No. 24-43

IN THE
Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.
Petitioners,

v.

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

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

BRIEF FOR PUBLIC JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. Public Justice has, for decades, litigated and advocated on behalf of students who have experienced discrimination, including harassment based on their sexual orientation or transgender identity. From its significant experience, Public Justice recognizes that judicial enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., that is consistent with the statute's full breadth and promise is crucial to ensuring students who have endured discrimination receive the redress they deserve.[1]

SUMMARY OF ARGUMENT

Discrimination based on sexual orientation or gender identity takes many forms in American schools. This case is about one kind: the exclusion of a student from the school sports team that aligns with her gender identity. Many other students face harassment based on their sexual orientation. Some are disciplined or excluded from school activities because they are gay or transgender. Others are punished when they speak up about the discrimination they face.

Depending on how the Court resolves this appeal, its decision may reach beyond the sports-specific question presented to shape the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) students

[1] No counsel for a party authored any part of this brief. Amicus curiae alone financed the preparation and submission of this brief.

broadly. West Virginia urges the Court to address the question of whether Title IX prohibits discrimination based on gender identity and sexual orientation. It does—and that prohibition is critically important for students across the country.

In *Bostock* v. *Clayton County*, this Court held that the words "because of" in Title VII of the Civil Rights Act of 1964 require a but-for causation standard. 590 U.S. 644, 656 (2020). For that reason, discrimination based on gender identity or sexual orientation is "because of . . . sex" in violation of the statute. *Id.* at 659–61. Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). That phrase means the same thing as "because of." So, Title IX prohibits discrimination based on sexual orientation and gender identity.

West Virginia would like to avoid that outcome, but the text will not allow it. The plain meaning of "on the basis of" requires the same but-for causation as "because of." Only that read is consistent with this Court's precedent. And the fact that Title IX is a Spending Clause statute offers the state no help. The statutory text provides clear notice that it prohibits anti-LGBTQ discrimination. Besides, that clear notice is not required in cases, like this one, where this Court has already recognized a private right of action and a plaintiff seeks injunctive relief. *Bostock* applies to Title IX, end of story.

Good thing, too. Properly interpreted, Title IX provides essential protections against the varied forms of discrimination that LGBTQ students face, including rampant harassment. These abuses put students' educations, and lives, at risk. Title IX encourages schools to avoid liability by avoiding discrimination.

And, if schools fall down on the job, the statute provides students needed remedies. But, if this Court were to interpret Title IX more narrowly than its reach, LGBTQ students would find themselves unprotected.

ARGUMENT

I. *Bostock* applies to Title IX

A. Under *Bostock*'s reasoning, Title IX's plain text prohibits discrimination based on sexual orientation or gender identity

1. *Bostock* held that an employer violates Title VII of the Civil Rights Act of 1964 when it fires an employee based on his or her sexual orientation or transgender status. *See* 590 U.S. at 651–52. Title VII forbids employment discrimination "because of . . . sex." 42 U.S.C. § 2000e–2(a). "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 590 U.S. at 656 (quoting *Univ. of Texas Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 346, 360 (2013)). That "but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Ibid.* Crucially, a but-for cause need not be a sole cause. *Ibid.*

This Court also noted that, in prohibiting "discriminat[ion] against any *individual* . . . because of such *individual*'s . . . sex," 42 U.S.C. § 2000e–2(a)(1), Title VII protects individuals, not groups. *Bostock*, 590 U.S. at 658. As a result, the question is whether an employer would have treated an employee differently if his or her sex were different, not whether an employer

"treat[s] women as a group the same when compared to men as a group." *Id.* at 659.

