No. 24-43

IN THE
Supreme Court of the United States

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 OF PROFESSOR WILLIAM N. ESKRIDGE JR. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

WILLIAM N. ESKRIDGE JR.
YALE LAW SCHOOL
127 Wall St.
New Haven, CT 06511
(203) 432-4992
william.eskridge@yale.edu

TRISHA ANDERSON
Counsel of Record
HECKER FINK LLP
1050 K St. NW, Ste. 1040
Washington, DC 20001
(212) 763-0883
tanderson@heckerfink.com

CLARA S. SPERA
MADELINE VERNIERO
NOELLE N. WYMAN
HECKER FINK LLP
350 Fifth Ave., 63rd Floor
New York, NY 10118

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

William N. Eskridge Jr. is the Alexander M. Bickel Professor of Public Law at the Yale Law School. He specializes in statutory interpretation. *Amicus* has written extensively on the proper application of statutes barring discrimination on the basis of sex, race, religion, and national origin.

SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 lays down this rule: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," subject to certain carve-outs. 20 U.S.C. § 1681(a). The rule is enforced by the possibility of losing federal funds and by a cause of action recognized by this Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1970).

This Court has interpreted Title IX by applying its ordinary meaning to a variety of circumstances, few of which were explicitly contemplated by the enacting Congress. Ordinary meaning entails the meaning of the words and phrases of § 1681(a), pursuant to the grammatical practices of the language. Precedents of this Court are instructive, and this Court strives for consistency in its reading of this and other anti-discrimination statutes.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than *amicus* and his counsel made a monetary contribution to the preparation or submission of the brief. *Amicus* joins this brief as an individual, not as a representative of his institutional employer.

Under the statute's plain text, and as confirmed by this Court's decisions interpreting Title IX and other anti-discrimination statutes, Title IX protects each and every individual from discrimination if a but-for cause of discrimination is their sex. This includes discrimination against transgender persons. Examples of discrimination on the basis of other protected traits such as race and religion illustrate why discrimination against transgender persons is sex discrimination prohibited by Title IX.

Title IX's plain meaning provides recipients of federal funding with notice that the statute prohibits discrimination against transgender persons. The Court's recent decision in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), holding that discrimination against transgender individuals is "because of sex," reinforced that notice.

In light of the Javits Amendment and a half century of administrative guidance and judicial decisions on Title IX and athletics, applying Title IX's anti-discrimination rule to athletic programs raises questions beyond the straightforward inquiry of defining discrimination "on the basis of sex." As such, *amicus* does not have a considered opinion on whether educational institutions necessarily violate Title IX by separating girls and boys into sex-segregated teams. Nor does *amicus* have a considered opinion on B.P.J.'s claim that Title IX requires federal funding recipients to allow transgender students to join the sex-based team consistent with their sex identity, although *amicus* supports B.P.J.'s position that a remand to the district court for further proceedings is warranted here. *Amicus* submits this brief to demonstrate that, regardless of how Title IX should be understood to apply to the specific context of sex-

segregation of school sports teams, the plain meaning of Title IX prohibits B.P.J.'s school from discriminating against her on the basis of her sex.

ARGUMENT

This Court has repeatedly held that judges should neutrally apply a statute's "ordinary" or "plain" meaning. The ordinary meaning of a clause or sentence is the meaning those words would convey to a typical member of the public. This Court considers the semantic meaning of the words and the meaning conveyed by those words under regular rules of grammar. *Bostock*, 590 U.S. at 655. Under this approach, which the Court has adopted for similar anti-discrimination statutes, Title IX's bar to exclusion or discrimination "on the basis of sex" protects a transgender "person" because the person's "sex" is a but-for cause of the exclusion or discrimination.

I. Consistent With Other Anti-Discrimination Statutes, Title IX Prohibits Schools from Discriminating Against Transgender Persons on the Basis of Their Sex.

A. Title IX's Plain Meaning

The plain text of § 1681(a) is the starting point for understanding the statute and applying it to transgender persons. The breadth of its meaning is evident on the face of the statute. To begin with, the focus of the sentence is any "person" involved in a federally funded educational program or activity. Title IX does not protect groups of persons; its protections are not class-based. This Court and lower courts have interpreted "person" broadly, to include each and every individual. See *Cannon*, 441 U.S. at

704 (Title IX protects "individual citizens"); see also, *e.g.*, *Elwell* v. *Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) ("Title IX does not limit its coverage at all, outlawing discrimination against any 'person,'" which is "broad language the Court has interpreted broadly.").

