No. 22A800

IN THE

Supreme Court of the United States

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

Applicants,

v.

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

Respondent.

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

RESPONDENT'S OPPOSITION TO APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

INTRODUCTION

Applicants have filed an emergency application in search of an emergency. Since July 2021, a narrow preliminary injunction has been in place allowing Respondent B.P.J. the opportunity to participate on the girls' sports teams at her West Virginia middle school. Applicants chose not to appeal the preliminary injunction. So B.P.J.—who has known she is a girl for as long as she can remember; has lived as a girl in all aspects of her life for years; and receives puberty-delaying treatment and estrogen hormone therapy, so has not experienced (and will not experience) endogenous puberty—has been participating on girls' teams at her middle school for the past three, going on four, sports seasons, harming no one. Applicants' emergency motion fails at every requisite step, including by failing to identify any harm that warrants this Court's intervention to block B.P.J. from continuing what she has been doing for more than a year and a half. This Court's intervention should be reserved for true emergencies. This is not one.

In April 2021, West Virginia enacted H.B. 3293, a law that categorically bars all transgender girls from playing on all school-sponsored girls' sports teams from middle school through college based solely on the fact that they were assigned a male sex at birth. The law was passed just months before B.P.J. was set to start middle school. West Virginia did not have a policy prohibiting transgender girls from playing on girls' teams prior to H.B. 3293, and B.P.J. had been looking forward to trying out

for her middle school's girls' cross-country team. She brought an as-applied challenge to H.B. 3293 and received what Applicants have conceded is "a very narrow" preliminary injunction that temporarily precludes enforcement of H.B. 3293 against her. *See* Attorney General Morrisey Briefs Media Regarding Major Development in Transgender Sports Law Case at 1:53-2:05, Mar. 9, 2023, http://bitly.ws/BKMs ("AG Press Statement").

With that injunction in place, B.P.J. has been able to participate on her school's girls' cross-country and track-and-field teams for her entire middle school career to date. B.P.J.'s mother reports that she has "never seen [her] daughter happier than when [she] pick[s] her up from practices and takes her to meets." Respondent's Supplemental Appendix ("Supp. App.") 218a. Meanwhile, the preliminary injunction has not harmed anyone. B.P.J.'s teammates and coaches have welcomed her participation (so much so that B.P.J. now thinks of them as a "second family"). Supp. App. 214a. No one has been injured as a result of her participation (unsurprisingly, as cross-country and track-and-field events are not contact sports). She has not had any problems with children on other schools' teams. Supp. App. 218a. And she has not "dominated" anything (she consistently finishes at the back of the pack). *See infra* note 2. As the District Court found, "not one child has been or is likely to be harmed by B.P.J.'s continued participation on her middle school's cross-country and track teams." App. 5a. Indeed, it is telling that the defendants in this litigation closest to B.P.J.'s actual participation—the Harrison County School Board and Superintendent—have *not* sought this Court's emergency intervention, and

stipulated below that B.P.J.'s participation did not cause "any disruption" or "displace[]" any fellow student. Supp. App. 38a.

In January 2023, the District Court reversed course, granting summary judgment to Applicants and dissolving the preliminary injunction. B.P.J. was devastated at the prospect of "not being able to continue doing the thing that she loves with her best friends." Supp. App. 219a. The day the decision came down, she "cried in [her] bed the whole night." Supp. App. 214a. The Spring 2023 girls' track-and-field season was just weeks away, so B.P.J. sought interim relief pending appeal, first from the District Court and then from the Fourth Circuit. The Fourth Circuit granted her request, issuing an interim order staying dissolution of the preliminary injunction and thus maintaining the status quo as to B.P.J. As is common practice for appellate courts when deciding requests for a stay or injunction pending appeal, the Fourth Circuit issued its order without a corresponding opinion. *See Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023) (Alito, J., respecting denial of stay).

Applicants now claim that what has been the status quo for over a year and a half has suddenly become an emergency requiring this Court's immediate intervention. There is no emergency, and the only harm at stake is the harm to B.P.J. that would result from barring her from her team. During the year and a half that the narrow injunction has been in place, Applicants never before contended that it created an emergency of any kind. They did not appeal the preliminary injunction, as was their right. Nor did they seek a stay of the injunction or endeavor in any way to expedite matters in the District Court. They also have not asked to expedite the

pending appeal. The fact that they now want "to get to the high court as soon as possible," AG Press Statement at 12:45-12:50, does not constitute an emergency. This Court can consider this matter in the ordinary course should it so choose. There is no need for this Court to act now.

Applicants also do not even attempt to meet their burden of demonstrating that this Court is likely to grant certiorari in this matter, particularly when no other court of appeals has even addressed the issue. Applicants should not be allowed to "use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument." *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application).

In short, the Application does not come close to the type of urgent and compelling circumstances required for extraordinary relief from this Court. There is no basis for this Court to order B.P.J. off the playing field where she has been for her entire middle school career to date and where her presence harms no one. The Application should be denied.

STATEMENT OF THE CASE

A. B.P.J. and Her Participation in School Sports

1. B.P.J. is a 12-year-old girl who lives in Harrison County, West Virginia, and attends Bridgeport Middle School. This is B.P.J. and her mother (and next friend), Heather Jackson:

B.P.J. is transgender. She was assigned a male sex at birth but has known since a very young age that she is a girl. For years, she has lived as a girl in all aspects of her life, with the full support of her family. Between third and fourth grade, B.P.J. socially transitioned to living and presenting as a girl. Supp. App. 43a-44a, 77a.

B.P.J.'s elementary and middle schools have acknowledged that B.P.J. is a girl.[1] Supp. App. 37a, 51a-52a, 58a-59a, 79a-81a, 159a-160a. Her elementary school created a gender support plan designed to help "account[]" for and "support[]" B.P.J.'s "authentic gender" at school. Supp. App. 37a, 69a, 159a; *see* Supp. App. 51a. Under this plan, school staff were instructed to refer to her with her new name and using female pronouns, and were given tools to support B.P.J. should she face problems at school because of her gender identity. Supp. App. 52a-53a, 159a. B.P.J.'s middle school created a similar plan, which provided that all teachers, students, and multiple administrators and county staff would be apprised of her gender identity. Supp. App. 58a, 160a.

[1] All redactions in exhibits submitted in the Supplemental Appendix protect non-relevant and confidential information from being made public. B.P.J. will provide unredacted versions to the Court upon request with a request to seal those versions.

The State of West Virginia, too—contrary to its litigation filings here—has acknowledged that B.P.J. is a girl. Supp. App. 206a. In June 2022, B.P.J. was officially permitted to change her name "to reflect her gender identity" after a West Virginia court found that doing so would allow B.P.J. to "feel more accepted by the community as a whole" and enjoy "a safe and happy mental state." Supp. App. 206a-210a.

In June 2020, at the first signs of puberty—known as the "Tanner 2" stage of pubertal development—B.P.J. began receiving puberty-delaying (or "blocking") treatment, in accordance with her doctor's orders and accepted clinical guidelines for treating gender dysphoria. Supp. App. 213a. Puberty-delaying treatment pauses puberty as soon as the treatment begins. Supp. App. 103a, 161a. When administered at the beginning of the "Tanner 2" stage, as here, puberty-delaying medication prevents transgender girls from experiencing levels of circulating testosterone above levels typical for cisgender girls and women. Supp. App. 103a-104a, 113a, 120a, 161a.

