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 FRIEND AND MOTHER, HEATHER JACKSON,

Respondent.

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

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QUESTIONS PRESENTED

1. Whether, as applied to B.P.J., West Virginia's categorical prohibition against transgender girls playing on girls' school sports teams violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*.

2. Whether, as applied to B.P.J., West Virginia's categorical prohibition against transgender girls playing on girls' school sports teams violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATE STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

West Virginia was one of the first states in the country to categorically ban girls and women who are transgender from participating in school sports on girls' and women's teams. In West Virginia's telling, it passed H.B. 3293 to "save women's sports" by staving off an impending tidal wave of "bigger, faster, and stronger males" from stealing championships, scholarships, and opportunities from female athletes. Pet'rs Br. 2. In reality, West Virginia's law banned exactly one sixth-grade transgender girl from participating on her school's cross-country and track-and-field teams with her friends. Rarely has there been such a disconnect between a law's actual operation and the claimed justifications for it.

B.P.J. transitioned early in life, and she has received puberty-delaying medication and gender-affirming estrogen that allowed her to undergo a hormonal puberty typical of girls, with all the physiological musculoskeletal characteristics of cisgender girls and none of the testosterone-induced characteristics of cisgender boys.

B.P.J. wants to play sports for the same reasons most kids do: to have fun and make friends as part of a team. Her experiences on sports teams have given her the opportunity to build teamwork, confidence, and friendship while cultivating her work ethic. She feels free and fully herself when she is out on the field. Because participating on boys' teams as a transgender girl would be isolating, stigmatizing, and publicly humiliating, and because co-ed teams in West Virginia are virtually non-existent, the girls' teams are B.P.J.'s only real option for participating in her school's athletic program.

B.P.J. has participated in only two school sports, both of which are noncontact. She ran cross-country in middle school on a team where there are no "cuts," and she routinely placed near the back of the pack. She also has participated since middle school on the track-and-field team in shot put and discus because she was too slow to qualify for running events. Through hard work and practice she eventually improved enough in shot put and discus to participate in post-season events where her performance is well within the range of cisgender girls her age.

West Virginia's brief is brimming with contradictions. It asserts that its categorical ban reflects real biological differences between boys and girls with respect to athletics. But whether that assertion is true for transgender girls—in particular, transgender girls like B.P.J. who have never experienced endogenous male puberty and who have instead gone through a female hormonal puberty—remains a disputed question of fact that cannot be resolved in this Court. And if B.P.J. has no biological athletic advantage over her cisgender peers, West Virginia's arguments fall apart.

The contradictions don't stop there. West Virginia rightly touts the importance of sports for the health and wellbeing of cisgender girls. "Girls who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs." Pet'rs Br. 6 (citation modified). But West Virginia is utterly dismissive of the harm it inflicts by denying those same benefits of participation to girls who are transgender. School athletics are fundamentally educational programs, and the benefits of participation are not a zero-sum

game. Yet West Virginia seeks to exclude B.P.J. from participating even on "no cut" teams like cross-country or intramural sports, regardless of whether there are any trophies or scholarships to compete over.

Title IX and the Equal Protection Clause protect everyone, and "all persons are entitled to the benefit of the law's terms." *Bostock v. Clayton County*, 590 U.S. 644, 678 (2020). "No person" can be "excluded from participation in" or "denied the benefits of" an education program "on the basis of sex." 20 U.S.C. § 1681(a). And West Virginia cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. That includes B.P.J. The Court should affirm the judgment below.

STATEMENT OF THE CASE

A. B.P.J.

B.P.J. is a teenage girl from West Virginia who is "bright and kind." J.A. 4406. She makes "straight A's" and loves math and science. J.A. 579. She also loves playing with her family dogs, riding her bike, running, and spending time with her friends. J.A. 579, 581.

B.P.J. is transgender, which means she has a gender identity that does not align with her sex assigned at birth. Though B.P.J. was designated male at birth, she has known she is a girl for as long as she can remember. B.P.J.'s mother could see she was different from her two brothers when she was as young as three years old. J.A. 548, 806-08. B.P.J. "always felt like [she] wasn't in the right body" and would ask her mother questions about why her body didn't look like her mother's. J.A. 548, 579. From her play to her dress, she gravitated towards typically feminine things, and after many conversations with her mother about how

she was feeling, B.P.J. "was able to clearly communicate that she knew she was a girl." J.A. 549. B.P.J. was ultimately diagnosed with gender dysphoria, the diagnostic term for when transgender people experience clinically significant distress from the incongruence between their gender identity and their sex assigned at birth. J.A. 4079.

In third grade, B.P.J. began a process of social transition by living consistently with her female gender identity at home, and her family started addressing her by a typically feminine name. J.A. 549. The following summer, B.P.J. began living consistently with her female gender in all aspects of life, including when she returned to school for fourth grade. J.A. 549, 649.

B.P.J. is "secure in her identity as a girl and well supported by her parents, school administrators, teachers, and friends." J.A. 549, 552. Since fourth grade, the Harrison County school district has provided support plans to ensure that B.P.J.'s new name is used for purposes of school photos and taking attendance. J.A. 559-60. B.P.J.'s birth certificate also includes her new name and reflects her "sex" as female. C.A. App. 4647.

