No. _____

# In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,

*Petitioners*,

v.

B.P.J., BY NEXT FRIEND AND MOTHER, HEATHER JACKSON,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Like everywhere else, West Virginia schools offer separate sports teams for boys and girls. The West Virginia Legislature concluded that biological boys should compete on boys' and co-ed teams but not girls' teams. This separation made sense, the Legislature found, because of the "inherent physical differences between biological males and biological females."

A parent sued on behalf of her child, B.P.J., arguing that the State must allow biological boys who identify as girls to compete on girls' teams. After extensive discovery, the district court disagreed, entering summary judgment for the State on claims under the Equal Protection Clause and Title IX. Yet a divided Fourth Circuit panel granted an injunction pending appeal. B.P.J. then beat and displaced hundreds of girls in track and field.

Ultimately, the same divided panel ruled in B.P.J.'s favor on the Title IX claim and vacated the district court's judgment for the defendants on the equal-protection claim. Judge Agee dissented, criticizing the majority for "inappropriately expand[ing] the scope of the Equal Protection Clause and upend[ing] the essence of Title IX." App.44a. He hoped this Court would "take the opportunity with all deliberate speed to resolve these questions of national importance." App.74a

The questions presented are:

1. Whether Title IX prevents a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth.

2. Whether the Equal Protection Clause prevents a state from offering separate boys' and girls' sports teams based on biological sex determined at birth.

## PARTIES TO THE PROCEEDING

Petitioners who were intervenors in the district court and intervenor-appellees in the court of appeals are the State of West Virginia and Lainey Armistead.

Petitioners who were defendants in the district court and defendant-appellees in the court of appeals are the West Virginia State Board of Education; Harrison County Board of Education; W. Clayton Burch, in his official capacity as State Superintendent; and Dora Stutler, in her official capacity as Harrison County Superintendent.

West Virginia Secondary School Activities Commission was a defendant in the district court and defendant-appellee in the court of appeals.

Respondent who was a plaintiff in the district court and plaintiff-appellant in the court of appeals is B.P.J., by next friend and mother, Heather Jackson.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

*B.P.J. by Jackson* v. *W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va.), memorandum opinion and order granting defendants' motions for summary judgment issued January 5, 2023; and

*B.P.J. by Jackson* v. *W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir.), opinion reversing in part, vacating in part, and remanding with instructions issued April 16, 2024.

There are no other directly related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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## INTRODUCTION

Schools have long separated sports into boys' and girls' teams. Drawing this line guaranteed that women and girls had a real chance to compete safely and fairly. Important laws like Title IX of the Education Amendments of 1972 then ensured that boys' and girls' sports teams received equal support. Women's sports flourished.

More recently, though, the lines have begun to blur. Biological males identifying as female have increasingly competed against females in women's sports. Female athletes have been demoralized, as they have been pushed further down the competitive ladder, out of tournaments, and off their teams. Female athletes have also suffered injuries when facing bigger, stronger males. Sporting organizations like the National Association of Intercollegiate Athletics, World Athletics, and others have responded by adopting policies that ensure athletes are placed on teams and in events based on sex, not gender identity.

Seeing these same problems, the West Virginia Legislature reaffirmed that biological differences drive the distinction between boys' and girls' sports, just as two dozen other States have done. West Virginia's Save Women's Sports Act provides that girls' sports teams based on "competitive skill" or "involv[ing] … a contact sport" should not be open to biological males, tracking Title IX's implementing regulations. W. VA. CODE § 18-2-25d(c)(2). Male students may play on male or co-ed teams. *Id.* § 18-2-25d(c)(3). Female students may play on all teams. *Id.* "Male" and "female" are defined by looking to biology—the student's "reproductive biology and genetics at birth." *Id.* § 18-2-25d(b). Gender identity plays no role. *Id.* § 18-2-25d(a)(4).

A divided Fourth Circuit panel thought these provisions were nefarious. In the majority's mistaken view, the law's "sole purpose" was to target "transgender girls." App.13a. The majority concluded the Act violates Title IX—and perhaps the Fourteenth Amendment's Equal Protection Clause—by preventing Respondent B.P.J., a biological male who identifies as female, from competing on girls' sports teams. The majority reversed the judgment in the defendants' favor on the Title IX claim while vacating and remanding the judgment in the defendants' favor on equal-protection grounds.

The majority conceded the State was entitled to draw the line between male and female sports somewhere. App.26a. But rather than using sex, the majority preferred an indeterminate mix of subjective factors such as how long a given student has "publicly liv[ed] as a girl," whether the student has a different name or notation on a birth certificate, whether the student has taken "puberty block[ers]," how long the student has participated on girls' teams, and the student's "outward physical characteristics," including "fat distribution, pelvic shape, and bone size." App.40a.

The majority's holding upends the Title IX and equal-protection frameworks. It tacitly overturns countless cases upholding sex distinctions for bathrooms, prisons, physical-fitness tests, and more. It rewrites Title IX, a law designed to protect female athletes, into one that subordinates their interests to those of certain males. It dispenses with any meaningful effort to determine how males are similarly situated to females when it comes to sports. (They're not.) And it renders sex-separated sports an illusion. Schools will need to separate sports teams based on self-identification and personal choices that have nothing to do with athletic performance. The

Fourth Circuit's decision will produce a "commingling of the biological sexes in the female athletics arena" that will "significantly undermine the benefits" that separate sports teams "afford[] to female student athletes." *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (en banc) (Lagoa, J., specially concurring).

This Court should set things right. The Fourth Circuit's splintered decision casts into doubt similar laws in at least 24 other States, sows confusion about anti-discrimination law, ignores scientific evidence, and renders school sports an un-administrable morass. In the end, the decision all but declares that any law recognizing differences between sexes is unlawful whenever that law runs counter to someone's "gender identity." Yet "[i]nherent differences between men and women … remain cause for celebration," not condemnation. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*").

In dissent below, Judge Agee raised a "hope that … [this] Court [would] take the opportunity with all deliberate speed to resolve these questions of national importance." App.74a. Two Justices of this Court recognized a year ago that this case "concerns an important issue that this Court [would] likely … be required to address in the near future." App.97a. The time to tackle these questions has come. The Court should grant the Petition.

## OPINIONS BELOW

The Fourth Circuit's opinion (App.1a-74a) is reported at 98 F.4th 542. The district court's opinion (App.75a-96a) is reported at 649 F. Supp. 3d 220.