In June 2022, B.P.J.'s doctor prescribed estradiol as part of her gender-affirming hormone therapy. Supp. App. 213a, 217a. As a result, B.P.J. has not and will not go through endogenous puberty, App. 11a, meaning she has not and will not experience any of the physiological characteristics consistent with puberty typical of boys, including an increase in circulating testosterone levels. Supp. App. 103a-104a, 120a, 161a. Instead, she will develop physiological characteristics consistent with hormonal puberty typical of girls. Supp. App. 104a, 120a, 161a.

2. Like many young people, B.P.J. loves sports and participating on teams. School-sponsored athletics offer a range of benefits for children and young adults, including creating camaraderie, teaching teamwork, and exercise. In elementary school, for example, B.P.J. participated on a recreational cheerleading team with other girls, an experience that helped her learn about responsibility, trust, and teambuilding. Supp. App. 45a, 69a-70a, 78a, 162a.

B.P.J. has always especially liked running. Supp. App. 45a, 70a, 213a. She grew up running and watching her older brothers and mother run competitively. Supp. App. 70a. Accordingly, B.P.J. hoped that when she began middle school, she would have a similar opportunity to run on the girls' cross-country team. Supp. App. 11a, 21a. But in April 2021, West Virginia enacted H.B. 3293 in order to prevent transgender girls from playing school sports with other girls. The next month, B.P.J.'s mother met with the new principal at Bridgeport Middle School to discuss the gender support plan for B.P.J., and the principal explained that B.P.J. would not be allowed to participate on the girls' cross-country team because of H.B. 3293. Supp. App. 46a, 83a-84a; App. 11a.

Because of the District Court's July 2021 as-applied injunction (detailed further below), B.P.J. has been able to participate on the girls' cross-country and track teams at her middle school for three seasons over the past year and a half. Supp. App. 213a; App. 3a, 5a. She has done so with the full support of her coaches and teammates, and without encountering any problems with any of her teammates or children from any other schools. Supp. App. 218a. Despite regularly finishing near

the back of the pack, she loves to play, have fun with her friends, and try her best. Supp. App. 218a. The Court of Appeals' recent order allowing the preliminary injunction to continue pending appeal allowed B.P.J. to participate when the Spring 2023 track-and-field season began on February 27, 2023.

B.P.J.'s experience participating on her middle school's sports teams illustrates the positive impact of school athletics. B.P.J.'s friends on the "cross-country and track-and-field teams have become [her] second family over the last two years." Supp. App. 214a. B.P.J.'s mother has "never seen [B.P.J.] happier" than when she "pick[s] her up from practices and take her to meets." Supp. App. 218a. Being able to participate on a team has allowed B.P.J. to make many friends, show good sportsmanship towards her team and girls from other schools, and motivate herself and her teammates to push themselves at practices and meets. Supp. App. 213a-214a. If B.P.J. "had not been able to join the cross-country or track-and-field teams these last few years, [she] would have missed out on challenging [her]self with all the amazing friends [she] made and the time [they] got to spend together." Supp. App. 213a.

Contrary to Applicants' contentions, *see* App. 36-37, there is no evidence that B.P.J.'s participation in middle school cross-country and track-and-field has displaced *anyone*. Applicants claim—citing nothing—that "as long as B.P.J. is on the team, another girl won't be," and that "[l]ast year, according to the County, B.P.J.'s school did not accept all students who tried out for girls' track." App. 37. There is no support anywhere in the record for these statements. The only evidence in the record of

anyone not making the cut for a team is that ***B.P.J.*** was not fast enough to make the girls' running events for track-and-field in the Spring 2022 season, leading her to participate in discus and shot put instead. Supp. App. 213a, 217a-218a.

Applicants also severely distort the record—again citing nothing—in claiming that "[j]ust during the time that the preliminary injunction was in place, for instance, B.P.J. displaced girls 105 times across eleven events." App. 36. This appears to be a reference to B.P.J. placing, for example, 54 out of 55 runners in a cross-country race—plainly not "displacement" based on any reasonable understanding of that term, let alone the "*substantial*" displacement that the Legislature proffered as H.B. 3293's purported justification. *See* W. Va. Code § 18-2-25d(a)(3) (emphasis added).[2] Indeed, Applicants' theory of displacement reveals that their real objection is to B.P.J.'s mere presence on a girls' team, regardless of performance.

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[2] For example, in the Fall of 2022, B.P.J. participated in five meets as a part of her cross-country season, and her performance was consistent with that in previous seasons. Supp. App. 218a. At the Charles Point Invitation, B.P.J. placed 54th out of 55 participants. *Id.* At the Mountain Holler Middle School Invitational, B.P.J. placed 43rd out of 53 participants. *Id.* At the Taylor County Middle School Invitational, B.P.J. placed 38th out of 46 participants. *Id.* At the Elkins Middle School Invitational, B.P.J. placed 78 out of 80 participants. *Id.* At B.P.J.'s final race of the season, the Mid-Mountain 10 Conference Middle School Championships, B.P.J. finished 64th out of 65 participants. *Id.*

During the Spring track-and-field season in 2022, B.P.J. placed 36th out of 45 participants in the shotput at the Connect Bridgeport Middle School Invitational. *Id.* At the Ritchie Middle School Pizza Box Invitational, B.P.J. placed 15th out of 25 participants in discus. *Id.* At the Harry Green Middle School Invitational, B.P.J. placed 57th out of 61 participants in shotput, and 35th out of 53 participants in discus. *Id.*

B. H.B. 3293's Transgender Exclusion

1. Sex separation in school sports has long been the rule in West Virginia. W. Va. Code R. § 127-2-3 (3.8); Supp. App. 86a-89a, 186a. Under this framework, which predates H.B. 3293, boys are prohibited from playing on girls' teams and girls are prohibited from playing on boys' teams if a girls' team is available. Supp. App. 86a-87a, 164a-165a; *see Gregor v. W. Va. Secondary Sch. Activities Comm'n*, No. 2:20-cv-00654, 2020 WL 5997057, at *3 (S.D.W. Va. Oct. 9, 2020) (unsuccessful challenge to West Virginia policy barring a girl from playing on her school's boys' soccer team). There are very few co-ed school sports in public secondary schools, and both cross-country and track-and-field are sex-separated. Supp. App. 74a, 88a-89a, 164a.

Prior to H.B. 3293, West Virginia did not prohibit transgender students from playing on sex-separated teams consistent with their gender identity. W. Va. Code R. § 127; Supp. App. 86a-89a, 186a. Rather, Applicant the West Virginia Secondary School Activities Commission ("WVSSAC") had a policy that allowed transgender students to participate on teams consistent with their gender identity if their school allowed them to participate; if another school contested the transgender student's eligibility to play, then WVSSAC would determine whether the student's participation threatened "competitive equity or the safety of teammates and opposing players." Supp. App. 186a. There are no known examples of this policy having been used or having been the source of any complaint or issue. Supp. App. 90a-91a, 165a.

