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 PETITIONERS

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QUESTIONS PRESENTED

Like everywhere else, West Virginia schools offer distinct sports teams for males and females. And the West Virginia Legislature has concluded that biologically male athletes should compete on boys' and co-ed teams, but not girls' teams. The Legislature found this line appropriately reflects "inherent physical differences between biological males and biological females."

A parent sued on behalf of her child—B.P.J., a biological male who identifies as female—demanding that the State allow B.P.J. to compete on girls' teams. The district court entered summary judgment for Petitioners on B.P.J.'s claims under both the Equal Protection Clause and Title IX. But a divided Fourth Circuit panel reversed, ruling in B.P.J.'s favor on the Title IX claim and vacating the judgment for Petitioners on the equal-protection claim.

The questions presented are:

1. Whether Title IX prevents a State from consistently designating girls' and boys' sports teams based on biological sex determined at birth.
2. Whether the Equal Protection Clause prevents a State from designating boys' and girls' sports teams based on biological sex determined at birth.

PARTIES TO THE PROCEEDING

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

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

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

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

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Relevant parts of Title IX of the Education Amendments of 1972, and implementing regulations, are found at Pet.App.103a-108a.

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

INTRODUCTION

More than fifty years ago, Title IX promised a new beginning for women's sports—one built on equal opportunity.

For half a century, that promise was kept. Women playing college sports rose from just over 15% of all athletes before Title IX to more than 50% today. Schools went from an average of two women's sports teams to more than eight. And female participation in high-school sports grew by more than 1,000%. Altogether, "Title IX ha[d] enhanced … women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in [school] athletics." *Neal* v. *Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999).

That promise is now in danger. Male athletes identifying as female are increasingly competing in women's sports, erasing the opportunities Title IX ensured. Women and girls have lost places on sports teams, surrendered spots on championship podiums, and suffered injuries competing against bigger, faster, and stronger males. For too many women and girls, the "thrill of victory" is gone.

Many have responded. The U.S. Olympic and Paralympic Committee, the NCAA, and other major athletic organizations have said that only female athletes can compete in women's sports. So have 27 States. These laws and policies do not ban anyone from competing in sports. Rather, they preserve hard-won equal athletic opportunities for both sexes while ensuring females enjoy safe, fair competition in *women*'s sports.

The State of West Virginia acted to protect women's sports, too. Mirroring Title IX's regulations, West

Virginia's Save Women's Sports Act says male students can compete on male and co-ed teams but may not compete on girls' teams in school sports involving competitive skill or contact. The Act defines "male" and "female" by referencing the student's reproductive biology and genetics at birth. It doesn't consider gender identity.

The Fourth Circuit rejected West Virginia's common-sense effort. The court read Title IX to say that West Virginia must allow Respondent B.P.J.—a male student who identifies as female—to compete in girls' track and field. Playing sports on a boys' or co-ed team was dismissed as no option. Pet.App.42a-43a. And according to the Fourth Circuit, West Virginia's law might violate the Constitution's Equal Protection Clause, too. Even though the court recognized West Virginia had the right "to police the line drawn between [boys' and girls'] teams," Pet.App.43a, it said West Virginia couldn't focus on biology (rather than gender identity) in doing so.

In short, the Fourth Circuit reasoned that both the Constitution and Title IX compelled West Virginia to treat sex and gender identity as synonymous when it comes to sports. That approach erases the line between men's and women's athletics. Sex affects athletic performance; gender identity does not. If the court below were right, then Title IX's role in preserving girls' sports opportunities would end.

Yet nothing in Title IX invalidates the Act. Title IX's text forbids sex discrimination—not sex distinctions. Males identifying as female are not similarly situated to females in athletic competition. The Act thus advances, rather than offends, Title IX's requirement of equal opportunity for the two sexes. In concluding otherwise,

the Fourth Circuit undermined protections for female athletes and turned Title IX upside down.

West Virginia's law also satisfies the Equal Protection Clause. The Constitution does not require States to dispense with objective, biological sex distinctions. Nor does it require States to ignore inherent differences between men and women. The ordinary line-drawing found in the Act is not invidious discrimination subject to higher scrutiny.

The Act implicates "fierce scientific and policy debates" that elected legislators are best able to resolve. *United States* v. *Skrmetti*, 145 S. Ct. 1816 (2025). The Fourth Circuit nullified West Virginia's legislative solution, undermined Title IX, warped the Equal Protection Clause, and hurt women and girls. The Court should reverse.

STATEMENT OF THE CASE

A. Sex designations in school sports.

Schools have long designated sports teams by sex. Sex-specific teams reflect that fundamental "[p]hysical differences between men and women … are enduring," "not fungible." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (cleaned up). Because of these differences, "males would displace females to a substantial extent if they were allowed to compete" together. *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) ("*Clark I*"). With sex-specific sports, women have a chance to compete fairly while not risking their safety against physiologically distinct competitors.

Recognizing that women often had fewer athletic opportunities than men, Congress passed Title IX in 1972. See *Tennessee* v. *Cardona*, 737 F. Supp. 3d 510, 521-23

(E.D. Ky. 2024). The law prohibits discrimination "on the basis of sex" in federally funded educational programs, 20 U.S.C. § 1681(a), including student athletics, 34 C.F.R. § 106.41. Title IX and its implementing regulations preserved sex-specific athletic teams for contact sports or where selection is "based upon competitive skill." *Id.* § 106.41(b). Congress acknowledged differences between the sexes throughout Title IX. *E.g.*, 20 U.S.C. § 1681(a)(6) (contemplating single-sex social organizations); *id.* § 1686 ("maintaining separate living facilities for the different sexes").

In the half-century since Congress passed it, Title IX has produced "stellar results" for girls in athletics. *Louisiana* v. *Dep't of Educ.*, No. 3:24-cv-00563, 2024 WL 2978786, at *4 (W.D. La. June 13, 2024). For high-school sports, girls' participation rates increased eleven-fold. See *Fast Facts: Title IX*, NAT'L CTR. FOR EDUC. STAT., https://perma.cc/Z5R5-CLSQ (last visited Sept. 3, 2025); see also NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2024-25 ATHLETICS PARTICIPATION SUMMARY 57 (2003), https://tinyurl.com/yc32tjtz. In college, "women's sports teams ha[ve] increased from 2 per school to 8.14 per school." Andrew J. Boyd, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 J. MARSHALL L. REV. 257, 266-67 (2003). Nearly half of college athletes are now women, up from only 16% before Title IX. *Quick Facts about Title IX and Athletics*, NAT'L WOMEN'S L. CTR. (June 21, 2022), https://perma.cc/ASX7-FWZX. While almost no women's sports scholarships existed when Title IX was passed, thousands of female athletes now play on scholarship. Fred Bowen, *Title IX has helped encourage many girls to play sports*, WASH. POST (June 20, 2012), https://perma.cc/2QVU-SMHE.

Equal opportunity on the field has led to advancement off it. "Girls who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs. They are also more likely to lead." *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 820 (11th Cir. 2022) (en banc) (Lagoa, J., specially concurring). In fact, "94 percent of women C-Suite executives today played sport[s], and over half played at a university level." *Ibid.* (cleaned up). So Title IX has benefited society, too. See *Cohen* v. *Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996).

B. The increase in males competing in female athletic events.

1. This progress is now at risk as males identifying as female have increasingly competed in women's sports—and won. A United Nations Special Rapporteur noted just a year ago how the "female sports category" has been often "replace[d]" by "a mixed-sex category," resulting in "over 600 female athletes" losing "more than 890 medals in 29 different sports." Reem Alsalem (Special Rapporteur on violence against women and girls), *Violence Against Women and Girls in Sports*, ¶ 11, U.N. Doc. A/79/325 (Aug. 27, 2024). A warped medal count is only the start; female athletes have been pushed out of championship bids, bumped out of roster spots, and denied other chances at fair competition by males identifying as female.

Examples abound. A University of Pennsylvania male swimmer set records and won an NCAA women's championship—beating two female former Olympians. Katie Barnes, *Penn Swimmer Lia Thomas Leaves Ivy League Meet a Four-Time Champion, But Questions Remain*, ESPN (Feb. 20, 2022, 2:00 PM ET),

https://perma.cc/E2KA-GX4V. A male college athlete won a women's NCAA championship in hurdles in 2018. Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions,'* N.Y. TIMES (Aug. 3, 2021), https://perma.cc/X4BZ-2499. Two males competing in Connecticut in the girls' category broke 17 track records and took 15 track championship titles—depriving girls of more than 85 opportunities to compete at higher levels. Appl. to Vacate Inj. at 5, *West Virginia* v. *B.P.J.*, No. 22A800 (S. Ct. Mar. 9, 2023) ("Appl."). And these were hardly isolated incidents. Appl. 5-6 (discussing incidents in Hawaii and Montana).