The prospect of going through male puberty was deeply distressing for B.P.J. Not only had B.P.J. recognized herself as a transgender girl from early childhood, but she was also already known as a girl to everyone around her. J.A. 549. In 2020, at the onset of puberty, she started receiving puberty-delaying medication to prevent the distress that would occur if she experienced physiological changes inconsistent with her female gender. J.A. 549-50, 4080. Because of this ongoing treatment, B.P.J. has never experienced

any elevated testosterone or physiological changes typical of a male puberty. J.A. 4084-85.

Consistent with her doctor's recommendation, B.P.J. later began taking estradiol—a type of estrogen—at the end of sixth grade in 2022 so she would undergo a typically female hormonal puberty. J.A. 4266, 4270. This treatment has allowed B.P.J. to develop physiological characteristics typical of other girls, such as "bone size, skeletal structure, pelvis shape, [and] fat distribution." J.A. 2755.

B. West Virginia's H.B. 3293

As she neared the end of fifth grade, B.P.J. was looking forward to advancing to middle school and participating in sports there. J.A. 580. But when B.P.J. and her mother told the middle school principal about B.P.J.'s interest in playing, the principal said she would not be allowed to participate on girls' teams because of a new state law. J.A. 551-52.

West Virginia's H.B. 3293 was part of a wave of similar legislation introduced across the country. It categorically prohibits girls who are transgender from participating on girls' sports teams at school and applies from middle school through college, at all levels of competition, even in intramural or non-competitive sports. Pet'rs Br. 8; Pet. App. 100a.

"[A]t the time it passed the law, West Virginia had no known instance of any transgender person playing school sports." Pet. App. 83a.[1] The West Virginia

[1] B.P.J. remains the only transgender student athlete identified in West Virginia over the last four years. J.A. 4107-08. Many states that have passed similar bans on participation could not

Department of Education had never received any complaints about transgender students participating in school athletics, and its general counsel characterized the bill as "much ado about nothing." J.A. 4109.

Before West Virginia passed its ban, school sports were already sex-separated. J.A. 4092; W. Va. Code St. R. § 127-2-3(3.8). Boys were prohibited from playing on girls' teams, and girls were prohibited from playing on boys' teams if a girls' team was available. J.A. 1041. Under a policy adopted by the West Virginia Secondary Schools Athletic Commission ("WVSSAC"), transgender students were also allowed to participate in school teams consistent with their gender if their home school agreed. J.A. 4039-41. If another school contested the student's eligibility to play, WVSSAC would determine whether the student's participation threatened "competitive equity or the safety of teammates or opposing players." J.A. 4040-41.

H.B. 3293 overturned that pre-existing policy and categorically banned transgender girls and women from school sports in West Virginia. As reflected in West Virginia's own brief, a person's "biological" sex encompasses not only genetics and internal anatomy, but also hormones and secondary sex characteristics. Pet'rs Br. 10; *accord* J.A. 3173-74. But H.B. 3293 mandates that participation on girls' teams shall be based "solely" on "biological sex," which the statute

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identify a single transgender student athlete in their state. *See* David Crary and Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, AP News (Mar. 3, 2021), https://perma.cc/MV89-US3R.

defines as a person's "reproductive biology and genetics at birth." Pet. App. 100a.

West Virginia claims its statute reflects real biological differences between men and women with respect to athletic performance, but the largest known biological driver behind sex-based differences in athletic performance is circulating testosterone levels that typically diverge starting at puberty. J.A. 1540, 4081-82. And that is the very criterion H.B. 3293 excludes from consideration. J.A. 4124. By defining "biological sex" based only on chromosomes and reproductive anatomy at birth—and excluding any consideration of hormones—West Virginia's new law ensured that transgender girls and women could never participate in girls' sports at any age or level of competition.[2]

Legislators were also clear that the purpose of the new statute was to exclude transgender girls. The Chief Counsel of H.B. 3293's originating committee referred to H.B. 3293 as a "[t]ransgender participation in secondary schools bill," a "[t]ransgender originating bill," and a "bill regarding transgender participation in sports." J.A. 4101. When asked how H.B. 3293 would change the status quo in West Virginia, counsel representing the bill replied that H.B. 3293 "would affect those that changed their sex after birth." J.A. 4102.

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[2] Even the House sponsor who first introduced the statute recognized there are no biological athletic advantages before puberty by virtue of chromosomes or reproductive anatomy, stating that "young children are about the same size, and[] don't pose a safety problem when boys and girls play together." W.V. Legislators Amicus 6-7.

The governor admitted he could not identify even "one example of a transgender child trying to get an unfair advantage" and stated that the issue was not "a priority" for him, as "we only have 12 kids maybe in our state that are transgender-type kids." J.A. 4107. He signed the bill anyway.

C. Procedural History

1. The Preliminary Injunction

In June 2021, before starting sixth grade, B.P.J. brought an as-applied challenge to H.B. 3293 based on Title IX and the Equal Protection Clause, and she moved for a preliminary injunction so she could try out for middle school sports. J.A. 411-37, 444-51. The district court agreed that B.P.J. was likely to succeed on both claims and entered a preliminary injunction in July 2021 prohibiting H.B. 3293 from being enforced against her alone. J.A. 8.[3]

Because of the injunction, B.P.J. participated on the girls' cross-country team in fall 2021. J.A. 4134. No girls who tried out for cross-country were "cut" from the team, so B.P.J.'s participation did not prevent any cisgender girl from participating. J.A. 4138. B.P.J. regularly finished near the back of the pack that season, placing 51st out of 66 in one competition and 123rd out of 150 in another. *See* J.A. 4135-36, 4271.