From these principles, this Court recognized that an employer cannot fire an employee based on that individual's "homosexuality or transgender status." *Id.* at 660. "That's because it is impossible to discriminate against a person for being homosexual or transgender without discrimination against that individual based on sex." *Ibid.* The Court offered two illustrative examples. First, "[c]onsider . . . an employer with two employees, both of whom are attracted to men." *Ibid.* "[O]ne is a man and the other a woman. If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague." *Ibid.* Second, "take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female." *Ibid.* The same reasoning applies. "If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified at birth for traits or actions that it tolerates in an employee identifies as female at birth." *Ibid.* In both examples, the employer violates Title IX because the individual's sex is a but-for cause of the termination. *See ibid.*

2. *Bostock*'s logic applies equally to Title IX, which prohibits sex discrimination in federally-funded education programs and activities, 20 U.S.C. § 1681(a). The statutes are not identical, but they are similar in the ways that count for this question. Where Title VII protects "individual[s]," 42 U.S.C. § 2000e–2(a)(1), Title IX protects "person[s]," 20 U.S.C. § 1681(a). Those

are synonyms. *See, e.g.*, *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 454 (2012) (collecting definitions of "individual" as meaning a "person"); 1 U.S.C. § 1 (defining "person" to encompass all "individuals").

Likewise, where Title VII forbids discrimination "because of . . . sex," 42 U.S.C. § 2000e–2(a), Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a). These phrases mean the same thing. *See* Katie Eyer, *Title IX in the Age of Textualism,* 86 Ohio St. L.J. 335, 362–63, 367 (2025) (collecting cases).

That is apparent from the words themselves. "On the basis of" means "based on." *See, e.g.*, *On the basis of*, Merriam-Webster, https://www.merriam-webster.com/dictionary/on%20the%20basis%20of [https://perma.cc/7KTS-EUZA] (last visited Nov. 12, 2025). And "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007); *accord Burrage* v. *United States*, 571 U.S. 204, 213 (2014) (explaining "based on" connotes "but-for" causation); *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (indicating that "based on," "because of," "by reason of" and other cognate terms are all plain language ways of legislating but-for causation).

And this Court has it explained that when a person discriminates "because of . . . sex," he "'discriminate[s]' on the basis of sex." *Franklin* v. *Gwinnett Cnty. Pub. Schs.,* 503 U.S. 60, 75 (1992) (quoting *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986)). It frequently uses the two terms interchangeably. *See, e.g.*, *Bostock*, 590 U.S. at 650, 653, 654, 662, 664, 666, 680; *Nassar*, 570 U.S. at 359–60; *United States* v. *Burke*, 504 U.S. 229, 238 (1992); *Meritor Sav. Bank,*

477 U.S. at 64. In *Bostock*, for example, this Court used "on the basis of" in place of Title VII's "because of" language eight times in the majority opinion. *Bostock*, 590 U.S. at 650, 653, 654, 662, 664, 666, 680. The *Bostock* dissents used "on the basis of" the same way nearly thirty times. *See id.* at 688, 691, 693, 695 n.16, 699, 701–02, 708–09, 715–16, 720–22 (Alito, J., dissenting); *id.* at 780–81, 797, 801, 804 (Kavanaugh, J., dissenting).

The circuit courts, too, have recognized the two terms import the same causation standard. *See, e.g.*, *Akridge* v. *Alfa Ins. Cos.*, 93 F.4th 1181, 1192 (11th Cir. 2024); *Natofsky* v. *City of New York*, 921 F.3d 337, 349 (2d Cir. 2019); *Murray* v. *Mayo Clinic*, 934 F.3d 1101, 1106 (9th Cir. 2019); *Gentry* v. *E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235–36 (4th Cir. 2016).

Moreover, this Court has held that "on the basis of" is "language . . . strongly suggestive of a but-for causation standard." *Comcast Corp.* v. *Nat'l Ass'n of Afr. Am. Owned Media*, 589 U.S. 327, 335 (2020). And Title VI's very similar language—"on the ground of"—"means 'because of,'" which "invoke[s] 'the simple and traditional standard of but-for causation.'" *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181, 289 (2023) (Gorsuch, J., concurring) (quoting *Bostock*, 590 U.S. at 656).

All of this comes against the backdrop of this Court's rule that the "ancient and simple 'but for' common law causation test . . . supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated . . . includ[ing] when it comes to federal antidiscrimination laws." *Comcast*, 589 U.S. at 332. "[B]ecause of" in Title VI and "on the basis of" in Title IX both require but-for causation.