Just in the last year, examples of males competing against (and beating) females have surged. Several volleyball teams forfeited matches against San Jose State University because they were concerned about the safety and fairness of competing against a female-identifying male. Katie Barnes, *Inside San Jose State's polarizing volleyball season*, ESPN (Nov. 26, 2024, 7:00 AM ET), https://perma.cc/X2L3-PQEZ. In Minnesota, softball players sued after a team featuring a male athlete won the state championship. Jim Paulsen, *Minnesota softball players sue Keith Ellison, state high school league over transgender athlete policy*, MINN. STAR TRIB. (May 21, 2025, 7:16 PM), https://perma.cc/8V3A-TGS7; Valerie Richardson, *Minnesota male-born pitcher powers girls' softball team to state crown*, WASH. TIMES (June 7, 2025), https://tinyurl.com/yeycvpjv. And biological males who identify as female won girls' state titles in Washington, California, and Maine. *E.g.*, Shane Lantz, *WA transgender athlete Verónica Garcia repeats as state track champion*, SEATTLE TIMES (May 31, 2025, 5:19 PM), https://tinyurl.com/rfr8vmjn; Kevin Rector, *Transgender track athlete wins gold in California state championships*

despite Trump threat, L.A. TIMES (May 31, 2025, 10:29 PM PT), https://perma.cc/PL5P-AL9G; Jesus Mesa, *Transgender Athlete's Win in Maine Sparks Backlash*, NEWSWEEK (Feb. 21, 2025, 7:23 PM ET), https://perma.cc/4QAW-QH9V.

2. Twenty-seven States have responded by implementing laws or regulations reserving girls' sports for females. After the change in administration, the White House immediately issued an executive order prohibiting educational programs from allowing males to compete in girls' sports. Exec. Order No. 14,201, 90 Fed. Reg. 9,279 (Feb. 5, 2025).

Major sports organizations have also acted to preserve women's sports for female athletes. See Sonia Twigg, *The Sports Where Trans Athletes Are Banned or Need Permission to Compete*, THE INDEPENDENT (U.K.) (Apr. 16, 2024, 9:02 BST), https://perma.cc/6GRP-N9BV. The NCAA's new policy limits competition in women's sports to biological females. *NCAA announces transgender student-athlete participation policy change*, NCAA (Feb. 6, 2025, 3:11 PM), https://tinyurl.com/ynp6rw8n. The new policy of the United States Olympic & Paralympic Committee does the same. Juliet Macur, *U.S. Olympic Officials Bar Transgender Women From Women's Competitions*, N.Y. TIMES, https://perma.cc/82XM-DQFL (July 24, 2025). And harkening back to the NCAA collegiate swimming incident, the University of Pennsylvania revoked the biological male swimmer's women's swimming records and apologized to the affected female swimmers. Alan Blinder, *Penn Agrees to Limit Participation of Transgender Athletes*, N.Y. TIMES, https://perma.cc/UD4U-HZ86 (July 2, 2025).

Others go further. World Athletics, the governing body for international track and field, mandates a one-

time gene test for athletes who want to compete in the female category. Rohith Nair, *World Athletics mandates gene test for female category eligibility*, REUTERS (July 30, 2025, 2:02 PM EDT), https://perma.cc/6RWS-JKCY. It did so after "[n]ew evidence clarife[d] that there is already an athletically significant performance gap before the onset of puberty." *World Athletics Planning Amendments to Female Eligibility Guidelines*, REUTERS (Feb. 10, 2025, 8:32 PM EST), https://perma.cc/DM5S-86WD. The organization's president explained that "gender cannot trump biology," and women must be able to "enter a sport believing there is no biological glass ceiling." Nair, *supra*.

Thus, a "broad and growing concern" is taking hold: the concern "that allowing men in women's sports severely harms women." *Spectrum WT* v. *Wendler*, No. 23-10994, 2025 WL 2388306, at *16 (5th Cir. Aug. 18, 2025) (Ho, J., dissenting).

C. West Virginia's effort to preserve girls' school sports.

In April 2021, West Virginia became one of the first States to address this concern and confirm that women's and girls' sports teams should consist only of biological females. West Virginia schools have long assigned athletic teams based on sex to ensure opportunities for females. See W. VA. CODE § 18-2-25d(a)(3). The West Virginia Legislature reasonably expected that the mounting stories of defeat and displacement by males nationwide would reach West Virginian women and girls, too. So relying on these "studies and anecdotes pertaining to different locales," *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995), state lawmakers passed the Act.

The Act recognizes that "inherent differences" between males and females "are a valid justification for sex-based classifications" to "promot[e] equal athletic opportunities for the female sex." W. VA. CODE § 18-2-25d(a)(2), (5). It ensures males cannot compete against females in contact or competitive "sports designated for females, women, or girls." *Id.* § 18-2-25d(c)(2). It draws the line based on objective biology—"an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." *Id.* § 18-2-25d(b)(1); accord *Understanding Transgender People, Gender Identity & Gender Expression*, AM. PSYCH. ASS'N (July 8, 2024), https://perma.cc/PN4Y-QZQ3 (sex "refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy").

Consistent with protecting equality for all—and in line with the idea that gifted female athletes can sometimes play on male teams, see JA82—the Act bars no one from trying out for men's, boys', or co-ed teams. W. VA. CODE § 18-2-25d(c)(3). Females—no matter how they identify—can play on boys' teams because on average they do not possess a physical advantage. Males—no matter how they identify—may play only on boys' or co-ed teams. The Act speaks only of biological sex. Any student can identify however they choose.

D. Litigation assailing West Virginia's law.

1. Before the law took effect, B.P.J., a then-11-year-old male who identifies as female, sued. Pet.App.15a. B.P.J. accepts that the State may designate sex-specific sports but disagrees with assigning males who identify as females to boys' and co-ed teams. B.P.J. argued that the

law's biology-based distinction violates Title IX and the Constitution's Equal Protection Clause. Pet.App.79a.

The district court preliminarily enjoined the Act based on an early, incomplete record. Pet.App.79a. While that injunction was in place, B.P.J. competed on the girls' cross-country and track-and-field teams, displacing female athletes. See Stay Response App. at 1729-46, *B.P.J.* v. *W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. filed Feb. 7, 2023), ECF No. 48-2.

Meanwhile, the parties engaged in substantial discovery—including expert testimony—that confirmed that biological sex affects athletic performance. Although B.P.J. argued "individual circumstances" should control because B.P.J. is on hormone-impacting drugs, evidence showed these drugs do not eliminate male physiological advantages in athletics. See JA2123-2124 ("[N]o published scientific evidence [shows] that the administration of puberty blockers to males before puberty eliminates the pre-existing athletic advantage that prepubertal males have over prepubertal females."); JA2154-2173 (describing studies); accord, *e.g.*, Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 105 (2017) (estrogen treatments or gonadectomy "do not eliminate all of the performance advantages associated with having a male body" because "much of this advantage is structural and set in utero and in puberty"); Joanna Harper, et al., *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin? Systematic Review With A Focus On The Implications For Sport Participation*, 55 BR. J. SPORTS MED. 1, 8 (Mar. 1, 2021), https://perma.cc/6FLK-LKWQ (meta-review finding that "transwomen competing in sports may retain strength advantages over cisgender women, even after 3 years of hormone therapy"); see also

generally Alison K. Heather, et al., *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19 INT'L J. ENV'T RES. PUB. HEALTH 9103 (2022) (describing how males cannot be "reformatted" with hormones in part because of physiological developments before and just after birth).

Discovery also confirmed B.P.J. sought to classify sports teams by gender identity, not sex. B.P.J., after all, did not want "boys [with] [lower] circulating testosterone levels" competing on girls' teams. Pet.App.92a-93a. Instead, B.P.J. thought that moving boys to girls' teams was necessary "the moment [students] verbalize their transgender status." Pet.App.93a (district court). Yet even B.P.J.'s expert agreed "gender identity … [is] not a useful indicator[] of athletic performance." Pet.App.35a.

After months of discovery and review, the district court reversed itself and sided with Petitioners. The district court found no genuine dispute that biological males possess physiological advantages over biological females. Pet.App.90a-93a. These "inherent" advantages—at least partly admitted by B.P.J.—mean "biological males … are not similarly situated to biological females" in sports. Pet.App.91a, 95a. The court rejected B.P.J.'s argument that individual circumstances should determine eligibility, explaining that "a transgender girl is biologically male and, barring medical intervention, would undergo male puberty like other biological males." Pet.App.92a. And it found the State had a substantial interest in acknowledging these differences in sports even if some males—whether because of naturally low testosterone or intervention—lack typical testosterone levels. Pet.App.91a-93a.

The trial court declared the Act constitutional, dissolved its prior injunction, and entered summary judgment for Petitioners.

