

No. 24-43

IN THE
Supreme Court of the United States

THE STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

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

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

**BRIEF OF THE ORGANIZATION OF
AMERICAN HISTORIANS, THE LGBTQ+
HISTORY ASSOCIATION, AND HISTORIAN
SCHOLARS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*

Amici are well-recognized scholarly historical organizations and academic scholars and historians whose many decades of study and research focus on the history of gender, sexuality, and society.¹ A summary of the qualifications and affiliations of the *amici* is provided in the appendix to this brief. The individual *amici* who hold academic appointments file this brief solely as individuals; their university institutional affiliations are given for identification purposes only.

Amici aim to provide the Court with accurate historical perspective as it considers the question presented in *West Virginia v. B.P.J.* as to whether state policy determining school sport team participation based on sex assigned at birth is inconsistent with Title IX of the Education Amendments of 1972. *Amici* have examined the opinion of the Fourth Circuit Court of Appeals, the underlying briefs, as well as the opinions of other courts in related cases, in which several jurists contend that transgender identity and transgender people were not well-known to the American public at the time Title IX was passed and enacted as law. Based on their expertise and research, *Amici* find this assertion to be unsupported by the historical evidence.

¹ Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *Amici*, their members, or their counsel made a monetary contribution to fund its preparation or submission. This brief does not purport to convey the position of Northwestern University Pritzker School of Law.

SUMMARY OF THE ARGUMENT

Congress enacted Title IX of the Civil Rights Act in 1972, during a time when our public systems were grappling with how to protect and include people from historically marginalized groups. That same year, the Equal Rights Amendment, to specifically incorporate equality of the sexes in the Constitution, passed Congress. Almost a decade prior, to address systemic resistance in the workplace, Congress enacted Title VII to protect Americans from employment discrimination based on protected classes, including sex. Congress enacted Title IX because it saw a similar need to protect Americans in the education sector.

Though the Court need not consider the intent of Congress in ruling for Respondent in *West Virginia v. B.P.J.*, Petitioners and their amici interpret Congress's purported intent in claiming that Title IX does not protect transgender people. To the extent the Court considers whether Congress intended to include transgender people in its use of the term "sex," it would be ahistorical to claim that in 1972, Congress could not have considered sex-segregated spaces to include transgender people. History shows that prior to and around the time of enactment of Title IX (1) there was broad public awareness of transgender people, and (2) transgender people were participating in the judicial system to advocate for their rights both directly and tangentially related to their sex.

First, prior to and around the time of enactment of Title IX, historical evidence shows that transgender people were in the consciousness of the public. There was broad public awareness of people who transitioned from their birth assigned sex to another sex, and by the 1950s, the term "transsexual" entered the public consciousness. The four decades preceding Title IX's

enactment saw a progression of the American public's understanding of "sex" as something that could be changed.² During the two decades immediately preceding Title IX's enactment, the country saw widespread awareness of transgender people as evidenced by headline news coverage and other forms of media highlighting the lived experiences of transgender people. By 1972, decades of journalism, autobiographies, television, literature, and film firmly established the basic fact that a small population of people called transsexuals existed and were part of society.

Second, awareness of transgender people can also be shown through efforts to seek access to court and public goods at the time of enactment. Beginning in the 1800s and increasingly in the 1950s, traditionally marginalized groups began both litigating and seeking Congressional redress for the discrimination they were experiencing. Congress passed the Civil Rights Act of 1964 to make clear the national intent was to ban discrimination on the basis of race, religion, sex, and national origin in employment and other spheres. By 1972, Congress further recognized the continued discrimination that existed on the basis of sex and passed Title IX to protect all Americans in the education sector. At the same time, the historical record shows transgender people sought to protect their rights, including their rights to social services,

² This brief employs the terms "sex change" (and derivatives thereof)—when referring to people who transitioned to a sex different from that which was designated at birth—to reflect the nomenclature common at the time Title IX was passed and enacted. *Amici* use "transsexual" to refer to people who socially and/or medically changed their sex to conform with their gender identity also to reflect the nomenclature common at the time Title IX was passed and enacted.

such as access to social welfare programs and disability benefits, and brought family law and employment cases both directly and indirectly related to their sex. When transsexuals sought legal recognition in the 1970s, they too were trying to resolve legal barriers to societal participation around their sex, contemporaneous with the same efforts within the broader women's rights movement during this critical period. Public awareness of transgender people was not only a product of the public's consumption of media but also attributed to the public institutions being confronted with these efforts.

This historical evidence thus shows that, because transgender people were in the public consciousness and pursuing their rights in court, Congress would have also had an awareness of transgender people when it enacted Title IX.

ARGUMENT

Several prominent jurists in these and related cases have suggested that transgender identity and transgender people were not well-known at the time of Title IX's enactment in 1972. This is incorrect. The historical record shows that there was widespread public consciousness of transsexuals at the time Congress enacted Title IX. By 1972, (1) the American public had widespread awareness of transsexuals through media, and (2) transsexuals were participating in the judicial system to advocate for their rights related to their sex. Congress too would have had available to it the media and litigation history concerning transsexuals.