2. In April 2021, West Virginia's legislature passed, and its governor signed, H.B. 3293, which changed the status quo by barring transgender girls from

participating on girls' sports teams under any circumstances. H.B. 3293 now requires that all public secondary school and college sports in West Virginia be "expressly designated" based on a student's "biological sex," and defines "[b]iological sex" as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." W. Va. Code §§ 18-2-25d(b)(1), (c)(1). H.B. 3293 further provides that female teams "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." W. Va. Code § 18-2-25d(c)(2); Supp. App. 166a, 3a-5a. The purpose and function of this prohibition was to categorically exclude all girls who are transgender from participating in girls' sports from middle school through college, including club and intramural sports, without any consideration of whether, like B.P.J., they have never gone through endogenous puberty and have circulating testosterone levels typical of cisgender girls. Supp. App. 166a; App. 9a, 24a.

H.B. 3293's categorical ban is not only a stark departure from the prior policy in West Virginia but is also at odds with the policies of elite sporting organizations. For example, the National Collegiate Athletics Association, World Athletics, and the International Olympic Committee permit transgender women to compete in women's events after suppressing their levels of testosterone for particular periods of time or below particular thresholds, taking into account considerations specific to each sport. Supp. App. 108a-112a, 165a. This practice reflects a medical consensus that the largest known biological cause of average differences in athletic performance between cisgender men as a group and cisgender women as a group is circulating testosterone,

which starts to diverge between boys and girls beginning with puberty. Supp. App. 107a, 118a-119a, 130a-131a, 174a-175a. No elite sporting organization—even the most restrictive ones—prevents transgender girls and women from participating if, like B.P.J., they have not gone through endogenous puberty. Supp. App. 135a-143a. Likewise, no evidence was before the Legislature—or was presented by Applicants below—that transgender girls like B.P.J. who receive puberty-delaying treatment followed by gender-affirming hormone therapy as a group have average athletic performances that are better than the average athletic performances of cisgender girls as a group. Supp. App. 114a-116a, 119a, 121a, 134a, 175a.

H.B. 3293's stated purpose and only effect was to overturn the WVSSAC's policy allowing transgender students to participate consistent with their gender identity and, in its place, to install a regime that systematically excludes transgender girls from girls' teams. As the District Court found, "in passing the law, the legislature intended to prevent transgender girls from playing on girls' sports teams." App. 24a; *accord* App. 9a (recognizing that "legislators made clear that the purpose of the bill was to address transgender participation in sports"). The Chief Counsel of the bill's originating committee referred to H.B. 3293 as a "[t]ransgender participation in secondary schools bill," a "[t]ransgender originating bill," and a "bill regarding transgender participation in sports." Supp. App. 152a, 167a. When asked how H.B. 3293 would change the status quo in West Virginia, counsel representing the bill replied that H.B. 3293 "would affect those that changed their sex after birth." Supp. App. 145a, 167a. The Chairman of the originating committee described the

"issue" that H.B. 3293 was designed to address as "two transgender girls" who "were allowed to compete in state track-and-field meetings in Connecticut."[3] Supp. App. 168a; App. 300a-301a. And per a State Senator, "the bill" was "about transgenders." Supp. App. 168a; App. 364a. It is thus, at best, disingenuous for Applicants to protest that H.B. 3293—a law openly acknowledged to do nothing besides exclude transgender athletes—does not literally "mention transgender status." App. 13.

As the District Court also recognized, H.B. 3293 was "a 'solution' in search of a problem." App. 19a. The District Court found that "[t]he record makes abundantly clear . . . that West Virginia had no 'problem' with transgender students playing school sports and creating unfair competition or unsafe conditions. In fact, at the time it passed the law, West Virginia had no known instance of any transgender person playing school sports." App. 18a. H.B. 3293's sponsors likewise acknowledged that they were not aware of any transgender athlete having competed on a secondary school or higher education sports team in West Virginia, let alone any "problem" from such participation. Supp. App. 169a. The West Virginia Department of Education provided legislative testimony that it had never received any complaints about transgender students participating in school athletics, Supp. App. 146a, 169a, and its General Counsel characterized the bill as "much ado about nothing," Supp. App. 149a,

[3] Although Applicants now claim that H.B. 3293 came after "West Virginia lawmakers had seen biological males increasingly competing against—and beating—females in women's sports events," App. 5, the only instance of participation by transgender women cited by the West Virginia Legislature was the example in Connecticut, App. 24a.

153a, 170a. Likewise, after signing the bill, Governor Justice admitted that he could not identify even "one example of a transgender child trying to get an unfair advantage" and stated that the issue was not "a priority" for him, as "we only have 12 kids maybe in our state that are transgender-type kids." Supp. App. 154a-157a, 169a-170a. To this day, Applicants are not aware of any transgender student seeking to play school sports in West Virginia other than B.P.J. Supp. App. 170a.

C. District Court Proceedings

1. In July 2021, in advance of B.P.J.'s first middle school sports season in the Fall of 2021, when B.P.J. was 11 years old, the District Court preliminarily enjoined Applicants from enforcing H.B. 3293 against her. App. 34a. The District Court concluded that H.B. 3293 "as applied to B.P.J." likely violated equal protection because it "is not substantially related to providing equal athletic opportunities for girls," in part because "permitting B.P.J. to participate on the girls' teams would not take away athletic opportunities from other girls." App. 42a, 44a. The District Court also concluded that H.B. 3293's application to B.P.J. would likely violate Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, because "B.P.J. will be treated worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity." App. 46a. The District Court further recognized that participating on the boys' team was not an option for B.P.J.: "Forcing a girl to compete on the boys' team when there is a girls' team available would cause her unnecessary distress and stigma." App. 46a.

Applicants took no action in response to the preliminary injunction. They did not appeal the injunction, despite having a right to do so. Nor did they seek to stay the injunction or expedite resolution of the district court proceedings.[4] Rather, for the next year and a half they allowed the preliminary injunction to stand without challenge, during which time B.P.J. uneventfully participated in middle school girls' sports for three seasons.

2. Following the District Court's preliminary injunction order, the parties engaged in several months of discovery. Much of this discovery was prompted by Intervenor Lainey Armistead, then a student attending college in West Virginia who claimed that H.B. 3293 protected her from potentially having to compete in soccer against women who are transgender—even though she knew of no such women who were playing or seeking to play soccer in her division. Supp. App. 100a. When Armistead was asked during her deposition whether she had had any objection to B.P.J. playing on her middle school cross-country teams, Armistead stated "I don't know."[5] Supp. App. 101a, 181a, 197a.

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[4] In fact, the State twice asked the District Court for extensions on briefing schedules and to push the scheduled trial date back two months. Supp. App. 235a (Dkts. 36, 39), 250a-251a (Dkts. 274, 275).

[5] Armistead graduated from college in 2022, no longer lives in West Virginia, and thus no longer has any cognizable interest in the outcome of this case. Supp. App. 191a, 195a-196a. In light of this, B.P.J. filed a motion for the District Court to revoke its grant of permissive intervention, Supp. App. 187a-203a, which the District Court failed to resolve—notwithstanding that the summary judgment presentation against B.P.J. below was driven largely by Armistead's discovery and arguments, Supp. App. 198a-200a. Armistead has no cognizable interest in the case, and certainly none to seek the emergency relief she seeks.