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

The injunction produced immediate, serious consequences. In the girls' spring 2023 track-and-field season, B.P.J. displaced "at least one hundred girls" in the standings—and prevented two girls from qualifying for the conference championships. Order Denying Mot. to Suspend at 6-7, *B.P.J.* v. *W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. Aug. 4, 2023), ECF No. 169 (Agee, J., dissenting). One girl on B.P.J.'s team—A.C.—recalled how she had typically beaten B.P.J. (two years her junior) in shot put and discus before. See A.C. Decl. at 4-7, *Tennessee* v. *Cardona*, No. 2:24-cv-00072 (E.D. Ky. filed May 3, 2024), ECF No. 21-5 ("A.C. Decl."). But in 2023, B.P.J. improved faster than female teammates, knocking A.C. out of the championship meet and leaving A.C. feeling "unheard and unseen." *Id.* at 5. Even her coach acknowledged the situation was "unfair." *Id.* at 6. Yet the same Fourth Circuit majority again refused to lift the injunction ahead of the fall 2023 season.

Things worsened into spring 2024. B.P.J. placed in the top three in every track event in which B.P.J. competed, winning most. B.P.J. beat over 100 girls again, displacing them over 250 times while denying multiple girls spots and

medals in the conference championship. See A.C. Decl. 7 & Ex. B. B.P.J. ended the academic year by placing second in both shot put and discus at a statewide invitational. *HGMSI*, ATHLETICLIVE (last visited Sept. 3, 2025), https://tinyurl.com/36s8vkbm.

The pattern repeated in spring 2025. Now a freshman in high school focusing on strength events, B.P.J. bumped female competitors out of the state tournament, then placed third in the State in discus and eighth in shot put while competing against much older female athletes. *Morrisey issues statement on transgender athlete at W.Va. state track & field meet*, WDTV (May 26, 2025, 10:04 AM ET), https://perma.cc/73GB-KBY5. In just this one season, B.P.J. displaced nearly 400 female competitors. *B.P.J.*, ATHLETICNET (last visited Sept. 3, 2025), https://tinyurl.com/373b8vt8. Along the way, some girls refused to compete against B.P.J. See Brad McElhinny, *Middle school athletes step out of shot put against transgender girl who just won court case*, METRONEWS (Apr. 19, 2024, 2:37 PM), https://perma.cc/G9HR-ZG6Z. Others protested. Sam Kirk, *West Virginia track state champion makes political statement during award ceremony*, WBOY (May 27, 2025, 12:15 PM ET), https://perma.cc/CD75-RXVS. Others reported worse. See, *e.g.*, A.C.Amicus.Br.3 (female athlete describing harms from competing on team with B.P.J.).

3. In the end, the same Fourth Circuit panel ignored these facts and ruled the State must allow B.P.J. to compete in girls' sports.

a. The court first reversed and remanded B.P.J.'s equal-protection claim. The majority concluded the Act facially discriminates "based on gender identity" because it does not define "female" to include males who *identify*

as female. Pet.App.23a-24a. The majority also held the Act discriminates by allowing girls to play on all teams while restricting males to boys' or co-ed teams. Pet.App.26a. It then held Petitioners must defend the Act as applied to B.P.J.'s particular circumstances, narrowing the relevant comparator to a female who has not "undergo[ne] Tanner 2 stage puberty" participating in girls' cross-country and track. Pet.App.31a, 34a. After loading the dice, the majority remanded the claim, declaring a dispute over whether certain biological males "enjoy a meaningful competitive athletic advantage over cisgender girls." Pet.App.34a.

As for Title IX, the majority reversed the district court and ruled for B.P.J. as a matter of law, saying the Act treated B.P.J. worse than similarly situated individuals and deprived B.P.J. "of any meaningful athletic opportunities." Pet.App.43a. No number of male advantages could convince the majority that the Act satisfies Title IX—those differences were irrelevant. Pet.App.39a. Instead, the majority held that by designating sex-specific sports and ensuring equal opportunities for female athletes, the Act discriminates based on gender identity. Pet.App.39a-40a. It added that the Act discriminates by allowing girls to play on all teams, while assigning males to boys' or co-ed teams. Pet.App.33a-34a, 39a. While it acknowledged B.P.J. could compete on male teams, the majority in the same breath declared that the Act left B.P.J. with "no real choice," "effectively excluding" B.P.J. from competing "in all non-coed sports." Pet.App.41a (cleaned up).

b. Judge Agee dissented in relevant part, concluding that "West Virginia may separate its sports teams by biological sex without running afoul of either the Equal Protection Clause or Title IX." Pet.App.44a. The

majority's reasoning, Judge Agee said, "inappropriately expand[ed] the scope of the Equal Protection Clause and upend[ed] the essence of Title IX." Pet.App.44a.

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

Judge Agee rejected B.P.J.'s Title IX claim for similar reasons. But he warned that the majority's Title IX error "has even further-reaching and destructive implications" than its flawed equal protection analysis because "Title IX does not require a justification inquiry." Pet.App.57a. Allowing biological boys to participate "in biological girls' sports turns Title IX on its head and reverses the monumental work Title IX has done to promote girls' sports from its inception." Pet.App.58a. The ruling below, Judge Agee concluded, "will drive many biological girls out of sports and eviscerate the very purpose of Title IX." Pet.App.59a.

Accordingly, Petitioners sought relief from this Court.

SUMMARY OF ARGUMENT

I. B.P.J.'s Title IX claim fails. Title IX forbids sex discrimination—treating one biological sex worse than the other—but does not forbid sex distinctions. The statute's plain text prohibits discrimination "on the basis of sex," where "sex" means the biological binary and requires sex to be the sole reason for differential treatment. Regulations, context, and more all show that Title IX permits biology-based distinctions to ensure equal opportunities in athletics. Reasoning from *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), does not apply here, either. In Title VII's workplace context, sex is generally irrelevant. But Title IX governs education, where biological differences are critical to athletic fairness. The Act designates sports based on biological sex—exactly what Title IX permits. The Fourth Circuit's decision displaces female athletes and encourages the exclusion Title IX was designed to prevent.

II. B.P.J.'s equal-protection claim also fails. Schools may preserve fairness and safety for female athletes by placing athletes on teams based on sex. When it comes to sports, males aren't like females—and the differences matter. B.P.J., a biological boy, is not similarly situated to a biological girl. And those to whom B.P.J. is similarly situated are treated equally under the Act. The Act contains only a facial sex-based classification that B.P.J. does not challenge: males cannot play on girls' teams, and girls can play on all teams. Under intermediate scrutiny, that classification passes muster. Even if one read a gender-identity classification into the Act, it would be subject to only rational-basis review because transgender status is not a suspect or quasi-suspect class. From every angle, the Act complies with the Equal Protection Clause.

ARGUMENT

I. The Act complies with Title IX.

Title IX forbids sex *discrimination*—that is, treating one sex worse than the other. It does not forbid sex *distinctions*. If it did, "women's sports" would be illegal. But Title IX recognizes sex-specific sports are necessary to ensure equal opportunities for women, so the Act's sex-specific designations satisfy Title IX.

A. Title IX's text forbids treating one *sex* worse than the other.

Title IX says students "shall" not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any federally funded "education program or activity" "on the basis of sex." 20 U.S.C. § 1681(a). Deciding how this provision would apply to West Virginia's law starts "with [the] text." *Groff* v. *DeJoy*, 600 U.S. 447, 468 (2023). Courts presume terms carry "their ordinary meaning at the time Congress adopted them." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 160 (2021). When terms have multiple possible meanings, the "everyday" meaning controls. *McBoyle* v. *United States*, 283 U.S. 25, 26 (1931).

To begin, "sex" here means biological sex—not gender identity. Title IX does not define "sex" because its meaning was obvious in 1972: sex meant (and still means) "either of the two divisions, male or female, into which persons … are divided, with reference to their reproductive functions." *Sex*, WEBSTER'S NEW WORLD DICTIONARY (1972); accord, *e.g.*, 20 U.S.C. § 1681(a)(2) (distinguishing schools using a binary conception of sex: either single-sex or for "both sexes"). The "overwhelming majority of dictionaries" from 1972 agree on this

definition. *Adams*, 57 F.4th at 812 (collecting sources); accord *Texas* v. *Cardona*, 743 F. Supp. 3d 824, 871-72 & n.122 (N.D. Tex. 2024). "The common theme running through these definitions of 'sex' is the focus on reproduction and the associated anatomical differences of men and women." *Id.* at 872.

The Court, too, has understood "sex" this way since the 1970s. Just a year after Title IX's passage, the Court said "sex" was "an immutable characteristic determined solely by the accident of birth." *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality). Closer to today, "all Members of the Court" agreed that a rule purporting to extend the term "sex" in Title IX to gender identity was likely unlawful. *Dep't of Educ.* v. *Louisiana*, 603 U.S. 866, 867 (2024) (per curiam).

