No. 22A800

In the Supreme Court of the United States

THE STATE OF WEST VIRGINIA; WEST VIRGINIA STATE BOARD OF EDUCATION; WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION; W. CLAYTON BURCH, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT; AND LAINEY ARMISTEAD,

Applicants,

v.

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

Respondent.

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

This Application is not controversial. The sole question is whether the Fourth Circuit properly enjoined enforcement of a sovereign State's law based on an apparent belief that local officials must use gender identity instead of sex to mark the line between male and female sports. The district court, after thoroughly reviewing a complete record, held that a State *can* assign athletic teams by sex without offending the Equal Protection Clause or Title IX, particularly when all parties recognize the benefits from separate sports teams, and where biological differences between males and females are the very reason those separate teams exist. Yet two Fourth Circuit judges summarily awarded extraordinary relief based on an unexplained view to the contrary, giving short shrift to the trial court's careful work.

Respondent hardly tries to defend that split decision on its merits—nor does Respondent explain how "the most critical and exigent circumstances" justified the Fourth Circuit's intervention in the first place. *Wis. Right to Life, Inc.* v. *FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (cleaned up). Instead, Respondent largely pleads "no harm no foul" by trying to rewrite the Fourth Circuit's decision in the narrowest possible terms. But this case is about more than just one plaintiff. The Fourth Circuit's order harms girls by displacing them from athletic standings and women's sports teams. And it harms the voters of West Virginia by cancelling their legislative choices by flat judicial decree. A bare majority of two appellate judges should not be allowed to undo half a century of well-understood law and practice when it comes to interscholastic sports. This Court should vacate the injunction.

ARGUMENT

I. Under the correct standard, Applicants deserve relief.

Applicants invoked the correct legal standard. In suggesting otherwise, Respondent misunderstands both the form of the order below and the nature of the relief that Applicants seek from this Court.

A. To be clear: Applicants have asked this Court for immediate relief from the Fourth Circuit's order entering an injunction, not for "an emergency stay" or to "vacate [a] stay" below. Opp. 20. The difference is critical. A request to vacate an injunction hinges on the traditional factors associated with injunctive relief, including the party's arguments for the injunction below and the court's reasons (or lack thereof) for issuing it. *E.g.*, App. to Vacate Inj., *Biden* v. *Nebraska*, 143 S. Ct. 477 (2022) (No. 22-506), 2022 WL 17330762, at *15 (United States arguing "the likelihood of success on the merits and the equities" in applying for immediate relief from the Eighth Circuit's "unsupported" order entering injunction) (cleaned up)). The decision should account for a loss in the district court. *E.g.*, *Cavel Int'l, Inc.* v. *Madigan*, 500 F.3d 544, 549 (7th Cir. 2007) (Easterbrook, J., dissenting) ("Once a plaintiff has litigated and lost, a higher standard is required for an injunction pending appeal."). In contrast, a request for a stay asks the Court to "suspend judicial alteration of the status quo," *Nken* v. *Holder*, 556 U.S. 418, 429 (2009), and requires an applicant to satisfy an entirely different set of factors, *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). Applicants are challenging an injunction, so the traditional factors for analyzing an injunction apply.

Respondent has confused this remedy issue before. At the front end of the appeal below, Respondent moved for a "stay" of the district court's order granting summary judgment and dissolving its earlier preliminary injunction. But the Fourth Circuit at least saw Respondent's request for what it was: a motion for "the extraordinary interim remedy of a mandatory injunction." *Barthuli* v. *Bd. of Trustees of Jefferson Elementary Sch. Dist.*, 434 U.S. 1337, 1339 (1977) (Rehnquist, J., in chambers); cf. Appl. App. 1a-2a (construing "motion for stay pending appeal … as a motion for an injunction pending appeal" and granting the motion). Indeed, it was the district court's judgment—not the Fourth Circuit's—that restored the status quo. So a "stay" of that judgment would have "amount[ed] to nothing more than a mere declaration in the air" and "accomplish[ed] nothing whatever for" Respondent on appeal. *Barthuli*, 434 U.S. at 1339 (cleaned up). Yet instead of explaining how Respondent had made and met the "indisputably clear" case for the Fourth Circuit to issue the extraordinary relief of a mandatory injunction, *Lux* v. *Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (cleaned up), the Fourth Circuit said nothing. See *Purcell* v. *Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam) (vacating injunction entered by two circuit judges via "bare order" that included "no explanation … showing the ruling and findings of the District Court to be incorrect").

