No. 24-

IN THE

Supreme Court of the United States

WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION,

Petitioner,

v.

B.P.J., BY HER NEXT FRIEND AND MOTHER, HEATHER JACKSON; WEST VIRGINIA STATE BOARD OF EDUCATION; HARRISON COUNTY BOARD OF EDUCATION; W. CLAYTON BURCH, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT; DORA STUTLER, IN HER OFFICIAL CAPACITY AS HARRISON COUNTY SUPERINTENDENT; THE STATE OF WEST VIRGINIA; AND LAINEY ARMISTEAD,

Respondents.

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

This case navigates the course of the state actor doctrine from *Brentwood Academy v. Tennessee SSAA* 531 U.S. 288 (2001), and *Smith v. NCAA*, 266 F.3d 152 (3d Cir. 2001), to *Peltier v. Charter Day School*, 37 F.4th 104 (2022).

The entwinement test has been variously and illogically applied. Where in *Christian Heritage Acad. v. Oklahoma SSAA*, 483 F.3d 1025 (10th Cir. 2007), and *Crane v. Indiana HSAA,* 975 F.2d 1315 (7th Cir. 1992), the test applied to action, here, WVSSAC has not acted, is not slated to act, and has no role identified for it in this process. In Title IX determinations, the role of federal funding is variably determinative. *See Parker v. Indiana HSAA,* 2009 U.S. Dist. LEXIS 113395 (S.D. In. 2009); *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n*, 134 F. Supp. 2d 965 (N.D. Ill. 2001). Here conversely, WVSSAC does not receive federal funds, has no 'controlling authority' and yet is held to answer under Title IX.

The questions presented here include the following:

> What are the indicia of 'state actor'? And do they include action, entwinement and controlling authority?
>
> Is private industry aggrieved by a baseless conversion into state actor, complete with heretofore unknown legal duties and no immunities?
>
> Should courts be called upon to make state actor determinations within some meaningful,

reproduceable, predictable framework or process?

Did the courts below apply this Court's seven tests relative to West Virginia Secondary School Activities Commission (WVSSAC)? If they failed to do so, did they improperly convert this private corporation into 'state actor' for the first time in its 108-year history?

PARTIES TO THE PROCEEDING

Petitioner who was a defendant in the District Court and an appellee and cross-appellant in the Court of Appeals is the West Virginia Secondary School Activities Commission.

Respondent who was a plaintiff in the District Court and an appellant in the Court of Appeals is B.P.J., by her next friend and mother, Heather Jackson.

Respondents who were defendants in the District Court and 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.

Respondents who were intervenors in the District Court and appellees in the Court of Appeals are the State of West Virginia and Lainey Armistead.

CORPORATE DISCLOSURE STATEMENT

Petitioner West Virginia Secondary School Activities Commission has no parent corporation. There is no publicly held company owning 10% or more of the corporation's stock.

RELATED PROCEEDINGS

B.P.J., by her next friend and mother, Heather Jackson v. West Virginia State Board of Education, et al., No. 2:21-cv-00316, U.S. District Court for the Southern District of West Virginia. Judgment entered January 5, 2023.

West Virginia, et al. v. B.P.J., by her next friend and mother, Heather Jackson, No. 22A800, Supreme Court of the United States. Application to Vacate the Injunction denied April 6, 2023.

B.P.J., by her next friend and mother, Heather Jackson v. West Virginia State Board of Education, et al., No. 23-1078 (L), U.S. Court of Appeals for the Fourth Circuit. Judgment entered April 16, 2024.

B.P.J., by her next friend and mother, Heather Jackson v. West Virginia Secondary School Activities Commission, et al., No. 23-1130 (consolidated with 23-1078), U.S. Court of Appeals for the Fourth Circuit. Judgment entered April 16, 2024.

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The Fourth Circuit's panel opinion (Pet. App. 1a) is reported at 98 F.4th 542 and is available at 2024 U.S. App. LEXIS 9153. The District Court's opinion (Pet. App. 76a) is reported at 649 F.Supp.3d 220 and is available at 2023 U.S. Dist. LEXIS 1820.

JURISDICTION

The Fourth Circuit issued its panel opinion on April 16, 2024. Pet. App. 1a. The 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.

STATUTORY PROVISIONS AND REGULATIONS

The relevant West Virginia statutory provisions are West Virginia Code §18-2-25d (Pet. App. 112a) and West Virginia Code § 18-2-25 (Pet. App. 116a).

The relevant West Virginia regulations are West Virginia C.S.R. §126-26-4, in part (Pet. App. 120a), §127-3-22 (Pet. App. 121a), and §127-3-29 (Pet. App. 122a).

INTRODUCTION

B.P.J. filed suit against *inter alia* the West Virginia Secondary School Activities Commission ("WVSSAC"), challenging the "Save Women's Sports Act," codified at W.Va. Code §18-2-25d. (Pet. App. 112a), passed by the West Virginia Legislature in 2021. WVSSAC does not belong in the litigation. WVSSAC had no role in passage of the Act, and it did not take any action as to B.P.J. While

the Act contemplates action by the West Virginia State Board of Education to implement its provisions, there is no action contemplated by WVSSAC. (Pet. App. 115a). B.P.J. has not identified any future harm that WVSSAC will likely cause. WVSSAC has maintained that it is not a state actor because it has not acted, thus, it cannot have been engaged in "state" action. Further, it is not subject to Title IX of the Education Amendments Act of 1972 (2018) because it does not receive federal funds.[1] Without meaningful analysis and only one generalized citation to the factual record, the District Court incorrectly held that WVSSAC is a state actor for purposes of this case and that it is subject to scrutiny under the Equal Protection Clause and Title IX. The Fourth Circuit erred in reaching the same conclusion on appeal. As a result, though WVSSAC is a private corporation that has done nothing to affect B.P.J. in any way, it has been swept along in the tide of this litigation regarding the legality of the Act. This Court should intervene to prevent such casual conversion of private industry into state actor.

WVSSAC is a nonprofit private corporation that organizes and sponsors interscholastic sports programs in West Virginia. WVSSAC's regulations are gender-neutral, and nothing in WVSSAC's policies would categorically exclude a transgender girl from playing on a girls' team.[2] The Act provides that teams "designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." (Pet. App. 114a). A parent of a transgender girl interested in participating in girls' sports filed suit to

1. Fourth Circuit Joint Appendix Vol. 1, JA0491 (ECF 53-1).

2. Fourth Circuit Joint Appendix Vol. 1, JA0061 (ECF 53-1).

challenge the Act on the basis of the Equal Protection Clause of the Fourteenth Amendment and Title IX. The State of West Virginia intervened in the suit to defend the legality of the legislation.

STATEMENT OF THE CASE

WVSSAC is a private corporation, founded in 1916, and the Supreme Court of Appeals of West Virginia has confirmed it is not a state agency as it has been a voluntary association since 1916 (and was not created nor empowered by the Legislature); it is not funded by public moneys; and not all public or private schools in West Virginia have elected to belong. [3]

In the District Court, WVSSAC did not argue the merits of the Equal Protection or Title IX claims. Instead, WVSSAC asserted that it is not a state actor subject to scrutiny under either the Equal Protection Clause or Title IX. The District Court rejected this argument when first made in a motion to dismiss. (Pet. App. 107a). The District Court relied on B.P.J.'s assertion that under the Act, "each defendant will take some action that will cause her asserted harm." (Pet. App. 109a). With respect to the Title IX claim, the District Court determined that B.P.J. had sufficiently alleged that each defendant "will exclude her from participation in an educational event on the basis of sex" and that each "receives federal funding, either directly or indirectly." (Pet. App. 110a-111a). With respect to Equal Protection, the court stated that B.P.J. had alleged that each defendant, "acting under the color

3. Syl. Pt. 2,3 *Mayo v. West Virginia SSAC,* 672 S.E.2d 231 (W. Va. 2008).

of state law, is discriminating against her on the basis of sex." (Pet. App. 111a).

These assertions by B.P.J. were demonstrated to be inaccurate. WVSSAC has no role under the Act. The Act provides that the State Board of Education, the Higher Education Policy Commission, and the Council for Community and Technical College Education shall propose and promulgate rules to implement the Act. (Pet. App. 115a). The Act does not contemplate action by WVSSAC. In West Virginia, State Board of Education rules are neither promulgated nor implemented by WVSSAC. Instead, they are embedded in WVSSAC's rule books as promulgated by the State Board. However, only the State Board can revise, amend, or provide waivers to its rules. An example is the existing "2.0 rule" promulgated by the State Board, requiring students to maintain a 2.0 average in order to participate in extracurricular activities. (Pet. App. 120a). Enforcement of the State Board's 2.0 rule lies with the schools and the counties, not WVSSAC.[4] Further, during the pandemic, the State Board waived or changed compliance with its 2.0 rule.[5] The State Board confirmed if a rule is promulgated by the State Board of Education as contemplated in the Act in the future, implementation and enforcement of the State Board's rule would be by the schools.[6]

That is no different from the status quo when it comes to designation of students on teams. The Harrison County

4. Fourth Circuit Joint Appendix Vol. 3, JA1531 (ECF 53-3).

5. Fourth Circuit Joint Appendix Vol. 3, JA1531 (ECF 53-3).

6. Fourth Circuit Joint Appendix Vol. 3, JA1533-1534 (ECF 53-3).

Board of Education, where B.P.J. is a student, confirmed that students are currently designated for either a boys' team or a girls' team at the school level, not by WVSSAC. Either the student or the parent fills out an information sheet that goes to the athletic director,[7] who then puts the information on a particular roster in a portal that can be seen by WVSSAC.[8] This has not changed with passage of the Act, because any rules slated to be promulgated by the State Board under the Act will be implemented by the schools.[9] WVSSAC does not now, nor would it in the future, implement State Board policies such as the 2.0 rule or any rules ultimately promulgated by the State Board under the Act.

The factual record also revealed that WVSSAC receives no governmental funding. WVSSAC's uncontroverted evidence with respect to its sources of funding are as follows:

> West Virginia's Secondary School Activities Commission (WVSSAC) receives no dues whatsoever from member schools and has not for more than a decade. WVSSAC sustains itself with corporate sponsorships, advertising revenue and gate proceeds from championship meets and tournaments.[10]

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7. Fourth Circuit Joint Appendix Vol. 3, JA1331 (ECF 53-3).

8. Fourth Circuit Joint Appendix Vol. 3, JA1331-1334 (ECF 53-3).

9. Fourth Circuit Joint Appendix Vol. 3, JA1533-1534 (ECF 53-3).

10. Fourth Circuit Joint Appendix Vol. 8, JA4193 (ECF 53-8).

Based on this factual record, WVSSAC moved for summary judgment, arguing that it has not acted, and it not slated to act in any way relative to B.P.J. and the Act, and thus is not a "state actor" in this context. Without meaningful analysis and only one generalized citation to the factual record, the District Court denied WVSSAC's motion and found WVSSAC was a state actor. (Pet. App. 82a). While acknowledging that "[a] court may only apply equal protection scrutiny to state action" (Pet. App. 82a), the District Court erred in determining that WVSSAC is a "state actor" while simultaneously failing to identify any "action" by WVSSAC related to B.P.J. upon which such a determination could be based. The District Court summarily concluded that WVSSAC is likewise subject to Title IX, without any analysis whatsoever regarding WVSSAC's argument that it receives no federal financial assistance. (Pet. App. 82a-85a).

While WVSSAC's motion for summary judgment was denied, the District Court found in favor of the defendants and held that the Act is constitutional and complies with Title IX, entering judgment and dismissing the case. (Pet. App. 99a-101a).

B.P.J. appealed to the Fourth Circuit. WVSSAC filed a cross-appeal, asserting that the District Court erred in denying its motion for summary judgment. The Fourth Circuit dismissed WVSSAC's cross-appeal on the grounds that WVSSAC "is not aggrieved by the district court's judgment but seeks to defend a favorable judgment on alternative grounds." (Pet. App. 10a). However, the Fourth Circuit stated that WVSSAC "may defend its favorable judgment 'on any basis supported by the record' – including arguments the district court rejected." (Pet.

App. 12a). The Fourth Circuit then addressed WVSSAC's arguments and agreed with the District Court based upon similarly flawed analysis. (Pet. App. 13a-16a). Relying on the concept of "pervasive entwinement" generally, the Fourth Circuit concluded that WVSSAC is a state actor, without identifying any "action" by WVSSAC in connection with B.P.J. or the Act. For "essentially the same reasons," the Fourth Circuit concluded that WVSSAC "exercises sufficient control over direct funding recipients to make it a Title IX defendant." (Pet. App. 15a). Finally, the Fourth Circuit rejected WVSSAC's argument that the claims against it are not ripe for adjudication because the possibility of any action by WVSSAC, and thus the possibility of any injury, are remote and speculative. (Pet. App. 15a-16a). The Fourth Circuit ignored the factual record and stated that "there is no question that – absent a judicial order directing otherwise – the Commission would update its enforcement policy to conform to the Act's requirements, thus preventing B.P.J. from doing the very thing she seeks to do." (Pet. App. 16a). In fact, it is undisputed that any policy to conform to the Act's requirements would be promulgated by the State Board of Education and implemented at the school level, not by WVSSAC.[11]

On the merits, a divided panel of the Fourth Circuit reversed Defendants generally with respect to the Title IX claim, remanding to the District Court with instructions to enter judgment in favor of B.P.J. and vacated the District Court's granting of summary judgment on the Equal Protection claim, remanding to the District Court for further proceedings. (Pet. App. 40a).

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11. Fourth Circuit Joint Appendix Vol. 3, JA1533-1534 (ECF 53-3).

A concurrent Petition for Certiorari is being filed by the State of West Virginia and others on the merits of whether the Act is constitutional and complies with Title IX. *State of West Virginia v. B.P.J.*, No. 24-__. WVSSAC petitions separately to seek review of the lower courts' erroneous conclusion that WVSSAC is a state actor subject to scrutiny for Equal Protection and Title IX purposes in the context of the Act. This is an important issue to WVSSAC and all similar organizations who do not control State policies but who may be called upon in the courts to defend such policies by overzealous litigants. WVSSAC is a private corporation that has not acted and is not slated to act according to the legislation. Thus, it cannot have been engaged in "state" action. WVSSAC has not excluded, denied benefits to, or discriminated against B.P.J. WVSSAC does not receive federal funds, so it is not subject to Title IX. This Court should reverse and remand with instructions to grant summary judgment to WVSSAC on the basis that it is not a state actor and is not subject to Equal Protection or Title IX scrutiny in connection with the Act.

REASONS FOR GRANTING THE WRIT

I. The Courts Below Have Lost Sight of the Channel Markers for State Actor, Mandating Course Correction by this Court Now.

More than twenty years ago, this Court issued *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,* 531 U.S. 288 (2001), and in the intervening decades, lower courts have attempted to employ the state actor rubric with varying success and rigor. Where this Court's state actor determinations evolved over time

into seven discrete tests,[12] both the District Court and the Fourth Circuit have declined to follow the channel markers floated by this Court, opting to adopt more of the 'I know it when I see it'[13] approach to the conversion of private industry into state actor. It is imperative that this Court course correct, reinstitute and reaffirm the distinctions between industry and state.

This Court has recognized, applauded, and upheld many of the positive attributes of private industry, along with its inherent value socially and economically, and has worked to provide room for it in regulatory settings.[14] Yet the courts below are suspicious of industry's access to and alleged monopoly of state enterprise. More than one court has linked private industry's disinclination to be 'state' to an alleged effort to evade responsibility for its acts.[15] However, if the state connection guarantees wealth or at least a steady stream of work, why then does private industry fight assimilation into statehood? Liability, after all, is a part of doing business, as demonstrated by any reading and consideration of these arguments. At the end of the day, why is the distinction important?

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12. Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine,* 73 Mo. L. Rev. 561, 564-67 (2008), citing public function test, state compulsion test, nexus test, state action test, entwinement test, joint participation, control by a state agency.

13. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

14. *Loper Bright Enterprises v. Raimondo,* 603 U.S. ___ (2024) at Concurrence, citing "practical and real protections for individual liberty,"

15. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 814-15 (2019); *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007).

The key concepts at issue have been and remain entwinement and control. Yet, some action must be at issue before private industry can be considered a state actor. In *Peltier v. Charter Day School, Inc.,* the District Court held that "'[i]n assessing a private actor's relationship with the state for purposes of an Equal Protection claim, the court must determine whether there is a sufficiently close nexus between the defendant's challenged action and the state so that the challenged action may be fairly treated as that of the state itself.'" 37 F.4th 104, 115 (4th Cir. 2022) (emphasis added), quoting *Mentavlos v. Anderson*, 249 F.3d 301, 314 (4th Cir. 2001). There is no such action here. Without recognizing the disconnect, the lower courts rely upon *Brentwood,* in which the alleged "challenged action" is the sanction imposed by the Athletic Association upon the Academy for alleged undue influence in recruiting. 531 U.S. at 293. The District Court further relied upon *Peltier*, in which a dress code is the "challenged action." B.P.J. relies upon *Communities for Equity v. Michigan High School Athletic Association*, 80 F. Supp. 2d 729, 735 (W.D. Mich. 2000), in which the "challenged action" was the Athletic Association's alleged discrimination against female athletes *inter alia* by operating shorter seasons for female athletes. None of these authorities considers the instance of an entity that has not undertaken any action at all. The lower courts failed to identify any "challenged action" undertaken by WVSSAC relative to B.P.J. that could serve as a predicate for the secondary analysis of whether such "challenged action" should be considered "state action."

While severely discounted by the Fourth Circuit, S*mith v. NCAA*[16] provides the only test for when control

16. *Smith v. NCAA*, 266 F.3d 152 (3d Cir. 2001).

and authority become 'controlling authority' so as to federalize a private association, corporation, or non-state actor, similar to WVSSAC. *Smith*'s analysis is salient to the Court and these parties. Control and authority do not become 'controlling authority,' absent more. *Smith* provides the rubric for determining 'more.'

Where this Court has held that it is bound by a state court's interpretation of state law,[17] the courts below have exceeded any and all rulings of the Supreme Court of Appeals of West Virginia in exceeding West Virginia's determinations relative to WVSSAC.[18] Where the Fourth Circuit finds entwinement between WVSSAC and the Act,[19] it violates its own precedent in that there is no nexus whatsoever between WVSSAC and the Act.[20] The Fourth Circuit finds that, while WVSSAC is neither a direct nor an indirect funding recipient, nonetheless, by apparent

17. *Wash. State Dep't of Licensing v. Cougar Den, Inc.,* 586 U.S. 347, 357(2019), citing *Johnson v. United States,* 559 U.S. 133 (2010).

18. *See* Pet. App. 14a-15a, citing a footnote in *Israel v. W. Va. Secondary Sch. Activities Comm'n,* 388 S.E.2d 480 n.4.(W. Va. 1989) (non-precedential in itself) that is more notable for what it doesn't say than what it does.

19. Pet. App. 14a-15a.

20. "Constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004, (1982). "A State normally can be held responsible for a private decision only when it has exercised *coercive power* or has provided such significant encouragement, *either overt or covert*, that the choice must in law be deemed to be that of the State." *Id.* (emphasis added).

alchemy, WVSSAC exerts sufficient control over direct funding recipients to convert the Commission into a Title IX defendant.[21] The Fourth Circuit's finding support in *Peltier v. Charter Day School, Inc.,* is perplexing in that, in *Peltier*, the Fourth Circuit held that the pervasive entwinement 'must be with the challenged conduct.' *Peltier v. Charter Day School,* 37 F.4th at 116, citing *Blum v. Yaretsky,* 457 U.S. at 1004; *Brentwood,* 531 U.S. at 298. Demonstrating 'if it quacks, it's a duck' and 'if I'm a hammer, it's a nail' reasoning, the Fourth Circuit found WVSSAC to be state actor without considering B.P.J.'s own concession – WVSSAC is identified nowhere in the statute as enacted and has no role in the process.[22]

In this instance, the courts below operated in a factual vacuum, applied the conventional wisdom of 'activity commissions,' and were demonstrably wrong as a matter of law and fact relative to WVSSAC, further littering the coastline of 'state actor' and injuring WVSSAC. With little more rigor or nuance than "if it quacks, it's a duck" reasoning, the courts failed to parse or consider meaningfully the clarity of *NCAA v. Smith*[23] or the solid ground of *Peltier v. Charter Day School.*[24] Conversely, these federal courts wandered between and among the channel markers, adrift, grasping at solid ground regardless of its applicability. As this Court has repeatedly and recently found, without oversight and

21. Pet. App. 15a.

22. Fourth Circuit Joint Appendix Vol. 1, JA0424-0429 (ECF 53-1); Pet. App. 112a.

23. *Smith,* 266 F.3d 152.

24. 37 F.4th 104 (4th Cir. 2022).

course correction, courts can resort to reflexive action rather than analysis. Rather than take on meaningful analysis, the courts below fall prey to narrative bias, hammering toward a nail,[25] finding resolution in a duck.[26] As a result, the shoreline is cluttered with parchment barriers, with courts overwhelmed in their "torchless search for a way out of a damp echoing cave."[27]

The Fourth Circuit further found that "Title IX's prohibitions are not limited to organizations that directly receive federal funds: the statute also covers organizations that 'control[] and manage[]' direct funding recipients."[28] However, after citing a key determinant, the Fourth Circuit failed to accurately define and apply this key determinant adopted by this Court over time.[29] Indeed, neither the District Court nor the Fourth Circuit considered 'control' in the legal (as opposed to anecdotal) sense. That is, as a matter of law, giving activity commissions the power to

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25. *Am. Express Co. v. Italian Colors Rest.,* 570 U.S. 228, 252 (2013).

26. *Sessoms v. Grounds,* 776 F.3d 615, 617 (3d Cir. 2015).

27. Charles. L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967).

28. *B.P.J. v. State Board,* 98 F.4th 542, 554, (4th Cir. 2024) quoting *Horner v. Ky. High Sch. Athletic Ass'n,* 43 F.3d 265, 272 (6th Cir. 1994) (emphasis removed); see *Williams,* 477 F.3d at 1294 (noting any other rule would allow direct funding recipients to "avoid Title IX liability" by "ced[ing] control over their programs to indirect funding recipients").

29. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288 296 (2001)

enforce the eligibility rules adopted by the State Board and member schools against the students directly does not constitute "ced[ing] authority."[30] Where schools have a voluntary relationship with commissions and have retained the authority to withdraw from same, courts have declined to find control.[31] That is, inherent in choice is a lack of meaningful control.

Schools can indeed withdraw from WVSSAC, and private schools have done so.[32] While withdrawal means that the member schools would be excluded from the championships, they nonetheless may participate in sports and activities as long as they remain a 'school.'[33] However, reviewing courts have found that even if resignation meant no participation, even if it would 'thwart' the schools' desire to 'remain a powerhouse' among the schools against which it competes, nonetheless, the ability to withdraw is a "'practical alternative to compliance with [WVSSAC's] demands,'" such that WVSSAC does not *control* any of the member programs.[34] No school is forced to join, another key determinant,[35] and each school must elect

30. *Id.*

31. *Smith,* 266 F.3d at 159.

32. Deposition of Dolan [Executive Director, WVSSAC] Fourth Circuit Joint Appendix Vol. 3, JA1408 (ECF 53-3).

33. Deposition of Dolan [Executive Director, WVSSAC] Fourth Circuit Joint Appendix Vol. 3, JA1409 (ECF 53-3).

34. *Smith*, 266 F.3d at 159, quoting *Cureton v. NCAA,* 198 F.3d 107, 116-18 (3d Cir. 1999).