I. The Historical Context Surrounding Title IX's Enactment Featured a Broad Public Awareness of People Who Transitioned From Their Birth-Assigned Sex to Another Sex.

For decades prior to enactment, both medical discourse and mass media show that the American public held a common understanding of “sex” as something that could be changed. Specifically in the two decades immediately before Congress enacted Title IX, headline news coverage and other forms of media highlighted the lived experiences of transsexuals, which further informed the public’s knowledge and comprehension of transsexualism.

A. The American Public’s Understanding of “Sex” as Something That Could Be Changed Was Common Decades Prior to Title IX’s Enactment.

There is ample historical evidence of people transitioning from their birth sex to another sex for hundreds of years prior to the beginnings of modern Western medicine.³ The terminology used today to refer to transgender people first developed in the

³ See, e.g., Kadin Henningsen, *Calling [herself] Eleanor: Gender Labor and Becoming a Woman in the Rykener Case*, 55 *Medieval Feminist F.* 249, 250 (2019) (examining a case of sex transition in 1394 London); Anna Kłosowska, *Wojciech of Poznań and the Trans Archive, Poland, 1550-1561*, *Trans Hist.* 114, 114–24 (Greta LaFleur et al. eds., 2021) (same in 1550s Poland); Jen Manion, *Female Husbands* 29–32, 166–71 (2020) (same in 1700s and 1800s England and United States); Genny Beemyn, *Transgender History in the United States*, *Trans Bodies, Trans Selves* 1, 7–9 (Laura Erickson-Schroth ed., 2014) (same in late 1800s United States); Emily Skidmore, *True Sex* 2 (2017) (describing American press reporting at least sixty-five cases of transgender men living as men between the 1870s–1930s).

practice and discourse of specialty medicine in the middle-to-late nineteenth century and, as it developed and became more precise, it moved into public discourse by the mid-twentieth century.⁴ By the 1950s, the term Americans used to refer to a person who had “changed sex” was “transsexual.”⁵

In addition to the medical discourse by practitioners in gender and psychological fields and their patients, during the nineteenth and early twentieth centuries, the press throughout the United States printed hundreds of stories about Americans and international persons who had successfully changed sex in all walks of life,

⁴ In the mid-nineteenth century, psychiatrists identified two seemingly related, but distinct patient groups based on symptom presentation—people who felt same-sex desire and people who sought to change their sex assignment. See Carl Westphal, *Contrary Sexual Feeling: Symptom of a Neuropathic (Psychopathic) Condition, Sodomites And Urnings* 87, 107, 117–18 (Michael Lombardi-Nash ed. and trans., 2006) (an 1869 essay describing “congenital contrary sexual feeling,” as “the man feels like a woman, and a woman like a man,” emphasizing that this was distinct from same-sex sexual desire). In 1910, a German medical doctor Magnus Hirschfeld advanced the first popular medical nomenclature to distinguish so-called “transvestism,” from non-heterosexual sexual attraction. See Magnus Hirschfeld, *Transvestites* 124–25 (Michael Lombardi-Nash trans., 1991). At a 1953 medical symposium in New York City, Dr. Harry Benjamin, who received his medical degree in Germany, updated Hirschfeld’s diagnosis of “transvestism” based on clinical experience treating patients experiencing gender dysphoria since 1938, referring to “the intense and often obsessive desire to change the entire sexual status including the anatomical structure.” Harry Benjamin, *Transsexualism and Transvestism as Psychosomatic and Somato-Psychic Syndromes*, 8 *Am. J. Psychotherapy* 219, 219–20 (1954); see also Alison Li, *Wondrous Transformations* 160–62 (2023).

⁵ See Joanne Meyerowitz, *How Sex Changed* 5–6 (2002).

from farmers to laborers, to politicians and doctors.⁶ Some were recognized specifically for their civic duty to the nation.⁷

In the 1930s, four internationally famous, retired celebrity athletes transitioned publicly from female to male. They were the British track and field star Mark Weston, the Czechoslovakian track athlete Zdeněk Koubek, the Polish track athlete Witold Smętek, and the cyclist Willy de Bruyn. These transitions, achieved through doctors' interventions, were widely reported in the American press.⁸ Weston, perhaps the most

⁶ See Emily Skidmore, *True Sex* 7 (2017); Peter Boag, *Re-Dressing America's Frontier Past* 15–18 (2011).

