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 THE STATES OF ARKANSAS, ALABAMA, 25 OTHER STATES, AND THE U.S. TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The States of Arkansas, Alabama, Alaska, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming, and the U.S. Territory of Guam ("*Amici* States") submit this brief in support of Petitioners. *Amici* States have a strong interest in safeguarding the benefits of equal access to athletic opportunities for women and girls.

Most of the *Amici* States have laws—like West Virginia's Save Women's Sports Act—that bar biological males from playing on women's and girls' sports teams or competing in women's and girls' athletic competitions. Those laws reflect basic biology; they also reflect the fact that ignoring basic biology deprives females of an equal opportunity to compete for athletic accolades.

Title IX does the same thing. For the last fifty years, it has made federal funding contingent on providing women and girls with equal access to athletic opportunities. But the panel's opinion below radically reinterprets Title IX as requiring States to destroy that equal access by allowing biological males who identify as female to steal athletic opportunities from women and girls. And worse still, the opinion below suggests that even if Title IX did not require denying women and girls a fair opportunity to compete, the Equal Protection Clause would.

Given that the *Amici* States either have similar laws or policies that promote equal opportunities for women and girls or have engaged in the democratic process to consider similar protections, they have a strong interest in ensuring that federal courts properly

interpret Title IX and apply the proper legal standard to resolve equal protection claims.

SUMMARY OF THE ARGUMENT

Neither Title IX nor the Equal Protection Clause compels West Virginia to classify biological males as girls. Yet that was the Fourth Circuit panel majority's holding below. Because that holding is profoundly wrong, the Court should reverse and correct circuit precedent that has mangled the meaning of Title IX and robbed women and girls of equal opportunities.

I. Further entrenching erroneous Fourth Circuit precedent, the panel majority wrongly held that Title IX's protection against discrimination "on the basis of sex" applies to gender identity. But Title IX plainly adopts biology-based sex classifications, and contemporaneous dictionary definitions and regulations show that Congress protected women and girls based on biological sex, not gender identity.

The majority also assumed that B.P.J.—a biological male who identifies as a girl—is "similarly situated" to the biological girls for whom West Virginia has reserved girls' cross-country and track teams simply by virtue of claiming a female gender identity. But as a biological male, B.P.J. is not similarly situated to biological girls both physiologically and performance-wise. Indeed, B.P.J. has outperformed nearly all other competitors, displacing over a hundred girls in track events. Pet. App. 46a, 55a. Because B.P.J. is necessarily not similarly situated to the female athletes on the girls' cross-country and track teams as a biological male, B.P.J.'s Title IX claim cannot succeed.

Moreover, in conducting its Title IX analysis, the majority wrongly refused to consider Title's IX status as Spending Clause legislation. That fact matters

because gender identity largely did not exist as a concept when Congress adopted Title IX and no one—least of all States who accept federal funds—would have understood the statute to prohibit discrimination based on gender identity rather than biological sex. Title IX thus cannot be read to do so and to prohibit States from ensuring women and girls enjoy equal access to athletic opportunities.

II. The Fourth Circuit majority also got the equal protection analysis wrong in two ways. *First*, it failed to appreciate that B.P.J. brought an underinclusiveness challenge, not a traditional equal protection claim. A traditional claim looks like *United States v. Virginia*, where the female applicants to the Virginia Military Institute wanted VMI's segregation dismantled—for the university to admit men *and* women. *See* 518 U.S. 515, 519 (1996). That is not what B.P.J. wants. Far from demanding that all boys and girls try out for the same basketball team or line up together for the 100-meter dash, B.P.J. sought to take advantage of sex-segregated sports by competing on a team that is based on gender identity rather than biological sex. In other words, B.P.J. generally supported West Virginia providing the sex-based benefit of girls' sports; B.P.J. just wanted West Virginia to expand the benefit to include some males with a female gender identity. That makes B.P.J's claim an underinclusiveness challenge no different than those brought by business owners who have sought access to race-based affirmative action. And as lower courts have recognized, a challenge to affirmative action triggers heightened scrutiny but arguing that there should be more of it does not.

Second, the Fourth Circuit also erred by relying on prior circuit precedent that wrongly held that

"transgender persons constitute a quasi-suspect class." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020). But West Virginia's law does not classify based on gender identity or transgender status but, at most, has a disparate impact on persons that identify as transgender—and disparate impact is not enough to trigger heightened scrutiny for any class. And in any event, gender identity does not check any of the required boxes to be a suspect or quasi-suspect class, so intermediate scrutiny would not apply regardless. *See United States v. Skrmetti*, 145 S. Ct. 1816, 1851–53 (2025) (Barrett, J., concurring); *id.* at 1866–67 (Alito, J., concurring in part).

Accordingly, the Fourth Circuit should have applied rational-basis review, deferred to legislative choices and the democratic process, and affirmed summary judgment against B.P.J. on the equal protection claim. The Fourth Circuit likewise should have affirmed summary judgment against B.P.J. on the Title IX claim. This Court should therefore reverse and hold that laws to protect girls' sports comport with the Constitution and Title IX.