Moreover, the statute's sentence structure is distinctive in its use of passive verbs. Rather than making the regulated institution (like employers in Title VII) the subject of the sentence, § 1681(a) makes the individual "person" protected by Title IX the subject of the sentence. "That sweep is broad indeed. . . . [T]he use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting).

Finally, and critically, § 1681(a) protects any person from being "excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance" when the exclusion/denial/discrimination is "on the basis of sex." The scope of the statute is, once again, very broad, reaching beyond discrimination and including exclusions from participation and denials of benefits.

Within the broad protection established by this language, the key limiting feature is that the exclusion/denial/discrimination must be "on the basis of sex." So Title IX is not a catch-all anti-discrimination law. If an educational institution receiving federal funds treats a person unfairly

because they weigh too much, are politically conservative or liberal, or have blue eyes, Title IX does not provide a claim for relief.

A pivotal issue is the meaning of "on the basis of" sex. The ordinary meaning of this phrase suggests a "but-for" standard of causation, as this Court recently opined in the context of another anti-discrimination law. See *Comcast Corp.* v. *Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 335 (2020) (inferring a private cause of action under § 1981, the Court "described [the provision] as 'afford[ing] a federal remedy against discrimination . . . on the basis of race,' language . . . strongly suggestive of a but-for causation standard" (quoting *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975))). Similar phrases in other anti-discrimination laws are to the same effect: "based on" an unfair credit report, see *Safeco. Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007) ("In common talk, the phrase 'based on' indicates a but-for causal relationship . . . ."); "because of sex," *Bostock*, 590 U.S. at 656 ("Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." (cleaned up)); or "because of age," see *Gross* v. *FBL Fin. Servs. Inc.*, 557 U.S. 167, 176 (2009) (opining that "because of age" in the Age Discrimination in Employment Act means that "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision"). This Court has interpreted Title VI's "on the ground of" language as similarly invoking but-for causation to describe the relationship between the adverse treatment and the statute's protected classes. See *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.* ("*SFFA*"), 600 U.S. 181, 198 n.2, 206, 220 (2023); *id.* at 289 (Gorsuch, J., concurring).

As this Court has explained, "a 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." *Bostock*, 590 U.S. at 656; cf. *Burrage* v. *United States,* 571 U.S. 204, 211-12 (2014) (but-for test is met even when other context contributed to the result). Put differently, a protected personal trait is a "regulatory variable" if changing that trait would affect the decision to discriminate against that person. In Title IX, the regulatory variable is "sex."

That brings us to what "sex" means in this context. That word enjoys a variety of ordinary usages, ranging from identification as a man or a woman to gender roles to various forms of intercourse. Compare *Bostock*, 590 U.S. at 655 (proceeding with the assumption that "sex" signifies "only . . . biological distinctions between male and female") (majority opinion), with *id.* at 686 (defining sex as "the genetic and anatomical characteristics that men and women have at the time of birth") (Alito, J., dissenting). For the purposes of this brief, *amicus* assumes "sex" to mean identification as a man or a woman—which encompasses two distinct but interrelated concepts, sex assigned at birth and sex identity.[2]

The statute's plain meaning thus is that an educational institution violates Title IX if it (1) excludes, denies, or otherwise discriminates against any "person" (usually a student or employee) (2) where a but-for cause is (3) the sex of the person. Under Title IX's but-for causation standard, the inquiry is whether the evidence shows treatment of a person in a discriminatory manner which but for that

[2] "Sex identity" could be as assigned by the state (other than at birth), by the individual's community, and/or by the individual.

person's sex would be different. Consider a school that "fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Bostock*, 590 U.S. at 660. If that were the case, "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Ibid.* Thus, if B.P.J. were expelled from school because she is transgender, her "sex" would be a but-for cause and the expulsion would, presumptively, violate Title IX. That is, but for her male **sex** assigned at birth, she would not have been expelled for presenting as a woman. But for her female **sex** identity, she would not have been expelled for rejecting her sex assigned at birth. See *Bostock*, 590 U.S. at 660-61.

B. Title VI and Title IX

Several illustrations using different regulatory variables in other anti-discrimination laws prove the point. For an anti-discrimination law prohibiting discrimination against a person "because of" or "on the basis of" an identity trait (race, sex, religion, etc.), there is discrimination when that trait is the "regulatory variable" causing the ill treatment. "Sex" is the regulatory variable for Title IX, but in other statutes the regulatory variable is "race," "color," "national origin," or "religion."