Other provisions in Title IX *do* extend protections beyond sex—showing Congress knows how to do so. See *United States* v. *Varner*, 948 F.3d 250, 255 (5th Cir. 2020) ("Congress knows precisely how to legislate with respect to gender identity discrimination, because it has done so in specific statutes."). Title IX provisions adopted in 2022 refer to "consideration" of "transgender" status. 20 U.S.C. § 1689(a)(6). "Congress' use of 'explicit language'" in Section 1689(a)(6) "cautions against inferring" coverage of those statuses "in another provision." *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 580 U.S. 26, 34 (2016).

"On the basis of sex," then, means solely because of biological sex. The word "basis" means "support" or "reasoning." *Basis*, OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (1966). Here, "basis" follows the definite article "the." Using a "definite article" before "a singular noun" means the noun is a "discrete thing." *Niz-Chavez*, 593 U.S. at 166. So "the basis" indicates a singular

reason—not multiple factors. See, *e.g.*, *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004) (Congress's "use of the definite article … indicates … only one proper" referent); *Corner Post, Inc.* v. *Bd. of Gov'rs of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2455 (2024) (holding "the right of action" meant the sole cause of action in the complaint (cleaned up)). Knitted together, Title IX says a student can't be "subject to discrimination" for the sole reason of his or her biological sex.

As even the majority below recognized, "subject to discrimination" means "treating an individual *worse than* others who are similarly situated." Pet.App.38a (cleaned up). In other words, in Title IX, to "be subjected to discrimination" means that the distinction or differential treatment is to someone's detriment. In *North Haven Board of Education* v. *Bell*, for instance, 456 U.S. 512, 521 (1982), "a female employee" was "subjected to discrimination" when she was "paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than [we]re her male colleagues." Similarly, in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167, 174 (2005), a woman was subject to discrimination when she suffered a materially adverse employment action (retaliation). "Discrimination" thus happens when "groups are similarly situated and there is no justification for the [unfavorable] difference in treatment." *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 287 (2011).

That "discrimination" entails worse treatment is also compelled by the preceding clauses. Title IX also forbids "exclud[ing] from participation in" or "den[ying] the benefits of" an educational program. 20 U.S.C. § 1681(a). Because each term involves derogation, "discrimination" must, too. *FCC* v. *AT&T Inc.*, 562 U.S. 397, 406 (2011)

(multiple "words together may assume a more particular meaning than those words in isolation"). To "exclude" means to "bar from participation, enjoyment, consideration, or inclusion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 793 (1966). And to "deny" means "to turn down or give a negative answer." *Id.* at 603; see *Murray* v. *UBS Sec., LLC*, 601 U.S. 23, 33 (2024) (similarly interpreting "discrimination" consistent with prior text rather than imbuing it "with a new or different meaning").

Finally, forbidden sex-based discrimination must happen in an "education program or activity" to be actionable. *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision … is often clarified by" its "context."). And biological sex is critical in several school settings, sports included. *O'Connor* v. *Board of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers) (disregarding sex-based differences would "deny" girls "an equal opportunity to compete in interscholastic events"). "Physical differences" between men and women are "enduring," and they sometimes require accommodation at school for "privacy" and safety. *Virginia*, 518 U.S. at 533, 540, 550 n.19. "Education program[s] or activit[ies]" aren't like narrow employment decisions in the Title VII context, where sex is generally irrelevant. See *Bostock*, 590 U.S. at 660. In sports, sex does matter.

In sum, Title IX prohibits treating a person worse than another solely on account of his or her biological sex in an educational program. It does *not* invalidate every distinction based on characteristics that might (or might not) touch on sex.

B. Context confirms Title IX does not forbid sex distinctions.

What dictionaries establish, "statutory and historical context" confirms. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001). Title IX prohibits *sex discrimination* and embraces *sex distinctions*.

1. First, put Section 1681(a) in its "place in the overall statutory scheme" and consider a nearby provision, Section 1686. *West Virginia* v. *EPA*, 597 U.S. 697, 721 (2022). Section 1686 says "nothing" in Title IX is to "be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes." This clarifies that Title IX doesn't prohibit sex-separated housing. But that provision would mean nothing if the statute allows no room for sex distinctions. Contra *Walters* v. *Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). And note how Section 1686 isn't an *exception* to Section 1681(a). Rather, by its own title, Section 1686 "interpret[s]" Section 1681(a). See *Dubin* v. *United States*, 599 U.S. 110, 121 (2023) (using title as a "tool"). It confirms Section 1681(a) may embrace sex distinctions when they matter.

Other parts of Title IX also preserve sex-separation in contexts where separation is needed to ensure equal opportunities. For instance, the statute says "father-son or mother-daughter" activities are permitted if "opportunities for reasonably comparable activities [are] provided for students of [both sexes]." 20 U.S.C. § 1681(a)(8). The same goes for single-sex colleges, "boy" and "girl" conferences," "boy" and "girl" scouts, and "men's" and "women's" Christian associations. *Id.* § 1681(a)(5), (6), (7). Still another provision speaks to

beauty pageants "limited to individuals of one sex only." *Id.* § 1681(9).

In short, Title IX did not intend to erase sex distinctions.

2. Context also "includes the mischiefs" the legislature was addressing, including "public knowledge of the problems that inspired [a law's] enactment." J. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84-85 (2006); accord *Fischer* v. *United States*, 144 S. Ct. 2176, 2186 (2024) (looking to "history of the provision" to discern meaning).

Here, "it would require blinders to ignore that" Title IX was meant to level educational opportunities for boys and girls—including by allowing sex distinctions to respect biological differences. *Williams* v. *Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993). "Title IX was enacted in response to evidence of "pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick* v. *Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 704 & n.36 (1979); *Cohen*, 101 F.3d at 164-65 (detailing same historical goal). Title IX's principal sponsor wanted the law to respect biological differences between men and women. 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh) (Title IX would not require co-ed sports teams or locker rooms); 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh) (Title IX would respect personal privacy in athletic facilities). Without sex distinctions, Title IX could never achieve its purpose when it comes to sports.

"Context also includes common sense." *Biden* v. *Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, J., concurring). And in sports, sex is the most obvious and

well-established characteristic to determine whether individuals are similarly situated. See, *e.g.*, *Clark I*, 695 F.2d at 1131; *B.C.* v. *Bd. of Educ., Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059, 1066 (N.J. App. Div. 1987) ("If [a male] is permitted to play on the girls' [sports] team, his personal interest would be attained at the expense of denying females the right to have equality of athletic opportunities."). Only by accounting for those biological differences in sports can Title IX achieve its goal to stop denials of educational "benefits" in educational programs "on the basis of sex." 20 U.S.C. § 1681(a).

3. Title IX's implementing regulations point in the same direction. 34 C.F.R. § 106; see also 40 Fed. Reg. 24,128 (June 4, 1975). Adopted three years after Title IX's enactment, these regulations authorize sex-separated physical-education classes, 34 C.F.R. § 106.34(a)(1), plus restrooms, showers, and locker rooms, *id.* § 106.33. And most importantly here, they allow sex-separated sports teams. *Id.* § 106.41(b); see also *Tennessee* v. *Dep't of Educ.*, 104 F.4th 577, 611 (6th Cir. 2024) ("[A]thletics programs solely used biological sex as a classification method for decades—an approach authorized by existing Title IX regulations."). The Department of Health, Education, and Welfare issued these regulations to implement Title IX's general nondiscrimination mandate in Section 1681(a). 40 Fed. Reg. at 24,139-43.

As contemporaneous constructions, these regulations embracing sex distinctions are "authoritative expressions concerning [Title IX's] scope and purpose," *N. Haven*, 456 U.S. at 535 (citation omitted), and are entitled to "very great respect." *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 386 (2024). Congress even blessed them. After six days of hearings on whether the Title IX rulemaking was "consistent with the law" and congressional intent,

Congress allowed the regulations to take effect, *N. Haven*, 456 U.S. at 531-32 (citation omitted), placing Congress's indelible stamp of approval on sex-differentiated sports teams. Congress approved this construction a second time when it amended Title IX to apply to all education programs at federally funded schools—including sports programs. 20 U.S.C. § 1687(2)(A). So these regulations "accurately reflect congressional intent." *Grove City Coll.* v. *Bell*, 465 U.S. 555, 568 (1984); see 89 Fed. Reg. 33,474, 33,817 (Apr. 29, 2024) (same). Refusing "to overrule an agency's construction" that Congress was aware of—and specifically asked to review—provides strong "evidence of the reasonableness of that construction." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

In short, Title IX "explicit[ly] recogni[zes] that schools may differentiate between students on the basis of sex in some contexts, such as … creating athletic teams." *Louisiana*, 603 U.S. at 870 (Sotomayor, J., dissenting). Congress wanted to ensure "equal opportunities for female athletes." *McCormick*, 370 F.3d at 287; *Cohen* v. *Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993).