35. *Smith*, 266 F.3d at 159.

to participate.[36] The fact that each member school has an opportunity for input on the rules has been found insufficient to demonstrate *control,* just as has their voluntary decision to follow them.[37] As for the eligibility enforcements, should member schools or athletes risk sanctions by violating the regulations or rules, that choice on their part demonstrates a lack of *control* by WVSSAC. The fact that "'options [may be] unpalatable does not mean that they were nonexistent.'"[38] And it is the option to be a member or withdraw, the option to follow the rules or face sanctions that undercuts any actionable understanding of control in which to anchor Plaintiff's Equal Protection claim. Finally, the same analysis applies whether the nomenclature is controlling authority, pervasive entwinement, public entwinement – the analysis of *control* "is no less rigorous."[39]

While the Supreme Court's 'interpretation of state and local law is not binding on state courts,'[40] this Court is bound by a state court's interpretation of state law.[41] Therefore, it is of some great moment that the District

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36. Deposition of Dolan [Executive Director, WVSSAC] Fourth Circuit Joint Appendix Vol. 3, JA1378 (ECF 53-3).

37. *Smith*, 266 F.3d at 159, quoting *NCAA v. Tarkanian*, 488 U.S. 179, 195 (1988).

38. *Smith*, 266 F.3d at 156, quoting *Tarkanian*, 488 U.S. at 198 n.19.

39. *Smith*, 266 F.3d at 160.

40. *Fulton v. City of Phila.,* 592 U.S. 522 n.21 (2021), citing *West v. Am. Tel. & Tel.,* 311 U.S. 223, 236 (1940).

41. *Cougar Den, Inc.,* 586 U.S. 347 (2019).

Court and Fourth Circuit overruled and undercut the express determinations made by the Supreme Court of Appeals of West Virginia when they misstated and miscast West Virginia law to accomplish federal ends. Indeed, the Supreme Court of Appeals of West Virginia has considered WVSSAC on twelve separate occasions without a finding that SSAC is a state actor.

WVSSAC respectfully disagrees with the Fourth Circuit's reasoning that "West Virginia's own highest court has treated the Commission as a state actor for purposes of federal and state constitutional challenges," so it must also be a state actor here. (Pet. App. 14a). Contrary to the Fourth Circuit's suggestion, neither *Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 388 S.E.2d 480 (1989), nor *Jones v. West Virginia State Board of Educ. et al.*, 218 W. Va. 52, 622 S.E.2d 289 (2005), specifically addresses the issue of whether WVSSAC is a state actor for purposes of Equal Protection claims or otherwise. The *Jones* Court considered whether the plaintiff's claims sound in Equal Protection so as to mandate a finding of 'state action or actor' (a finding it never reaches as to WVSSAC). The *Israel* Court embeds in footnote 4 a list of organizations in other jurisdictions without ever undertaking any analysis whatsoever of their similarities to WVSSAC or vice versa under the 'state actor' rubric. Reliance on the footnote in *Israel* is problematic for the additional reason that in West Virginia, footnotes are precisely and only *obiter dicta*. If West Virginia's Supreme Court believed that WVSSAC were a state actor, the Court could and would have stated it outright but declined to do so.

Emblematic of the torchless search in the damp cave is the fact that WVSSAC is not slated to act relative to

B.P.J. It is not envisioned as having any role in activating or enforcing this law. Further, WVSSAC ascribes to the spirit of Title IX but is not required by law to follow its precepts. While it has been involved in litigation in state and federal courts, WVSSAC has never been adjudged a state actor until this litigation – and here, on the basis of minimal discovery and no evidence that it acted in any way, let alone as a 'state actor.' Indeed, WVSSAC expressly took no position on Plaintiff's motion for preliminary injunction,[42] on the basis that B.P.J.'s involvement in sports did not impact WVSSAC's policies in any way nor did WVSSAC have to adjust its policies or take any action or refrain from acting for B.P.J. to participate.

The entwinement test has been variously and illogically applied. However, in cases determining whether similar associations are state actors, the analysis is necessarily tied to action on the part of the association. In *Christian Heritage Acad. v. Oklahoma Secondary School Activities Association (OSSAA)*, 483 F.3d 1025 (10th Cir. 2007), the Tenth Circuit determined that Oklahoma SSAA was a state actor in connection with the challenged SSAA action, which was membership requirements that differed for public and parochial schools. In *Crane v. Indiana High School Athletic Ass'n,* 975 F.2d 1315 (7th Cir. 1992), both the majority and Judge Posner in dissent agreed that the Indiana HSAA was a state actor, where the challenged HSAA action was a transfer eligibility rule that prohibited the plaintiff's involvement in the state golf tournament.

Equal variability can be found in Title IX determinations over time. In *Parker v. Indiana High School Athletics*

42. District Court ECF 2, 47.

Association (IHSAA), 2009 U.S. Dist. LEXIS 113395 (S.D. In. 2009), a Title IX suit against Indiana HSAA was dismissed because the IHSAA is not a direct recipient of federal funds. On reconsideration in *Parker v. IHSAA*, 2010 U.S. Dist. LEXIS 23409 (S.D. In. 2010), the District Court affirmed that it does not accept the controlling authority theory for Title IX suits, interpreting *NCAA v. Smith*. In *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n*, 134 F. Supp. 2d 965 (N.D. Ill. 2001), the court distinguished the 'controlling authority' theory and held that an analogous high school athletic association is not a recipient under Title IX. Here conversely, WVSSAC is not a direct nor an indirect recipient of federal funds, has no 'controlling authority' (*NCAA v. Smith)* and yet is held to answer under Title IX.

It is imperative that this Court course correct now. The lower courts have misapplied and mischaracterized *NCAA, Brentwood* and *Peltier* in order to reach the determination that WVSSAC is a state actor. WVSSAC asks this Court to pause and re-establish the true path.

II. WVSSAC is aggrieved by the lower courts' decisions.

After finding that WVSSAC did not join the defense group in challenging the constitutional claims,[43] the Fourth Circuit rolled WVSSAC into that defense group. Because that defense group prevailed below, the Fourth Circuit found WVSSAC had not been aggrieved and, therefore, could not appeal.[44] Stated the Court, "we dismiss the Commission's cross appeal (No. 23-1130) because the Commission is not aggrieved by the district

43. Pet. App. 10a.

44. Pet. App. 10a.

court's judgment but seeks to defend a favorable judgment on alternative grounds."[45] However, the Fourth Circuit further stated that WVSSAC "may defend its favorable judgment 'on any basis supported by the record' – including arguments the district court rejected."[46]

WVSSAC is indeed injured by the District Court's determination and Fourth Circuit's affirmation that it is state actor. WVSSAC has been injured[47] by B.P.J.'s assertions and the courts' failure to parse the state actor rubric with more care. State actor determination changes industry's legal duties, providing it all of the particularized liabilities of being both state and private industry but none of the immunity inherent in state.[48] Industry comes under increased scrutiny in that a state actor can become subject to FOIA,[49] along with other regulatory regimes saved solely for 'state.'[50] Where private corporations

45. Pet. App. 10a.

46. Pet. App. 12a.

47. *Rainwater v. Bd. of Regents of the Univ. of Okla.,* No. CIV-19-382-R, 2020 U.S. Dist. LEXIS 12867, *7 (W.D. OK March 11, 2020).

48. *Richardson v. McKnight,* 521 U.S. 399, 404-05 (1997).

49. *See. e.g., Nabholz Constr. Corp. v. Contractors For Pub. Prot. Ass'n.*, 37 Ark. 411, 416 (2007), 266 S.W.3d 689, 692 (2017); *Better Gov't Ass'n v. Ill. High Sch. Assn.,* 89 N.E.3d 376 (Ill. 2017).

50. *See* West Virginia Civil Action No. 23-C-101, in which the Circuit Court of Wood County, West Virginia, has converted WVSSAC into 'state' (not 'state actor') in reliance on the District Court's and Fourth Circuit opinions, finding jurisdiction thereby under West Virginia's Human Rights Act (W. Va. Code §16B-17-1), pending now on extraordinary process before Supreme Court of Appeals of West Virginia (24-213).

maintain their finances and accounts largely without governmental intervention and oversight, a finding of state actor can convert private moneys into public moneys with commensurate oversight. Indeed, following the District Court's ruling in this matter, an effort was made in West Virginia to legislate state oversight of WVSSAC's finances, but was vetoed by the Governor.[51] Where private industry has acted as private industry, an after-the-fact determination of 'state actor' applies a different regulatory and legal standard, a destabilizing, undermining and unnatural process.[52]

WVSSAC has been injured by this litigation and by the decisions of the lower courts relative to the state actor issue. It is a private corporation whose arguments and identity have been bootstrapped to the litigation surrounding the Act without any adequate basis.

III. The District Court and Fourth Circuit are wrong.

In order to fall within the mandates of Title IX, WVSSAC would need to be a recipient of federal financial assistance. Pursuant to 20 U.S.C. § 1681, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[53]

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51. 2023 SB 667 [§18-2-25e. Requiring the Legislative Auditor conduct periodic performance audits of the West Virginia Secondary Schools Activities Commission] (vetoed).

52. *Labrador v. Poe,* 144 S. Ct. 921 (2024).

53. *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019):

> To state a claim under [Title IX], a plaintiff must show that the alleged constitutional deprivation at issue

However, the evidence shows that funding comes from corporate sponsorships, advertising revenue, and gate proceeds from championship meets and tournaments.[54]

Whereas WVSSAC might receive de minimis fines or fees from schools or coaches, those moneys have never been determined to be federal funds. Assuming *arguendo* that they could be found to be federal funds, they would be indirectly received, such that no contractual privity exists between WVSSAC and the federal source of those funds.[55]

B.P.J.'s Equal Protection Clause claims are equally dependent on WVSSAC's being a 'state actor.'[56] That is,

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occurred because of action taken by the defendant "under color of . . . state law." *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). "The traditional definition of acting under color of state law requires that the defendant in a [Title IX] action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941)).

54. Fourth Circuit Joint Appendix Vol. 8, JA4193 (ECF 53-8).

55. *Smith*, 266 F.3d at 162, declining to apply Title IX on the basis of indirect funding when the recipient did not assume control the program that directly received the funds and was not in the position to expressly reject/receive the funds dependent upon the obligations inherent in that receipt.

56. "[R]ights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause does not . . . add anything to the rights which one citizen has under the Constitution against another." *United Bhd. of*

> in a claim under the Fourteenth Amendment, the defendant "must either be a state actor or have a sufficiently close relationship with state actors such that a court would conclude that the non-state actor is engaged in the state's actions." *DeBauche v. Trani*, 191 F.3d 499, 506 (4th Cir. 1999). Put another way, "private activity will generally not be deemed 'state action' unless the state has so dominated such activity as to convert it to state action: 'Mere approval of or acquiescence in the initiatives of a private party' is insufficient." *Id.* at 507 (citation omitted).[57]

As demonstrated in the courts below and here, WVSSAC is not a recipient of public moneys so as to convert it into a 'state actor.' Beyond that, however, B.P.J. has alleged that the delegation of the State's authority to WVSSAC converts WVSSAC into a 'state actor' as relates to athletics and activities.[58] Specifically, Plaintiff asserts that "Defendants are all governmental actors acting under color of state law for purposes of 42 U.S.C. § 1983 and the Fourteenth Amendment."[59] Conversely, WVSSAC is differently situated as a matter of law.

Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 831 (1983) (internal quotation marks and citations omitted).

57. *Shipman v. Balt. Police Dept.,* ELH-13-0396, 2014 U.S. Dist. Lexis 59733 (D. Md. Apr. 29, 2014).

58. *See* First Am. Compl. (Fourth Circuit ECF 53-1) at JA0415-0416, JA0434, citing in pertinent part W. Va. Code §18-2-5; *Jones v. W. Va. State Bd. of Educ.*, 218 W. Va. 52, 61 (2005).

59. *See* First Am. Compl. (Fourth Circuit ECF 53-1) at JA0434.

Whereas the State and County Boards delegate authority to WVSSAC, the key distinction for determining that WVSSAC would be a 'state actor' is *whether WVSSAC truly assumes control of a federally funded program*.[60] Reviewing courts have found expressly that giving WVSSAC the power to enforce the eligibility rules adopted by the State Board and member schools directly against the students does not constitute "ced[ing] authority."[61] Here, the schools have a voluntary relationship with WVSSAC and have retained the authority to withdraw from the association – also found to be a key determinant and a factor mitigating against any finding of control.[62] Schools can indeed withdraw from WVSSAC, and private schools have done so.[63] As for the eligibility enforcements, should member schools or athletes risk sanctions by violating the regulations or rules, that choice on their part demonstrates a lack of *control* by WVSSAC. The fact that "'options [may be] unpalatable does not mean that they were nonexistent.'"[64] Finally, the same analysis applies whether the nomenclature is controlling authority, pervasive entwinement, public entwinement – the analysis of *control* "is no less rigorous."[65] Where the Fourth Circuit distinguishes NCAA from WVSSAC, it does not attempt

60. *Smith v. NCEAA*, 266 F.3d at 157.

61. *Id.*

62. *Id*. at 159.

63. Deposition of Dolan [Executive Director, WVSSAC] Fourth Circuit Joint Appendix Vol. 3, JA1408 (ECF 53-3).

64. *Smith*, 266 F.3d at 156, quoting *Tarkanian*, 488 U.S. at 198 n.19 (emphasis added).

65. *Smith*, 266 F.3d at 160.

to parse the logic of control set out clearly in *Smith*.[66] Indeed, where control is the *sine qua non* of state, the Fourth Circuit sidestepped any meaningful analysis of what it means to *control* and judged WVSSAC to be no different than any other activities commission.

In other instances, once again, federal courts have considered Title IX and Fourteenth Amendment challenges brought as against what might appear to be parallel athletic associations. *See, e.g., Communities for Equity v. Michigan High School Athletic Association,* 80 F. Supp. 2d 729 (W. D. Mich. 2000) (alleging that MHSAA discriminated against female athletes based on inequities in programs including non-traditional and/or shorter seasons and different rules); *Alston v. Virginia High School League, Inc.*, 144 F. Supp.2d 526 (W. D. Va. 1999) (alleging that VHSL denied certain female public school athletes equal treatment, opportunities and benefits based on their sex in violation of Title IX[67]). Beyond those instances, the United States Court of Appeals for the Sixth Circuit considered *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association,* 647 F.2d 651 (6th Cir. 1981) (challenging coeducational teams in contact sports as a violation of Title IX), and *Brentwood Academy v. Tennessee Secondary School Athletic Association,* 180 F.3d 758 (6th Cir. 1999), *rev'd*, 531 U.S. 208 (2001).

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66. Pet. App. 15a.

67. *But see Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association,* 647 F.2d 651, 658 (6th Cir. 1981), finding that any resolution by necessity involves the Fourteenth Amendment as well.

Among the factors these courts – including this Court – considered in determining the propriety of holding the associations accountable under federal law were sources of funding and whether the associations adopted the provisions that were alleged to be violations of federal law. That is, more particularly, the courts considered whether the associations are federally funded or receive support or dues from federally funded programs and/or whether the associations further the objectives of federally funded programs. In terms of Equal Protection, this Court in *Brentwood* considered whether the Tennessee association was a 'state actor' given the depth with which its operations were intertwined with a single state's (Tennessee's) activities (as compared to the interstate impact of the NCAA[68]). The District Courts in both *Alston* and *Communities* addressed Equal Protection, considering whether the athletic (as opposed to activities) associations were 'state actors,' whether they served a public function, and/or whether they had a symbiotic relationship with the State and the regulated activity.[69]

In determining whether the associations were subject to Title IX, then, the courts considered whether the source of funding was public, including flow-through funding from school dues, and/or whether the associations controlled programs or practices in the member school and/or whether the associations held functions at school facilities and/or

68. *Tarkanian,* 488 U.S. 179, finding *inter alia* that NCAA "was not a state actor because it was acting under the color of its own policies rather than under the color of state law and because university did not delegate power to petitioner to take specific action against university or respondent."

69. *See Alston v. Virginia High School League, Inc.,* 144 F. Supp.2d 526, 537 (W. D. Va. 1999).

whether the associations were involved in some manner with every school within the state (as opposed to organizations or programs across more than one state). In overview, Michigan High School Athletic Association (Michigan), Ohio High School Athletic Association (Ohio), Tennessee Secondary School Athletic Association (Tennessee) and WVSSAC are private non-profit or not-for-profit corporations, yet Ohio, Tennessee and Michigan receive some funding through member schools. Virginia High School League (Virginia) is a public, for-profit corporation that has only public schools as members and is funded by member dues.[70]

Unlike Michigan, Tennessee, Ohio and Virginia,[71] however, WVSSAC receives no dues whatsoever from member schools and has not for at least twenty years.[72] Also, conversely to the Virginia High School League, WVSSAC includes parochial schools among its number, including a significant number of them at the middle school level, which schools receive no federal funds and yet who participate in WVSSAC programs.[73]

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70. *Id.* at 527.

71. *Yellow Springs,* 647 F.2d at 658 (finding that OHSAA issues regulations that reach deep into school administration, including regulating the member of school administration to handle sports finances; *Alston,* 144 F Supp. 2d at 527 (accepting dues from federally funded School); *Communities,* 80 F. Supp. 2d at 732 (noting that *the bulk* of the money is from gate receipts but that MSHAA regulates within its member School by requiring that the member School adopt the "Handbook as their own and agree to be primarily responsible for their enforcement").

72. Deposition of Dolan [Executive Director, WVSSAC] Fourth Circuit Joint Appendix Vol. 3, JA1378 (ECF 53-3).

73. www.wvssac.org/school-directory

In considering the Fourteenth Amendment, this Court found in *Brentwood* that the Tennessee Association was inextricably bound and intertwined with its member schools so as to be a 'state actor.' As analyzed above, however, that entwinement requires a level of control and federal involvement not present with WVSSAC. WVSSAC does not receive federal funds and does not mandate membership (nor include in its membership every public or parochial school in the state). Plaintiff concedes (indeed, asserts) that WVSSAC's policies and regulations make no gender determinations.[74] WVSSAC does not build or challenge rosters, and, perhaps most pointedly, WVSSAC does not have an express or implied role under the Act. Indeed, where the Act provides express remedies against some actors, WVSSAC is not referenced in the Act nor is a remedy suggested as against it.

In *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association,* 647 F.2d 651 (6th Cir. 1981), the Appeals Court considered the applicability and enforcement of Title IX relative to co-educational sports, that is, whether boys and girls may play basketball on the same team. In considering whether Title IX applied to OHSAA, the Court found that

> the focus of both Title IX and the regulations is on "recipients." It is federal aid to "recipients" that will be cut off if Title IX is not complied with. "Recipients" bear ultimate responsibility

74. Declaration of Heather Jackson (Fourth Circuit ECF 53-1) JA0061; *see also* First Am. Compl. (Fourth Circuit ECF 53-1) at JA0429.

> for providing an equal educational opportunity. The OHSAA is not a "recipient," and does not bear the burden of non-compliance, so may not adopt a rule which limits the ability of recipients to furnish girls the same athletic opportunities it provides for boys. The OHSAA has not claimed that it attempted to frame rules with an eye to achieving the goal of universally applicable equal athletic opportunity. Thus, based on this record, we conclude that the determination as to compliance with Title IX must be made by individual School, not the OHSAA.[75]

Likewise here, pursuant to the direct language of the statute, WVSSAC will not promulgate the regulations envisioned under the statute. The Act provides for the State Board to promulgate rules to implement the section,[76] yet in West Virginia, State Board rules are neither promulgated nor enforced by WVSSAC but rather are embedded in WVSSAC's rule books, where only the State Board can revise, amend, provide waivers.[77] Eligibility enforcement as a matter of law is insufficient to convert WVSSAC into a state actor.[78]

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75. *Yellow Springs,* 647 F.2d at 656.

76. Pet. App. 115a.

77. Deposition of Dolan [Executive Director, WVSSAC] Fourth Circuit Joint Appendix Vol. 3, JA1400 (ECF 53-3), testifying that the State Board's 2.0 rule is embedded in WVSSAC's regulation book but remains the State Board's rule. *See also* Deposition of Blatt [State Board of Education] Fourth Circuit Joint Appendix Vol. 3, JA1531-1532 (ECF 53-3).

78. *Smith*, 266 F.3d at 159, quoting *Cureton v. NCAA,* 198 F.3d 107, 116-18 (3d Cir. 1999).

WVSSAC opens its membership to public and parochial schools, functions outside any concept of 'state,' and operates in conjunction with regional boards, drawing officials from both West Virginia and Ohio, relying on two local boards of officials that are intrastate: Mid-Ohio Valley Local Board and the West Virginia Ohio Local Board. The Supreme Court of Appeals of West Virginia has expressly found that WVSSAC is not a state agency on the basis that it has been a voluntary association since 1916 (and was not created nor empowered by the Legislature); it is not funded by public moneys; and not all public or private schools in West Virginia have elected to belong.[79] The relevant WVSSAC regulations are uniform across the board in providing one set of regulations for boys and girls.[80]

The Fourth Circuit failed to understand how the pre-enforcement review defense operated here, arguing ripeness from B.P.J.'s perspective rather than any duty imposed upon WVSSAC under the Act.[81] WVSSAC has never asserted or opined relative to the ripeness of B.P.J.'s claims generally – but rather only the ripeness of those claims *as against WVSSAC*. The Commission is not referenced in the Act, and no regulations exist that would tie SSAC to the process of application or enforcement. To date, WVSSAC has no role in nor relation to the Act. Unlike the other parties, if WVSSAC were mandated to

79. Syl. pt. 2, 3, *Mayo v. WVSSAC,* 233 W. Va. 88, 96, 672 S.E.2d 224, 232 (2008).

80. Pet. App. 121a-123a; Of note, B.P.J. does not challenge sex-separated teams. *See* Mem. (District Court ECF 19) at p. 16.

81. Pet. App. 15a-16a.

act, to perform some duty relative to the Act, nothing is identified for it.

> To determine whether a case is ripe for pre-enforcement review, courts "balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration." *Miller [v. Brown],* 462 F.3d [312], 319 (4th Cir. 2006*)* (citation omitted); *see Nat'l Park Hosp. Ass'n v. Dep't of the Interior,* 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (setting forth fitness and hardship as the two predominant factors in determining ripeness). With respect to fitness, a claim is unfit for adjudication where the possibility of injury is remote and the issues presented abstract. *Texas v. United States,* 523 U.S. 296, 301, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) ("A claim is not ripe . . . if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Thomas v. Union Carbide Agric. Products Co.,* 473 U.S. 568, 580-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985))); *Miller,* 462 F.3d at 319 (to be ripe, an action in controversy must not be "dependent on future uncertainties.").[82]

Plainly stated: The Act itself occasions no changes in WVSSAC policies nor imposes any new duties on WVSSAC. In fact, as Plaintiff's Amended Complaint indicates, the legislature considered including WVSSAC

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82. *Air Evac. EMS, Inc. v. Cheatham,* 260 F. Supp. 3d 628, 636-37 (S.D. W. Va. 2017).

in the Act but ultimately chose not to do so. [83] This statutory silence is reflected as well in the evidence adduced in discovery, where the State Board's rule will be embedded in WVSSAC's regulations,[84] where the schools will create the rosters,[85] where eligibility fails to rise to the level of 'state action.'[86] WVSSAC has no actionable role, and the statute does not envision a cause of action against WVSSAC for any statutory violation (no doubt because enjoining or not enjoining WVSSAC does not affect outcome under this statute).[87] Any 'ripeness' as to WVSSAC is dependent on a future act – that is, a determination that WVSSAC will have a role under the Act. To date, it has none.

