No. 24-43

IN THE
Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,

Petitioners,

v.

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

HEATHER JACKSON,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* TITLE IX SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST *OF AMICI CURIAE*

Amici curiae are preeminent scholars on Title IX. They have published and lectured on the history of Title IX and the Education Amendments of 1972. Their scholarship establishes that Title IX does not allow for the categorical exclusion of transgender girls from girls' sports teams at their schools. *Amici* submit this brief to explain why Respondent's position aligns with the text of Title IX, the Javits Amendment, and Title IX's implementing regulations. A list of *amici* is provided in the Appendix.[1]

SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 prohibits recipients of federal funds from excluding individuals, denying benefits, or otherwise subjecting persons to discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Properly construed using established textualist tools, the statutory language of Title IX is inconsistent with a categorical ban that excludes all transgender girls from participating on girls' sports teams.

Petitioners argue that the permission for sex-separated teams found in Title IX's regulations effectively mandates categorical exclusion of transgender girls from girls' teams. The statutory text says otherwise. First, where Congress intended to impose mandatory requirements in Title IX, it used

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief. SUP. CT. R. 37.6.

mandatory language. *Compare* 20 U.S.C. § 1681(a) ("No person . . . shall . . . be excluded . . .") *with* 20 U.S.C. § 1686 ("nothing . . . shall be construed to prohibit"). The Javits Amendment, as discussed in further detail below, uses permissive language, directing regulations that include "reasonable provisions." *See* Part I.C, *infra*. Second, the limited exceptions enumerated in Title IX permit certain sex-based distinctions but do not require them. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 11 (2012) ("*shall* is mandatory and *may* is permissive") (*Reading Law*). Permission to make distinctions is not a mandate to exclude, and none of the enumerated exceptions apply to sports teams. *See* Part I.B, *infra*. Third, Congress's instruction that any regulations must be "reasonable" and "consider the nature of particular sports" forecloses categorical rules that operate without such consideration. A mandate for wholesale exclusion would nullify these limiting terms. *See Reading Law* § 26 (explaining the surplusage canon as instructing that no word should be ignored or interpreted to have no consequence).

A rigorous statutory interpretation of Title IX—guided by well-established textualist canons—leads to a clear and compelling conclusion: Title IX's core nondiscrimination mandate prohibits blanket exclusions based on sex but permits some conditions on participation. A ruling in favor of Respondent would not mandate a requirement for every transgender student to participate in every aspect of every sport at every level of competition without any limits or conditions. Rather, such a ruling would affirm that state legislatures retain the authority to establish reasonable sex-based conditions on

participation that consider the nature of particular sports. Any other holding would contravene the ordinary meaning of Title IX's nondiscrimination mandate: to ensure that no student is denied the opportunity to participate or subjected to discrimination in federally funded education programs on the basis of sex.

ARGUMENT

I. TITLE IX PROHIBITS CATEGORICAL EXCLUSIONS ON THE BASIS OF SEX WHILE ALLOWING SEX-SEPARATE TEAMS

A. Title IX Forbids Categorical Exclusions on the Basis of Sex

"Textualism, in its purest form, begins and ends with what the text says and fairly implies." *Reading Law* at Introduction Part A (Textualism and Its Challenges); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.") (citations omitted). Title IX's operative clause begins and ends with a clear directive: "No 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[.]" 20 U.S.C. § 1681(a).

The terms "exclude," "deny," and "subject to discrimination" all refer to adverse treatment, and each carries a clear, prohibitive meaning. There is no

question that a law that excludes a subset of students from an education program or activity on the basis of sex fits squarely within this prohibition. Title IX's plain meaning is clear: it flatly bars exclusion on the basis of sex. While other provisions discussed *infra* recognize "specific, narrow exceptions" to Title IX's "broadly written general prohibition on discrimination," nothing in the statute's operative text authorizes schools to categorically exclude students from an education program or activity based on sex. *See Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 175 (2005).

Petitioners contend that although Title IX does not define the term "sex," it means "'either of the two divisions, male or female, into which persons . . . are divided, with reference to their reproductive functions." Petr.'s Br. 18 (citations omitted). Even assuming that definition applies, as the Court did in *Bostock v. Clayton County,* the comparative inquiry is straightforward: if a student is permitted to participate on a girls' team but would be denied that opportunity if her sex assigned at birth was different, then sex is a but-for cause of the adverse treatment. 590 U.S. 644, 661 (2020) ("[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. . . . [T]he individual employee's sex plays an unmistakable and impermissible role in the discharge decision.").