* * *

Text, history, and context agree: Title IX forbids treating one sex worse than the other but does not forbid sex distinctions.

C. The Act draws a permissible sex distinction.

1. Against this background, the Fourth Circuit held the Act violates Title IX by "operat[ing] on the basis of sex" in two ways. Pet.App.39a (cleaned up). Neither is right.

First, the Court determined the Act "discriminates based on gender identity," and in the Fourth Circuit's

view, gender-identity discrimination "is discrimination on the basis of sex." Pet.App.39a (cleaned up). But Title IX forbids only biological sex discrimination. *Supra* § I.A-B. It says nothing about gender-identity discrimination. And it *allows* schools to consider biological sex in athletics. *Supra* § I.B.3. In any event, West Virginia's Act does not discriminate on the basis of gender identity. Whether a biological male identifies as male, female, or something else makes no difference for how the Act applies—*no* male may compete in girls' sports. Were that not clear enough, the only mention of gender identity comes in the Act's legislative findings, when it *disclaims* any consideration of gender identity. See W. VA. CODE § 18-2-25d(a)(4). Its operative provisions designate sports based on biological sex alone.

Second, the Fourth Circuit decided the Act "discriminates based on sex assigned at birth by forbidding transgender girls—but not transgender boys—from participating in teams consistent with their gender identity." Pet.App.39a. Yet B.P.J. doesn't contest that feature of the Act; B.P.J. is solely "challeng[ing] the Act's requirement that [B.P.J.] may compete only on boys or coed teams." Pet.App.42a.

At any rate, the Act's line is an appropriate sex *distinction*. Recall that Title IX does not mandate sex-blind symmetry. If schools "provide equal athletic opportunity for members of both sexes"—considering factors like the "abilities of members of both sexes,"—then they satisfy Title IX. 34 C.F.R. § 106.41(c). Given the typical physical advantages of males over females, it makes sense to allow females to try out for boys' teams but not allow males to compete on girls' teams. This approach recognizes males' and females' "differing abilities" to ensure both sexes have fair opportunities. Jamal Greene,

Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX, 11 MICH. J. GENDER & L. 133, 169 (2005) ("The skills gap, then, is the only justification that should be needed for any asymmetry in tryouts, either under the Constitution or under Title IX."); accord Rosalind S. Simson, *The Title IX Athletic Regulations and the Ideal of A Gender-Free Society*, 2011 DEN. U. SPORTS & ENT. L.J. 3, 30 (2011).

That's why federal regulations and court decisions have allowed (and sometimes required) schools to provide opportunities to females but not males. See 34 C.F.R. § 106.41(b) (requiring schools to allow members of sex whose opportunities "have] previously been limited" to try out for opposite-sex teams when schools do not provide team for their sex); *Kelley* v. *Bd. of Trs.*, 35 F.3d 265, 272-73 (7th Cir. 1994) (upholding decision to terminate men's swim team while keeping women's swim team); *Williams*, 998 F.2d at 175 (rejecting argument that allowing females to try out for male teams violated Title IX).

By allowing females to try out for boys' teams, the Act comports with Title IX.

2. Additionally, the Fourth Circuit held the Act "treat[s] students differently even when they are similarly situated." Pet.App.39a. But as Judge Agee observed, the Fourth Circuit assumed—"without discussion"—that males who identify as girls, including B.P.J., are similarly situated to female students. Pet.App.57a. The Fourth Circuit erred by focusing only on gender identity.

A similarly situated student is one "who is directly comparable to the plaintiff in all material respects." *Boumehdi* v. *Plastag Holdings, LLC*, 489 F.3d 781, 791 (7th Cir. 2007) (cleaned up); see *Dawson* v. *Steager*, 586 U.S. 171, 177-78 (2019). Such a student must be

comparable "for all relevant purposes" furthered by the challenged law. *Williams* v. *Vermont*, 472 U.S. 14, 23-24 (1985). A male student who identifies as female is not similarly situated to a female student for purposes of athletics. On average, male athletes are larger, stronger, faster, and more muscular—and they process oxygen more efficiently—than female athletes. JA2125-2151. That's why Title IX allows sports teams to be assigned based on sex and allows West Virginia's Act.

But the Fourth Circuit concluded gender identity alone matters. If that were true, then schools must allow males who identify as female into women's sports regardless of whether they take puberty blockers or cross-sex hormones. This mandate includes, as Judge Agee noted, biological males who identify as girls and have a "significant physiological advantage." Pet.App.58a. That reality exposes the breadth of the Fourth Circuit's Title IX analysis; it would require States to grant any male access to any sport based solely on gender identity.

The Fourth Circuit tried to buttress its analysis by asserting "Title IX protects the rights of individuals, not groups." Pet.App.40a (cleaned up). But in provision after provision, Title IX and its regulations allow schools to treat males and females as groups. *E.g.*, 20 U.S.C. § 1681(a)(8) (allowing "father-son or mother-daughter activities" so long as "opportunities for reasonably comparable activities [are] provided for students of [both sexes]"); 34 C.F.R. § 106.33 (similar for "toilet, locker room, and shower facilities"); 34 C.F.R. § 106.34(b)(2) (similar for a "single-sex class or extracurricular activity"). And Title IX allows group comparisons by inviting adjudicators to consider statistics of group imbalances. 20 U.S.C. § 1681(b).

Title IX allows these relevant sex-based distinctions no matter how they affect individual students. The statute does not, for instance, force schools to allow boys who are short or slow to compete on girls' teams. The Fourth Circuit's narrow focus on B.P.J. would topple Title IX's existing regulatory framework.

D. *Bostock*'s reasoning does not apply to Title IX.

B.P.J. insists *Bostock* requires schools to allow males who identify as female to compete on female athletic teams. Br. in Opp. 18-20. But *Bostock* did not conflate gender identity with biological sex as B.P.J. suggests. And *Bostock* did not involve opportunities in sports, where biological differences between the sexes *must* be considered to *prevent* discrimination. The Court has already suggested *Bostock*'s reasoning likely does not extend to Title IX. *Louisiana*, 603 U.S. at 867.

Title VII "is a vastly different statute" from Title IX. *Jackson*, 544 U.S. at 175. The difference starts with the text. Title VII prohibits discrimination in "employment practice[s]" "because of" various traits, including sex, race, and religion. 42 U.S.C. § 2000e-2(a). Title IX prohibits discrimination "under any education program" only "on the basis of sex." 20 U.S.C. § 1681(a). *Bostock* concluded "because of" requires mere but-for causation, so it is unlawful if sex is one of multiple motivating factors. But Title IX contains no such language. Instead, it forbids discrimination "on the basis of sex," signaling sex must be the *sole* reason for invidious discrimination. *Supra* § I.A.

More fundamentally, Title VII's focus on hiring and firing in the workplace does not map onto Title IX's educational context, which focuses on "schools and children." *Adams*, 57 F.4th at 808. "[S]chools are unlike

the adult workplace." *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). While Title VII *prohibits* considering sex in hiring and firing because those traits are generally irrelevant there, Title IX *authorizes* schools to consider sex when necessary to give women and girls equal opportunity. Indeed, "while an employer risks Title VII liability when it makes distinctions among employees based on sex, an education program risks Title IX liability when it *fails* to distinguish between student athletes based on sex." *Soule* v. *Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 63 (2d Cir. 2023) (Menashi, J., concurring). That's why schools can have male and female soccer teams, but law firms cannot have male and female practice groups.

On its own terms, *Bostock*'s logic cannot apply to sports. *Bostock* said an individual's "transgender status is not relevant to employment decisions" about hiring and firing. 590 U.S. at 660. But a student's sex *is* relevant in sports, often requiring sex-differentiated opportunities to ensure fairness and safety. So Title VII "precedents are not relevant in the context of [school] athletics." *Neal*, 198 F.3d at 772-73, 772 n.8.

Ignoring physiological differences between the sexes "will drive many biological girls out of sports and eviscerate the very purpose of Title IX." Pet.App.59a (Agee, J., dissenting). Indeed, B.P.J.'s participation displaced hundreds of girls and prevented some from competing in end-of-season championship meets. Using *Bostock* to *require* such results "would provide more protection against discrimination on the basis of transgender status … than it would against discrimination on the basis of sex." *Adams*, 57 F.4th at 814. Title IX would provide more protection to men and boys who *identify* as female than to women and girls who are biologically female. That can't be right.

Two additional considerations confirm *Bostock* does not control here. First, even under Title VII, the Court refused to prejudge issues involving "sex-segregated" facilities and policies such as "bathrooms, locker rooms, and dress codes." *Bostock*, 590 U.S. at 681. Second, Title IX's "contractual framework distinguishes [it] from Title VII, which is framed in terms not of a condition but of an outright prohibition." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). While "Title VII applies to all employers without regard to federal funding and aims broadly to eradicate discrimination throughout the economy," "Title IX focuses more on protecting individuals from discriminatory practices carried out by recipients of federal funds." *Id.* at 286-87 (cleaned up). Title IX's contractual nature, discussed below, demands clearer statutory language from Congress.

