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

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

BRIEF FOR THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The U.S. House of Representatives (House)[2] has a substantial institutional interest in ensuring that: (1) Title IX is interpreted in a manner consistent with the intent of Congress; and (2) the Court does not decide an important question of constitutional law in a way that would eliminate Congress's ability to legislate to protect women's and girls' sports.

Congress passed Title IX in 1972 to combat sex inequality in education. With respect to school athletic programs, Congress recognized that a critical part of providing equal opportunity to women was maintaining sex-differentiated teams and programs. Over the last 53 years, Title IX has been a spectacular success, significantly increasing women's sports participation by allowing them to compete on their own terms with their own teams. But this case threatens to undo all these gains. Affirming the decision below would mean that states and local school boards lack the power to separate sports programs based on biological sex and could mean the same for Congress. This would open the floodgates, subjecting girls and women to

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[1] Consistent with Supreme Court Rule 37.6, the House states that no counsel for a party authored this brief in whole or in part and that no person or entity other than the House or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The House's Bipartisan Legal Advisory Group (BLAG) has authorized the filing of this *amicus* brief. BLAG comprises the Speaker of the House, Majority Leader, Majority Whip, Minority Leader, and Minority Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the U.S. House of Representatives, 119th Cong. (2025), https://perma.cc/QD7D-WRAX. The Speaker, Majority Leader, and Majority Whip voted to support the filing of this brief; the Minority Leader and Minority Whip did not.

unfair competition and providing them with unequal opportunities, the very harms that Congress sought to address when it enacted Title IX.

The House thus files this brief to explain how the decision below, if affirmed, would eviscerate Title IX, would reverse decades of progress, and could handicap Congress from legislating in the future to protect women's and girls' sports.

SUMMARY OF THE ARGUMENT

Sports teams have long been divided by biological sex, which reflects the scientific understanding that the different physiologies of men and women require separate teams to ensure fair competition. Thus, when Title IX and its implementing regulations were enacted to support women in education, they permitted the continuation of sex-separated athletic teams. Indeed, any action to prohibit single-sex teams for biological females would have been completely at odds with Congress's overriding goal of providing women and girls with equal opportunities.

In particular, Title IX and its implementing regulations allow for distinctions to be made based on biological sex in numerous places, all of which show that when Title IX's regulations say that schools "may operate or sponsor separate teams for members of each sex," 45 C.F.R. § 86.41(b), it means that schools may operate separate teams for each *biological* sex. Significantly, the rule specifically permitting schools to have single-sex sports teams was included in the initial Title IX regulations submitted to Congress by the Executive Branch in 1975. And after giving particularly close scrutiny to the regulations pertaining to athletics, Congress did not exercise its legislative veto to invalidate them. Beyond that, the record

from that review provides no evidence that Senators or Representatives believed that continuing to allow single-sex sports teams was inconsistent with the statute they had passed just three years earlier.

West Virginia's Save Women's Sports Act (the Act) separates boys' and girls' athletic teams by biological sex. The Act thus implements an unremarkable and lawful state policy long permitted by Title IX: sex-separated sports. However, Respondent B.P.J., a biological boy, wants to play on girls' teams and seeks to redefine Title IX to do so. While B.P.J. does not take issue with separate teams for boys and girls, B.P.J. believes that these teams should not be based on a biological definition of sex. Instead, B.P.J., and the Fourth Circuit below, broaden the definition of sex to include non-biological traits such that the term "girl" can include biological boys. But precedent teaches that sex is unchanging. And this immutable biological view of sex was the one enshrined by Congress in Title IX, and so it is the view that courts must use in interpreting this statute. Thus, irrespective of whatever medical, social, or legal changes a student may have undergone, and how sex may be defined in other settings, because West Virginia may form sports teams based on biological sex and biological sex alone, the Act is lawful.

B.P.J.'s arguments that the Act violates the Equal Protection Clause fare no better. Forming a single-sex sports team involves a classification based on sex, not transgender status. Further, even if the Act is viewed as classifying based on transgender status, such a classification does not trigger heightened scrutiny because transgender status is not a suspect class. Finally, the Act's sex-based classification of boys and girls, including permitting girls to compete on boys'

teams but prohibiting the opposite, is constitutionally sound as it advances the important government interests of ensuring fair competition and providing equal opportunities for girls.

ARGUMENT

The Act designates all athletics teams as boys', girls', or co-ed, with the designations based on biological sex. W. Va. Code § 18-2-25d(c)(1)(A)–(C). For "contact sport[s]" teams or those based on "competitive skill," the Act prohibits biological boys from joining girls' teams. *Id*. § 18-2-25d(c)(2). This restriction is based on the longstanding scientific understanding of the physiological differences between males and females. Yet Respondent B.P.J., a biological boy who identifies as a girl, contends that the way the Act classifies boys' and girls' teams (that is, based on a biological definition of sex) is unlawful, violating both Title IX and the Constitution. The Fourth Circuit agreed, holding that the Act runs afoul of Title IX and, potentially, the Equal Protection Clause.