Courts should not import limitations that are not found in the statute's text. *See Reading Law* § 8

(noting "[the omitted-case canon's] principle that a matter not covered is not covered is so obvious that it seems absurd to recite it"). The text Congress chose in Title IX—"on the basis of sex"—is causal and cannot be rewritten to protect rules that flatly bar participation based on sex from Title IX's reach. *See Bostock*, 590 U.S. at 660 ("[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."). Under the ordinary meaning of "on the basis of," causation is satisfied when the outcome would differ if the person's sex were different. *Reading Law* § 9 (explaining that general words "are not to be arbitrarily limited").

Further, the statutory language of Title IX unambiguously confers an individual right, ensuring that its protections extend to every individual student. 20 U.S.C. § 1681(a) ("No person . . . shall . . . be excluded . . . "). In *Cannon v. University of Chicago*, this Court recognized that Title IX was enacted "to provide individual citizens effective protection" against "the use of federal resources to support discriminatory practices." 441 U.S. 677, 704 (1979). The Department of Education's implementing regulation, discussed further *infra*, directs administrative enforcement to examine compliance by considering the totality of a school's athletic program, but that does not diminish or override the individual right guaranteed by the text of the statute itself. *See* 34 C.F.R. § 106.41(b) & (c) (1980). The statute is clear: every student is entitled to the protections of Title IX.

Thus, under a faithful textualist interpretation of Title IX, excluding transgender girls like Respondent from girls' teams constitutes a direct exclusion of students from an education program or activity that

is available to others, based solely on their sex assigned at birth. Such treatment is not merely a procedural or administrative distinction; it is a substantive denial of equal opportunity to participate in education activities. Title IX's guarantee of individual rights was designed precisely to prohibit this kind of exclusion, ensuring that no student is denied the benefits of, or subjected to sex discrimination in, any education program or activity receiving federal financial assistance. The statutory mandate is clear: categorical policies that exclude transgender girls from girls' teams violate the individual rights guaranteed by Title IX.

B. Title IX's Statutory Carveouts and Enumerated Exceptions Foreclose Unwritten Categorical Exclusions

While the core mandate of Title IX prohibits exclusions based on sex, Congress enumerated specific statutory exceptions permitting different treatment based on sex in discrete circumstances. Section 1681(a) contains discrete carveouts, such as for religious tenets, social fraternities or sororities, and voluntary youth service organizations, [2] and

[2] Section 1681(a)'s enumerated exceptions permit sex-based distinctions for: educational institutions controlled by religious organizations, 20 U.S.C. § 1681(a)(3); membership practices of social fraternities and sororities, *id.* § 1681(a)(6)(A); father-son or mother-daughter activities at educational institutions, *id.* § 1681(a)(8); scholarship awards in beauty pageants, *id.* § 1681(a)(9); Boys State, Girls State, and similar activities, *id.* § 1681(a)(7); and voluntary youth service organizations like Boy Scouts, Girl Scouts, YMCA, YWCA, and Camp Fire Girls, *id.* § 1681(a)(6)(B). Notably,

Section 1686 permits sex-separate living facilities. 20 U.S.C. §§ 1681(a), 1686. Notably, none of the statutory exceptions address sports.

Section 1686 of Title IX, which states that "[n]otwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes," warrants additional discussion because of the contention that this provision is rendered meaningless if a transgender girl is allowed to participate on a girls' sports team. *Id.* § 1686. *See* Petr.'s Br. at 22. But a textualist reading counsels otherwise. Section 1686 is explicitly confined to living facilities, and its text cannot be stretched to justify broader exclusions elsewhere in the statute. *See Reading Law* § 10 (explaining the negative-implication canon means that "[t]he expression of one thing implies the exclusion of others"); *id.* § 28 (clarifying that under the general/specific canon, a narrow, specific provision does not void a broader command).[3]

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none of these enumerated exceptions address eligibility for school sports.

