

Accommodating Transgender Athletes

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ABSTRACT

The challenges of trying to accommodate transgender athletes appropriately in competitive sports come from living in a society that places a high value on athletic achievement, as well as on the competing virtues of equality, individual freedom, and fairness. On an individual level, a person's participation in competitive sports confers benefits to that individual, with those benefits increasing dramatically as the person becomes more skillful and successful—that is, when they win more. On a societal level, the meritocratic nature of competitive sports, combined with our collective desire to win and to associate the winner with who is the best, has led sports to play a central role in advancing social change in the US, particularly in the areas of race and sex. This paper starts from the assumption that it is a matter of justice generally to regard a trans man as a man and a trans woman as a woman. Even given this assumption, it is not obvious that this general position should be extended to competitive sports in any and all cases, and, in particular, to the participation in women's sports by trans women or trans men.

In 2018, philosophy professor Rachel McKinnon accomplished what most academics never even dream of—she became a world champion in a competitive sport, winning the Union Cycliste Internationale (UCI) Women's Masters Track World Champion in the 35-44 age bracket. In 2019, McKinnon defended her title and became a two-time world champion.² She has received an extraordinary amount of attention for these victories, much of which comes from her fellow competitors. But instead of congratulating her, many have cried foul, arguing that she was a cheat and won only because of an unfair advantage. What was this unfair advantage? McKinnon is a transwoman, and transwomen are born biologically male.

McKinnon is not the only transgender athlete whose recent success has caused controversy. In 2018 and 2019, Terry Miller—a transwoman—dominated women's high school track events throughout Connecticut, setting state records and winning state championships in the 55m (indoor), 100m (outdoor), 200m (outdoor), and 300m (indoor).³

Her closest competitor in those events—Andraya Yearwood—was also a transwoman. In Texas, Mack Beggs—a transman—won the 2017 and 2018 state wrestling championship in the

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²Rebecca Reza, *Transgender Cyclist Rachel McKinnon Wins Second-Straight World Masters Title*, *Bicycling* (Oct. 24, 2019), <https://www.bicycling.com/news/a29578581/rachel-mckinnon-world-championship-masters-win-transgender-sport-debate/> [https://perma.cc/S8VK-NB8E].

³Pat Eaton-Robb, *Transgender sprinters finish 1st, 2nd at Connecticut girls indoor track championships*, *WASH. TIMES*, Feb. 24, 2019, <https://www.washingtontimes.com/news/2019/feb/24/terry-miller-andraya-yearwood-transgender-sprinter/>.

girls Class 6A 110-pound division, while compiling a record of 89 wins and 0 losses.⁴ Unlike in Connecticut, where athletes may compete in the gender category they identify as, in Texas, athletes must compete in the gender listed on their birth certificate.

Let's be clear: No one would care about transgender athletes' accommodations in competitive sports if they were not winning events, setting performance records, or otherwise impacting the outcome of competitions. But while these stories grab headlines, the number of transgender athletes is very low, and few have had success comparable to McKinnon, Miller, Yearwood, and Beggs. Furthermore, there is no evidence suggesting that any transgender athletes have transitioned for the purpose of gaining a competitive advantage in sports, and existing social stigmas make it unlikely (although not impossible) that someone would fraudulently claim a transgender accommodation explicitly for the purpose of gaining a competitive advantage.

Given these considerations, who should count as a female athlete? Furthermore, should transgender athletes, and trans women in particular, be allowed to compete in women's sports? Assume that it is a matter of justice generally to regard a transman as a man and a transwoman as a woman. Even granting this assumption, it is not obvious that this general position should be extended to competitive sports in any and all cases, and, in particular, to the participation in women's sports by transwomen or transmen.

I. WHY COMPETITIVE SPORTS?

The challenge of trying to accommodate transgender athletes appropriately in competitive sports comes with living in a society that places a high value on athletic participation and achievement. Beyond the social benefits, children, and young adults especially, derive important physical and psychological benefits from participating in competitive sports, as they have "higher physical fitness, particularly regarding endurance, strength, power, and agility" as compared to non-participants of similar age and body weight⁵; maintain a "healthier lifestyle" overall, including being "significantly less likely to use cocaine and psychedelics, and...less likely to smoke cigarettes;"⁶ possess increased discipline, more initiative, a higher physical confidence, and more of a "can do" approach to the world that positively impacts the rest of their lives;⁷ and are better able to cope with, and learn from, both adversity and defeat.⁸

This discussion should not be a surprise to those that have meaningfully participated in competitive sports. Success requires commitment, preparation, proper execution, and often, a little luck. Winning often comes with rewards and validate efforts, but losing provides important

⁴Cindy Boren, *Transgender wrestler Mack Beggs wins second Texas state girls' championship*, WASH. POST, Feb. 25, 2018, <https://www.washingtonpost.com/news/early-lead/wp/2018/02/25/transgender-wrestler-mack-beggs-wins-second-texas-state-girls-championship/> [https://perma.cc/2X8X-KP3S].