ARGUMENT

West Virginia's Save Women's Sports Act seeks to "promote equal athletic opportunities for the female sex." W. Va. Code § 18-2-25d(a)(5). West Virginia is one of at least twenty-six States that have codified the longstanding separation of girls' and boys' sports teams.[1] Recognizing that "[b]iological males would

[1] *See* Ala. Code § 16-1-52 (2021); Alaska Admin. Code tit. 4, § 06.115(b)(5)(D) (2023); Ariz. Rev. Stat. Ann. 15-120.02 (2022); Ark. Code Ann. § 6-1-107 (2021); Fla. Stat. Ann. § 1006.205 (2021); Idaho Code § 33-6201 (2020); Ind. Code Ann. § 20-33-13-4 (2022); Iowa Code Ann. § 261I.2 (2022); Kan. Stat. Ann. § 60-5601 (2023); Ky. Rev. Stat. Ann. § 164.2813 (2022); La. Stat. Ann.

displace females to a substantial extent if permitted to compete on teams designated for biological females," *id.* 18-2-25d(a)(3), the law calls for public schools' sports teams to be "expressly designated" for either "[m]ales, men, or boys," "[f]emales, women, or girls," or "[c]oed or mixed" teams, *id.* 18-2-25d(c)(1). Closely mirroring longstanding Title IX regulations, athletic teams or sports designated for males are open to all sexes, but teams or sports "designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* 18-2-25d(c)(2)-(3); *accord* 40 Fed. Reg. 24,128, 24,142–43 (Jun. 4, 1975) (recognizing that teams for activities involving "competitive skill" or "contact sport[s]" may be separated); 34 C.F.R. § 106.41(b) (same). The baseline for these distinctions is "biological sex determined at birth." W. Va. Code § 18-2-25d(b).

A divided Fourth Circuit panel wrongly concluded that Title IX requires West Virginia to allow B.P.J.—a biological male who identifies as a girl—to participate on the girls' cross-country and track teams. In reversing the district court's grant of summary judgment to West Virginia on both B.P.J.'s Title IX and Equal Protection Clause claims and directing the district court to enter summary judgment for B.P.J.

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§ 4:442 (2022); Miss. Code Ann. § 37-97-1 (2021); Mo. Rev. Stat. § 163.048 (2023); Mont. Code Ann. § 20-7-1306 (2021); N.C. Gen. Stat. Ann. § 116-401 (2023); N.D. Cent. Code Ann. § 15-10.6.-02 (2023); N.H. Rev. Stat. Ann. § 193:41 (2024); Ohio Rev. Code § 3313.5320; Okla. Stat. Ann. tit. 70, § 27-106 (2022); S.C. Code Ann. § 59-1-500 (2022); S.D. Codified Laws § 13-67-1 (2022); Tenn. Code Ann. § 49-7-180 (2022); Tex. Educ. Code Ann. § 33.0834 (2022); Utah Code Ann. § 53G-6-902 (2022); W. Va. Code Ann. § 18-2-25d (2021); Wyo. Stat. Ann. § 21-25-201 (2023).

under Title IX, Pet. App. 43a, "the majority inappropriately expand[ed] the scope of the Equal Protection Clause and upend[ed] the essence of Title IX," Pet. App. 44a (Agee, J., dissenting). This Court should correct those missteps.

I. Title IX Does Not Require West Virginia to Treat Biological Males as Girls.

The Fourth Circuit erroneously concluded that West Virginia "subjected [B.P.J.] to discrimination" on "the basis of sex" under Title IX. Pet. App. 38a; *see* 20 U.S.C. § 1681(a). In doing so, it made several analytical missteps. It misinterpreted Title IX's protections against discrimination based on biological sex as applying to gender identity. It failed to recognize that sex separation is permissible in athletics precisely because biological differences between the sexes matter under Title IX. And it wrongly assumed B.P.J. was similarly situated to biological girls for purposes of athletics by virtue of identifying as a girl, even though gender identity is irrelevant when it comes to biological differences and Title IX. To top it off, the Fourth Circuit refused to consider that, as Spending Clause legislation requiring a clear statement of its conditions, Title IX could not possibly be read as prohibiting recipients from having some athletic teams reserved for biological girls so that girls have equal athletic opportunities.

A. Title IX Protects Against Discrimination on the Basis of Biological Sex, Not Gender Identity.

The majority relied on erroneous circuit precedent to hold that Title IX prohibits discrimination based on gender identity. Pet. App. 39a (citing *Grimm*, 972 F.3d at 616). This conclusion is contrary to the text, decades

of interpretation, and well-reasoned decisions from other circuits. The Court should reverse the Fourth Circuit and restore Title IX's long-understood meaning.

Over 50 years ago, Congress was motivated to address "corrosive and unjustified discrimination against women" in "all facets of education," 118 Cong. Rec. 5803 (Feb. 28, 1972) (Sen. Bayh), and sought to "guarantee that women, too, enjoy the educational opportunity every American deserves."117 Cong. Rec. 32,476 (Sept. 20, 1971) (Sen. Bayh); *see N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 523, 526–27 (1982) (discussing Senator Bayh's role as Title IX's sponsor). To that end, Congress enacted Title IX under its Spending Clause power, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999), conditioning federal funds on a requirement that recipients generally not discriminate "on the basis of sex" and provide equal opportunities to both sexes in their education programs, 20 U.S.C. § 1681(a).