## JURISDICTION

The Fourth Circuit entered judgment on April 16, 2024. Petitioners timely filed this petition for certiorari on July 11, 2024. Lower courts had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment provides no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The relevant provisions of Title IX and Title IX's implementing regulations are reproduced at App.103a-108a.

West Virginia Code § 18-2-25d appears at App.99a-102a.

## STATEMENT

**1.** Schools have long separated sports teams by sex. See *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Ed.* v. *Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 670 (6th Cir. 1981). Sex-separated sports teams reflect biological differences between males and females and ensure athletic opportunities for women. See *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (*Clark I*). With sex-separated sports, women have a chance to compete while not risking their safety against physiologically different competitors.

Trouble was, women often had fewer athletic opportunities than men. *Williams* v. *Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993). So Congress

passed Title IX, prohibiting discrimination "on the basis of sex" in federally funded educational programs, 20 U.S.C. § 1681(a), including student athletics, 34 C.F.R. § 106.41. But because men and women have significant physiological differences, *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 73 (2001); *Neal* v. *Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 772 n.8 (9th Cir. 1999), Title IX and its implementing regulations continued to allow sex-specific athletic teams for contact sports or where selection is "based upon competitive skill," 34 C.F.R. § 106.41(b). Indeed, Congress acknowledged differences between the sexes throughout Title IX. See 20 U.S.C. § 1681(a)(6) (contemplating single-sex social organizations); *id.* § 1686 ("maintaining separate living facilities for the different sexes").

Fifty years later, Title IX has "had stellar results." *Louisiana* v. *Dep't of Educ.*, No. 3:24-cv-00563, 2024 WL 2978786, at *4 (W.D. La. June 13, 2024). For high-school sports, girls' participation rates are up eleven-fold. See *Fast Facts: Title IX*, NAT'L CTR. FOR EDUC. STAT., https://bit.ly/3MIAeiC (last visited July 8, 2024). And nearly half of college athletes are now women, up from 16% before Title IX leveled the playing field. *Quick Facts about Title IX and Athletics*, NAT'L WOMEN'S L. CTR. (June 21, 2022), https://bit.ly/41eUaxC. In short, time has shown "the provisions of Title IX and its attendant regulations are not merely hortatory" but have instead "sculpt[ed] the relevant playing field." *Pederson* v. *La. State Univ.*, 213 F.3d 858, 880 (5th Cir. 2000).

**2.** Yet more recently, Title IX's promise of equal opportunity for women and girls began breaking down, as men and boys identifying as women and girls have increasingly been competing in women's sports—and

winning. Women have been pushed out of podium spots, championship bids, and other chances at fair competition.

Take what happened in Connecticut. In just a few years, two males competing as women broke 17 women's track records, took 15 women's track championship titles, and deprived girls of more than 85 opportunities to compete at higher levels. See Appl. to Vacate Inj. at 5, *West Virginia* v. *B.P.J.*, No. 22A800 (Mar. 9, 2023) ("Appl."). The losses were "demoralizing," and the girls felt defeated before they even began. *Id.* Things haven't improved in Connecticut since then; a male identifying as female won the high jump in the New England Track & Field Championship last season. See Valerie Richardson, *Another Winning Transgender Athlete Lands Connecticut's Policy on Hot Seat*, WASH. TIMES (Mar. 19, 2024), https://bit.ly/3zj4iwY.

Connecticut is no aberration. In 2018, for instance, a college athlete who had competed on Franklin Pierce University's men's track team competed on the women's team. Appl.6. Despite never qualifying for a championship event while competing with men, the student won an NCAA championship in the women's 400-meter hurdles after the switch. *Id.* The next year, another student competed for the University of Montana's women's cross country and track teams after competing for three years on the men's teams. *Id.* The athlete then won the women's mile at the 2020 Big Sky Championship. *Id.* For female competitors, the experience was "deflating," discouraging, and defeating. *Id.*; see also, *e.g.*, *Transgender Track Star Stirs Controversy Competing In Alaska's Girls' State Meet Championships*, CBSNEWS.COM (June 8, 2016), https://perma.cc/M8KR-EHBG (describing similar feelings from female competitor).

**3.** Schools in West Virginia have long designated athletic teams based on sex to ensure opportunities for females. See W. VA. CODE § 18-2-25d(a)(3). But the stories of defeat and displacement by males worried the West Virginia Legislature. So relying on these "studies and anecdotes pertaining to different locales," *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995), state lawmakers passed the Sports Act to reaffirm that girls' sports are for girls. The Act recognizes "inherent differences" between males and females "are a valid justification for sex-based classifications" to "promote equal athletic opportunities for the female sex." W. VA. CODE § 18-2-25d(a)(2), (5). It then ensures males cannot compete against females in contact or competitive "sports designated for females, women, or girls." *Id.* § 18-2-25d(c)(2). And it draws the line by looking to biology—"an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." *Id.* § 18-2-25d(b)(1).

Consistent with the goal of protecting equality in girls' sports—and in line with the idea that girls sometimes played on boys' teams before the Act—the Act restricts no one from trying out for men's, boys', or co-ed teams. W. VA. CODE § 18-2-25d(c)(3). In other words, females—no matter how they identify—can play on boys' teams (because they do not possess a physical advantage). Males—no matter how they identify—can play men's sports. And the Act addresses only sports separation, so biological males can still *identify* however they want. It is only when students are playing skill and contact sports—where biological sex has a direct effect—that biological males (again, however they might identify) cannot compete with females.

The West Virginia Legislature was not alone in acting as it did: 25 States have implemented laws or regulations to protect girls' sports in much the same way. Katherine Knott, *Report: Title IX Rule on Trans Athletes Delayed Until After Election*, INSIDE HIGHER ED (Mar. 29, 2024), https://bit.ly/4eYfsaL. Similar laws are under consideration elsewhere. These laws reflect the realities of interscholastic sports today. They also mirror the actions of major sports organizations here and abroad, many of which have limited or barred biological males from competing in women's sports. See Sonia Twigg, *The Sports Where Trans Athletes Are Banned Or Need Permission to Compete*, THE INDEPENDENT (U.K.) (Apr. 16, 2024, 9:02 BST), https://bit.ly/45X3VUU.