B.P.J. avers that WVSSAC's involvement is gender and transgender neutral.[88] B.P.J. does not assert that

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83. *See* First Am. Compl. (Fourth Circuit ECF 53-1) at JA0424-0429.

84. Deposition of Mazza [Harrison County Board of Education] Fourth Circuit Joint Appendix Vol. 3, JA1333 (ECF 53-3); Deposition of Dolan [Executive Director, WVSSAC] Fourth Circuit Joint Appendix Vol. 3, JA1385, JA1399, JA1494-1495 (ECF 53-3); Deposition of Blatt [State Board of Education] Joint Appendix Vol. 3, JA1531-1533 (ECF 53-3).

85. Deposition of Mazza [Harrison County Board of Education] Fourth Circuit Joint Appendix Vol. 3, JA1332-1334 (ECF 53-3).

86. *Smith*, 266 F.3d at 156, quoting *Tarkanian*, 488 U.S. at 198 n.19.

87. Pet. App. 115a.

88. Jackson Declaration ¶25 (Fourth Circuit ECF 53-1) JA0061; *See Communities,* 459 F.3d at 695, finding that "[d]isparate

WVSSAC's regulations or programs violate any rights in any way. Indeed, B.P.J. overlooks that the WVSSAC regulations under which B.P.J. is now participating have been neutral and inclusive at all times and required no engineering or adjustment to allow for B.P.J.'s participation, whether with or without an injunction in place. B.P.J. has asserted that, prior to the Act, West Virginia had "separate sports teams for boys and girls and did not categorically bar girls like B.P.J. from competing in school sports on girls' teams."[89] In particular, as relates to cross-country and track, all WVSSAC regulations are uniform across the board in providing one set of regulations for boys and girls.[90] Further, Heather Jackson admits that "verification of 'reproductive biology and genetics' is not part of the routine sports physical exam required by Defendant WVSSAC."[91] WVSSAC's physical examination form, the sole registration form WVSSAC requires from athletes for participation, does not have the athletes identify themselves by gender.[92] WVSSAC does

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treatment does not arise from any and all differences in treatment; it occurs only where the offending party '*treats some people less favorably* than others because of their race, color, religion, sex, or national origin'" (emphasis in original).

89. *See* Mem. (District Court ECF 19) at p. 7, citing §127-2-3.8 (Eligibility), which states in pertinent part "School may sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill."

90. Of note, B.P.J. does not challenge sex-separated teams. *See* Mem. (District Court ECF 19) at p. 16. *See also* Pet. App. 121a-123a.

91. *See* Mem. (District Court ECF 19) at n.6.

92. Jackson Declaration ¶25 (Fourth Circuit ECF 53-1) JA0061.

not have regulations that categorically ban transgender athletes nor does WVSSAC's enrollment paperwork (physical exam) ask athletes to select or identify themselves by gender. WVSSAC has not determined the appropriate team for B.P.J. but only 'received'[93] the rosters for cross-country or track with B.P.J.'s name in place. That is, WVSSAC will not drive outcome, will not determine the solution, will not enforce the Act, and is not identified or called upon in the Act to do anything whatsoever. The rush to include entities situated such as WVSSAC into the rolls of 'state actor' demonstrates a flaw and misdirection in the application of law to industry. The time to course correct is now.

Including WVSSAC creates a substantial hardship for it and yet does not advance B.P.J.'s case at all. The District Court and the Fourth Circuit have focused upon the Title IX and Equal Protection issues – certainly key determinations. "The United States Constitution has created a schism between governmentally controlled domains and privately controlled sector,"[94] and WVSSAC has found itself lost therein.

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93. Deposition of Mazza [Harrison County Board of Education] Fourth Circuit Joint Appendix Vol. 3, JA1335, JA1339 (ECF 53-3).

94. Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine,* 73 Mo. L. Rev. 561, 561 (2008).

CONCLUSION

Certiorari should be granted. State actor determinations arise regularly with courts applying ad hoc 'know them when I see them' reasoning rather than the tenets set out by this Court. The rulings below raise significant questions worthy of review.[95] For WVSSAC and for private industry generally, the time to clarify and course correct is now and the opportunity is here. This Court should grant certiorari and reverse.

Respectfully submitted,

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95. *Sandoval v. Texas*, 144 S. Ct. 1166 (2024) (Dissent).

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1078, No. 23-1130

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

Plaintiffs—Appellants,

v.

WEST VIRGINIA STATE BOARD OF EDUCATION; HARRISON COUNTY BOARD OF EDUCATION; WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION; W. CLAYTON BURCH, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT; DORA STUTLER, IN HER OFFICIAL CAPACITY AS HARRISON COUNTY SUPERINTENDENT,

Defendants—Appellees,

and

THE STATE OF WEST VIRGINIA; LAINEY ARMISTEAD,

Intervenors—Appellees.

Appendix A

TREVOR PROJECT; TRANSGENDER WOMEN ATHLETES; UNITED STATES OF AMERICA; NATIONAL WOMEN'S LAW CENTER AND 51 ADDITIONAL ORGANIZATIONS; STATE OF NEW YORK; AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL ASSOCIATION; FOUR ADDITIONAL HEALTH CARE ORGANIZATIONS; ATHLETE ALLY; CURRENT AND FORMER PROFESSIONAL, OLYMPIC AND INTERNATIONAL ATHLETES IN WOMENS SPORTS; NATIONAL WOMEN'S SOCCER LEAGUE PLAYERS ASSOCIATION; WOMEN'S SPORTS FOUNDATION; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGTON,

Amici Supporting Appellants,

and

THOMAS MORE SOCIETY; NATIONAL ASSOCIATION OF EVANGELICALS; CONCERNED WOMEN FOR AMERICA; INSTITUTE FOR FAITH AND FAMILY; SAMARITAN'S PURSE; WOMEN'S DECLARATION INTERNATIONAL USA; 25 ATHLETIC OFFICIALS AND COACHES

Appendix A

OF FEMALE ATHLETES; FEMALE OLYMPIC ROWERS MARY I. O'CONNOR, CAROL BROWN, PATRICIA SPRATLEN ETEM, VALERIE MCCLAIN, AND JAN PALCHIKOFF; 22 BUSINESS EXECUTIVES; INTERNATIONAL CONSORTIUM ON FEMALE SPORT; INDEPENDENT COUNCIL ON WOMEN'S SPORT; DEFENSE OF FREEDOM INSTITUTE; 78 FEMALE ATHLETES, COACHES, SPORTS OFFICIALS, AND PARENTS OF FEMALE ATHLETES; PUBLIC ADVOCATE OF THE UNITED STATES; AMERICA'S FUTURE; U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND; ONE NATION UNDER GOD FOUNDATION; FITZGERALD GRIFFIN FOUNDATION; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; INDEPENDENT WOMEN'S LAW CENTER; PARENTS DEFENDING EDUCATION; ALABAMA, ARKANSAS, AND 15 OTHER STATES,

Amici Supporting Appellees.

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

Plaintiffs—Appellees,

v.

WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION,

Defendant—Appellant,

Appendix A

and

WEST VIRGINIA STATE BOARD OF EDUCATION; HARRISON COUNTY BOARD OF EDUCATION; W. CLAYTON BURCH, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT; DORA STUTLER, IN HER OFFICIAL CAPACITY AS HARRISON COUNTY SUPERINTENDENT, DEFENDANTS, AND THE STATE OF WEST VIRGINIA; LAINEY ARMISTEAD,

Intervenors.

THOMAS MORE SOCIETY; NATIONAL ASSOCIATION OF EVANGELICALS; CONCERNED WOMEN FOR AMERICA; INSTITUTE FOR FAITH AND FAMILY; SAMARITAN'S PURSE; WOMEN'S DECLARATION INTERNATIONAL USA; 25 ATHLETIC OFFICIALS AND COACHES OF FEMALE ATHLETES; FEMALE OLYMPIC ROWERS MARY I. O'CONNOR, CAROL BROWN, PATRICIA SPRATLEN ETEM, VALERIE MCCLAIN, AND JAN PALCHIKOFF; 22 BUSINESS EXECUTIVES; INTERNATIONAL CONSORTIUM ON FEMALE SPORT; INDEPENDENT COUNCIL ON WOMEN'S SPORT; DEFENSE OF FREEDOM INSTITUTE; 78 FEMALE ATHLETES, COACHES, SPORTS OFFICIALS, AND PARENTS OF FEMALE ATHLETES; PUBLIC ADVOCATE OF THE UNITED STATES; AMERICA'S FUTURE; U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND; ONE NATION UNDER GOD FOUNDATION; FITZGERALD GRIFFIN FOUNDATION;

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CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; INDEPENDENT WOMEN'S LAW CENTER; PARENTS DEFENDING EDUCATION; ALABAMA, ARKANSAS, AND 15 OTHER STATES,

Amici Supporting Appellants,

and

TREVOR PROJECT; TRANSGENDER WOMEN ATHLETES; UNITED STATES OF AMERICA; NATIONAL WOMEN'S LAW CENTER AND 51 ADDITIONAL ORGANIZATIONS; STATE OF NEW YORK; AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL ASSOCIATION; FOUR ADDITIONAL HEALTH CARE ORGANIZATIONS; ATHLETE ALLY; CURRENT AND FORMER PROFESSIONAL, OLYMPIC AND INTERNATIONAL ATHLETES IN WOMENS SPORTS; NATIONAL WOMEN'S SOCCER LEAGUE PLAYERS ASSOCIATION; WOMEN'S SPORTS FOUNDATION; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGTON,

Amici Supporting Appellees.

Appendix A

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. (2:21-cv-00316). Joseph R. Goodwin, District Judge.

October 27, 2023, Argued; April 16, 2024, Decided

Before AGEE, HARRIS, and HEYTENS, Circuit Judges.

No. 23-1130 dismissed. No. 23-1078 vacated in part, reversed in part, and remanded with instructions by published opinion. Judge Heytens wrote the opinion, which Judge Harris joined and Judge Agee joined as to Parts II and III. Judge Agee wrote an opinion concurring in part and dissenting in part.

TOBY HEYTENS, Circuit Judge:

A West Virginia law originally introduced as the "Save Women's Sports Act" provides that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex," while defining "male" as "an individual whose biological sex determined at birth is male." W. Va. Code § 18-2-25d(b)(3) & (c)(2). Because West Virginia law and practice have long provided for sex-differentiated sports teams, the Act's sole purpose—and its sole effect—is to prevent transgender girls from playing on girls teams. The question before us is whether the Act may lawfully be applied to prevent a 13-year-old transgender girl who takes puberty blocking medication and has publicly identified as a girl since the third grade from participating in her school's cross country and track teams. We hold it cannot.

Appendix A

I.

A.

To state the obvious, the Act did not originate the concept of sex-based sports teams. Indeed, regulations in West Virginia have stated for at least 30 years that "[s]chools may sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill." W. Va. Code. R. § 127-2-3(3.8).

Nor does the Act represent West Virginia's first effort to address athletic participation by students whose gender identity differs from their sex assigned at birth. Before the Act, such questions were governed by a 2016 policy adopted by the West Virginia Secondary Schools Activities Commission (Commission). Under that policy, transgender students of any sex could join teams matching their gender identity if—but only if—their school determined that "fair competition" would not be impacted by the student's participation. JA 4214. Any other member school could appeal such determinations to the Commission's board of directors, which would decide whether the student's participation "would adversely affect competitive equity or safety of teammates or opposing players." *Id.* In making its judgment, the board was directed to consider the student's "age," "athletic experience," "strength, size, [and] speed," "the nature of the sport," and "the degree to which fair competition among high school teams would be impacted." *Id.*

The Act worked a sea change in how West Virginia decides which teams a student can participate on. Its first operative provision requires all public high school and college sports teams be "expressly designated" as "[m]ales, men, or boys"; "[f]emales, women, or girls"; or "[c]oed or mixed" and that the designations be "based on biological sex." W. Va. Code. § 18-2-25d(c)(1). The Act next instructs that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." § 18-2-25d(c)(2). The Act's final substantive provision says it shall not be "construed to restrict the eligibility of any student to participate in any . . . teams or sports designated as 'males,' 'men,' or 'boys' or designated as 'coed' or 'mixed.'" § 18-2-25d(c)(3). The Act defines "male" as "an individual whose biological sex determined at birth is male," "female" as "an individual whose biological sex determined at birth is female," and "biological sex" as "an individual's physical form as male or female based solely on the individual's reproductive biology and genetics at birth." § 18-2-25d(b)(1)-(3).

B.

B.P.J. is currently in eighth grade. At birth, B.P.J.'s sex was assigned as male, but she has publicly identified as a girl since third grade. A month after the Act took effect, B.P.J. sued the West Virginia State Board of Education, its then-superintendent, the Harrison County Board of Education, its superintendent, and the Commission, arguing enforcement of the Act against her violated the

Equal Protection Clause and Title IX. The State of West Virginia intervened as a defendant, and B.P.J. filed an amended complaint.

During the initial stages of this litigation, the district court granted a preliminary injunction, concluding B.P.J. had shown "a likelihood of success in demonstrating that this statute [wa]s unconstitutional as it applie[d] to her and that it violate[d] Title IX." JA 440. The court emphasized that B.P.J. only sought "relief . . . insofar as this law applie[d] to her" (JA 442), and its grant of relief was also so limited. Although they could have done so, see 28 U.S.C. § 1292(a)(1), the defendants did not appeal that ruling. Since then, B.P.J. has participated in her school's cross country and track teams for girls, first under the district court's preliminary injunction and later under an injunction pending appeal from this Court.

A year and a half later, the district court reversed course. Ruling on the parties' cross-motions for summary judgment, the court rejected both of B.P.J.'s claims. On B.P.J.'s equal protection claim, the court held that West Virginia's "definition of 'girl' as being based on 'biological sex' [wa]s substantially related to the important government interest of providing equal athletic opportunities for females." JA 4274-75. On B.P.J.'s Title IX claim, the court pointed to regulations "authoriz[ing] sex separate sports in the same manner as [the Act], so long as overall athletic opportunities for each sex are equal." JA 4276. Because B.P.J. was still "permitted to try out for boys' teams," the district court concluded her Title IX challenge failed as well. JA 4277.

II.

We begin our review of the parties' claims with two procedural matters. First, we conclude we have appellate jurisdiction because the district court entered a final judgment against B.P.J. on all her claims against all defendants. Second, we dismiss the Commission's cross appeal (No. 23-1130) because the Commission is not aggrieved by the district court's judgment but seeks to defend a favorable judgment on alternative grounds.

A.

"We have an independent obligation to ensure that we possess appellate jurisdiction." *Conway v. Smith Dev., Inc.*, 64 F.4th 540, 544 (4th Cir. 2023). The only source of jurisdiction any party identifies here is 28 U.S.C. § 1291, which lets us hear appeals from "final decisions." "Ordinarily, a district court order is not 'final' until it has resolved all claims as to all parties." *Fox v. Baltimore City Police Dep't*, 201 F.3d 526, 530 (4th Cir. 2000).

Now comes the wrinkle. As noted above, B.P.J. brought multiple claims against multiple defendants. Before the district court, one of those defendants—the Commission—chose not to "argue the merits" and instead "only" sought summary judgment on the ground "that it is not a state actor and is therefore not subject to scrutiny under either the Equal Protection Clause or Title IX." JA 4261. The district court rejected that argument, and thus denied the Commission's motion for summary judgment, while also denying B.P.J.'s summary judgment motion and granting

those filed by the remaining defendants. At first glance, based solely on the district court's summary judgment opinion, it looks like we do not have an appealable final decision because the court never disposed of B.P.J.'s claims against the Commission.

But we "look to substance, not form" when deciding whether we have an appealable final decision. *Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015). As directed by Federal Rule of Civil Procedure 58(a), the district court issued "a separate document" setting out its judgment. And in that document, the district court ordered "that judgment be entered in accordance with [the] accompanying Memorandum Opinion and Order, *and that this case be dismissed and stricken from the docket*." JA 4279 (emphasis added). To be sure, B.P.J. could have sought reconsideration of that judgment on the ground that the district court's summary judgment opinion did not actually resolve her claims against the Commission. But that does not matter for purposes of our jurisdiction. Because the district court's written judgment—unlike the opinion it implemented—"resolved all claims as to all parties" and terminated the district court phase of this litigation, *Fox*, 201 F.3d at 530, we have appellate jurisdiction.

B.

Having concluded we have appellate jurisdiction because the district court dismissed all B.P.J.'s claims against all defendants, we dismiss the Commission's cross appeal (No. 23-1130) "as unnecessary and not

properly taken." *Harriman v. Associated Indus. Ins.*, 91 F.4th 724, 726 (4th Cir. 2024). The Commission's notice of appeal says it challenges "the 'state actor' and other related determinations related to its summary judgment motion as set forth in" the district court's summary judgment opinion. JA 4291. "But appellate courts review judgments, not statements in opinions, and the judgment we review here rejected [B.P.J.'s] entire suit on the merits." *Harriman*, 91 F.4th at 728 (quotation marks and citation removed). To be sure, the Commission may defend its favorable judgment "on any basis supported by the record"—including arguments the district court rejected. *Id.* Because the Commission is not aggrieved by the district court's judgment, however, the Commission has no basis to appeal it.

III.

We turn next to various defendants' arguments they should not have been named in the suit. We conclude those arguments lack merit.

The Harrison County Board of Education (County Board)—a defendant only on B.P.J.'s Title IX claim—protests that it has no policy of excluding transgender girls from girls sports teams and that it would merely be complying with state law if it excluded B.P.J. from such teams. But the County Board does not deny the only pertinent facts: that it is a recipient of federal funds and that it would, absent a judicial order to the contrary, prevent B.P.J. from participating in girls teams—the very thing B.P.J. claims violates Title IX. See *Grimm v.*

Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) (listing elements of Title IX claims). Federal law trumps state law, not vice versa, see U.S. Const. art. VI, cl. 2, and those who violate federal law cannot defend on the ground they were simply following state law.

The County Board's only response is to cite an out-of-circuit decision addressing a different issue—municipal liability under 42 U.S.C. § 1983. See Appellees' Br. 53 n.* (citing *Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998)). But the reason a lack of a municipal policy matters in that context is not because compliance with state law is a defense to violating federal law. Rather, it is because—under Section 1983—there can be no municipal liability without establishing an "official policy" or custom of that municipality. *Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The County Board cites no authority for the view that Title IX imposes a similar requirement.

Next, Harrison County superintendent Dora Stutler asserts she would "at most . . . be subject to an injunction" but cannot be found liable for "any monetary award" or attorneys' fees. Appellees' Br. 54 n.*. That assertion has no consequence at this stage, where no remedy has been imposed and we are reviewing a district court ruling that all B.P.J.'s claims fail on the merits.

Finally, the Commission renews its argument that it cannot be held liable for violating either the Equal

Protection Clause or Title IX. Like the district court, we are unpersuaded.

To begin, we reject the Commission's argument that it is not a state actor and thus cannot violate the Equal Protection Clause. West Virginia's own highest court has treated the Commission as a state actor for purposes of federal and state constitutional challenges. See *Israel v. West Va. Secondary Schs. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480, 484 n.4 (W. Va. 1989) (federal and state constitutional challenges); *Jones v. West Va. State Bd. of Educ.*, 218 W. Va. 52, 622 S.E.2d 289, 291 (W. Va. 2005) (state constitutional challenge). We see no basis for a different conclusion. Despite being a nominally private organization, the Commission is "pervasive[ly] entwine[d]" enough with public institutions to be subject to suit. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). The principals of every public secondary school in West Virginia sit on the Commission's governing board. See W. Va. Code § 18-2-25(b). The Commission comprehensively supervises and controls interscholastic athletics among its member schools, including by determining eligibility criteria for all interscholastic athletics. And it does so under a West Virginia statute authorizing schools to delegate "control, supervision, and regulation of interscholastic athletic events" to the Commission and designating dues paid to the Commission by county boards of education as "quasi-public funds." W. Va. Code § 18-2-25(b). It is thus unsurprising that "[e]very court that has considered the question [of] whether associations like the [Commission]

are state actors" for the purpose of claims like these has answered that question yes. *Israel*, 388 S.E.2d at 484 n.4.

The Commission's argument that it cannot be sued under Title IX fails for similar reasons. Title IX's prohibitions are not limited to organizations that directly receive federal funds: the statute also covers organizations that "control[] and manage[]" direct funding recipients. *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (emphasis removed); see *Williams v. Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007) (noting any other rule would allow direct funding recipients to "avoid Title IX liability" by "ced[ing] control over their programs to indirect funding recipients"). And for essentially the same reasons we conclude the Commission is a state actor, we also conclude it exercises sufficient control over direct funding recipients to make it a Title IX defendant. The Commission's contrary arguments—which are based on decisions holding the NCAA is not subject to Title IX—are unconvincing. See Appellees' Br. 58-60 (citing *Smith v. NCAA*, 266 F.3d 152, 156-57 (3d Cir. 2001)). Most importantly, even those decisions note several key differences between the NCAA and state athletic associations, including that the NCAA spans every state and that states had "delegated no power to the NCAA to take specific action against any . . . employee." *Smith*, 266 F.3d at 159-60. Unlike the Commission, the NCAA has no statutory authority to control the athletic programs of its member schools.

We also reject the Commission's assertion that B.P.J.'s claims against it are not ripe for adjudication because "the

possibility of injury is remote and the issues presented abstract." Appellees' Br. 60. There is no question B.P.J. wishes to participate in her school's cross country and track teams for girls. And there is no question that—absent a judicial order directing otherwise—the Commission would update its enforcement policy to conform to the Act's requirements, thus preventing B.P.J. from doing the very thing she seeks to do. Nothing more is required to show ripeness.

IV.

We turn to the merits. The district court granted summary judgment to the defendants on both B.P.J.'s equal protection and Title IX claims. We review that decision de novo. See *Griffin v. Bryant*, 56 F.4th 328, 335 (4th Cir. 2022). B.P.J. asks us to go further and hold the district court erred in denying her motion for summary judgment. We review that decision de novo as well. See *W.C. & A.N. Miller Dev. Co. v. Continental Cas. Co.*, 814 F.3d 171, 176 (4th Cir. 2016). Like the district court, we "examine[] each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *Desmond v. PNGI Charles Town Gaming L.L.C.*, 630 F.3d 351, 354 (4th Cir. 2011).

We conclude the district court erred in granting summary judgment to the defendants on both of B.P.J.'s claims. We also conclude that, while it would be inappropriate to direct a grant of summary judgment to B.P.J. on her equal protection claims, the district court erred in not granting summary judgment to B.P.J. on her

Title IX claims. We thus vacate in part, reverse in part, and remand with instructions to grant summary judgment on B.P.J.'s Title IX claim and for further proceedings consistent with this opinion.

A.

We begin where the parties do: with B.P.J's equal protection claim. In so doing, we do not slight the maxim that courts should not "pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring). Because B.P.J has named different defendants for her equal protection and Title IX claims, there is no way to fully resolve this appeal without reaching the constitutional question.

