

IN THE
Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, *et al.*,
Petitioners,

v.

LINDSAY HECOX, *et al.*,
Respondents.

WEST VIRGINIA, *et al.*,
Petitioners,

v.

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

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

**BRIEF OF *AMICI CURIAE* SCHOLARS OF EQUAL
OPPORTUNITY AND ANTIDISCRIMINATION LAW
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE

Amici curiae are legal scholars whose scholarship and teaching focus on equal opportunity and nondiscrimination in education, employment, family law, and other areas. These scholars have an interest in ensuring that laws prohibiting discrimination, including Title IX, are interpreted to protect all covered individuals, including transgender students such as B.P.J., from discrimination. Amici submit this brief in their personal capacities; institutional affiliations are listed for identification only.¹ Amici include:

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SUMMARY OF ARGUMENT

In a highly contested case such as this one, there is a risk that the parties' disagreements may obscure points of agreement and other undisputed material facts to the

detriment of the legal analysis. Here, the agreed-upon and otherwise undisputed facts together with the text, regulations, and well-settled interpretations of Title IX make several points clear with respect to B.P.J.’s Title IX claim:²

- First, there is no dispute that Title IX prohibits sex discrimination against individual students in school-sponsored athletics, including B.P.J.³
- Second, the parties agree that puberty is “most significant” in differentiating male and female students with respect to speed and strength, with male students typically gaining athletic advantage during and following puberty.
- Third, it is undisputed that B.P.J. has not undergone male puberty and is undergoing female hormonal puberty.

2. Similar arguments could be made on behalf of respondent Lindsay Hecox but because Hecox no longer seeks to participate in collegiate athletics, amici address only the Title IX claim at issue in B.P.J.’s lawsuit. *See Hecox v. Little*, No. 24-38 (Oct. 20, 2025) (order deferring consideration of requested dismissal due to mootness pending oral argument). Amici also do not address the equal protection arguments before the Court.

3. References to “school” throughout this brief refer to elementary and secondary schools and school districts that receive federal financial assistance and are therefore subject to Title IX, 20 U.S.C. § 1681 *et seq.*, unless otherwise specified.

- Fourth, notwithstanding its stated goal to recognize biological differences relevant to athletics, the West Virginia law would require B.P.J.—a student undergoing female hormonal puberty—to compete against boys undergoing male puberty.
- Fifth, the West Virginia law would impose this competitive disadvantage on B.P.J. based on a male sex designation made when B.P.J. was a newborn, thereby disregarding B.P.J.’s female adolescent sex development.

While the facts above are undisputed, there is an unresolved and possibly material factual dispute between the parties’ experts regarding the significance of pre-puberty sex-based physiological or other differences for athletic performance after a student-athlete enters puberty.

These points of agreement and disagreement support two possible outcomes in this case. Either 1) the West Virginia law violates Title IX as applied because it subjects B.P.J. to a materially worse athletic opportunity based on an incorrect sex-based assumption; or 2) if evidence regarding pre-puberty physiological effects on the athletic performance of pubertal male and female student-athletes is deemed relevant under Title IX, the unresolved factual dispute about this evidence should be returned to the district court for resolution.

ARGUMENT

I. Many points of agreement between the parties and additional uncontested evidence inform Title IX’s application to B.P.J.

Numerous points of agreement between the parties and additional uncontested evidence set the foundation for Title IX’s application to B.P.J.’s claim.

A. Title IX protects individual students in their access to athletic opportunities, which need not be identical but must be equivalent in numbers and supporting resources.

Statutory text, regulations, official interpretations, and the agreement of the parties all reinforce two points with respect to Title IX’s application to students who seek to participate in school athletics. First, individual students have a right under Title IX to be free from sex discrimination in school athletic programs. Second, although Title IX does not guarantee identical opportunities, schools must offer “equal athletic opportunity” to every student, regardless of sex. *See* 34 C.F.R. § 106.41(c). Among the undisputed points of law and fact on these issues relevant to these points are the following:

1. Title IX protects individual students on public school athletic teams.

It is undisputed that Title IX’s text protects individuals, including individual students such as B.P.J., from sex discrimination in programs and activities that receive federal financial assistance: “*No person . . . 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[.]” 20 U.S.C. § 1681(a) (emphasis added). Both parties agree that this protection covers athletic teams sponsored by public schools. *See B.P.J. v. W. Va. Bd. of Educ.*, 98 F.4th 542, 562 (4th Cir. 2024) (“The defendants do not dispute that middle school sports are an ‘education program or activity’” under Title IX.).