Time has confirmed West Virginia was right to act. Consider a biological male swimmer on the University of Pennsylvania women's swim team who set several records and became an NCAA champion. Katie Barnes, *Penn Swimmer Lia Thomas Leaves Ivy League Meet a Four-Time Champion, But Questions Remain*, ESPN (Feb. 20, 2022, 2:00 PM ET), https://es.pn/3zNFXML; Greg Johnson, *Thomas Concludes Spectacular Season with National Title*, PENN TODAY (Mar. 20, 2022), https://bit.ly/41lYqvh. Or witness how "[f]ive biological males who identify as female won girls' state scholastic titles at outdoor-season spring meets in Connecticut, New Hampshire, Maine, Oregon and Washington." Valerie Richardson, *Girls Left In Dust As Male-Born Transgender Athletes Take State Track Titles In Five States*, WASH. TIMES (June 16, 2024), https://bit.ly/3XAL8N6. And a swimmer who competed for three unsuccessful years on the Ramapo College men's team recently switched to the women's team and set new records. See Amanda Wallace, *Transgender Swimmer at Ramapo College Faces More Criticism After Breaking*

*School Record*, NORTHJERSEY.COM (Feb. 20, 2024, 12:31 PM ET), https://bit.ly/4cdolLI. Thus, competitive fairness for girls remains a real problem.

**4.** Yet the West Virginia Legislature's effort to address this problem was blocked. Before the law took effect, B.P.J., a then-11-year-old biological male who identifies as female, sued. App.15a. B.P.J. agrees sex-separated sports are unobjectionable in theory but disagrees with assigning biological males to boys' teams. B.P.J. argued the law's biology-based distinction violates Title IX and the Constitution's Equal Protection Clause. App.79a. The district court preliminarily enjoined the Act based on an early and incomplete record. App.79a. And while that injunction was in effect, B.P.J. competed on the girls' cross country and track-and-field teams, routinely defeating and displacing female athletes. See Stay Response App. at 1729-1746, *B.P.J.* v. *West Virginia State Bd. of Educ.*, No. 23-1078 (4th Cir. filed Feb. 7, 2023), ECF No. 48-2. Meanwhile, the parties engaged in extensive discovery, including voluminous expert testimony. Discovery changed things.

Thousands of pages of evidence confirmed that biology affects athletic performance. Although B.P.J. argued "individual circumstances" should control because B.P.J. is on hormone-impacting drugs, scientists disagree on "whether and to what extent" taking such drugs reduce male physiological advantages. App.92a. Petitioners submitted evidence the advantage remained, drugs or no drugs. It also became even more obvious what B.P.J. thought *should* be the determining factor for separating sports teams: gender identity, not sex. B.P.J., after all, had no interest in seeing "boys [with] lower circulating testosterone levels" competing on girls' teams. App.92a-93a. Instead, B.P.J. thought moving boys to girls' teams

was necessary "the moment [students] verbalize their transgender status." App.93a. Yet even B.P.J.'s expert agreed that "gender identity … is not a useful indicator of athletic performance." Appl.App.214a.

So after reviewing the record over seven months, the district court entered summary judgment for the State and other defendants. The district court found no genuine dispute that biological males have physiological advantages over biological females. App.90a-93a. These "inherent" advantages—at least partly admitted by B.P.J.—mean that "biological males … are not similarly situated to biological females" in sports. App.91a, 95a. The court rejected B.P.J.'s argument that B.P.J.'s individual circumstances should decide things. App.92a-95a. "[A] transgender girl is biologically male and, barring medical intervention, would undergo male puberty like other biological males." App.92a. The State's substantial interest holds even though a male—whether due to naturally low testosterone or intervention—might lack typical testosterone levels. App.91a-93a. The trial court declared the Sports Act constitutional, dissolved its prior injunction, and entered judgment for the defendants.

B.P.J. appealed and immediately asked the Fourth Circuit to reinstate an injunction against the Sports Act. After B.P.J. insisted "no one w[ould] be harmed," Mot. for Stay at 14, *B.P.J.* v. *W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. filed Feb. 7, 2023), ECF No. 34-1, a divided panel issued an injunction. App.43a, 74a. Over Justice Thomas and Justice Alito's dissent, this Court denied West Virginia's request to vacate that injunction. App.97a-98a.

B.P.J. was thus permitted to compete in the girls' spring 2023 track-and-field season—displacing "at least one hundred girls" in the standings and bumping two girls

from the conference championships. Order Denying Mot. to Suspend at 6-7, *B.P.J.* v. *W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. Aug. 4, 2023), ECF No. 169 (Agee, J., dissenting). One of the girls on B.P.J.'s team—A.C.—recounted how she usually beat B.P.J. (two years her junior) in shot put and discus previously. See A.C. Decl. at 4-7, *Tennessee* v. *Cardona*, No. 2:24-cv-00072 (E.D. Ky. filed May 3, 2024), ECF No. 21-5 ("A.C. Decl."). But in 2023, B.P.J. rapidly improved, knocking A.C. out of the championship meet and making her feel "unheard and unseen." *Id.* at 5. Even her coach admitted what had happened was "unfair." *Id.* at 6. Despite these increasingly worrisome facts, the same Fourth Circuit majority again refused to lift the injunction ahead of the 2023 fall season.

Things went from bad to worse. This spring, B.P.J. placed top three in every track event B.P.J. competed in, winning most. B.P.J. beat over 100 girls, displacing them over 250 times while denying multiple girls spots and medals in the conference championship. A.C. Decl. 7 & Ex. B. In response, five girls refused to compete against B.P.J. See Brad McElhinny, *Middle school athletes step out of shot put against transgender girl who just won court case*, METRONEWS (Apr. 19, 2024, 2:37 PM), https://bit.ly/3XUs6RK. B.P.J. won the shot put by more than three feet while placing second in discus. *Id.* B.P.J. also took two of the limited spots in the conference championships. In all, B.P.J. has displaced 283 girls some 704 times. *See* Rouleau Decl. 2-3, *Tennessee* v. *Cardona*, No. 2:24-cv-00072 (E.D. Ky. May 16, 2024), ECF No. 63-2. Meanwhile, A.C. reports that female athletes have been subjected to "offensive and inappropriate sexual comments" in the locker room from their now teammate, B.P.J. A.C. Decl. 9-11.