⁵Clemens Drenowatz, Klaus Greier, Gerhard Ruedl & Martin Kopp, *Association between club sports participation and physical fitness across 6- to 14-year-old Austrian youth*, 16 INT'L. J. OF ENV'T RSCH. & PUB. HEALTH 3392, 3392 (2019).

⁶A.H. Naylor, D. Gardner & L. Zaichkowsky, *Drug Use Patterns among High School Athletes and Nonathletes*, 36 ADOLESCENCE 627, 627 (2001).

⁷Reed Larson, David Hansen & Giovanni Moneta, *Differing Profiles of Developmental Experiences across Types of Organized Youth Activities*, 42 DEV. PSYCH. 849 (2006).

⁸Tracey Devonport, *Emotional intelligence and the coping process amongst adolescent populations: A case study of student athletes*, in MOOD AND HUMAN PERFORMANCE: CONCEPTUAL, MEASUREMENT, AND APPLIED ISSUES 165 (Andrew Lane ed., 2007).

lessons, not only in learning how to lose well, but in learning how to recognize why someone else beat you. While the outcome of games matter at the time, especially when people have made sacrifices to prepare for those games, such outcomes are generally insignificant to the outcome of someone's life. What is not insignificant, however, is how the experience of preparing, participating in, and reflecting on the outcome of those games shape someone's life. Although meaningful participation in competitive sports is not the only way to get these experiences, sports is the option most accessible to most people.

Meaningful participation provides the opportunity to receive this full range of physical and non-physical benefits. Someone who is formally on a team but does not substantively participate in games or team practices does not meaningfully participate in a competitive sport. Meaningful participation in competitive sports is not possible without winning and losing or where the outcome of the game was never in question. For example, professional wrestling is not a competitive sport, not because its participants are not athletic (they are), but because the outcomes are predetermined. Significant differences in skill, ability, or circumstances between competitors can also undermine meaningful participation. One such circumstance is financial resources—teams or individuals facing extreme poverty often cannot compete against teams or individuals with substantial financial resources. To promote fair and meaningful competition in their states, some high school athletic associations have either adopted or are considering adopting policies that group high-poverty schools together into the same athletic divisions.⁹

The most obvious challenge to meaningful participation is excessive natural differences in athletic ability, due to either physical disabilities or differences in biological ability. Organizations like the Special Olympics and Paralympics provide opportunities for people with physical and mental handicaps to participate in competitive sports. The U.S. government has also played an important role in helping to provide similar opportunities to people with biological disadvantages—women. In 1975, the U.S. government acknowledged the social, physical, and psychological benefits that come from participating in competitive athletics and how significant differences in athletic ability led to disproportionate levels of participation between males and females in school sports by extending Title IX of the Educational Amendments to the 1964 Civil Rights Act to athletics at the college, high school, and elementary school level. It prohibits sex discrimination in any educational program that received federal funds.

Title IX's impact on women's athletics, and, as a result, U.S. culture generally, has been nothing short of dramatic. In 1970, less than 5% of U.S. women and roughly 50% of men participated in high school sports.¹⁰ While male participation rates have stayed the same since 1970, female participation rates have grown steadily and reached approximately 43% in 2019.¹¹ This rise in high school athletic participation has impacted college participation. In 1971, 3% of female college students—around 25,000 in total—were on university athletic teams. By 1980, this number had grown to 73,000, or 9%. In 2019, it was at 212,000 or 18%.¹² Put differently, in 1971, females made up only 3% of the total number of college athletes (97% were male). By

⁹Julie Chang, *Why high-poverty schools lose more football games*, GATEHOUSE MEDIA, Oct. 4, 2019 <https://gatehousenews.com/school-poverty-and-football-success/> [https://perma.cc/ERN8-WUJ8].