2. The Department of Education’s “reasonable” regulations focus on ensuring equivalent participation opportunities and school-provided resources for male and female teams.

There is also no dispute that Department of Education (“Department”) regulations require schools to provide “equal athletic opportunity” to students. Congress, through the Javits Amendment, directed the Department to issue “reasonable provisions considering the nature of particular sports” to guide Title IX’s application to athletics. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). The Department’s responsive athletics regulations, which cover pre-college and collegiate athletic programs, were signed by President Ford, submitted to Congress for review in 1975, and are understood to “accurately reflect congressional intent.” *Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984) (describing submission to Congress “[u]nder the statutory ‘laying before’ procedure of the General Education Provisions Act”) (citations omitted); *see also Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 95–96 (4th Cir. 2011) (“HEW followed notice and comment rulemaking procedures, and

President Ford approved the final regulations, as required by Title IX, 20 U.S.C. § 1682.” (footnote omitted)).

These “reasonable” regulations require schools to provide “equal athletic opportunity” to students, 34 C.F.R. § 106.41(c), a requirement that courts have affirmed repeatedly. *See, e.g., McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 296 (2d Cir. 2004) (“Title IX requires that schools provide equal athletic opportunity to boys and girls.”); *Equity in Athletics, Inc.*, 639 F.3d at 95, 102–04 (reviewing numerous cases applying the “equal opportunity mandate of Title IX” to college athletic programs).

Although 34 C.F.R. § 106.41(c) refers to “equal athletic opportunity for members of both sexes,” petitioners have not suggested this means transgender students are not entitled to equal athletic opportunity on the same basis as other students. Nor would that be a reasonable interpretation in light of the statute’s application to all persons.

To determine whether equal opportunity is provided consistent with Title IX, the regulations set out detailed factors in two areas: (1) the number of participation opportunities for students; and (2) the material and other resources provided to teams. 34 C.F.R. § 106.41(c). As the Department explained, “the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.” A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979).

For both participation opportunities and resources, the regulatory focus is entirely on internal equality within the school or school district. On the numbers of participation opportunities, for example, “the selection of sports and levels of competition [must] effectively accommodate the interests and abilities of members of both sexes[.]” 34 C.F.R. § 106.41(c)(1). The Department’s authoritative guidance explains that schools can meet this obligation by offering opportunities substantially proportionate to enrollment, demonstrating a history of expanding opportunities, or demonstrating that existing opportunities “fully and effectively” meet “the interests and abilities of the [underrepresented] sex.” *Equity in Athletics, Inc.*, 639 F.3d at 96–97 (describing the Department’s guidance documents); *see also* 44 Fed. Reg. 71,413–14 (recognizing that the Department’s policy interpretation, though designed for intercollegiate athletics, has “general principles” that “will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation” (footnote omitted)).

The resource requirement similarly focuses on the school’s provision of support to its teams, including key factors at the pre-collegiate level: equipment and supplies; game and practice schedules; coaching; provision of locker rooms, practice and competitive facilities; and publicity. 34 C.F.R. § 106.41(c)(2), (3), (5), (7), (10); *see also McCormick*, 370 F.3d at 293 (stating that under the Policy Interpretation, a disparity based on sex can constitute a Title IX violation if it “has a negative impact on athletes of one sex when compared with benefits, treatment, services, or opportunities available to athletes of the other sex” (footnote omitted)).

While winning is inherently a part of interscholastic athletics, Title IX itself, through its text, regulations, and Department guidance, does not look to the external competitive results of individual athletes or their teams to determine whether sex discrimination has occurred. Indeed, the variety of program elements specified in the regulations arguably reflects the recognition that many factors affect the competitiveness of a given team. It is also well known that an individual's performance in athletic competition is multifactorial, shaped by training, nutrition, physical and mental health, and numerous other factors. *See, e.g.,* NCAA, *Training and Performance*, NCAA.org (Apr. 23, 2024), <https://www.ncaa.org/sports/2024/4/23/training-and-performance.aspx> (listing “healthy fuel and training” and restorative sleep as among the factors that affect student-athlete performance). To be clear, this is not to undermine the importance of competition to school sports but rather to clarify that Title IX does not give rise to a right of an individual student either to prevail in competition or be part of a winning team.