At the close of discovery, B.P.J.'s evidence and experts confirmed that H.B. 3293 did not advance any proffered state interests, including as applied to transgender girls like B.P.J., who have never experienced endogenous puberty and never had levels of circulating testosterone akin to those of cisgender boys. Supp. App. 103a-104a, 113a, 120a, 161a. Applicants' experts failed to identify any studies finding athletic advantages in transgender girls who, like B.P.J., have received puberty-delaying medication since the onset of puberty. Supp. App. 134a, 175a. Both sides submitted summary judgment motions, as well as multiple *Daubert* motions and motions *in limine*.

3. On January 5, 2023, the District Court granted summary judgment to Applicants and dissolved its preliminary injunction. Supp. App. 267a. The District Court's summary judgment order marked a complete about-face from the reasoning of the preliminary injunction order, without any explanation for the shift. The District Court rejected B.P.J.'s claims as a matter of law without discussing—or even ruling on the admissibility of—the voluminous expert evidence submitted by both sides. But despite ruling against B.P.J., the District Court observed that "[t]he record makes abundantly clear . . . that West Virginia had no 'problem' with transgender students playing school sports and creating unfair competition or unsafe conditions." App. 18a.

When B.P.J.'s mother told B.P.J. about the summary judgment ruling, B.P.J. ran upstairs and "cried in [her] bed the whole night." Supp. App. 214a. She "was terrified about not being able to continue doing the thing that she loves with her best

friends." Supp. App. 219a. B.P.J. was particularly worried that, with the preliminary injunction no longer in place, she would be unable to participate in the Spring 2023 track-and-field season at Bridgeport Middle School, which was scheduled to start on February 27, 2023. Supp. App. 218a.

4. Because the District Court's dissolution of the preliminary injunction would have prevented her from participating in Spring 2023 track-and-field in a matter of weeks, B.P.J. sought a stay pending appeal from the District Court on January 20, 2023 and asked the District Court to rule by February 3 so that B.P.J. could move for an appellate stay if needed prior to the February 27 tryouts. Supp. App. 267a (Dkt. 515). On February 7, 2023, the District Court denied B.P.J.'s stay motion. App. 3a.

Notably—and entirely ignored by the Application—the District Court found in denying the stay that all equitable "factors weigh heavily in favor of granting B.P.J.'s motion for a stay." App. 5a. Among other things, "*not one child* has been or is likely to be harmed by B.P.J.'s continued participation on her middle school's cross-country and track teams." *Id.* (emphasis added). The District Court rejected the notion "that B.P.J. finishing ahead of a few other children, who would have placed one spot higher without her participation, constitutes a substantial injury." *Id.* The District Court found that "the only person truly injured by the enforcement of the Act against her is B.P.J., who must now watch her teams compete from the sidelines." *Id.* Finally, the District Court observed that "[i]t is in the public interest that all children who seek

to participate in athletics have a genuine opportunity to do so." *Id.* Nonetheless, the District Court denied B.P.J.'s request for a stay pending appeal. App. 9a.

D. Fourth Circuit Proceedings

On February 7, 2023, the same day that the District Court denied B.P.J.'s stay motion, B.P.J. filed with the Fourth Circuit a motion for stay pending appeal of the District Court's dissolution order, again seeking relief so that B.P.J. could participate in Spring 2023 track-and-field starting on February 27. Supp. App. 276a (Dkt. 34). The Fourth Circuit ordered Applicants to respond by February 15 and for B.P.J. to reply by February 17. Supp. App. 276a (Dkt. 35). Applicants took no issue with those deadlines.

After these additional filings, a Fourth Circuit panel, with Judge Agee dissenting, issued an order on February 22 temporarily staying the dissolution of the preliminary injunction pending appeal. App. 1a-2a. The panel "construe[d]" B.P.J.'s stay motion as "as a motion for an injunction pending appeal" and then "grant[ed] the motion and stay[ed] the district court's January 5, 2023, order dissolving its preliminary injunction" pending appeal. App. 2a. This order allowed B.P.J. to try out for girls' Spring track-and-field on February 27, a team on which she is currently participating. The Fourth Circuit also quickly issued a schedule requiring the merits briefing to be promptly completed by mid-June. Supp. App. 276a (Dkt. 41).

More than two weeks after the Fourth Circuit's stay order, and more than a year and a half after the original injunction was issued, the Attorney General of West Virginia and counsel for Intervenor Lainey Armistead held a press conference on

March 9, 2023, announcing that they were "taking the fight for fairness in women's sports all the way to the U.S. Supreme Court." W. Va. Att'y General's Office, Attorney General Morrisey Takes Fight for Fairness in Women's Sports to the U.S. Supreme Court, Mar. 9, 2023, https://bit.ly/3lr2bAt ("AG News Release"). The Attorney General stated that "it's critical that we get to the high court as soon as possible." AG Press Statement at 12:45-12:50. At the same time, the Attorney General acknowledged that the Fourth Circuit merely "reinstated a preliminary injunction the U.S. District Court for the Southern District of West Virginia had initially issued against the Act in July 2021." AG News Release. According to the Attorney General, the reinstated injunction was "very narrow." AG Press Statement at 1:53-2:05.

STANDARD OF REVIEW

Applicants invite this Court to plunge prematurely into ongoing lower court proceedings and overturn an interim order of the Fourth Circuit on a breakneck timeline. That extraordinary request brings with it a heavy burden. *See*, *e.g.*, *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers) (explaining that the power to "vacate[]" an interim order "by the Court of Appeals . . . should be exercised with the greatest of caution and should be reserved for exceptional circumstances."); *accord Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). Yet Applicants fail even to acknowledge their burden, much less attempt to satisfy it.[6]

[6] Applicants instead discuss only the general standard for obtaining an injunction. App. 11-12.

To obtain an emergency stay from this Court, an applicant generally must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see also Certain Named & Unnamed Non-Citizen Child & Their Parents v. Texas*, 448 U.S. 1327, 1330–31 (1980) (Powell, J., in chambers) (applying same requirements for motion to vacate stay); *Doe v. Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers). These three conditions are "*necessary*" to merit this Court's intervention, but they are "not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). Rather, as with any request that this Court exercise its emergency equitable authority, it is ultimately "necessary to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (quoting *Barnes*, 501 U.S. at 1305) (alteration incorporated).

Moreover, in seeking to lift an interim order from a court of appeals in a pending matter "stay[ing] the district court's January 5, 2023, order dissolving its preliminary injunction," App. 2a, Applicants "bear an augmented burden" from that facing those seeking stays pending disposition of a writ of certiorari, *Certain Named & Unnamed Non-Citizen Child & Their Parents*, 448 U.S. at 1331 (Powell, J., in chambers). "[W]hen a court of appeals has not yet ruled on the merits of a

controversy, the vacation of an interim order invades the normal responsibility of that court to provide for the orderly disposition of cases on its docket." *Id.* at 1330–31 (Powell, J., in chambers). This Court's "[r]espect for the assessment of the Court of Appeals is especially warranted when," as here, "that court is proceeding to adjudication on the merits with due expedition." *Doe*, 546 U.S. at 1308 (Ginsburg, J., in chambers).

