

OPINION

## N.C. bill goes too far in banning transgender girls from female sports. There are options.

BY DORIANE COLEMAN, JUNIPER EASTWOOD AND MARTINA NAVRATILOVA

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In this Aug. 15, 2019, file photo, is University of Montana cross country runner Juniper Eastwood, center, warming up with her teammates at Campbell Park in Missoula, Mont. Transgender kids would be banned from playing on school sports teams for the gender with which they identify under a GOP-backed bill in North Carolina. [ RACHEL LEATHE | AP ]



We write in opposition to North Carolina House Bill. 358, the [Save Women's Sports Act](#), which proposes to exclude all transgender girls from playing on all girls' school sports teams. The bill itself uses our names and its proponents rely on us in one way or another in support of their position. In doing so, however, they cherry pick what we have said and done, missing the essential point.

It is important to protect girls' and women's sport, and this does require paying attention to sex. But because categorical bans go beyond what is necessary and do harm in the process, they are legally and scientifically flawed. When that unnecessary harm would be done to children by the adults who are supposed to be taking care of them, the choice to do so is also deeply problematic as a moral matter. Because of this, they should be rejected.

H.B. 358's proponents are right that Title IX requires separate sex sport when this is necessary to ensure that competitive opportunities for females are equal to those available to males. Girls' and women's sports exist specifically for this purpose, and the way they accomplish the goal is by excluding males from competition.

Proponents are also right that from the onset of male puberty, because of the effects of testosterone on the male body, it's not possible to ensure that females have equal opportunities without distinguishing the sexes. Finally, they're right that "sex" in the law of sport means biological sex.

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The legislation's proponents are wrong, however, to seek to bar all transgender girls from all girls' sport. Distinctions based on sex are only constitutional when they're necessary to secure equality for females and when the means chosen to achieve that goal are not unnecessarily broad or intrusive. The proposed legislation fails this test.

It fails because it doesn't make an exception for transgender girls who've never experienced male puberty and so haven't developed the traits the classification was designed to exclude. It fails because it doesn't take into account the multiple goals of sport at different levels of play and competition, which range from after school clubs to elite regional events. It fails because it doesn't distinguish between being on the team and being tapped for a spot in the competition. Finally, it fails because it doesn't allow for reasonable accommodations akin to the approach taken by the NCAA, which allows transgender women who have experienced all or part of male puberty to compete with hormone suppression.

One of us, Juniper Eastwood, has competed under similar accommodations – those established by World Athletics – and we can attest not only to their effectiveness at mitigating male-sex linked performance advantages, but also to the confidentiality and respectfulness with which they are administered. As a high school athlete, had no conditions been imposed on her inclusion in girls' competition, Juniper Eastwood would have been the world record holder in the women's 800 meters. Having followed those conditions, she was the very good but not category defeating athlete she had always been.

People of good faith across the political spectrum understand that girls' and women's sports have enormous societal value and are worth protecting. But this doesn't have to be an "either/or" proposition. When it's possible to include transgender girls in ways that enhance their health and well-being and don't defeat the goals of the category, that should be done. At a minimum, both the law and our moral code teach us that we should strive to do no unnecessary harm.

Competitive sport is in part about drawing lines and making cuts that have intended exclusionary effects: A ten-person varsity roster excludes all those who try out but fail to make the team. An under- 16s event excludes those who have just turned 16. A 120-pound weight class excludes those who don't make weight. In competitive sport, including in high school, we can't be only inclusive and we can't avoid the fact that the cuts hurt. But this doesn't entitle us to adopt exclusionary rules that are unnecessary to accomplishing institutional goals.

Instead of a categorical ban, lawmakers who care about girls' and women's sport should consider legislation that provides for separate categories based on sex with reasonable accommodations to allow transgender girls to play in a way that doesn't diminish competitive opportunities for non-transgender girls.

This would mean transgender girls who haven't experienced male puberty can participate on equal terms with non-transgender girls. Transgender girls who have experienced male puberty but wish to participate in girls' competitions could do so by demonstrating – just as Juniper did when she competed in the NCAA – that they've successfully mitigated their sex-linked performance advantages.

Transgender girls who aren't on hormone suppression shouldn't compete head-to-head against female athletes when prizes, podiums, championships, and records are at stake. Allowing this is undoubtedly category defeating. However, there's no reason to exclude them from aspects of team membership that are unrelated to the

competition itself. School sports teams are about a lot more than the competition and kids often join mainly for the other opportunities they provide. The rationale for sex segregated sport justifies sex-linked conditions on eligibility for competition, not on eligibility for the rest.

It's possible to draw lines and make cuts intelligently based on the evidence and respectfully based on an ethic of care. We are happy to lend our names to the development of legislation that reflects these principles.

*Doriane Coleman is a law professor at Duke Law School and a former national champion in the 800 meters. Juniper Eastwood was the first NCAA D1 athlete to compete on a women's team while openly identifying as transgender. Martina Navratilova is an LGBTQ activist and one of the best female tennis players of all time.*

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