B. Equal opportunity in school sports matters because of the benefits that participation offers to students while in school and after.

There is no disagreement between the parties that school-sponsored athletic programs offer myriad educational and other benefits to their students. The nationwide governing body for high school athletics, which also covers most middle schools, including in West Virginia, confirms that these programs “are not a diversion, but rather an extension of a good educational program” and that they “are inherently educational and are a significant part of the school or education system.”

Nat'l Fed'n of State High Sch. Ass'ns, *The Case for High School Activities*, https://assets.nfhs.org/umbraco/media/4119479/nfhs-_the-case-for-high-school-activities.pdf. Cf. Nat'l Fed'n of State High Sch. Ass'ns, *State Association Directory*, <https://nfhs.org/about/state-association-directory> (last visited Oct. 31, 2025) (listing West Virginia Secondary Schools Activities Commission among the member-state associations).

There is wide agreement on this point among researchers, as well. See, e.g., Kelsey Logan & Steven Cuff, Am. Acad. Pediatrics Council on Sports Med. & Fitness, *Organized Sports for Children, Preadolescents, and Adolescents*, 143 *Pediatrics* (June 2019), <https://publications.aap.org/pediatrics/article/143/6/e20190997/37135/OrganizedSports-for-Children-Preadolescents> (associating participation in organized sports in childhood with long-term participation in organized sports, development of life skills, and a high level of physical fitness later in life). Early participation in athletics has also been recognized as important. See Sandra D. Simpkins et al., *Participating in Sport and Music Activities in Adolescence: The Role of Activity Participation and Motivational Beliefs During Elementary School*, 39 *J. Youth Adolescence* 1368 (2009), <https://link.springer.com/article/10.1007/s10964-009-9448-2> (concluding that elementary school children who did not participate in sports were unlikely to participate when they became adolescents).

West Virginia's governing athletic body makes the point succinctly in one of the public service announcements it proposes for its member middle schools: "Sportsmanship is one of the strongest educational lessons and life-time

values taught by interscholastic activities.” Other states take a similar approach. *See, e.g.*, Iowa High Sch. Athletic Ass’n, Junior High Sports Manual (2023–2025) at 1, <https://www.iahsaa.org/wp-content/uploads/2023/07/2023-25-Junior-High-Manual-7.26.23.pdf> (“The primary purpose of the junior high school athletic program is participation, with emphasis on the development of skills, sportsmanship, and citizenship of all students.”); S.C. High Sch. League, 2025–2026 Middle School Rules & Regulations at 3, <https://schsl.org/wp-content/uploads/2025/07/2025-26-Rules-Middle-School-Section.docx.pdf> (focusing in middle school on “the desirable growth and development of . . . participants” and “[t]he welfare of the youth concerned”).

In middle school, in particular, widespread variation exists among students with respect to their stage of puberty and athletic abilities. State school athletic associations have recognized the role of school athletic programs in accommodating the “great range in individual differences among boys and girls of this age (age; body build; interest; ability; experience; health, and the stages of physiological, emotional and social maturity)[.]” *See, e.g.*, S.C. High Sch. League, 2025–2026 Middle School Rules & Regulations at 3, <https://schsl.org/wp-content/uploads/2025/07/2025-26-Rules-Middle-School-Section.docx.pdf>.

C. Puberty is the most significant biological point of differentiation related to strength and speed relevant for athletic competition.

Although the parties and their experts disagree about the significance of pre-puberty physiological and other differences, they agree that male puberty

is the developmental phase that gives male athletes a demonstrable athletic advantage with respect to strength and speed. *B.P.J.*, 98 F.4th at 561. As the court below stated, “[b]efore the district court, both sides cited authorities agreeing that the driver of the *most significant* sex-based differences in athletic performance is differing levels of circulating testosterone.” *Id.* at 560 (emphasis added); *see also B.P.J. v. W. Va. Bd. of Educ.*, 649 F. Supp. 3d 220, 231 (S.D.W.V. 2023) (“B.P.J. herself recognizes that ‘[t]here is a medical consensus that the largest known biological cause of average differences in athletic performance between [males and females] is circulating testosterone beginning with puberty.’”).