1.

The essence of an equal protection claim is that at least one person has been treated differently from another without sufficient justification. See, *e.g.*, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). For that reason, our first step is to identify the differential treatment that results from the Act.

The Act's substantive provisions make three relevant classifications. #1: All sports teams must be "expressly designated" as male, female, or co-ed. W. Va. Code § 18-2-25d(c)(1). #2: A person's male-ness or female-ness must be

determined "based solely on the individual's reproductive biology and genetics at birth." § 18-2-25d(b)(1). #3: "[S]tudents of the male sex" are prohibited from joining female teams but female students are not barred from participating in any team. Compare § 18-2-25d(c)(2), with § 18-2-25d(c)(3).

The defendants insist that the only relevant classification here is the first one and that this fact is fatal to B.P.J.'s equal protection claim. The defendants acknowledge that creating separate teams for boys and girls is a sex-based distinction, which triggers intermediate scrutiny under the Equal Protection Clause. See, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (*VMI*). But, as the defendants note, B.P.J. has disavowed any "challenge [to] sex separation in sports," insisting that she "simply wants to play on the girls' team like other girls." B.P.J. Br. 26-27. And this, the defendants say, makes all the difference, because it shows "B.P.J. objects to where the state legislature drew the line" between which students can play on which team, "not the fact that the line exists." Appellees' Br. 27.

But even when lines may—or must—be drawn, the Constitution limits how and where they may fall. And here, the way the State has chosen to implement its decision to establish separate athletic teams for boys and girls triggers another round of intermediate scrutiny review for two independent reasons.

The first reason is the Act's differing treatment of cisgender girls and transgender girls. If B.P.J. were a cisgender girl, she could play on her school's girls teams. Because she is a transgender girl, she may not. The Act declares a person's sex is defined only by their "reproductive biology and genetics at birth." § 18-2-25d(b)(1). The undisputed purpose—and the only effect—of that definition is to exclude transgender girls from the definition of "female" and thus to exclude them from participation on girls sports teams. That is a facial classification based on gender identity. And, under this Court's binding precedent, such classifications trigger intermediate scrutiny. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610-13 (4th Cir. 2020).

The defendants dispute this reading of *Grimm*, claiming that case holds only that a difference in treatment based on gender identity triggers heightened scrutiny "when no genuine governmental interest support[s] it." Appellees' Br. 51. In a similar vein, the dissenting opinion argues intermediate scrutiny does not apply because B.P.J. cannot show she is similarly situated to cisgender girls. That is not how equal protection review works. To the contrary, decades of Supreme Court precedent make clear that whether a particular classification is supported by a good enough reason goes to whether that classification satisfies the relevant level of constitutional scrutiny—not which level of scrutiny applies in the first place. See, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-27, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (race-based classifications); *VMI*, 518 U.S. at 531 (sex-based classifications). *VMI* provides

a particularly telling example: Because the challenged policy facially discriminated based on sex, the Court applied intermediate scrutiny without first asking whether the policy was supported by a good enough reason or whether men and women are similarly situated when it comes to attending a physically rigorous military-style academy. See 518 U.S. at 531.

The defendants also insist the Act does not discriminate based on gender identity because it treats all "biological males"—that is, cisgender boys and transgender girls—the same. Appellees' Br 21. But that is just another way of saying the Act treats transgender girls differently from cisgender girls, which is—literally—the definition of gender identity discrimination.

That brings us to the second reason the defendants' argument that no additional scrutiny is warranted since the Act is a concededly "constitutional sex-based classification" (Appellees' Br. 25) fails: The Act contains a second layer of sex-based classification beyond its required separation of teams into those for "boys" and those for "girls." As its final substantive provision reveals, the Act does not mandate that boys teams are open to boys only and girls teams are open to girls only. Instead, by providing it does not "restrict the eligibility of any student"—male or female—"to participate in any . . . teams or sports designated as 'males,' 'men,' or 'boys,'" W. Va. Code § 18-2-25d(c)(3), the Act creates a rule that people whose sex was assigned at birth as female may play on any team but people whose sex was assigned at birth as male may only play on male or co-ed teams. Put another way, the

Act would not have forbidden Gavin Grimm (a transgender boy) from playing on the boys teams at B.P.J.'s school but it does forbid B.P.J. (a transgender girl) from playing on the girls teams.[1] To agree the Act is a "constitutional sex-based classification," we would have to conclude this additional level of sex discrimination is also justified.

To sum up: The Act triggers intermediate scrutiny for three reasons. Because its first classification—its requirement that all teams be designated male, female, or co-ed—is conceded to be valid and is necessary to the relief B.P.J. seeks (being allowed to participate in girls cross country and track teams) we need go no further in determining whether the State can justify it. But the Act does not stop there. Instead, it mandates two further classifications—one based on gender identity and the other based on sex—that each forbid B.P.J. from doing the thing she wants to do. For that reason, we must subject those classifications to intermediate scrutiny as well.

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1. To be sure, a regulation long predating the Act says people whose sex was assigned at birth as female only have *a right* to play on a team designated male if their school "sponsors no" female team in the relevant sport. W. Va. Code. R. § 127-2-3(3.8). But—unlike the Act—that regulation does not *forbid* schools from permitting students whose sex was assigned as female at birth (including transgender boys) from playing on any male team. And, in any event, the challenge we consider here is against the Act, not the regulation, so it is the Act's classifications that must satisfy constitutional scrutiny.

2.

Having determined the appropriate level of constitutional scrutiny, we must next resolve a dispute about the dimensions of our analytical frame. B.P.J. does not ask us to hold the Act may not constitutionally be applied to anyone in any circumstances. Instead, she "challenges [the Act] only as applied to her" and seeks an injunction that would prevent the defendants from enforcing it against her. B.P.J. Br. 33

In the defendants' view, B.P.J.'s efforts to limit the scope of her challenge make no difference to our analysis. Instead, they say that if applying the Act to the population at large is substantially related to an important state interest, the Act is constitutional—even if its application to B.P.J. would not advance the asserted governmental interests at all. In essence, the defendants claim there really is no such thing as an as-applied equal protection challenge because a plaintiff like B.P.J. can only win by making the same showing needed to demonstrate the Act is facially invalid. And to the extent that an as-applied equal protection challenge even exists, the defendants argue that its as-appliedness goes only to the remedy B.P.J. may obtain rather than the showing she must make to secure relief.

The problem with that argument: The Supreme Court has repeatedly held a statute can violate the Equal Protection Clause as applied to some without being facially invalid. In *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct.

1760, 60 L. Ed. 2d 297 (1979), and *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), for example, the Court considered equal protection challenges to statutes giving unwed fathers fewer rights than unwed mothers to prevent the adoption of their child. In both decisions, the Supreme Court concluded those sorts of laws would be valid in situations where "the father had not come forward to participate in the rearing of [the] child" but that they "*may not constitutionally be applied* in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child." *Lehr*, 463 U.S. at 267 (citing *Caban*, 441 U.S. at 380, 392) (quotation marks removed and emphasis added).

The Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), is similar. That case involved an equal protection challenge to a zoning ordinance requiring a special use permit for group homes for people with intellectual disabilities. See *id.* at 435. Although the plaintiff brought both facial and as-applied claims, the Court specifically declined "to decide whether the special use permit provision [was] facially invalid." *Id.* at 436. Instead, it held that "the ordinance [was] invalid *as applied in this case*" because "the record [did] not reveal any rational basis for believing that" *the specific group home the plaintiff proposed to operate* "would pose any special threat to the city's legitimate interests." *Id.* at 448 (emphasis added); accord *id.* at 456, 474 (Marshall, J., concurring in the judgment in part and dissenting in part) (noting that the Court had invalidated the ordinance "only as applied to respondents, rather than on its face" based

on the conclusion "that the ordinance might be 'rational' as applied to some subgroup" of people with intellectual disabilities). Indeed, the *Cleburne* Court described such an as-applied challenge as "the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *Id.* at 447.

The defendants respond by quoting the Supreme Court's statement in *Bucklew v. Precythe*, 139 S. Ct. 1112, 203 L. Ed. 2d 521 (2019), that "classifying a lawsuit as facial or as-applied . . . does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Id.* at 1127. True enough. But the same sentence the defendants quote refutes their argument that the fact a plaintiff is bringing an as-applied challenge goes only to the "relief " a court may grant. Appellees' Br. 33, 35, 36. Rather, as *Bucklew* states—consistent with *Caban, Lehr*, and *Cleburne*—B.P.J.'s decision to bring only an as-applied challenge *also* "affects the extent to which the invalidity of the challenged law must be demonstrated." *Bucklew*, 139 S. Ct. at 1127; accord *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 782 (4th Cir. 2023) (whether a challenge is facial or as applied affects "how much we consider plaintiffs' particular identity and circumstances").

The defendants also make a more conceptual argument. As they see it, letting B.P.J. bring an as-applied challenge would improperly "convert[] intermediate scrutiny into strict" by allowing any party to whom application of a law would not advance the State's interests to obtain a judicially ordered exception. Appellees' Br. 36.

That argument fails to convince, too. Most importantly, it cannot be squared with *Cleburne*, where the Supreme Court entertained—and sustained—an as-applied equal protection challenge despite holding that an even lower substantive standard (rational-basis review) applied to the type of classification at issue. 473 U.S. at 447-48.

The defendants' argument falls short for other reasons as well. For one, it ignores the different consequences that follow when a plaintiff prevails in a facial challenge versus an as-applied one. When a court holds a statute is facially unconstitutional, the result is that the statute cannot be applied to anyone—even if it could hypothetically be "implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). In contrast, winning an as-applied challenge does not impact the state's ability to apply its law to other parties if doing so would advance the relevant interests. See *Cleburne*, 473 U.S. at 447. Indeed, the injunction B.P.J seeks is the same one she received at the preliminary injunction stage: one limited to her.

Finally, even when a plaintiff brings an as-applied challenge, a defendant may prevail by showing that its refusal to make an exception for the plaintiff 's individual circumstances itself satisfies the relevant level of constitutional scrutiny. In *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), for example, the Supreme Court rejected an as-applied challenge to a provision of the tax code requiring employers to

pay social security taxes. See *id.* at 254. *Lee* did not examine the strength of the government's interest in applying that requirement to the specific plaintiff before it. Instead, the Court explained "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." *Id.* at 259-60; accord *Faver v. Clarke*, 24 F.4th 954 (4th Cir. 2022) (prison's requirement that all items stocked in commissary be sourced from a single supplier was narrowly tailored to its compelling interest in preventing contraband, regardless of prisoner's individual circumstances).

3.

We now turn to the ultimate merits question for B.P.J.'s equal protection challenge: Is the decision to exclude B.P.J. from the teams she seeks to join substantially related to an important government interest? The district court concluded B.P.J. failed to create a genuine dispute of material fact on this point, and thus granted summary judgment to the defendants. We disagree and vacate that aspect of the district court's judgment.

During this litigation, the defendants have identified two general justifications for excluding transgender girls from girls sports teams: participant safety and competitive fairness. See Oral Arg. 20:13-21:05 (disclaiming reliance on any other potential interests, including privacy or bodily autonomy). B.P.J. does not dispute that participant safety and competitive fairness are important government

interests; instead, she argues that excluding her from the girls cross country and track teams is not substantially related to either goal. For their part, the defendants do not seriously assert that excluding B.P.J. (or any other transgender girl) from cross country and track—both non-contact sports—is substantially related to the government's important interest in participant safety. See Oral Arg. 20:50-21:19 (acknowledging that their defense against B.P.J.'s as-applied equal protection challenge "doesn't focus on safety"). So, as the defendants acknowledge, the central question for B.P.J's as-applied equal protection challenge is whether excluding her from the girls cross country and track teams is substantially related to the concededly important government interest in competitive fairness. See Oral Arg. 21:19-21:23.

At minimum, the district court erred in concluding the defendants were entitled to summary judgment on this point. For purposes of assessing the defendants' summary judgment motion, we must assume a factfinder would credit all B.P.J.'s evidence and resolve all disputed factual issues in her favor. See, *e.g.*, *Knibbs v. Momphard*, 30 F.4th 200, 215 (4th Cir. 2022). This matters because B.P.J. presented evidence that transgender girls with her background and characteristics possess *no* inherent, biologically-based competitive advantages over cisgender girls when participating in sports.

We note at the outset an argument the defendants have avoided making directly and specifically disclaimed at oral argument that nonetheless forms the basis for

much of the dissenting opinion. The argument is one via definition. It starts by positing that girls' sports are exclusively for the benefit of cisgender girls (and, it seems, transgender boys). So, it follows, regardless of whether any given transgender girl has any inherent competitive advantage over cisgender girls in athletic performance, the government may exclude *all* transgender girls from *all* girls teams because it is the only way to ensure no cisgender girl ever has to compete against (and thus risk finishing behind) a transgender girl.

That argument is deeply flawed. For one thing, limiting the beneficiaries of the State's largesse "begs the question" of whether the challenged classification is justified in the first place. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 n.17, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). A State's decision to create a classification that benefits only one class at the expense of others must itself be "substantially related to achieving a legitimate and substantial goal." *Id.* Without more, the defendants may not simply posit that all cisgender girls are entitled to be protected from competition from all transgender girls, even when the result is harm to transgender girls.

To see why this argument cannot be right, imagine a sixth-grade cisgender girl who competes on her middle school's track team. Based on her consistent times throughout the season, she is projected to finish in 15th place at the season-end countywide track meet. But then, the week before the county meet, a new family moves into the county, bringing a girl of the same age who also runs

track. As a result, the first girl is now projected to finish in 16th place. Would a State be able to justify otherwise unconstitutional discrimination based on an asserted interest in protecting the first girl's anticipated 15th place finish?

Of course not. As the defendants conceded at oral argument, the government has no interest in protecting one girl's ranking in any competition or "in ensuring that cisgender girls do not lose ever to transgender girls." Oral Arg. 23:35-24:05. True, West Virginia has an interest in preventing "athletic opportunities for women" from being "diminished" by substantial displacement. *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982). But for that interest to carry any weight, the defendants must show the alternative is actually and meaningfully unfair—*i.e.*, that there is "a substantial relationship *between* the exclusion of " all transgender girls from all girls teams and "providing equal opportunities for women." *Id.* (emphasis added). We thus turn to that question.

Before the district court, both sides cited authorities agreeing that the driver of the most significant sex-based differences in athletic performance is differing levels of circulating testosterone. Larger amounts of circulating testosterone produce an increased ability to build muscle mass. And increased muscle mass, in turn, leads to greater strength and speed—two attributes relevant to most competitive sports.

Appendix A

Before puberty, circulating testosterone levels do not vary significantly depending on whether a person has two X chromosomes, one X and one Y chromosome, or some other genetic makeup. Once puberty begins, however, sex-based differences begin to emerge. Those differences—along with others that begin at the same time—lead to different physical processes during puberty. These differences manifest at what medical professionals call the "Tanner 2" stage.

The undisputed evidence shows B.P.J. has never gone through the Tanner 2 stage. As part of her treatment for gender dysphoria, B.P.J. began receiving puberty blocking treatment at the beginning of that stage. The medication prevented B.P.J. from progressing through the Tanner 2 stage, and as a result, B.P.J. has never experienced elevated levels of circulating testosterone. In addition, B.P.J. is receiving gender affirming hormone therapy, which, based on her expert testimony, will cause her to experience physical changes to her bones, muscles, and fat distribution that are typically experienced by cisgender girls. Because B.P.J. has never felt the effects of increased levels of circulating testosterone, the fact that those who do benefit from increased strength and speed provides no justification—much less a substantial one—for excluding B.P.J. from the girls cross country and track teams.

That leaves one final question for purposes of B.P.J.'s as-applied equal protection challenge: Even without undergoing Tanner 2 stage puberty, do people whose sex

is assigned as male at birth enjoy a meaningful competitive athletic advantage over cisgender girls?

We conclude there is a genuine dispute of material fact about this question, and that the district court therefore erred in granting summary judgment against B.P.J. on her equal protection claim. B.P.J. provided an expert report stating that—other than the puberty-based changes she will never experience—"[a] person's genetic makeup and internal and external reproductive anatomy are not useful indicators of athletic performance." JA 2104. The report also states that, "[w]ith respect to average athletic performance, girls and women who are transgender and who do not go through . . . puberty are somewhat similarly situated to women with XY chromosomes who have complete androgen insensitivity syndrome"—a group "long . . . recognized" to "have no athletic advantage simply by virtue of having XY chromosomes." *Id.* To be sure, the defendants moved to exclude that testimony. But the district court never ruled on that motion, so it could not ignore that conclusion for purposes of ruling on the defendants' summary judgment motion. See, *e.g.*, *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th ir. 2010) (en banc) (district court must resolve "evidentiary objections that are material to its ruling" on motion for summary judgment). And although the defendants offered their own contrary evidence as well, Rule 56 required the district court to resolve that factual dispute in B.P.J.'s favor when deciding whether to grant summary judgment against her. See *Knibbs*, 30 F.4th at 215. For that reason, the

district court erred in granting summary judgment to the defendants on B.P.J.'s equal protection claim.[2]

The same factual dispute explains why we decline to direct the district court to enter summary judgment in B.P.J.'s favor. The defendants submitted an expert report contradicting the assertions by B.P.J.'s experts and saying that, even apart from increased circulating testosterone levels associated with puberty, there are "significant physiological differences, and significant male athletic performance advantages in certain areas." JA 2514. Here too, B.P.J. moved to exclude that expert's testimony, and offered evidence to rebut it. But the district court never ruled on the motion to exclude. That means we could not grant B.P.J.'s requested relief without doing one of two things: (1) ruling on a *Daubert* motion the district court never ruled on (which could allow us to disregard the defendants' expert); or (2) accepting the defendants' expert's conclusions as true but concluding B.P.J. is still entitled to summary judgment.

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2. The circumstances before the Act was passed further undermine the defendants' assertion that the State's chosen means are substantially related to its interest in ensuring competitive fairness. The Commission—to which every West Virginia public school delegates responsibility for regulating eligibility for athletics—already had a policy addressing participation by transgender students. Unlike the Act's categorical rule, that policy was narrowly focused on the interests the State claims the Act advances—competitive fairness and safety. See pp. 8-9, *supra* (describing former policy). As the district court noted, "[t]he record makes abundantly clear . . . that West Virginia had no 'problem' with transgender students . . . creating unfair competition or unsafe conditions" before the Act passed because "at the time it passed the law, West Virginia had no known instance of any transgender person playing school sports." JA 4264. For that reason, the district court aptly described the Act as "at best a solution to a potential, but not yet realized 'problem.'" *Id.*

We conclude neither step is warranted. For the first, questions about the admissibility of evidence are uniquely within the province of trial courts, and we review such decisions only for abuse of discretion. See, *e.g.*, *Nease v. Ford Motor Co.*, 848 F.3d 219, 228 (4th Cir. 2017). For that reason, appellate courts rarely—if ever—resolve a disputed evidentiary issue in the first instance. See, *e.g.*, *Fox v. Maulding*, 16 F.3d 1079, 1082 (10th Cir. 1994) (declining to decide "in the first instance" an issue that would be reviewed only for abuse of discretion on appeal because to do so would "enter the realm of de novo review").

As for the second possibility: Once the defendants' expert is considered, the same principles that lead us to conclude the district court erred in granting the defendants' summary judgment motion make us reluctant to order the district court to grant B.P.J.'s. For purposes of considering B.P.J.'s summary judgment motion, we must assume a factfinder would credit the defendants' evidence over B.P.J.'s. And although portions of B.P.J.'s briefs in this Court assert that even a significant advantage in athletic performance would not justify excluding her from the girls cross country and track teams, B.P.J. does not develop that argument and focuses instead on arguing that no such advantage exists or is minimal—the very thing the experts disagree about.

For that reason, we conclude the district court erred in granting summary judgment to the defendants on B.P.J.'s equal protection claim but decline to direct the entry of summary judgment in B.P.J.'s favor. Instead, we vacate that portion of the district court's judgment and remand

for further proceedings, including consideration of the still-pending *Daubert* motions.

B.

We turn next to B.P.J.'s Title IX challenge. Although much of what we have already said bears on our analysis here, the details are different, and we arrive at a somewhat different conclusion. Here too, we conclude the district court erred in granting summary judgment to the defendants. But we also conclude B.P.J. has shown applying the Act to her would violate Title IX, and the district court thus erred in denying her motion for summary judgment. For that reason, we reverse this portion of the district court's order and remand with instructions to enter summary judgment for B.P.J. and conduct remedial proceedings on her Title IX claim.

Title IX says "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The defendants do not dispute that middle school sports are an "education program or activity." Three defendants named in B.P.J.'s Title IX claim (the State of West Virginia, the State Board of Education, and the County Board) also do not deny they receive federal financial assistance, and we have already concluded the fourth (the Commission) may be sued under Title IX because it controls entities that receive such assistance. See Part III, *supra*. The only remaining question is whether B.P.J. has "on the basis of sex, be[en]

excluded from participation in," "denied the benefits of," or "subjected to discrimination" in connection with middle school sports. 20 U.S.C. § 1681(a).

We conclude the answer is yes. Although Title IX and equal protection claims are similar, they are "not . . . wholly congruent." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257, 129 S. Ct. 788, 172 L. Ed. 2d 582 (2009). For one thing, not every act of sex-based classification is enough to show legally relevant "discrimination" for purposes of Title IX. Instead, under Title IX, "discrimination 'mean[s] treating [an] individual *worse than* others who are similarly situated.'" *Grimm*, 927 F.3d at 618 (first alteration in original) (emphasis added) (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740, 207 L. Ed. 2d 218 (2020)). In addition, even having experienced worse treatment than a similarly situated comparator is not enough to prevail on a Title IX claim. Rather, a plaintiff must establish that the "improper discrimination caused [her] harm." *Id.* at 616. On the other hand, once a Title IX plaintiff shows she has been discriminated against in the relevant sense and suffered harm, no showing of a substantial relationship to an important government interest can save an institution's discriminatory policy. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 309, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023) (Gorsuch, J., concurring) (noting that Title VI, whose language Title IX mirrors, "does not direct courts to subject these classifications to one degree of scrutiny or another").

Because B.P.J. can show both worse treatment based on sex and resulting harm, she has established each of the disputed requirements for a Title IX claim. First, the Act operates "on the basis of sex" for two reasons that should be familiar by now. For one, this Court has already held that discrimination based on gender identity is discrimination "on the basis of sex" under Title IX, see *Grimm*, 972 F.3d at 616, and this Act discriminates based on gender identity, see Part IV(A)(1), *supra*. The Act also discriminates based on sex assigned at birth by forbidding transgender girls—but not transgender boys—from participating in teams consistent with their gender identity. See *id.* The Act thus goes beyond even what this Court concluded was impermissible in *Grimm*: Under this Act, a transgender boy like Gavin Grimm may play on boys teams but a transgender girl like B.P.J. may not play on girls teams.

Second, the Act requires treating students differently even when they are similarly situated. The Act forbids one—and only one—category of students from participating in sports teams "corresponding with [their] gender": transgender girls. *Grimm*, 972 F.3d at 618. And it does so on a categorical basis, regardless of whether any given girl possesses any inherent athletic advantages based on being transgender. See *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130 (4th Cir. 2022) (en banc) (emphasizing that "Title IX protects the rights of individuals, not groups" (quotation marks removed)).