Both Respondent and the Fourth Circuit are incorrect. In the 1970s, Congress and the Executive Branch understood that sex-separated athletic teams were integral to ensuring competitive fairness and equal opportunity for girls and women. That is why Title IX and its implementing regulations allow such teams to exist. The Act is also fully consistent with the Constitution; it is not discrimination against transgender individuals to form a competitive sports team based on biological sex. For these and the other reasons explained below, the Court should reverse.

I. Title IX permits sports teams to be separated based solely on a student's biological sex

"Although girls and women have [long] participated in sports," they have had to overcome considerable historical barriers to do so. U.S. Comm'n on C.R., *More Hurdles to Clear: Women and Girls in Competitive Athletics* 1 (1980). From outdated beliefs like "sports and competition [are] … unwomanly," to arguments "that it would cost too much" to provide athletic opportunities to women, *id*., Title IX was passed to tear down these barriers so that girls and women could have equal opportunities in education and scholastic athletics. But policymakers in the 1970s recognized that ensuring equal opportunity for women meant preserving sex-based divisions in competitive sports. After all, it would be difficult for women to "become the centers for the Michigan football team," so maintaining sex-based teams served to ensure fair competition for both men and women. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. and Lab.*, 94th Cong. 61 (1975) (*Sex Discrimination Regulations Hearings*) (Statement of Representative Marvin Esch). As a result, Title IX and its implementing regulations permit athletic teams to be formed based on biological sex.

West Virginia's Act grows out of this history. It is an unremarkable division of the sexes for competitive and contact sports because in those circumstances the different biology of the sexes matter. Thus, the Act is fully consistent with Title IX and its implementing regulations, and the Court should uphold it.

A. Title IX was passed to ensure equal opportunity for girls and women, and it succeeded through regulations that permit sex-specific sports teams

In the Civil Rights Act of 1964, Congress forbade discrimination on several bases in a host of settings. But one thing the law did not address was sex discrimination in the educational sphere. While Title VI of the law prohibited federally funded programs from discriminating based on race, color, and national origin, it did not include sex. Likewise, while Title VII protected women against sex discrimination in employment, its protections did not extend to education. As a result, despite the passage of this landmark civil rights law, inequalities persisted against women in education and extracurricular activities. For example, in the 1970 to 1971 school year, over 3.6 million boys played high school sports while fewer than three hundred thousand girls did. *See More Hurdles to Clear* at 11, 13. "[A]ware[] that opportunity for women was restricted throughout American education and, further, that denying women equal education opportunity also denies them equal opportunity in employment," U.S. Comm'n on C.R., *Enforcing Title IX* 1 (1980), legislators recognized that another law was needed to "provide for the women of America something that is rightfully theirs—an equal chance … to develop the skills they want," 118 Cong. Rec. 5808 (1972) (Statement of Senator Birch Bayh, primary sponsor of Title IX).

Enter Title IX. Enacted in 1972, 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). While its command is simple, implementation was largely left to the relevant Executive Branch agencies, which were instructed to "effectuate [its] provisions … by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." 20 U.S.C. § 1682. But developing and implementing these regulations was a prolonged process: it would take the United States Department of Health, Education, and Welfare (HEW) until 1975 to promulgate Title IX regulations.

In the meantime, questions arose about whether Title IX applied to education-adjacent athletic programs, and if so, how it would affect lucrative men's programs like football. These financially successful men's teams "did not want to have to include females on their rosters or to be made to subsidize the equality project." Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. of Gender L. & Pol'y 69, 78 (2020). Fears abounded that Title IX would "destroy the men's programs to promote the women's." *Sex Discrimination Regulations Hearings*, at 61 (Statement of University of Michigan Head Football Coach Bo Schembechler). Indeed, "[t]he then-all-male National Collegiate Athletic Association (NCAA), through formal lobbying efforts, attempted to remove the application of Title IX to intercollegiate athletics." Nancy Hogshead-Makar & Andrew Zimbalist, *Introduction* to *Staking a Claim: The First Decade*, *in Equal Play: Title IX and Social Change* 49, 50 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007).

Some lawmakers agreed with this view. In 1974, Senator John Tower of Texas proposed an amendment to exempt revenue-generating sports from Title IX.

See More Hurdles to Clear at 7 (summarizing Senator Tower's Amendment). But Congress decided instead to adopt an amendment from Senator Jacob Javits of New York. *Id*. The Javits amendment simply stated that the forthcoming regulations "shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). The Javits Amendment served the important purpose of confirming that Title IX indeed applied to athletics. Moreover, because of another provision included in the Education Amendments of 1974, any promulgated regulation implementing Title IX was required to be submitted to Congress for review and subject to a legislative veto. Specifically, such regulation would only become effective if Congress did not disapprove of it through a concurrent resolution within forty-five days. *See id*. § 509(a)(2), 88 Stat. at 567–68.