⁷ For example, Frances Thompson and Murray Hall were both nineteenth century public figures who were widely discussed in the press as politically impactful personas and as individuals who happened to have changed their sex from its birth status and lived accordingly for most of their lives. Hannah Rosen, *Terror in the Heart of Freedom* 235–36 (2009) (press coverage of Frances Thompson); *Murray Hall Fooled Many Shrewd Men*, N.Y. Times (Jan. 19, 1901) (press coverage of Murray Hall). Thompson, a former slave who was born male, was recognized as a woman in her testimony to Congress in 1866 concerning the violence she experienced firsthand during the Memphis Riots, a pivotal event in the legislative passage of the Fourteenth Amendment. See Rosen, *supra* note 7, at 82; *Memphis Riots and Massacres*, H.R. Rep. No. 101, at 196–97 (1866). And Hall, a Tammany Hall politician in New York City, was born female in 1840 but lived for decades as a man and was recognized as an important figure in the city's male political class. *Murray Hall Fooled Many Shrewd Men*, *supra* note 7; see also Johnathan Katz, *Gay American History* 232–38 (1976).

⁸ Michael Waters, *The Other Olympians* 168 (2024) (noting that multiple press stories of athletes transitioning “had cropped up in local newspapers and off for many decades”).

famous of the four, had his “face . . . plastered across newspapers in the United States and Europe.”⁹

The power of medicine to change a person’s sex was a theme throughout this extensive reportage. For example, *Newsweek* magazine’s sports section in 1937 stated that Weston, Koubek, and Smetek had either switched their sex or were going to, quoting Smetek saying, “The doctor says he can change my sex with an operation.”¹⁰ *The Washington Post* ran a story about Koubek under the headline “Surgeon Makes Man of Noted Girl Athlete,” reporting that Koubek “had her sex changed by an operation . . . and now—medically speaking—is a man” and that Koubek’s birth certificate was amended to a male sex designation.¹¹

Through the 1930s and 40s, sex change stories continued to make news. In 1941, Barbara Ann Richards successfully petitioned the Superior Court of California to legally transition to female, in a widely reported case, and was quoted in the press saying, “I know now that nature intended me for a girl.”¹² A book about the Danish painter Lili Elbe came out in the United States in 1933, and the American press reported on her transition as well.¹³

⁹ *Id.*

¹⁰ *Women: About a Table Tennis, A Mermaid, and a Sex Switcher*, *Newsweek* (April 24, 1937).

¹¹ *Surgeon Makes Man Of Noted Girl Athlete*, *Washington Post* (Dec. 29, 1935).

¹² Meyerowitz, *supra* note 5, at 39–40.

¹³ *Id.* at 30–32.

B. The Two Decades Preceding Title IX's Enactment Saw Widespread Awareness of Transgender People as Evidenced by Headline News Coverage and Other Forms of Media Highlighting the Lived Experiences of Transsexuals.

In the twenty years prior to Congress's enactment of Title IX in 1972, public awareness of transsexuals reached an all-time high. The 1950s were a pivotal decade during which transsexuals' experiences moved from the metaphorical public interest section of print media to front-page, unmissable news in America.¹⁴ In that decade, following years of well-known people publicly transitioning after they were famous, the first person to *become* famous *because* she transitioned entered public discourse: Christine Jorgensen.¹⁵

It is difficult to overstate how the life and story of Jorgensen changed the common understanding of sex in the two decades prior to Title IX's enactment. Her life and opinions graced news stories, and the details of the marvel of her gender-affirming medical care captured the public arena.¹⁶ As a result, opportunities for similar care to others were expanded, allowing more people to access that medical care, which was

¹⁴ See *infra* at Section I.B.

¹⁵ Rebecca Poole, *From GI Joe to GI Jane: Christine Jorgensen's Story*, The National World War II Museum (June 30, 2020), <https://www.nationalww2museum.org/war/articles/christine-jorgensen> ("WWII veteran Christine Jorgensen became the first American transgender woman to attain fame for having sex reassignment surgery. Her story has influenced many others and helped redefine gender identity.").

¹⁶ Meyerowitz, *supra* note 5, at 51–53.

followed by coverage and celebration in the media.¹⁷ Jorgensen ignited a global sea-change in the public's understanding of sex.¹⁸ Indeed, "sex change" reached a new height of indelible fame for Americans on December 1, 1952, when the *New York Daily News* announced the "sex change" of Jorgensen under the legendary headline, "Ex-GI Becomes Blonde Beauty: Operations Transform Bronx Youth."¹⁹ Jorgensen's "sex change" set off a media frenzy, with the three major wire services sending out fifty thousand words in just the first two weeks of coverage.²⁰ "In the 1950s, Jorgensen made *sex change* a household term."²¹ "With the Jorgensen story, the floodgates broke," sparking "[a] torrent of new stories on other transsexuals" and "ma[king] sex change a constant feature in the popular press."²² "Soon sex change made its appearance in record albums, films, and popular novels."²³ Jorgensen's fame was so great that letters addressed simply to "Christine Jorgensen, United States of America" reached their destination.²⁴

Both the public news rhetoric and private citizens affirmed Jorgensen's female identity after her gender-affirming medical care interventions.²⁵ In the months

¹⁷ *Id.* at 53.

¹⁸ *Id.* at 52–53.

¹⁹ *Id.* at 1, 62.

²⁰ *Id.* at 1.