This Court should reject Respondent's framing here, just as the Fourth Circuit did. It should treat the Fourth Circuit's unreasoned order as the injunction it is—and set it aside.

B. Respondent also fixates on the irrelevant question of whether this case presents an "emergency" in some subjective sense. See, *e.g.*, Opp. 1-4, 21, 23-25. The underlying

need here *is* urgent. See *infra* Section III. But really, the application must turn on whether Applicants have shown that they are entitled to relief from the Fourth Circuit's order enjoining the "enforcement of a presumptively valid state statute." *Brown* v. *Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers). Applicants have done just that.

Relatedly, Applicants have not somehow forfeited their ability to seek relief from this Court by their decision not to appeal the district court's earlier preliminary injunction that rested on an undeveloped record. This Court is generally not in the business of second-guessing "strategic decisions" or narrowing the "wide degree of latitude" attorneys have to make them. *Mitchell* v. *Kemp*, 107 S. Ct. 3248, 3251 (1987) (Marshall, J., dissenting from denial of certiorari). And this case is no exception, as Applicants' decision to hold off on an appeal flowed from a drive to have these issues finally decided on the fullest record possible. Eventually, that's exactly what happened. And the district court's summary-judgment order proved that Applicants made the right call: Once the district court considered "all of the evidence in the record," Appl. App. 28a, it dissolved its injunction. This considered decision was no "about-face" ruling "without any explanation," Opp. 16; just reading it is enough to reject that idea. But faced with a condensed record and a few short days of review, the Fourth Circuit saw fit to upset the sound decision anyway.

And indeed, once the Fourth Circuit issued its injunction, the same prudence that stayed Applicants' hand at the initial preliminary-injunction stage propelled the Application forward here. With the record below set in stone and the Fourth Circuit's order lacking any details or boundaries, this Court provided Applicants the only remaining option to preserve the status quo during appeal. See *Wise* v. *Circosta*, 978 F.3d 93, 98 (4th Cir. 2020)

(en banc) ("[I]t is the state's action—not any intervening federal court decision—that [sets] the status quo."). The Court should now act, too.

II. Applicants are likely to succeed on the merits.

One of the tells that Respondent wants to focus on anything other than the ordinary injunction factors (and the Fourth Circuit's choice to skip over them) is the mere 4.5 pages the response spends on the merits. Opp. 31-35. Yet likelihood of success is critical to interlocutory injunctive relief. Cf. *Glossip* v. *Gross*, 576 U.S. 863, 876 (2015) (describing how preliminary injunction "turn[ed] on … likelihood of success on the merits"). And the merits of this case are simple: Designating sports teams by sex is not controversial or in dispute. Indeed, B.P.J. wants to benefit from this separation by playing on the girls' team. But rather than focus on sex, the response refashions the Sports Act into a law that deliberately excludes athletes who identify as transgender. Opp. 31. According to the brief, intermediate scrutiny requires West Virginia to set aside biological factors in the expressly physical context of sports to accommodate any male who identifies as female. *Id.* And further, Respondent thinks *Bostock* v. *Clayton County*'s Title VII analysis purportedly controls this case and dictates that Title IX prohibits excluding biologically male athletes from women's sports teams. Opp. 32. Both these positions are wrong.