Given the similarities between Title VII's and Title IX's texts, *Bostock*'s reasoning equally applies to Title IX. *See* Eyer, *supra*, at 360–65. Just as an employer discriminates "because of sex" when it treats an employee differently because he is gay or transgender, so does a school discriminate "on the basis of sex" when it treats a student differently because he is gay or transgender. In both cases, the individual's sex is the but-for cause of the discrimination. It is unsurprising, then, that federal courts have recognized that *Bostock* means Title IX prohibits anti-LGBTQ discrimination. *See, e.g.*, *A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024); *Grabowski* v. *Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023); *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

3. West Virginia's alternative reading of the statute is incompatible with the natural reading of the text and this Court's precedent.

3a. The state fixates on "the" in "on the basis of" to argue (at 29) that Title IX prohibits discrimination *solely* on the basis of sex.. That is wrong. "On the basis of" must be read as a whole, not by isolating any single word. *See Smith* v. *United States*, 508 U.S. 223, 233 (1993) ("[A] single word cannot be read in isolation."); *FCC* v. *AT&T Inc.,* 562 U.S. 397, 406 (2011) (declining to read a phrase as "simply the sum of its two words"); *Life Techs. Corp.* v. *Promega Corp.,* 580 U.S. 140, 146 (2017) ("'[A] word is given more precise content by the neighboring words with which it is associated.'" (quoting *United States* v. *Williams,* 553

U.S. 285, 294 (2008))); *Bostock*, 590 U.S. at 784 (Kavanaugh, J., dissenting) ("[C]ourts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase."); Antonin Scalia & Bryan Garner, *Reading Law: Interpretation of Legal Texts* 356 (2012) ("Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text."); *see also Helvering* v. *Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934) (Hand, J.) ("[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes.").

Reading "on the basis of" together, rather than word-by-word, especially makes sense because the phrase is an idiom. *See On the basis of*, Merriam-Webster, https://www.merriam-webster.com/dictionary/on%20the%20basis%20of [https://perma.cc/7KTS-EUZA] (last visited Nov. 12, 2025). Reading it "hyperliterally" would "destroy its sense." Scalia & Garner, *supra*, at 357; *see Idiom,* Merriam-Webster, https://www.merriam-webster.com/dictionary/idiom [https://perma.cc/SEM6-8QD3] (last visited Nov. 12, 2025) (defining an idiom to have "a meaning that cannot be understood from the combined meaning of its elements"). West Virginia reads too much into Title IX's use of a definitive article: The statute does not read "on *a* basis of sex" because that is not the correct figure of speech.

So, this Court should read the phrase "on the basis of" as a whole. And, as a whole, that statutory language indicates but-for causation, not exclusive causation. *See supra* pp. 5–6.

Plus, as this Court noted in *Bostock*, when Congress wants an exclusive causation standard, it says

so. "As it has in other statutes, [Congress] could have added 'solely' to indicate that actions taken" on the basis of "multiple factors do not violate the law." *Bostock*, 590 U.S. at 656 (citing 11 U.S.C. § 525; 16 U.S.C. § 511); *see also, e.g.*, 26 U.S.C. 3304(a)(12) ("[N]o person shall be denied compensation . . . solely on the basis of pregnancy[.]"); 42 U.S.C. § 290dd(b)(1) ("No person may be denied . . . Federal civilian employment . . . solely on the grounds of prior substance abuse."). But Congress did not.

3b. West Virginia's reading is also incompatible with this Court's interpretation of Title VI of the Civil Rights Act of 1965, on which Congress modeled Title IX, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009). Title VI analogously prohibits discrimination "on *the* ground of race." 42 U.S.C § 2000d (emphasis added). In *Students for Fair Admissions* v. *President and Fellows of Harvard College*, the universities' consideration of an applicant's race as just "one factor" violated Title VI. 600 U.S. at 195–96, 198 n.2, 230–31; *see id.* at 287, 289–91 (Gorsuch, J., concurring) (explaining "on the ground of" means "because of," which invokes traditional but-for causation). West Viriginia's version of the statute would have barred the plaintiffs' claims because they were denied admissions for reasons *in addition* to their race. *See id.* at 195–96 (listing various admissions factors).