Consider a thought experiment where the regulatory variable is race. Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national

origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. As this Court has noted, "[e]xcept for the substitution of the word 'sex' . . . to replace the words 'race, color, or national origin,'" Title IX and Title VI "use identical language to describe the benefited class." *Cannon*, 441 U.S. at 695. Where the question at issue relates to the statutes' practically identical text, the Court has interpreted Title IX in lockstep with Title VI. See, *e.g.*, *id.* at 696 (invoking Title VI's implied cause of action to imply a cause of action under Title IX); *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 258-59 (2009) (finding Title IX liability does not preclude § 1983 claims because Title VI permits concurrent § 1983 claims); *Gebser*, 524 U.S. at 287 (requiring actual notice for teacher-student harassment claims in light of Title VI precedent "conclud[ing] that the relief in a [Title VI] action" must be limited such that a grantee is "aware" of its violation).

Importantly here, both Title IX's prohibition of discrimination "on the basis of" "sex" and Title VI's prohibition of discrimination "on the ground of" "race, color, or national origin" invoke but-for causation. See *SFFA*, 600 U.S. at 289-90 (Gorsuch, J., concurring, joined by Thomas, J.) ("Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin."). Title IX demands the same: A recipient may not treat any individual worse even in part because of her sex. Discriminating against transgender persons necessarily violates this rule.

In this thought experiment, School X receives federal funds and so is covered by Title VI. Homer

Plessy applies to be a teacher at School X. The school turns him down because Plessy views his own race identity as White even though his race assigned at birth was Black. Claiming a violation of Title VI, Plessy sues, but School X responds that Plessy was not subject to "discrimination" or other negative action "on the ground of race." School X says he was turned away "on the ground" that he was a "transracial" person who illegitimately "changed" his race. The decision not to hire Plessy was grounded in the educational mission of the school, which believes that staff need to properly understand their biological destiny and adhere to their state-assigned identity.[3]

Mildred Jeter is a student at School X. She has been humiliated and harassed by a teacher at School X, who has derided her because her ancestry recognized at birth is African but she considers herself Native American. She is proud of her African ancestors but does not consider that dispositive as to her race identity, as she also has Cherokee and other Native ancestors. School X ignores her complaints, and an official tells her that she needs to follow the school's race-assigned-at-birth norms relating to ancestry. Claiming a violation of Title VI, Jeter sues, but School X responds that she was not subject to "discrimination" and was not "denied the benefits" of the educational program "on the ground of race." Whatever the teacher said to her was grounded in the educational mission of the school, which believes that

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[3] The historic Homer Plessy challenged the state's refusal to seat him in the "whites-only" railroad car. His initial claim was that his state-assigned race at birth was "colored," but his self-assigned race was "white." *Plessy* v. *Ferguson*, 163 U.S. 537, 541-42 (1896), overruled by, *Brown* v. *Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

students need to properly understand their biological destiny and adhere to their state-assigned identity.[4]

Can there be any doubt that School X has discriminated "on the ground of race" in both cases? As an analytical matter, "race" was a but-for cause of the discrimination against Plessy and Jeter. School X does not have a policy of excluding all Black individuals as a group from being teachers or students, but Title VI is not limited to that scenario. It assures any "person" (whatever their group) that they will not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in a federally funded program "on the ground of race." 42 U.S.C. § 2000d. That includes situations where the school or its personnel penalizes a teacher or student whose racial identity differs from the race that the school attributes to that person.

Now consider the same hypotheticals using the regulatory variable of sex. Homer Plessy (Plessy 2) applies to be a teacher at School X. When the school learns that his sex assigned at birth was female, it refuses to consider Plessy 2, whose sex identity is male. Claiming a violation of Title IX, Plessy 2 sues, but School X responds that Plessy 2 was not subject to "discrimination" or other negative action "on the basis of sex." School X says Plessy 2 was disqualified

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[4] The historic Mildred Jeter, whose marriage was protected against prosecution in *Loving* v. *Virginia*, 388 U.S. 1 (1967), did in fact have both Native American and African ancestors. See John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 How. L.J. 15, 21 (2007). By some accounts, she identified more with her Native ancestry. See Arica L. Coleman, *The White and Black Worlds of* Loving *v.* Virginia, Time (Nov. 4, 2016), https://time.com/4552130/loving-movie-racial-passing-history.

"on the basis of" being "transgender." The decision not to hire Plessy 2 was grounded in the educational mission of the school, which believes that staff need to properly understand their biological destiny and adhere to their state-assigned identity.