Indeed, relying on undisputed expert testimony, the Fourth Circuit explained:

Larger amounts of circulating testosterone produce an increased ability to build muscle mass. And increased muscle mass, in turn, leads to greater strength and speed—two attributes relevant to most competitive sports.

Before puberty, circulating testosterone levels do not vary significantly depending on whether a person has two X chromosomes, one X and one Y chromosome, or some other genetic makeup. Once puberty begins, however, sex-based differences begin to emerge. Those differences—along with others that begin at the same time—lead to different physical processes during puberty.

B.P.J., 98 F.4th at 560. These differences manifest at what medical professionals call the “Tanner 2” stage. *Id.*

D. It is undisputed that B.P.J. has not gone through Tanner 2 stage male puberty and is undergoing female hormonal puberty.

The evidence is also undisputed that B.P.J. took puberty-blocking medication at the beginning of the Tanner 2 stage, and, as a result, has not experienced the increased levels of circulating testosterone associated with male puberty that lead to increases in muscle mass and, in turn, strength and speed. *Id.* at 560–61; *see also B.P.J.*, 649 F. Supp. 3d at 223 (“B.P.J. has not undergone endogenous male puberty.”). Undisputed evidence also indicates that B.P.J. is undergoing female hormonal puberty, with the resulting changes to “bones, muscles, and fat distribution that are typically experienced by cisgender girls.” *B.P.J.*, 98 F.4th at 561.

The district court’s conclusion that “transgender girls are biologically male,” *B.P.J.*, 649 F. Supp. at 233, thus conflicts with two points of undisputed evidence: 1) B.P.J. does not have the pubertal development (elevated circulating testosterone) associated with male biology that the State identifies as most significant for athletic performance; and 2) B.P.J. *does* have the pubertal development of secondary sex characteristics and hormone levels associated with female biology.

II. To the extent pre-puberty differences between male and female student-athletes and their effects on competition are deemed material for purposes of evaluating a sex-based athletics eligibility rule under Title IX, the record evidence is in dispute.

Record evidence demonstrates a genuine dispute between the parties regarding the relevance of pre-

puberty physiological and other differences to the athletic performance of male and female athletes. According to B.P.J.’s expert, apart from puberty-related changes, “[a] person’s genetic makeup and internal and external reproductive anatomy are not useful indicators of athletic performance.” *B.P.J.*, 98 F.4th at 561. The petitioners’ expert asserted, to the contrary, “that, even apart from increased circulating testosterone levels associated with puberty, there are ‘significant physiological differences, and significant male athletic performance advantages in certain areas.’” *Id.* at 561–62. Each side moved to exclude the other’s expert; B.P.J. also offered evidence to rebut the petitioners’ expert testimony. *Id.* at 562. The district court did not resolve the competing motions or the underlying factual dispute. *Id.* at 561–62 (noting that the court had not resolved either party’s challenge to the admissibility of the other’s expert testimony).

Thus, if pre-puberty status is deemed to have a relevant effect on B.P.J.’s current athletic ability in ways that implicate Title IX, the district court should resolve this factual dispute under this Court’s longstanding precedent. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 152 (1999) (holding that when an expert’s testimony is “called sufficiently into question . . . the trial judge must determine whether the testimony has ‘a reliable basis in the knowledge and experience of [the relevant] discipline’ and an appellate court must “apply an abuse-of-discretion standard when it reviews a trial court’s decision to admit or exclude expert testimony” (citation and internal punctuation omitted)). Alternatively, without resolving that factual dispute, this Court could find in B.P.J.’s favor for the reasons set out below.

III. West Virginia’s reliance on a newborn’s sex marker as a proxy for athletic advantage mischaracterizes B.P.J., whose developmental process related to puberty is biologically female.

A. Title IX permits sex-separate athletic teams to advance equal athletic opportunity.

In ordinary circumstances, girls attending Harrison County public schools play on girls’ athletic teams and boys play on boys’ athletic teams. W. Va. Code § 18-2-25d. This participation on sex-separate teams becomes especially salient starting in middle school as many students enter puberty, given the divergent consequences of male and female puberty for athletic ability, discussed *supra*. See also Petitioners’ Br. at 4 (“With sex-specific sports, women have a chance to compete fairly while not risking their safety against physiologically distinct competitors.”). The parties agree that sex-separate teams are permissible under Title IX. *B.P.J.*, 98 F.4th at 555 (noting that B.P.J. has “disavowed any ‘challenge [to] sex separation in sports’”).