As this Court has held repeatedly, whether a statute satisfies equal protection does not depend on "whether the governmental interest is directly advanced as applied to a single person or entity." *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 427 (1993). Rather, equal protection focuses on "the basic validity of the legislative classification" and whether it furthers the government's objective. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 272 (1979). That broader perspective explains why plaintiffs bringing equal-protection claims

will "generally allege that they have been arbitrarily classified as members of an 'identifiable group,'" *Engquist* v. *Or. Dep't of Agr.*, 553 U.S. 591, 601 (2008) (quoting *Feeney*, 442 U.S. at 279), and courts focus on how the legislation affects *that group*, *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977). In short, a "broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Id.*

Sex-based classifications are no exception. The Court has always looked at a challenged statute's disparate treatment of men and women as a whole, *not* at an equal-protection plaintiff's individual circumstances. See, *e.g.*, *Nguyen* v. *INS*, 533 U.S. 53 (2001); *United States* v. *Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982); *Feeney*, 442 U.S. at 256. Those cases boil down to the idea that legislatures can pass laws that "realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances." *Michael M.* v. *Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (plurality op.); *accord Nguyen*, 533 U.S. at 63-64 (law may impose "a different set of rules" to prove biological parenthood "with respect to fathers and mothers" because of "the unique relationship of the mother to the event of birth").

It's impossible to square these precedents with Respondent's new rule requiring a gender-identity-based classification here. Sex-based classifications are valid if "sex represents a legitimate, accurate proxy" for a permissible objective. *Craig* v. *Boren*, 429 U.S. 190, 204 (1976). And Respondent's counsel conceded below that gender identity "is not a useful indicator of athletic performance." Appl. App. 214a (167:22-168:1). In sports,

fairness is an important objective, and fairness is furthered by designating teams based on the average physiological differences between the sexes.

So West Virginia's Sport Act is valid under the Court's equal-protection metrics. It does not traffic in mere "generalizations" with some "statistical support." *Contra* Opp. 33 n.14; *see Craig*, 429 U.S. at 190 (invalidating law regulating alcohol sales that favored women because men were more likely to drive drunk). Indeed, under the opposition brief's logic, sex itself is a stereotype, which would make all sex-designated sports unconstitutional. That's never been the law. See, *e.g.*, Appl. 2-3. Like many laws before it, the Sports Act just seeks to accommodate physiological differences rooted in biological sex in a context where those differences matter.

In its limited merits analysis, the opposition brief claims that the Sports Act newly "singles out" individuals who identify differently from their biological sex, Opp. 31, and focuses primarily on Respondent alone, failing to grapple with how the Act treats men and women as a whole. Neither stratagem works.

The Act is not a new "exclusion." Opp. 31. West Virginia schools have long assigned athletic teams based on sex, and until recently, everyone understood that meant biological sex. It was only after male athletes started competing in women's sports at the international, national, and state levels that West Virginia's Legislature responded by clarifying that "sex" means "biology" in women's athletics. See, *e.g.*, Chris W. Surprenant, *Accommodating Transgender Athletes*, 18 GEO. J.L. & PUB. POL'Y 905, 906 (2020) (explaining that "recent" cases in which "transgender athletes" were "winning events,

setting performance records, or otherwise impacting the outcome of competitions" raised questions about whether and how to accommodate them).

As for focusing on Respondent rather than men and women generally, the opposition brief argues in a footnote that this Court applies a different kind of "intermediate scrutiny" for equal protection claims than for other constitutional contexts. Opp. 33 n.14. Not so. *Ngyuen* involved an equal-protection claim, and this Court held that "[f]or a gender-based classification to withstand equal protection scrutiny, it must be established at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." 533 U.S. at 60-61 (cleaned up). The Application presses the exact same standard, Appl. 14-21, and Respondent does not contest any of the related argument. Moreover, a win for Respondent would allow the substantive rule for equal-protection cases to vary depending on the scope of relief sought. The Court's precedents say the opposite here, too, *e.g.*, *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1127 (2019), further undercutting Respondent's likelihood of success.

Respondent's Title IX argument fares no better. As the Applicants have already explained, Appl. 21-32, applying this Court's reasoning in *Bostock* v. *Clayton County* to Title IX does not work. *Bostock* said that sex is not a relevant characteristic to hiring decisions implicating Title VII. 140 S. Ct. 1731, 1741 (2020). But here, sex-based, biological differences are the foundation for designating separate men's and women's sports teams. So in this context, Respondent is not similarly situated to other female athletes because

Respondent's gender identity is irrelevant to the very reason for establishing separate girls and boys sports teams.

