheless, with the new Supreme Court decision to keep the Idaho's ban on gender-affirming care, this case requires the attention of the supreme court to conclusively decide on whether the statute in question was in fact a violation of the equal protection clause.⁹

Since the statute allowed the biological sex of an athlete to be determined on one of the following: student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels, the district court was of the view that regulation of testosterone levels would be sufficient to permit transwomen to participate in women sports.

The Idaho's Fairness in Women's Sports Act was passed based on several research which demonstrated how male physiology can work for the competitive advantage of transwomen. One such research relied on demonstrated that men were able to generate higher speed and power in athletics¹⁰ and another study of female and male Olympic performances since 1983 have indicated that though athletes from both sexes improved over the time span, the "gender gap" between female and male performances remained stable.¹¹

Most importantly, benefits which natural testosterone provides to male athletes was found to be not diminished through the use of puberty blockers and cross-sex hormones.¹² Further, the impact of such treatments indicated that even after 12 months of hormonal therapy, a man who

⁷ Legal Information Institute, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited October 12, 2024)

⁸ League of Women Voters, <https://www.lwv.org/legal-center/hecox-v-little> (last visited October 10, 2024)

⁹ *ibid*

¹⁰ *ibid*

¹¹ *ibid*

¹² *ibid*

identifies as a woman and is taking cross-sex hormones was identified as having absolute advantage over female athletes.¹³ Accordingly, a woman's performances at the high level appeared to never match those of a transwoman.

Therefore, since male physiology aids transwomen to have more speed and power than women when involved in activities requiring significant endurance and as even a 12 months hormonal therapy isn't capable of completely taking away the said physiological advantage which transwomen have over cisgender women, the Idaho statute was passed with the intention of providing an opportunity for cisgender women to have a better chance of winning than it would be if they are forced to compete with a new category of women who have better physiological advantages over them. However, it must stressed that the competitive advantage which transwomen supposedly have over cisgender women is yet to be thoroughly analysed.

For instance, a fitness test administered to transwomen discovered that they have lost their advantage over cisgender women on the number of push ups and sit ups per minute.¹⁴ As such, studies have produced conflicting results on the supposed competitive advantage which transwomen have over ciswomen. However, majority of studies indicate that transwomen have a better advantage against ciswomen in female sports. Further, as science continues to evolve and improve in future, different and unexpected findings on the physical composition of trans and ciswomen can be expected to come into limelight which may change many of the perceptions surrounding the physical makeup of transwomen as backed by current research.

In the case of *D.N v DeSantis*¹⁵ and *B.P.J v West Virginia Board of Education*¹⁶ transwomen respectively challenged the bans imposed on them by Idaho's Fairness in Women's Sports Act and the West Virginia's Save Women Sports Act alleging the violation of the Equal Protection clause and title IX. However, both challenges remained futile before the respective District courts as the bans were upheld on the grounds of promoting equal opportunity for women. In the case of *De Santis*, A federal district court dismissed a lawsuit challenging Idaho's Fairness in Women's Sports Act upholding that the statute does not violate either the constitution or title IX by preventing transwomen from competing in the women's sports category.¹⁷ In *BPJ v West*

¹³ *ibid*

¹⁴ Timothy A Roberts, Joshua Smalley and Dale Ahrendt, *Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators*, 55 *BMJ Journals*, 577-583 (2021)
,<https://bjsm.bmj.com/content/55/11/577>

¹⁵ Bloomberg Law, <https://news.bloomberglaw.com/litigation/transgender-athlete-ban-survives-challenge-from-florida-teenager> (last visited October 15, 2024)

¹⁶ *B.P.J v West Virginia State Board of Education* , 550 F. Supp. 3d 347 (S.D.W. Va. 2021)

¹⁷ Bloomberg Law, <https://news.bloomberglaw.com/litigation/transgender-athlete-ban-survives-challenge-from-florida-teenager> (last visited October 15, 2024)

Board Education too, U.S. District Judge Joseph Goodwin concluded the state's ban as lawful.¹⁸ However, United States Court of Appeals for the Fourth Circuit disagreed with the latter decision made by Judge Joseph Goodwin and declared "Save Women's Sports Act" as unconstitutional.¹⁹

The Court of Appeal did not view the ban as promoting an important governmental interest, thus refuse to justify the same under the exception to the Equal Protection Clause. However, the District Court upheld to the contrary. As such, lordships are divided on the issue of what aspect of the law pursues an important government interest; is it banning transwomen from women's sports and providing an opportunity for ciswomen to increase their success rate by competing in their own category or creating an environment where transwomen are treated the same way as ciswomen and thereby aiding them to feel and be treated as a person of the desired gender as opposed to the assigned gender at birth. Answering the latter question is a matter of how much a person believes in scientific advancements. If it can be proven with conclusive scientific evidence that medical intervention could allow transwomen to be biologically identical to ciswomen, then there seems to be no issue in allowing both trans and ciswomen to be equally judged in sports competitions. However, science has sometimes proven otherwise and as explained earlier despite medical intervention, there are proven differences between trans and ciswomen.