Likewise, this Court has held that sexual harassment is discrimination "on the basis of sex." *Franklin*, 503 U.S. at 75. Yet sexual harassment is never based on sex alone. So long as a harasser does not harass every member of his victim's sex—for example, if he harasses one woman but not all women—sex cannot

be the *sole* reason for the harassment. Rather, a harasser targets his victim based on a combination of her sex and other factors, such as her appearance or perceived vulnerability.

And still more absurd results would follow from West Virginia's formulation of the statute. For instance, a school could evade Title IX liability if it cuts girls' sports teams for reasons related to sex and, say, budgetary restraints. *See, e.g., Cohen* v. *Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993). A school could also discriminate against mothers, but not fathers, because its discrimination would be on the basis of sex and parental status, not sex alone. *See Bostock*, 590 U.S. at 663 (discussing *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971)). A male student wrongly disciplined for sexual harassment due to anti-male bias could not bring a claim because his punishment would be attributable to a combination of his sex and the accusation lodged. *See Doe* v. *Purdue Univ.*, 928 F.3d 652, 669–70 (7th Cir. 2019) (Barrett, J.).

3. West Virginia is also wrong (at 29–30) that *Bostock*'s reasoning does not apply because Title IX sometimes permits sex segregation in schools. "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). None of those exceptions remove LGBTQ students from the statute's anti-discrimination mandate. *See* 20 U.S.C. § 1681(a); Eyer, *supra*, at 365. And these exceptions do not, as West Virginia suggests (at 22–23), imply additional atextual limitations on Title IX's core anti-discrimination mandate. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (noting that "[w]here Congress explicitly

enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied." (quoting *Andrus* v. *Glover Constr. Co.,* 446 U.S. 608, 616–617 (1980)).

Consider a boy whose school excludes him from student government, or from the soccer team, because he is gay. Under *Bostock*'s reasoning, that is "discrimination on the basis of sex" and thus prohibited by Title IX. *See supra* p. 7. The fact that Title IX permits "father-son or mother-daughter activities" at his school does nothing to disrupt that conclusion. Pet'rs Br. at 22 (quoting 20 U.S.C. § 1681(a)(8)); *cf. Bostock*, 590 U.S. at 681 (noting question of whether Title VII generally prohibits discrimination based on sexual orientation and gender identity is distinct from questions about its application to sex-segregated spaces).

West Virginia argues (at 22) that sometimes sex segregation is permissible as an interpretation of Title IX's core prohibition, rather than an exception to the statute. If that is right, it reflects only that sex segregation may not always injure students, and so may not always constitute "discrimination" prohibited by Title IX. 20 U.S.C. § 1681(a); *see* Eyer, *supra*, at 377–79. That read of the statute does not undermine the plain meaning of Title IX's text, which, per *Bostock*, prohibits discrimination based on gender identity or sexual orientation. *See supra* pp. 3–7.

To the extent West Virginia suggests that, if Title IX permits one instance of sex separation, it must allow all sex separation, that interpretation is also belied by the existence of Title IX's exceptions. If West

Virginia were right, the statute's exceptions permitting sex separation—for example, in some student clubs—would be unnecessary. *See* 20 U.S.C. § 1681(a)(6). And this Court will not read a statute in a way that renders an "express exception . . . insignificant," let alone "wholly superfluous." *TRW*, 534 U.S. at 31 (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)); *see Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 537 (2015).

B. That Title IX is a Spending Clause statute does not disturb this conclusion

1. West Virginia argues (at 32–33) that Title IX did not give it sufficiently clear notice that it could be liable for the ban at issue in this case—notice it says was required because Congress passed the statute under its spending powers. The state rightfully does not argue, however, that the Spending Clause's clear notice requirement bears on whether *Bostock* applies to Title IX. *See id.* at 29–31.

Here, Title IX's plain text gives schools clear notice that they will violate the statute if they discriminate based on sexual orientation or gender identity. *See supra* pp. 3–7. That is enough. The Spending Clause clear notice rule "does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999).