Dictionaries at the time of Title IX's enactment "show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc) (collecting dictionary definitions); *see Grimm*, 972 F.3d at 632–33 (Niemeyer, J., dissenting). And this interpretation of "sex" is confirmed when the "cardinal rule" of reading the statute "as a whole" is followed. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Throughout Title IX's provisions, it indicates that "sex" means biological sex, referring to it in binary terms. *See, e.g.*, 20 U.S.C. §§ 1681(a)(2) ("both sexes"), 1681(a)(8) (referring to "father-son or mother-daughter activities," "one sex," and "the other sex"). These provisions make sense only

if "sex" refers to the male-female binary and the associated physiological differences, not a person's self-professed gender identity.

Title IX also broadly instructs that "nothing contained" in it "shall be construed to prohibit" recipients from "maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. This rule of construction means that, under Title IX, not all differential treatment based on sex is discrimination—namely, differentiation where biological differences matter.

Longstanding regulations likewise confirm that everyone understood Title IX to prohibit only discrimination based on biological sex, not discrimination based on other grounds like gender identity and not justifiable differentiation between the sexes where biology matters. *See, e.g.*, 40 Fed. Reg. at 24,132 ("women" and "men"), 24,135 ("male and female teams"), 24,135 ("opposite sex"), 24,134 ("members of either sex"), 24,132 ("requiring use of standards for measuring skill or progress in physical education which do not impact adversely on members of one sex" and noting that the use of certain standards "may be virtually out-of-reach for many more women than men because of the difference in strength between the average persons of each sex"), 24,141 (allowing "separate sessions for boys and girls" when dealing with "human sexuality"); 24,141 (allowing "separation of students by sex within physical education classes or activities during participation in [sports involving bodily contact]"). This "early, longstanding, and consistent interpretation" is "powerful *evidence*" of the "original public meaning." *Kisor v. Wilkie*, 588 U.S. 558, 594 (2019) (Gorsuch, J., concurring). And that is especially true given "Title IX's unique postenactment history," which the Court has repeatedly found

"probative." *Grove City Coll. v. Bell*, 465 U.S. 555, 567–68 (1984).[2]

This early, longstanding, and consistent interpretation of Title IX as prohibiting only sex discrimination and allowing sex separation where biological differences matter also extended to athletics. In the sports-context, courts have long recognized that "Title IX requires that schools provide equal athletic opportunity to boys and girls," *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 296 (2d Cir. 2004), and that equal opportunity will require some female-only athletic teams, *see, e.g.*, *O'Connor v. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers) ("Without a gender–based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events.");[3] *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 63 & n.8 (2d

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[2] After Title IX's enactment, Congress enacted a statute requiring Title IX regulations to be published that specifically addressed sports and subjected those regulations to a 45-day review period where Congress could disapprove the regulations if it found them inconsistent with Title IX. *See* Pub. L. 93-380, 88 Stat. 566-68; Pub. L. No. 93-380, 88 Stat. 612. The first Title IX regulations (proposed in 1974 and finalized in 1975) were accordingly given special congressional scrutiny, including hearings, before going into effect. *See N. Haven*, 456 U.S. at 532–33 & n.22.

[3] *See United States v. Skrmetti*, 145 S. Ct. 1816, 1856 (2025) (Alito, J., concurring in part) (explaining that this Court's opinions "used 'gender' as a synonym for 'sex,'" tracking the "change in usage" that was occurring at the time where gender was replacing sex "as the usual word for the biological grouping of males and females" because sex was increasingly being used "to mean sexual intercourse" (quoting Oxford English Dictionary (3d ed., June 2011), https://doi.org/10.1093/OED/8610510183)).

Cir. 2023) (Menashi, J., concurring) ("[T]he Title IX framework effectively requires a recipient to maintain separate sports teams." (collecting cases)).

Ultimately, as the district court below concluded, "[t]here is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex." Pet. App. 95a. But far from staying faithful to Title IX's guarantee that female students must enjoy equal treatment with their male peers, the Fourth Circuit panel majority held that individuals are entitled to be treated like whatever gender they profess. In doing so, the panel majority echoed the Department of Education's rulemaking under the Biden administration that sought to redefine "sex" in Title IX to include "gender identity." *See* Pet. App. 42a. That was a clear mistake. The 2024 rule's redefinition was vacated because "expanding the meaning of 'on the basis of sex' to include 'gender identity' turns Title IX on its head." *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 624 (E.D. Ky. 2025), *as amended* (Jan. 10, 2025). And before the vacatur ended the dispute, several courts reached the same conclusion in the preliminary-injunction context.

Multiple district courts concluded that the rule's redefinition of sex to include gender identity likely violated Title IX and preliminarily enjoined enforcement of the rule. *See Arkansas v. U.S. Dep't of Educ.*, 742 F. Supp. 3d 919, 940–45 (E.D. Mo. 2024); *Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, 741 F. Supp. 3d 515, 520–25 (N.D. Tex. 2024); *Kansas v. U.S. Dep't of Educ.*, 739 F. Supp. 3d 902, 919–23 (D. Kan. 2024); *Louisiana v. U.S. Dep't of Educ.*, 737 F. Supp. 3d 377, 397–400, 410 (W.D. La. 2024); *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 529–36 (E.D. Ky. 2024); *Texas v. United States*, 740 F. Supp. 3d 537, 545–49 (N.D. Tex.