Third, B.P.J. has established that she is harmed by the Act's application to her—both in terms of what the

Act forbids her from doing and what it would require if she wants to gain the opportunity to participate in school sports. For starters, "emotional and dignitary harm . . . is legally cognizable under Title IX" and it requires no feat of imagination to appreciate "[t]he stigma of being" unable to participate on a team with one's friends and peers. *Grimm*, 972 F.3d at 617-18.

But the Act goes further by requiring B.P.J. to take on additional harms to avoid forfeiting the ability to play school sports altogether. B.P.J. has been publicly living as a girl for more than five years. During that time, her elementary and middle schools created gender support plans to affirm her gender identity and ensure she is recognized as a girl at school. To align with her gender identity, B.P.J. has changed her name, and the State of West Virginia (whose Act is challenged here) has issued a birth certificate that recognizes her changed name and lists her sex as female. B.P.J. also takes puberty blocking medication to prevent her body from experiencing male adolescent development and estrogen hormone therapy, which is leading her to develop the outward physical characteristics—including fat distribution, pelvic shape, and bone size—of an adolescent female. Her family, teachers, and classmates have all known B.P.J. as a girl for several years, and—beginning in elementary school—she has participated only on girls athletic teams.

Given these facts, offering B.P.J. a "choice" between not participating in sports and participating only on boys teams is no real choice at all. The defendants cannot expect that B.P.J. will countermand her social transition, her

medical treatment, and all the work she has done with her schools, teachers, and coaches for nearly half her life by introducing herself to teammates, coaches, and even opponents as a boy. The defendants do not dispute that doing so would directly contradict the treatment protocols for gender dysphoria. It also would expose B.P.J. to the same risk of unfair competition—and, in some sports, physical danger—from which the defendants claim to be shielding cisgender girls. By participating on boys teams, B.P.J. would be sharing the field with boys who are larger, stronger, and faster than her because of the elevated levels of circulating testosterone she lacks. The Act thus exposes B.P.J. to the very harms Title IX is meant to prevent by effectively "exclud[ing]" her from "participation in" all non-coed sports entirely. 20 U.S.C. § 1681(a).

Rather than trying to show B.P.J. is not harmed by the Act, the defendants offer several arguments that emphasize the historical expectations surrounding Title IX's application and the regulations that have implemented it. But legislators' "expected applications" of a statute "can never defeat unambiguous statutory text." *Bostock*, 140 S. Ct. at 1750. And "because a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well." *Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 440 (4th Cir. 2003) (quotation marks removed).

True, regulations introduced soon after Title IX's enactment say recipients of federal funds "may operate . . . separate teams for members of each sex." 34 C.F.R.

§ 106.41(b). But, once again, B.P.J. does not challenge the legality of having separate teams for boys and girls. Instead, she challenges the Act's requirement that she may compete only on boys or coed teams—even though doing so treats her differently than people to whom she is similar situated, would contradict her gender identity, and would cause her significant harm. The regulations the defendants cite do not purport to address this situation, and they are being reevaluated with an eye toward doing so. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023) (to be codified at 34 C.F.R. § 106.41). For that reason, the defendants' emphasis on the regulations as expressly authorizing the Act's chosen discrimination is misguided.

Finally, the district court erred in rejecting B.P.J.'s Title IX claim on the theory that, under the Act, "overall athletic opportunities for each sex are equal." JA 4276. As our en banc Court has explained, "Title IX protects the rights of individuals, not groups, and does not ask whether the challenged policy treats [one sex] generally less favorably than [the other]." *Peltier*, 37 F.4th at 130 (quotation marks removed). For the same reason, whether other transgender girls undergo different "medical intervention[s]" that prevent them from being "similarly situated" to cisgender girls for purposes of participating in sports, JA 4277, is irrelevant to B.P.J.'s individual case. B.P.J. has shown that applying the Act to her would treat her worse than people to whom she is similarly situated,

deprive her of any meaningful athletic opportunities, and do so on the basis of sex. That is all Title IX requires.[3]

* * *

We do not hold that government officials are forbidden from creating separate sports teams for boys and girls or that they lack power to police the line drawn between those teams. We also do not hold that Title IX requires schools to allow every transgender girl to play on girls teams, regardless of whether they have gone through puberty and experienced elevated levels of circulating testosterone. We hold only that the district court erred in granting these defendants' motions for summary judgment in this particular case and in failing to grant summary judgment to B.P.J. on her specific Title IX claim.

The cross-appeal (No. 23-1130) is dismissed. In No. 23-1078, the district court's judgment is vacated in part and reversed in part. The case is remanded with instructions to enter summary judgment for B.P.J. on her Title IX claims and for further proceedings (including remedial proceedings) consistent with this opinion.

SO ORDERED

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3. We decline to consider any argument that we should artificially narrow our interpretation of Title IX because it is Spending Clause legislation. Although such arguments have been made and rejected in other cases, see, *e.g.*, *Grimm*, 972 F.3d at 619 n.18, the defendants have never made such an argument in this case.

AGEE, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that we have jurisdiction over this appeal, that the Commission had no basis to appeal from the district court's decision, and that all of the defendants (collectively, "West Virginia") were properly named in this action. I cannot join the rest of the majority's opinion, however, because West Virginia may separate its sports teams by biological sex without running afoul of either the Equal Protection Clause or Title IX. In coming to the opposite conclusion, the majority inappropriately expands the scope of the Equal Protection Clause and upends the essence of Title IX. Therefore, I dissent from all but Parts II and III of the majority opinion.

I.

In 2021, West Virginia enacted § 18-2-25d (the "Act") to promote equal opportunities for women in sports. Noting the "inherent differences between biological males and biological females," the Act provides that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education . . . shall be expressly designated as [either male, female, or coed] based on biological sex" and that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." W. Va. Code § 18-2-25d. "Female" is defined under the Act as "an individual

whose biological sex determined at birth is female" and "male" is defined as "an individual whose biological sex determined at birth is male." *Id.*

Consistent with the Act, B.P.J.—a biological boy who identifies as a girl—was excluded from the middle school girls' track-and-field and cross-country teams. Disagreeing with that result, B.P.J. brought this action, alleging that the Act violates the Equal Protection Clause and Title IX as applied to B.P.J. and transgender girls like B.P.J. who have not gone through endogenous puberty. Although the district court agreed with B.P.J. at the preliminary injunction stage, with the benefit of a developed record, the district court determined in its summary judgment decision that the Act violates neither the Equal Protection Clause nor Title IX. *See B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220 (S.D.W. Va. 2023).

Regarding the equal protection claim, the court acknowledged that "[t]here is no debate that intermediate scrutiny applies to the law at issue here" because it "plainly separates student athletes based on sex." *Id.* at 229. But it explained that preventing "biological males[] from playing on girls' teams is not unconstitutional if the classification is substantially related to an important government interest." *Id.* at 230. And it concluded that, here, the government's interest in "providing equal athletic opportunities for females" satisfied that standard. *Id.* at 231.

As for the Title IX claim, the district court reasoned that B.P.J. was not similarly situated to biological girls because "biological males are not similarly situated to biological females for purposes of athletics." *Id.* at 233. The court also noted that "Title IX authorizes sex separate sports in the same manner as [the Act], so long as overall athletic opportunities for each sex are equal." *Id.*

B.P.J. appealed. Pending that appeal, a majority of this panel granted B.P.J. an injunction, allowing B.P.J. to participate on the middle school's girls' track-and-field team for the spring season.

As West Virginia explained in its motion to stay the injunction, throughout the spring season, B.P.J. dominated track meets. Rather than finishing near the back of the pack—as B.P.J. contended would be the case in the motion for the injunction—B.P.J. consistently placed in the top fifteen participants at track-and-field events and often placed in the top ten. In so doing, over one hundred biological girls participating in these events were displaced by and denied athletic opportunities because of B.P.J. Additionally, B.P.J. earned a spot at the conference championship in both shot put and discus. Because participation in a conference championship event requires that the athlete place in the top three competitors at their school, judged by their best performance that season, two biological girls were denied participation in the conference championships because of B.P.J.

II.

The majority holds that the Act may violate the Equal Protection Clause and conclusively violates Title IX. I disagree.[1]

A.

Assessing the equal protection claim, the majority concludes that the Act discriminates against B.P.J., but remands B.P.J.'s claim because it believes a factual dispute prevents determining whether the Act survives heightened scrutiny. Its analysis is flawed for at least three reasons: the majority (1) without explanation, erroneously concludes that B.P.J.—a biological boy—is similarly

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1. I note at the outset that there are few cases involving transgender discrimination and the cases that exist are limited to their specific contexts. For example, in *Bostock v. Clayton Cnty.*, the Supreme Court considered whether an employer's termination of employees on the basis of their transgender or homosexual status violated Title VII. 590 U.S. 644, 653, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020). In determining that it did, the Court explicitly limited its decision to Title VII and the employment context. *See id.* at 681 ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind.").

Similarly, in *Grimm v. Gloucester Cnty. Sch. Bd.*, this Court considered whether a restroom policy that limited the use of male and female restrooms to the corresponding biological sexes violated the Equal Protection Clause and Title IX. 972 F.3d 586, 593 (4th Cir. 2020). Its analysis necessarily applied only to restroom policies. *See id.*

Neither decision, therefore, answers the question before the Court today.

situated to biological girls; (2) incorrectly determines that the Act discriminates against transgender athletes on its face; and (3) inaccurately decides that the Act may not be substantially related to West Virginia's important government interest in ensuring equal opportunities for females as applied to B.P.J.

First, the majority fails to grapple with the similarly situated element of B.P.J.'s equal protection claim and, in so doing, erroneously implies that biology is irrelevant to sports. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). To prove an equal protection violation, the plaintiff must identify persons materially identical to him or her who has received different treatment. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992) (stating that the Equal Protection Clause prevents "governmental decisionmakers from treating differently persons who are *in all relevant respects alike*." (emphasis added)).

But B.P.J. cannot make such a showing because it is beyond dispute that biological sex is relevant to sports and therefore that the person who is "in all relevant respects alike" to a transgender girl is a biological boy. It is undisputed that after puberty biological males have physiological advantages over biological females that significantly impact athletic performance. *See* Opening Br. 14 ("[M]edical consensus is that the largest known biological cause of average differences in athletic performance between cisgender men as a group and cisgender women

as a group is their levels of circulating testosterone, which start to diverge between boys and girls beginning with puberty."); *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) ("[I]t is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports."). Indeed, "[i]n tangible performance terms, studies have shown that these [biological] 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." *Adams*, 57 F.4th at 820 (Lagoa, J., specially concurring) (citation omitted).

Although B.P.J. has not gone through puberty, the majority recognizes that there is evidence that biological boys have a competitive advantage over biological girls *even before puberty. See ante* at 30 ("The defendants submitted an expert report contradicting the assertions by B.P.J.'s experts and saying that, even apart from increased circulating testosterone levels associated with puberty, there are 'significant physiological differences, and significant male athletic performance advantages in certain areas.'" (citation omitted)). And the evidence cited earlier as to B.P.J.'s actual displacement of multiple biological girls despite being on puberty blockers shows that this evidence of a biological advantage is particularly apt in this case.

It seems axiomatic that because biology provides a competitive advantage in sports, biology is a significantly

relevant characteristic for the similarly situated analysis. Yet, for reasons unknown, the majority concludes that B.P.J.—a biological boy—is nonetheless similarly situated to biological girls. By so holding—despite evidence that B.P.J. may have a distinct biological advantage over biological girls—the majority necessarily must have determined that transgender girls are similarly situated to biological girls *regardless of the competitive advantage* they may have. It must be, then, that the majority considers gender identity the only relevant factor when determining the individuals with whom B.P.J. is similarly situated. That is plainly incorrect.

It is not enough—and is actually irrelevant when it comes to competitive sports—that B.P.J. identifies as a girl. Gender identity, simply put, has nothing to do with sports. It does not change a person's biology or physical characteristics. It does not affect how fast someone can run or how far they can throw a ball. Biology does. The majority was therefore wrong to conclusively determine that B.P.J. is similarly situated to biological girls based on B.P.J.'s gender identity alone. *See Nguyen v. INS*, 533 U.S. 53, 73, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001) ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it.").[2]

2. The majority, tellingly, failed to provide *any* similarly situated analysis. It instead perplexingly states that the Court need not determine whether B.P.J. is similarly situated to biological girls prior to determining the appropriate level of scrutiny. *See ante* at 19. The majority misunderstands the equal protection inquiry.

It is not that the Court cannot determine the appropriate level of scrutiny before determining that B.P.J. is similarly situated to biological girls; it is that the Court cannot determine that any discrimination has occurred until it determines with whom B.P.J. is similarly situated. To find that West Virginia discriminated against B.P.J., the Court must conclude that B.P.J. was treated differently than the similarly situated group. *See Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) ("To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated[.]"). If B.P.J. is not similarly situated to biological girls, then it is of no consequence that B.P.J. is treated differently than them. *See Nordlinger*, 505 U.S. at 10 ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."). Consequently, only after the Court concludes that an individual was treated differently does the Court determine the applicable level of scrutiny. The similarly situated analysis thus necessarily precedes any level of review.

It's true that in *United States v. Virginia*, which the majority uses to support its flawed similarly situated contention, the Supreme Court did not explicitly discuss whether women were similarly situated to men when determining whether Virginia could lawfully exclude women from admission to the Virginia Military Institute. 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Nonetheless, it is clear throughout the opinion that the Supreme Court had implicitly come to that conclusion. *See, e.g.*, *id.* at 530 (stating that the question before the Court was whether "Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women *capable of all of the individual activities required of the VMI cadets* the equal protection of the laws guaranteed by the Fourteenth Amendment?" (emphasis added) (cleaned up)); *id.* at 540-41 (noting that the expert testimony established that some women "are capable of all of the individual activities required of

Second, the majority erroneously determines that the Act *facially* treats transgender athletes differently than their peers. To demonstrate that a statute makes a classification on its face, the plaintiff must show that it "explicitly distinguish[es] between individuals on [protected] grounds." *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993); *see*, *e.g.*, *Reed v. Reed*, 404 U.S. 71, 73, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971) (involving a facial classification where the statute stated that "males must be preferred to females" (cleaned up)).

The Act does not facially discriminate based on transgender status. It simply places athletes on sports teams based on their biological sex. *See* W. Va. Code § 18-2-25d(c)(1) (stating that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports . . . shall be expressly designated as" male, female, or coed, "based on biological sex").[3] Although the Act explicitly treats

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VMI cadets" (citation omitted)). Therefore, *Virginia* simply does not support the majority's similarly situated analysis—or, more accurately, its lack thereof.

3. The majority makes much of the fact that the Act allows biological girls to play on any team but does not allow the same for biological boys. But this differential treatment of biological boys is justified by West Virginia's exceedingly persuasive government interest in promoting fair competition and safety and ensuring opportunities for girls. Given that biological girls have no physiological advantage over biological boys, their inclusion in boys' sports does not hinder biological boys' competition. The converse is not true.

biological boys and biological girls differently, it does not expressly treat transgender individuals differently.[4]

Indeed, the Act's only reference to transgender status is a statement that the West Virginia Legislature found that "gender identity is separate and distinct from biological sex." *Id.* § 18-2-25d(a)(4). But that factually accurate statement does not serve to treat transgender individuals differently.[5] Applying the Act, schools place all athletes on the team corresponding with their biological sex. Transgender athletes fair no differently than any other athlete. On its face, therefore, the Act does not discriminate against transgender athletes. *See Adams*, 57 F.4th at 809 ("[W]hile the . . . policy at issue classifies students on the basis of biological sex, it does not facially discriminate on the basis of transgender status.").

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4. Given that the Act facially distinguishes between the sexes, it is subject to heightened scrutiny for that reason. But no one disputes that West Virginia has sufficiently important government interests in separating its sports teams by sex. In fact, as the majority acknowledged, B.P.J. "disavowed any challenge to sex separation in sports" and merely challenges the Act's definition of "sex." *Ante* at 18 (cleaned up).

5. The Act is different from the restroom policy in *Grimm*—which the Court found involved a facial classification—because that policy expressly stated that "students with gender identity issues [would] be provided an alternative appropriate private facility," explicitly placing transgender students in a different restroom than their counterparts. *Grimm*, 972 F.3d at 599 (citation omitted). Here, there is no language *expressly* treating transgender students differently than other students.

It may be that the Act has the *effect* of treating transgender students differently than non-transgender students, but that's irrelevant to a facial challenge under the Equal Protection Clause. If B.P.J. intended to challenge the effect of the Act, B.P.J. should have brought a disparate impact claim, which allows a plaintiff to show discrimination when a statute "otherwise neutral on its face," has a "disproportionate impact" on a particular class of individuals if the statute was enacted with "an invidious discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 241-42, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). But B.P.J. failed to bring such a claim. *See* Opening Br. 23 ("H.B. 3293 *facially* discriminates based on transgender status by explicitly excluding consideration of 'gender identity.'" (emphasis added)). The majority errs by rectifying B.P.J.'s failure and finding a transgender classification on the face of the Act where one does not exist.[6]

Lastly, even assuming that the Act facially treats similarly situated individuals differently than B.P.J., the majority erroneously concludes that there is a material dispute of fact regarding whether the Act

6. Ostensibly recognizing that the Act does not make a facial classification, the majority posits that the "undisputed purpose" of the Act's reliance on biology is to exclude transgender girls from participation on girls' sports teams. *Ante* at 19. But purpose—like effect—is relevant only when considering a disparate impact claim, which, again, B.P.J. did not bring. The Act's purpose has no relevance in a facial classification analysis. *See Shaw*, 509 U.S. at 642 ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.").

survives heightened scrutiny. In this Circuit, a statute that plainly rests on distinctions based on transgender status is suspect. *See Grimm*, 972 F.3d at 610. The Court reviews such a statute with heightened scrutiny, finding it unconstitutional "unless [it is] substantially related to a sufficiently important governmental interest." *Id.* at 608 (quoting *Cleburne*, 473 U.S. at 441). For a statute to survive such scrutiny, "the state must provide an 'exceedingly persuasive justification'" for the distinction. *Id.* (citation omitted). West Virginia has done so here.

Everyone agrees that ensuring equal opportunities for females is a sufficiently important government interest. The dispute centers around whether excluding B.P.J.—and other transgender girls who have not gone through puberty—is substantially related to that interest. It is.[7]

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7. Taking hormone suppressants is not a permanent condition. B.P.J. can, at any point, choose to stop taking them. In fact, as health care providers, states, and entire countries increasingly find that the negative side effects of preventing the human body from going through puberty are too destructive, B.P.J. may be compelled to quit taking hormone suppressants. *See*, *e.g.*, Josh Parry, *NHS England to Stop Prescribing Puberty Blockers*, BBC (Mar. 13, 2024), https://perma.cc/UA9Y-SMB5 (explaining that Great Britain banned prescribing puberty blockers to minors after finding a lack of evidence that they are safe or effective).

And since B.P.J.'s puberty status can be so easily modified, it seems reasonable to allow West Virginia to apply a blanket ban on transgender girls' participation in biological girls' sports. To hold otherwise puts the burden on West Virginia to ensure that transgender girls who *currently* take puberty suppressants remain on them for the entire period they are involved in West Virginia sports programs. But that is hardly feasible. Is West Virginia required to take transgender girls at their word and

Given how biological differences affect typical outcomes in sports, ensuring equal opportunities for biological girls in sports requires that they not have to compete against biological boys. And B.P.J.'s experience on the girls' track-and-field team is a quintessential example of why transgender girls participating in biological girls' sports interferes with West Virginia's well-founded interest. B.P.J.'s participation did exactly what West Virginia was trying to prevent: B.P.J. repeatedly took opportunities away from biological girls.

As noted earlier, by consistently placing in the top fifteen—and often in the top ten—competitors at events, B.P.J. displaced at least one hundred biological girls at track-and-field events and pushed multiple girls out of the top ten. Similarly, by making the conference championships in two events (something reserved for the top three girls on a team), B.P.J. took away at least two biological girls' opportunities to participate in the conference championships. And this was in a single season.

Thanks to the new-found rubric of today's majority opinion, such displacement will become commonplace. By continuing to allow B.P.J.—and transgender girls

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hope that they don't take advantage of its trust in order to excel in girls' sports? Or does West Virginia have to require transgender girls to undergo periodic medical testing to ensure nothing has changed? I think not.

Instead, recognizing that B.P.J.'s puberty status can change solely at B.P.J.'s discretion permits West Virginia to justify the Act through evidence that transgender girls generally have a physiological advantage over biological girls.

like B.P.J.—to participate on girls' teams, the number of displaced biological girls will expand exponentially. Further, as the spots on teams become more limited, B.P.J. will prevent other biological girls from participating on the teams altogether, thereby denying them any athletic opportunity.

Thus, B.P.J.'s presence in biological girls' sports has taken—and will continue to take—away opportunities from biological girls. The Act, therefore, directly relates to West Virginia's interest in ensuring equal opportunities for girls in sports. The majority errs in concluding otherwise.[8]

At bottom, the majority expands the scope of the Equal Protection Clause and erroneously concludes that biological boys and biological girls who share only the

8. This is especially true given that this case involves a policy decision about the welfare of minor students at school. "Schools operate in loco parentis to students" and, together with the state, are "responsible for maintaining [the] discipline, health, and safety" of students. *Adams*, 57 F.4th at 802 (cleaned up). Given this responsibility, we owe states a certain amount of deference when determining policies that affect student welfare. Of course, states do not have "carte blanche," but when states "have prudently assessed and addressed an issue that affects student welfare, we should pay attention." *Id.* At the very least, we should take care not to unnecessarily usurp the state's ability to make policy decisions regarding such issues. Thus, the fact that West Virginia deemed biological-sex-separated sports necessary in schools after thoroughly considering the issue should have resulted in some degree of deference from the Court. *See id.* ("Given schools' responsibilities, the Supreme Court has afforded deference to their decisions even when examining certain constitutional issues.").

same gender identity are similarly situated for purposes of sports. In so doing, the majority has uncovered an aspect of the Equal Protection Clause hidden from all others for over 150 years: a remarkable find.

B.

Undeterred, the majority compounds its flawed analysis and, in the process, overturns Title IX's advancement of women in sports.

1.

Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To prevail on a Title IX claim, a plaintiff must show that: (1) she was "excluded from participation in an education program or activity, denied the benefits of this education, or otherwise subjected to discrimination because of [her] sex;" (2) "the challenged action caused [her] harm"; and (3) "the defendants are recipients of federal funding." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 129 & n.21 (4th Cir. 2022) (en banc).

B.P.J.'s Title IX claim fails on the first prong. Under Title IX, "'discrimination' means treating an individual worse than others who are similarly situated." *Id.* at 129-30 (cleaned up). The similarly situated analysis is the same under Title IX as it is under the Equal Protection

Clause. *See Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 238 (4th Cir. 2021). Thus, for the same reason B.P.J. did not meet the similarly situated element of the equal protection claim, B.P.J. cannot meet this element of the Title IX claim: Biological sex is material to sports.

Yet, the majority again ignores this fact and, without discussion, concludes that B.P.J.—a biological boy—is similarly situated to biological girls for purposes of sports teams. As discussed, because there is evidence that biological boys, particularly B.P.J., have an advantage over biological girls before puberty, the majority could not have supported its similarly situated decision with a finding that B.P.J. has no competitive advantage over biological girls. So, once again, the majority must have concluded that the fact that B.P.J. persistently *identified* as a girl is sufficient to permit a finding that B.P.J. is similarly situated to biological girls, ignoring biology and competitive advantages altogether.