When it came time to try out for track and field in spring 2022, B.P.J.'s coach said she was too slow to compete in running events and encouraged B.P.J. to

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[3] The district court also granted permissive intervention to Lainey Armistead, then a college student in West Virginia, who claimed H.B. 3293 protected her from playing collegiate soccer against hypothetical transgender women. J.A. 12.

look at field events instead. J.A. 4266. B.P.J. was happy to try something new and picked up shot put and discus. *Id.* During the 2022 spring track season, B.P.J. placed 36th out of 45 in shot put at her first meet. J.A. 4271. At another, she placed 15th out of 25 in discus. *Id.* And at a third meet, she placed 35th out of 53 in discus. *Id.*

In fall 2022, B.P.J. participated again in cross-country, which—unlike track and field—does not cut people from the team during tryouts. B.P.J. ran five meets that season, and her performance continued to lag. *Id.* She continued to finish at the very back of the pack, placing 54th out of 55 for her first race and 64th out of 65 in her final one. *Id.*

Despite B.P.J.'s lackluster performance, her mother had "never seen [B.P.J.] happier" than when she "pick[ed] her up from practices and [took] her to meets." J.A. 4272. She "made so many new friends and loved competing with and supporting [her] teammates." J.A. 581. Through sports, B.P.J. has "learned about teamwork, having a positive attitude, and how to have fun while being competitive." *Id.* She loves "breathing in the fresh air and feeling proud when [she] work[s] hard." J.A. 4267. B.P.J. said she feels "free and fully myself" when she "is out on the field." *Id.*

2. Summary Judgment Proceedings

After extensive discovery, the parties filed cross-motions for summary judgment. J.A. 16-20. The undisputed facts at the close of discovery showed there were no complaints associated with B.P.J.'s participation. J.A. 4138. Even Defendant-Intervenor could not identify "any specific fairness issue" or safety

concern. J.A. 4139, 4144-45. And Defendants did not know of any middle-school girl who was physically harmed by B.P.J.'s participation. J.A. 4145. West Virginia nevertheless took the position that B.P.J.'s performance on the girls' teams "displaced" cisgender girls because B.P.J. did not finish dead last every time. J.A. 4135-36; *accord* Pet'rs Br. 11 (repeating assertion that B.P.J.'s performance during this period "displac[ed] female athletes").

A central factual question addressed by both sides' putative experts was whether transgender girls like B.P.J.—who receive puberty-delaying medication so they do not go through endogenous male puberty and who then receive gender-affirming hormones to undergo a female hormonal puberty—have an athletic advantage compared to cisgender girls. Both parties filed *Daubert* motions to exclude the other side's experts as unreliable under Federal Rule of Evidence 702 and thus inadmissible for purposes of summary judgment under Federal Rule of Civil Procedure 56(c)(2). Pet. App. 34a-37a.

B.P.J.'s expert, Dr. Joshua Safer—a Fellow of the American College of Physicians and endocrinologist at Mount Sinai—testified that before puberty, athletic differences between cisgender boys and girls are either minimal or non-existent, and that there is a scientific consensus that performance advantages observed at the group level for cisgender men compared to cisgender women are due to diverging levels of circulating testosterone starting at puberty. J.A. 1549-50. Without the effect of hormones, there is no athletic advantage conferred by "reproductive biology and genetics at birth." *Id.*

Dr. Safer explained that transgender girls like B.P.J.—who receive puberty delaying medication at the onset of puberty and then gender-affirming hormones to go through a female hormonal puberty—do not have any of the physiological characteristics associated with athletic advantage between cisgender men and cisgender women. These transgender girls never experience the effects of high levels of testosterone and accompanying physiological changes that typically occur at puberty in people assigned male at birth. Rather, they go through puberty with the same levels of hormones as other girls and develop typically female physiological characteristics, including muscle mass and bone structure. J.A. 1550.

Dr. Safer further explained that, in terms of biological athletic advantages, these transgender girls are analogous to women with XY chromosomes and Complete Androgen Insensitivity Syndrome ("CAIS"). J.A. 1541, 1550. Women with CAIS are born with XY chromosomes but do not have tissue receptors that respond to testosterone. J.A. 1257, 1541, 4120. It has long been recognized that women with CAIS have no athletic advantage simply by virtue of having XY chromosomes. J.A. 1550, 4121. The same principles apply to transgender girls who have XY chromosomes but receive puberty-delaying medication and never experience physiological changes from the increase in testosterone that occurs during a male hormonal puberty. As with women who have CAIS, there is no basis to assume that these transgender girls have any athletic advantage simply by virtue of their chromosomes.

West Virginia's expert, Dr. Gregory Brown, who is not a medical doctor, has testified in legislatures

around the country in favor of similar bans. J.A. 2246-48, 3169. Dr. Brown claimed that prepubertal boys have a biological athletic advantage over prepubertal girls "in almost all sports." J.A. 3202, 3176-77. Dr. Brown insisted those advantages are based on biology and persist for transgender girls and women even when they receive puberty-delaying medication and gender-affirming hormones. J.A. 2145-73. But Dr. Brown admitted during deposition that he drafted his expert report by selectively quoting from portions of articles to support his position while ignoring portions of the same articles that conflicted with it. *See* J.A. 2401 (testifying that he omitted reference to a "key point" in a consensus statement because "I disagree with that key point" and "I cited the information that I agree with"); *see also* J.A. 3167-68, 3173-74, 3179-81, 3191-95 (collecting examples of Dr. Brown cherry picking quotes).

