SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of the Application of LONG ISLAND ROLLER REBELS, ,

Index No. 604254/2024

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and rules,

OBJECTIONS IN POINT OF LAW

-against-

BRUCE BLAKEMAN, in his official capacity as NASSAU COUNTY EXECUTIVE, and COUNTY OF NASSAU,

Respondents.
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MEMORANDUM OF LAW
FILED ON BEHALF OF THE RESPONDENTS

THOMAS A. ADAMS
COUNTY ATTORNEY
OFFICE OF THE COUNTY ATTORNEY
1 WEST STREET, MINEOLA, NEW YORK 11501

STATEMENT OF FACTS

On February 22, 2024, Nassau County Executive Bruce A. Blakeman (hereinafter "County Executive") signed and enacted Nassau County Executive Order Number 2-2024 (hereinafter "executive order"). The purpose of the executive order is to ensure the integrity and protection of women sports. Specifically, the executive order allows only biological females to compete in designated girls' and women's sports. The executive order protects fairness, equality, and safety in women's and girls' sports, while at the same time ensuring that men and transgender athletes are provided an opportunity to perform in designated events.

On March 14, 2024, the Honorable Justice of the Supreme Court, Francis Ricigliano, filed and entered with the Nassau County Clerk's Office, petitioner's order to show cause application. *See* Document # 29. Long Island Roller Rebels (hereinafter "petitioner") argue pursuant to CPLR 7806, that the executive order violates the New York State Human Rights Law (Executive Law §296) and the New York Civil Rights Law section 40-c. *See Id*. In addition, petitioner argues for a preliminary injunction pursuant to CPLR 6301, in which, respondents are enjoined, pending a determination by the Court on the verified Article 78 petition, from enforcing the executive order; and declaring that the petitioner has no obligation to comply with the executive order prior to a determination by the Court on the verified Article 78 petition. *See Id*.

The Office of the Nassau County Attorney, on behalf of the County Executive and the County of Nassau, respectfully requests the Court to deny the petitioners' requests and declare the executive order valid under State Law.

LEGAL ARGUMENTS

I. COUNTY EXECUTIVE BLAKEMAN DID NOT ACT IN EXCESS OF HIS JURISDICTION

One of the questions that may be raised in an article 78 proceeding is, whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction. *See* NY CPLR §7803[2]. "[New York Court's] precedents emphasize, however, that such relief is extraordinary and should only be granted in limited circumstances." *See Matter of Garner v. New York Sate Dept. of Correctional Servs.,* 10 N.Y.3d 358, 361 [2008]. "A petitioner seeking a writ of prohibition must demonstrate that: (1) a body or officer is acting in a judicial or quasi-judicial capacity, (2) that body or officer is proceeding or threatening to proceed in excess of its jurisdiction and (3) petitioner has a clear legal right to the relief requested." *See Matter of Garner*, 10 N.Y.3d at 362.

"Prohibition is not available to prevent administrative action unless the agency is acting in a judicial or quasi-judicial capacity." *See American Transit Ins. Co. v. Corcoran,* 65 N.Y.2d 828, 830 [1985]. "The remedy is confined to judicial or quasi-judicial action rather than to legislative, executive, administrative, or ministerial acts." *See Matter of Doe v. Cuomo,* 71 A.D.3d 889 [2d Dept 2010]. The court must refuse to reach the merits of petitioner's contentions because the issuance of the Executive Order was not a judicial or quasi-judicial action. *See McGinley v. Hynes,* 51 N.Y.2d 116, 122 [1980].

"It shall be the duty of the County Executive to supervise, direct, and control, subject to the provisions of the act, the administration of all departments, offices, and functions of County government … in addition to such other powers as may be

necessary to maintain the efficient operation of county government, to develop maintain and administer services on a county-wide basis that are common needs of all departments of county government . . .” *See* Nassau County charter §203[1].

In the instant case, County Executive Blakeman’s Executive Order was issued pursuant to the powers granted to a County Executive under the Nassau County charter. Petitioner’s fail to proffer any evidence that County Executive Blakeman’s issuance of the order falls within a judicial or quasi-judicial act. Therefore, “[t]he court must refuse to reach the merits of petitioner’s contentions ...” *See McGinley* 51 N.Y.2d 116 at 122.

II. EXECUTIVE ORDER NOT AFFECTED BY AN ERROR OF LAW

Petitioner alleges that, “in enacting and enforcing the Order . . . the respondents have made a determination … affected by an error of law. . .” *See* Document #1, ¶ 77. “CPLR 7803[3] succinctly provides that the standard of judicial review of any administrative action or determination is whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” *See New York State Ass’n of Crim. Defense Lawyers v. Kaye,* 182 Misc.2d 85, 93 [Sup Ct. Albany County 1999].

“An administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule . . . or where its determination violates some other statutory or constitutional provision.” *See Matter of Moscatelli v. New York City Police Dep’t,* 2022 N.Y. Misc. LEXIS 8341, * 11-12 [Sup Ct. New York County 2022]. “As a general matter, an agency’s interpretation of the statutes and regulations that it is charged with administering will be upheld if the question before the court involves the agency’s special competence or expertise, and there has been no sowing that the agency’s interpretation is irrational or unreasonable.” *See Matter of Held*

v. State of New York Workers' Compensation Bd., 42 Misc.3d 1216(A), *7 [Sup Ct. Albany County 2008].

The executive order limits use of County facilities, for purposes of women and girls' sports and athletic competitions, to biological females and girls. Petitioner alleges that, the executive order violates New York Law because it discriminates based on gender identity and protection. *See* Document # 1, pp. 12, ¶ 45. The challenged limitation must be "reviewed under an intermediate level of scrutiny – meaning that [it] will be sustained if 'substantially related to the achievement of an important governmental objective,'" because it is a gender-based classification. *See Hernandez v. Robles,* 7 N.Y.3d 338, [2006].