The Court of Appeal decision above was appealed before the US Supreme Court and it remains to be seen how the justices of Supreme Court view the situation. It must be noted that if there is one thing that one could never change between trans and ciswomen despite how advanced the medical technology would be, that is the fact that former was born a male and latter was born a female. This difference must be taken to account in evaluating both genders in competitions.

Can the rationale for justifying the ban imposed on transwomen from participating in female sports be extended to justify banning transwomen from in female modelling competitions?

The ban imposed by Idaho's Fairness in Women's Sports Act on transwomen preventing their participation from women's sports attempted to respond to challenges brought against it under the Equal Protection Clause by relying on the exception to the Clause which warrants discrimination provided such discrimination pursues an important governmental interest. The

¹⁸ *B.P.J v West Virginia State Board of Education* , 550 F. Supp. 3d 347 (S.D.W. Va. 2021)

¹⁹ *ibid*

state was of the view that the ban was a necessity to pursue the important governmental interest in promoting equality for women by restricting transwomen from utilizing their birth advantages against ciswomen when competing in women's sports.

However, if transwomen are restricted or prevented from joining a beauty pageant, such a ban or restriction is unlikely to survive any challenges brought by transwomen under the Equal Protection Clause of the 14th Amendment, unless evidence can be used to demonstrate that transwomen have a potential competitive advantage over ciswomen when competing against the latter. The competitive advantage which transwomen had over ciswomen in women's sports was the power, endurance and the speed which they had over the latter in performing physical activities.²⁰ However, the same attributes may not give any competitive advantage to transwomen over ciswomen in beauty pageants as although strength and endurance play a pivotal role in determining the success of the participants in women's sports, the same does not provide an opportunity to transwomen to dominate beauty pageants.

Since the bans which got challenged before a court of law only addressed bans imposed on transwomen athletes, it is worth addressing how a court of law should interpret a ban placed on transwomen models considering the Equal Protection Clause. As mentioned earlier, bans imposed on transwomen athletes are likely to survive any challenges for pursuing the important governmental interest of promoting fairness in women's sports by preventing biological males from taking advantage on their physiological strength. However, the US Supreme Court is yet to decide the constitutionality of the ban in question.

If the US Supreme Court upholds the sports bans on transwomen as constitutional, the argument that transwomen have a better competitive advantage over biological women which in itself was the rationale used to ban transwomen from women's sports may have the potential to be extended to restrict transwomen from women's competitions in general and not just women's sports. The cases of *D.N v DeSantis*²¹ and *B.P.J v West Virginia Board of Education*²² depicted how having a competitive advantage against ciswomen through physiological differences could support a state ban on transwomen participation in women's sports to a significant degree as District Courts involved in both cases were in support of the bans.

In terms of athletic competitions transwomen demonstrated to have better speed, endurance and power during athletic performances.²³ However, whether the difference between transwomen

²⁰ Florida Statute § 1006.205

²¹ Bloomberg Law, <https://news.bloomberglaw.com/litigation/transgender-athlete-ban-survives-challenge-from-florida-teenager> (last visited October 15, 2024)

²² *B.P.J v West Virginia State Board of Education*, 550 F. Supp. 3d 347 (S.D.W. Va. 2021)

²³ Florida Statute § 1006.205

and ciswomen competing in female pageants works for the competitive advantage of the former is a complex issue which has a broad range of responses. For example, transwomen undergo cosmetic and gender affirming surgeries which allow them to transform into a conventionally attractive woman. Their artificially constructed appearance can assist them to have a degree of competitive advantage over ciswomen. Transwomen undergo gender reconstruction surgery to align closely with their preferred gender identity.²⁴ The process involves facial and body reconstruction.²⁵ Further, since birth assigned men are taller than ciswomen, transwomen can on average appear taller than an average ciswoman,²⁶ which is one of the important elements looked for in beauty pageants.

Providing an opportunity to a transwoman who has used scientific developments to perfect their appearance to compete against someone who has not changed their biological appearance is a clear violation of the latter's right to a fair treatment. However, many modelling competitions including the famous Miss Universe Pageant with its new policies do not have rules restrict the competitors from undertaking cosmetic surgeries.²⁷ Therefore, ciswomen too are allowed to cosmetically reconstruct themselves. Thus, cosmetic procedures alone would not be sufficient to justify a banning transwoman from beauty pageants which has no restrictions on cosmetic or surgical procedures. Further, there are not enough evidence to suggest that transwomen have a better advantage over ciswomen in beauty pageants since both parties are evaluated based on the same footing and male physiology does not appear to confer any advantage to transwomen to dominate beauty pageants.