2024).[4] Multiple appellate courts refused to stay those injunctions, *see Louisiana v. U.S. Dep't of Educ.*, No. 24-30399, 2024 WL 3452887, at *3 (5th Cir. July 17, 2024) (per curiam) (denying stay and reasoning the injunction does not prevent the Department "from enforcing Title IX or longstanding regulations to prevent sex discrimination"); *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *2 (6th Cir. July 17, 2024) ("As we see it, the district court likely concluded correctly that the Rule's definition of sex discrimination exceeds the Department's authority."). And this Court *unanimously* agreed that the Department of Education was not entitled to a stay of the injunctions as they related to the rule's redefinition of "sex." *See Dep't of Educ. v. Louisiana*, 603 U.S. 866, 867 (2024) (per curiam). "Importantly, all Members of the Court . . . accept[ed] that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, *including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity*." *Id.* (emphasis added); *see id.* at 868–69 (Sotomayor, dissenting in part) ("Every Member of the Court agrees respondents are entitled to interim relief as to three provisions of that Rule," including the provision redefining sex discrimination to include gender identity: "34 C.F.R. § 106.10").

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[4] Only one district court reached the contrary conclusion, *Alabama v. Cardona*, No. 7:24-CV-533-ACA, 2024 WL 3607492, at *14–18 (N.D. Ala. July 30, 2024), and the Eleventh Circuit promptly granted an injunction that prevented enforcement of the rule, concluding "it is certainly highly likely that the Department's new regulation defining discrimination 'on the basis of sex' to include 'gender identity' is contrary to law" and exceeds statutory authority, *Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *4 (11th Cir. Aug. 22, 2024).

Therefore, recent cases confirm what the plain text, decades of interpretation, and longstanding practice all show—Title XI protects against invidious discrimination on the basis of biological sex, not gender identity. The Fourth Circuit was wrong to conclude otherwise.

B. The Sexes Are Not "Similarly Situated" In Contexts Where Biological Differences Matter Like Athletics.

The Fourth Circuit majority likewise erred in concluding that B.P.J. is similarly situated to biological girls for purposes of competing in cross country and track. Although the majority emphasizes that B.P.J. did not have the same amount of circulating testosterone as most boys, Pet. App. 34a, the majority acknowledged that defendants submitted an expert report explaining that, "even apart from increased circulating testosterone levels associated with puberty, there are 'significant physiological differences, and significant male athletic performance advantages in certain areas.'" Pet. App. 36a. So all the talk about testosterone levels is a red herring. (It also underscores the impossible task the majority's rule would pose for policymakers. Is it really the case that Title IX requires schools to weigh and test ever-changing levels of testosterone and stages of pubertal development in adolescent athletes to arrive at just the right blend of policies that protect girls sports *just enough* from unfair or unsafe competition but that do not exclude all biological males from the girls' teams?)

As the district court properly recognized, what "B.P.J. really argues" is that "transgender girls are similarly situated to cisgender girls for purposes of athletics at the moment they verbalize their transgender status, regardless of their hormone

levels." Pet. App. 93a. And the majority accepted this argument when it concluded that "B.P.J. has shown that applying the Act to [B.P.J.] would treat [B.P.J.] worse than people to whom [B.P.J.] is similarly situated," Pet. App. 43a, despite evidence of B.P.J.'s biological advantages as a male. As the dissent aptly put it, by reaching this holding, "the majority necessarily must have determined that transgender girls are similarly situated to biological girls *regardless of the competitive advantage* they may have," and "[t]hat is plainly incorrect." Pet. App. 49a.

The majority's assumption that biological males who claim a female gender identity are similarly situated to girls and thus entitled to play on girls' sports teams under Title IX ignores Title IX itself. "Title IX's endorsement of sex separation in sports refers to biological sex," Pet. App. 95a, based on Congress's acknowledgement that the sexes are not similarly situated when it comes to sports and other contexts where biology matters, *see supra* pp. 7–10. Title IX cares about biological sex, not gender identity and whether a male identifies as a girl—or as non-binary, agender, bigender, polygender, gender fluid, eunuch, or anything else. *See* E. Coleman et al., *Standards of Care for the Health of Transgender & Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health S31 S80, S88 (2022), https://perma.cc/Y9G6-TP3M ("SOC-8"). In other words, gender identity is "irrelevant when it comes to competitive sports" and Title IX. Pet. App. 49a.

B.P.J.'s own experience underscores that point. *See* Pet. 11 (explaining that B.P.J. won nearly every track event that B.P.J. competed in, "won the shot put by more than three feet," and "displaced 283 girls some 704 times"). Because "B.P.J. is not similarly situated to biological girls" competing on girls' cross-country and

track teams, "it is of no consequence that B.P.J. is treated differently than them." Pet. App. 50a n.2. B.P.J. has not been treated "worse than others who are similarly situated," Pet. App. 57a (quotation omitted), and West Virginia's reservation of girls' sports teams for biological girls does not conflict with Title IX.

C. As Spending Clause Legislation, Title IX's Conditions Must Be Unambiguously Clear.

In construing Title IX, the panel majority also erred by ignoring the significance of Title IX being Spending Clause legislation. *See* Pet. App. 43a. The fact that Title IX was enacted under the Spending Clause is relevant to how courts must interpret it and shows just how far off the mark the majority's interpretation was.

As this Court has repeatedly explained, and reaffirmed in a case involving Title IX itself, when "interpreting language in spending clause legislation," courts must "'insis[t] that Congress speak with a clear voice,' [and] recogniz[e] that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'" *Davis*, 526 U.S. at 640 (quoting *Pennhurst State Sch. and Hosp. v. Halderman,* 451 U.S. 1, 17 (1981)). A spending-power law thus must "furnish[] clear notice" of what it requires. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Otherwise, recipients cannot "voluntarily and knowingly" "agree to comply with federally imposed conditions." *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 219 (2022) (quotations omitted).