In the instant case, promoting women's equality in athletics is an important governmental interest. "Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *See O'Connor v. Board of Education,* 449 U.S. 1301, 1307 [1980]. Athletic competition is an area were a classification based on sex is permissible under equal protection. *See* U.S. Const. 14th Amend., § 1; *United States v. Virginia,* 518 U.S. 515, 533 [1996].

The executive order is substantially related to the County's interest in promoting women's equality in sports. "None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *See Tuan Anh Nguyen v. INS,* 533 U.S. 53, 70 [2001]. Based on the Supreme Court's decision, intermediate scrutiny does not require narrow tailoring. The goal needs to be only "substantially related". *See Hernandez v. Robles,* 7 N.Y.3d 338, [2006].

In the instant case, gender-based classifications substantially serve the County's important interest in protecting and promoting athletic opportunities for women and girls. The order is rooted in real differences between the sexes, not stereotypes. In requiring sporting organizations to disclose the biological sex of its participants in women and girls' sports, the order adopts the commonsense proposition that most men and women do have different physical attributes.

Physiologically, it is undeniable that males and females are different. Even transgender males and transgender females are unable to alter their DNA post-transition. Additionally, bone density, bone mass, bone structure, and length differ in male and females. These are innate differences that do not disappear after altering hormones or genitalia. These inherent differences are what make it dangerous for transgender females to compete against and with biological females.

In tangible performance terms, studies have shown that these physical differences allow post-pubescent males to "jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster than females" on average. *See* Jennifer C. Braceras, et al., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports*, Indep. Women's F. & Indep. Women's L. Ctr. 20 (2021)." *Id.* at 819-820. Physical differences between men and women are enduring: "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *See Ballard* v. *United States*, 329 U.S. 187, 193 [1946].

The importance of fairness in sports is further illustrated by the organization of sports such as wrestling and boxing, which have separate weight classifications. In men's wrestling, there are different weight classification to ensure that men are only competing against men of similar weight and mass. The same is true for men's boxing. Common

sense tells us that this is to protect the athletes and maintain a safe and fair sport. If a man wrestled or boxed against a man several weight classes heavier than him, this would not only be unfair, but also dangerous. These classifications limit which athletes can compete in which class, but we wouldn't consider this a discriminatory practice. Similarly, Executive Order 2-2024 does not contain discriminatory practices by simply separating biological males from biological females for purposes of equity and safety.

The biological differences between men and women highlight why Executive Order 2-2024 is of utmost importance to the safety and fairness of girls and women in sports. The Executive Order is substantially related to the achievement of an important governmental objective. "[County Executive's] interpretation of the statutes and regulations that it is charged with administering will be upheld if the question before the court involves the agency's special competence or expertise, and there has been no sowing that the agency's interpretation is irrational or unreasonable." *See Matter of Held* 42 Misc.3d 1216(A) at*7.

III. PETITIONER NOT ENTITLED TO A PRELIMINARY INJUNCTION

"To be entitled to a preliminary injunction, the movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor." *See Ying Fung Moy v. Hohi Umeki,* 10 A.D.3d 604 [2d Dept 2004]. "While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits . . . to such a degree that it cannot be said that the plaintiff established a clear right to relief." *See Kenner v. Balkany,* 219 A.D.3d 1504, 1506 [2d Dept 2023].

Classifications based on biological sex have been found nondiscriminatory in

New York. *See generally, Hispanic Aids Forum v. Estate of Bruno,* 16 A.D.3d 294, 298-299 [1st Dept 2005]. In *Hispanic Aids Forum,* the Court found no violation of the Human Rights Law as to gender where a restriction, such as for public restrooms, is based on biological sex rather than an individual's biological self-image. *See Id*.

Similarly, in the instant case, the executive order merely requires that a sporting organization disclose the biological sex of the organization's members. *See* Document #8. Importantly, the executive order does not ban transgender individuals from County facilities but does restrict biological men from participating in sporting events for biological women (except in the case of co-ed organizations). In other words, the executive order imposes a very limited restriction based on biological sex consistent with the intent of Title IX.

In addition, limitations are allowed under New York Law, and must be "reviewed under an intermediate level of scrutiny – meaning that [it] will be sustained if 'substantially related to the achievement of an important governmental objective,'" because it is a gender-based classification. *See Robles,* 7 N.Y.3d 338.

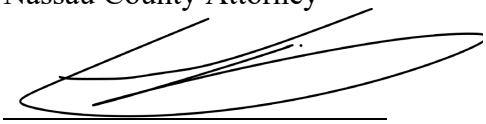
As discussed in Section II of the memorandum, protecting women's equality in athletics is an important governmental objective. The limitation imposed in the Executive Order is substantially related to achieving the important governmental objective. Petitioner has not established a clear right to relief that would justify the issuance of an injunction.

CONCLUSION

For the reasons set forth above County respectfully demands that this Court render a determination dismissing the verified petition of a judgment pursuant to Article 78, in the entirety and with prejudice, and such other and further relief deemed just, proper, and equitable.

Dated: Mineola, NY
April 4, 2024

THOMAS A. ADAMS
Nassau County Attorney



Sheharyar Ali, Esq.
Victoria LaGreca, Esq.
Deputy County Attorneys
Attorneys for County
Office of the County Attorney
l West Street
Mineola, NY 11501
Sali@nassaucountyny.gov
VLaGreca@nassaucountyny.gov
516-571-3106

TO: NEW YORK CIVIL LIBERTIES UNION
Gabriella Larios, Esq.
Attorney for Petitioner
125 Broad Street, 19th Floor
New York, New York 10004
glarios@nyclu.org
212-607-3300