E. Federalism principles support the Act's validity.

A last consideration pertains to federalism. States "retain substantial sovereign authority" due to our system's "constitutionally mandated balance of power." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457-60 (1991) (cleaned up). This decentralized structure helps to protect "our fundamental liberties." *Id.* at 458 (cleaned up).

For this reason, federal courts should "be certain of Congress' intent before finding that federal law overrides [the federal-state] balance." *Id.* at 460 (cleaned up). The Court thus "insist[s] on a clear" congressional pronouncement "before interpreting" even "expansive language in a way that intrudes on the police power of the States." *Bond* v. *United States*, 572 U.S. 844, 860 (2014); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (requiring "clear and manifest purpose" to override the

"historic police powers of the States"). States' traditional power includes regulations over education, which is "the very apex of the function of a State," *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972), and regulations that protect public health and safety, *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 (1905).

What's more, this Court requires "Congress [to] speak with a clear voice" when imposing conditions on the receipt of federal funds through spending legislation like Title IX. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). "'[L]egislation enacted pursuant to the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006). The federal government may not "surpris[e] participating States with post acceptance or 'retroactive' conditions," *Pennhurst*, 451 U.S. at 25, or impose "a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 190 n.11 (1982).

These federalism principles demand a clear statement that Congress intended to force states to allow males who identify as female to compete in girls' sports. That intent must be "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (cleaned up).

Nothing suggests—let alone makes "unmistakably" clear—that Congress intended to usher in a sea change. Yet without such a statement, the Fourth Circuit overrode core state responsibilities over education and upset a half-century of settled expectations. The decision also threatens to redefine principles of fairness and biological

differences that have "been commonplace and universally accepted … across societies and throughout history." *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 634 (4th Cir. 2020) (Niemeyer, J., dissenting). And it would force States to change their school-sports structure.

* * *

Both the Fourth Circuit and B.P.J. embrace a reading of Title IX that sacrifices safety and fairness in women's sports. Indeed, the Fourth Circuit's decision invites Title IX violations. A girl who cannot access girls' sports teams or a place in a championship race because a spot she could otherwise secure is occupied by B.P.J. or another biological male is "excluded" from an educational program "on the basis of sex" and is "denied the benefits of" that program, contravening Section 1681(a). See *Cape* v. *Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam) (without distinct teams, many biological "females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement"). Those excluded girls—no less than B.P.J.—get one childhood. Their opportunities matter, too.

II. The Act satisfies the Equal Protection Clause.

Beyond misconstruing Title IX, the Fourth Circuit also constitutionalized gender identity as the organizing principle for school athletics. The Court should reverse on that ground, too.

A. The Act treats similarly situated students equally.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."

City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It is "not a demand that a statute necessarily apply equally to all persons." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966). Nor does it "require things which are different in fact to be treated in law as though they were the same." *Id.* (cleaned up).

Thus, Plaintiffs bringing equal-protection claims must show that a challenged statute treats them differently from a proposed comparator who is "in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992). Without this showing, no invidious discrimination exists for a court to cure. See *Lehr* v. *Robertson*, 463 U.S. 248, 268 n.27 (1983) (applying rational basis and rejecting equal-protection challenge by father to "the manner in which the statute distinguishes among classes of fathers"); *Michael M.* v. *Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 472, 475-76 (1981); *Parham* v. *Hughes*, 441 U.S. 347, 354-55 (1979); Pet.App.50a n.2 (Agee, J., dissenting). Quite the opposite: "[t]o fail to acknowledge even our most basic biological differences" in such circumstances "risks making the guarantee of equal protection superficial and so disserving it." *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 73 (2001); see also *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ.* v. *Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 657 (6th Cir. 1981) ("When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist.").

The Legislature drew a line based on biology, and males are not similarly situated to female athletes on this score. "It is undisputed that after puberty biological males have physiological advantages over biological females that significantly impact athletic performance."

Pet.App.48a (Agee, J., dissenting). Biological males are, on average, bigger, stronger, and faster than biological females. JA2123-2173; JA2452-2499. They have 60% to 100% greater arm strength than women and 25% to 60% greater leg strength than women. JA2133-2135. They are 10%-13% faster, "an overwhelming difference." JA2135-2136. Their advantage in jumping is even greater. JA2140-2141. They throw, hit, and kick faster and farther than females. JA2141-2142; see also, *e.g.*, Charles J. Dunlap, Jr., *Annie Get Your Gun: The Constitution, Women, and Involuntary Service in Combat*, 27 DUKE J. GENDER L. & POL'Y 149, 154 (2020) (collecting data that "men as a group significantly outperform women in almost all sporting activities that … require physical strength and aerobic performance"). Even before puberty, "boys have a competitive advantage." Pet.App.48a (Agee, J., dissenting); see, *e.g.*, Mira A. Atkinson, et al., *Sex Differences in Track and Field Elite Youth*, 56 MED. & SCI. IN SPORTS & EXERCISE 1390, 1394 (2024) (documenting a significant difference in performance among prepubertal youth in key track-and-field events). In short, "[b]ecause of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition." *Kleczek* v. *R.I. Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992).

Really, by taking no issue with sex-specific sports teams generally, B.P.J. concedes boys and girls aren't athletically alike. If B.P.J. thought the sexes were similarly situated in athletics, then the answer would be to make all sports co-ed. Yet "B.P.J. recognizes the benefits of sex-separated athletics and takes issue only with the state's definitions … based on biological sex." Pet.App.88a.

A plaintiff's gender identity does not change the calculus. "Gender identity … has nothing to do with sports." Pet.App.49a. That's why B.P.J.'s expert agreed "gender identity … is not a useful indicator of athletic performance." JA1743.

Gender identity does not affect biology or physiology. *E.g.*, *Gender & Health*, WHO, https://perma.cc/EP5S-SYR6 (noting how gender "may or may not correspond to the person's physiology or designated sex at birth"); Aditi Bhargava, et al., *Considering Sex as a Biological Variable in Basic & Clinical Studies: An Endocrine Society Scientific Statement*, 42 ENDOCRINE REV. 219, 228 (2021), https://perma.cc/V99Y-PJP2 ("Sex is an essential part of vertebrate biology, but gender is a human phenomenon; sex often influences gender, but gender cannot influence sex.").

What's more, unlike "immutable" sex, *Frontiero*, 411 U.S. at 686, gender identity is alterable—it can change, sometimes quickly. It's also kaleidoscopic, as someone can identify as neither sex, both sexes, gender fluid, or something else—all with no tie to the kind of physical features underlying athletic ability. See Wylie C. Hembree, et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3873 (2017). An athlete's medication choices do not change things, either. That some athletes take medications confirms those they are not similarly situated based on gender identity alone.

More importantly, the Act classifies between males and females based on biology, not medication use or gender identity. Any male can take medicines that will affect his hormone levels or physical abilities, for many reasons. Yet the Fourteenth Amendment confers no right on him to use

those medical treatments to allow him to compete in women's sports. Rightly so considering how boys have physical advantages over girls even before the effects of any hormonal changes are felt. *E.g.*, Konstantinos D. Tambalis, et al., *Physical Fitness Normative Values for 6-18-Year-Old Greek Boys and Girls, Using the Empirical Distribution and the Lambda, Mu, and Sigma Statistical Method*, 16 EUR. J. SPORT SCI. 736 (2016).

When it comes to athletic teams, males are similarly situated to males, and females are similarly situated to females. B.P.J is a biological male. And the Act treats all biological males the same. W. VA. CODE § 18-2-25d(c)(2)-(3).

"In cases where men and women *are not* similarly situated, … and a statutory classification is realistically based upon the differences in their situations, this Court [will] [uphold] its validity." *Parham*, 441 U.S. at 354 (emphasis added) (upholding law without further analysis where mothers and fathers were not similarly situated); see also *Lehr*, 463 U.S. at 267-68. That's true here. The Act does not offend the Equal Protection Clause, as it does not treat similarly situated students differently.

B. The Act does not classify based on gender identity.

B.P.J. has another problem: trying to write both sex *and* gender-identity classifications into the Act. No gender-identity classification is found in the Act.

By its terms, the Act classifies based on sex. The Act first requires sports teams be designated male, female, or co-ed, which B.P.J. "concede[s] to be valid." Pet.App.26a. The Act then places students on those sports teams "based on biological sex"—that is, each student's "male or

female … reproductive biology and genetics" as determined "at birth." W. VA. CODE § 18-2-25d(b), (c)(1).

Teams designated for males may be open to females, but not vice versa. W. VA. CODE § 18-2-25d(c)(2)-(3). Male students compete only on male or coed public-school teams no matter how they identify. Thus, the only "explicit" distinction at issue here is biological sex. *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993).