ARGUMENT

Applicants ask this Court, on an "emergency" motion, to bar a 12-year-old girl from continuing to participate on the girls' team at her middle school, even though her participation harms no one. The emergency docket is meant for true emergencies. This is not one.

Applicants have not made any of the required showings for an emergency order from this Court. At the threshold, Applicants did not appeal or seek to stay the "very narrow" preliminary injunction that issued over a year and a half ago. AG Press Statement at 1:53-2:05. They thus cannot now credibly argue that the Fourth Circuit's preservation of the injunction that has been in place for B.P.J.'s entire middle school career suddenly constitutes an emergency necessitating this Court's intervention. Applicants point to no intervening developments that have created an emergency—other than their stated desire to "get to the high court as soon as possible," *id.* at 12:45-12:50, which is irrelevant to their entitlement to emergency relief. And Applicants have failed to show anything wrong with the summary nature

of the Fourth Circuit's resolution of B.P.J.'s stay motion—a standard practice that does not justify Applicants' groundless request for automatic reversal.

Applicants also have not made the required strong showing that this Court would vote to grant a writ of certiorari, or that they are likely to succeed on the merits of B.P.J.'s as-applied challenge. As the Attorney General conceded at his recent press conference, the as-applied injunction at issue is "very narrow" and "[t]his is the first" case concerning the participation of transgender students in school sports to be presented to this Court. AG Press Statement at 1:53-2:05; 3:15-3:25. There is no circuit split; indeed, no court of appeals has even issued an opinion in such a case. This Court's "ordinary practice" is to "deny[] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals[,]" not to intervene at the first possible opportunity. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019). Nor have Applicants made a strong showing of likely success on the merits of their contentions that H.B. 3293 is constitutional and does not violate Title IX as applied to B.P.J., who has never gone through (and will never go through) endogenous puberty.

Finally, and glaringly, Applicants have failed to identify any harm from allowing B.P.J. to continue to play and disregard the harm that denying her that opportunity will immediately inflict. As the District Court recognized, ***all*** equitable factors weigh in favor of allowing the as-applied preliminary injunction to remain in place pending appeal. App. 5a-6a. The status quo is B.P.J.'s participation on girls' sports teams at her middle school—as she has done for her entire middle school career

to date—not her exclusion from those teams. No one is harmed by the status quo and B.P.J. will be irreparably harmed by changing it.

I. Applicants' Failure To Diligently Seek Relief In The Ordinary Course Precludes Their Request for Emergency Relief.

According to Applicants, they are seeking relief from this Court in order to "get to the high court as soon as possible" and so that H.B. 3293 "gets back in place very, very quickly." AG Press Statement at 12:45-12:50; 4:43-4:45. What Applicants overlook, however, is that they had a ready way of seeking prompt appellate review of the "very narrow" preliminary injunction order they now decry as in urgent need of reversal, *id.* at 1:53-2:05: appealing the District Court's July 2021 preliminary injunction order, which they were entitled to do as a matter of right. *See* 28 U.S.C. § 1291. They chose not to do so. They also could have requested a stay pending appeal from the Fourth Circuit and this Court, but again, chose not to. The result of their strategic decision a year and a half ago *not* to appeal or seek a stay of that order, but instead to pursue protracted litigation in the District Court, ensured that B.P.J.'s participation in middle school girls' sports is now the status quo and has been for three, going on four, sports seasons.[7] Given Applicants' own decision not to seek

[7] Applicants did not merely fail to seek expedition of the proceedings below, but did all they could to turn B.P.J.'s as-applied challenge into a wide-ranging, painstaking inquiry into B.P.J.'s life and medical care, and the provision of gender affirming transgender medical care writ large. Likewise resulting in an unnecessary and excessive discovery burden, all state agency and county defendants denied their role in enforcing H.B. 3293, requiring written discovery and depositions by B.P.J. to establish the contrary.

prompt appellate review of the "very narrow" preliminary injunction order from which they now seek relief, *see* AG Press Statement at 1:53-2:05, this Court should not permit Applicants to "use the emergency docket to force the Court to give a merits preview . . . on a short fuse without benefit of full briefing and oral argument." *Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurring in denial of application).

Applicants also have other "avenues for expedited or interim" relief that they have failed to pursue. *Yeshiva Univ. v. YU Pride All.*, 143 S. Ct. 1, 1 (2022) (denying stay pending appeal). Under this Court's Rules, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." Sup. Ct. R. 23.3. Here, however, Applicants waited over two weeks from issuance of the Fourth Circuit's stay order to file their Application with the Court—using none of that time to seek further relief from the Fourth Circuit panel (given Applicants' complaint about the panel's lack of reasoning, *see infra)* or the en banc Fourth Circuit (given Applicants' observation that the Fourth Circuit's injunction pending appeal was issued 2-1 by a divided panel, *see* App. 2). Nor have Applicants even sought "to expedite consideration of the merits of their appeal." *Yeshiva*, 143 S. Ct. at 1.

One of the only examples of a "rare, extraordinary circumstance" in which this Court has excused a party's failure to diligently seek relief below before obtaining emergency relief from this Court was when "the exigencies of th[e] case" made seeking relief below both "virtually impossible and legally futile." *W. Airlines, Inc. v. Int'l*

Bhd. of Teamsters, 480 U.S. 1301, 1304 (1987) (O'Connor, J., in chambers). Here, Applicants' failure to pursue multiple other avenues of potential relief indicates their stay application to this Court is not driven by actual irreparable harm from the injunction, but by a desire to use this Court's emergency docket to gain an unwarranted tactical advantage. The Court should reject Applicants' gamesmanship.

II. The Fourth Circuit's Summary Order Is Standard Practice.

Applicants disparage the Fourth Circuit's order as an "unreasoned" "rush-job," claiming this alone is a basis for vacatur. App. 12-13. But it is common practice for courts, including this Court, to issue summary orders denying or granting injunctions or stays on the emergency docket without a corresponding opinion.[8] That the Fourth Circuit issued a summary order here certainly is "not dispositive" of the relief Applicants seek. *Coleman*, 424 U.S. at 1305; *see also id.* at 1304-05 (explaining that "in the absence of a statute, rule, or controlling precedent there is no fixed requirement that a court [of appeals] . . . explain its reason for taking the action which it did" and therefore rejecting the argument that a court of appeals is required "to

[8] *See, e.g.*, *Vinkov v. Bhd. Mut. Ins. Co.*, No. 22A718, 2023 WL 2357301, at *1 (U.S. Mar. 6, 2023) (denying stay); *Ward v. Thompson*, 143 S. Ct. 439 (2022) (denying stay and injunction); *Hunt v. Nationstar Mortg. LLC*, No. 22A445, 2023 WL 2123705, at *1 (U.S. Feb. 21, 2023) (denying stay); *R.J. Reynolds Tobacco Co. v. Bonta*, 143 S. Ct. 541 (2022) (denying injunction); *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (granting stay); *Moore v. Circosta*, 141 S. Ct. 46 (2020) (denying injunction); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (granting stay); *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019) (granting stay); *Akina v. Hawaii*, 577 U.S. 1024 (2015) (Kennedy, J.) (granting injunction).