This means that if Congress intended to condition Title IX spending on States' acquiescence to a non-

biological definition of sex (contrary to all evidence), it would have had to "unambiguously" state those "conditions" and "consequences of … participation." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *see, e.g.*, *Cummings*, 142 S. Ct. at 1570 (explaining States must "clearly understand" in advance the obligations that they are undertaking in exchange for federal funds). Only such clarity keeps Spending Clause legislation from undermining the States' status as "independent sovereigns." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576–77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

Title IX does not come close to providing "clear notice" that it extends to gender-identity discrimination. *Arlington Cent.*, 548 U.S. at 296. After all, it speaks unambiguously in terms of biological sex. *See supra* pp. 7–8. That understanding persisted uncontested for decades, including in Title IX's regulatory framework. *See supra* pp. 8–11. So it is "untenable" to suggest that recipients knew that "sex" in Title IX "unambiguously meant something other than biological sex." *Adams*, 57 F.4th at 816. As the Sixth Circuit recently noted, "[i]t can't be that sexual orientation and gender identity have always been protected given the clear evidence of prior contrary agency positions." *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 612 (6th Cir. 2024). And not a shred of evidence supports the idea that any State in 1972 understood that Title IX would be read as requiring them to allow males—whatever their professed gender identity—to deprive females of spots on female teams, titles at female competitions, and privacy in locker rooms.

Title IX thus cannot be read as prohibiting West Virginia from requiring its schools to have some athletic teams reserved for biological girls, when that

is exactly what everyone has interpreted Title IX as requiring for decades.

II. The Constitution Does Not Require West Virginia to Treat Biological Males as Girls.

The Equal Protection Clause similarly does not prohibit West Virginia from offering separate sports teams for biological girls. Because "[p]hysical differences between men and women" are "enduring," *Virginia*, 518 U.S. at 533, separating sports teams by sex ensures that female athletes have an equal opportunity to compete. And given that it is the physical differences between males and females that warrant separate teams to begin with, the Constitution does not force West Virginia to use gender identity rather than biological sex to demarcate the teams.

The Fourth Circuit flipped things, concluding that the Constitution requires defendants to use gender identity unless they can prove that excluding B.P.J. from the girls-only team satisfies intermediate scrutiny. Pet. App. 24a. But heightened review does not apply for two main reasons. First, B.P.J. does not seek to dismantle girls' sports but to take advantage of it by expanding its scope. Like business owners who have previously sought access to (rather than the end of) affirmative action programs, such underinclusiveness claims are subject only to rational-basis review. Second, given that B.P.J's claimed *relief* is for West Virginia to use gender identity rather than sex to segregate its sports teams, the Fourth Circuit erred by concluding that West Virginia's law discriminates based on gender identity, which is not a protected class in any event.

A. B.P.J.'s Underinclusiveness Challenge is Subject to Rational-Basis Review.

The Fourth Circuit concluded that intermediate scrutiny applies because West Virginia's law allows females to play on male teams but only allows males to "play on male or co-ed teams." Pet. App. 25a–26a. But B.P.J. "disavowed any challenge [to] sex separation in sports" because B.P.J. wants to play on the girls' team—not dismantle that team by opening it up to all biological males. Pet. App. 23a–24a. So the relief that B.P.J. seeks—"to play on the girls' team," Pet. App. 24a—presumes the constitutionality of continuing to exclude males from the girls' team. B.P.J. wants West Virginia to *continue* segregating sports teams by sex, but for the State's definition of "sex" to change from a historical, physical-based definition to a new "gender identity"-based definition that would allow some biological males to play on teams currently reserved for biological females.

That request should give the Court pause. Asking a federal court to compel segregation based on self-professed identity is unusual. Doing so under the Equal Protection Clause is especially bizarre. Under that provision, plaintiffs normally try to end the segregation, not continue it along new lines. When the United States sued on behalf of high-school girls seeking admission to VMI, the government argued that the institution's "exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment," *Virginia*, 518 U.S. at 523, not that some female applicants were in fact males who should be able to avail themselves of an otherwise salutary sex-segregated admissions process. And Oliver Brown was not trying to take advantage of separate-but-equal schooling on the theory that the

Board of Education of Topeka should have classified him as white. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). When black students were "denied admission to schools attended by white children under laws requiring or permitting segregation according to race," *id.* at 487–88, the problem was not *how* the Board had separated students into different schools based on racial categories; the problem was that the Board had separated the students because of their race—*period*. In canonical equal protection cases, segregation provides the cause of action. But here, according to B.P.J., segregation provides the remedy.

B.P.J.'s claim is thus a textbook underinclusiveness challenge—a challenge to how far the classification "extend[s] . . . relief." *Katzenbach v. Morgan*, 384 U.S. 641, 656–57 (1966). B.P.J. does not ask West Virginia to do away with the benefit of girls-only sports, but for the State to extend that benefit to some males as well. But "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). Thus, "[a] statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen v. Ward*, 279 U.S. 337, 339 (1929), because "reform may take one step at a time," *Williamson*, 348 U.S. at 489. "The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Id.*; *accord, e.g.*, *Katzenbach*, 384 U.S. at 656–57 (applying rational-basis review where Congress extended benefit to citizens educated in "American-flag schools" in Puerto Rico but did "not extend[] the relief … to those educated in non-American-flag schools"); *cf. Peightal v. Metro. Dade Cnty.*, 940 F.2d 1394, 1409 (11th Cir. 1991) ("The Equal Protection Clause does not require a state actor to grant preference to all

ethnic groups solely because it grants preference to one or more groups.").