HEW's regulations finally arrived in June 1975. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 40 Fed. Reg. 24128-45 (June 4, 1975). With respect to sports, they stated in relevant part that a federally funded school "may operate or 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." 45 C.F.R. § 86.41(b). The regulations thus "allow[ed] … recipient institutions to sponsor separate teams for members of each sex." *More Hurdles to Clear*, at 8; *see also Tennessee v. Dep't of Educ.*, 104 F.4th 577, 610–11 (6th Cir. 2024) ("[T]he regulations permit … [schools] to organize their athletics programs and facilities by biological sex.").

Critically, Title IX regulations promoted equal opportunity for women not through integration with men's teams, but through a holistic examination of whether both sexes have equal athletic opportunity. *See* 45 C.F.R. § 86.41(c) (holding that schools must "provide equal athletic opportunity" and listing ten factors that schools must use to evaluate whether they have done so). Indeed, the "Overall Objective" of Title IX is "equal opportunity in athletics," which requires looking at the "totality of the athletic program of the institution rather than each sport offered" or the specific details of any one factor listed under 45 C.F.R. § 86.41(c). Memorandum from Dir., Off. for C.R., U.S. Dep't of Health, Educ., & Welfare, to Chief State Sch. Officers, et al. 8 (Sept. 1975), https://perma.cc/39QV-FBZ8.

After their statutorily mandated submission to Congress, lawmakers in the House held extensive hearings on the regulations over six days in June 1975. *See generally Sex Discrimination Regulations Hearings*. The record reflects a recognition that the regulations' sex-separated scheme for athletics sufficiently satisfied both men's and women's interests.

For men, it alleviated much of the concern that Title IX would destroy or bankrupt existing male athletic programs through integration or subsidization. *See Sex Discrimination Regulations Hearings*, at 125 (The regulations "provide substantial protection for contact sports such as football," because "[w]omen are not required to be permitted to try out for male-only contact sports teams nor partake of the benefits afforded to men on those teams.") (Statement of Laurie Mabry, President of the Association of Intercollegiate Athletics for Women (AIAW)). Legislators also embraced this view. Representative Stewart McKinney

stated that Title IX "does not mean that women must be allowed to play on all-male teams," *id*. at 198, and Representative Patricia Schroeder concluded that the regulations "strike a reasonable balance … and provid[e] substantial protection for contact sports such as football," *id.* at 206.

For women, the regulations protected their competitive interests. Legislators and feminist advocates alike recognized that permitting men to compete with women would "exclud[e] from participation most of the women who now participate, because in many of those sports men have [an] advantage because of their greater size and muscular strength, and that might end up hurting women's participation." *Id.* at 94 (Statement of Subcommittee on Postsecondary Education Chairman James O'Hara). Indeed, in response to Representative Ronald Mottl's question of whether "men playing on the girl[s'] athletic teams should be allowed," AIAW President Laurie Mabry responded, "I don't think [that] provides opportunities for women. … [T]he whole of title IX and its purpose in athletics would be defeated [and] there would be very few women participating in athletics." *Id*. at 133. For that reason, the AIAW "welcome[d] the adoption of the title IX regulations and urge[d] the Congress to permit them to take effect immediately." *Id*. at 123.

While attempts were made to disapprove the Title IX regulations in whole or in part, all were unsuccessful.[3] As a result, following Congressional review of HEW's regulations, they became effective on

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[3] *See* H. Con. Res. 311, 94th Cong. (1975); H. Con. Res. 310, 94th Cong. (1975); H. Con. Res. 329, 94th Cong. (1975); H. Con. Res. 330, 94th Cong. (1975); S. Con. Res. 46, 94th Cong. (1975); S. Con. Res. 52, 94th Cong. (1975).

July 21, 1975. "Assurances that sports teams would be sex segregated were material to Title IX's passage and to congressional approval of its implementing regulations." Coleman, *supra* page 7, at 77.

While "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act," "[h]ere, however, we do not have an ordinary claim of legislative acquiescence." *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (citations omitted). Rather, Congress passed a law (Title IX) requiring implementing regulations, enacted another law (the Education Amendments of 1974) that specifically mandated regulations addressing school athletics and subjected Title IX regulations to a legislative veto, held extensive hearings on the regulations mere days after they were promulgated, and failed to pass any of the numerous bills introduced to amend or disapprove the regulations.