²¹ *Id.* at 51.

²² *Id.* at 52–53.

²³ *Id.* at 53.

²⁴ *Id.* at 92.

²⁵ Jorgensen was a public figure from the 1950s until her death in 1989, and, throughout those four decades, the press typically referred to her as a woman. For example in 1953, the *New York*

after her sex change was announced and she became globally famous, Jorgensen reported that she had received some twenty thousand letters.²⁶ Worldwide, Jorgensen set off what historians call the “global Christine” phenomenon: a wave of celebrity sex changes in other countries in the 1950s, each with its own national star, such as Marta Olmos in Mexico and Xie Jianshun in Taiwan.²⁷

By the 1960s, the concept of transsexuality had proliferated in the American public consciousness, and they understood medical change-of-sex was a

Times called her “Miss Jorgensen,” “her” and “the blonde young woman.” *Miss Jorgensen Returns*, N.Y. Times (Feb. 13, 1953). Even when she was in discourse at cross-purposes with the most powerful leaders in government—regarding political matters beyond the scope of gender politics—she was likewise “Miss Jorgensen” and “she” and “the former GI whose sex was surgically changed two decades ago.” Paul Houston, *Christine Jorgensen Brands Agnew’s Remark Degrading*, L.A. Times (Oct. 11, 1970). In 1967, while she was in Atlanta promoting her new memoir, the *Atlanta Constitution* reported her appearance under the headline: “Christine Jorgensen (Nee George) Captivates Atlantans as Beauty.” Sam Hopkins, *Atlanta Constitution* (Nov. 6, 1967). “After being with Christine for more than three hours, and seeing how people react to her and she to them, one comes away impressed with her personality as a woman and her lack of self-consciousness about her new life,” the reporter wrote. *Id.* “She has, in fact, perfected a great-lady style that’s every bit as impressive as Greer Garson’s,” a journalist wrote of Jorgensen in 1970. Gary Arnold, ‘Christine’ Story in Film, Washington Post (July 13, 1970). Further, “the vast majority of letters accepted her as a woman, offered encouragement and support, and expressed admiration for her courage and dignity.” Meyerowitz, *supra* note 5, at 95–96.

²⁶ Meyerowitz, *supra* note 5, at 92.

²⁷ Howard Chiang, *Transtopia in the Sinophone Pacific* 58–59 (2021).

treatment for transsexualism. Stories about transsexuals were a regular feature in the news cycle and other media.²⁸ For example, Harry Benjamin was a doctor who brought much attention to the plight of transsexuals with his 1966 book *The Transsexual Phenomenon*.²⁹

The 1960s also saw the creation of a nationwide network of clinics devoted to treating transsexualism by medical sex change (surgeries and hormone therapy).³⁰ Journalists reporting on these clinics did much to publicize transsexuals as well as the rationale for treating them. For example, in 1966, *The New York Times* ran a front-page report on Johns Hopkins Hospital's gender clinic, where two patients had already undergone "sex change."³¹ Similar clinics established in the 1960s were at the University of Michigan, University of Washington, University of Minnesota, Northwestern University, UCLA, and Stanford.³² "By the end of the

²⁸ Meyerowitz, *supra* note 5, at 52–53 ("With the Christine story. . . [a] torrent of new stories on other transsexuals made sex change a constant feature in the popular press. . . . And the public responded. Readers bought the newspapers and magazines that carried the sex-change stories, audiences flocked to nightclubs to see Jorgensen perform, and correspondents wrote to the transsexuals whose names made it into the press.").

²⁹ See generally Harry Benjamin, *The Transsexual Phenomenon* (1966); see also *supra* note 4.

³⁰ Melanie Fritz & Nat Mulkey, *The Rise and Fall of Gender Identity Clinics in the 1960s and 1970s*, Am. College of Surgeons (April 1, 2021), <https://www.facs.org/for-medical-professionals/news-publications/news-and-articles/bulletin/2021/04/the-rise-and-fall-of-gender-identity-clinics-in-the-1960s-and-1970s/>.

³¹ Thomas Buckley, *A Changing of Sex By Surgery Begun at Johns Hopkins*, N.Y. Times (Nov. 21, 1966).

³² Jules Gill-Peterson, *Histories of the Transgender Child* 143 (2018); Meyerowitz, *supra* note 5, at 213, 222; Cole Roblee et al., *A History of Gender-Affirming Surgery at the University of*

1970s, more than a thousand transsexuals had undergone surgery at the hands of doctors based at American universities, and fifteen to twenty ‘major centers’ conducted transsexual surgery in the United States.”³³

Alongside public awareness of medical sex change for transsexualism, from the 1950s into 1972, transsexualism remained in public awareness through a steady stream of popular autobiographies and depictions in film. Roberta Cowell, a British pilot and war hero, published her autobiography in 1954, two years after Jorgensen’s story first broke, receiving extensive media attention in the United States.³⁴ Several more autobiographies of transsexual authors were published in the 1960s.³⁵ Jorgensen’s own 1967 autobiography, *Christine Jorgensen: A Personal Autobiography*, was made into a film, *The Christine Jorgensen Story*, released in 1970.³⁶ The ubiquity of transsexualism reached such a high tide by 1970 that it became a subject for cultural satire in *Myra Breckinridge*, a comedy film starring Raquel Welch and Mae West, based on Gore Vidal’s 1968 bestselling novel.³⁷

Michigan: Lessons for Today, 38 Seminar Plastic Surgery 53, 54 (2024).