specifically address in terms the factors of irreparable harm and probable success on the merits" in a stay decision).[9]

And just as this Court does not always issue opinions upon a decision to issue a stay or injunction pending appeal, this Court shows a similar "respect for [a court of appeal's] procedures in managing its own docket." *Antonyuk*, 143 S. Ct. at 481 (Alito, J, respecting denial of stay) (noting that Second Circuit had failed to provide any explanation for its ruling); *Certain Named & Unnamed Non-Citizen Child. & Their Parents*, 448 U.S. at 1330–31 (Powell, J., in chambers) (emphasizing deference to a court of appeals' "normal responsibility . . . to provide for the orderly disposition of cases on its docket"). Vacating court of appeals' emergency docket rulings solely because they are unaccompanied by an opinion would dramatically transform those courts' regular practice and exponentially increase their workload. Such a sweeping change should be made (if at all) only through careful study by the Advisory Committee on Appellate Rules—not in the context of an emergency application.[10]

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[9] Justice Rehnquist granted the application for a stay in *Coleman* not because of the summary nature of the court of appeals' order but because the court of appeals' "formulation of issues and stipulation as to the record" in a briefing order to the parties "convincingly demonstrate[d]" that it misunderstood a key legal presumption in the case and thus did not properly assess likelihood of success on the merits. *Coleman*, 424 U.S. at 1305-06.

[10] The only authority from this Court that Applicants cite in support of their demand for automatic reversal is *Munaf v. Geren*, 553 U.S. 674 (2008). *See* App. 12. That case has no bearing here, as it involved this Court's review of a court of appeals decision affirming a lower court ruling on the merits—not an emergency application for a stay or injunction pending appeal. *See Munaf*, 553 U.S. at 690-93.

In any event, Applicants offer no reason to think that the basis for the Fourth Circuit's interim order is anything other than its proper consideration of the merits and equities issues as set out in the parties' briefs. In seeking relief from the Fourth Circuit, B.P.J. argued that the District Court's summary judgment decision was inconsistent with controlling precedent, including the Fourth Circuit's decision in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021), and that the equities strongly favored continuing the preliminary injunction pending appeal, rather than excluding B.P.J. from her teams mid-way through her middle school career, *see* Supp. App. 276a (Dkt. 34).

In *Grimm,* the Fourth Circuit held that a school policy prohibiting a boy who is transgender from using the boys' restroom unlawfully discriminated against him in violation of Title IX and the Equal Protection Clause. 972 F.3d at 614-615, 619. B.P.J. argued to the Fourth Circuit that the District Court's initial preliminary injunction faithfully applied *Grimm* and other precedent, whereas the District Court's sudden reversal at summary judgment improperly adopted the reasoning of the *Grimm* dissent. *See* Supp. App. 276a (Dkt. 34). B.P.J. also argued—and the District Court agreed—that continuing the preliminary injunction pending appeal would preserve the status quo, prevent irreparable harm to her, harm no one else, and advance the public interest. *Id*. If Applicants believe a statement of reasons is necessary, they should have promptly sought one from the Fourth Circuit through a petition for rehearing, rather than proclaim an emergency requiring this Court's immediate involvement.

III. This Court Is Unlikely To Grant Review And Applicants Have Not Otherwise Made A Strong Showing Of Likely Success On The Merits.

A. This Court Is Unlikely To Grant Review.

As explained above, an applicant seeking vacatur of an interim order must establish "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction." *Certain Named & Unnamed Non-Citizen Child.*, 448 U.S. at 1330 (Powell, J., in chambers) (citation omitted). Applicants have not even attempted to show that this case is a likely candidate for review under this Court's criteria for granting certiorari. Nor could they. No court of appeals has ever ruled on the underlying legal questions in this case. And without any circuit decisions to review, there is certainly no circuit split. This Court's "ordinary practice" is to "deny[] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box*, 139 S. Ct. at 1782; *Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurring in denial of application) (explaining that whenever an applicant seeks "extraordinary relief" from this Court, an applicant's likelihood of success "encompass[es] not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case," and denying an application because it "is the first to address the questions presented" (citing *Perry*, 558 U.S. at 190)).

Nor is a circuit split likely to develop any time soon. No circuit has yet weighed in on the legality of restricting transgender students from participation in school

sports. Currently, the Ninth Circuit is the only other circuit even considering a challenge to a sports participation ban brought by a transgender athlete, and that court has not yet ruled. Moreover, the case pending before the Ninth Circuit is only at the preliminary injunction stage, involves an Idaho transgender sports ban that includes an invasive process of sex verification, and does not include a Title IX claim. *See Hecox v. Little*, 479 F. Supp. 3d 930, 975, 988 (D. Idaho 2020) (issuing preliminary injunction on Equal Protection Clause grounds only), appeal filed, No. 20-35815, Dkt. 1 (9th Cir. Sept. 17, 2020).[11] The only other pending federal challenges brought by transgender athletes seeking to participate in school sports are a case brought by a transgender boy who wishes to play golf with the other boys in his high school, which remains pending in the Middle District of Tennessee, *see L.E. v. Lee*, No. 3:21-cv-00835 (M.D. Tenn.), and a case in the Southern District of Florida that has not moved

[11] Nor does a case currently pending en banc review by the Second Circuit have the potential to create a circuit split. *See Soule v. Conn. Ass'n of Schs.*, No. 21-1365, Dkt. 258 (2d Cir. Feb. 13, 2023). Unlike H.B. 3293's categorical *exclusion* of transgender girls from school sports, the school athletics policy at issue in *Soule* is one of transgender *inclusion*. No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021). The District Court in *Soule* dismissed the cisgender female plaintiffs' Title IX challenge because the plaintiffs lacked standing and their damages claim was barred by *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). 2021 WL 1617206, at *1. The Second Circuit panel affirmed in full. 57 F.4th 43 (2d Cir. 2022). The Second Circuit recently voted to rehear the case en banc, but, in any event, the issues presented in that case are not those presented here.

past a motion to dismiss, *see D.N. v. DeSantis*, No. 0:21-cv-61344-RKA (S.D. Fla. 2021).[12]

Moreover, even after the Fourth Circuit rules on B.P.J.'s pending appeal, the case may well remain in an "interlocutory posture." *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096-97 (2022) (Alito, J., respecting denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting denial of certiorari). The District Court granted summary judgment to Applicants as a matter of law without considering—or ruling on the admissibility of—a voluminous amount of proffered expert evidence.[13] It is possible that the Fourth Circuit could either affirm or reverse and grant summary judgment to B.P.J. But the Fourth Circuit might instead simply vacate the grant of summary judgment and remand for the District Court to address the evidentiary issues and then decide whether summary judgment is appropriate and to whom. There is certainly no reason for this Court to step in now and issue a stay, where Applicants have made no showing that the case is worthy of certiorari at this point, if ever.

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[12] The only circuit split Applicants even allude to concerns the issue of transgender students' exclusion from sex-separated restrooms. App. 17. Applicants do not explain how a claimed circuit split on a different issue could warrant emergency relief here.