Likewise, in *Bob Jones University*, this Court upheld IRS Revenue Rulings as consistent with the statute and congressional intent because "[o]nly one month after the IRS announced its position in 1970, Congress held its first hearings on this precise issue" then held "exhaustive" hearings over the next decade or so, and ultimately decided not to pass any of the "13 bills [that were] introduced to overturn the IRS interpretation." *Id*. at 600. Under these circumstances, the "non-action … is significant." *Id.* at 600. Here, when Congress failed to exercise its legislative veto, it was "abundantly aware of what was going on [and so] Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced" to the adoption of HEW's regulations. *Id*. at 600–01; *see also United States v. City of Yonkers*, 592 F. Supp. 570, 581 (S.D.N.Y. 1984)

(noting that "Congress[] acquiesce[ed] [to President Carter's] Reorganization Plan No. 1 by declining to use [the legislative] veto" contained in the Reorganization Act of 1978).

Title IX and its regulations permitting sex-separated sports teams quickly produced stunning successes for girls and women. Whereas in 1970-71 only "7.4 percent of all [interscholastic athletics] participants were girls," by 1978-79, that percentage was up to nearly 32 percent. *More Hurdles to Clear* at 11. Title IX's success was not only reflected in participation rates, but also the availability of opportunities. For example, "[b]asketball was available to boys in 19,647 schools in 1970-71 but available to girls in only 4,856 schools. By 1978-79 basketball was available to boys in 18,752 schools and to girls in 17,167 schools. Track was available to boys in 16,383 schools in 1970-71 and to girls in 2,992 schools; by 1978-79, 16,142 schools offered track to boys, and 13,935 schools offered it to girls." *Id*. at 12. Simply put, "[a]lthough many factors have undoubtedly operated to influence women's increased athletic participation, one that has apparently had a major effect is Title IX." *Id*. at iii.

B. The sex-specific carveouts in Title IX and its regulations refer to biological sex

As explained above, the driving force behind Title IX and its implementing regulations for athletics was to create equal opportunities for women. The federal government did so, however, not by integrating athletic programs, but by ensuring overall athletic opportunities for each sex are equal. The federal government did not disturb the longstanding differentiation in athletic programs based on biological sex. In fact, it recognized that physical differences necessitated separate teams to ensure equality of opportunity.

Congress and the Executive Branch agreed that safeguarding equal opportunity for women in sports often required separation of the sexes, and this separation was based on a biological understanding of the term "sex."

Starting with the statutory text, Title IX commands that no person shall be discriminated against "on the basis of sex." 20 U.S.C. § 1681(a). When Title IX was enacted in 1972, the term "sex" was understood to mean the biological distinctions between males and females. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 655 (2020) (assuming that "sex" in Title VII, which was passed just years earlier in 1964, referred only to the "biological distinctions between male and female"); *id.* at 734–44 (Alito, J., dissenting) (listing dictionary definitions of "sex" published from 1953 to 2011); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (noting that "sex" is "an immutable characteristic" determined by "birth"); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632–33 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (Niemeyer, J., dissenting) (observing that "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females—particularly with respect to their reproductive functions"). The numerous "[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 ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022).

The structure of Title IX also confirms that it incorporates a biological understanding of sex. 20 U.S.C. § 1681(a)(1)-(9) lists carveouts to Title IX's general prohibition against sex-based discrimination.

Most notably, Congress exempted social fraternities and sororities and voluntary youth services organizations (including the Girl Scouts and Boy Scouts) with membership practices that have "traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age." *Id.* § 1681(a)(6)(B). The same is true for certain "Boy or Girl conferences" of the American Legion. *Id.* § 1681(a)(7). Given that these organizations limited membership back in 1972 based on biological sex,[4] Congress understood that these carveouts were premised on biological sex. Finally, Title IX specifically authorizes educational institutions to account for biological sex in certain situations. For instance, it does not preclude "father-son" or "mother-daughter" activities at educational institutions so long as any such activities that are provided for "one sex" are reasonably comparable to activities provided for students of "the other sex." *Id*. § 1681(a)(8). And it allows schools to maintain "separate living facilities for the different sexes." *Id*. § 1686. There can be little doubt that these two provisions in 1972 were intended to reflect a binary classification of sex based on biological differences.

Title IX's implementing regulations also reflect an understanding of "sex" as a biological binary. For instance, as discussed above, they allow schools to have separate athletics teams "for members of each sex." 34 C.F.R. § 106.41(b). And if schools have a team for one sex but not the other, then members of "the

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[4] *See, e.g.*, Claudia Lauer, *Boy Scouts will allow transgender children into programs*, Associated Press (January 30, 2017), https://perma.cc/SG2J-7RDK (reporting a Boy Scout of America press release as stating "[f]or more than 100 years, the Boy Scouts … have ultimately deferred to the information on an individual's birth certificate to determine eligibility" for membership).

excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport" if "athletic opportunities for members of that sex have previously been limited." *Id.* Schools must ensure that athletics options for students "effectively accommodate the interests and abilities of members of both sexes." *Id.* § 106.41(c)(1). Finally, the regulations allow for "separate toilet, locker room, and shower facilities" so long as facilities "for students of one sex" are equivalent to facilities "for students of the other sex." *Id*. § 106.33.