[3] A textualist interpretation of Title IX disfavors a review of legislative history because the plain text of this provision is unambiguous as to its scope. *See Reading Law* § 66 (dispelling the "false notion" that legislative history is valuable in statutory interpretation); *see also United States v. Rutherford,* 442 U.S. 544, 555 (1979) ("Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied."). However, if this Court chooses to examine the legislative history of Section 1686, such an inquiry confirms that Congress intended Section 1686 only to

Additionally, Petitioner's claim that Congress indicated its intent to exclude transgender students from the protections of Title IX through legislation passed in 2022 is plainly incorrect and relies on the wrong statute. Petitioner argues that Congress knew how to "extend protections beyond sex" because "Title IX provisions adopted in 2022 refer to 'consideration' of 'transgender' status." Petr.'s Br. at 19. Petitioner cites 20 U.S.C. § 1689(a)(6), which is not part of Title IX at all. Although Section 1689 appears in the same chapter of the U.S. Code as Title IX (which is codified at 20 U.S.C. §§ 1681–1688), Section 1689 was enacted decades later as part of a legislative act *separate* from Title IX—the Violence Against Women Act Reauthorization Act of 2022 and the Consolidated Appropriations Act, 2022, Public Law 117-103, 136 Stat. 936 (2022), and *not* as an amendment to Title IX. Petitoner's reliance on Section 1689(a)(6) to interpret Title IX's scope is unfounded, as Congress expressed no intent for Section 1689 to alter, expand, or modify the statutory text or framework of Title IX. Courts must interpret a statute according to the objective meaning a reasonable reader would draw from the statute's *own* text in context, not by importing language from later, separately enacted statutes or nearby code provisions absent a clear textual signal that Congress meant to amend the earlier law. *See Reading Law* § 2 (explaining that textualism

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address concerns that the general nondiscrimination mandate of Title IX might otherwise be interpreted to *require* co-ed dormitories, not to sanction discrimination against transgender students. *See* 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) (stating that Title IX regulations should "permit differential treatment by sex only . . . [when] absolutely necessary to the success of the program").

examines the words of the text, not extrinsic sources). This is especially so where, as here, Congress enacted the later provision as part of a distinct legislative program and not to revise Title IX. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143–44 (2001) (explaining that the mere fact that two statutes are codified in proximity does not mean that one modifies the other unless Congress clearly expresses such intent) (citation omitted).

Title IX's statutory exceptions and carveouts demonstrate that when Congress intended to allow categorical distinctions based on sex, it did so expressly. The text of Title IX says nothing authorizing the categorical exclusion of transgender girls from girls' sports teams; in fact, Congress's intent with respect to sports appears nowhere in the statutory language of Title IX. Reading an unwritten exclusion into the statute conflicts with the familiar inference that the express listing of exceptions suggests the exclusion of others. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) *(*"Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citation omitted). Textualist principles caution courts not to infer new exceptions that Congress did not expressly articulate in the law—especially not categorical exceptions like banning an entire group of students from sports teams. If a particular situation is not identified within a statute, it should be treated as not covered by that statute, and the fact that some exceptions are listed means others should not be added by implication. *See Reading Law* § 8 (explaining the omitted-case canon as "a matter not covered is to be treated as not

covered"); *id.* § 10 (explaining the negative-implication canon).

C. The Javits Amendment Allows for Reasonable, Sport-Specific Conditions, Not Categorical Bans

Just two years after enacting Title IX, Congress passed the Education Amendments of 1974, which included a provision known as the Javits Amendment. This amendment directed the Department of Health, Education, and Welfare (HEW) (now the Department of Education) to "prepare and publish . . . proposed regulations implementing the provisions of [T]itle IX . . . which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Education Amendments of 1974, Public Law 93–380, § 844, 88 Stat. 484 (1974). Thus, through the Javits Amendment Congress clarified that sex separation in athletics could be permissible under Title IX when "reasonable" and taking into consideration "the nature of particular sports." *Id.*

The Javits Amendment's allowance for the "reasonable" regulation of athletic teams tailored to "the nature of particular sports" does not include exclusive language that mandates sex separation of sports teams, that authorizes wholesale exclusions based on sex alone, or that excludes consideration of other equitable considerations. This Court has recognized that Congress uses particular language when it intends to impose a mandate. *See Reading Law* § 11 ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive[.]"); *Biden v. Texas*, 597 U.S. 785, 802 (2022) (noting the

Supreme Court has "'repeatedly observed' that 'the word "may" clearly connotes discretion'") (quoting *Opati v. Republic of Sudan*, 590 U.S. 418, 428 (2020)). For example, in *Mims v. Arrow Financial Services, LLC*, the Supreme Court held that a statute providing that "'[a] person or entity may . . . bring [an action] in an appropriate court of that State,'" should not be construed to prevent a plaintiff from bringing the claim in federal court because the language is permissive and does not use terms like "only" or "exclusively." 565 U.S. 368, 380 (2012) (quoting 47 U.S.C. § 227(b)(3)). Had Congress wanted to convey such exclusivity here, it could have done so.