[13] Applicants repeatedly refer to the "thousands of pages" in the record before the District Court, App. 34; *see also, e.g.*, *id.* at 2, 9, 12, but fail to mention that the District Court granted summary judgment against B.P.J. largely without reference to that record and without resolving B.P.J.'s many challenges to the admissibility and relevance of Applicants' evidence, including the testimony of several experts proffered by Applicants who were the subject of unresolved *Daubert* motions. Supp. App. 254a (Dkts. 315, 319, 323, 327).

B. Applicants Fail To Show A Strong Likelihood Of Success On The Merits In This "Very Narrow" As-Applied Challenge.

Applicants also have failed to make a strong showing of likely merits success. Although Applicants extoll the virtues of sex separation, App. 16-19, 24-28, the permissibility of sex separation in sports does not answer the question presented here: whether a statute may categorically exclude B.P.J., a 12-year-old middle school girl, from all girls' sports team—and, effectively, from all sex-separated sports—based solely on the incongruence between her gender identity and sex assigned at birth, when she has not gone through, and will not go through, endogenous puberty.

Applicants refuse to acknowledge that H.B. 3293 singles out transgender girls for exclusion. App. 13. It does. Sex separation in sports already existed in West Virginia prior to H.B. 3293. And B.P.J. does not challenge sex separation; she simply seeks to play on the *girls'* team. What H.B. 3293 does—as the District Court made clear even in denying relief to B.P.J.—is "prevent transgender girls from playing on girls' sports teams." App. 24a. It conditions participation on girls' sports teams on a new definition of "biological sex" that operates by design to exclude transgender girls from girls' teams. The Legislature openly announced that excluding transgender girls was the entire point of H.B. 3293, referring to the bill as the "[t]ransgender participation in secondary schools bill," or, as one legislator put it, "the bill" "about transgenders," Supp. App. 150a, 167a-168a; App. 364a, and thereby confirming that the law was passed "'because of,' not merely 'in spite of,' its adverse effects upon" girls who are transgender, *Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 279 (1979). Yet,

as the District Court also found, "[t]he record makes abundantly clear . . . that West Virginia had no 'problem' with transgender students playing school sports and creating unfair competition or unsafe conditions. In fact, at the time it passed the law, West Virginia had no known instance of any transgender person playing school sports." App. 18a. H.B. 3293 thus is "a 'solution' in search of a problem," App. 19a, "aimed to politicize participation in school athletics for transgender students," App. 22a.

With respect to B.P.J.'s as-applied Title IX claim, Applicants are not likely to prevail. This Court's reasoning in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), applies to Title IX and prohibits discrimination against transgender students. *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130 n.22 (4th Cir. 2022) (en banc); *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022); *Grimm*, 972 F.3d at 616. Excluding transgender students from facilities and programs—as H.B. 3293 does to B.P.J.—constitutes "discrimination" by treating transgender students worse than similarly situated cisgender students and harming protected individuals. *See Grimm*, 972 F.3d at 618-19; *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017).

Applicants are also not likely to prevail against B.P.J.'s as-applied equal protection claim. H.B. 3293 is subject to heightened scrutiny both because discrimination based on transgender status is sex discrimination, *see Bostock*, 140 S. Ct. at 1741, and because transgender status independently constitutes a quasi-suspect classification, *see Grimm*, 972 F.3d at 610; *Karnoski v. Trump*, 926 F.3d 1180,

1200 (9th Cir. 2019). Applicants cannot possibly meet their "demanding" burden under heightened scrutiny, *United States v. Virginia*, 518 U.S. 515, 533 (1996), to justify H.B. 3293's categorical ban as applied to a girl like B.P.J., a 12-year-old who has not undergone—and will never undergo—endogenous puberty.[14] Applicants seek to justify H.B. 3293 based on physiological characteristics that arise from male puberty, but B.P.J. has none of those physiological characteristics. Supp. App. 44a, 69a, 93a-94a, 103a-104a, 120a, 160a-161a. Accordingly, Applicants are unlikely to defeat B.P.J.'s as-applied claim.

Further, despite Applicants' assertions to the contrary, *see* App. 8a, 18a, there are no scientific studies—or even anecdotes—showing that a transgender girl who has never gone through endogenous puberty has athletic advantages over cisgender girls, Supp. App. 134a, 175a. And even the most restrictive professional sports policies allow those girls and women to play. Supp. App. 135a. To the extent that Applicants seek to dispute the existing evidence, they should argue to the Fourth Circuit that, absent a direction that summary judgment should be entered for B.P.J.,

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[14] Applicants accuse B.P.J. of demanding a degree of tailoring not required by intermediate scrutiny. App. 19-20. But the sources they cite in support of that argument are a rational basis case, *see Califano v. Jobst*, 434 U.S. 47, 55 (1977), and cases involving "intermediate scrutiny" for commercial speech and content-neutral regulations, *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989); *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993). By contrast, intermediate scrutiny under the Equal Protection Clause is a "demanding" standard that requires an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 533. Under that scrutiny, even when generalizations "have 'statistical support,' [this Court's] decisions reject measures that classify unnecessarily and overbroadly . . . when more accurate and impartial lines can be drawn." *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017) (quoting *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 139 n.11 (1994)).

the District Court should be directed to rule on the pending *Daubert* motions and otherwise resolve any disputed facts that remain.

Contrary to Applicants' claim, allowing B.P.J. to participate does not lack a "limiting principle," and a ruling in her favor will not, as they suggest, require relief for "the male student who identifies as female but takes no other steps to reflect that identity," "[o]r the male with low testosterone," [o]r the male who lacks athletic talent." App. 37. B.P.J. has been precise about the bases for her as-applied challenge: she has "consistently and persistently" identified as a girl, *Grimm*, 972 F.3d at 619, and she has not gone through, and will never go through, endogenous puberty. And the law already supplies a limiting principle—the exclusion must constitute "*discrimination*," *Bostock*, 140 S. Ct. at 1753 (emphasis added), as assessed from the "perspective of a reasonable person in the plaintiff's position, considering all the circumstances," *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71 (2006) (internal quotation marks and citation omitted). "Context matters," and an exclusion "that would be immaterial in some situations is material in others." *Id.* at 69 (citations omitted). Under that established standard, Applicants' hypothetical cisgender boy is similarly situated to other boys for purposes of being able to access sex-separated activities, and he experiences no harm from participating on the boys' teams instead of the girls' teams. By contrast, "[f]orcing B.P.J. to compete on the boys' cross-country or track teams when girls' teams are available would completely erase who she is." Supp. App. 177a. *Cf.* Transcript of Oral Argument at 15:2-6, *Bostock v. Clayton County, Georgia*, No. 17-1618, and *Altitude Express, Inc. v. Zarda*,

No. 17-1623 (Gorsuch, J.) ("[T]here are male and female bathrooms, there are dress codes that are otherwise innocuous, right, most—most people would find them innocuous. But the affected communities will not. And they will find harm.").

* * *

Applicants are obviously eager to litigate the merits before this Court. But the sheer amount of space that Applicants devote to the merits in their Application only underscores the need for this Court to have an actual merits decision from a court of appeals to review. If the divided vote reflected in the Fourth Circuit's interim order is any indication, merits decisions from the courts of appeals will provide the Court with the benefit of contrasting opinions to sharpen analysis. This Court should not allow that invaluable process to be short-circuited, particularly where, as here, Applicants have failed to make the strong merits showing that is required.