Interpreting sex to include gender identity would render the statute and the regulations "meaningless." *Adams*, 57 F.4th at 813. For example, Title IX's authorization of sex-separated living facilities would be eviscerated if schools were required to give transgender individuals the choice of living in facilities either "associated with their biological sex" or their gender identity. *Id.* at 813–14 (citing 20 U.S.C. § 1686). Quite simply, it strains credulity to think that when Congress and the Executive Branch acted in the 1970s to preserve certain single-sex activities and institutions in Title IX and its implementing regulations, they intended to mandate the consideration of gender identity rather than just permit the continued division of students by biological sex.

Nor is there any mention of transgender individuals in Title IX's legislative history. This is no surprise because transgender individuals were not societally prominent then and, as discussed above, Title IX was passed to benefit women (as that term was understood in the early 1970s). Consequently, "[t]here is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex." Pet. App. 95a; *see also* Coleman, *supra* page 7, at 79 ("[T]he

legislative history [of Title IX] is clear that 'sex' meant biological sex … ."). Indeed, the legislative history indicates that sex-separated athletic teams were a necessary component of equal opportunity for women. *See, e.g.*, *Sex Discrimination Regulations Hearings*, at 130 ("[D]ue to physiological limitations that women do have, we are not capable of getting a place on the men's team, and they then have an obligation … to provide a separate team for the women … .") (Statement of Joan Holt, AIAW).

Thus, in furtherance of Congress's goal of promoting equal opportunity for women, Title IX's text and regulations allow for separation of the sexes at times. Essential to this scheme was Congress's understanding that "sex" as used in the statutory text and regulations refers to biological sex. *See Adams*, 57 F. 4th at 812 (observing that Title IX's prohibition against sex discrimination necessarily applies to "biological sex," because that is what the bill's authors would have understood in 1972). In short, Title IX and its implementing regulations permit biological sex-separated sports teams to ensure equal athletic opportunity for women.

C. The Act does not violate Title IX

In accordance with the Title IX regulations to which Congress acquiesced, the Act separates boys and girls for contact sports and competitive skill-based activities. *Compare* W. Va. Code § 18-2-25d(c)(1)-(2), *with* 45 C.F.R. § 86.41(b). Thus, the Act easily falls within the longstanding regulation's permissible sex-specific carveouts. Moreover, it is consistent with Title IX's overriding objective of providing equal opportunities for girls.

Respondent claims not to challenge the Act's classification of boys and girls per se, but only in Respondent's specific case. Respondent argues that a biological girl "and a transgender girl who has not gone through endogenous puberty [do not] have any relevant physiological differences for purposes of athletics," and thus, despite being "male at birth," B.P.J. is similarly situated to other girls. Resp't's Br. in Opp'n to Pet. 20–21. This argument is irrelevant to the inquiry compelled by Title IX and its implementing regulations. The only pertinent fact is that B.P.J. is a biological male, which is "an immutable characteristic" determined by "birth." *Frontiero*, 411 U.S. at 686. Permitting B.P.J. to play on girls' teams would amount to holding that Title IX does not allow sports classifications to be based solely on biological sex. But such classifications, as explained above, are lawful, and there is no language in Title IX or its regulations that requires classifications for a sports team to be based on anything other than biological sex. Thus, for Title IX to concern anything more than just biological sex "add[s] words to the statute Congress enacted. It is to impose a new requirement on a Title [IX-covered entity], so that the law as applied demands something more than the law as written." *Muldrow v. City of St. Louis*, 601 U.S. 346, 347 (2024).

For the same reason, the Fourth Circuit's decision below is flawed. It complains that the Act bans transgender girls from competing with biological girls "regardless of whether any given girl possesses any inherent athletic advantages based on being transgender," and that B.P.J. is similarly situated to biological girls because B.P.J. has legal documents recognizing "her changed name and list[ing] her sex as female," B.P.J. "takes puberty blocking medication," and B.P.J.'s "family, teachers, and classmates have all

known B.P.J. as a girl." Pet. App. 40a. But, as explained above, individual "athletic advantages" or any other factor besides biological sex are irrelevant. The material issue here is that Title IX permits biological sex-separated teams, so the only relevant question is whether B.P.J. is a biological boy or girl. Since B.P.J. is a biological boy, B.P.J. is not similarly situated to biological girls for Title IX purposes and thus is not entitled to participate on girls' sports teams. Rather, like other biological boys, B.P.J. has the right to play on boys' sports teams.