Title IX, like Title VII, may not include the words "sexual orientation" or "transgender status" in its text. But the Spending Clause does not require that every potential violation be "specifically identified and proscribed in advance," *Bennett* v. *Ky. Dep't of*

Educ., 470 U.S. 656, 666 (1985), in a manner "resembling qualified immunity," *Soule* v. *Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 61 (2d Cir. 2023) (en banc) (Menashi, J., concurring). "[T]he text of Title IX gives recipients notice that intentional discrimination will result in liability." *Hall* v. *Millersville Univ.*, 22 F.4th 397, 404 (3d Cir. 2022). "It is for this reason that the Supreme Court has, throughout its Title IX jurisprudence, rejected arguments that [the Spending Clause clear notice requirement] bars a particular plaintiff's cause of action after finding that a funding recipient's conduct constituted an intentional violation of Title IX." *Ibid.*; *see Jackson,* 544 U.S. at 182–83 (similar). For example, although Title IX does not mention either retaliation or deliberate indifference to sexual harassment, this Court has held that the Spending Clause poses no obstacle to liability for such forms of intentional sex discrimination. *See Jackson*, 544 U.S. at 182–83.

2. Moreover, the clear statement rule West Virgina invokes does not apply when, as here, Congress has created a private cause of action to enforce conditions on federal funding and a plaintiff seeks "prospective relief" to ensure "future" compliance with them. *Guardians Ass'n* v. *Civ. Serv. Comm'n of City of New York*, 463 U.S. 582, 604 (1983) (opinion of White, J.).

As a general matter, because the Constitution gives the political branches, not courts, the power to allocate federal funds, courts "must . . . neutrally interpret and apply the spending laws enacted by Congress and the President . . . by heeding the statutory text and employing the traditional tools of statutory interpretation." *Rudisill* v. *McDonough*, 601 U.S. 294, 317–18 (2024) (Kavanaugh, J., concurring). Because

clear statement rules require courts to "depart" from "the best reading of the statutory text," a court should not deploy them without a strong justification "rooted in constitutional principles or congressional practices." *Id.* at 315; *see also Biden* v. *Nebraska*, 600 U.S. 477, 508–09 (2023) (Barrett, J., concurring) (explaining that clear statement requirements "pose 'a lot of trouble' for 'the honest textualist'" (quoting Antonin Scalia, A Matter of Interpretation 28 (1997)).

When construing spending legislation, this Court has found sufficient justification to apply a clear statement rule in two narrow circumstances. The first is in determining "whether a private party may sue to enforce the terms of a federal grant." *Medina* v. *Planned Parenthood S. Atl.*, 606 U.S. 357, 373 (2025). The second is in determining the scope of "damages" liability for past violations of those terms. *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022); *see Davis*, 526 U.S. at 641–42. But the rationales for applying a clear statement rule in those contexts have no application here.

2a. In the first line of cases, this Court presumes that a Spending Clause statute does not create a private cause of action unless Congress "clear[ly]" and "unambiguously" expressed an intent to do so. *Medina*, 606 U.S. at 373 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)); *accord Suter* v. *Artist M.*, 503 U.S. 347, 356 (1992) (characterizing *Pennhurst* as holding that the Spending Clause statute there "did not confer an implied cause of action"). That presumption rests on an understanding that Congress seldom authorizes private parties to enforce conditions on the receipt of federal funds. The "'typical remedy for state noncompliance' with a

federal grant's conditions is an 'action by the Federal Government to terminate funds to the State,'" not a private lawsuit. *Medina*, 606 U.S. at 373 (quoting *Pennhurst*, 451 U.S. at 28). So unless a particular Spending Clause statute signals an intent to depart from that convention, a reasonable interpreter would assume that Congress did not mean to create a private remedy to enforce the statute. *Id.*

That assumption about remedies has no bearing here. This case does not ask whether Title IX creates private right to sue. This Court answered that question affirmatively decades ago. *See Cannon* v. *Univ. of Chicago,* 441 U.S. 677, 690–693 (1979). And Congress "ratified" that decision through a statutory amendment. *Cummings*, 596 U.S. at 218. The issue here is a different one: whether Title IX's general prohibition on sex discrimination covers certain conduct.[2]