In rebuttal, B.P.J.'s expert explained there is no reliable basis for attributing small differences in athletic performance between prepubertal cisgender boys and cisgender girls to biology instead of social factors such as greater societal encouragement of athleticism in boys or greater opportunities for boys to play sports. J.A. 1618. To the extent that performance differences are influenced by social factors, the experience of transgender girls may be closer to the experiences of cisgender girls than to cisgender boys. J.A. 1619. No studies purport to draw a causal connection between those differences in performance and exposure to hormones in utero or during infancy. *Id.* And if differences in performance were shown to have such a connection, those biological factors are not necessarily true for transgender girls in light of potential connections between hormone exposure and

transgender status. *Id.* For example, even before initiating hormone therapy, transgender women tend to have lower bone density than cisgender men. *Id.*; *see also* J.A. 3184-85.

In January 2023, the district court granted summary judgment for West Virginia and dissolved the preliminary injunction without resolving the pending *Daubert* motions or determining whether there was a triable question of fact regarding whether transgender girls like B.P.J. have any inherent athletic advantage compared to cisgender girls. Pet. App. 75a. The district court reasoned that "barring medical intervention," transgender girls "would undergo male puberty like other biological males. And biological males generally outperform females athletically." Pet. App. 92a. According to the district court, that generalization was enough to sustain the ban for transgender girls like B.P.J. who *do* have medical intervention and do *not* undergo male hormonal puberty.

3. Injunction Pending Appeal

The district court's summary judgment ruling came shortly before B.P.J.'s seventh-grade spring track-and-field season in 2023. J.A. 4272. B.P.J. was "devastated" when she heard about the summary judgment ruling. *Id.* She "cried for the entire night," because she "was terrified about not being able to continue doing the thing that she loves with her friends." *Id.*

Because the district court's ruling dissolved the injunction that had long been in place, B.P.J. sought emergency relief from the Fourth Circuit, which granted an injunction pending appeal. J.A. 4347. This

Court then denied an application to lift the injunction. *See West Virginia v. B.P.J.*, 143 S. Ct. 889 (2023).

Because of the injunction, B.P.J. continued participating on the girls' track-and-field team as a seventh grader. J.A. 4407. Once again, she was too slow to compete in running events, so she continued to focus on shot put and discus. *Id.* Over the course of the season, after practicing for hours after school and on weekends to work on her throwing form, B.P.J. began to improve. *Id.* B.P.J.'s mother is "so proud of how hard B.P.J. has been training." *Id.* When she looks outside her window, B.P.J.'s mother "often see[s] B.P.J. in the backyard practicing her throwing form, by herself, for hours." *Id.*

In July 2023, West Virginia asked the Fourth Circuit to lift the injunction pending appeal. CA4 ECF 142. Though B.P.J. has never experienced any increase in testosterone, West Virginia sought to paint B.P.J.'s improvement across seasons as anomalous and attributable to her sex assigned at birth. CA4 ECF 142-1 at 12. But, as B.P.J. explained, if being transgender were the key to her success, that would presumably have been reflected in her performance the previous year too. B.P.J. also explained that West Virginia had presented the data in a misleading manner to inflate B.P.J.'s relative improvement compared to other girls. *See* CA4 ECF 144-1 at 15-18 (illustrating how West Virginia altered time horizons when comparing different girls).

The Fourth Circuit denied West Virginia's motion, expressing skepticism that "a young athlete's ordinary, year-over-year athletic improvement is the sort of significant factual development" that warrants lifting the injunction. J.A. 4413-14. The court also

noted that West Virginia had presented no reason why B.P.J.'s improvements in shot put and discus would plausibly justify excluding her from running cross-country too. J.A. 4414.[4]

4. Fourth Circuit Opinion

In April 2024, the Fourth Circuit vacated in part and reversed in part the district court's judgment. For B.P.J.'s equal protection claim, the Fourth Circuit held that the district court granted summary judgment prematurely because there remained a disputed question of fact with respect to whether transgender girls like B.P.J., who never go through endogenous puberty, have any meaningful athletic advantages compared to cisgender girls. Pet. App. 34a-35a. The Fourth Circuit remanded the case for the district court to resolve the pending *Daubert* motions and determine whether a trial is ultimately necessary to resolve that question. Pet. App. 35a.

For the Title IX claim, the Fourth Circuit reversed the grant of summary judgment to West Virginia and remanded with instructions to "enter summary judgment for B.P.J. and conduct remedial proceedings." Pet. App. 38a. The court explained that discrimination against transgender students is discrimination "on the basis of sex" under Title IX. Pet. App. 39a. In light of B.P.J.'s social transition, name

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[4] West Virginia gives the misimpression that it presented the Fourth Circuit with a declaration from another student, A.C. *See* Pet'rs Br. 13. But A.C.'s declaration was not submitted in B.P.J.'s case. Instead, after the Fourth Circuit issued its opinion, the Alliance Defending Freedom filed A.C.'s declaration in unrelated litigation in a different court where B.P.J. was not a party. *See* Decl. of A.C., *Tennessee v. Cardona*, No. 24-cv-072 (E.D. Ky. May 3, 2024), ECF No. 21-5.

change, identity documents, and medical treatments, the Fourth Circuit concluded that "offering B.P.J. a 'choice' between not participating in sports and participating only on boys['] teams is no real choice at all." *Id.* Excluding B.P.J. from girls' teams was "effectively 'exclud[ing]' her from 'participation in' all non-coed sports entirely," in violation of Title IX. Pet. App. 41a.