Mildred Jeter (Jeter 2) is a student at School X. She is humiliated and harassed by a teacher at School X, who derides her because she is a student whose sex assigned at birth was male, but she considers herself female. She does not hide the fact that she is intersex: She has XY chromosomes, but her secondary sex characteristics are both female and male. And she has a female identity. School X ignores her complaints, and an official tells her that she needs to follow the school's sex-assigned-at-birth norms. Claiming a violation of Title IX, Jeter 2 sues, but School X responds that Jeter 2 was not subject to "discrimination" and was not "denied the benefits" of the educational program "on the basis of sex." Whatever the teacher said to her was grounded in the educational mission of the school, which believes that students need to properly understand their biological destiny and adhere to their state-assigned identity.

For the same reasons that Plessy 1 and Jeter 1 were discriminated against on the ground of race, Plessy 2 and Jeter 2 were discriminated against on the basis of sex. In each of those latter hypotheticals, "sex" was a but-for cause of the discrimination. School X does not have a policy penalizing all women as a group from being teachers or students, but Title IX is not limited to that scenario. It assures any "person" (whatever their group) that they will not be "excluded from participation in, be denied the benefits of, or be subjected to discrimination" in a federally funded program "on the basis of sex." 20 U.S.C. § 1681(a).

That includes situations where the school or its personnel penalizes a teacher or student whose personal sex identity differs from that which the school attributes to that person.

C. Title VII and Title IX

Now run the thought experiment through the lens of Title VII using religion as the regulatory variable. Title VII of the Civil Rights Act of 1964 provides that "[i]t shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Like Title IX and Title VI, Title VII also prohibits discrimination where a protected trait is a but-for cause of the discrimination. *Bostock*, 590 U.S. at 656.

In this version of the thought experiment, Martin Luther applies to be a teacher at School Y. He is a Protestant, as are several teachers at the institution, but School Y refuses to consider his application when it learns that Luther had been a Roman Catholic for most of his adult life and only recently changed his religious identity. Claiming discrimination "because of . . . religion," Luther brings a Title VII lawsuit, but School Y responds that Luther was not subject to "discrimination" or other negative action "because of . . . religion." School Y says he was disqualified "on the basis of" being a "wishy-washy faith-shifter." He "changed" his religion, which School Y considers

subversive of its educational mission to inculcate respect for stability and tradition in its students.[5]

Aimee Stephens is a funeral director at Harris Funeral Home. Harris Funeral fires her when she identifies as a woman, a sex identity inconsistent with her male sex assigned at birth. Claiming discrimination "because of . . . sex," Stephens brings a Title VII lawsuit, but Harris Funeral responds that Stephens was not subject to "discrimination" or other negative action "because of . . . sex." Stephens was fired "because of" her abandonment of her sex assigned at birth. She "changed" her sex, which Harris Funeral considers subversive of its mission to provide stability and closure for its clients.[6]

While her lawsuit is proceeding against Harris Funeral, Aimee Stephens applies to be a teacher at School Y. She is well-qualified (with a teaching certificate from an excellent school). When School Y learns that her sex assigned at birth was male, it refuses to consider Stephens, whose sex identity is female. Claiming a violation of Title IX, Stephens sues, but School Y responds that Stephens was not subject to "discrimination" or other negative action "on the basis of sex." School Y says Stephens was disqualified "on the basis of" being "transgender." The decision not to hire her was grounded in the educational mission of the school, which believes that staff need to properly understand their biological destiny and adhere to their state-assigned identity.

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[5] Martin Luther was a historic figure who was a Roman Catholic for most of his life but left the Church and ultimately founded his own Protestant denomination.

[6] Aimee Stephens was the transgender Title VII plaintiff in *Bostock*.

There can be little doubt that both Martin Luther and Aimee Stephens have been discriminated against in violation of Title VII. Indeed, the Court's recent decision in *Bostock* compels that conclusion. This Court in *Bostock* interpreted Title VII's bar to discrimination "because of . . . sex" to protect transgender persons from being excluded from employment because their sex identity does not match that assigned to them by the state and/or by private employers. After extensive deliberation and detailed debate in the pages of the U.S. Reports, this Court held that the ordinary meaning of Title VII treated "sex" as a but-for cause (or, as *amicus* would put it, the regulatory variable) of Harris Funeral's discrimination against Stephens.