At bottom, by interpreting "sex" to include non-biological aspects, the Fourth Circuit has effectively redefined a core statutory term in a way that undermines Congress's original intent. Such an interpretation permits biological males to compete in women's sports and would therefore reduce opportunities for females. *See Clark ex rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) ("[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete [together]. Thus, athletic opportunities for women would be diminished."); Memorandum from Pamela Bondi, Attorney General, to All Federal Agencies 6 (July 29, 2025) ("permitting males to compete in women's athletic events almost invariably denies women equal opportunity by eroding competitive fairness").

A judicially expanded definition of "sex" would also create immense legal uncertainty and complicate Title IX compliance. Consider the Fourth Circuit's mishmash of factors for deciding when a transgender girl is a girl for Title IX purposes: identity documents, medical interventions, and how the student is perceived. Pet. App. 40a. With respect to documents,

if the state where a college student attends school and the state where the student's birth certificate is held disagree on the student's sex, what then? As for medical interventions like puberty-blocking drugs, how long must the student take such drugs before playing? Could a male student join girls' teams after taking puberty blockers for a week? A month? A year? And as to how the student is perceived, the Fourth Circuit found it significant that B.P.J.'s "family, teachers, and classmates have all known B.P.J. as a girl." Pet. App. 40a. Must it be unanimous? What if teachers and classmates consider the student a girl, but the parents refer to their child as a boy? What about the reverse? What if any of these groups are split on how they refer to the student in question? And underlying all this, what would make judges better suited to answering these questions than legislators or local school boards? At bottom, the lack of a clear, consistent definition of "sex" in Title IX would impose wide-ranging burdens on states and schools as they try to figure out how to comply with whatever new rule a court may fashion as applied to every single student and their individualized circumstances. This Pandora's Box need not, and should not, be opened.

Finally, *Bostock* does not apply. As an initial matter, *Bostock* says so, 590 U.S. at 681 ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind."), and applying its reasoning here would conflict with Title IX's sex-based carveouts outlined above. In any case, the differences between Titles VII and IX render *Bostock* inapplicable. Titles VII and IX are different statutes with different purposes. Title VII sought to protect women (and other suspect classes) from discrimination in employment because sex (like race) is generally not relevant to job performance. Title IX in the athletics context, on the

other hand, is geared towards ensuring women have equal opportunity while accounting for the fact that there are significant biological differences between men and women. As Bernice Sandler, Director of the Project of the Status and Education of Women, explained to the House, "[i]n almost all other areas of discrimination, the precedents and principles developed by the courts in race discrimination cases can readily and easily be applied to sex discrimination problems." *Sex Discrimination Regulations Hearings*, at 390. But "[b]ecause of the general physical differences between men and women … principles developed in other discrimination areas do not easily fit athletic issues, particularly in the area of competitive sports … '[s]eparate but equal,' which is a discredited legal principle in terms of civil rights, may have some validity when applied to some areas of competitive athletics." *Id.* Legislators acknowledged this distinction in the 1970s as well: Representative Albert Quie noted that others have observed that "on the basis of sex, there is a difference between individuals, and this is evident even in HEW's regulations, where they do not require that females be permitted to participate on the same team in contact sports with males." *Id.* at 54. Simply put, because Title VII and Title IX were "aimed at distinct and different evils," *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 612 (1926), *Bostock*'s interpretation of Title VII does not answer the Title IX question here.

II. The Act is consistent with the Equal Protection Clause

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which 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 (1985) (quoting U.S. Const. amend. XIV, § 1). Generally, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. But for "classifications based on sex," heightened scrutiny applies, which means that the "classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Despite the heightened scrutiny, it is well understood that there are "inherent differences" between the sexes that justify distinctions between them in certain settings. *See United States v. Virginia*, 518 U.S. 515, 533 (1996); *Nguyen v. INS*, 533 U.S. 53, 73 (2001). One of these settings is competitive athletics, where physiological differences between the sexes have long been held to justify sex-separated teams. *See Clark ex rel. Clark*, 695 F.2d at 1131. Indeed, "a number of courts have held that the establishment of separate male/female teams in a sport is a constitutionally permissible way of dealing with the problem of potential male athletic dominance." *Force by Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1026 (W.D. Mo. 1983) (collecting cases). The Act therefore does nothing new; it is a sex-based classification supported by the different physiology of boys and girls in a setting where that difference matters: competitive and contact sports.

The Fourth Circuit, however, determined that the Act contains two problematic classifications: (1) transgender status/gender identity, and (2) sex (because the Act permits girls to play on all three teams, but boys can only play on boys and co-ed teams).

Pet. App. 25a–26a. However, the Act does not target transgender status, and, regardless, such status is not a suspect category subject to heightened scrutiny. The Act is also constitutional for the same reason that separate-sex sports teams are: the physiological differences between boys and girls permit different rules for fair competition and equal opportunity.