³³ Meyerowitz, *supra* note 5, at 222.

³⁴ *Id.* at 83–84; Roberta Cowell, *Roberta Cowell’s Story* (1954).

³⁵ Hedy Jo Starr, *My Unique Change* (1965); Gayle Sherman, *I Want to Be a Woman!* (1964); Abby Sinclair, *“I Was Male!”* (1965).

³⁶ Christine Jorgensen, *Christine Jorgensen: A Personal Autobiography* (1967); *The Christine Jorgensen Story* (MGM+ 1970).

³⁷ *Myra Breckinridge* (20th Century Fox 1970); Gore Vidal, *Myra Breckinridge* (1968); Carolyn Kellog, *Books: David Mamet pens a gangster novel, ‘Myra Breckinridge’ turns 50 and more in books*, L.A. Times (Feb. 24, 2018), available at <https://www.latimes.com/books/la-et-jc-books-newsletter-20180224-story.html> (“50 years ago, ‘Myra Breckinridge,’ Gore Vidal’s novel about an

By the 1970s, opinions were varied as to whether transsexuals ought to be accepted and whether “sex change” was good, but knowledge of “sex change” was so widespread that a discussion of it made Ann Landers’s syndicated column.³⁸ This decade saw even more books and headlines telling the story of people who had changed sex, most of which were written by Americans.³⁹ The divorce of Deborah Hartin, an openly transsexual woman, for example, made national news when *The New York Times* published a story under the headline “Transsexual Seeks Divorce From Wife: Wants to Remarry.”⁴⁰

ambitious, secretly transgender woman who moves to Hollywood, became a huge bestseller.”).

³⁸ Ann Landers, Washington Post (July 21, 1970); Ann Landers, Vancouver Sun (Jan. 18, 1971).

³⁹ See, e.g., Dawn Langley, *Man Into Woman* (1971); Theo Lang, *The Difference Between a Man and A Woman* (1971); Dianna, Behold, *I am a Woman* (1972); Patricia Morgan, *The Man-Maid Doll* (1973); Jan Morris, *Conundrum* (1974); Mario Martino, *Emergence* (1977); Nancy Hunt, *Mirror Image* (1978); Phoebe Smith, *Phoebe* (1979). Additionally, referring to transsexual people in gender-affirming terms was widespread. For example, on the opening of the University of Minnesota’s clinic *The New York Times* reported that the clinic’s patients “are ‘transsexuals,’ persons with normal male physiques who are, mentally and emotionally, women.” *Operations to Change Sex Planned in Minneapolis*, N.Y. Times (Dec. 18, 1966). And in the decades of Jorgensen’s celebrity the press correctly gendered her as a woman whether she was covered positively or not. See *supra* note 25.

⁴⁰ See, e.g., *Transsexual Seeks Divorce From Wife; Wants to Remarry*, N.Y. Times (Oct. 7, 1970) (also showing that in making national press, even those like Deborah Hartin, who was covered unfavorably due to breaking social norms in seeking divorce, were named as their post-transition sex in the press); see also *Sex-Change Navy Veteran Divorced From Former Wife*, Bremerton Sun (Oct. 8, 1970).

Just five years after the passage of Title IX, openly transsexual tennis player Renée Richards made headlines and garnered support from influencers, like feminist Billie Jean King, who further raised the profile of the case in the public's eye when Ms. Richards sought to play in the U.S. Open.⁴¹ A court found that requiring Richards to take a chromosomal test to prove that she was female in order to play "is grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this state [New York] . . . the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female."⁴² Richards played in the 1977 US Open in the women's division.⁴³

* * *

⁴¹ Robin Herman, 'No Exceptions,' and No Renee Richards, N.Y. Times (Aug. 27, 1976) ("By instituting the sex test" that had barred Richard's play, "the U.S.T.A. . . . belatedly follow[ed] the lead of the International Olympic Committee. At the 1968 Olympics in Mexico, the I.O.C. made the chromosome test mandatory for competitors in women's events."); Neil Amdur, *Dr. Richards Gets Support Of Mrs. King*, N.Y. Times (Aug. 11, 1977) ("In an affidavit signed on Tuesday and submitted yesterday in New York State Supreme Court, [Billie Jean] King said the 42-year-old transsexual should be allowed to qualify for this year's Open. . . . Billie Jean's declaration was her most definitive position on the controversial Richards case. The six-time Wimbledon singles champion has been in the forefront of the women's movement for equality in sports.").