Judge Agee dissented. He disagreed that the statute facially discriminated based on transgender status but agreed it was subject to heightened scrutiny as a sex classification. Pet. App. 51a. For both the Title IX and equal protection claims, Judge Agee viewed the majority as holding "that B.P.J. is similarly situated to biological girls based on B.P.J.'s gender identity alone." Pet. App. 49a; *accord* Pet. App. 57a.

5. Proceedings on Remand

On remand, the district court entered judgment *sua sponte* in favor of B.P.J. on the Title IX claim, including declaratory relief, nominal damages, and a permanent injunction. J.A. 4419-20. The court also issued a scheduling order for additional summary-judgment proceedings on the equal protection claim. J.A. 4421. But West Virginia asked the district court to stay proceedings while West Virginia pursued an interlocutory petition for certiorari. J.A. 4424. On July 3, 2025, this Court granted review.

SUMMARY OF THE ARGUMENT

1. The Court should ignore West Virginia's contested factual claims and evidence from outside the summary-judgment record. West Virginia's merits brief is filled with citations to disputed expert testimony that is subject to a pending *Daubert*

challenge, references to events that occurred after the summary-judgment record closed, and documents that have never been disclosed in discovery or submitted to the courts below. Having made the decision to seek certiorari in an interlocutory posture without supplementing the record in the district court, West Virginia must defend the statute based on the record as it stands.

2. On the merits, the Fourth Circuit properly held that H.B. 3293's categorical exclusion violates Title IX as applied to B.P.J. Title IX declares that "[n]o 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." 20 U.S.C. § 1681(a).

Excluding B.P.J. from girls' sports teams because she is a girl who is transgender is differential treatment of a "person" "on the basis of sex" under Title IX. By referring to any "person," Title IX's text focuses on individuals, not groups. And by using the phrase "on the basis of," Title IX's text establishes a "but-for causation" standard. As in *Bostock*, these two "key drafting choices" compel the conclusion that treating a student differently because they are transgender inherently entails differential treatment of a "person" "on the basis of sex." 590 U.S. at 680, 695.

Here, H.B. 3293's categorical exclusion of B.P.J. from girls' sports teams not only treats B.P.J. differently—it treats her *worse*. The real social impact of excluding B.P.J. from participating on girls' teams is that she is excluded from school athletics entirely. B.P.J. has lived and been recognized as a girl since she was eight. Being forced to participate on the boys'

team would "countermand her social transition, her medical treatment, and all the work she has done with her schools, teachers, and coaches for nearly half her life." Pet. App. 41a. And there are virtually no co-ed teams, so B.P.J.'s options are the girls' team or nothing.

Title IX's regulations do not authorize B.P.J.'s complete exclusion from the entire athletic program. In the athletics context, Congress authorized some differential treatment on the basis of sex in the form of "reasonable provisions considering the nature of particular sports," Pub. L. 93-380, § 844, 88 Stat. 612 (1974). But athletics are still educational programs, and construing the regulations to implicitly authorize the wholesale exclusion of transgender girls like B.P.J. from athletics, even in "no cut" or intramural teams and even when there is no connection to fairness or safety, would bring the regulations into conflict with Title IX itself.

3. The Fourth Circuit also properly determined that West Virginia is not entitled to summary judgment on B.P.J.'s equal protection claim based on the current record. H.B. 3293 is subject to heightened scrutiny because the ban facially classifies based on sex and transgender status and because it was enacted, at least in part, for the purpose of excluding transgender girls from school sports. Classifications based on transgender status—no less than classifications based on sex or "illegitimacy"—have all the characteristics warranting heightened review.

As applied to B.P.J., H.B. 3293 fails heightened scrutiny if disputed material facts are viewed in her favor. Excluding transgender girls who have no physiological characteristics relevant to athletic

advantage does not advance West Virginia's asserted interest in protecting equal athletic opportunity. And West Virginia also fails to show a substantial "fit" between its stated goals and the categorical exclusion of B.P.J. from school athletics. Indeed, the breadth of the exclusion demonstrates that West Virginia's real objection is to transgender girls' mere presence on a team with cisgender girls. Exclusion for exclusion's sake is not a legitimate governmental interest, much less an important one.

ARGUMENT

I. THE COURT SHOULD IGNORE WEST VIRGINIA'S CONTESTED FACTUAL CLAIMS AND EXTRA-RECORD EVIDENCE.

"[T]his Court must affirm or reverse upon the case as it appears in the record." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 n.3 (1986). West Virginia had ample opportunity to supplement the record on remand. But instead of expanding the summary-judgment record or litigating this case to trial in the ordinary course, West Virginia petitioned this Court for interlocutory review and moved to stay proceedings in the district court, thereby keeping the record firmly closed. Having made that decision—and having assured this Court that outstanding factual disputes were "irrelevant" and "beside the point," Pet. Reply 8—West Virginia must defend the statute based on the record as it currently stands.

West Virginia's merits brief does not even try to complete that assignment. Instead, West Virginia's brief is built on disputed expert testimony, events that occurred after the summary-judgment record closed, and documents that have never been disclosed in

discovery or submitted to the courts below. None of these materials is properly before the Court.

First, and most prominently, West Virginia repeats the disputed assertion that even transgender girls who do not go through endogenous male puberty have innate biological advantages over cisgender girls. Pet'rs Br. 9, 35, 45. For support, West Virginia relies not only on Dr. Brown's expert report, which is still subject to a pending *Daubert* motion, but also on materials developed in 2022 through 2025—after the record before the courts below closed. Pet'rs Br. 6-9, 12-14, 35.