This separation has long been authorized under Title IX, following the Javits Amendment’s requirement that regulations be “reasonable” and implemented by 34 C.F.R. § 106.41(b), which permits a recipient to offer male and female athletic teams under certain circumstances. Together, these provisions reflect the recognition that athletics is a unique context in which separation based on sex can advance rather than undermine equal opportunity by creating participation opportunities that were historically lacking for girls and women. See 1979 Policy Interpretation, 44 Fed. Reg. 71,421 (Dec. 11, 1979)

(identifying the equality benefits to individuals when “women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes”); *cf.* *McCormick*, 370 F.3d at 290 (citing cases applying the 1979 Policy Interpretation).

Consistent with the recognition that sex-separate teams can advance equality, courts have regularly permitted schools to maintain sex-separate teams, including when adjudicating equal protection challenges, and even when some female students wanted to play on male teams or vice versa. *See Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1130–31 (9th Cir. 1982) (discussing cases, the majority of which rejected claims from boys seeking to play on girls’ teams or vice versa); *see also* W. Va. Code § 18-2-25d(a)(3) (citing *Clark*). *Clark*’s equal protection analysis also clarified, however, that sex-based criteria would not be substantially related to promoting a government interest if based on overbroad generalizations “without factual justification.” *Clark*, 695 F.2d at 1129 (citations omitted).⁴

4. West Virginia’s adoption of a sex-separate teams approach for only girls’ teams, *see* W. Va. Code § 18-2-25d (c)(2)–(3), reduces opportunities for boys in ways that raise an important but separate Title IX question not presented in B.P.J.’s as-applied challenge. *Cf. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (finding a policy to be facially discriminatory under Title VII because it imposed a sex-based exclusion from certain employment only on female employees).

B. Athletic opportunities, including on sex-separate teams, must not rest on sex-based stereotypes or overbroad generalizations.

Even with this allowance for sex-separate teams, it would be plainly impermissible for a school to exclude a girl from the girls' team for being too "boyish" in appearance; Title IX requires that opportunities for male and female athletes to participate on those teams not rest on sex stereotypes. *See, e.g., McCormick*, 370 F.3d at 295 (noting that "girls and women were historically denied opportunities for athletic competition based on stereotypical views that participating in highly competitive sports was not 'feminine' or 'ladylike'"); *see also id.* (rejecting under Title IX a school district's different and worse schedule for girls' soccer, stating that "[s]cheduling the girls' soccer season out of the championship game season sends a message to the girls on the teams that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys"); *Cohen v. Brown Univ.*, 101 F.3d 155, 178–79 (1st Cir. 1996) ("To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities.").

This prohibition on sex stereotyping cuts across the many areas in which Title IX applies. The Department has long made this clear in its regulations and commentary. *See, e.g.,* 34 C.F.R. § 106.34(b) (authorizing sex separation

for certain classes and extracurricular activities only to achieve an “important objective” and if implemented “in an evenhanded manner”); *id.* at § 106.8(d) (requiring that training materials for Title IX coordinators and others involved in sexual harassment investigations “must not rely on sex stereotypes”); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,100–101 (May 19, 2020) (stating that the purpose of the Department’s regulation governing the Title IX grievance process for sexual harassment allegations is “to provide individuals with effective protection from discriminatory practices that . . . avoid injection of sex-based biases and stereotypes”).

Courts have likewise confirmed Title IX’s prohibition on schools separating students based on stereotypes in ways that result in worse treatment based on sex or imposing sex stereotypes in ways that harm an individual student. *See, e.g., Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130–31 (4th Cir. 2022) (holding that a school’s sex-based dress code, which rested on “blatant gender stereotypes about the ‘proper place’ for girls and women in society,” was “subject to review under the anti-discrimination provisions of Title IX”); *Schiebel v. Schoharie Cent. Sch. Dist.*, 120 F.4th 1082, 1106 (2d Cir. 2024) (holding that Title IX requires that recipients investigating sexual misconduct claims do not make presumptions about accused male students “based on invidious sex stereotypes” (citations omitted)).