There should likewise be little doubt that Aimee Stephens, in the above hypothetical, was also discriminated against by School Y in violation of Title IX. The same ordinary meaning analysis that drove this Court's holding in *Bostock* should impel this Court to hold that Title IX's rule against discrimination "on the basis of sex" prohibits discrimination against transgender persons in educational programs and activities receiving federal funds. Like the employer in *Bostock*, an educational institution that discriminates against a transgender student "necessarily and intentionally applies sex-based rules," 590 U.S. at 667, by penalizing the student for not conforming to their sex assigned at birth. So long as sex is a but-for cause of discrimination, liability may attach. *Id.* at 661.

It might be the case that B.P.J., when speaking to a friend, articulates that she was discriminated against because of her transgender status, not because of "sex-based" discrimination. But such

"conversational conventions" do not alter the causation analysis, see *Bostock*, 590 U.S. at 666-67, nor does the fact that the word "transgender" is not enumerated in a list of regulatory variables. All Title IX requires is that sex is a but-for cause for discrimination, which is unavoidably the case in the context of discrimination against a transgender person.

II. This Court's Title IX Jurisprudence Supports Application of the Statute to Discrimination Against Transgender Persons.

This Court's prior decisions interpreting Title IX provide further support for the straightforward understanding of Title IX as protecting transgender persons from discrimination in federally funded educational programs and activities. These decisions have read the statute in accordance with its broad plain terms, applying it to novel contexts even where the enacting Congress did not explicitly contemplate the particular applications of the statute. This Court should take a similar approach to applying Title IX to the context of discrimination against transgender persons and recognize that treating transgender persons worse than non-transgender persons is discrimination "on the basis of sex."

Take, for example, the Court's consideration of whether Title IX's private right of action encompasses claims of retaliation against individuals who report sex discrimination. In *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), the Court noted the "broad reach" of the statute that Congress enacted to root out "diverse forms" of sex discrimination. *Id.* at 175, 183. Focusing on the text of the statute, the

Court concluded that retaliation against a person who complained of an educational institution's sex-discriminatory practice "is a form of 'discrimination' [for purposes of Title IX] because the complainant is being subjected to differential treatment," and it is "'on the basis of sex' because it is an intentional response to . . . an allegation of sex discrimination." *Id.* at 174. This Court understood retaliation claims to fall within the statute's plain text even though Title IX made "no mention of retaliation." *Ibid.* (citation omitted). Particularly where Congress had enacted certain narrow exceptions to Title IX's broad prohibition on sex-based discrimination, 20 U.S.C. § 1681(a)(1)-(9), Congress's "failure to mention" a specific form of sex discrimination did not carve it out from Title IX's protection. *Jackson*, 544 U.S. at 173, 175.

As another example, this Court has interpreted Title IX's private cause of action to cover multiple forms of sexual harassment, despite Congress making no reference to "harassment" in the statute itself. See *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75-76 (1992) (sexual harassment); *Gebser*, 524 U.S. at 290-91 (deliberate indifference to known acts of teacher-student sexual harassment); *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (deliberate indifference to severe student-on-student harassment). This Court's holdings, all of which have "relied on the text of Title IX," *Jackson*, 544 U.S. at 173, understand the statute's scope to include claims for harassment because the "statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender," *Davis*, 526 U.S. at 650; see also *Franklin*, 503

U.S. at 75 (explaining Title IX must not be interpreted to permit "expend[ing]" "federal moneys . . . to support the intentional actions" the statute "sought . . . to proscribe").

This Court should similarly recognize that the ordinary, plain meaning of Title IX protects transgender persons from discrimination. In fact, it is even more straightforward to see how the statute applies to discrimination against transgender persons than it is to conclude, as the Court did in prior cases, that the statute precludes retaliation and sexual harassment. In those prior cases, this Court relied on Title IX's purposes, namely, "[t]o avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Gebser*, 524 U.S. at 286 (quoting *Cannon*, 441 U.S. at 704). Those cases also required it to engage in the more abstract task of discerning whether sex-based "discrimination" includes retaliation and harassment. Here, the Court need only read "on the basis of sex" in accordance with its clear semantic meaning. Cf. *Jackson*, 544 U.S. at 186-87 (Thomas, J., dissenting) (focusing on the plaintiff's sex in interpreting Title IX's plain meaning).

Jackson is particularly striking because it illuminates the logic unifying the nation's anti-discrimination laws. The plaintiff in *Jackson* was not discriminated against because of *his* sex identity or any employer's reaction to *his* sex as a man rather than a woman. Rather, the plaintiff prevailed because the school was imposing sex-based conformity on the student body by silencing a critic. Similarly, discrimination against a transracial person and discrimination against a religious convert are efforts

to impose race and religious conformity in federally funded schools and workplaces. Under Title IX, an effort to impose sex conformity in federally funded schools is equally forbidden.