This alleged new evidence suffers from the same flaws as Dr. Brown's testimony below, as recounted in the pending *Daubert* motion. J.A. 3165. While some studies purport to document small differences in athletic performance between cisgender boys and girls before puberty, no evidence establishes that those small differences are attributable to innate biological factors as opposed to social ones or that those differences also exist for prepubertal girls who are transgender. *See Doe v. Horne*, 683 F. Supp. 3d 950, 965-67 (D. Ariz. 2023)*, aff'd*, 115 F.4th 1083 (9th Cir. 2024), *petition for cert. filed*, Oct. 22, 2024 (No. 24-449); Sandra K. Hunter et al., *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine,* 55 Med. & Science in Sports & Exercise 2328, 2337-38 (2023).

Second, West Virginia relies on B.P.J.'s athletic performance during post-season competition in spring 2024 and spring 2025 *after* the Fourth Circuit issued its decision. Pet'rs Br. 13-14. West Virginia asserts there is something anomalous about B.P.J.'s

performance, but that is a proper subject for factfinding and expert testimony, not untested speculation in briefing before this Court. Notably, B.P.J.'s performance in shot put and discus is not outside the range of other girls. When B.P.J. competed in state championships as a ninth grader (Pet'rs Br. 14), a different ninth-grade girl who is not transgender outperformed B.P.J. in both of B.P.J.'s events, and four ninth-grade girls (including B.P.J.) were in the top ten for discus. *See* WVSSAC Track Championship 2025 (May 23-24, 2025), https://perma.cc/A3G8-8J53. And, as the record reflects, B.P.J. remains a below-average runner at best.

Third, West Virginia points to instances where governing bodies for elite sports have adopted new rules that exclude transgender women from competing in women's events as evidence of an ostensible consensus in favor of exclusion. Pet'rs Br. 2, 8, 9. But most of the cited changes were compelled by the Trump administration's enforcement of Executive Order 14201, 90 Fed. Reg. 9,279 (Feb. 11, 2025), not by new scientific evidence.[5] Indeed, a 2023 study of transgender athletes by the Olympics organization demonstrated that transgender women are actually at a competitive disadvantage compared to cisgender women athletes in key areas. Blair Hamilton et al.,

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[5] *See* NCAA, *NCAA Announces Transgender Student-Athlete Participation Policy Change* (Feb. 6, 2025), https://perma.cc/5HMB-4GXA; Seb Starcevic, *US Olympic Committee Bans Transgender Athletes after Trump Order*, Politico (July 22, 2025), https://perma.cc/6RH8-L6WY; Alan Blinder, *Penn Agrees To Limit Participation of Transgender Athletes*, N.Y. Times (July 1, 2025), https://perma.cc/378L-HNQK.

Strength, Power and Aerobic Capacity of Transgender Athletes: A Cross-Sectional Study, 58 British J. Sports Med. 586 (2024). Meanwhile, leading organizations dedicated to supporting women and girls in athletics oppose laws and policies that categorically exclude transgender girls and women. *See* NWLC Amicus. According to these organizations, bans like West Virginia's harm not only transgender people but cisgender girls and women too.

These factual disputes are a reason to affirm the court of appeals, not to reverse it. A court's job at the summary-judgment stage "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (citation modified). But as the Fourth Circuit correctly recognized, that task has not yet been done because the district court has not determined which expert reports are admissible under *Daubert*. Pet. App. 34a-36a. If West Virginia has new evidence to consider at the summary-judgment stage, the district court is the proper forum for it.[6]

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[6] West Virginia also alludes to allegations of harassment made by another student, A.C., in unrelated litigation not involving B.P.J. *See* Pet'rs Br. 14. B.P.J. categorically denies A.C.'s allegations, and counsel for the Harrison County school district has advised B.P.J. in writing that the district investigated the allegations reported to the school by A.C. and found them to be unsubstantiated. (Copy on file with counsel.) If West Virginia believed these allegations were relevant to the issues before this Court, it should have supplemented the record at the district court, which would have provided B.P.J. an opportunity to refute them.

West Virginia likewise cannot circumvent the rules of civil procedure via *amicus* briefs or citations to cherry-picked studies outside the record. The conflicting briefs filed in support of both sides illustrate the need for factfinding to separate advocacy from evidence. "Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery." *Sykes v. United States*, 564 U.S. 1, 31 (2015) (Scalia, J., dissenting).

The Court should affirm based on the existing record so the case can be remanded for further proceedings as the Fourth Circuit directed.

II. AS APPLIED TO B.P.J., H.B. 3293 VIOLATES TITLE IX.

Title IX provides that "[n]o 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." 20 U.S.C. § 1681(a). Both elements of the statute are satisfied here. The categorical prohibition on transgender girls participating on girls' teams is an exclusion "on the basis of sex." And, as applied to B.P.J., that categorical ban is "discrimination" that treats B.P.J. worse than her peers and completely "exclude[s] [her] from participation in" and "denie[s] [her] the benefits of" the school's entire athletic program.