C. West Virginia’s categorical exclusion of B.P.J. from the girls’ team based on the sex marker from when B.P.J. was a newborn rests on an incorrect sex-based assumption about B.P.J.’s experience of puberty that is detrimental to B.P.J.’s athletic opportunity.

As this Court has observed, the problem with decision-making based on sex stereotypes is not that the stereotype is never accurate, but instead that its accuracy for some or even most individuals does not render the stereotype accurate for all individuals. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (explaining that “even when some statistical support can be conjured up for [a] generalization” based on sex, that “measure of truth” does not render a sex-stereotype permissible under the Equal Protection Clause); *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (describing stereotypes about women and men as “mutually reinforcing”).

Thus, this Court and lower courts have consistently held—under both the Equal Protection Clause and antidiscrimination statutes—that unlawful sex stereotyping occurs when a government or private actor takes action that is detrimental to an individual based on a generalized or oversimplified sex-based assumption about that individual’s sex, rather than on facts specific to that individual. *See, e.g., United States v. Virginia*, 518 U.S. 515, 550 (1996) (rejecting under the Equal Protection Clause “generalizations about ‘the way women are’” as insufficient to justify excluding an applicant from an educational opportunity based on sex); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding, under Title VII, that “[a]s for the legal relevance of sex stereotyping,

we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982) (identifying concern, in equal protection analysis, about sex-based stereotypes relying on “fixed notions concerning the roles and abilities of males and females”); *Pederson v. La. State Univ.*, 213 F.3d 858, 880 (5th Cir. 2000) (holding, under Title IX, that a university acted impermissibly in limiting athletic opportunities for women because of “paternalism and stereotypical assumptions about their interests and abilities”).

In this case, West Virginia’s separation of boys’ and girls’ teams, consistent with Title IX, rests on a generally accurate premise: for most students, their sex marker as a newborn aligns with their pubertal development and the associated physiological changes relevant to athletic performance. This general rule serves the interest, accepted under Title IX and asserted by the State, in preserving athletic opportunities for girls.

But the law’s premise is not accurate for B.P.J., who, as the undisputed record shows, is not undergoing Tanner 2 stage male puberty, is instead undergoing female hormonal puberty, and has the outward physical characteristics and circulating hormone levels typical of an adolescent girl. As the Fourth Circuit observed, participation on a boys’ team would mean that “B.P.J. would be sharing the field with boys who are larger, stronger, and faster” based on their elevated levels of circulating testosterone, and thus exposes B.P.J., who is in the process of developing the “outward physical characteristics—including fat distribution, pelvic shape,

and bone size—of an adolescent female . . . to the very harms Title IX is meant to prevent[.]”⁵ *B.P.J.*, 98 F.4th at 564.

Thus, the Title IX problem is not that West Virginia separates its school athletic teams based on sex or even that it generally assigns students to male or female teams according to their sex designation as a newborn. Instead, it is the categorical imposition of that sex-based team assignment to a student whose individual biological development—and in particular their pubertal development—does not match the sex-based assumption reflected in the team-assignment law.

In short, to assign a student undergoing female hormonal puberty to a male team because of a sex designation recorded when the child was a newborn is to overlook an essential element of the context that gave rise to West Virginia offering separate athletic teams for boys and girls in the first place. “Context also includes common sense[.]” *Biden v. Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, J., concurring).

The record also forecloses the suggestion that this case is merely about a student who has expressed a gender identity not consonant with the sex marker on their birth certificate and provides no support for a “one drop”-type rule to justify the state’s reliance on a sex marker from

5. As the Fourth Circuit noted, this is also not a meaningful opportunity given that B.P.J. is known to herself, her family, teachers, coaches and classmates as a girl and, in recent years, as a member of girls’ athletic teams in her school. *B.P.J.*, 98 F.4th at 564; *see also id.* (noting that B.P.J. is identified as female on her state-issued birth certificate).

birth. Although Title IX does not guarantee a student a right to win or even make the team, *supra*, it does protect every student from being denied the benefits of school sports based on sex, including sex-based generalizations that do not apply to them.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the ruling of the Fourth Circuit and remand for further proceedings consistent with that court's opinion.

Respectfully submitted,

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