2b. In the second line of cases, when a statute creates a private cause of action, this Court has applied a clear notice rule as a "limitation on private damages actions." *Jackson*, 544 U.S. at 182; *accord Guardians*, 463 U.S. at 602 (opinion of White, J.) (describing the rule as a "presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power"). Courts may only award damages for intentional violations of the clear terms of the statute. *See*

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[2] *Pennhurst State School & Hospital* v. *Halderman* is also inapplicable because "the rights asserted" there would have "impose[d] *affirmative* obligations on the States to fund certain services," and "we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." 451 U.S. at 16–17. No one claims that the rights asserted here would place "massive financial obligations" on West Virginia. *Id.* at 17.

Jackson, 544 U.S. at 183. That rule is designed to ensure that courts do not impose impermissible retroactive conditions on federal funds that recipients did not "knowingly" and "voluntarily" accept before they incurred damages. *Cummings*, 596 U.S. at 219.

That rationale has no application to injunctions that prevent future violations. When a court spells out the precise "violation and enjoin[s] its continuance," or orders recipients "prospectively to perform their duties incident to the receipt of federal money," it provides clear notice of the statute's conditions. *Guardians*, 463 U.S. at 596 (opinion of White, J.). Armed with that notice, the recipient can make a fully informed choice. If it does not wish to comply with the clarified terms of the grant, it "has the option of withdrawing" from the federal program "and hence terminating the prospective force of the injunction." *Ibid.* If, on the other hand, it chooses to keep federal funds but continue the unlawful conduct, it has "intentionally violate[d] the statute," and the notice problem does not arise. *Davis*, 526 U.S. at 642.

Accordingly, there is no justification for applying a clear statement rule to requests for injunctive relief, as in this case.[3]

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[3] The federalism canon West Virginia cites (at 31–32) does not change the result either. That canon demands that Congress speak clearly before it significantly "alter[s] the usual [federal-state] balance" by "impos[ing] its will" in "areas traditionally regulated by the States." *Gregory* v. *Ashcroft,* 501 U.S. 452, 460 (1991). The Court has not applied this canon to Spending Clause statutes, which do not "impose[] congressional policy on a State involuntarily." *Gregory,* 501 U.S. at 469. Rather, they give states a free choice to accept the terms or decline the federal funds. *See, e.g.*, *Jackson*, 544 U.S. at 171–84 (not applying federalism canon

Footnote continued on next page

II. Title IX offers crucial protections for LGBTQ students beyond those at issue in this case

This case presents the question of whether a transgender student in West Virginia has a Title IX right to participate in school sports teams that align with her gender identity. But the ramifications of this Court's decision may reach well beyond the athletics context. Title IX, as properly interpreted to forbid anti-LGBTQ discrimination, offers crucial protections for students, including those who face terrible harassment at school. This Court's recognition that *Bostock*'s reasoning applies to Title IX will ensure those protections remain in place, however it applies that rule to the issue of sex-segregated athletics.

1a. LGBTQ students face significant discrimination at school on the basis of their sexual orientation and gender identities. Some of the most disruptive discrimination comes in the form of harassment—and schools' tolerance for it.

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in interpreting Title IX); *Biden* v. *Missouri*, 595 U.S. 87 (2022) (same, over objection from dissent, when interpreting Medicaid statute); *Students for Fair Admissions*, 600 U.S. at 192 (same when interpreting Title VI). In any event, this Court has already interpreted Title IX to "broadly" prohibit "diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 183. Interpreting the statute to cover two forms of such sex discrimination—discrimination based on sexual orientation and gender identity—would not "radically readjust the balance of state and national authority" or "intrude" on areas of governance previously reserved to states. *Bond* v. *United States*, 572 U.S. 844, 857–58, 860 (2014) (citation modified) (declining to adopt construction of chemical weapon statute that would have constituted an unprecedented extension of federal power to "purely local crimes").