So even assuming West Virginia could further its "interest in promoting equal athletic opportunities for the female sex" while allowing biological males who identify as girls to take girls' spots on the team and on the podium, W. Va. Code Ann. § 18-2-25d(a)(4), that would not make the choice the West Virginia Legislature made constitutionally suspect. Because the State need not deal with all classes or address all interests "at the same time or in the same way," *Semler v. Ore. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935), it does not matter as a constitutional matter that biological males might *also* seek the benefit of playing on teams reserved for girls. Again: Even if the State's decision to segregate sports teams by sex in the first instance warrants heightened scrutiny, the sex classification that informs how far West Virginia's law "extend[s] … relief," *Katzenbach*, 384 U.S. at 656–57, does not.

Examples from the racial-affirmative-action context bear this out. Take *Jana-Rock Construction, Inc. v. New York Department of Economic Development*. 438 F.3d 195 (2d Cir. 2006). That case involved "New York's 'affirmative action' statute for minority-owned businesses," which extended to "Hispanics" but did "not include in its definition of 'Hispanic' people of Spanish or Portuguese descent." *Id.* Plaintiff Rocco Luiere owned a construction company and was "the son of a Spanish mother whose parents were born in Spain," but he was not considered Hispanic for purposes of the program. *Id.* at 199. (This despite Luiere's sworn affidavit stating, "I am a Hispanic from Spain." *Id.* at 203.) Luiere did not "challenge the constitutional propriety of New York's race-based

affirmative action program," but only the State's decision not to classify him as Hispanic for purposes of the program. *Id.* at 200, 205.

On its way to rejecting Luiere's claim, the Second Circuit confirmed that "[t]he purpose of [heightened scrutiny] is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* at 210. Accordingly, the Second Circuit "evaluate[d] the plaintiff's underinclusiveness claim using rational basis review." *Id.* at 212.

Or consider the case of Ralph Taylor. In 2010, Taylor "received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African." *Orion Ins. Grp. v. Wash. State Off. of Minority & Women's Bus. Enters.*, No. 16-5582-RJB, 2017 WL 3387344, at *2 (W.D. Wash. Aug. 7, 2017), *aff'd sub nom. Orion Ins. Grp. v. Wash.'s Off. of Minority & Women's Bus. Enters.*, 754 F. App'x 556 (9th Cir. 2018). This was big news for a man who "grew up thinking of himself as Caucasian." *Id.* Once Taylor "realized he had Black ancestry, he 'embraced his Black culture.'" *Id.* He "joined the NAACP, subscribed to Ebony magazine," and began to "take[] a great interest in Black social causes." *Id.* at *3. And believing his new identity might bestow economic rewards, Taylor classified himself as "Black" and applied for special benefits under state and federal affirmative-action programs. *Id.* at *2–3.

The programs' managers rejected Taylor's proposed racial classification and denied his application. So Taylor brought suit alleging, among other things, that the state and federal governments' restrictive definition of "Black" violated his constitutional and

statutory rights. *Id.* at *4. He advocated an expansive definition of "Black," asserting that he fit into the category because "Black Americans are defined to include persons with 'origins' in the Black racial groups of Africa," and his genetic testing revealed he had African ancestry. *Id.* at *11.

The court summarily dispatched with Taylor's claim, explaining that "construing the narrower definition as broadly as [Taylor] advocates would strip the provision of all exclusionary meaning." *Id.* Rather than apply heightened scrutiny and force the State to justify its definition of "Black," the court applied rational-basis review and rejected Taylor's claim accordingly. *Id.* at *13 ("Both the State and Federal Defendants offered rational explanations for the denial of the application.").

By challenging the lawfulness of a classification's definitional contours rather than the lawfulness of the classification itself, B.P.J. follows the same path as Luiere and Taylor. B.P.J. endorses sex-segregated sports teams and challenges only West Virginia's decision to base its definition of female on biological sex rather than gender identity. But the "purpose" of heightened scrutiny "is to ensure that the government's choice to use [protected] classifications is justified," not to police the classifications' "contours," *Jana-Rock*, 438 F.3d at 210, so the "contours" attendant to the State's sex-segregated sports teams warrant only rational-basis review. *Cf. Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 n.23 (D. Haw. 1986) ("The mere mention of the term 'race' does not automatically invoke the 'strict scrutiny' standard."); *accord Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1325–26 (11th Cir. 2021) (W. Pryor, C.J., dissenting) (noting that while "[s]eparating bathrooms by sex treats people differently on the basis of sex," by

contrast "the mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex"), *rev'd en banc*, 57 F.4th 791.