**5.** Eventually, the same Fourth Circuit majority would rule against the State for a third time.

The Court first reversed and remanded B.P.J.'s equal-protection claim. Though the majority applied intermediate scrutiny, and though B.P.J. accepted that sex-specific sports are allowed, App.23a-24a, the majority said the Act facially classified "based on gender identity" because it does not define "female" to include biological males who identify as female and designates only girls for "girls[']  sports teams," App.24a. The majority also said the Act discriminates by allowing girls to play on all teams while designating males to boys' or co-ed teams. App.26a. It then held that Petitioners must defend the Act as applied to B.P.J.'s particular circumstances, defining the relevant comparator as a female who has not "undergo[ne] Tanner 2 stage puberty" participating in girls' cross-country. App.31a, 34a. After setting these rules, the majority remanded the claim because it found a dispute over whether certain males "enjoy a meaningful competitive athletic advantage over cisgender girls." App.34a.

As for Title IX, the majority reversed the trial court *and* ruled for B.P.J., believing the Act treated B.P.J. worse than similarly situated individuals and deprived B.P.J. "of any meaningful athletic opportunities." App.43a. No number of male advantages could convince the majority that the Act satisfies Title IX—they thought that irrelevant. App.39a. Instead, the majority held that by designating sex-specific sports and ensuring equal opportunities for female athletes, the Act discriminates based on gender identity. App.39a-40a. It also said that the Act discriminates by allowing girls to play on all teams while assigning males to boys' or co-ed teams. App.33a-34a, 39a. And despite acknowledging that the Act would

allow B.P.J. to compete on male teams, the majority found the Act left B.P.J. with "no real choice," "effectively excluding" B.P.J. from competing "in all non-coed sports." App.41a (cleaned up).

**6.** Judge Agee dissented. He explained that "West Virginia may separate its sports teams by biological sex without running afoul of either the Equal Protection Clause or Title IX." App.44a. By holding otherwise, the majority, "inappropriately expand[ed] the scope of the Equal Protection Clause and upend[ed] the essence of Title IX." App.44a.

On the equal-protection claim, Judge Agee said B.P.J. failed to show that similarly situated persons received different treatment. "[I]t is beyond dispute that biological sex is relevant to sports," he wrote, "and therefore that the person who is 'in all relevant respects alike' to [B.P.J.] is a biological boy." App.48a. The Act also does not "facially discriminate based on transgender status." App.51a. The Act satisfies even heightened scrutiny, Judge Agee said, because "biological differences affect typical outcomes in sports." App.53a. B.P.J.'s success in sports—"displac[ing] at least one hundred biological girls at track-and-field events and push[ing] multiple girls out of the top ten"—proved that. App.55a.

Judge Agee rejected B.P.J.'s Title IX claim for similar reasons. But he noted that the majority's Title IX error "has even further-reaching and destructive implications" than its defective equal-protection analysis because "Title IX does not require a justification inquiry." App.57a. Allowing biological boys to participate "in biological girls' sports turns Title IX on its head and reverses the monumental work Title IX has done to promote girls' sports from its inception." App.58a. The ruling below, he

warns, "will drive many biological girls out of sports and eviscerate the very purpose of Title IX." App.59a.

## REASONS FOR GRANTING THE PETITION

The decision below took on an exceptionally important issue—and got most every step exceptionally wrong. On the equal-protection claim, the majority embraced a controversial view of "gender identity discrimination," rewrote the test for challenging a law under intermediate scrutiny, and dispensed with any need to show a similarly situated comparator. It then moved on to Title IX, making more striking mistakes. There, it took a law designed to ensure meaningful competitive opportunities for women and girls—based on biological differences—and fashioned it into a lever for males to force their way onto girls' sports teams based on identity, destroying the very opportunities Title IX was meant to protect.

Last term, two Justices said it would be appropriate for the Court to get involved at the emergency-relief stage. The case for the Court's involvement now is even more compelling. The Fourth Circuit has set out its fractured analysis. And so long as this decision stands, 25 state laws on these issues are in doubt. That doubt irreparably damages safe and fair athletic competition. As each sports season comes and goes, more girls will lose the benefits of safe and fair play. But those girls shouldn't have to wait. "If males are permitted to displace females … even to the extent of one player …, the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th Cir. 1989). The Court should grant review to ensure that women's sports are preserved and protected.

## I. This Case Is An Ideal Vehicle To Address Vital Questions Of Federal Law.

This case presents two key questions. Either would call for the Court's involvement—the combination of both nearly demands it.

The first is how to interpret "a major federal statute." *United States* v. *Donovan*, 429 U.S. 413, 422 (1977). For over 50 years, Title IX has ensured that women and girls have equal athletic opportunities. This promise has been a lifeline to countless women and girls. It ensures they can compete on equal footing, enjoy opportunities once exclusive to men, and fulfill childhood dreams. And as part of that effort, "existing Title IX regulations" have allowed "athletics programs" to "solely use[] biological sex as a classification method for decades." *Tennessee* v. *Dep't of Educ.*, 104 F.4th 577, 611 (6th Cir. 2024). Yet the ruling below threatens Title IX's promise. Consider that the court of appeals' injunction allowed one biological male, over one track and field season, to displace over 100 girls and prevent two girls from advancing to a championship.

If the ruling below stands, and Title IX is rewritten, then this harm will spread, and women's sports will never be the same. The reasoning below has already taken hold elsewhere. See, *e.g.*, *Doe* v. *Horne*, 683 F. Supp. 3d 950, 975-76 (D. Ariz. 2023) (holding law like West Virginia's likely violated Title IX). And it will likely continue to spread, especially now that the current administration has promulgated a regulation—albeit one that has since been enjoined many places—that embraces a view like the majority's below. See generally *Tennessee* v. *Cardona*, No. 24-072, 2024 WL 3019146, at *1 (E.D. Ky. June 17, 2024) (enjoining new Title IX rule that purports to redefine "sex" to include "gender identity"); *Louisiana*, 2024 WL 2978786, at *2 (same); *Kansas* v. *Dep't of Educ.*,

No. 24-4041-JWB (D. Kan. July 2, 2024) (same). The Court has stepped in before when muddled cases and a new (enjoined) regulation have left things in a confused state of play. *E.g.*, *Sackett* v. *EPA*, 598 U.S. 651, 679 (2023); see also *Grove City Coll.* v. *Bell*, 465 U.S. 555, 603 (1984) (Brennan, J., concurring in part) ("The interpretation of statutes as important as Title IX should not be subjected so easily to shifts in policy by the executive branch."). Now is the time to step in here, too, and protect women and girls.