Although this conclusion was also error as to the equal protection claim, it has even further-reaching and destructive implications in the Title IX context. When a court finds that a statute discriminates under an equal protection analysis, it then moves on to the justification inquiry. The statute will be struck down only if the state fails to meet the requisite level of scrutiny—which is unlikely in a case like this. In contrast, Title IX does not require a justification inquiry. If a court finds discrimination under Title IX, the inquiry ends. It does not matter that the state has an exceedingly persuasive justification for its actions.

So, the majority's determination that transgender girls are similarly situated to biological girls *regardless of any potential advantage*, and therefore that separating sports teams by biological sex is discrimination against transgender girls, has far reaching implications under Title IX. In short, it means that states cannot exclude transgender girls from biological girls' sports teams even when the transgender girls have gone through puberty and it is even clearer that they have a significant physiological advantage over biological girls. And allowing transgender girls—regardless of any advantage—as participants 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.

For context, "Title IX 'precipitated a virtual revolution for girls and women in sports.'" *Adams*, 57 F.4th at 818 (Lagoa, J., specially concurring) (quoting Deborah Blake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 15 (2000)). It "paved the way for significant increases in athletic participation for girls and women," increasing female student participation in sports from less than 300,000 students in 1971 to over 2.6 million students in 1999. *Id.* at 818 (citation omitted). Notably, this remarkable increase was not the result of a "sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports." *Id.* at 819 (citation omitted)). Put simply, girls wanted to be a part of sports but didn't have access to it. Title IX granted them access by evening the playing field.

The majority's decision to "commingle[] . . . the biological sexes in the female athletics arena" hurdles in the opposite direction and "significantly undermine[s] the benefits afforded to female student athletes under Title IX's allowance for sex-separated sports teams." *Id.* "[I]f sport[s] were not sex segregated, most school-aged [biological] females would be eliminated from competition in the earliest rounds" or "may not even make the team." *Id.* at 820 (quoting Doriana Lambelet Coleman et al., *Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. Gender L. & Pol'y 69, 90 (2020)). It is no understatement to say that the inclusion of transgender girls on girls' teams will drive many biological girls out of sports and eviscerate the very purpose of Title IX. *See Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993) (stating that "it would require blinders to ignore that the motivation for" enacting Title IX and its sports regulations was to promote opportunities for girls in sports).

And excluding biological girls from sports will be detrimental on many levels beyond fields, courts, and arenas. Inclusion in sports has countless far-reaching benefits individually and to society at large. "Girls who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs. They are also more likely to lead." *Adams*, 57 F.4th at 820 (cleaned up). In fact, 94 percent of female C-Suite executives played a sport. *Id.* This is probably because participating in sports instills the values of "teamwork, sportsmanship, and leadership" and encourages "goal setting, time management,

perseverance, discipline, and grit," *Id.* at 820-21 (citation omitted), values that are necessary for successful careers.

By compelling schools to allow transgender girls to participate on biological girls' teams regardless of physiological advantage, the majority uses Title IX to deny the very benefits it was enacted to protect. As we have already seen, B.P.J.'s participation on the girls' track-and-field team resulted in the exclusion of multiple biological girls from competitive achievement and barred them from the conference championships. And that was the effect of just one person over the course of a single season.

2.

Moreover, the majority's conclusion that West Virginia violated Title IX by enacting a policy that unremarkably separates its sports teams by biological sex also runs afoul of the Constitution's Spending Clause, U.S. Const., art. 1, § 8, cl.1. When Congress enacts legislation under the Spending Clause—like it did for Title IX—Congress "generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (citation omitted). As a result, Congress is required to provide the States "with unambiguous notice of the conditions they are assuming when they accept" any funding. *Id.* at 637 (cleaned up); *see also Adams*, 57 F.4th at 815 (stating that the Spending Clause mandates that Congress give "a clear statement when imposing a[ny] condition[s] on federal funding").

In that vein, when "interpreting language in spending legislation, [Courts] thus insist that Congress speak with a clear voice, recognizing that there can, of course, be no knowing acceptance of the terms of the putative contract if a State is unaware of the conditions imposed by the legislation or is unable to ascertain what is expected of it." *Davis*, 526 U.S. at 640 (cleaned up).

Applying that principle here, West Virginia cannot be found to have violated Title IX by uncontroversially requiring biological-sex-separated sports teams. Though Title IX prohibits "sex" discrimination, 20 U.S.C. § 1681(a), a Department of Education implementing regulation clarifies that a school may "sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b). So, given that West Virginia was expressly allowed to create sex-separated competitive sports teams, the question becomes, does "sex" unambiguously mean gender identity? The answer to that question is undeniably no.

When Title IX was enacted, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females." *Grimm*, 972 F.3d at 632 (Niemeyer, J., dissenting) (collecting definitions); *see also Adams*, 57 F.4th at 812 (same). For example, *Webster's New World Dictionary* defined sex as "either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions." *Sex, Webster's New World Dictionary* (1972). It cannot be, then, that the definition of "sex" unambiguously

means gender identity. If anything, "sex" unambiguously means biological sex.

Indeed, demonstrating that the commonly understood definition of "sex" is biological sex, schools intending to comply with Title IX have long separated sports teams by biological sex. It is not hyperbole to say that, up to this point, most of the country has understood Title IX to prohibit biological-sex discrimination rather than gender-identity discrimination.

Rightfully so. It defies logic to conclude that Congress actually meant to prohibit gender identity discrimination *sub silentio* when enacting Title IX in 1972. Or that West Virginia should have been aware that that is what Congress meant to do. If Congress so intended, it should have explicitly said so. It did not.[9]

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9. A divided panel in *Grimm* rejected a similar Spending Clause argument in a footnote, reasoning that "*Bostock* forecloses [the argument] that [the phrase] 'on the basis of sex' is ambiguous as to discrimination against transgender persons." *Grimm*, 972 F.3d at 619 n.18. But the *Grimm* majority's reasoning does not apply here because *Bostock* clearly does not answer the question before the Court today—whether a statute that separates sports by biological sex and does not explicitly treat transgender individuals differently than their peers violates Title IX. The *Bostock* Court did not conclude that discriminating based on biological sex is transgender discrimination and, actually, assumed that the use of the word "sex" in Title VII means biological sex.

Thus, *Grimm*'s discussion of the Spending Clause has no bearing here.

It is not the judiciary's role to "become an outcome-driven enterprise prompted by feelings of sympathy." *Grimm*, 972 F.3d at 628 (Niemeyer, J., dissenting). "The judiciary's role is simply to construe the law." *Id.* And, here, the law unequivocally allows for biological-sex-separated sports teams.

III.

My dissent rests entirely on the foregoing discussion, which accepts *Grimm* as binding precedent in this Circuit to the extent that its holding has any implications here. That said, because B.P.J. heavily relies on *Grimm*, I also take this opportunity to emphasize that *Grimm* was wrongly decided and should be recognized as such.

In *Grimm*, this Court considered a School Board's policy that stated that its schools would "provide male and female restroom and locker room facilities in its schools, and the use of said facilities [would] be limited to the corresponding biological genders," as listed on the student's birth certificate. 972 F.3d at 608. "[S]tudents with gender identity issues" were provided "alternative appropriate private" facilities. *Id.* at 609. Grimm, a biological girl who identified as a boy, argued that the restroom policy facially violated the Equal Protection Clause and Title IX because it treated Grimm differently than non-transgender students. *Id.* at 593. A divided panel of this Court agreed. They erred.

In concluding that the restroom policy violated the Equal Protection Clause, the *Grimm* majority made three

material errors: it incorrectly (1) concluded that Grimm was similarly situated to biological boys; (2) surmised that statutes that classify based on transgender status receive heightened scrutiny; and (3) determined that the restroom policy did not survive heightened scrutiny. Additionally, in holding that the restroom policy violated Title IX, the *Grimm* majority erroneously concluded that "sex" actually means "gender identity," ignoring a plethora of dictionary definitions in the process.

A.

I begin with the *Grimm* majority's decision that the restroom policy violates the Equal Protection Clause and its erroneous conclusion that Grimm was similarly situated to biological boys. The *Grimm* majority erroneously rejected the School Board's argument that Grimm was similarly situated to biological girls because his "gender identity did not cause biological changes in his body, and [he] remained biologically female." *Id.* at 610. It posited that "[a]dopting the [School] Board's framing of Grimm's equal protection claim . . . would only vindicate the [School] Board's own misconceptions, which themselves reflect 'stereotypic notions'" of what "sex" means. *Id.* In contrast, the *Grimm* majority concluded that "[t]he overwhelming thrust of everything in the record—from Grimm's declaration, to his treatment letter, to the amicus briefs—is that Grimm was similarly situated to other boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth." *Id.*

But this explanation misunderstands the similarly situated analysis, which, as noted earlier, requires the plaintiff to identify persons *materially identical* to him or her who have received different treatment. When it comes to restroom use, there is nothing more materially relevant than an individual's anatomy. Indeed, "anatomical differences are at the root of why communal restrooms are generally separated on the basis of sex." *Grimm*, 972 F.3d at 636 (Niemeyer, J., dissenting); *see also Adams*, 57 F.4th at 803 n.6 ("When it comes to the bathroom policy, biological sex is the relevant respect with respect to which persons must be similarly situated because biological sex is the sole characteristic on which the bathroom policy and the privacy interests guiding the bathroom policy are based." (cleaned up)). And it was undisputed that Grimm had the same anatomical characteristics as the biological girls at his school. Therefore, "by adopting a policy pursuant to which Grimm was not permitted to use male student restrooms, the School Board did not treat differently persons who are in all *relevant* respects alike." *Grimm*, 972 F.3d at 636 (Niemeyer, J., dissenting) (cleaned up). It treated Grimm the exact same way it treated all individuals with like anatomy. How Grimm persistently identified simply has nothing to do with what occurs in the restroom. This conclusion should have ended the Court's equal protection inquiry.

Nonetheless, having erroneously determined those with whom to compare Grimm, the *Grimm* majority then furthered its error by concluding that classifications based on transgender status receive heightened scrutiny. It gave two reasons to support its conclusion: it posited

(1) "various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes," *id.* at 608, and (2) "transgender people constitute at least a quasi-suspect class," *id.* at 610. Both of these rationales are incorrect.[10]

As to the sex-stereotype justification, the *Grimm* majority misunderstood and misapplied Supreme Court precedent. The Supreme Court has explained that states cannot *justify* a sex-based classification by relying on "traditional, often inaccurate, assumptions about the proper roles of men and women." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). "The need for [that] requirement is amply revealed by reference to the broad range of statutes already invalidated by [the Supreme] Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification,' to establish [the] link between objective and classification" necessary to survive intermediate scrutiny. *Id.* (internal citation omitted). But the Court has never concluded that policies that rely on stereotypes can demonstrate a *classification* where one did not already exist.

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10. To be clear, my disagreement stems from the *Grimm* majority's conclusion that transgender-based classifications receive intermediate scrutiny. I take no issue with the *Grimm* majority's additional conclusion that the restroom policy was a sex-based classification and, therefore, was subject to intermediate scrutiny on that ground. *See* 972 F.3d at 608-09.

Stated differently, the fact that a state relies on a sex stereotype does not affect the Court's analysis as to the existence of a classification; it is, instead, relevant only to the state's justification when trying to meet the already-determined level of scrutiny. *See id.* at 725 ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); *United States v. Virginia*, 518 U.S. 515, 550, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) ("[G]eneralizations about the way women are, estimates of what is appropriate for *most women*, no longer *justify* denying opportunity to women whose talent and capacity place them outside the average description." (second emphasis added) (cleaned up)); *Craig v. Boren*, 429 U.S. 190, 198, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) ("[A]archaic and overbroad generalizations . . . could not *justify* use of a gender line in determining eligibility for certain governmental entitlements." (emphasis added) (cleaned up)); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 138, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) ("We shall not accept *as a defense* to gender-based preemptory challenges the very stereotypes the law condemns." (emphasis added) (cleaned up)). So, assuming the restroom policy in *Grimm* did rely on sex stereotypes, that fact would only become relevant when discussing whether the School Board met the appropriate level of scrutiny. It does not support the Court finding a classification.

Further, "[t]o say that the bathroom policy relies on impermissible stereotypes because it is based on the biological differences between males and females is

incorrect." *Adams*, 57 F.4th at 810. The policy relies on anatomy, and it is not a stereotype but an undisputed fact that Grimm did not have the same anatomy as the biological boys with whom he wished to share a restroom. *See Nguyen*, 533 U.S. at 73 ("Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real."). Thus, even assuming the *Grimm* majority was correct to conclude that a sex stereotype can create a classification where none exists, it still erred in applying heightened scrutiny based on this premise because the bathroom policy does not rely on such a stereotype.

Similarly, the *Grimm* majority incorrectly determined that heightened scrutiny applied because transgender individuals form a quasi-suspect class. Importantly, the Supreme Court has not held that transgender persons constitute a suspect or quasi-suspect class. And, to establish a new suspect or quasi-suspect class, Grimm was required to show that transgender individuals: (1) have historically been subjected to discrimination; (2) "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (3) are a minority lacking political power. *Bowen v. Gilliard*, 483 U.S. 587, 602, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987) (citation omitted). Grimm did not make the required showing.

Most evidently, transgender individuals do not share an obvious, immutable, or distinguishing characteristic. In fact, as the World Professional Association for Transgender Health Guidelines—relied on by the *Grimm* majority—explain, the word "transgender" is used

"to describe a *diverse group* of individuals who cross or transcend culturally-defined categories of gender. The gender identity of transgender people *differs to varying degrees* from the sex they were assigned a birth." World Professional Association for Transgender Health, *Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People*, (7th ed. 2012) https://wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf (emphasis added). As the *Grimm* majority acknowledged, not "everyone identifies as a binary gender of male or female . . . [and] there are other gender-expansive youth who many identify as nonbinary, youth born intersex who do not identify with their sex-assigned-at-birth, and others whose identities belie gender norms." *Grimm*, 972 F.3d at 597.

Further, transgender individuals differ in the extent of their transition to their preferred sex. Some individuals, like B.P.J., take hormone suppressants, some undergo surgery to change their physical appearance, and still others simply socially transition, keeping their original physical characteristics. This expansive and diverse group can hardly be thought of as sharing a defining characteristic.[11]

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11. This is especially true when comparing transgender individuals as a class to the suspect classes that the Supreme Court has recognized. Those groups share obvious characteristics such as a particular race or sex. Unlike any characteristic present in transgender individuals, both of those characteristics are "definitively ascertainable at the moment of birth." *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015).

Additionally, a substantial number of transgender individuals detransition, meaning that after transitioning to the sex that they were not assigned at birth, these individuals transition back to their sex assigned at birth. *See L.W. ex rel Williams v. Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023) (noting that being transgender is not immutable "as the stories of 'detransitioners' indicate" (citation omitted)); Pamela Paul, *As Kids, They Thought They were Trans. They no Longer Do.*, The New York Times (Feb. 2, 2024), https://www.nytimes.com/2024/02/02/opinion/transgender-children-gender-dysphoria.html. If a person's transgender status can so easily change of their own volition, it is not immutable.

Therefore, given the high bar required to demonstrate a suspect class, *see L.W.*, 83 F.4th at 486, the Court should have concluded that Grimm failed to show that transgender individuals constitute such a class and therefore that transgender-based classifications do not receive heightened scrutiny.

Even accepting the applicability of heightened scrutiny, however, the *Grimm* majority further erred by concluding that the School Board's justification for the restroom policy—protecting student's privacy—did not meet that scrutiny. In its view, "bodily privacy of cisgender boys using the boys restroom did not increase when Grimm was banned from those restrooms." *Id.* at 614. Although the Court acknowledged that "students have a privacy interest in their body when they go to the bathroom," it opined that the School Board "ignore[d] the reality of how a transgender child uses the bathroom:

by entering a stall and closing the door." *Id.* at 613-14 (cleaned up).

But isn't that how all biological women use the restroom? Does that mean that biological women should therefore be allowed open access to the men's restroom? It seems evident that, under the *Grimm* majority's reasoning, privacy is an insufficient justification to support sex-separated restrooms in general. If all that matters is that individuals can go into a stall or utilize a urinal with a privacy strip, why bother with sex-separated restrooms at all? *See id.* at 614 (noting that Grimm's use of the restrooms actually "increased" privacy "because the Board installed privacy strips and screens between the urinals"). Even briefly considering this question underscores the *Grimm* majority's flawed reasoning. It is plain that "the differences between the [sexes] demand a facility for each [sex] that is different" *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). Thus, separating restrooms by anatomy in order to ensure the privacy of the students using the restroom clearly "serves [an] important government objective[]" that "substantially relate[s] to the achievement of [that] objective[]," satisfying intermediate scrutiny. *See Virginia*, 518 U.S. at 533; *see also id.* at 550 n.19 (acknowledging that ordering an all-male Virginia college to admit female students "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements").

Nonetheless, in order to further its goals of "affirm[ing] the burgeoning values of our bright youth" and abandoning the "prejudices of our past," the *Grimm* majority ignored

how the restroom policy plainly related to privacy interests and inappropriately created a new suspect class in the process. *Grimm*, 972 F.3d at 620.

B.

The *Grimm* majority also incorrectly concluded that the restroom policy violated Title IX. As noted earlier, Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A longstanding Department of Education implementing regulation clarifies that, despite that prohibition, Title IX allows for "separate toilet, locker room, and shower facilities on the basis of sex" so long as they are "comparable" to one another. 34 C.F.R. § 106.33.

Given that regulation, the *Grimm* Court's conclusion should have been straightforward: because Title IX allows for restrooms separated by sex, the restroom policy—which did exactly that—did not violate Title IX. Unhappy with that conclusion, the *Grimm* majority maneuvered a different outcome. It posited that Grimm did not challenge *sex-separated restrooms* but the restroom policy's *definition of sex*. *Grimm*, 972 F.3d at 618. And because "the [Department of Education] regulation cannot override the statutory prohibition against *discrimination* on the basis of sex," the *Grimm* majority concluded that the regulation only suggests that "the act of creating sex-separated restrooms in and of

itself is not discriminatory—not that, in applying restroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what 'sex' means." *Id.* In other words, it construed Title IX to require "sex" to be defined as "gender identity" and, therefore, to comport with Title IX restrooms can only be separated on the basis of gender identity. Wrong again.

For starters, "[r]eputable dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Adams*, 57 F.4th at 812 (collecting definitions); *see Grimm*, 972 F.3d at 632 (Niemeyer, J., dissenting) ("And [when Title IX was enacted], virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females—particularly with respect to their reproductive functions."); *see also Johnson v. Zimmer*, 686 F.3d 224, 232 (4th Cir. 2012) (reiterating that when interpreting statutes, the Court gives undefined statutory provisions "their ordinary, contemporary, common meaning" and that the Court looks to dictionaries to help determine that meaning (cleaned up)). For example, Webster's New World Dictionary defined "sex" as "either of the two divisions, male or female, into which persons, animals or plants are divided, *with reference to their reproductive functions*." *Sex, Webster's New World Dictionary* (1972) (emphasis added).[12] Given this common

12. Notably, *Bostock* supports this reading of Title IX. Although *Bostock* expressly declined to opine on whether biological-sex-separated bathrooms violated any federal or state

understanding of "sex," it is unfathomable that Congress silently intended to address gender identity discrimination when enacting Title IX in 1972.

This is especially true given that, "[t]here simply is no limiting principle to cabin [the *Grimm* majority's] definition of 'sex' to . . . bathrooms under Title IX, as opposed to . . . the statutory and regulatory carve-outs for living facilities, showers, and locker rooms." *Adams*, 57 F.4th at 818 (Lagoa, J., specially concurring). And, regardless of the majority's view on restrooms, it defies logic to conclude that Congress meant to allow biological boys who identify as girls to shower with biological girls. *See* 20 U.S.C. § 1686 ("Notwithstanding anything to the contrary contained in this chapter, *nothing contained herein shall be construed to prohibit* any education institution . . . from maintaining separate living facilities for the different sexes." (emphasis added)). Congress clearly intended to affirm certain aspects of sex separation in education—like in restrooms, showers, locker rooms, and sports—within its overall prohibition on sex discrimination.[13]

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laws, it "proceed[ed] on the assumption that 'sex' [as used in Title VII] . . . referr[ed] only to biological distinctions between male and female." *Bostock*, 590 U.S. at 655.

13. Had the *Grimm* majority not erroneously concluded that "sex" means gender identity under Title IX, a Department of Education implementing regulation would foreclose the majority's Title IX decision today as well. *See* 34 C.F.R. § 106.41(b) (stating that a school may "sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport").

Moreover, under the *Grimm* majority's—and now this majority's—approach, Title IX "provide[s] more protection against discrimination on the basis of transgender status . . . than it would against discrimination on the basis of sex." *Adams*, 57 F.4th at 814. Indeed, under their reading, ensuring that transgender individuals get access to the restrooms and sports teams of their choosing is more important than biological females' rights to privacy and to play competitive sports. No Congress has ever intended such a result.

IV.

Ignoring what would seem to be clear law, the majority ensures that policy preferences prioritizing transgender persons take precedence. But where will this Court, or any court, draw the line? *Bostock* allegedly drew the line at employment decisions under Title VII. *Grimm* was specific to bathrooms. Yet, here we are again, miles away from the straightforward text of the laws we are called to apply, judicially rewriting the Equal Protection Clause and nullifying Title IX's promise of equal athletic opportunity for women.

And if the commonly understood and accepted limits on restroom usage and sports teams are negated by judicial fiat, I fail to see where the Court will ever impose a limit. No unelected judge is empowered to decide that the Equal Protection Clause and Title IX require schools

to allow transgender individuals to share locker rooms and showers with the sex they *identify* with, anatomy notwithstanding. Yet that seems to be the next stop on this runaway train. Neither the drafters of the Equal Protection Clause nor Congress when enacting Title IX intended such a result.

Accordingly, I dissent from all but Parts II and III of the majority opinion. One can only hope that the Supreme Court will take the opportunity with all deliberate speed to resolve these questions of national importance.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, CHARLESTON DIVISION, FILED JANUARY 5, 2023

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, CHARLESTON DIVISION

CIVIL ACTION NO. 2:21-cv-00316

B. P. J., *et al.*,

Plaintiffs,

v.

WEST VIRGINIA STATE BOARD OF EDUCATION, *et al.*,

Defendants.

January 5, 2023, Decided;
January 5, 2023, Filed

MEMORANDUM OPINION AND ORDER

West Virginia passed a law that defines "girl" and "woman," for the purpose of secondary school sports, as biologically female. Under the law, all biological males, including those who identify as transgender girls, are ineligible for participation on girls' sports teams. B.P.J., a transgender girl who wants to play girls' sports,

challenges the law. The question before the court is whether the legislature's chosen definition of "girl" and "woman" in this context is constitutionally permissible. I find that it is.

I. Relevant Facts

A. B.P.J.

B.P.J. is an eleven-year-old transgender girl. This means that although B.P.J.'s biological sex is male, she now identifies and lives as a girl. According to her First Amended Complaint, B.P.J. began expressing her female gender identity when she was three years old. [ECF No. 285-2]. By the end of third grade, B.P.J. expressed herself fully—both at home and otherwise—as a girl. In 2019, B.P.J. was diagnosed with gender dysphoria and, at the first signs of puberty, she began taking puberty blocking medications to treat that condition. [ECF No. 289-21]. As a result, B.P.J. has not undergone endogenous male puberty.