¹⁰Betsy Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* 7 – 9 (Fed. Res. Bank of S.F., Working Paper No. 2006-44, 2006).

¹¹*Id.*; Amy Wimmer Schwarb, “More college students than ever before are student-athletes,” NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Nov. 19, 2019.

¹²National Collegiate Athletic Association, *45 Years of Title IX: The Status of Women in Intercollegiate Athletics* 16 – 18 (2017); Schwarb, *supra* note 11.

1980, this number had climbed to 30.5%.¹³ In 2019, 43.5% of all college student athletes were female.¹⁴

II. WHY WOMEN'S SPORTS?

Serena Williams is not only one of the best female tennis players in history, but one of the best female athletes in history. She has won 23 Grand Slam singles titles, has been runner-up in an additional 10 Grand Slam events, and was The Women's Tennis Association (WTA) number one ranked player in the world for an astonishing 319 weeks. In 1998, both Serena and her sister Venus—who won seven Grand Slam events herself between 2000 and 2008—claimed that no male ranked outside of The Association of Tennis Professionals (ATP) top 200 could beat them. Karsten Braasch, the 203rd ranked ATP player at the time, challenged them to a match. Braasch beat Serena 6-1 and Venus 6-2. “I didn’t know it would be that difficult,” said Serena after the match. “I played shots that would have been winners on the women’s circuit, and he got to them very easily.”¹⁵

The gap between the best men and women tennis players is dramatic. In 2008, tennis professional Dave Howell developed the Universal Tennis Ranking (UTR), an algorithm that rates all players on the same 16-point scale regardless of age or sex.¹⁶ Rafael Nadal, currently the highest ranked UTR player in the world, has a UTR of 16.32.¹⁷ For comparison, the current top ranked UTR college player in the U.S., Jenson Brooksby, has a UTR of 14.83; the average Division 1 (D1) men’s college player’s UTR is around 13 and the threshold to play D1 is 12.¹⁸ In comparison, in November 2019, Ashleigh Barty was the WTA number one ranked player in the world.¹⁹ She had a UTR of 13.35, making her the third highest female ranked UTR player—only Serena Williams (13.36) and Bianca Andreescu (13.43) had higher.²⁰ In other words, while Barty, Williams, and Andreescu would have no problem making a D1 men’s college tennis team, they would be about as good as the average player on one of those teams.

There are similarly dramatic gaps across the sports spectrum. In 2019, Christian Coleman won the men’s 100m sprint at the USA Track & Field Outdoor Championship with a time of 9.99 seconds.²¹ The slowest time of any male runner at the meet was 10.66 seconds.²² In the women’s 100m at the same event, Teahna Daniels won with a time of 11.20 seconds.²³ But Daniels is not the fastest woman in the world. In 2019, that title belonged to Shelly-Ann Fraser-Pryce, who won the 100m at the 2019 International Amateur Athletics World Championship

¹³ Stevenson, *supra* note 10, at 24.

¹⁴ Schwarb, *supra* note 11.

¹⁵ Alvaro Roca, *Battle of the sexes: when the world No. 203 swept the Williams sisters*, MARCA, June 27, 2017, <https://www.marca.com/en/more-sports/2017/06/27/595296da468aeb99218b464c.html> [https://perma.cc/8WZH-7KZY].

¹⁶UTR POWERED BY ORACLE, myutr.com (last visited Oct. 25, 2019).

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹Flash Results, Inc., *2019 Toyota USATF Championships – 7/25/2019 to 7/28/2019* (July 29, 2019) https://www.flipsnack.com/USATF/results_outdoors2019/full-view.html.

²²*Id.*

²³*Id.*

with a time of 10.71 seconds.²⁴ This time is nearly three quarters of a second behind Christian Coleman's. To put this time difference in context—because 0.72 seconds may not seem like much—Joseph Fahnbulleh of Hopkins High School in Minnesota won the men's 100m at the 2019 New Balance Nationals Outdoor, the national championship for high school students, with a time of 10.35 seconds.²⁵ Shelly-Ann Fraser-Pryce's time, the fastest in the world by a woman in 2019, would have tied for 19th at that U.S. high school men's event.