The opposition brief also claims that West Virginia cannot apply its law to someone like Respondent who received puberty-delaying treatment followed by hormone therapy. Opp. 16. That argument ignores relevant record evidence. Professor Brown provided substantial evidence regarding *pre-pubertal* male advantage in athletics. Appl. App. 80a-92a (describing studies showing boys have greater lean body mass, strength, speed, and cardiovascular endurance than girls even before puberty). And "there is no published scientific evidence that the administration of puberty blockers to males before puberty eliminates the pre-existing athletic advantage that prepubertal males have over prepubertal females." Appl. App. 111a. Developing evidence like this made all the difference between the thin record the district court had before it when it originally granted injunctive relief to Respondent and the fully developed record it carefully considered when it granted summary judgment to the State. Combined with the *lack* of evidence suggesting that pre-pubescent males have *no* physiological advantages over females, the evidence supporting the State confirms that the West Virginia Legislature acted reasonably.

Finally, the opposition brief is wrong in arguing that the issues presented are unlikely to garner this Court's review. Opp. 28-30. The Court recognized the importance of Title IX and the Equal Protection Clause issues even without a split in lower-court authority when it granted review in *Gloucester County School Board* v. *G.G.*, No. 16-273. (The Court ultimately vacated and remanded the lower court decision for further consideration based on new Department of Education and Department of Justice guidance.)

In this context—as even the opposition brief notes, Opp. 29-30—disputes are pending across the country involving the issue of biological males who identify as female seeking to participate in girls' sports. One, for instance, is a Sixth Circuit case reviewing a district court injunction of federal administrative guidance prohibiting state and local laws exactly like West Virginia's Sports Act. *State of Tennessee, et al., and Assoc. of Christian Schs. Int'l* v. *Dept. of Ed.*, No. 22-5807 (6th Cir.). Disputes like these further confirm "this is precisely the sort of emergency docket application that this Court should review." Amici Br. of Ala., Ark., and 19 Other States 7-8.

III. The balance of harms strongly favors vacating the injunction.

The opposition brief is silent on the harms the Fourth Circuit's injunction imposes on the State of West Virginia and its residents, and minimizes the injunction's consequences for female athletes. This one-sided approach to the equities should not have justified relief below. The Court should restore the pre-litigation status quo.

A. First, the State and West Virginians generally. State "legislative enactments" occupy a special place in our system of government. *Atkin* v. *State of Kansas*, 191 U.S. 207, 223-24 (1903). Unless one is "plainly and palpably" wrong, it "should be recognized and enforced by the courts as embodying the will of the people." *Id.* And if enjoining "enforcement of a presumptively valid state statute" is cause for serious concern, *Brown*, 533 U.S. at 1303 (Rehnquist, C.J., in chambers), then all the more the unreasoned injunction of a law declared constitutional just 48 days earlier on the basis of a full record and merits briefing. Respondent's brief does not acknowledge what the Fourth Circuit's order means for members of West Virginia's Legislature and the voters that put them there. The Sports

Act represents the considered judgment of the people through their elected representatives that *all* female athletes participate on an equal playing field, no matter how prestigious or "important" the sporting event. The injunction is an affront to that important legislative goal.

Instead of confronting this problem, Respondent tries to paint the Application as a broadside against "common practice … summary orders." Opp. 25; see also *id.* at 25 n. 8 (collecting mostly stay rulings). But again, nothing is garden-variety about the Fourth Circuit's order; this type of mandatory injunction is justified in "only … the most unusual case." *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers). It should be even more unusual for one to issue with no consideration of each of the relevant factors, much less "a proper" one. *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). And orders like these are worse yet—and per se "irreparable injury"—when, as here, "a State is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The "common practice," Opp. 25, that the Fourth Circuit's order actually implicates, then, is this Court's "ordinary practice" of "suspend[ing]" injunctions "pending appellate review" that "declare state laws unconstitutional and enjoin state officials from enforcing them." *Strange* v. *Searcy*, 574 U.S. 1145 (2015) (Thomas, J., dissenting from denial of the application for a stay). The Applicants urge no more than this ordinary remedy here, too.