Viewing B.P.J.'s claim as an underinclusiveness challenge subject to rational-basis review makes short work of the legal claim while allowing elected officials room to wrestle with the policy question of how best to ensure a level playing field for women and girls while respecting the dignity of individuals who identify as transgender. West Virginia's answer is perfectly rational. Restricting access to girls' sports teams to biological females makes sense because the physical differences between males and females are what justify separate teams in the first instance. Other States are trying out different solutions, as are the governing bodies of different athletic associations. But West Virginia need not copy those experiments. It is not required to experiment now at the expense of girls who are subjected to unfair competition and deprived of equal opportunities. And federal courts are in no better position than the West Virginia Legislature or local school boards to arrive at an appropriate balance. As in *Skrmetti*, this Court should apply rational-basis review and "leave questions regarding" the policies themselves "to the people, their elected representatives, and the democratic process." 145 S. Ct. at 1837.

B. The Fourth Circuit Erred by Subjecting West Virginia's Law to Heightened Review Based on Gender Identity.

Rather than apply rational-basis review, the Fourth Circuit applied heightened scrutiny based on the Act's purported "gender identity discrimination." Pet. App. 25a. But West Virginia's law does not so discriminate,

and even if it did, heightened scrutiny would still not apply because transgender status is not a suspect class.

1. West Virginia's law classifies based on sex, not gender identity.

At the outset, the Fourth Circuit's theory that the Act contains "a facial classification based on gender identity," Pet. App. 24a, makes little sense because the Act turns entirely on biological sex—*not* gender identity. Indeed, that is precisely why B.P.J. sued—to force West Virginia to use gender identity *rather than sex* to segregate its sports teams. As this case demonstrates, the State cannot use both definitions; one must control. West Virginia chose biological sex.

The upshot is that an athlete's gender identity plays *no role whatsoever* in determining which sports team he or she is allowed to play on. The logic of *Bostock v. Clayton County*, 590 U.S. 644 (2020), confirms this.[5] There, the question was whether an employer who discriminates "against employees for being homosexual or transgender" necessarily discriminates "because of" or "based on" sex. *Id.* at 661–62. Here, the question is the inverse—whether sex-segregated sports leagues necessarily classify "because of" or "based on" gender identity.

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[5] This Court has "not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context," and it "need not do so here." *Skrmetti*, 145 U.S. at 1834. And the Court *should not* apply *Bostock* to the Equal Protection Clause because of their different wording and histories and this Court's "entirely different methodology" for interpreting the provisions. *Id.* at 1859 (Alito, J., concurring in part). But to the extent *Bostock*'s logic helps to identify what an action is "based on," it confirms that West Virginia's law is based on sex—not gender identity.

To answer that question under *Bostock*'s logic, we must "change one thing at a time and see if the outcomes changes." *Id.* at 656. In *Bostock*, the Court changed the employee's sex to determine whether sex was a but-for cause of the employer's action. *Id.* at 660. So here, we change the player's gender identity to determine whether gender identity serves as a basis for West Virginia's law.

The result is not surprising. Changing an athlete's gender identity[6] changes nothing about the law's application. Whether one identifies as male, female, transgender,[7] non-binary,[8] or one of the other countless gender identities,[9] it does not matter. Biological sex, not gender identity, determines what sports teams an athlete may play on:

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[6] WPATH defines "gender identity" as a "person's deeply felt, internal, intrinsic sense of their own gender," SOC-8 at S252.

[7] The Court in *Skrmetti* defined "transgender" as meaning that a person's "gender identity does not align with [his or her] biological sex." 145 S. Ct. at 1824.

[8] According to WPATH, "[t]he term nonbinary includes people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of other genders (e.g., polygender, demiboy, demigirl), and/or who have a gender that changes over time (e.g., genderfluid)." SOC-8at S80. WPATH also says that "[n]onbinary" can "function[] as a gender identity in its own right." *Id.*

[9] According to WPATH, there are "a huge variety of gender identities," SOC-8 at S15, including transsexual, trans, gender queer, gender diverse, nonbinary, two-spirit, gender fluid, agender, and eunuch *see id.* at S18–19, S88, S137.

Sex	Gender Identity	Identify as transgender?	Able to compete on girls' sports team?
Male	Male	No (typically)	No
Male	Female	Yes (typically)	No
Male	Non-binary	Maybe	No
Male	Other	Maybe	No
Female	Male	Yes (typically)	Yes
Female	Female	No (typically)	Yes
Female	Non-binary	Maybe	Yes
Female	Other	Maybe	Yes

This result makes sense. As the bathroom cases show, "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." *Adams*, 57 F.4th at 809. Such is the case here. Because transgender status plays no role in determining whether an individual may compete on a girls' sports team, the Fourth Circuit erred by holding that West Virginia's law discriminates based on transgender status.

2. Even if West Virginia's law classified based on gender identity, it would not trigger heightened review.

Even if West Virginia's law somehow turned on gender identity rather than sex, it would not matter because transgender persons do not constitute a suspect or quasi-suspect class. The test to be a constitutionally protected class "is strict, as evidenced

by the failure of even vulnerable groups to satisfy it." *Skrmetti*, 145 S. Ct. at 1851 (Barrett, J., concurring). The test asks "whether members of the group in question 'exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group,' whether the group has, '[a]s a historical matter, . . . been subjected to discrimination,' and whether the group is 'a minority or politically powerless.'" *Id.* at 1851 (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)). None of these boxes are checked here.