A categorical exclusion is plainly contrary to the Javits Amendment. The Javits Amendment does not contain rigid categorical rules; in fact, it does not require sex separation at all. Here again, the omitted-case canon guides courts away from creating an across-the-board exclusion that Congress itself did not specifically include in the law. *See Reading Law* § 8 (cautioning judges not to assert judicial power to "supply words or even whole provisions that have been omitted"). Further, Congress's specific instruction to account for the "nature of particular sports" narrows any more general discretion to impose sex-based eligibility conditions and forecloses categorical rules that are imposed based on generalized assumptions or stereotypes rather than a sport-by-sport analysis. *See id.* § 28 (explaining that the general/specific canon instructs that a specific provision is treated as a "'nearer and more exact view'" of the general provision) (quoting Jeremy Bentham, "A Complete Code of Laws," in 3 *The Works of Jeremy Bentham* 210 (John Bowring ed., 1843)).

Thus, a categorical ban excluding a transgender girl from participating on any girls' teams is inconsistent with the Javits Amendment because it is neither "reasonable" nor does it "consider[ ] the nature of particular sports." Rather, it applies categorically—from a young elementary-aged girl simply wishing to run with her friends on a recreational girls' cross-country team to an elite collegiate volleyball star—without consideration of reasonable factors such as the ages of the students or the level of competition. And imposing a ban categorically assumes that all transgender girls have an advantage in every sport, a premise not supported by the record in this case, and in direct contradiction to Congress's express direction that "the nature of particular sports" must be considered in regulating on sex separation in athletics.

D. The Title IX Athletics Regulation Implements the Javits Amendment by Requiring a Noncategorical Approach that Preserves Equal Athletic Opportunity

After the Javits Amendment passed, HEW promulgated its Title IX implementing regulations in 1975. The Title IX regulations were required to be "la[id] before" Congress, allowing Congress to review the proposed regulations and, if Congress concluded they were inconsistent with the statute, to overturn them. *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 531–32 (1982). Congress did not disapprove the Title IX regulations, which the Supreme Court has explained "strongly implies that [they] accurately reflect congressional intent." *Grove City Coll. v. Bell,* 465 U.S. 555, 568 (1984); *see also N. Haven Bd. of*

Educ., 456 U.S. at 533–34. As a result, the Title IX regulations are "'entitled to very great respect'" because they are contemporaneous to the enactment of the statute and were not disapproved by Congress. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024) (quoting *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210 (1827)).

The Title IX athletics regulation, now codified at 34 C.F.R. § 106.41, first restates Title IX's core statutory prohibition on sex discrimination, clarifying that "[n]o person shall, on the basis of sex, be excluded from participation in . . . any interscholastic, intercollegiate, club or intramural athletics" offered by a school. In addition, the regulation prohibits schools from "provid[ing] any such athletics separately on [the] basis [of sex]." 34 C.F.R. § 106.41(a).

Having reiterated this foundational principle, the regulation implements the congressional directive for an approach to athletics that is "reasonable" and "consider[s] the nature of particular sports" by permitting schools to have sex-separate teams in limited circumstances: only "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 45 C.F.R. § 86.41(b) (1975) (currently codified at 34 C.F.R. § 106.41(b)). Then, the regulation requires schools to provide equal athletic opportunity for all students and enumerates 10 factors that the Department will consider when determining compliance. 45 C.F.R. § 86.41(c) (1975) (currently codified at 34 C.F.R. § 106.41(c)).