In 2021, as she prepared to enter middle school, B.P.J. expressed interest in trying out for the girls' cross-country and track teams. When her mother, Plaintiff Heather Jackson, asked the school to allow B.P.J. to participate on the girls' teams, the school initially informed her that whether B.P.J. would be permitted to play on the girls' teams depended on the outcome of House Bill ("H.B.") 3293, which was then pending in the West Virginia legislature. When the law passed, the school informed Ms. Jackson that B.P.J. would not be permitted to try out for the girls' teams.

Appendix B

B. The "Save Women's Sports Bill"

H.B. 3293, entitled the "Save Women's Sports Bill," was introduced in the West Virginia House of Delegates on March 18, 2021. The bill passed and was codified as West Virginia Code Section 18-2-25d, entitled "Clarifying participation for sports events to be based on biological sex of the athlete at birth." The law, which was clearly carefully crafted with litigation such as this in mind, begins with the following legislative findings:

> (1) There are inherent differences between biological males and females, and that these differences are cause for celebration, as determined by the Supreme Court of the United States in *United States v. Virginia* (1996);
>
> (2) These inherent differences are not a valid justification for sex-based classifications that make overbroad generalizations or perpetuate the legal, social, and economic inferiority of either sex. Rather, these inherent differences are a valid justification for sex-based classifications when they realistically reflect the fact that the sexes are not similarly situated in certain circumstances, as recognized by the Supreme Court of the United States in *Michael M. v. Sonoma County, Superior Court* (1981) and the Supreme Court of Appeals of West Virginia in *Israel v. Secondary Schools Act. Com'n* (1989);

(3) In the context of sports involving competitive skill or contact, biological males and biological females are not in fact similarly situated. Biological males would displace females to a substantial extent if permitted to compete on teams designated for biological females, as recognized in *Clark v. Ariz. Interscholastic Ass'n* (9th Cir. 1982);

(4) Although necessarily related, as concluded by the United States Supreme Court in *Bostock v. Clayton County* (2020), gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity. Classifications based on gender identity serve no legitimate relationship to the State of West Virginia's interest in promoting equal athletic opportunities for the female sex; and

(5) Classifications of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex.

W. Va. Code § 18-2-25d(a)(1)-(5).

After making these findings, the law sets forth definitions of "biological sex," "female," and male" as follows:

> (1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.
>
> (2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.
>
> (3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.

Id. § 18-2-25d(b)(1)-(3).

Finally, the law requires that each athletic team that is "sponsored by any public secondary school or a state institution of higher education" "be expressly designated as" either male, female, or coed, "based on biological sex." *Id.* § 18-2-25d(c). Teams that are designated "female" "shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 18-2-25d(c)(2).

C. Procedural History

On May 26, 2021, B.P.J., through her mother, filed this lawsuit against the West Virginia State Board of Education and its then-Superintendent W. Clayton Burch, the Harrison County Board of Education and its Superintendent Dora

Stutler, and the West Virginia Secondary Schools Activities Commission ("WVSSAC"). The State of West Virginia moved to intervene, and that motion was granted. Plaintiff then amended her complaint, [ECF No. 64], naming the State of West Virginia and Attorney General Patrick Morrisey as defendants. Mr. Morrisey has since been dismissed as a party from this lawsuit.

In her amended complaint, B.P.J. alleges that Defendants Burch, Stutler, and the WVSSAC deprived her of the equal protection guaranteed to her by the Fourteenth Amendment and that the State, the State Board of Education, the Harrison County Board of Education, and the WVSSAC have violated Title IX. B.P.J. seeks a declaratory judgment that Section 18-2-25d of the West Virginia Code violates Title IX and the Equal Protection Clause; an injunction preventing Defendants from enforcing the law against her; a waiver of the requirement of a surety bond for preliminary injunctive relief; nominal damages; and reasonable attorneys' fees.

B.P.J. initially requested a preliminary injunction to allow her to compete on the girls' track and cross-country teams during the pendency of this case. Finding that B.P.J. had a likelihood of success on the merits of her as-applied challenge to the law, I granted the preliminary injunction. All defendants moved to dismiss, and those motions were denied. Lainey Armistead, a cisgender[1]

1. "Cisgender" means a person whose gender identity aligns with her biological sex. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021).

female college athlete then moved to intervene as a defendant and that motion was granted. All parties have now moved for summary judgment.

II. Legal Standard

Summary judgment is appropriate where the "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . ., admissions, interrogatory answers, or other materials" show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a), (c)(1)(A).

III. Analysis

B.P.J. alleges that H.B. 3293 violates the Constitution's Equal Protection Clause and Title IX. I will address each argument in turn. Before turning to the merits of those arguments, however, I find it important to address some preliminary matters.

A. The WVSSAC's Motion

The WVSSAC does not argue the merits of Plaintiff's Equal Protection or Title IX claims. Rather, the WVSSAC only argues that it is not a state actor and is therefore not subject to scrutiny under either the Equal Protection Clause or Title IX. I disagree. Defendant WVSSAC's motion [ECF No. 276] is DENIED.

A court may only apply equal protection scrutiny to state action. U.S. Const. amend. XIV, § 1, cl. 4.; *Lugar*

v. Edmondson Oil Co., Inc., 457 U.S. 922, 923-24, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). Likewise, only a party acting under the color of state law is subject to suit pursuant to 42 U.S.C. § 1983. Despite differing terms, the color-of-law requirement in a § 1983 claim and the state action requirement under the Fourteenth Amendment are synonymous and are analyzed the same way. *See Lugar*, 457 U.S. at 923-24; *United States v. Price*, 383 U.S. 787, 794, 86 S. Ct. 1152, 16 L. Ed. 2d 267 (1966).

"[T]he character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 121 S. Ct. 924, 931, 148 L. Ed. 2d 807 (2001) (citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995)). For example, an ostensibly private actor can become a state actor when it is "controlled by an 'agency of the State,'" or "entwined with governmental policies[,]" or the government is "entwined in [its] management or control." *Pennsylvania v. Bd. of Dir. of City Trs. of Phila.*, 353 U.S. 230, 231, 77 S. Ct. 806, 1 L. Ed. 2d 792 (1957); *Evans v. Newton*, 382 U.S. 296, 299, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966). There is, however, no rigid test to determine when a challenged action becomes a state action. *Brentwood Acad.*, 531 U.S. at 295. No single fact nor set of conditions will definitively confer state action because there may be a better "countervailing reason against attributing activity to the government." *Id.* at 295-96. "Only by sifting facts and weighing circumstances can

the nonobvious involvement of the State in private conduct be attributed its true significance." *Lugar*, 457 U.S. at 939 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S. Ct. 856, 860, 6 L. Ed. 2d 45 (1961); *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 116 (4th Cir. 2022) ("[T]he inquiry is highly fact-specific in nature.").

After considering its composition, rulemaking process, obligations under state law, and other rules for student eligibility, I find the WVSSAC is a state actor. Like in *Brentwood Acad.*, the WVSSAC's nominally private character "is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." 531 U.S. at 298. I find that the WVSSAC is a state actor for several reasons. Though county boards of education have the statutory authority to supervise and control interscholastic athletic events, they have delegated that authority to the WVSSAC. [ECF No. 285-1]. Every public secondary school in West Virginia is a member of the WVSSAC, and the school principals sit on the WVSSAC's Board of Control to propose and vote on sports rules and regulations. *Id.* Any rule the WVSSAC passes is then subject to approval by the State Board of Education, and the State Board of Education requires that any coach who is not also a teacher be trained by the WVSSAC and certified by the State Board of Education. *Id.* And the WVSSAC Board of Directors—the entity that enforces the rules—includes representatives of the State Superintendent and the State Board of Education, among other governmental entities. *Id.*; 127 C.S.R. § 127-

1-8.2. Here, it appears that the WVSSAC cannot exist without the state, and the state cannot manage statewide secondary school activities without the WVSSAC. The WVSSAC is pervasively entwined with the state.

The WVSSAC's motion for summary judgment [ECF No. 276] is therefore **DENIED**.

B. Animus

In her Amended Complaint, B.P.J. alleges that H.B. 3293 was introduced in the legislature "as part of a concerted, nationwide effort to target transgender youth for unequal treatment." [ECF No. 64, ¶ 45]. B.P.J. alleges that the law was "targeted at, and intended only to affect, girls who are transgender." *Id.* ¶ 46. In support of these contentions, B.P.J. points to the actions of bill co-sponsor Delegate Jordan Bridges. According to the Amended Complaint, Delegate Bridges made a Facebook post announcing the introduction of the bill and then "'liked' comments on his post that advocated for physical violence against girls who are transgender, compared girls who are transgender to pigs, and called girls who are transgender by a pejorative term." *Id.* ¶ 47. In her summary judgment motion, B.P.J. again points the court to the actions of Delegate Bridges and points to several instances where legislators made clear that the purpose of the bill was to address transgender participation in sports.

Notwithstanding these statements, B.P.J. does not argue that the law is unconstitutional under the Supreme Court's animus doctrine, and the record lacks sufficient

legislative history to make such a finding. The record makes abundantly clear, however, that West Virginia had no "problem" with transgender students playing school sports and creating unfair competition or unsafe conditions. In fact, at the time it passed the law, West Virginia had no known instance of any transgender person playing school sports. While the legislature did take note of transgender students playing sports in other states, it is obvious to me that the statute is at best a solution to a potential, but not yet realized, "problem."

Even so, the law is only unconstitutional under the animus doctrine if the reason for its passage was the "bare desire" to harm transgender people. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973). While the record before me does reveal that at least one legislator held or implicitly supported private bias against, or moral disapproval of, transgender individuals, it does not contain evidence of that type of animus more broadly throughout the state legislature. Therefore, I cannot find unconstitutional animus on the record before me.

C. Other Matters

Next, before proceeding to the merits of the case, I find it important to briefly discuss what this case is *not*.

First, despite the politically charged nature of transgender acceptance in our culture today, this case is *not* one where the court needs to accept or approve B.P.J.'s existence as a transgender girl. B.P.J., like all

transgender people, deserves respect and the ability to live free from judgment and hatred for simply being who she is. But for the state legislature, creating a "solution" in search of a problem, the courts would have no reason to consider eligibility rules for youth athletics. Nevertheless, I must do so now.

This is also *not* a case where B.P.J. challenges the entire structure of school sports. B.P.J. does not challenge, on a broad basis, sex-separation in sports. B.P.J. wants to play on a girls' team. And she admits that there are benefits associated with school athletics, "including when such athletics are provided in a sex-separated manner." [ECF No. 286-1, at 1445]. Ultimately, B.P.J.'s issue here is not with the state's offering of girls' sports and boys' sports. It is with the state's definitions of "girl" and "boy." The state has determined that for purposes of school sports, the definition of "girl" should be "biologically female," based on physical differences between the sexes. And the state argues that its definition is appropriate here because it is substantially related to an important government interest. B.P.J., for her part, seeks a legal declaration that a transgender girl is "female."

I will not get into the business of defining what it means to be a "girl" or "woman." The courts have no business creating such definitions, and I would be hard-pressed to find many other contexts where one's sex and gender are relevant legislative considerations. But I am forced to consider whether the state's chosen definition passes constitutional muster in this one discrete context.

D. Equal Protection

Having addressed those matters, I now turn to the merits of B.P.J.'s claim that H.B. 3293 violates the Constitution's Equal Protection Clause.

1. Legal Standard

The Equal Protection Clause of the Fourteenth Amendment provides that no state may deny any person within its jurisdiction "equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. In other words, "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Realistically, though, every law impacts people differently, and the Fourteenth Amendment does not prohibit that outcome. *Reed v. Reed*, 404 U.S. 71, 75, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971). But the Equal Protection Clause does forbid a statute from placing people into different classes and treating them unequally for reasons "wholly unrelated to the objective of that statute." *Id.* at 75-76. Ultimately, if a law seeks to treat different groups of people differently, it must do so "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920)).

In general, courts presume that a law is constitutional. Based on that presumption, courts may only overturn a law if the challenger can show that the law's classification is

not rationally related to *any* government interest. *Moreno*, 413 U.S. at 533. This general review is known as rational basis review. However, the court's inquiry becomes more searching if the law disadvantages a group of people who have historically been discriminated against and whose identity has nothing to do with their ability to participate in society. Race-based laws, for example, are "immediately suspect" because "they threaten to stigmatize individuals by reason of their membership in a racial group." *Shaw v. Reno*, 509 U.S. 630, 643, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993). Laws based on race, or other suspect classifications such as alienage and national origin, are subject to strict scrutiny and will only be upheld "upon an extraordinary justification." *Id.* at 643-44 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)). Under strict scrutiny, the law must be "narrowly tailored to serve a compelling governmental interest." *Cleburne*, 473 U.S. at 440.

In the middle of rational basis review and strict scrutiny lies intermediate scrutiny. Intermediate scrutiny applies to laws that discriminate on the basis of a quasi-suspect classification, like sex, *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996), and transgender status, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021) ("Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class."). Sex discrimination receives intermediate scrutiny because while states have historically used sex as a basis for invidious discrimination, we recognize that

there are some "real differences" between males and females that could legitimately form the basis for different treatment. *Virginia*, 518 U.S. at 533.

The Supreme Court has long "viewed with suspicion laws that rely on 'overbroad generalizations about the different talents, capacities, or preferences of males and females.'" *Sessions v. Morales-Santana*, 582 U.S. 47, 137 S. Ct. 1678, 1692, 198 L. Ed. 2d 150 (2017) (quoting *Virginia*, 518 U.S. at 533). Therefore, laws that discriminate based on sex must be backed by an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 524. That is to say, the law's proponents must show that it "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). Even if the law's objective is to protect the members of one sex, that "objective itself is illegitimate" if it relies on "fixed notions concerning [that sex's] roles and abilities." *Morales-Santana*, 137 S. Ct. at 1692.

The party defending the statute must "present[] sufficient probative evidence in support of its stated rationale for enacting a [sex] preference, i.e., . . . the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations." *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010) (quoting *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty.*, 122 F.3d 895, 910 (11th Cir. 1997)); *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 321 F.3d 950, 959 (10th Cir. 2003) ("[T]he

gender-based measures . . . [must be] based on 'reasoned analysis rather than [on] the mechanical application of traditional, often inaccurate, assumptions.'" (quoting *Miss. Univ. for Women*, 458 U.S. at 726)).

2. Discussion

There is no debate that intermediate scrutiny applies to the law at issue here—H.B. 3293 plainly separates student athletes based on sex. And even B.P.J. agrees that the state has an important interest in providing equal athletic opportunities for female students. [ECF No. 291, at 24]. As discussed earlier, B.P.J. does not challenge sex-separation in sports on a broad basis; she does not argue that teams should be separated based on some other factor or not separated at all. Rather, B.P.J. recognizes the benefits of sex-separated athletics and takes issue only with the state's definitions of "girl" and "woman" as based on biological sex.

B.P.J. argues that "H.B. 3293 excludes students from sports teams based on 'biological sex' and defines 'biological sex' solely in terms of 'reproductive biology and genetics at birth.'" *Id.* at 19. According to B.P.J., H.B. 3293 uses this "'ends-driven definition[] of "biological sex" to 'guarantee a particular outcome': Barring girls who are transgender from qualifying as girls for purposes of school sports and thereby categorically excluding them from girls' teams and therefore from school sports altogether." *Id.* (quoting *Grimm*, 972 F.3d at 626 (Wynn, J., concurring)). B.P.J. argues that this definition of "biological sex," and the related definitions of "girl" and

"woman," are not substantially related to the government interest in providing equal athletic opportunities for females.

The State of West Virginia, the State Board defendants, the Harrison County defendants, and Intervenor Lainey Armistead all argue that the state's classification based on "biological sex" is substantially related to its important interest in providing equal athletic opportunities for females. The state points to a longstanding recognition in the courts that "'[p]hysical differences between men and women . . . are enduring' and render 'the two sexes . . . not fungible.'" [ECF No. 305, at 13-14 (quoting *Virginia*, 518 U.S. at 533)]. And the state argues that in order to preserve athletic opportunities for females, it is necessary to exclude biological males from female teams because males as a group have significant athletic advantage over females and thus the two groups are not similarly situated. [ECF No. 287, at 6-8].

The record does make clear that, in passing this law, the legislature intended to prevent transgender girls from playing on girls' sports teams. In making that decision, the legislature considered an instance in Connecticut where two transgender girls ran on the girls' track team and won at least one event. Cisgender girls there sued, claiming the state's policy allowing the transgender girls to play on girls' teams violated Title IX. *Id.* at 5. But acting to prevent transgender girls, along with all other biological males, from playing on girls' teams is not unconstitutional if the classification is substantially related to an important government interest. The state's interest in providing

equal athletic opportunity to females is not at issue here, and B.P.J. does not argue that sex-separate sports in general are not substantially related to that interest. Rather, B.P.J. argues that she and other transgender girls should be able to play on girls' teams despite their male sex, because their gender identity is "girl."

While sex and gender are related, they are not the same. *See e.g., PFLAG, PFLAG National Glossary of Terms* (June 2022), http://pflag.org/glossary (defining "biological sex" as the "anatomical, physiological, genetic, or physical attributes that determine if a person is male, female, or intersex . . . includ[ing] both primary and secondary sex characteristics, including genitalia, gonads, hormone levels, hormone receptors, chromosomes, and genes" and explaining that "[b]iological sex is often conflated or interchanged with gender, which is more societal than biological, and involves personal identity factors"). It is beyond dispute that, barring rare genetic mutations not at issue here, a person either has male sex chromosomes or female sex chromosomes. Gender, on the other hand, refers to "a set of socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate." *Id.* Gender identity, then, is "[a] person's deeply held core sense of self in relation to gender." *Id.* For most people, gender identity is in line with biological sex. *See Grimm*, 972 F.3d at 594. That is, most females identify as girls or women, and most males identify as boys or men. But gender is fluid. There are females who may prefer to dress in a style that is more typical of males (or vice versa), and there are males who may not enjoy what are considered typical male activities.

These individuals may, however, still identify as the gender that aligns with their sex. Others may not. When one's gender identity is incongruent with their sex, that person is transgender. To be transgender, one must have a deeply held "consistent[], persistent[], and insistent[]" conviction that their gender is, "on a binary, . . . opposite to their" biological sex. *Id.* I recognize that being transgender is natural and is not a choice. But one's sex is also natural, and it dictates physical characteristics that are relevant to athletics.

Whether a person has male or female sex chromosomes determines many of the physical characteristics relevant to athletic performance. Those with male chromosomes, regardless of their gender identity, naturally undergo male puberty, resulting in an increase in testosterone in the body. B.P.J. herself recognizes that "[t]here is a medical consensus that the largest known biological cause of average differences in athletic performance between [males and females] is circulating testosterone beginning with puberty." [ECF No. 291, at 28]. While some females may be able to outperform some males, it is generally accepted that, on average, males outperform females athletically because of inherent physical differences between the sexes. This is not an overbroad generalization, but rather a general principle that realistically reflects the average physical differences between the sexes. Given B.P.J.'s concession that circulating testosterone in males creates a biological difference in athletic performance, I do not see how I could find that the state's classification based on biological sex is not substantially related to its interest in providing equal athletic opportunities for females.

Appendix B

In parts of her briefing, B.P.J. asks me to find that specifically excluding transgender girls from the definition of "girl" in this context is unconstitutional because transgender girls can take puberty blockers or other hormone therapies to mitigate any athletic advantage over cisgender females. B.P.J., for example, is biologically male, but she identifies as a girl. To express her gender identity, she goes by a traditionally feminine name, wears her hair long, uses female pronouns, and in all other respects lives as a girl. Before the first signs of puberty, B.P.J. made no other changes as a result of her transgender identity. But, once she started showing signs of male puberty, B.P.J. began taking puberty blocking medications, pausing the male puberty process. In that respect, B.P.J. argues that she has not gained the physical characteristics typical of males during and after puberty.

While this may be true for B.P.J., other transgender girls may not take those medications. They may not even come to realize or accept that they are transgender until after they have completed male puberty. Even if a transgender girl wanted to receive hormone therapy, she may have difficulty accessing those treatment options depending on her age and the state where she lives. And, as evidenced by the thousands of pages filed by the parties in this case, there is much debate over whether and to what extent hormone therapies after puberty can reduce a transgender girl's athletic advantage over cisgender girls. Additionally, of course, there is no requirement that a transgender person take any specific medications or undergo hormone therapy before or after puberty. A transgender person may choose to only transition socially,

rather than medically. In other words, the social, medical, and physical transition of each transgender person is unique.

The fact is, however, that a transgender girl is biologically male and, barring medical intervention, would undergo male puberty like other biological males. And biological males generally outperform females athletically. The state is permitted to legislate sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.

Could the state be more inclusive and adopt a different policy, as B.P.J. suggests, which would allow transgender individuals to play on the team with which they, as an individual, are most similarly situated at a given time? Of course. But it is not for the court to impose such a requirement here. Sex-based classifications fall under intermediate scrutiny and therefore do not have a "narrowly-tailored" requirement. As intervenor, Lainey Armistead, points out, "[s]ome boys run slower than the average girl . . . [and] [s]ome boys have circulating testosterone levels similar to the average girl because of medical conditions or medical interventions," but B.P.J. denies that the latter "would be similarly situated [to cisgender girls] for purposes of Title IX and the Equal Protection Clause," and does not argue that they should be allowed to play on girls' teams. [ECF No. 288, at 17 (citing ECF No. 286-1, at 1473)]. This is inconsistent with her argument that the availability of hormone therapies makes transgender girls similarly situated to cisgender

girls. In fact, after reviewing all of the evidence in the record, including B.P.J.'s telling responses to requests for admission, it appears that B.P.J. really argues that transgender girls are similarly situated to cisgender girls for purposes of athletics at the moment they verbalize their transgender status, regardless of their hormone levels.

The legislature's definition of "girl" as being based on "biological sex" is substantially related to the important government interest of providing equal athletic opportunities for females. B.P.J.'s motion for summary judgment on this basis is **DENIED**.

E. Title IX

Finally, I address B.P.J.'s claim that H.B. 3293 violates Title IX. B.P.J. brings this claim against the State of West Virginia, the State Board of Education, the County Board of Education, and the WVSSAC.

1. Legal Standard

Title IX provides that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To succeed on a Title IX claim, a plaintiff must prove that she was (1) excluded from an educational program on the basis of sex; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that "improper discrimination caused [her] harm." *Grimm*, 972 F.3d

at 616 (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). "In the Title IX context, discrimination 'mean[s] treating [an] individual worse than others who are similarly situated.'" *Id.* at 618 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741, 207 L. Ed. 2d 218 (2020)). Title IX permits sex-separate athletic teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b).

2. Discussion

B.P.J. argues that H.B. 3293 violates Title IX because it excludes transgender girls from participation on girls' sports teams. B.P.J. argues that this amounts to complete exclusion from school sports altogether, and that it is discrimination because she and other transgender girls are similarly situated to cisgender girls. [ECF No. 291, at 17]. The state responds that the law does not violate Title IX because it does not exclude B.P.J. from school athletics. "To the contrary, it simply designates on which team [she] shall play." [ECF No. 287, at 22]. And, the County Defendants argue that Title IX authorizes sex separation in sports in the same scenarios outlined in H.B. 3293—" where selection for such teams is based upon competitive skill or the activity involved is a contact sport." W. Va. Code § 18-2-25d(c)(2). All Defendants[2] argue that while it did not define the term, Title IX used "sex" in the biological sense because its purpose was to promote sex equality. Therefore, they argue that H.B. 3293 furthers, not violates, Title IX. I agree.