The Act does not turn on gender identity. No matter how they identify, males play on only male and co-ed teams; females play on any team. It's a sex-based distinction, not one turning on a student's professed identity. And mere engagement with biology does not alone transform a sex classification into a gender-identity classification. After all, this Court "has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences." *Adams*, 57 F.4th at 809 (collecting authorities).

The Fourth Circuit mistakenly held the Act contained an additional "facial classification based on gender identity" because the "purpose" and "only effect" of defining a person's sex as their "reproductive biology and genetics at birth" was to "exclude transgender girls from the definition of 'female'" and "exclude" them from "girls['] sports teams." Pet.App.24a. Notice what's missing from this allegation of pretext: any support. "[A]bsent a showing" that the Act's team designations are "pretexts designed to effect invidious discrimination" against transgender students, the Act does not classify based on gender identity. *Skrmetti*, 145 S. Ct. at 1833.

The Act's sex-based classification serves a legitimate, non-pretextual purpose: "to promote equal athletic

opportunities for the female sex" by keeping biological males—who possess inherent physical differences—from "displac[ing] females" who compete on female teams. W. VA. CODE § 18-2-25d(a)(1)-(5). It then operates as intended, prohibiting males from participating on female sports teams.

No animus lurks. This Court "has long disfavored arguments based on alleged legislative motives." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 253 (2022). And "state actors are entitled to a presumption that their actions turn on constitutionally legitimate motivations rather than impermissible animus." *Skrmetti*, 145 S. Ct. at 1854 (Barrett, J., concurring). B.P.J. has not overcome that presumption.

The record contains no evidence of "broad" animus "throughout the state legislature." Pet.App.84a. To the contrary, the Act's "limited scope" provides strong evidence the legislature's stated purpose was genuine. See *Skrmetti*, 145 S. Ct. at 1859 (Alito, J., concurring). The Act does not refer to "names, pronouns, hair styles, attire, recreational activities or hobbies, or career interests," nor does it "regulate any other behavior in which minors might engage for the purpose of expressing their gender identity." *Ibid.* It also addresses the specific concern of *male* advantage over *female* competitors, allowing women to cross over to men's teams (because fairness and safety concerns don't arise when that happens). And it applies to all males, no matter how they identify.

Selected statements from legislators can't show animus, either. For one, in passing the Act, the legislature expressed a genuine concern for fairness—not a disdain for those who identify as transgender. *E.g.*, JA159-160; JA244; JA406-407; JA257-258. For another, "[i]t is a

familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). West Virginia also has a strong interest in protecting women and girls, so the Act is not "inexplicable by anything but animus." *Trump* v. *Hawaii*, 585 U.S. 667, 706 (2018).

Looking at the Act's effect, the Fourth Circuit again got it wrong. The Equal Protection Clause prohibits only "invidious discrimination," not "[d]isproportionate impact … [s]tanding alone." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). Cases discussing "when a neutral law has a disparate impact … signal[] no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 265, 273 (1979). In this context especially, disparate impacts are "an unavoidable consequence of a legislative policy that has … always been deemed to be legitimate." *Id.* at 279 n.25. And if disparate impact were enough, then countless lawful distinctions would fall—even when biological sex is "not a stereotype" that unfairly separates other people otherwise similarly situated. *Nguyen*, 533 U.S. at 68.

Finally, this Court's decision in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), doesn't transform the Act's sex classification into gender-identity discrimination. Indeed, *Bostock*'s statutory analysis has no role to play in the equal-protection context for at least three reasons. First, *Bostock* "rested its analysis on what it took to be the ordinary meaning of the relevant statutory terms" in Title VII: "because of," "otherwise discriminate against," and "individual." *Skrmetti*, 145 S. Ct. at 1838 (Alito, J., concurring) (cleaned up). None of those terms appear in the Equal Protection Clause. Second, this Court has

examined sex and sexual-orientation equal-protection claims "for decades" without suggesting "sexual orientation discrimination is just a form of sex discrimination." *Ibid.* Importing *Bostock* now would depart from this longstanding precedent. And third, *Bostock* would invite a slippery slope; "it is difficult to see why it would not apply to other protected characteristics" if it applies here. *Ibid.*

So this Court "need not engage *Bostock* at all." *Skrmetti*, 145 S. Ct. at 1839 (Alito, J., concurring); see also *Lange* v. *Houston Cnty.*, No. 22-13626, 2025 WL 2602633, at *7 (11th Cir. Sept. 9, 2025) (Newsom, J., concurring) (explaining why the "distinctions" between *Bostock*'s Title VII analysis and the test under the Equal Protection Clause "run wide and deep").

C. The Act's sex distinction satisfies intermediate scrutiny.

1. The Act's sex classification is constitutional. The Equal Protection Clause does not eliminate the State's power to classify, but "measure[s] the basic validity of the legislative classification." *Feeney*, 442 U.S. at 271-72. Sex is not "a proscribed classification." *Skrmetti*, 145 S. Ct. at 1829 (cleaned up). "Recognizing and respecting biological sex differences does not amount to stereotyping" of the sort that the Equal Protection Clause forbids. *L.W. by & through Williams* v. *Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023). Here, the Act's sex distinction does no more than that.

Laws containing sex-based classifications trigger intermediate scrutiny. *Skrmetti*, 145 S. Ct. at 1828-29. Under this standard, "the State must show" its sex-based distinction "serves important governmental objectives" and the "discriminatory means" chosen are "substantially

related" to the State's goal. *Id.* at 1829 (citation omitted). Because the Act draws a sex-based classification, intermediate scrutiny (at most) applies.

2. The Fourth Circuit botched this test—essentially ratcheting intermediate scrutiny to strict scrutiny—by tailoring the analysis to B.P.J.'s personal circumstances for B.P.J.'s "as-applied" challenge. In effect, the Fourth Circuit required any sex-based classification be justified on a case-by-case.

That's wrong, as "case-by-case adjudication … has little, if any, role to play in equal protection analysis." David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1382-83 (2005). The "facial or as-applied" label "does not speak at all to the substantive rule of law." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1127 (2019). And intermediate scrutiny always turns on how it relates "to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989). As-applied or not, "broad legislative classification[s] must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977).

Thus, when it comes to sex-based classifications like this one, the Supreme Court looks at a statute's disparate treatment of men and women *as a whole*—not at a plaintiff's individual circumstances. *E.g.*, *Nguyen*, 533 U.S. at 53; *Virginia*, 518 U.S. at 515; *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). As-applied equal-protection challenges involving strict or intermediate scrutiny "lead inexorably to facial review"; "the distinction between facial and as-applied adjudication rarely surfaces." Gans, *supra* at 1381-82. "If the classification is

reasonable in substantially all of its applications," the policy cannot "be said to be unconstitutional simply because it appears arbitrary in an individual case." *O'Connor*, 449 U.S. at 1306.

The Fourth Circuit nevertheless hyper-fixated on B.P.J.'s specific characteristics. But its cited authorities don't support that approach. *Caban* v. *Mohammed*, 441 U.S. 380 (1979), and *Lehr* v. *Robertson*, 463 U.S. 248 (1983), for instance, both considered whether a class of unwed fathers was similarly situated to unwed mothers under an adoption statute—not the individual facts of each plaintiff. The particular facts of the case merely "illustrate[d]" the classification's "harshness." *Caban*, 441 U.S. at 394.

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432 (1985), has little import, either. It didn't involve intermediate scrutiny or a sex classification. *Cleburne* applied rational-basis review, where any space between a facial and as-applied equal-protection challenge (assuming it exists) might matter. *Id.* And before granting as-applied relief, *Cleburne* explained courts "should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before" it. *Id.* at 446.

Accepting the Fourth Circuit's approach would dispense with decades of "carefully crafted rules" for intermediate-scrutiny analysis. Logan A. Worrick, *Rules for Thee … And Also For Me: Why Courts Should Reject As-Applied Intermediate Scrutiny*, 37 REGENT U. L. REV. 131, 150 (2024). As it stands, only a substantial fit between means and an important end is required under immediate scrutiny—not a perfect fit. *Nguyen*, 533 U.S. at 70. The policy "chosen may not maximize equality, and may represent trade-offs between equality and

practicality. But … even the existence of wiser alternatives than the one chosen does not serve to invalidate" a policy that "is substantially related to the goal." *Clark I*, 695 F.2d at 1131-32.

In contrast, under the Fourth Circuit's refashioned test, styling a complaint "as applied" would require a sex-based classification to be a perfect fit in "every instance," converting intermediate scrutiny into strict. *Nguyen*, 533 U.S. at 70. Governments would be left with the impossible option of litigating every application of any classification. In the athletic context, schools would have to show a perfect justification whenever they directed any male to play male sports, factoring in that male's unique physical abilities, disabilities, medical diagnosis, preferred medical treatments, alternative athletic options, and lifestyle. The same would apply for athletes who identify as transgender. And the outcomes could vary because "the social, medical, and physical transition of each transgender person is unique." Pet.App.92a. It also might require constant reevaluation—to account, for instance, for the possibility of an athlete starting and stopping medication.