A. The Act does not classify based on transgender status and, in any case, it is not subject to heightened scrutiny on this basis

The Act "[c]larif[ies] [that] participation for sports events [is] to be based on [the] biological sex of the athlete at birth." W. Va. Code § 18-2-25d. While recognizing that "gender identity" and "biological sex" are "necessarily related," the Act makes explicit that these two concepts are "separate and distinct" and that "[c]lassifications 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." *Id*. § 18-2-25d(a)(4). Thus, the Act "facially classifies based on biological sex—not transgender status or gender identity. Transgender status and gender identity are wholly absent from the … classification. And both sides of the classification … include transgender students." *Adams*, 57 F.4th at 808. For example, under the Act, B.P.J. could still play on boys' teams as a transgender girl (like all other biological boys), and a transgender boy could play on any team (like all other biological girls). Thus, there is a "lack of identity" between the Act and transgender status as the sports options are "equivalent to th[ose] provided [to] all" students of the same biological sex. *See Geduldig v. Aiello*, 417 U.S. 484, 496–97, 496 n.20 (1974).

This Court's recent decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) is instructive. *Skrmetti* involved a Tennessee law that banned certain medical procedures for minors. *Id*. at 1826–27. As this Court held, that law incorporated two classifications: age and medical use. *Id*. at 1833. For the latter classification, healthcare providers could administer puberty blockers or hormones to minors to treat certain conditions, but not to treat gender dysphoria, gender identity disorder, or gender incongruence. *Id*. Though Tennessee's law impacts transgender status as "only transgender individuals seek puberty blockers and hormones for the excluded diagnoses," this Court held that the law was nonetheless targeted at medical diagnoses and not transgender status as transgender individuals could still seek those same drugs (just not for those specific diagnoses). *Id*.

Similarly, while the Act does impact transgender status as transgender girls (like other biological boys) cannot play on girls' teams, transgender boys can. Furthermore, nothing in the Act prevents transgender girls from identifying as girls. They are free to identify at school however they want but are simply not allowed to play on girls' sports teams. Thus, the Act is not targeted at transgender status, but biological sex. Indeed, that the Act applies differently to the sexes shows that it is a sex classification. The Act permits girls to play on all three types of teams, but boys may only play on co-ed or boys' teams. Thus, a transgender boy could play on all three types of teams in West Virginia. It would be strange to label the Act as transgender or gender-identity discrimination considering it does not affect any transgender boys. Instead, the Act's classification is better explained as one based on sex.

Even if the Act is interpreted as classifying based on transgender status or gender identity, this classification is not subject to heightened review. "To determine whether a group constitutes a 'suspect class' [a court must] consider whether members of the group in question 'exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group,' whether the group has, '[a]s a historical matter, ... been subjected to discrimination,' and whether the group is 'a minority or politically powerless.'" *Id.* at 1851 (Barrett, J., concurring). As three Justices of this Court have concluded, transgender status does not satisfy this test. *See id.* at 1850–55 (Barrett, J., joined by Thomas, J., concurring); 1860–67 (Alito, J., concurring).

First, transgender status is not immutable because unlike race or sex, transgender "persons can and do move into and out of the class." *Id*. at 1861 (Alito, J., concurring). It is undeniable that some transgender individuals "detransition or regret" their transition in the first place. Transcript of Oral Argument at 49, *Skrmetti,* 145 S. Ct. 1816 (2025) (No. 23-477) (Statement of Elizabeth Prelogar); *see also The Dangers and Due Process Violations of "Gender-Affirming Care" for Children: Hearing Before the Subcomm. on the Const. and Ltd. Gov't of the H. Comm. on the Judiciary*, 118th Cong. 13 (2023) ("I am a detransitioner.") (Statement of Chloe Cole). And "there are such people" who change their gender identity throughout their lifetime. Transcript of Oral Argument at 97, *Skrmetti,* 145 S. Ct. 1816 (2025) (No. 23-477) (Statement of Chase Strangio). Transgender status is also not "distinct" because the term refers to a "large, diverse, and amorphous" population that "can describe a huge variety of gender identities and expressions," which means that "[t]he boundaries of the group … are not defined by an easily ascertainable characteristic that

is fixed and consistent across the group." *Skrmetti,* 145 S. Ct. at 1852 (Barrett, J., concurring).

Second, suspect classes must have "been subject to a longstanding pattern of discrimination *in the law*," that is, "a history of *de jure* discrimination." *Id*. at 1853 (Barrett, J., concurring). But that is not true here. A point of comparison is helpful. This Court "has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so." *Id*. at 1850 (Barrett, J., concurring) (quoting *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015)). The classes that this Court has declined to subject to heightened scrutiny include the elderly, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976), those living in poverty, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and the intellectually disabled, *Cleburne*, 473 U.S. at 442. These groups at times have suffered intense discrimination and been politically disadvantaged. Indeed, in an infamous opinion a century ago, this Court upheld a law that permitted the forced sterilization of some of these individuals. *See Buck v. Bell*, 274 U.S. 200 (1927). Given that these classes failed to achieve suspect status, it is hard to imagine how transgender individuals could.