If the beauty pageant in question entails the evaluation of natural looks, then it is safe to assume that bans imposed by such a pageant on transwomen are unlikely to get challenged under the Equal Protection Act and if nevertheless being challenged, the discrimination in question is likely to be justified based on the rationale of promoting equal opportunities for women. However, if the pageant has no such restrictions, there appears to be no reason to justify banning transwomen from participating in female beauty pageants as both trans and ciswomen will be evaluated on the same basis.

Can the government nevertheless defend a ban imposed on transwomen intending to participate

²⁴Cleveland Clinic, <https://my.clevelandclinic.org/health/procedures/gender-affirmation-surgery> (last visited October 18, 2024)

²⁵ *ibid*

²⁶ Stephanie A Roberts and Jeremy M Carwell, *Growth, growth potential, and influences on adult height in the transgender and gender-diverse population*, 9 *Andrology*, 1679-1688 (2021), <https://onlinelibrary.wiley.com/doi/10.1111/andr.13034>

²⁷ Pageant Guides, <https://missplanetinternational.com/is-plastic-surgery-allowed-in-miss-universe/> (last visited November 1, 2024)

in beauty pageants on the basis that the restriction promotes an important governmental interest? The defence used to ban transwomen from athletics was attributed to their physiological difference which granted a competitive advantage to them over ciswomen. However, for reasons explained above, it is difficult to use the same rationale for justifying a ban imposed on transwomen from competing in beauty pageants. Nevertheless, if there is any evidence to suggest that transwomen have birth advantages which will support them to dominate a women's competition, then the rationale behind Idaho's statute could be used to successfully ban transwomen from such competitions.

It must be noted that the rationale behind the ban, could also be used to justify categorically restricting transwomen from non-interactive sports as well. For example, there has been evidence to suggest that male chess players perform better than female players as men demonstrated to have higher fide rating than female chess players.²⁸ Although, there is not enough evidence to evaluate the reason behind it, there are evidence which indicate the male brain to be ten percent larger than that of a female.²⁹

It was identified that the state of Idaho attempted to justify the bans placed on transwomen athletes from competing in female sports by relying on the evidence which supported the existence of a competitive advantage which transwomen had over cisgender women that was not capable of complete erasure even with medical intervention.³⁰ Further, biological male participation in athletics was found to be a greater threat on women's opportunity to win competitions by competing in their own category justifying state intervention.³¹ Thus, the justification used was simply a question of dominance. Applying the same rationale of dominance to transwomen participation in beauty pageants designed for cisgender women, it was identified that the said rationale could be extended to justify banning transwomen from female beauty pageants provided it can be proven that transwomen have a competitive advantage against cisgender women in the competition in question.

IV. RECOMMENDATIONS AND CONCLUSIONS

The underlying rationale behind the passing of Fairness in Women's Sports Act was to foster a culture where women are given an opportunity to be celebrated and recognized by allowing them to compete with fellow women who aligns with their biological identity. This is mainly

²⁸Exonian, <https://theexonian.net/opinions/does-gender-make-chess-skill> (last visited November 5, 2024)

²⁹ North Western Medicine, <https://www.nm.org/healthbeat/healthy-tips/battle-of-the-brain-men-vs-women-infographic> (last visited November 5, 2024)

³⁰ Florida Statute § 1006.205

³¹ Florida Statute § 1006.205

because male physiology grants an opportunity for men to dominate sports due to their high speed and endurance.³²In fact, men are gifted with larger organs than women, such as a bigger heart to which provides them better performance in physical activities.³³

The Idaho's statute justifies its ban with reference to a set of research findings which indicated that women must be evaluated separately from men owing to their physiological differences.³⁴If the said ban is declared unconstitutional, then the same implies the possibility of disregarding physiology altogether as a factor to demarcate individuals or beings for the purposes of competitions.

This essentially means, joining cheetahs who are faster than the fastest runner to compete against humans in running events would not be seen as a violation of the right to be fairly evaluated as law declares it unconstitutional to take physiological differences into account in forming categories for sports competitions. If the physiological difference between a trans and a ciswoman requires to be disregarded for the purposes of canvassing all-inclusivity policies, then so is the treatment should be for the physiological differences between humans and any other being. The US Supreme Court is yet to decide on the constitutionality of the said ban and the ban imposed on transwomen under the Save Women's Sports Act.

If the Supreme Court upheld the ban, the decision would mark a milestone in the legal history for ruling on the validity of a categorical ban which attempts to exclude transwomen from women's sports. The decision would also result in far reaching consequences such as giving birth to the potential new opportunity to ban transwomen from any women's competitions including beauty pageants provided it can be proven with evidence that trans status grants a competitive advantage to them against ciswomen.

³² Florida Statute § 1006.205

³³ *ibid*

³⁴ *ibid*