III. *Pennhurst* Does Not Bar Private Damages for Intentional Conduct Discriminating Based on Transgender Status.

Pennhurst notice principles do not undermine the ordinary meaning of Title IX or require excluding transgender individuals from Title IX's prohibition of discrimination on the basis of sex. Because Title IX was enacted pursuant to the Spending Clause, private damages are not available for every violation of the statute.[7] See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981); *Davis*, 526 U.S. at 640. But *Pennhurst*'s notice requirement "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*, 526 U.S. at 642. When a recipient knowingly operates an official program or policy, or makes an official institutional decision, it engages in intentional conduct. See *Jackson*, 544 U.S. at 183 (retaliation is intentional conduct because "[i]t is easily attributable to the funding recipient, and it is always—by definition—intentional"). And when that program or policy discriminates against transgender students, the recipient violates the clear terms of the statute—that it shall not discriminate on the basis of sex—not

[7] *Pennhurst* notice principles are not at issue for B.P.J.'s claim for injunctive relief. See Br. for Public Justice as *Amicus Curiae* 16-17. *Amicus* also recognizes that, according to Respondent, Petitioners waived their *Pennhurst* arguments by failing to raise those arguments in the proceeding below. See Resp. Br. 30 n.12.

some "vague language describing the objectives of the statute." *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002); see *Soule* v. *Conn. Ass'n of Schs., Inc.*, 90 F.4th 34, 61 (2d Cir. 2023) (Menashi, J., concurring) ("Conduct violates the 'clear terms of the statute' when it contravenes a legal requirement articulated in the statute." (cleaned up)).

Petitioners' argument that recipients did not predict the *application* of Title IX's mandate against "discrimination" "on the basis of sex" to protect transgender persons, even if true, does not limit the available remedies. The *Pennhurst* inquiry is guided by the statute's text, not by recipients' subjective predictions about the statute's application. As discussed in Part II, this Court in *Jackson*, for example, concluded that "the text of Title IX" provides sufficient notice of liability for "retaliating against a person who speaks out against sex discrimination," 544 U.S. at 178, notwithstanding that such an application of Title IX "expands the class of people the statute protects" beyond the anticipated beneficiaries, *id.* at 194 (Thomas, J., dissenting). Looking to the plain text, the Court explained that "when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,'" sufficient to attach liability for private damages under Title IX. *Id.* at 174 (majority opinion). Subjecting students to differential treatment because they are transgender is much more clearly "discrimination" "on the basis of sex," and this ought to resolve the *Pennhurst* inquiry. See also *Davis*, 526 U.S. at 637-38 (finding clear notice of liability for student-on-student harassment under Title IX

despite "a conflict in the Circuits" over Title IX's application to that context).

In any case, even if notice beyond the statutory text were required (and it is not), this Court's decision in *Bostock* that discrimination based on transgender status is "because of sex," 590 U.S. at 665, provides such notice, as do the numerous lower-court decisions applying *Bostock*'s reasoning to the Title IX context, see Br. for Public Justice as *Amicus Curiae* 7. That *Bostock* is a Title VII case does not preclude it from providing fair notice. For example, in finding clear notice of liability for sexual harassment under Title IX, the Court in *Franklin* relied on its Title VII decision in *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), where it held that workplace sexual harassment is discrimination "on the basis of sex," *id.* at 64. *Franklin*, 503 U.S. at 75.

CONCLUSION

For the foregoing reasons, the Court should rule in favor of Respondent on the issue of whether Title IX generally applies to protect transgender persons against discrimination "on the basis of sex," and should affirm the Fourth Circuit's decision remanding the case to the district court for further proceedings.

Respectfully submitted,

November 17, 2025

WILLIAM N. ESKRIDGE JR.
YALE LAW SCHOOL
127 Wall St.
New Haven, CT 06511
(203) 432-4992
william.eskridge@yale.edu

TRISHA ANDERSON
Counsel of Record
HECKER FINK LLP
1050 K St. NW, Ste. 1040
Washington, DC 20001
(212) 763-0883
tanderson@heckerfink.com

CLARA S. SPERA
MADELINE VERNIERO
NOELLE N. WYMAN
HECKER FINK LLP
350 Fifth Ave., 63rd Floor
New York, NY 10118

Counsel for Amicus Curiae