To be sure, the lack of widespread historical de jure discrimination against transgender individuals may reflect in part their recent emergence as a noticed part of our country. For most of our nation's past, transgender individuals were barely contemplated by Congress or society at large, much less discriminated against on a de jure basis. *See supra* Sections I.A, I.B. But the relative novelty of issues involving transgender individuals argues in favor of, not against, giving

legislators considerable flexibility in addressing them. Scientific understandings regarding the modern concept of gender identity, one that is only decades old, are not fixed but continue to evolve. *See*, *e.g.*, Massimo Aria, et al., *Mapping the Evolution of Gender Dysphoria Research: A Comprehensive Bibliometric Study*, 58 Quality & Quantity Int'l J. Methodology 5351, 5352 (2024). And incertitude exists when it comes to public policy questions involving gender identity. Here, for example, while the parties agree that after puberty males enjoy significant athletic advantages over females, Pet. App. 33a–34a, 90a–91a, the parties submitted contradictory evidence about whether those advantages are present before puberty, *id*. at 34a–36a. "[S]tate and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). West Virginia has done that here, and so may Congress. *See* Protection of Women and Girls in Sports Act of 2025, H.R. 28, 119th Cong. (2025) (explicitly providing that it is a violation of Title IX for federally funded education programs or activities to operate athletic programs that allow males to participate in female programs and using a biological definition of sex). As a result, given that "[t]he Equal Protection Clause does not resolve these disagreements[,] [n]or does it afford [the courts] license to decide them as [they] see best," *Skrmetti*, 145 S. Ct. at 1837, the issue is best left to those representatives directly elected by the people.

Moreover, it would be a significant mistake for courts to assume that what some may see as discrimination against transgender individuals is motivated by animus. Public policy debates about such issues often involve important competing equities. Just as those opposed to providing puberty

blockers and hormone therapy to minors for the treatment of gender dysphoria have legitimate concerns about the impact of those treatments on children, *Skrmetti*, 145 S. Ct. at 1825–26, here, the Act's supporters have genuine concerns about preserving equal opportunities for biological females. This is yet another reason why it would be inappropriate for courts to apply heightened scrutiny in this area. *See Cleburne*, 473 U.S. at 440 (explaining that heightened scrutiny is appropriate when "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"). Balancing competing concerns on complex public policy issues is the province of legislatures, not the courts. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (referring to the "original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws").

B. West Virginia's differential treatment of boys and girls is justified

The Fourth Circuit held that because girls may play on all three types of teams, but boys may only play on co-ed or boys' teams, this constitutes another sex-based classification beyond the Act's initial division of sports based on sex. *See* Pet. App. 25a–26a. This additional classification does not change the calculus; the Act still passes constitutional muster.

West Virginia has an important government interest in promoting fair competition and ensuring equal opportunities for girls. Here, the physiological differences between boys and girls permit West Virginia not just to adopt sex-separated sports teams, but also a rule permitting girls to join boys' teams while

prohibiting boys from joining girls' teams. *See Clark ex rel. Clark*, 695 F.2d at 1131; *Force by Force*, 570 F. Supp. at 1026. The Act explains that "[i]n 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." W. Va. Code § 18-2-25d(a)(3). This finding is well supported in scientific literature. *See Force by Force*, 570 F. Supp. at 1026 ("Based upon the expert testimony … the average male, even at age 13, will to some extent outperform the average female of that age in most athletic events … ."). Indeed, the district court, having received extensive evidence on this issue, held 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." Pet. App. 91a. While the Fourth Circuit begrudgingly admitted that these differences are generally present, it split hairs and held that the evidence did not definitively resolve whether these differences are present before puberty. Pet. App. 34a. But even if that is true, because, as explained above, legislative options must be preserved in areas of scientific uncertainty, *see Gonzales*, 550 U.S. at 163, West Virginia "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," Pet. App. 92a.

Given that this significant government interest is premised around protecting women, the fact that the Act permits girls to join boys' teams does not change the constitutional analysis. As Judge Agee in dissent

stated below, the "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." *Id*. at 51a. What West Virginia has done here is perfectly reasonable: it allows girls who can (or wish to) compete with boys to do so, while protecting all other girls who cannot or do not wish to do so. Thus, rather than relying on "fixed notions concerning [that sex's] roles and abilities," *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), the Act gives girls the chance to succeed against both girls and boys (if they so choose). So too does the Protection of Women and Girls in Sports Act of 2025, H.R. 28, 119th Cong. (2025), which passed the House earlier this year and only prohibits biological males from joining female athletic teams.

CONCLUSION

The Court should reverse the judgment below and uphold the Act.

Respectfully submitted,

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