⁴² *Richards v. U. S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977).

⁴³ Steve Flink, *This Day in US Open History: Sept. 1, 1977*, US Open (September 1, 2018), https://www.usopen.org/en_US/news/articles/2018-09-01/this_day_in_us_open_history_sept_1_1977.html.

By 1972, the American public had widespread consciousness of transsexuals. Given this record of public knowledge, Congress—a body of legislators representing the American public—would have had similar knowledge and visibility of transsexuals.

II. In the 1960s and 1970s, Transsexuals Sought Access to Legal Rights Based on Their Post-Transition Sex, Not Always Succeeding, but Often Contributing to an Already Strong Public Awareness.

The changes in public perception and accessibility of sex change throughout the 1960s⁴⁴ altered transsexuals' attitudes towards their right to legal protections. Increasingly, people who were open about their transsexual identity sought access to their rights and benefits after having changed sex. These efforts again brought to the fore the existence of transsexuals in American life. When transsexual people went to court in the 1960s and 1970s to assert their rights, they often did so in a glare of publicity. As discussed *supra*, the media had a keen eye for any story about transsexuals, so the historical record is replete with examples of these efforts.

When transsexuals sought legal recognition at the turn of the 1970s, it was to resolve legal questions related to discrimination based on their sex, contemporaneous with the same effort in the broader women's rights movement. By the early 1970s, courts were far from unanimous in their interpretation of transsexual rights,⁴⁵ just as they were divided over women's rights.

⁴⁴ See *supra* at Section I.B.

⁴⁵ See *infra* notes 58–65.

Specifically, there was confusion around how legal protections and social services apply to transgender people, if at all.⁴⁶ One leading issue was over amendments to identity documents. State legislators, for example, debated over amendments to identity documents and transsexuals' access to state funds.⁴⁷ The courts saw this same debate as transsexuals filed cases seeking to amend identity documents to reflect their post-transition sex.⁴⁸ By 1965, ten states had allowed changes of sex on birth certificates.⁴⁹ Around this time, the U.S. Department of State allowed transsexuals to change their passports,⁵⁰ eventually requiring a court decree on a change of name and identity.⁵¹ In an opinion approving a woman's name change petition in New York State in 1968, the court wrote, "[a] male transsexual who submits to sex-reassignment is anatomically and psychologically a female in fact," noting that "the question of a person's identity [should not] be limited by the results of mere

⁴⁶ See Meyerowitz, *supra* note 5, at 242; see also Douglas Smith, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L. Rev. 963 (July 1971).

⁴⁷ The decision occasioned a policy debate in the California legislature in 1978 when two state senators introduced a bill to prohibit such coverage in the future. *Barring the Wrong Door and Wrong Group*, L.A. Times (Apr. 26, 1978). The Los Angeles Times editorial board opposed the bill, recognizing the legitimacy of medical sex change. *Id.*

⁴⁸ See *Mtr. Of Anonymous v. Weiner*, 50 Misc. 2d 380 (N.Y. Sup. Ct. 1966); *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975); *K. v. Health Div., Dept. of Hum. Res.*, 560 P.2d 1070 (Or. 1977).

⁴⁹ Meyerowitz, *supra* note 5, at 243.

⁵⁰ *Id.* at 248.

⁵¹ *Id.*

histological section or biochemical analysis.”⁵² Minors also sought these provisions, and at times, they were extended accordingly.⁵³ For example, in the 1960s, a teenage girl who received hormone therapy at UCLA’s clinic was able to legally change her name, transfer to a new high school, and attend as a girl.⁵⁴

Another policy issue that percolated through states during this time was whether transsexual people were able to access state support. Until 1973, Connecticut provided funds for gender-reassignment surgery.⁵⁵ In California, the state’s Aid to the Totally Disabled program paid for the sex change surgery of several women in the late 1960s, as a form of rehabilitation to allow them to rejoin the workforce and live independently as women.⁵⁶ In the same time period and also in California, other transsexuals were able to access Aid to Families With Dependent Children.⁵⁷

Transsexuals also sought marriages and divorces, leading to case law with outcomes on either side of the debate.⁵⁸ In a 1974 case in New York, for example, a

⁵² *In re Anonymous*, 293 N.Y.S.2d 834, 838 (Civ. Ct. 1968).

⁵³ Jules Gill-Peterson, *supra* note 32, at 148–49.

⁵⁴ *Id.*

⁵⁵ Meyerowitz, *supra* note 5, at 248.

⁵⁶ Interview by Susan Stryker with Suzan Cooke, in Hollywood, CA, 35 (Jan. 10, 1998), available at https://docs.glbthistory.org/oh/Cooke_SuzanCooke1-10-1998_web.pdf; Canary Conn, *Canary* 210–11 (1974); Elliot R. Blackstone, *The Transsexual: The Recognition of a Problem at a Local Level and the Steps Taken to Resolve the Problem* (1967), on file with GLBT Historical Society, San Francisco, CA, Don Lucas Papers Box 16, Folder 14.