Title IX's regulations do not authorize H.B. 3293's discrimination against B.P.J. Congress passed a

separate statute, known as the Javits Amendment, to provide federal agencies with added flexibility to implement Title IX's prohibition on discrimination in the context of athletics with "reasonable" regulations that ensure overall athletic equality for all students. Pub. L. 93-380, § 844, 88 Stat. 612 (1974). In the absence of any connection to fairness or safety, excluding B.P.J. from every girls' sports team does not reasonably implement Title IX's prohibition on discrimination. It unreasonably *inflicts* discrimination in violation of both the Javits Amendment and Title IX itself.[7]

A. Discrimination Against Transgender Students Is Discrimination "On the Basis of" Sex.

1. Title IX prohibits discrimination against any "person . . . on the basis of sex." By referring to any "person," Title IX's text focuses on individuals, not groups. And by using the phrase "on the basis of," Title IX's text denotes "a but-for causation standard." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 335 (2020).

In *Bostock*, this Court held that Congress's use of the same two "key drafting choices" in Title VII—"to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's

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[7] In accordance with the Fourth Circuit's remand for further "remedial proceedings" on B.P.J.'s Title IX claim, Pet. App. 38a, the resolution of outstanding factual disputes about whether transgender girls like B.P.J. have any physiological advantages can be taken into account in crafting the scope of an appropriate injunction for B.P.J.

injuries"—compelled the conclusion that discrimination based on transgender status is discrimination "because of [an] individual's . . . sex" under Title VII. 590 U.S. at 680.

The same reasoning should apply to Title IX's "materially identical" terms. *See Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 302 (2023) (Gorsuch, J., concurring). Indeed, the Court has long construed Title VII and Title IX in harmony. After *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), held that sexual harassment by an employer is a form of sex discrimination under Title VII, this Court had no trouble concluding in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992), that "the same rule should apply when a teacher sexually harasses and abuses a student" under Title IX. And after *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998), held that sex-based harassment between co-workers violates Title VII, this Court also concluded in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999), that "student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under" Title IX. The Court should follow the same path here.[8]

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[8] West Virginia states that "Title VII 'is a vastly different statute' from Title IX." Pet'rs Br. 29 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005)). Of course there are *other* differences between Title VII and Title IX. But none of those differences relates to the "key drafting choices" that drove the decision in *Bostock*. *Cf. SFFA*, 600 U.S. at 302 (Gorsuch, J., concurring) (applying *Bostock* to Title VI, which was the template for Title IX).

To be sure, *Bostock* declined to address whether its "decision will sweep beyond Title VII to other federal . . . laws that prohibit sex discrimination." 590 U.S. at 681. *See* Pet'rs Br. 30. And some lower courts have relied on that caveat to hold that *Bostock*'s reasoning applies only to Title VII. But that "mistakes the reservation of a question with its answer." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). The fact that a precedent reserves questions for another day does not mean the precedent is irrelevant in answering those questions once another day arrives. *Cf. Borden v. United States*, 593 U.S. 420, 432-33 (2021) (plurality) (explaining that although a prior decision "reserved the question we decide today, its reasoning all but precludes the Government's answer"). The plain meaning of settled legal terms cannot be treated as "mood rings" that "change their message from one moment to the next." *SFFA*, 600 U.S. at 302 (Gorsuch, J., concurring).

Like an employer who fires employees for being transgender, a school administrator who discriminates against students for being transgender "must intentionally discriminate against individual [students] in part because of sex." *Bostock*, 590 U.S. at 662. That is what Title IX's plain terms prohibit—"and that should be the end of the analysis." *Id.* (citation modified).[9]

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[9] As in *Bostock*, Title IX prohibits discrimination against transgender people even assuming "for argument's sake" that sex refers to "biological sex" as defined by West Virginia. 590 U.S. at 655, 679. But that does not mean West Virginia's definition is correct. Indeed, "[s]ex is such a complex subject that any invocation of plain meaning is apt to misfire." *A.C. by M.C. v.*

2. West Virginia's contrary arguments lack merit. West Virginia contends that (a) Title IX focuses on discrimination between groups, not individuals, and (b) Title IX imposes liability only when sex is the sole cause of adverse treatment. Neither of those claims withstands scrutiny.

To support its claim that Title IX focuses on equality between groups instead of individuals, West Virginia cites statutory exceptions for things like mother-daughter activities and scouting organizations. Pet'rs Br. 22-23. But that gets it backwards. The exceptions were added in 1974 and 1976 because the original text of Title IX would have otherwise prohibited those activities, an outcome Congress wanted to avoid. *See* Joint Resolution, Pub. L. No. 93-568, § 3(a), 88 Stat. 1862 (1974); 120 Cong. Rec. 39,991-94 (1974); An Act To Extend the Higher Education Act of 1965, Pub. L. No. 94-482, Title IV, § 412(a), 90 Stat. 2234 (1976); 122 Cong. Rec. 27,979-87 (1976). Congress's adoption of these "specific, narrow exceptions" to Title IX's "broadly written general prohibition on discrimination," *Jackson*, 544 U.S. at 175, demonstrates that other exceptions, like

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Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 775 (7th Cir. 2023) (Easterbrook, J., concurring in the judgment), *cert. denied*, 144 S. Ct. 683 (2024). The dictionary definitions of "sex"—both in 1972 and today—include more than just biology. *See id.* at 770 (majority). And even the definitions related to the biological aspects of sex include more than reproduction and genetics. "Narrow definitions of sex do not account for the complexity of the necessary inquiry." *Id.*

those urged by the State, "are not to be implied," *Hillman v. Maretta*, 569 U.S. 483, 496 (2013).[10]

To support its claim that Title IX requires more than "but for" causation, West Virginia asserts that the phrase "on the basis of sex" uses the definite article "the," which indicates that sex must be "the" cause rather than just "a" cause. Pet'rs Br. 19-20. But West Virginia does not cite any precedent interpreting "on the basis of" to require "sole causation" and ignores this Court's precedent in *Comcast*, which says that "on the basis of" connotes a but-for standard instead. 589 U.S. at 335. Title VII itself uses the phrases "because of" and "on the basis of" interchangeably. *See* 42 U.S.C. §§ 2000e(k), 2000e-2(b), (e). So does this Court's opinion in *Bostock*. *See* 590 U.S. at 650, 654, 664. West Virginia gives no plausible reason to assign the same phrase a radically different meaning here. *Cf. SFFA*, 600 U.S. at 302 (Gorsuch, J., concurring).