Using Title IX's athletics regulation to justify a categorical ban excluding all transgender girls from all girls' teams would render the statute's core nondiscrimination mandate meaningless for these

students. More fundamentally, it would allow a regulation to override the individual statutory right that Title IX's text creates. That result is foreclosed by the principles of statutory interpretation. Those principles direct that the regulatory provision permitting (but not requiring) sex-separate sports teams must be read in harmony with the statute's prohibition against sex discrimination. 20 U.S.C. § 1681(a); 34 C.F.R. § 106.41(b) (echoing the statutory prohibition against sex discrimination); *Reading Law* § 27 (directing textual provisions to be interpreted harmoniously). *See also Mercer v. Duke Univ.*, 190 F.3d 643, 646 (4th Cir. 1999) ("Subsections (a) and (b) of section 106.41 stand in a symbiotic relationship to one another."). Accordingly, the regulation's permission for sex separation in sports teams cannot eviscerate the statutory command under Section 1681(a) that "[n]o person . . . shall . . . be excluded . . . on the basis of sex."

Also, under bedrock interpretive rules, Congress's directives must be given operative effect and cannot be read out of the text. *See Reading Law* § 4 (explaining the presumption against ineffectiveness favors an interpretation that "furthers rather than obstructs" the text's purpose). When interpreting the Javits Amendment, courts must not adopt an interpretation that renders the instruction for reasonableness and consideration of the nature of the sport worthless. *See id.* § 26 (describing the surplusage canon as holding that no word should be ignored or interpreted to have no consequence); *see also id.* § 24 (instructing that the entire text must be interpreted as a whole); *id.* § 55 (emphasizing that repeals by implication are "'very much disfavored'"). A provision that categorically excludes transgender

students without considering the nature of the sports to which it applies or whether the exclusion is based on sex would nullify those terms in practice.

The regulatory allowance to create sex-separate teams in some circumstances is not a license to categorically exclude a group of students from all sports teams based on sex. Courts must read regulations to avoid conflict with the statute; and here, such a broad reading of the regulation would exceed the statutory text. *See id.* § 27 (explaining that provisions should be interpreted as "compatible, not contradictory" under the harmonious-reading canon); *id.* § 24 (discussing the whole-text canon); *id.* § 8 (explaining the omitted-case canon). Further, a textualist reading instructs that exceptions should be read narrowly and the general rule broadly. *See id.* § 28 (explaining that under the general/specific canon, a specific exception suspends the general rule only to the precise extent it covers and no more). The general rule of Title IX is a broad prohibition on exclusion "on the basis of sex"; by contrast, the athletics regulation is a narrow exception authorizing sex-separated teams in discrete circumstances; it cannot be read to create a categorical ban that the statute itself does not authorize, nor can an agency regulation be construed to contradict, enlarge, or override the statute's operative command.

Additionally, the Title IX athletics regulation is permissive, not mandatory. The contexts in which "may" and "shall" (or "must") are used throughout Title IX's statutory text and the Title IX regulations, or within a single provision, also informs the interpretation. Courts presume that when a text repeats a term, the term carries the same meaning throughout the text; materially different terms within

a text suggest different meanings. *Id.* § 25 ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggest a variation in meaning."). Courts have notably applied the latter principle to find that "may" is permissive and "shall" is mandatory when the terms are used in the same provision. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (agency retains discretion where statute provides that the agency "'may'" reduce a sentence in light of "Congress' use of the permissive 'may' . . . and mandatory 'shall' in the very same section") (quoting 18 U.S.C. § 3621(e)(2)). The Title IX athletics regulation follows this pattern, providing that schools "may" provide sex-separate teams, followed by a requirement that the school "shall" provide equal athletic opportunity for all students. 34 C.F.R. § 106.41(b) & (c); *see Tennessee v. Dep't of Educ.*, 104 F.4th 577, 604 (6th Cir. 2024) (describing use of "may" in Title IX as "permissive language" and contrasting it with the adjacent use of the term "shall," which is "mandatory language").

Further, the Title IX regulations have, since their promulgation, permitted schools to deny students the opportunity to participate on a particular male or female team based on sex under specific circumstances: based on the nature of the sport or if it is a contact sport. For instance, a school may, in some circumstances, offer a volleyball team for girls but not boys, and a boy may be excluded from trying out for that team. However, the regulations have also always required the school to nonetheless provide overall equal athletic opportunity for all students regardless of sex. 34 C.F.R. § 106.41(b) & (c). Thus, even if that boy is excluded from playing on the volleyball team because of his sex, there is no Title IX violation under

the regulations if, under the factors listed in 34 C.F.R. § 106.41(c), there are equal opportunities in the school's overall athletics program such that there are other boys' teams on which this boy could participate. The same is not true when a transgender girl is categorically excluded from playing on all girls' sports teams because she will have *no* opportunity to participate on any girls' teams.