In swimming, the 800m freestyle is a combination of speed and endurance. At the 2019 FINA World Championships, Gregorio Paltrinieri won the 800m freestyle with a time of 7:39.27.²⁶ On the women's side, the winner was superstar swimmer Katie Ledecky. Ledecky has won five Olympic gold medals and 15 world championships, and she currently holds the world record in the women's 400m, 800m, and 1500m freestyle.²⁷ Ledecky won the 2019 gold medal with a time of 8:13.58, over 34 seconds behind Paltrinieri's time.²⁸ Not only would Ledecky not be competitive against the best male swimmers in the world, she wouldn't even be competitive against the best male college swimmers in the U.S. At the 2019 USA Swimming National Championship, University of Florida swimmer Robert Finke won the 800m finals with a time of 7:47.58.²⁹ Ledecky's gold medal time would have earned her 38th place in that event.

There is one more example—this one, a bit different. In 2012, 12-year-old Keeling Pilaro from Southampton, New York, wanted to play field hockey.³⁰ The only problem: Pilaro is a boy. While field hockey is played by men and women across the globe, it is predominantly a woman's sport in the U.S. Thus, Pilaro, a 4-foot-8, 80-pound 7th grade student, successfully requested that the New York State Public High School Athletic Association (NYSPHSAA) allow him to play on his high school's team.³¹ As a 7th grader he made the junior varsity team, and the varsity team as an 8th grader. But other field hockey players and coaches argued he had a distinct advantage because he was a boy. Jenn Quinn, a high school state field hockey champion, Division 1 college athlete, and current high school coach, explained: "You take a 110-pound boy and a 110-pound girl, he's still going to be bigger, stronger, faster. They can generate more velocity on the ball.

²⁴Ben Church, *Shelly-Ann Fraser-Pryce crowned the fastest woman in the world ... not that many fans saw it*, CNN, Sept. 30, 2019, <https://www.cnn.com/2019/09/30/sport/doha-world-championships-shelly-ann-fraser-pryce-spt-intl/index.html> [https://perma.cc/23NS-3G2U].

²⁵New Balance Nationals, *100M Outdoor 06/18/2019 – 06/21/2019*, https://www.nbnationalsout.com/eprofile.php?do=title&title_id=693&event_id=3689.

²⁶Craig Lord, *Gregorio Paltrinieri Punches 7:39.27 Euro-Record Victory As Christiansen & Aubry Make History*, SWIMMING WORLD, July 24, 2019, <https://www.swimmingworldmagazine.com/news/gregorio-paltrinieri-punches-739-27-euro-record-victory-as-christiansen-aubry-make-history/> [https://perma.cc/RSR2-97TA].

²⁷ESPN Staff, *Katie Ledecky lowers own 1,500-meter freestyle record in pro debut*, ESPN, May 17, 2018, https://www.espn.com/olympics/swimming/story/_/id/23524194/katie-ledecky-tops-own-world-record-1500-meter-freestyle [https://perma.cc/MRA5-PLNQ].

²⁸*Id.*

²⁹[INSERT]

³⁰Mike Grimala, *Pilaro benched for being too good*, ESPN, May 7, 2012, https://www.espn.com/high-school/story/_/id/7902557/male-field-hockey-player-keeling-pilaro-fighting-stay-field [https://perma.cc/DAS8-7QKA].

³¹Joey LoMonaco, *Keeling Pilaro can't play field hockey with girls, but he and Episcopal help each other*, WASH. POST, Oct. 22, 2014, https://www.washingtonpost.com/sports/highschools/keeling-pilaro-cant-play-field-hockey-with-girls-but-he-and-episcopal-help-each-other/2014/10/22/b5b70b82-5475-11e4-809b-8cc0a295c773_story.html [https://perma.cc/L5NE-QFSA].

They have more power. It is totally evident [when you watch them play].”³² During the summer between his 8th grade and 9th grade year, the NYSPHSAA agreed with Quinn and ruled that Pilaro could no longer participate on the women’s team. Their explanation? His “advanced field hockey skills” had “adversely affected the opportunities of females.”³³

These examples are not to denigrate women athletes or women’s sports, but to demonstrate the significance of the differences between the best male and female athletes across a variety of sports. These differences are not just present with elite athletes, but they exist at all levels. No fitness regimen, amount of practice, or reallocation of financial resources could allow the best female athletes at any level to compete against the best male athletes at that same level. Even though these athletes may possess a similar level of skill in the respective sports, biologically male athletes have a physical advantage that translates into them having a higher level of ability. This advantage isn’t simply a difference in degree—it’s not just that male athletes are bigger, faster, and stronger—but it’s a difference in kind—*pound for pound, male bodies are more athletic*.³⁴