Aside from administrability problems, this *ad hoc* approach—one the Fourth Circuit is not empowered to impose in the first place—"raise[s] entirely new problems related to fairness, official discretion, and equal administration of the laws." *Bonidy* v. *USPS*, 790 F.3d 1121,1128 (10th Cir. 2015). More likely, it would abolish sex-specific sports.

3. Properly applied, the Act satisfies intermediate scrutiny. Everyone agrees West Virginia's interest in fair and safe athletic opportunities for women is an important one. See Pet.App.87a-88a, Pet.App.84a, 4CCA Op. Br. at 37; Pet.App.33a. And the Act's means—designating

students to teams by sex—is substantially related to that end.

It is "beyond dispute" that biology and athletic performance are inextricably intertwined. See Pet.App.33a-34a, 48a. Sex chromosomes determine the factors most relevant to performance differences between males and females. Extensive scientific evidence demonstrates biological males outperform biological females in athletic competitions, both before and after puberty. Pet.App.48a (Agee, J., dissenting); *Adams*, 57 F. 4th at 819 (Lagoa, J., concurring) (recognizing that pre-puberty advantages aren't "negligible"); JA2154-2173. Acknowledging this difference isn't a "stereotype" or an "overbroad generalization[] about the differences between men and women." *Skrmetti*, 145 S. Ct. at 1828. It reflects biological reality. See *Nguyen*, 533 U.S. at 73; *Adams*, 57 F. 4th at 819 (Lagoa, J., concurring). Classifying based on sex has a "close and substantial bearing on" preserving fairness in women's sports. *Nguyen*, 533 U.S. at 70.

Still, the Fourth Circuit demanded a perfect fit rather than a substantial one—a fit that accounted for how certain sex-based differences only emerge "once puberty begins." Pet.App.34a. In addition to setting the bar too high, this approach overlooks the evidence that boys have athletic advantages over girls *even before puberty*. As one expert explained, "much data" and "multiple studies" show "significant physiological differences, and significant male athletic performance advantages in certain areas, exist before significant developmental changes associated with male puberty have occurred." JA2155. "Young girl athletes are not simply smaller, less muscular boys." JA2155. And B.P.J. has admitted this evidence exists. 4CCA Op. Br. 42 n.7. That's enough. Under intermediate scrutiny, conclusive proof is not required, and summary

judgment on an equal-protection claim can be appropriate even if "the evidence is in conflict." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 211 (1997).

Redrawing the line at puberty or based on medication use, as the majority below seemed to propose, would be unworkable. Puberty occurs at different ages for different children. And children take all sorts of medicines that may adversely affect their physical abilities. At the same time, not all males who identify as females avoid male puberty or take puberty blockers. Some "may have difficulty accessing" puberty blockers; others may not want them, "choos[ing] to only transition socially"; still others may not identify as female until after puberty. Pet.App.91a-92a. And biological men take puberty blockers for different medical reasons unrelated to gender identity.

Redrawing the line at gender identity—as B.P.J. seeks—also goes too far. "Gender identity, simply put, has nothing to do with sports." Pet.App.49a (Agee, J., dissenting). Allowing self-declared identity to be decisive would thwart the State's interest and *require* government discrimination based on gender identity. For instance, under B.P.J.'s conception, a male identifying as male with low testosterone would be excluded from girls' sports, but a male identifying as female with low testosterone would not.

Ultimately, this Court is loath to "second-guess" a State's policy judgments. *Skrmetti*, 145 S. Ct. at 1836. "[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *U.S. R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). A legislature's "superior institutional competence" is critical here, where people of good faith can (and do) disagree about the "policy considerations" at

stake. *Patsy* v. *Bd. of Regents of Fla.*, 457 U.S. 496, 513 (1982).

"Recent developments" in sex-specific sports rules "underscore the need for legislative flexibility." *Skrmetti*, 145 S. Ct. at 1836. Since West Virginia enacted its law, national and international sports organizations have implemented similar policies, insisting that only female athletes may compete in women's competitions. This evolving state of play shows that legislatures are best suited to act. They are "far better situated than … [c]ourt[s] to assess the empirical data, and to balance competing policy interests." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 520 (2008). And "the calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Skrmetti*, 145 S. Ct. at 1837 (cleaned up).

B.P.J.'s approach—which "go[es] beyond the original bedrock promise of treating like individuals alike—would usher in a new form of equal protection, what might be called a substantive equal protection claim." *Gore* v. *Lee*, 107 F.4th 548, 558 (6th Cir. 2024) (Sutton, C.J.). The Court should reject it.

4. A final point: if B.P.J. means to challenge just the Act's *definition* of sex, then that characterization still doesn't work. Only rational-basis review would apply to this under-inclusiveness argument. "Once it has been established that the government is justified" in using a classification, heightened scrutiny "has little utility in supervising the government's definition of its chosen categories." *Jana-Rock Const., Inc.* v. *N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006); accord *Orion Ins. Grp.* v. *Wash. State Off. of Minority & Women's Bus. Enters.*, No. 16-5582, 2017 WL 3387344, at *13 (W.D. Wash. Aug. 7, 2017) (rejecting equal-protection claim

based on claimant's allegation that he had sufficient tribal heritage to be given disadvantaged business enterprise status); *Hoohuli* v. *Ariyoshi*, 631 F. Supp. 1153, 1159-61 (D. Haw. 1986) (rational-basis review applied when the plaintiff did not contest racial preferences generally, only "the line the legislature has drawn"). Here, the many inherent differences between males and females more than justify the Legislature's choice to focus on biology.

D. Even if the Court read a gender-identity classification into the Act, the Act would satisfy rational-basis review.

Finally, even if the Court were to find the Act draws a line based on transgender status, the law would stand. Transgender status is not a suspect or quasi-suspect class, and the Act satisfies rational-basis review.

To show a class is suspect, "plaintiffs face a high bar." *Skrmetti*, 145 S. Ct. at 1850 (Barrett, J., concurring). The Court considers whether "members of the group in question exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group," whether the group has historically been subjected to *de jure* discrimination, and whether "the group is a minority or politically powerless." *Id.* at 1851 (cleaned up). This test is a "strict" one: failure on any prong is fatal. *Ibid.*; see *id.* at 1866 (Alito, J., concurring). Only "truly extraordinary" circumstances will lead the Court to recognize a suspect class. *Id.* at 1863 (Alito, J., concurring).

Gender identity falters on all fronts. *First*, "transgender status is not marked by the same sort of obvious, immutable, or distinguishing characteristics" as the Court's canonical suspect classes, race or sex. *Skrmetti*, 145 S. Ct. at 1851 (Barrett, J., concurring)

(cleaned up). It is not "definitively ascertainable at the moment of birth," *id.* (cleaned up), and "a person who is transgender now may not be transgender later." *Id.* at 1866 (Alito, J., concurring) (cleaned up). *Second*, "the category of transgender individuals is large, diverse, and amorphous," so it lacks sufficient discreteness to qualify as a suspect class. *Id.* 1852 (Barrett, J., concurring) (cleaned up); see *id.* at 1867 (Alito, J., concurring). *Third*, the transgender population has not faced a long history of *de jure* discrimination that is "severe and pervasive" like existing suspect classes. *Id.* at 1866 (Alito, J., concurring); see *id.* at 1853-54 (Barrett, J., concurring). *Fourth*, "there is no evidence that transgender individuals, like racial minorities and women, have been excluded from participation in the political process." *Id.* at 1866 (Alito, J., concurring). If anything, despite the group's small size, members "have had notable success in convincing many lawmakers to address their problems." *Ibid.*

The Act satisfies the "exceedingly deferential" rational-basis standard that applies without a suspect classification. *Free Speech Coal., Inc.* v. *Paxton*, 145 S. Ct. 2291, 2301 (2025). Under that standard, the Court will "uphold a statutory classification so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Skrmetti*, 145 S. Ct. at 1835 (cleaned up). "Where there exist plausible reasons for the relevant government action, [the Court's] inquiry is at an end." *Id.* (cleaned up).

Any gender-identity classification would be justified for the same reasons the Act's sex classification substantially advances West Virginia's interest in protecting women's sports: Allowing biological males—no matter their gender identity—to play against females creates an unfair and unsafe playing field. See, *e.g.*, *D.N.*

by Jessica N. v. *DeSantis*, 762 F. Supp. 3d 1219, 1244 (S.D. Fla. 2024) (upholding similar law under rational-basis standard). The Legislature can address that concern by preserving women's sports for female athletes.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted.

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