2. Excluding the WVSSAC.

Title IX authorizes sex separate sports in the same manner as H.B. 3293, so long as overall athletic opportunities for each sex are equal. 34 C.F.R. § 106.41(b)-(c). As other courts that have considered Title IX have recognized, although the regulation "applies equally to boys as well as girls, it would require blinders to ignore that the motivation for the promulgation of the regulation" was to increase opportunities for women and girls in athletics. *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993). There is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex. Nevertheless, B.P.J. argues that transgender girls are similarly situated to cisgender girls, and therefore their exclusion from girls' teams is unlawful discrimination. But as I have already discussed, transgender girls are biologically male. Short of any medical intervention that will differ for each individual person, biological males are not similarly situated to biological females for purposes of athletics. And, despite her repeated argument to the contrary, transgender girls are not excluded from school sports entirely. They are permitted to try out for boys' teams, regardless of how they express their gender.

I do not find that H.B. 3293, which largely mirrors Title IX, violates Title IX. B.P.J.'s motion for summary judgment on this basis is **DENIED**.

IV. Conclusion

I have no doubt that H.B. 3293 aimed to politicize participation in school athletics for transgender students.

Nevertheless, there is not a sufficient record of legislative animus. Considering the law under the intermediate scrutiny standard, I find that it is substantially related to an important government interest. B.P.J.'s motion for summary judgment is **DENIED**. Defendant WVSSAC's motion for summary judgment [ECF No. 276] is **DENIED**. The motions for summary judgment filed by the State of West Virginia [ECF No. 285], the Harrison County defendants [ECF No. 278], the State Board defendants [ECF No. 283], and Intervenor Lainey Armistead [ECF No. 286] are **GRANTED** to the extent they argue that H.B. 3293 is constitutional and complies with Title IX. The preliminary injunction is **DISSOLVED**. All other pending motions are **DENIED** as moot.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party. The court further **DIRECTS** the Clerk to post a copy of this published opinion on the court's website, www.wvsd.uscourts.gov.

ENTER: January 5, 2023

/s/ Joseph R. Goodwin
JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, CHARLESTON DIVISION, FILED JANUARY 5, 2023

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

CIVIL ACTION NO. 2:21-cv-00316

B. P. J., *et al.*,

Plaintiffs,

v.

WEST VIRGINIA STATE BOARD
OF EDUCATION, *et al.*,

Defendants.

JUDGMENT ORDER

The court **ORDERS** that judgment be entered in accordance with accompanying Memorandum Opinion and Order, and that this case be dismissed and stricken from the docket.

The court **DIRECTS** the Clerk to send a certified copy of this Judgment Order to counsel of record and to any unrepresented party.

Appendix C

ENTER: January 5, 2023

/s/ Joseph R. Goodwin
JOSEPH R. GOODWIN
UNITED STATES DISTRICT
JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, CHARLESTON DIVISION, FILED DECEMBER 1, 2021

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

CIVIL ACTION NO. 2:21-cv-00316

B. P. J., *et al.*,

Plaintiffs,

v.

WEST VIRGINIA STATE BOARD OF EDUCATION, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court are three motions to dismiss Plaintiff's First Amended Complaint, filed by Defendant West Virginia Secondary School Activities Commission [ECF No. 70], Defendants Harrison County Board of Education and Dora Stutler [ECF No. 72], and Defendants West Virginia Board of Education and Superintendent W. Clayton Burch [ECF No. 74]. For the following reasons, the motions to dismiss are **DENIED**.

Appendix D

I. PRELIMINARY MATTER

Before turning to the merits of the case, I will first address the Court's use of pronouns going forward. I note from the outset that I have consistently used female pronouns to refer to B.P.J. in my opinions. Courts hearing cases involving transgender litigants have long used language respecting the gender identity used by the litigants. *See, e.g., Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) ("[T]he defendants say 'he,' but Farmer prefers the female pronoun and we shall respect her preference."); *Farmer v. Circuit Court of Maryland for Baltimore Cty.*, 31 F.3d 219, 220 n.1 (4th Cir. 1994) ("This opinion, in accord with Farmer's preference, will use feminine pronouns."); *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 n.1 (6th Cir. 1997) ("Murray uses the feminine pronoun to refer to herself. Although the government in its brief used the masculine pronoun, for purposes of this opinion we will follow Murray's usage."); *Schwenk v. Hartford*, 204 F.3d 1187, 1192 (9th Cir. 2000) ("In using the feminine rather than the masculine designation when referring to Schwenk, we follow the convention of other judicial decisions involving male-to- female transsexuals which refer to the transsexual individual by the female pronoun."); *Cuoco v. Moritsugu*, 222 F.3d 99, 103 n.1 (2d Cir. 2000) ("We . . . refer to the plaintiff using female pronouns" because "[s]he [is] a preoperative male to female transsexual."); *Smith v. Rasmussen*, 249 F.3d 755, 757 (8th Cir. 2001) ("As did the parties during the proceedings in the district court, we will refer to Smith, in accordance with his preference, by using masculine pronouns."); *Kosilek v. Spencer*, 740 F.3d 733, 737 (1st Cir. 2014) ("We will refer to Kosilek as her

preferred gender of female, using feminine pronouns."); *Pinson v. Warden Allenwood USP*, 711 F. App'x 79, 80 (3d Cir. 2018) ("Because Pinson has referred to herself using feminine pronouns throughout this litigation, we will follow her example.").

That being said, it will be necessary in this case to differentiate between males and females, as assigned at birth, without regard to their gender identity. The Court, therefore, adopts the following framework for the language it will use in its opinions going forward:

When referring to a person's sex assigned at birth, I will use the term "biological male" and "biological female." A person who was assigned male at birth but identifies as female I will refer to as a transgender girl or a transgender woman. A person who was assigned female at birth but identifies as male I will refer to as a transgender boy or a transgender man. A person who was assigned female at birth and identifies as female is a cisgender woman or girl. A person who was assigned male at birth and identifies as male is a cisgender man or boy. I will use the pronouns associated with a person's gender identity. In doing so, I am not expressing any opinion, political, judicial, or otherwise about any issue in this case. I will not order any litigant to use the language that I use.

II. BACKGROUND

On April 28, 2021, the State of West Virginia passed H.B. 3293, known as the "Protect Women's Sports Act." W. Va. Code § 18-2-25d. ("H.B. 3293" or "the Act"). The

Act requires that any sports team sponsored by a public secondary school or higher education institution be expressly designated as a male, female, or coed team. § 18-2-25d(c)(1). Teams designated as "female" are not open to males, while teams designated as "male" are open to either sex. § 18-2-25d(c)(2). The act defines "male" and "female" as a person's "biological sex determined at birth." § 18-2-25d(b)(3).

B.P.J. is an eleven-year-old transgender girl. The complaint alleges that B.P.J. has been "living authentically as the girl she is" since the end of her third grade school year. [ECF No. 64, at ¶¶ 31–32]. She enjoys sports and has competed on girls' sports teams throughout elementary school. [ECF No. 64, at ¶¶31, 36]. Going into middle school, the complaint alleges that she anticipated trying out for girls' sports teams. [*Id*. at ¶ 34]. H.B. 3293 would prevent her from doing so because her sex assigned at birth is male.

B.P.J. has brought suit asserting that H.B. 3293 violates her rights under Title IX and the Equal Protection Clause. Count I of B.P.J.'s First Amended Complaint, against the State of West Virginia, the State Board of Education, the Harrison County Board of Education, and the West Virginia Secondary School Activities Commission ("WVSSAC"), alleges that the law violates Title IX of the Education Amendments of 1972 (20 U.S.C. § 1618 *et seq.*) [*Id.* at ¶¶ 88–99]. Count II, against State Superintendent W. Clayton Burch, Harrison County Superintendent Dora Stutler, and the WVSSAC, alleges that the law violates the Equal Protection Clause of the Fourteenth Amendment

to the United States Constitution. [*Id.* at ¶¶ 100–110].[1] All named defendants, except the State of West Virginia, have filed motions to dismiss. The motions to dismiss are filed pursuant to Federal Rules of Civil Procedure 12(b)(1)—lack of subject matter jurisdiction—and 12(b)(6)—failure to state a claim upon which relief can be granted. I will first consider the court's subject matter jurisdiction and then consider whether the plaintiff has adequately stated a claim under both Title IX and the Equal Protection Clause.

III. SUBJECT MATTER JURISDICTION

The West Virginia Board of Education and Superintendent Clayton Burch (collectively, the "State Board Defendants") have moved to dismiss the complaint for lack of subject matter jurisdiction. They argue first that Plaintiff' lacks standing because the State Board Defendants did not cause her injuries, and second that Plaintiff's claims are not ripe for judicial consideration because the law has not been enforced against her.

The WVSSAC similarly challenges B.P.J.'s standing and the ripeness of her claims. WVSSAC argues that

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1. Both claims named Patrick Morrisey in his official capacity as the Attorney General of West Virginia, but Mr. Morrisey is no longer a defendant because the court has granted the Joint Motion to Dismiss Equal Protection Claim Against Defendant Patrick Morrisey in his Official Capacity as Attorney General of the State of West Virginia. [ECF No. 127].

because it has no mandate to enforce the law against B.P.J., it is an improper party. The Harrison County Board of Education and Harrison County Superintendent Dora Stutler (collectively, the "County Board Defendants") argue that their actions are not the cause of B.P.J.'s harm and that they have not and will not enforce the law against her. Though their arguments are clothed in 12(b)(6), they nonetheless challenge Plaintiff's standing and the claims' ripeness. Accordingly, I will address these arguments as if they were made under 12(b)(1).

A. Standard of Review

It is axiomatic that a court must have subject matter jurisdiction over a case before it can render any decision on the merits. A motion to dismiss challenging that jurisdiction arises under Federal Rule of Civil Procedure 12(b)(1). Rule 12(b)(1) covers challenges to Article III standing and ripeness because those issues implicate a court's competency to hear a claim and therefore its subject matter jurisdiction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) ("[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement . . . by alleging an actual case and controversy."). A defendant can challenge the court's subject matter jurisdiction facially—by arguing that the facts alleged in the complaint are not sufficient to establish jurisdiction—or factually—by arguing that the facts establishing jurisdiction are untrue. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). If a factual challenge is made, the court may hold an evidentiary

hearing to test the validity of the jurisdictional allegations. *Id.* However, if a facial challenge is made, as it is here, "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Id.*

B. Discussion

B.P.J. has standing to sue the State Board Defendants, the County Board Defendants, and the WVSSAC. She has adequately alleged an injury-in-fact—that she will be treated differently on the basis of sex; she has asserted that under H.B. 3293, each defendant will take some action that will cause her asserted harm; and she has established that each defendant can redress her claims because a favorable ruling against each will prevent them from enforcing the Act as to B.P.J.

B.P.J.'s claims are ripe against each defendant. First, her claims are fit for judicial review because they do not require any future factual development. The question in this case is whether it is permissible under Title IX or the Equal Protection Clause to prevent B.P.J., a transgender girl, from playing on girls' sports teams. H.B. 3293 requires each defendant to prevent B.P.J. from playing on girls' sports teams; no future factual development will change that effect. Second, and consistent with my ruling on the preliminary injunction, B.P.J. has sufficiently alleged that she will experience hardship if this law is enforced against her.

IV. FAILURE TO STATE A CLAIM

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint or pleading. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). To achieve facial plausibility, the plaintiff must plead facts allowing the court to draw the reasonable inference that the defendant is liable, moving the claim beyond the realm of mere possibility. *Id.* Mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" are insufficient. *Twombly*, 550 U.S. at 555.

A. DISCUSSION

All named defendants claim that B.P.J. has failed to state a claim upon which relief can be granted under both Title IX and the Equal Protection Clause.

B.P.J. has plausibly stated a claim under Title IX against State Superintendent Burch, Harrison County Superintendent Stutler, and the WVSSAC. She has sufficiently alleged that each defendant (1) will exclude

her from participation in an educational event on the basis of sex, (2) receives federal funding, either directly or indirectly, and (3) that the exclusion from school events will cause her harm. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied,* No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021) (defining the elements of a Title IX claim).

B.P.J. has plausibly stated an equal protection claim against State Superintendent Burch, Harrison County Superintendent Stutler, and the WVSSAC. She has alleged that each defendant, acting under the color of state law, is discriminating against her on the basis of sex. Both the Supreme Court and the Fourth Circuit have ruled that discrimination on the basis of a person's transgender status is discrimination on the basis of sex. *Bostock v. Clayton Cty.*, ___ U.S. ___, 140 S. Ct. 1731, 1741 (2020); *Grimm*, 972 F.3d at 609; 616 (2020).

V. CONCLUSION

For the foregoing reasons, the Motions to Dismiss [ECF Nos. 71, 72, 74] are **DENIED**. The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: December 1, 2021

/s/ Joseph R. Goodwin
JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

APPENDIX E — RELEVANT STATUTORY PROVISIONS & REGULATIONS

WEST VIRGINIA CODE § 18-2-25d.

§ 18-2-25d. Clarifying participation for sports events to be based on biological sex of the athlete at birth.

(a) The Legislature hereby finds:

(1) There are inherent differences between biological males and biological females, and that these differences are cause for celebration, as determined by the Supreme Court of the United States in United States v. Virginia (1996);

(2) These inherent differences are not a valid justification for sex-based classifications that make overbroad generalizations or perpetuate the legal, social, and economic inferiority of either sex. Rather, these inherent differences are a valid justification for sex-based classifications when they realistically reflect the fact that the sexes are not similarly situated in certain circumstances, as recognized by the Supreme Court of the United States in Michael M. v. Sonoma County, Superior Court (1981) and the Supreme Court of Appeals of West Virginia in Israel v. Secondary Schools Act. Com'n (1989);

(3) In the context of sports involving competitive skill or contact, biological males and biological females are not in fact similarly situated. Biological males would displace females to a substantial extent if permitted to compete on teams designated for

biological females, as recognized in Clark v. Ariz. Interscholastic Ass'n (9th Cir. 1982);

(4) Although necessarily related, as concluded by the United States Supreme Court in Bostock v. Clayton County (2020), gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity. Classifications based on gender identity serve no legitimate relationship to the State of West Virginia's interest in promoting equal athletic opportunities for the female sex; and

(5) Classification of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex.

(b) Definitions. — As used in this section, the following words have the meanings ascribed to them unless the context clearly implies a different meaning:

(1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.

(2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.

(3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.

(c) Designation of Athletic Teams. —

(1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education, including a state institution that is a member of the National Collegiate Athletic Association (NCAA), National Association of Intercollegiate Athletics (NAIA), or National Junior College Athletic Association (NJCAA), shall be expressly designated as one of the following based on biological sex:

(A) Males, men, or boys;

(B) Females, women, or girls; or

(C) Coed or mixed.

(2) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.

(3) Nothing in this section shall be construed to restrict the eligibility of any student to participate in any interscholastic, intercollegiate, or intramural

athletic teams or sports designated as "males," "men," or "boys" or designated as "coed" or "mixed": Provided, That selection for a team may still be based on those who try out and possess the requisite skill to make the team.

(d) Cause of Action. —

(1) Any student aggrieved by a violation of this section may bring an action against a county board of education or state institution of higher education alleged to be responsible for the alleged violation. The aggrieved student may seek injunctive relief and actual damages, as well as reasonable attorney's fee and court costs, if the student substantially prevails.

(2) In any private action brought pursuant to this section, the identity of a minor student shall remain private and anonymous.

(e) The State Board of Education shall promulgate rules, including emergency rules, pursuant to §29A-3B-1 et. seq. of this code to implement the provisions of this section. The Higher Education Policy Commission and the Council for Community and Technical College Education shall promulgate emergency rules and propose rules for legislative approval pursuant to §29A-3A-1 et. seq. of this code to implement the provisions of this section.

Appendix E

WEST VIRGINIA CODE § 18-2-25

§ 18-2-25. Authority of county boards to regulate athletic and other extracurricular activities of secondary schools; delegation of authority to West Virginia Secondary School Activities Commission; authority of commission; approval of rules by state board; incorporation; funds; participation by private and parochial schools and by home-schooled students and participants in the Hope Scholarship Program or in a Microschool or Learning Pod.

(a) The county boards of education shall exercise the control, supervision, and regulation of all interscholastic athletic events, and other extracurricular activities of the students in public secondary schools, and of those schools of their respective counties. The county board of education may delegate control, supervision, and regulation of interscholastic athletic events and band activities to the West Virginia Secondary School Activities Commission.

(b) The West Virginia Secondary School Activities Commission is composed of the principals, or their representatives, of those secondary schools whose county boards of education have certified in writing to the State Superintendent of Schools that they have elected to delegate the control, supervision, and regulation of their interscholastic athletic events and band activities of the students in the public secondary schools in their respective counties to the commission. The West Virginia Secondary School Activities Commission may exercise the control, supervision, and regulation of interscholastic athletic events and band activities of secondary schools,

delegated to it pursuant to this section. The rules of the West Virginia Secondary School Activities Commission shall contain a provision for a proper review procedure and review board and be promulgated in accordance with the provisions of chapter 29A of this code, but shall, in all instances, be subject to the prior approval of the state board. The West Virginia Secondary School Activities Commission, may, with the consent of the State Board of Education, incorporate under the name of West Virginia Secondary School Activities Commission, Inc., as a nonprofit, nonstock corporation under the provisions of chapter 31 of this code. County boards of education may expend moneys for and pay dues to the West Virginia Secondary School Activities Commission, and all moneys paid to the commission, as well as moneys derived from any contest or other event sponsored by the commission, are quasi-public funds as defined in §18-5-1 et seq. of this code, and the funds of the commission are subject to an annual audit by the State Tax Commissioner.

(c) The West Virginia Secondary School Activities Commission shall promulgate reasonable rules providing for the control, supervision, and regulation of the interscholastic athletic events and other extracurricular activities of private and parochial secondary schools as elect to delegate to the commission control, supervision, and regulation, upon the same terms and conditions, subject to the same rules and requirements and upon the payment of the same fees and charges as those provided for public secondary schools. Any such private or parochial secondary school shall receive any monetary or other benefits in the same manner and in the same proportion as any public secondary school.

(d) Notwithstanding any other provision of this section, or the commission's rules, the commission shall consider eligible for participation in interscholastic athletic events and other extracurricular activities of secondary schools a student who is receiving home instruction pursuant to §18-8-1(c) of this code, is a participant in the Hope Scholarship Program, pursuant to §18-8-1(m) of this code and as provided for in §18-31-1, et seq. of this code, or participates in a microschool or learning pod, pursuant to §18-8-1(n) of this code, and who:

(1) Has demonstrated satisfactory evidence of academic progress for each year in compliance with the provisions of that subsection: Provided, That the student's average test results are within or above the fourth stanine in all subject areas;

(2) Has not reached the age of 19 by August 1 of the current school year;

(3) Is an amateur who receives no compensation but participates solely for the educational, physical, mental and social benefits of the activity;

(4) Agrees to comply with all disciplinary rules of the West Virginia Secondary School Activities Commission and the county board in which the student lives; and

(5) Agrees to obey all rules of the West Virginia Secondary School Activities Commission governing awards, all-star games, parental consents, physical examinations, and vaccinations applicable to all high school athletes.

> Eligibility is limited to participation in interscholastic athletic events and other extracurricular activities at the public secondary school serving the attendance zone in which the student lives: Provided, That students who leave a school during the school year are subject to the same transfer protocols that apply to member-to-member transfers. Reasonable fees may be charged to the student to cover the costs of participation in interscholastic athletic events and other extracurricular activities.

(e) Students enrolled in a private school shall be eligible to participate in extracurricular activities at the public secondary school serving the attendance zone in which the student lives if the extracurricular activity is not offered at the student's private school: Provided, The student meets the requirements of subsection (d)(4) and (d)(5) of this section.

(f) The West Virginia Secondary School Activities Commission shall recognize preparatory athletic programs, whose participants attend a secondary school in West Virginia for academic instruction, as nonparticipating members of the commission solely for the purpose of competing on the national level: Provided, That the preparatory athletic program shall pay the same fees as member schools. Such recognition does not entitle the preparatory athletic program to compete against a member school during the regular season or in any commission state championship events. The commission may promulgate an emergency rule pursuant to subsection (b) of this section, if necessary, to carry out the intent of this subsection.

Appendix E

West Virginia C.S.R. §126-26-4, in part.

126 CSR 26

Title 126
Legislative Rule
Board of Education
Series 26
Participation in Extracurricular Activities (2436.10)

§126-26-4. Eligibility.

4.1 In order to participate in the extracurricular activities to which this policy applies, a student must meet the following:

4.1.a. adhere to all state and local attendance policies.

4.1.b. maintain a 2.0 average.

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West Virginia C.S.R. §127-3-22.

Title 127
Legislative Rule
West Virginia Secondary School Activities Commission
Series 3
Provisions Governing Contests

§127-3-22. Cross Country (Boys and Girls).

22.1. Rules: Cross country rules published by the NFHS are the official rules for all interscholastic competition unless otherwise provided by Commission modification.

22.2. Organized team practice will begin on Monday of Week 5 and the first meet may be held on Saturday of Week 7.

22.3. Length of Season: The cross country season will end for each team or individual at tournament elimination.

22.4. Maximum Team Contests: A cross country team will be permitted 16 meets exclusive of regional and state contests.

22.5. Scrimmages: Schools may conduct two cross country scrimmages with another high school may be conducted. (See Glossary.)

22.6. Individual students of a team must have practiced on 12 separate days, exclusive of the day of a contest, before participating in an interscholastic contest.

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22.7. A student may accept awards in WVSSAC sanctioned events and non-sanctioned events during the entire year. These awards must be consistent with the items specified in the §127-3-5.

. . .

West Virginia C.S.R. §127-3-29.

§127-3-29. Track and Field (Boys and Girls).

29.1. Rules: Track and Field rules published by the NFHS are the official rules for all interscholastic competition unless otherwise provided by Commission modification.

29.2. Organized Team Practice: Organized team practice will begin on Monday of Week 35 and the first contest may be on Wednesday of Week 37.

29.3. Length of Season: The track and field season will end for each team or individual by WVSSAC tournament elimination.

29.4. Maximum Team Contests: A track and field team will be permitted 16 meets exclusive of sectional, regional, and state contests.

29.5. Participation Limitations: Maximum of four events per participant per meet.

29.6. Scrimmages: Not permitted.

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29.7. Individual students of a team must have practiced on 12 separate days, exclusive of the day of a contest, before participating in an interscholastic contest.

29.8. A student may accept awards in WVSSAC sanctioned events and non-sanctioned events during the entire year. These awards must be consistent with the items specified in §127-3-5.

29.9. Middle Schools – The above will apply for middle schools with the following adaptations:

29.9.a. Middle school teams will be permitted 14 meets and only two meets per week.

29.9.b. Middle school season will be completed by Thursday of Week 46.

29.9.c. Participation limitation: Middle school students, regardless of grade levels (6, 7, or 8), may compete in a maximum of four events, of which only three may be running events, including relays.