III. ACCOMMODATING TRANSGENDER ATHLETES

The challenge in accommodating transgender athletes is the perceived competitive advantage gained solely due to factors related to their gender transition. While Rachel McKinnon has argued that her transition has not given her an advantage over her female opponents,³⁵ most successful transgender athletes acknowledge that their transition gives them an advantage. Recent scientific studies support this position, showing that most transgender athletes retain significant biological advantages long after their transition.³⁶ Yet, these biological advantages are not necessarily unfair. When questioned about their success, transgender athletes Andraya Yearwood and Mack Beggs both argued that non-transgender women may have distinct advantages, such as longer legs, perfect form, or rich parents who are able to spend money on trainers and coaches.³⁷

For McKinnon, fairness, from the standpoint of competition, is not pertinent: "By preventing trans women from competing [as women] or requiring them to take medication,

³²Cam Smith, *The war against boys playing field hockey is picking up steam in Mass.*, USA TODAY, Nov. 16, 2018, <https://usatodayhss.com/2018/the-war-against-boys-playing-field-hockey-is-organizing-in-mass> [https://perma.cc/3P2P-AAUH].

³³Terrell Brown, *Ruling: boy can play on girls' field hockey team*, CBS NEWS, May 16, 2012, <https://www.cbsnews.com/news/ruling-boy-can-play-on-girls-field-hockey-team/> [https://perma.cc/L5KF-DEZ3].

³⁴See Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE LAW: CENTER FOR SPORTS LAW AND POLICY, <https://web.law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf> [https://perma.cc/457F-2JM7]; Gabriele Mascherini, Jorge Castizo-Olier, Alfredo Iruiria, Cristian Petri & Giorgio Galanti, *Differences between the sexes in athletes' body composition and lower limb bioimpedance values*, 7 MUSCLES, LIGAMENTS AND TENDONS J. 573 (2017); A.E. Miller, J.D. MacDougall, M.A. Tarnopolsky & D.G. Sale, *Gender differences in strength and muscle fiber characteristics*, 66 EUR. J. APPLIED PHYSIOLOGY AND OCCUPATIONAL PHYSIOLOGY 254 (1993).

³⁵Fred Dreier, *Q&A: Dr. Rachel McKinnon, masters track champion and transgender athlete*, VELO NEWS, Oct. 15, 2018, <https://www.velonews.com/news/qa-dr-rachel-mckinnon-masters-track-champion-and-transgender-athlete/> [https://perma.cc/KCQ5-Q7HY].

³⁶Taryn Knox, Lynley Anderson & Alison Heather, *Transwomen in elite sport: scientific and ethical considerations*, 45 J. OF MED. ETHICS 395 (2019).

³⁷Eaton-Robb, *supra* note 2.

you're denying their human rights . . . Trans inclusion is fairness. This is much bigger than sport, it's a proxy for all of trans inclusion in society."³⁸ McKinnon is not alone in this position. Glenn Lungarini, executive director of the Connecticut Association of Schools, the organization that governs high school sports in Connecticut, echoed a similar point when questioned about the success of Yearwood and Terry Miller: "I don't think this is that different from other classes of people, who, in the not too distant past, were not allowed to compete. I think it's going to take education and understanding to get to that point on this issue."³⁹

It is unclear whether education and understanding address these concerns. Transwomen have the right to participate meaningfully in competitive sports, but, because someone can identify as a woman if her personal identity and gender performance is that of a woman, there may be cases—for competitive or safety reasons—where it would be inappropriate for some transwomen to participate in a women's division. It seems unreasonable to claim that any transwoman denied the opportunity to compete in the woman's division is being denied the essential human right of being recognized as the gender with which she identifies. While a transwoman should be recognized as a woman generally, choosing not to identify her as a woman in all cases does not necessarily undermine her humanity—especially when there are other important considerations in play.

Consider the following. A salon has different prices for men's and women's haircuts. The salon informs a man with long, curly hair that he will be charged the women's rate. Not recognizing him as a man for the purpose of charging him what is fair does not undermine his humanity. He is still a man, and the salon staff recognizes him as a man, but he is not characterized as one for haircut purposes. What this trivial example shows is that it is not always the case that failing to categorize a man as a man or a woman as a woman undermines a person's humanity. Rather, it depends on the circumstances. Change the example above and imagine a transman is charged the women's rate solely because the salon does not recognize transmen as men. In that case, his humanity has been undermined.