For starters, "transgender status is not an immutable characteristic." *Id.* at 1866 (Alito, J., concurring). Not only is it "not defined by a trait that is 'definitively ascertainable at the moment of birth,'" but it also is not an unchangeable characteristic as "some transgender individuals 'detransition' later in life—in other words, they begin to identify again with the gender that corresponds to their biological sex." *Id.* at 1851 (Barrett, J., concurring) (quoting *L. W.*, 83 F.4th at 487). WPATH itself recognizes this, noting that "transgender" is an "umbrella term" that can include individuals "whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender)" and "who have a gender that changes over time (e.g., genderfluid)." SOC-8 at S80. If individuals can be part of the group one day but not another—as when "genderfluid" individuals identify with their natal sex on Saturday but not Sunday—then that group obviously cannot be defined by an immutable characteristic.

For similar reasons, B.P.J. cannot show that the class is "clearly defined and readily identifiable" because "transgender people make up a diverse and amorphous class." *Skrmetti*, 145 S. Ct. at 1866–67 (Alito, J., concurring) (quotation omitted). WPATH

confirms this point, too. According to WPATH, there are "a huge variety of gender identities," including many that are culturally contingent and vary from one culture to the next (such as the "large number of *two spirit* identities across North America (e.g., *nadleehi* in Navajo (Diné) culture).)" *See* SOC-8 at S15, S18; *see also supra* notes 6–9. So it is unsurprising that transgender status is not "marked by the same sort of 'obvious'" or "'distinguishing characteristics' as race or sex." *Skrmetti*, at 1851 (Barrett, J., concurring). The boundaries are simply "not defined by an easily ascertainable characteristic that is fixed and consistent across the group." *Id.* at 1852. (Perhaps for this reason, it is also unsurprising that neither B.P.J. nor the Fourth Circuit have explained what sports team someone who identifies as agender, polygender, or gender fluid should be allowed to play on—or whether, under their theory, West Virginia would need to create new teams for each of the various gender identities.[10])

Last, "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). Accordingly, even if the law classified based on transgender status, the Fourth Circuit is wrong that such a classification would trigger heightened scrutiny.

The Constitution provides protection to all Americans, no matter their gender identity. But it does not carve out gender identity or transgender status for special

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[10] This is not an idle question if recent studies regarding the increasing numbers of youth who identify as nonbinary are true. *See* SOC-8 at S80 ("Recent studies suggest nonbinary people comprise roughly 25% to over 50% of the larger transgender population, with samples of youth reporting highest percentage of nonbinary people.")

protection. The Fourth Circuit's holding otherwise should be reversed.

3. Disparate impact does not trigger heightened review in any event.

Finally, even if transgender persons were a suspect class, a sex-based law that has a disparate impact on them would still not trigger heightened scrutiny. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979) (recognizing that "a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact"). "[P]urposeful discrimination"—not disparate impact alone—"is the condition that offends the Constitution." *Id.* at 274 (cleaned up). "Purposeful discrimination" means "more than" "intent as awareness of consequences" and "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

B.P.J. did not bring a purposeful discrimination claim. As Judge Agee pointed out in his dissent, rather than alleging that West Virginia's "otherwise neutral" law was enacted with "an invidious discriminatory purpose" that resulted in a "disproportionate impact" on transgender individuals, Pet. App. 52a (quoting *Washington v. Davis*, 426 U.S. 229, 241–42 (1976)), B.P.J. claimed that the Act "*facially* discriminates based on transgender status by explicitly excluding consideration of 'gender identity,'" *id.* at 53a (citation omitted). That was, of course, quite the claim—akin to alleging that a policy facially discriminates based on race when it excludes consideration of race—but B.P.J. was clear that the claim was that West Virginia's law discriminates on its face.

The majority tried to fix things by mixing analyses. Rather than looking to the statutory text to find a facial classification, the majority peeked behind the Act to its purported *purpose*. It declared that "[t]he undisputed purpose—and the only effect—of" using biology to determine a person's sex "is to exclude transgender girls from the definition of 'female' and thus to exclude them from participation on girls sports teams." Pet. App. 24a. And "that," the majority said, "is a facial classification based on gender identity." *Id.*

Among the many problems with this reasoning, two are particularly glaring. *First*, as Judge Agee noted, "[t]he Act's purpose has no relevance in a facial classification analysis." Pet. App. 53a n.6. Legislative purpose cannot be used to bootstrap a classification from the minds of legislators (as imagined by the minds of judges) to the face of the text if that purpose does not actually appear in the statute. A "facial" classification must appear somewhere on the statute's face.

Second, the majority's inquiry into legislative purpose was deeply flawed even if it had been relevant. Even "when a court assesses whether a duly enacted statute is tainted by discriminatory intent"—as the majority did here in all but name—"the good faith of the state legislature must be presumed." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (per curiam) (quoting *Abbott v. Perez*, 585 U.S. 579, 603 (2018)). The presumption applies at every "stage[] of litigation," *Miller v. Johnson*, 515 U.S. 900, 916–17 (1995), and "directs district courts to draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions," *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1235–36 (2024).

Here, the Legislature's actual purpose should have been easy to find because it was on the face of the statute: "to promote equal athletic opportunities for the female sex." W. Va. Code § 18-2-25d(a)(5). That compelling interest has a direct and substantial relationship to the Act's (actual) classifications, as the facts of this case attest. As the dissent noted, "B.P.J.'s presence in biological girls' sports has taken—and will continue to take—away opportunities from biological girls." Pet. App. 55a. And "the number of displaced biological girls will expand exponentially" if the Fourth Circuit's holding is allowed to stand. *Id.*

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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