⁵⁷ Blackstone, *supra* note 56; *Barring the Wrong Door*, *supra* note 47.

⁵⁸ *See M. T. v. J. T.*, 140 N.J. Super. 77, 89–90 (App. Div. 1976) (finding a marriage between a transsexual woman and cisgender

transsexual man's marriage was annulled on the basis of a decision that he was not male.⁵⁹ In contrast, in a 1976 case in New Jersey, a three-judge panel found that a transsexual woman was female and that her ex-husband owed her support, holding "if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche, or psychological sex, then identity by sex must be governed by congruence of these standards."⁶⁰

Around the time of enactment of Title IX, transsexuals also used the legal system to seek justice related to employment dismissals on the basis of their sex. Transsexual employees believed in a capacious definition of the term "sex," bringing complaints of discriminatory employment actions to the EEOC as well as the courts based on theories of sex discrimination.⁶¹ These cases

man was a legal heterosexual marriage); *Christian v. Randall*, 33 Colo. App. 129 (1973) (after birth father challenged a custody arrangement raising anti-trans bias and fitness arguments, the court maintained a custody arrangement with children's primary caregiver who was a transgender man having transitioned from a sex of female assigned at birth after divorce from the children's birth father); *but see Corbett v. Corbett*, 2 W.L.R. 1306, 2 All E.R. 33 (P.D.A.1970) (finding a marriage between a transsexual woman and cisgender man was not valid); *see also* Meyerowitz, *supra* note 5, at 249–50.

⁵⁹ *B v. B*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974).

⁶⁰ *M. T.*, 140 N.J. Super. at 88; Meyerowitz, *supra* note 5, at 249–51.

⁶¹ *See, e.g.,* Smith, *supra* note 46 (describing how a "Georgia transsexual allegedly encountered job discrimination" and that the EEOC had "offered its assistance"); *E.B. v. Twin City Milk Prods. Ass'n*, No. 72-1394 (EEOC Mar. 8, 1972) (on file with Nat'l Archives, College Park, Md.); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (1975); *see also* Shay R. Olmstead, "Refuse to Run Away": Transsexual Workers Fight for Civil Rights, 1969–

resulted in mixed outcomes, but they demonstrate the vigorous and extensive public debate concerning transsexual rights. In 1971, Paula Grossman, a Pennsylvania schoolteacher, sued when she was dismissed from her position after changing sex.⁶² The case was widely reported on in the press.⁶³ Steve Dain, a California gym teacher, filed a similar suit in 1975 after he was dismissed following medical sex change.⁶⁴ Mary Elizabeth Clark sued the US Army in 1975 for wrongful dismissal after medically transitioning, winning an honorable discharge and a \$25,000 settlement.⁶⁵

As the historical record makes clear, there were ongoing debates on the application of legal protections

1992, at 146–50, 159–64 (May 2024) (Ph.D. dissertation, Univ. of Mass. Amherst) (on file with author).

⁶² *In re Grossman*, 316 A.2d 39 (N.J. Super. App. Div. 1974); *Grossman v. Bernards Tp. Bd. of Educ.*, No. 74-1904, 1975 WL 302 (D.N.J. Sept. 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976); Judy Klemesrud, *A Transsexual and Her Family*, N.Y. Times (Oct. 23, 1973) (“Mrs. Grossman received nationwide publicity in the summer of 1971 after she was dismissed from her [role] as an elementary music teacher . . . Mrs. Grossman . . . had taught there as a man for 14 years and had asked the school board if she could return that fall as a woman. The board refused The dismissal was upheld by Dr. Carl L. Marburger, New Jersey’s State Commissioner of Education, after which Mrs. Grossman’s lawyers took the case to the courts. It is currently on the docket of the Appellate Division of the New Jersey Superior Court and, Mrs. Grossman vows, ‘We’re going to take it all the way—to the United States Supreme Court if necessary.’”).

⁶³ *Sex Change May Oust A Teacher*, Washington Post (Aug. 14, 1971); *Transsexual’s Rights Not Violated, High Court Rules*, L.A. Times (October 18, 1976).

⁶⁴ See Bella Stumbo, *Teacher Sparks Battle Over Sexual Identity*, L.A. Times (Nov. 22, 1976).

⁶⁵ See Jean O. Pasco, *A Life of Service*, L.A. Times (Dec. 1, 1997).

and social services as applied to transsexuals. In this environment, such public policy issues are the very type that Congress seeks to solve through legislation like Title IX. Indeed, it is the very function of such legislation to define the rights of individuals when courts, states, and administrators have been unable to develop a coherent and logical paradigm for addressing such issues, and though Congress could have narrowly defined legislative scope, in the context of broad public consciousness of transsexual people, it did not.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be upheld.