This wholescale exclusion of all transgender girls from an education program or activity on the basis of sex cannot be reconciled with Title IX's textual prohibition against discrimination based on sex or Congress's specific instruction for regulations that "consider the nature of particular sports." Where the regulations allow distinctions (e.g., sex-separated teams), those distinctions are tied directly to the statute's equal-opportunity mandate, not to a broad authority to outright ban students from participation because of their sex. A categorical exclusion goes beyond Congress's directive in the Javits Amendment and falls squarely within exclusion, which the text prohibits. Accordingly, a simple textualist interpretation integrates Title IX, the Javits Amendment, and its implementing regulation together into a simple instruction: separation is permitted, discrimination is not; categorical bans collapse the distinction.

II. THE FRAMEWORK OF TITLE IX, INCLUDING THE JAVITS AMENDMENT AND ITS IMPLEMENTING REGULATION, REQUIRES A NONCATEGORICAL APPROACH THAT PRESERVES EQUAL ATHLETIC OPPORTUNITY

The determination that Title IX forbids the categorical exclusion of a transgender girl from girls' teams does not imply that Title IX precludes all sex-based conditions on participation. To the contrary, Title IX's text and structure permit schools to adopt such conditions.

Title IX, both on its own and when viewed as a whole, including the Javits Amendment and its implementing athletic regulation, allows reasonable conditions limiting participation, even when based on sex, when they flow from sport-specific differences. The Javits Amendment and Title IX's regulatory factors confirm precisely this interpretation, recognizing that competition is not monolithic. Education Amendments of 1974 § 844; 34 C.F.R § 106.41. Through the Javits Amendment, Congress deliberately allowed for "reasonable provisions considering the nature of particular sports," inviting contextual and nuanced interpretation, not rigid categorical rules that apply across athletic programs. *See Reading Law* at Introduction Part B (Permissible Meanings) (explaining that legislatures often use vague terms to cover varied situations unforeseen in advance).

Here, the fair-reading principle points to a modest, administrable rule: Title IX forbids blanket exclusions of transgender girls from girls' teams because those exclusions are imposed "on the basis of sex," but it permits reasonable conditions that consider the

nature of the sport and further the interests that Congress recognized in the Javits Amendment. *See Reading Law* at Introduction Part B (The "Fair Reading" Method) (endorsing the "fair reading" interpretive approach). This reading harmonizes the plain text of the Javits Amendment and the longstanding, contemporaneous athletics regulation without swallowing the nondiscrimination mandate of Title IX.

This reading also avoids the pitfalls associated with both extreme interpretations. It does not transform Title IX into a mandate for co-ed athletics programs, which would read Section 106.41(b) out of the Code of Federal Regulations. Nor does it turn the athletics regulation into a broad license to exclude entire classes of students, which would reduce the nondiscrimination prohibition to a nullity for the affected students. It instead gives full effect to the statutory text of Title IX and the Javits Amendment, as well as the contemporaneous regulation, consistent with the canons of construction that textualists routinely apply.

CONCLUSION

As Justice Scalia's formative text instructs, "[t]he court's job is to carry out the legislative project, not to change it in conformity with the judge's view of sound policy," nor is it "the court's function to alter the legislative compromise." *Reading Law* at Foreword, Introduction Part A (Textualism and Its Challengers); *see also Loper Bright Enters.*, 603 U.S. at 403–04 (2024) (courts should "construe the law with '[c]lear heads . . . and honest hearts,' not with an eye to policy preferences that had not made it into the statute")

(quoting 1 Works of James Wilson 363 (J. Andrews ed. 1896)). A faithful textualist reading makes clear that Title IX prohibits blanket exclusions "on the basis of sex," while permitting sex-separate teams and reasonable, sport-specific conditions to achieve equal athletic opportunity for all students. A state law that categorically excludes transgender girls from participating in girls' sports is inconsistent with Title IX's text. Therefore, this Court should affirm the lower court's decision.

Respectfully submitted,

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NOVEMBER 2025

APPENDIX

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APPENDIX A: SIGNATORIES*

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