Second, this case presents a nationally important constitutional question about sports laws. See *Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 650 (2003). Twenty-five states have laws protecting fairness in women's sports. *States Act to Protect Women's Sports*, CONCERNED WOMEN FOR AMERICA, LEGISLATIVE ACTION COMMITTEE, https://bit.ly/3zCv9nJ (last visited July 9, 2024). These laws require only what Title IX has historically allowed. Yet the ruling below says such a law violates equal protection. If that decision stands, and its logic spreads, States will be unable to protect fairness in women's sports. Unfortunately, that's already happening. See, *e.g.*, *Hecox* v. *Little*, No. 20-35813, 2023 WL 11804896, at *6-18 (9th Cir. Aug. 17, 2023), as amended June 7, 2024. This threat requires immediate review. *Walsh*, 538 U.S. at 650.

This case is also an ideal vehicle to answer those vital questions.[*] To begin, the record is sufficiently developed,

[*] Additionally, this case presents the question of whether, and, if so, to what extent, a county school board and its superintendent may be held liable for enforcing a challenged state law. While this issue is not a separate question presented, the Harrison County Board of Education and Ms. Stutler would address it in merits briefing unless the Court says otherwise. In any event, the Board and Ms. Stutler do

as shown by the unusual events below. Recall how the district court preliminarily enjoined the Act. But after months of record building, producing over 3,000 pages of testimony and expert reports, both sides moved for summary judgment, and the district court reversed itself—dissolving its prior injunction and entering judgment for Petitioners. Although the circuit court reversed that well-reasoned decision, it entered judgment for B.P.J. on Title IX, showing the dispute is a legal one. And ultimately, one can't lose sight of the on-the-ground realities this case involves. Millions of girls play interscholastic sports. States need clarity, especially considering how States "clearly" have an "interest in the continued enforceability of [their] own statutes." *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986). Now is the time to offer that clarity, and this case presents a chance to protect basic fairness for women and girls.

This Court's recent grant of the petition in *United States* v. *Skrmetti*, No. 23-477, will not resolve the circuit splits and confusion that undergird this case. Most obviously, *Skrmetti* did not address the Title IX question that the Fourth Circuit resolved against West Virginia. As for the Equal Protection analysis, the level of scrutiny, the importance of a state's interest, and the relative "fit" between that interest and the state's solution are different in the context of saving women's sports versus protecting children from experimental and harmful medical interventions. So lower courts and States will still require more guidance after *Skrmetti*.

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not waive this issue, which they properly raised and preserved below. See, *e.g.*, App.19a-20a.

## II. The Title-IX Question Warrants Review.

The Fourth Circuit's Title IX analysis is egregiously wrong. In ruling for B.P.J., the Fourth Circuit turned a statute enacted to protect women on its head and exacerbated a multi-circuit split.

In the Fourth Circuit, females must now compete against biological males—and all the physiological advantages they possess—in all athletic events. This "commingling of the biological sexes in the female athletics arena w[ill] significantly undermine the benefits" that separate sports teams "afford[-] to female student athletes." A*dams*, 57 F.4th at 819 (Lagoa, J., specially concurring). Where Title IX originally heralded a "virtual revolution for girls and women in sports," the Fourth Circuit's opinion precipitates a counterrevolution. *Id.* at 818 (cleaned up). Given the importance of equality in women's sports, this Court should grant certiorari and stop this regression.

### A. The circuits are split over whether school policies that divide the sexes based on biological differences violate Title IX.

Title IX prohibits "discrimination" in educational programs "on the basis of sex." 20 U.S.C. § 1681(a). This Court interprets these "key statutory terms" "in accord with the ordinary public meaning of [those] terms at the time of [Title IX's] enactment." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 654-55 (2020). Each word "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *West Virginia* v. *EPA*, 597 U.S. 697, 721 (2022). Courts must not "add to, remodel, update, or detract from old statutory terms" to fit their "own imaginations," *Bostock*, 590 U.S. at 654-55, or to "better

reflect the current values of society," *id.* at 685 (Alito, J., dissenting).

Though Title IX does not define sex, its ordinary meaning in 1972 is clear: the "overwhelming majority of dictionaries defin[ed] sex on the basis of biology and reproductive function." *Adams*, 57 F.4th at 812. As this Court stated just one year after Congress passed Title IX, "sex" is "an immutable characteristic" determined by "birth." *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973).

What dictionaries tell us, the "statutory and historical context" confirms. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001). Throughout Title IX, Congress used "sex" to denote a biological binary. For example, Title IX permits schools to go from admitting "only students of *one sex*" to admitting "students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphases added). It also exempts "father-son or mother-daughter activities … but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*." *Id.* § 1681(a)(8) (emphases added).

Title IX's enactment history underscores that the American public understood "sex" to denote a biological binary. *Gundy* v. *United States*, 588 U.S. 128, 140 (2019) (statutory interpretation is a "holistic endeavor" that looks at "purpose and history"). "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick* v. *Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); accord *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 704 & n.36 (1979). Its primary sponsor, Senator Birch Bayh, noted the statute sought to "provide for the women of America something that is rightfully theirs—an equal chance … to

develop the skills they want." 118 CONG. REC. 5808 (1972). This purpose "to prohibit the discriminatory practice of treating women worse than men" "is evident in the text itself." *Neese* v. *Becerra*, 640 F. Supp. 3d 668, 681 (N.D. Tex. 2022) (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011)). In short, "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges." *Williams*, 998 F.2d at 175.

Yet blinders the Fourth Circuit wore. Its interpretation "essentially reverse[s] the entire premise of Title IX." *Louisiana*, 2024 WL 2978786, at *11. And interpreting "sex" to mean gender identity "would render meaningless all of the Exemptions set forth in Title IX." *Louisiana*, No. 3:24-CV-00563, 2024 WL 2978786, at *11; see also *Yates* v. *United States*, 574 U.S. 528, 543 (2015) (explaining how the canon against surplusage is strongest when an interpretation renders another part of the same scheme superfluous). For instance, if "sex" encapsulates "gender identity," then Title IX's exemption permitting "living facilities for the different sexes" does not work. 20 U.S.C. § 1686. Transgender students could "live in both living facilities associated with their biological sex and living facilities associated with their gender identity." *Adams*, 57 F.4th at 813. So, too, with Title IX's exemption permitting an institution to limit its admission to "only students of one sex." 20 U.S.C. § 1681(a)(5). Transgender students could gain admission to any institution. Title IX's exemptions make sense only if sex means sex—not gender identity. Holding otherwise "would allow decades of triumphs for women and men alike to go down the drain." *Louisiana*, No. 3:24-CV-00563, 2024 WL 2978786, at *11.