IV. Applicants Have Not Shown They Will Suffer Irreparable Injury—Or Any Injury—Without a Stay.

"The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury." *Nken v. Holder*, 556 U.S. 418, 432 (2009) (internal quotation marks and citation omitted). If an applicant fails to establish a likelihood of irreparable harm, the request for a stay must be denied. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers) (denying stay for lack of irreparable harm even though there was reasonable probability of granting certiorari and fair prospect of reversal); *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (denying stay

where no irreparable harm); *Rubin v. United States*, 524 U.S. 1301, 1301 (1998) (Rehnquist, C.J., in chambers) (similar).

Applicants have failed to show any irreparable harm from preserving the preliminary injunction that has been in place for over a year and a half without harming anyone. As the District Court recognized in its stay order, "not one child has been or is likely to be harmed by B.P.J.'s continued participation on her middle school's cross-country and track teams." App. 5a. While the preliminary injunction was in place, B.P.J. participated on her school's girls' cross-country and track teams alongside her classmates and friends for three seasons. Supp. App. 38a, 180a-181a. No one was injured as a result of her participation. She did not "dominate" anything (and, indeed, consistently finished at the back of the pack). *See supra* note 2. And her teammates and coaches welcomed her participation. Supp. App. 214a, 218a.

Given that no harm whatsoever has befallen Applicants from B.P.J.'s participation over the last year and a half, Applicants resort to false and unsupported assertions. The record does not reflect *any* girl being cut from *any* team due to B.P.J.'s participation. *Contra* App. 37. Applicants also assert, citing nothing in the record, that "[l]ast year, according to the County, B.P.J.'s school did not accept all students who tried out for girls' track." *Id.* But the only evidence in the record of anyone not making the cut for a team is that ***B.P.J.*** herself was not fast enough to make the running events in girls' track in the Spring of 2022, leading her to participate in discus and shot put instead. Supp. App. 213a, 217a-218a. Applicants likewise mislead the Court in claiming, without citation, that "[j]ust during the time that the

preliminary injunction was in place, for instance, B.P.J. displaced girls 105 times across eleven events." App. 36. Applicants appear to be referring to the fact that even though B.P.J. regularly finishes at the back of the pack, occasionally she is ahead of a few other runners. *See supra* note 2. As the District Court correctly observed, this is not displacement, App. 5a, let alone the "substantial" displacement that the Legislature proffered as H.B. 3293's purported justification.[15] *See* W. Va. Code § 18-2-25d(a)(3).

It is telling that, after nearly two years of intensive litigation, Applicants continue to identify absolutely no one in West Virginia who will suffer cognizable harm from allowing B.P.J. to participate on girls' teams. Intervenor Lainey Armistead, a college graduate living in Florida who never competed against, much less was "displaced" by B.P.J., will certainly not be harmed, and Applicants do not contend otherwise—in fact, their Application does not mention her at all. At the time she intervened, Armistead was a soccer player at a college in West Virginia, and had never competed against a transgender girl or had any prospect of doing so. Supp. App. 100a, 195a. Perhaps for that reason, when Armistead was asked during her

[15] Contrary to Applicants' demand for exclusion, female athletes from across the country and from a broad cross-section of sports, as well as multiple women's rights organizations, support the inclusion of girls and women who are transgender on girls' and women's teams. *See, e.g.*, Br. of Amici Curiae 138 Athletes in Women's Sports, *A.M., by her mother and next friend, E.M. v. Indianapolis Pub. Schs.*, No. 22-2332 (7th Cir. Nov. 10, 2022), https://bit.ly/3lqOxgF; Br. of Amici Curiae National Women's Law Center and 34 Additional Civil Rights and Other Organizations, *Soule v. Conn. Ass'n of Schs.,* No. 21-1365 (2d Cir. Oct. 14, 2021), https://bit.ly/40h0bJR; Becky Sauerbrunn, *Let Missouri trans girls and women play*, SPRINGFIELD NEWS-LEADER (Feb. 5, 2023, 5:03 AM), https://bit.ly/3JTPEPz.

deposition whether she actually "object[ed] to B.P.J. playing on the Bridgeport Middle School girls' cross-country team," she responded, "I don't know." Supp. App. 101a, 181a. In any event, Armistead has now graduated college and moved to Florida. Supp. App. 195a. She has no remaining interest in this litigation and would have no basis even to seek a stay if West Virginia had not done so. *See Hollingsworth v. Perry,* 570 U.S. 693, 707 (2013) (reaffirming that intervenor without Article III standing cannot appeal); *cf. Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 440 (2017) ("[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing."). Yet the District Court failed to rule on B.P.J.'s motion to revoke its grant of permissive intervention to Armistead, instead considering Armistead's arguments in granting summary judgment against B.P.J. Armistead's continued participation in this case absent any direct interest weighs heavily against impairing B.P.J.'s rights at Armistead's behest.

V. A Stay Will Irreparably Harm B.P.J. And Is Contrary To The Public Interest.

Finally—and ignored by Applicants—the requested relief will irreparably harm B.P.J., a 12-year-old girl who simply wants to continue playing on her team. Although Applicants have shown neither likely success nor irreparable harm, even if they had, it is "ultimately necessary" for the Court to "'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes*, 501 U.S. at 1304–05 (Scalia, J., in chambers) (citation

omitted); *accord Trump*, 137 S. Ct. at 2087. "The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others." *Barnes*, 501 U.S. at 1305. Here, the only injury at stake is B.P.J.'s.

If this Court stays the Fourth Circuit's injunction, the harm to B.P.J. would be profound and irreparable. Forcing B.P.J. to leave the girls' track-and-field team she again joined this Spring after being on the team last year, and to sit out her upcoming cross-country season (which would be her third) while this case is pending on appeal would isolate B.P.J. from her peers and irreparably harm her during "a memorable and pivotal time in [her] life." App. 5a. B.P.J.'s teammates have become like a "second family," and she simply wants to be allowed to "run with [her] friends and be happy." Supp. App. 212a. Not only would staying the Fourth Circuit's injunction cause B.P.J. to lose her "second family," but it would also cause her to lose all the other benefits and life-lessons that participation in school sports indisputably brings. Supp. App. 214a.

Applicants' only retort is that B.P.J. could play on the boys' team, and that cisgender girls sometimes choose to compete on boys' teams. App. 35-36. But that is not so in West Virginia, where girls are *prohibited* from playing on boys' teams if a girls' team is available. *See Gregor*, 2020 WL 5997057, at *3. And, more fundamentally, "[f]orcing B.P.J. to compete on the boys' cross-country or track teams when girls' teams are available would completely erase who she is." Supp. App. 74a-75a, 177a, 219a.

This as-applied challenge is about a child who simply wants to play on her middle school team with her friends without harming anyone, as she has done for over a year and a half. As the District Court acknowledged, it is in the public interest that "all children who seek to participate in athletics have a genuine opportunity to do so." App. 5a.

CONCLUSION

The Application for Vacatur should be denied.

Respectfully submitted,

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