Respectfully submitted,

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November 17, 2025

APPENDIX

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APPENDIX**LIST OF *AMICI CURIAE***

The Organization of American Historians (OAH) is the largest scholarly organization devoted to the history of the U.S. and to promoting excellence in the scholarship, teaching, and presentation of that history. It is an international non-profit membership organization, including historians employed in a variety of academic and institutional settings. The OAH is committed to the principle that the past is a key to understanding the present and has an interest—as a steward of history, not as an advocate of a particular legal standard—to ensure that the Court is presented with an accurate portrayal of American history and traditions.

The LGBTQ+ History Association was founded in 1979 as the Committee on Lesbian and Gay History. Since 1982, the Association has been officially recognized as an affiliate of the AHA and meets annually in conjunction with the AHA conference, where it sponsors sessions on LGBTQ+ history. It holds a bi-annual Queer/Trans History Conference, continuing its tradition of facilitating communication among scholars in a variety of disciplines who together shape and share the latest advances in research. The Association's expertise ranges from local and global LGBTQ+ history and spans from ancient times to the near present. Today it has nearly 400 active members.

Jules Gill-Peterson is Associate Professor of History at Johns Hopkins University. She authored two books: *Histories of the Transgender Child* (2018) and *A Short History of Trans Misogyny* (2024). Gill-Peterson is the editor of *The Conversation on Gender Diversity* (2023) and was an editor of *TSQ*:

Transgender Studies Quarterly from 2020-2024. Gill-Peterson received fellowships from the American Council of Learned Societies and the Radcliffe Institute for Advanced Study at Harvard University. She was the inaugural Mellon Foundation Public Scholar in Residence at the University of Southern California's Department of Gender and Sexuality Studies in 2021 and is a recipient of the Chancellor's Distinguished Research Award from the University of Pittsburgh.

Laurie Marhoefer is Professor of History at the University of Washington. He authored two books *Racism and the Making of Gay Rights* (2022) and *Sex and the Weimar Republic* (2015). His essays appeared in the *American Historical Review*, *Central European History*, *The Washington Post*, *Der Spiegel*, and elsewhere. He held visiting positions at the University of Oxford, the University of Toronto, and the University of Michigan, and won fellowships from the Andrew W. Mellon Foundation and the U.S. Holocaust Memorial Museum, among others.

Joanne Meyerowitz is the Arthur Unobskey Professor of History and American Studies at Yale University. She is a past president of the OAH and past editor of the *Journal of American History*. At Yale, she chaired the American Studies Program (2012-15) and the Department of History (2018, 2020-21) and currently serves as co-director of the Yale Research Initiative on the History of Sexualities. Her books include *How Sex Changed: A History of Transsexuality in the United States* (2002) and *A War on Global Poverty: The Lost Promise of Redistribution and the Rise of Microcredit* (2021). Her articles have been published in the *American Historical Review*, *Journal of American History*, *Modern American History*, *Gender*

and History, and the Bulletin of the History of Medicine, among others.

Genny Beemyn is Director of the Stonewall Center at the University of Massachusetts Amherst. Their research focuses on the history of trans and nonbinary people in the U.S. in the 20th and 21st centuries, particularly the experiences of trans and nonbinary college students. They authored *The Lives of Transgender People* (2011), which, at the time, was the largest study of trans people by a U.S. researcher. Their other books include *A Queer Capital: A History of Gay Life in Washington, D.C.* (2014), *Trans People in Higher Education* (2019), *The SAGE Encyclopedia of Trans Studies* (2021), and *The SAGE Encyclopedia of LGBTQ+ Studies* (2024). They have had work published in, among others, the *Journal of Diversity in Higher Education*, *International Journal of LGBTQ+ Youth*, *Journal of Lesbian Studies*, *Journal of Homosexuality*, and *Psychology of Sexual Orientation and Gender Diversity*.

Margot Canaday is Dodge Professor of History at Princeton University. She studies gender and sexuality in modern America. Her first book, *The Straight State: Sexuality and Citizenship in Twentieth Century America* (2009), won seven prizes, including the Association of American Law Schools' Order of the Coif Biennial Book Award, the American Society for Legal History's Cromwell Book Prize, the Organization of American Historians' Ellis Hawley Prize, the American Political Science Association's Gladys M. Kammerer Award, the American Studies Association's Lora Romero Prize, the Committee on LGBT History's John Boswell Prize, and the Lambda Literary Award for LGBT Studies. In 2023, she published *Queer Career: Sexuality and Work in Modern America*. That book won the Hagley Prize

in Business History from the Business History Conference, and the Philip Taft Labor History Award from the Labor and Working-Class History Association (co-winner). It was also named as a “Best Scholarly Book of the Year” by the *Chronicle of Higher Education*, a finalist for the PROSE Award in American and US History from the Association of American Publishers, and a finalist for the Lambda Literary Award for LGBT Studies. Canaday has won fellowships from the Social Science Research Council, the Princeton University Society of Fellows, the Radcliffe Institute for Advanced Study, the National Endowment for the Humanities, and the American Council of Learned Societies. She is an elected member of the Society of American Historians.