*Bostock* does not counsel differently. *Bostock*'s "text-driven reasoning applies only to Title VII." *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023). This Court carefully cabined its decision to not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" or address other issues not before the Court. *Bostock*, 590 U.S. at 681; accord *Pelcha* v. *MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

For good reason. *Bostock*'s analysis does not work under Title IX. *Bostock* focuses on Title VII, which "is a vastly different statute" than Title IX. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005); accord *Meriwether* v. *Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("Title VII differs from Title IX in important respects.").

The differences start with the statutes' texts. Title VII prohibits discrimination on the basis of multiple traits in employment, whereas Title IX forbids being subjected to discrimination on the basis of only sex in educational programs. That matters because, as this Court explained shortly after Title IX's enactment, educational distinctions based on sex are only problematic when they "have the effect of invidiously relegating the entire class of females to inferior legal status without regards to the capabilities of its individual members." *Frontiero*, 411 U.S. at 686-87. Reserving girls' teams for girls promotes and protects female athletes vis-à-vis male athletes.

The statutes also have two very different contexts, and, in "law as in life," context matters. *Yates*, 574 U.S. at 537. "[T]he same words, placed in different contexts, sometimes mean different things." *Id.* at 537. Whereas

Title VII focuses on hiring and firing in the workplace, Title IX deals with "schools and children." *Adams*, 57 F.4th at 808. And the Court has long recognized that "schools are unlike the adult workplace." *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

Title VII and Title IX also handle sex distinctions differently. Under Title VII, sex "is not relevant to the selection, evaluation, or compensation of employees"—ever. *Bostock*, 590 U.S. at 660 (cleaned up). So under *Bostock*, when an employer takes an adverse action, "if changing the employee's sex would have yielded a different choice by the employer[,] a statutory violation has occurred." *Id.* at 660-61.

Conversely, to comply with Title IX, schools often "must consider sex." *Meriwether*, 992 F.3d at 510 n.4. Though sex has no "relevan[ce] to the selection, evaluation, or compensation of employees," *Bostock*, 590 U.S. at 660 (cleaned up), it "is not an irrelevant characteristic" in sports, *Cohen* v. *Brown Univ.*, 101 F.3d 155, 178 (1st Cir. 1996). Without sex separation in sports, "the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape* v. *Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam). Unlike in employment, a male is not "materially identical in all respects" to a female, no matter how each may identify. Contra *Bostock*, 590 U.S. at 660. Thus, courts should not take "principles announced in the Title VII context [and] automatically apply [them] in the Title IX context." *Meriwether*, 992 F.3d at 510 n.4.

The Fourth Circuit's decision is "miles away from the straightforward text of" Title IX and will "nullify[ ] Title IX's promise of equal athletic opportunity for women."

App.74a. And it exacerbates a split over whether schools can divide the sexes based on biological differences. The Eleventh Circuit in *Adams* said yes. The Fourth Circuit said no, joining the Ninth Circuit in *Hecox* and the Seventh Circuit in *A.C.* v. *Metro Sch. Dist. of Martinsville*, 75 F.4th 760 (2023). This Court should "take the opportunity with all deliberate speed to resolve these questions of national importance." App.74a (Agee, J., concurring and dissenting in part). App.74a. Certiorari is warranted.

### B. Title IX has always been understood to allow sex-specific sports teams and privacy spaces.

All three branches of government have understood Title IX to allow laws like the Sports Act.

After Congress enacted Title IX, Congress passed the so-called "Javits Amendments," directing the Department of Education's predecessor agency to publish Title IX implementing regulations, including regulations addressing athletics. Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). The agency responded by issuing the sports regulation codified today at 34 C.F.R. § 106.41(b), which authorizes schools to "sponsor separate teams for members of each sex." Congress required that these rules be submitted for its approval, and Congress then authorized the rules to take effect. *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531-34 (1982). The agency has never changed 34 C.F.R. § 106.41(b).

Courts, too, have long understood Title IX to allow women's only sports teams. *E.g., Mansourian* v. *Regents of Univ. of Cal.*, 602 F.3d 957, 973 (9th Cir. 2010); *Pederson*, 213 F.3d at 871; *Cohen*, 101 F.3d at 177; *Kelley* v. *Bd. of Trs.*, 35 F.3d 265, 269-70 (7th Cir. 1994);

*Williams*, 998 F.2d at 175. The Fourth Circuit's opinion here conflicts with these circuit decisions and the understanding of every federal administration until today.

### C. Various clear-statement canons undermine the Fourth Circuit's Title IX interpretation.

Several clear-statement canons compel the Title IX reading that the Fourth Circuit rejected.

First, courts require a clear statement before a court can assume that Congress intended to impede the states' traditional police powers. *Bond* v. *United States*, 572 U.S. 844, 859-60 (2014). These traditional powers include public education, "the very apex of the function of a State." *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972). And "[i]nterscholastic athletics obviously play an integral part in the public education of [the States]." *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 299 (2001).

Second, "Title IX was enacted as an exercise of Congress' powers under the Spending Clause." *Jackson*, 544 U.S. at 181. Here, too, "Congress speak[s] with a clear voice" before imposing funding conditions on the States. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Crystal clarity is the only way to ensure that the State "voluntarily and knowingly" accepted the condition. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006) (cleaned up); see also *Kansas*, 2024 WL 3273285, at *10 (explaining why Spending Clause prevented conditioning of Title IX funds on acceptance of new notion of "gender identity" discrimination).

Yet Title IX contains no "clear statement" prohibiting States from classifying sports teams on the basis of sex.

To the contrary, 34 C.F.R. § 106.41(b), which bears Congress's imprimatur, expressly says otherwise. And States have proceeded on that understanding for the entirety of Title IX's existence—until now. This Court should grant review and reaffirm that Title IX means what it has always said: States and schools may provide equal opportunities by classifying teams and competitions according to biological sex.

## III. The Equal-Protection Question Warrants Review.

The decision below on B.P.J.'s equal-protection claim deserves immediate review, too. The majority re-entrenches circuit splits on critical issues. At other times, it conflicts with central tenets in this Court's cases.