B. Second, West Virginia's women and girls. In addition to enjoining a validly enacted law, leaving the injunction in place will severely injure women and girls' right to equal competitive opportunity.

It already has. Though the opposition brief denies that B.P.J. displaced anyone while the preliminary injunction was in place, Opp. 36-37, it concedes elsewhere that B.P.J. finished in front of numerous female runners, Opp. 9 & 9 n.2. This competitive displacement has happened 105 times.[*] For example, finishing "35 out of 53 participants in discus," Opp. Supp. App. 218a, means that B.P.J. displaced 18 female athletes who would have finished higher. The same was true when Respondent displaced other athletes at other events last fall. See Pl.'s Mot. to Stay, Exs. A & B, *B.P.J.* v. *West Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. Jan. 20, 2023), ECF No. 515-4; see also Athletic.net, https://bit.ly/3LAf1Hk (last visited Mar. 21, 2023). Respondent's brief suggests that no one should be bothered by a male participant placing ahead of "a few other runners." Opp. 37. But even mid- or back-of-the-pack placements matter—particularly to athletes trying to build up finishes, spots, qualifying times, and points to qualify for more competitive races and future championship competitions. Losing out on a spot on the victor's podium is not

[*] Respondent says this number "mislead[s] the Court." Opp. 36. But the number comes from competition results provided by B.P.J. and Athletic.net. See Pl.'s Mot. to Stay, Exs. A & B, *B.P.J.* v. *West Va. State Bd. of Educ*., No. 2:21-cv-00316 (S.D. W. Va. Jan. 20, 2023), ECF Nos. 515-3, 515-4; see also ATHLETIC.NET, https://bit.ly/3LNISMi (last visited Mar. 21, 2023) (providing click-through links to various competition results B.P.J. participated in). Respondent also says it is "false" to say that girls are cut from girls' track if they are not fast enough in certain events but then admits three sentences later that such cuts actually happened. Opp. 36.

the only way that competitive displacement harms athletes. Accord 67 Female Athletes Amici Br. 6-20 (detailing harms caused by lost positions).

The opposition brief tries to minimize this harm by redefining "displacement" to mean only the inability to participate on a sports team at all. Opp. 37 (arguing that no girl has been "cut from any team due to B.P.J.'s participation"). But this theory would credit harm to female athletes only when a biological male takes the final spot on a female sports team. And of course, Title IX's promise of equal opportunity guarantee more than participation trophies. Women and girls deserve fair competition; a fair "chance to be champions." *McCormick ex rel. McCormick* v. *Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004). It is no answer to tell female athletes that competitive displacement is not real harm because they are still on the roster. Their loss should not be discounted or dismissed. And because lost equal opportunity cannot be brought back, it is irreparable.

In addition to the numerous middle school girls who already faced irreparable harm while the Sports Act was preliminarily enjoined, keeping this injunction and accepting Respondent's legal theory would ensure that more women and girls would be harmed in the future. In fact, the opposition brief has no answer to what West Virginia should do if other males who identify as female ask to compete on female sports teams in West Virginia, as has occurred across the country. See *Winter*, 555 U.S. at 27 (reversing preliminary injunction in part because "lower courts failed properly to defer to" government officials' "predictive judgments about how the preliminary injunction would reduce the effectiveness of" the government program). Respondent chiefly focuses on B.P.J.'s own hurt from not being permitted to join girls' sports teams. See Opp. 34, 39. Applicants do not discount

that. But that hurt is not greater than the female athletes already displaced by Respondent and the displaced female athletes to come.

CONCLUSION

This Court should vacate the Fourth Circuit's injunction pending appeal.

Respectfully submitted.

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