Amicus curiae Public Justice has represented students who experienced unchecked anti-LGBTQ harassment at school. It has also represented the estate of one student, Nigel Shelby of Alabama, who died by suicide as a result of such harassment. *See* Uwa Ede-Osifo, *After her only son died by suicide, a mother wants other gay Black students to thrive*, NBC News (May 22, 2023), https://www.nbcnews.com/news/nbcblk/nigel-shelbys-mother-settlement-alabama-school-rcna84507 [https://perma.cc/P26A-MTL2].

Data bear out the prevalence and destructive effects of anti-LGBTQ harassment in schools. According to a recent national survey of LGBTQ students, 76.1% of survey participants had been verbally harassed on the basis of their sexual orientation over the last year. Joseph G. Kosciw et al., GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools* 19 (2022), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf [https://perma.cc/XJ79-UAW8] [hereinafter Kosciw 2022]. Over a third had been physically harassed, and 12.5% had been assaulted, on the same basis. *Id.* at 19–20. Nearly 70% of LGBTQ students "reported feeling unsafe at school" because of their sexual orientation or gender identity. *Id.* at 10. And another study found that youth who are sexual or gender minorities experience significantly higher rates of bullying (47.1%) than their heterosexual and cisgender peers (30%). Gelila Haile et al., Nat'l Ctr. for Health Stats., *Bullying Victimization Among Teenagers: United States, July 2021–December 2023*, 2 (2024), https://www.cdc.gov/nchs/data/databriefs/db514.pdf [https://perma.cc/S94V-WZVE].

This harassment poses a grave threat to students' educations. Sexual orientation-based harassment leads to lower academic performance and grade point averages, and higher rates of absenteeism. Kosciw 2022, *supra*, at 35–36. It also leads to "lower educational aspirations." *Id.* at 36. LGBTQ students, for example, are nearly twice as likely to report that they do not plan to attend college if they have been subjected to severe sexual orientation-based harassment. *Id.* at 35.

Harassment also has significant effects on LGBTQ students' mental health. In a 2024 study, LGBTQ students who reported being bullied in the past year were three times more likely to have attempted suicide during the same period than those who had not been bullied. Ronita Nath et. al, The Trevor Project, *2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People* 20 (2024), https://www.thetrevorproject.org/survey-2024/assets/static/TTP_2024_National_Survey.pdf [https://perma.cc/H9HNW6H9].[4]

[4] Rates of suicidality among LGBTQ youth are devastatingly high. In one recent study, 41% of LGBTQ youth reported seriously considering suicide, compared to 13% of heterosexual and cisgender peers. U.S. Dep't of Health & Hum. Servs. & Ctrs. for Disease Control & Prevention, *Youth Risk Behavior Survey Data Summary & Trends Report: 2013-2023*, 60 (2024), https://www.cdc.gov/yrbs/dstr/pdf/YRBS-2023-Data-Summary-Trend-Report.pdf [https://perma.cc/9RGS-43B7]. Thirty-two percent of LGBTQ youth reported making a suicide plan, and twenty percent had attempted suicide. *Id.* at 62-64. In a survey published last year, 46% of transgender and nonbinary youth reported seriously considering suicide and 14% reported having attempted suicide. Nath, *supra*, at 3.

2. LGBTQ students face other kinds of discrimination, beyond harassment, that are squarely illegal under *Bostock*'s reasoning. At a number of schools, for example, students have been prohibited from buying discounted couples tickets to prom if they attend with a same-sex date rather than with an opposite-sex date. *See, e.g.*, Meredith Nardino, *Prom Discrimination: Student Stories From All 50 States,* DoSomething (April 26, 2019), https://dosomething.org/article/prom-discrimination-stories [https://perma.cc/EA4A-MW4B]; Human Rights Watch, *"Like Walking Through a Hailstorm": Discrimination against LGBT Youth in US Schools* 75 (2016), https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf?utm [https://perma.cc/LSY8-QUAF]; Joseph G. Kosciw et al., GLSEN, *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 74 (2012), https://files.eric.ed.gov/fulltext/ED535177.pdf?utm [https://perma.cc/ABM5-8P4X]. And at an Idaho school, LGBTQ students were deemed ineligible for the senior award of "best couple," which was restricted to straight couples. Nardino, *supra*. Under policies like these, a female student attracted to girls is treated worse than a male student attracted to girls. She is treated "worse based in part on [her] sex." *Bostock*, 590 U.S. at 622.