### A. The circuits are split over whether and how biology-based distinctions constitute actionable discrimination.

**1.** West Virginia's Sports Act doesn't mention "transgender" or any similar status. The Act focuses on biological sex, a distinction that reflects "inherent differences between men and women." *VMI*, 518 U.S. at 533 (cleaned up). Even so, the majority below concluded that the Act constituted "a facial classification based on gender identity" that in turn triggered intermediate scrutiny. App.24a (citing *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610-13 (4th Cir. 2020)).

But the circuits are split on whether transgender status or gender identity triggers intermediate (or "heightened") scrutiny at all. Prominent among those cases is *L.W.*, 83 F.4th at 408 (6th Cir. 2023), cert. granted 2024 WL 3089532 (June 24, 2024), though, as explained above, a decision there will not resolve the issues

presented here. Likewise, a concurrently filed petition for certiorari in *Little* v. *Hecox*, No. 23-___, presents the same equal-protection question in the athletics context.

On one side of the line fall courts like the Fourth Circuit. There, "transgender persons constitute a quasi-suspect class," so heightened scrutiny applies whenever some separation is thought to implicate them. *Grimm*, 972 F.3d at 613. In much the same way, the Ninth Circuit has held that "heightened scrutiny applies to laws that discriminate on the basis of transgender status, reasoning that gender identity is at least a 'quasi-suspect class.'" *Hecox* v. *Little*, 79 F.4th 1009, 1026 (9th Cir. 2023); see also *Brandt ex rel. Brandt* v. *Rutledge*, 47 F.4th 661, 670 n.4 (8th Cir. 2022) (discerning "no clear error in the district court's factual findings underlying [its] legal conclusion" that a law deserved heightened scrutiny as facially discriminatory against "transgender people"). Meanwhile, the Seventh Circuit has reasoned that "discrimination based on transgender status is a form of sex discrimination," which likewise triggers intermediate scrutiny. *A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023).

Conversely, other courts have refused to apply heightened or intermediate scrutiny in similar circumstances. For instance, the en banc Eleventh Circuit did not look to "transgender status" or the like when evaluating a sex-separation bathroom policy like the one at issue in *Grimm*. *Adams*, 57 F.4th at 809. Instead, it did what should have been done here: look to whether the separation between biological boys and girls can be constitutionally justified. *Id.* The Eleventh Circuit is not alone. See, *e.g.*, *Druley* v. *Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) ("[T]his court has not held that a

transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims.").

But it gets worse, as a second split lurks. The majority below reasoned that the Act's biology-focused distinction is a "facial classification based on gender identity" because it treats "all 'biological males' … the same." App.24a-25a. In other words, in the Fourth Circuit, distinctions drawn with an eye towards biological sex are assumed to target those who self-identify with a different gender. The Ninth Circuit held similarly, reasoning that a reference to "biological sex functions as a form of proxy discrimination." *Hecox*, 79 F.4th at 1024 (cleaned up). But the Eleventh Circuit rightly concluded that "discrimination based on biological sex" "does not" "necessarily entail[] discrimination based on transgender status." *Adams*, 57 F.4th at 809; see also *Soule* v. *Conn. Assoc. of Schs. Inc.*, 90 F.4th 34, 62 (2d Cir. 2023) (Menashi, J., concurring) (explaining how this Court has not "establish[ed] that assigning sports teams based on biological sex would constitute discrimination"); *Doe 2* v. *Shanahan*, 917 F.3d 694, 733 (D.C. Cir. 2019) (Williams, J., concurring) (explaining how a military requirement that member "serve in their biological sex" is "facially neutral"). So the Fourth Circuit has deepened another circuit split here, too.

**2.** The decision below reflects how the courts' confused approaches have produced wrong-headed results.

Under the Sports Act, everyone born male competes on male or coed public-school teams—no matter whether they identify as male, female, nonbinary, or one of the other dozens of genders that students might adopt. The Act, then, is deliberately *indifferent* to the question of gender identity, hinging instead on sex—"an immutable

characteristic determined solely by the accident of birth." *Frontiero*, 411 U.S. at 686. How, then, can the Act be said to target gender identity as a trait for discrimination? Because the Act's purported "bar" affects half the population (males), a "lack of identity" exists between its sex-based classification and those identifying as "transgender." *Adams*, 57 F.4th at 809.

But the majority refused to look to "the statutory classification itself." *Califano* v. *Boles*, 443 U.S. 282, 294 (1979). Instead, it surmised from unidentified facts that the law had the "sole" and "undisputed purpose" of "exclud[ing] transgender girls … from participation on girls [sic] sports teams." App.13a, 24a. Yet the statute itself says otherwise. W. VA. CODE § 18-2-25d(a)(3). And naked disbelief can't transform a facially neutral statute into intentional discrimination. Beyond that, the majority below repeatedly—and mistakenly—emphasized the Act's perceived "effect." But many laws "affect certain groups unevenly," and those laws are "ordinarily of no constitutional concern" if they treat that group "no differently from all other members of the" overall "class described" by the law. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 271-72 (1979). Disparate impact isn't actionable. "The Equal Protection Clause … prohibits only intentional discrimination; it does not have a disparate-impact component." *Ricci* v. *DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting). Cases discussing "when a neutral law has a disparate impact" "signal[] no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Feeney*, 442 U.S. at 273.

Muddled reasoning like the Fourth Circuit's will continue without this Court's intervention, and "a

nationally uniform approach" will never be possible. *A.C.*, 75 F.4th at 775 (Easterbrook, J., concurring).

### B. The Fourth Circuit's approach to as-applied challenges sharply conflicts with this Court's decisions.

The Fourth Circuit also refashioned the intermediate-scrutiny standard in as-applied cases, requiring the State to explain how the Act advances substantial interests in B.P.J.'s specific circumstances. This approach will compel lower courts to apply a strict-scrutiny-style standard in *every* as-applied constitutional challenge. The Court must intervene to stop that chaos.

Start from first principles. Labeling a claim "facial or as-applied … does not speak … to the substantive rule of law." *Bucklew* v. *Precythe*, 587 U.S. 119, 138 (2019). For equal-protection claims, courts consider whether the state "action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before" it. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). And West Virginia need not use a classification "capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70; accord *Clark I*, 695 F.2d at 1132; see also *Edge Broad. Co.*, 509 U.S. at 427 (explaining intermediate scrutiny does not turn on "whether the governmental interest is directly advanced as applied to a single person or entity"). Rather, the Sports Act's validity turns on how it relates "to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989); *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 430 (1993); *accord Califano*, 434 U.S. at 55 (equal protection considers "characteristics typical of the

affected classes rather than … selected, atypical examples"). Sex-based classifications play by these same rules. See, *e.g.*, *Nguyen*, 533 U.S. at 53; *VMI*, 518 U.S. at 515; *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982).