The issue is not whether transgender athletes should be allowed to compete, but rather, who they should compete against. Bioethicist Andria Bianchi argues that we should allow transgender athletes to compete in the women's division but apply testosterone-level-based handicaps to all competitors in that division to level the playing field.⁴⁰ But bioethicists Taryn Knox and Lynley Anderson, along with physiologist Alison Heather, correctly argue that Bianchi's approach fails to take into account the retained biological advantages not connected to current testosterone levels.⁴¹ Instead, they suggest eliminating gender divisions entirely, replacing them with ability-level divisions that take into account social parameters (e.g., socioeconomic status) and physiological parameters (size, testosterone levels, if someone transitioned and when, bone structure, lung capacity, etc.).

These models derive their inspiration from the handicap system in golf, and anyone familiar with golf handicapping knows it is never used for meaningful competition. While handicapping systems are fine for social events, they are not appropriate for competition where the aim is to determine who is objectively the best, as opposed to who is best after application of

³⁸Sarah Young, *Transgender cyclist Rachel McKinnon says it would be 'unfair' to exclude her from female competition*, INDEPENDENT, Oct. 18, 2019, <https://www.independent.co.uk/life-style/women/rachel-mckinnon-transgender-cyclist-interview-unfair-womens-sport-a9161241.html>.

³⁹Eaton-Robb, *supra* note 2.

⁴⁰Andria Bianchi, *Transgender Women in Sport*, 44 J. OF THE PHIL. OF SPORT 229 (2017).

⁴¹Knox et al., *supra* note 15.

various handicaps. Furthermore, handicap systems can be—and almost always are—exploited by people who want to win. Accordingly, unless the aim is to destroy meaningful competition entirely, handicapping is not a solution.

There are also far-reaching negative social consequences of replacing gender/sex-based categories with ability-based categories. Female athletes would disappear entirely at the elite level and would no longer be featured prominently in our society for their athletic accomplishments. In a world where there are no female-only divisions, Serena Williams would have still won some tennis tournaments, but they would not have been any you have heard of. More importantly, you never would have heard of Serena Williams. The loss of prominent female athletes makes it less likely that girls will take sports seriously. While it seems unlikely that we would return to female participation levels seen before Title IX, and Title IX itself could be retained and satisfied via gender/sex quotas, female athletes would end up competing in lower-ability divisions. This move formally recognizes female athletes as worse than male athletes, instead of recognizing them as equally skillful but having certain biological disadvantages when compared to their male counterparts.

Instead of destroying women's sports to accommodate a handful of individuals, a better solution is to (1) determine if a transgender athlete is allowed to compete in the women's division on a case-by-case basis, and (2) eliminate "men's" divisions and replace them with "open" divisions. Since there is no "typical transgender athlete," broad rules on how all transgender athletes should be accommodated are not appropriate. Instead, language similar to the Equal Employment Opportunity Commission's disability accommodation policy could be used for transgender athletes: "The decision as to the appropriate accommodation must be based on the particular facts of each case."⁴² While whatever decision is made would never make all competitors happy, this approach is the most sensible given the relatively small number of transgender athletes and the unique circumstances of each athlete.

For transwomen athletes, at issue is their athletic ability, not their womanhood. "Women" is just a proxy for determining what competition category someone should belong to. In the rare cases where that proxy breaks down, we can go case-by-case to determine who should be excluded from a competition class with which they would otherwise associate in the real world. Determining, for example, that a transwoman athlete is too good because of her biology to compete against other women does not undermine her humanity. Instead, it acknowledges and takes seriously that she identifies herself as a woman, but that fair competition requires an exception to what might normally take place. Renaming the "men's" division to "open" (where that has not happened already) would further ensure that any trans athletes aren't inappropriately characterized as men.

Accommodating transgender athletes appropriately in athletic competitions presents unique challenges. While it is important to respect the humanity of transgender individuals by acknowledging their gender preferences and making reasonable accommodations, not every accommodation demanded by an individual is reasonable. In the case of some transgender athletes, accommodating their preference to compete in the athletic division of the gender in which they identify undermines the ability of the other competitors to participate meaningfully. When and where that happens must be determined on a case by case basis in a way that aims to respect the rights of all parties as best as possible.

⁴²U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2002-2, THE ADA: QUESTIONS AND ANSWERS (2019).