Transgender students face discrimination for wearing clothing their school policies would allow if they had been assigned a different sex at birth. A transgender student in Alabama was recently banned from attending her prom because she wore a dress; school officials blocked her entry until she changed into pants. Shannon Power, *Transgender Teen Denied*

Entry to Prom for Wearing Dress, Newsweek (Apr. 10, 2024), https://www.newsweek.com/transgender-teen-prom-dress-alabama-lgbtq-1888839 [https://perma.cc/G49V-AWAE]. A school in South Texas removed a picture of transgender teenager in a tuxedo from the yearbook because the photo violated "community standards." Lila Shapiro, *School Blocks Transgender Student's Tuxedo Yearbook Picture For 'Community Standards,'* HuffPost (Nov. 14, 2013), https://www.huffpost.com/entry/transgender-tuxedo-yearbook_n_4269843?gay-rights= [https://perma.cc/4FFK-EHYS]. The school explained that it would include the teenager's photograph only if he wore traditionally feminine clothing. *Id.*

LGBTQ students are also disciplined for expressions of romantic affection that are routinely permitted for their heterosexual peers. For example, a lesbian student in Utah was called into the principal's office and warned that "disciplinary action would be taken if she did not stop holding hands with girls." Complaint at 19, *Equality Utah* v. *Utah Dept. of Educ.* (D. Utah 2016) (No. 2:16-cv-01081). Yet the school did not discipline students for engaging in the same conduct with classmates of the opposite sex. *Ibid.* If the student had been a boy, then her school would not have prohibited her from "holding hands with girls." *Ibid.*; *see also* Human Rights Watch, *supra*, at 75–76 (collecting similar accounts); GLSEN & Nat'l Center for Transgender Equality, Comment Letter on Proposed Title IX Rule, 96 (Sept. 12, 2022), https://www.regulations.gov/comment/ED-2021-OCR-0166-238930 [https://perma.cc/H2UT-TVSC] (recounting that a lesbian student was told by school staff to stop holding hands with her girlfriend, even

though heterosexual couples were allowed to engage in the same conduct).

Students also face retaliation when they report anti-LGBTQ discrimination. Nearly one in ten LGBTQ students in a recent study reported that they *themselves* were disciplined when they reported being victimized. Kosciw 2022, *supra*, at 29.

3. Properly interpreted, Title IX provides critical protections against these varied forms of anti-LGBTQ discrimination. When a student is subject to discrimination on the basis of sex, Title IX provides remedies through the courts or administrative complaints. *See Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280–81 (1998); *Cannon,* 441 U.S. at 690–93. This relief is available for retaliation for reporting sex discrimination. *See Jackson*, 544 U.S. at 178. And it is available for students whose schools are deliberately indifferent to known sex-based harassment. *See, e.g.*, *Gebser*, 524 U.S. at 290. Because *Bostock* translates to Title IX, that sex-based harassment includes anti-LGBTQ harassment. *Grabowski*, 69 F.4th at 1117–19. So, when a school receives actual notice of anti-LGBTQ harassment within its programs, it must respond. *See id.*

To avoid the risks of liability, smart schools are proactive. They root out discriminatory policies, train their staff to comply with the law and treat LGBTQ students right, and address harassment as soon as it starts. The best evidence of Title IX's success is the lawsuits that never have to be filed because schools do the right thing. But if this Court were to hold *Bostock*'s logic does not translate to Title IX, and the statute does not prohibit discrimination based on sexual

orientation and transgender status, schools could engage in such discrimination without fear of statutory consequences.

CONCLUSION

If the Court addresses the question, it should hold that *Bostock*'s reasoning applies equally to Title IX, and it should also affirm the Fourth Circuit's decision.

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