The majority below rejected these principles. Though it wasn't clear exactly what "fit" standard it was applying, it was effectively a perfect one—requiring the State to justify the Act in the specific case of a biological male who has arguably not undergone Tanner 2 stage puberty and seeks to compete on a girls' cross-country or track team. App.31a, 34a. But leaning on "personal circumstances" in this way "is an impermissible attempt to ratchet up [the] standard of review … toward strict scrutiny." *Doe* v. *United States*, 419 F.3d 1058, 1063 (9th Cir. 2005) (cleaned up). And the approach is "fundamentally flawed because it effectively would create an exception to the statute that does not exist." *Harley* v. *Wilkinson*, 988 F.3d 766, 770 (4th Cir. 2021), abrogated on other grounds by *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 19 n.4 (2022). Schools are left to wrestle with a slew of claims from students who feel their circumstances justify special exceptions, too.

The Fourth Circuit's attack on traditional standards of review—which effectively requires West Virginia schools to classify athletes using a case-by-case parsing of each students' individual circumstances—requires this Court's review.

### C. The Fourth Circuit's reasoning on similarity flouts this Court's precedents and other courts' decisions.

The Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact to be treated in law as

though they were the same." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966) (cleaned up). So policymakers may pass laws that reject sex-based stereotypes but still "realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances." *Michael M.* v. *Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). After all, the "[p]hysical differences between men and women … are enduring." *VMI*, 518 U.S. at 533. Sex can thus "represent[] a legitimate, accurate proxy" to pursue a permissible legislative end, *Craig* v. *Boren*, 429 U.S. 190, 204 (1976), such as "provid[ing] for the special problems of women," *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 653 (1975). And courts have allowed for the use of these proxies even when some other categorization might provide for a tighter fit with the targeted physical characteristics. See, *e.g.*, *Texas* v. *Cardona*, No. 4:23-cv-00604, 2024 WL 2947022, at *34 (N.D. Tex. June 11, 2024) (focusing on "average physiological differences" and the "great bulk" of affected women (cleaned up)); *Petrie* v. *Ill. High Sch. Ass'n*, 394 N.E.2d 855, 862 (Ill. 1979) (noting the "impractical" nature of trying to parse physical differences on an individual basis).

Thus, in choosing to focus on sex, the West Virginia Legislature respected the Equal Protection Clause's command. The Sports Act's reliance on "biological sex" "represents a legitimate, accurate proxy" to pursue a permissible legislative end. *Craig,* 429 U.S. at 204. It declined to make the focus *gender identity*—a factor B.P.J.'s expert said "is not a useful indicator of athletic performance." Appl.App.214a.

This choice to focus on biological sex is nothing new when it comes to sports. In physical contexts, "[t]he difference between men and women … is a real one." *Nguyen*, 533 U.S. at 73; accord *Adams*, 57 F.4th at 819

(Lagoa, J., specially concurring) ("[T]here are inherent differences between … male[s] and … female[s] and … those born male … have physiological advantages in many sports."). Evidence below agreed. Appl.App.27a-28a, 94a-109a, 151a-192a. And "due to [these] average physiological differences, males would displace females to a substantial extent if they were allowed to compete" together. *Clark I*, 695 F.2d at 1131; see also *Cape*, 563 F.2d at 795 (without distinct teams, many biological "females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement"). This displacement would in turn deny girls "an equal opportunity to compete in interscholastic events." *O'Connor* v. *Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers).

Recognizing these common-sense ideas, courts across the country have found for decades that men and women may be constitutionally separated by biological sex when it comes to sports. See, *e.g.*, *Kleczek* v. *R.I. Interscholastic League, Inc.*, 612 A.2d 734, 739 (R.I. 1992); *B.C.* v. *Bd. of Educ., Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059, 1065 (N.J. App. Div. 1987); *In re Mularadelis* v. *Haldane Cent. Sch. Bd.*, 74 A.D.2d 248, 256 (N.Y. App. Div. 1980); *Petrie*, 394 N.E.2d at 862. In other words, "[i]n requiring schools to designate sports-team memberships on the basis of biological sex," statutes like the Sports Act "adopt[] the uncontroversial proposition that most men and women do have different (and innate) physical attributes." *D.N. ex rel. Jessica N.* v. *DeSantis*, No. 21-cv-61344, 2023 WL 7323078, at *9 (S.D. Fla. Nov. 6, 2023). The need for physical engagement in sports explains why sex-separation is the "norm" in that context (unlike "admissions and employment," which differ in "analytically material ways"). *Cohen*, 101 F.3d at 177.

But the majority below abandoned these long-accepted principles. It felt West Virginia must face an equal-protection claim because it had not been conclusively established that all males "enjoy a meaningful competitive athletic advantage over cisgender girls." App.34a; but see *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 211 (1997) (explaining that question under intermediate scrutiny is "not whether" the legislature was right about the existence of a problem "as an objective matter"). As Judge Agee recognized in dissent, this approach effectively abandons any meaningful "similarly situated analysis." App.47a-50a & n.2. It transforms gender identity into the decisive criterion for competitive sports; after all, B.P.J. is not suggesting low-performing biological males who identify as males should be permitted to play on the girls' teams. And it allows even the weakest of supposed comparisons to defeat a validly enacted state law. That's a far cry from requiring "similarly situated" persons to be "identical in all relevant respects," *Reinebold* v. *Bruce*, 18 F.4th 922, 926 (7th Cir. 2021) (cleaned up), which courts required before. See also *Back Beach Neighbors Comm.* v. *Town of Rockport*, 63 F.4th 126, 131 (1st Cir. 2023) (an "extremely high degree of similarity" (cleaned up)); *Golden Glow Tanning Salon, Inc.* v. *City of Columbus*, 52 F.4th 974, 978 (5th Cir. 2022) ("in all relevant respects alike" (cleaned up)); *Griffin Indus., Inc.* v. *Irvin*, 496 F.3d 1189, 1204 (11th Cir. 2007) (same).

The Court should thus grant the petition to reaffirm the idea that biology justifies the different treatment reflected in the Sports Act and similar statutes.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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