In any event, this Court's "insistence on but-for causality has not been restricted to statutes using the term 'because of.'" *Burrage v. United States*, 571 U.S. 204, 213 (2014). Rather, "it is one of the traditional background principles against which Congress legislates." *Id.* at 214 (citation modified); *accord Comcast*, 589 U.S. at 332. *Bostock* did not create a bespoke but-for causation test applicable exclusively for Title VII. *Contra Tennessee v. Cardona*, No. 24-

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[10] West Virginia asserts that 20 U.S.C. § 1686's provision authorizing sex-separated living facilities is not an "exception" to Title IX. But the provision begins with the clause, "Notwithstanding anything to the contrary contained in this chapter," which indicates that the provision "operates as an exception." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 379 (2018).

5588, 2024 WL 3453880, at *3 (6th Cir. July 17, 2024). It expressly applied the "'simple' and 'traditional' standard of but-for causation" used throughout antidiscrimination law. *Bostock*, 590 U.S. at 656.

Congress knows how to create a "sole causation" standard when it wants to. Just one year after passing Title IX, Congress passed Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an otherwise qualified individual "solely by reason of his [disability]." Rehabilitation Act of 1973, Pub. L. 93-112, Title V, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. § 794); *see also Bostock*, 590 U.S. at 656 (collecting other examples). Congress did not include a similar limitation in Title IX, and it is not the role of the Court to add words to the statute that Congress chose to leave out.[11]

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[11] West Virginia notes that 20 U.S.C. § 1689(a)(6) specifically refers to consideration of transgender status, which (according to West Virginia) implies that Congress knew how to refer to transgender people explicitly. Pet'rs Br. 19. Congress enacted this provision in 2022 to create a joint interagency task force on sexual violence in education. Although codified near Title IX, the 2022 legislation is not part of Title IX and did not purport to amend the statute. *See* Violence Against Women Act Reauthorization Act of 2022 and the Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 936 (Mar. 15, 2022). Among other things, § 1689(a)(6) instructs the newly created task force to provide "recommendations on culturally responsive and inclusive approaches to supporting survivors, which include consideration of compounding factors," including, race, religion, and transgender status. Far from helping West Virginia, the statute confirms that Congress in 2022 understood that Title IX encompasses discrimination, not only when sex is the sole cause, but also when other "compounding factors" are present.

Retreating from the statute's text, West Virginia asserts more generally that Title VII and Title IX are different because sex is "irrelevant" when it comes to employment, but relevant when it comes to sports. Pet'rs Br. 17, 21, 30. That argument again confuses the exceptions to the general rule with the rule itself. Title VII has an exception recognizing that sex can sometimes be relevant to employment if it meets the standard of a "bona fide occupational qualification." *See* 42 U.S.C. § 2000e-2(e). That exception does not undermine the general rule that sex is otherwise irrelevant. It confirms it.

So too with Title IX. As a general matter, Title IX establishes that sex is irrelevant to a person's ability to pursue an education, enroll in AP calculus, join the school newspaper, or take "shop" instead of "home economics." The statute contains some exceptions, but the general default rule is *against* sex separation, not *in favor* of it. "Title IX was developed, in part, to abolish most single-sex programs and classes not only because these programs typically reinforce stereotypes about males and females, but also because, with very rare exceptions, single-sex programs and classes in public schools almost always shortchange girls." Bernice Sandler, *Title IX: How We Got It and What a Difference it Made*, 55 Cleveland State L. Rev. 473, 488 (2007).[12]

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[12] Title IX's status as a Spending Clause statute does not alter the analysis. West Virginia waived reliance on *Pennhurst* at the Fourth Circuit, Pet. App. 43a, and this Court should not be the first to address the argument. *See Stanley v. City of Sanford*, 145 S. Ct. 2058, 2071 (2025). Regardless, *Pennhurst*—and the common law of contracts on which it relies—does not nullify

B. H.B. 3293 Subjects B.P.J. to "Discrimination."

1. Title IX "does not concern itself with everything that happens because of" sex. *Cf. Bostock*, 590 U.S. at 657 (citation modified). The statute prohibits only sex-based distinctions that "subject[]" a person "to discrimination" or otherwise "exclude[]" a person "from participation in" or "den[y]" a person "the benefits of" an educational program or activity. 20 § U.S.C. 1681(a). The term "discrimination" typically refers to "differences in treatment that injure" individuals by "treat[ing] [a] person worse because of sex or other protected trait[s]." *Muldrow v. City of St. Louis*, 601 U.S. 346, 354 (2024) (citation modified); *accord* Pet'rs Br. 18, 20. And "[t]he statute's other prohibitions" regarding exclusion from participation and denial of benefits "help give content to the term 'discrimination' in this context." *Davis*, 526 U.S. at 650.

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unanticipated applications of clear statutory text. *Cf. SFFA*, 600 U.S. at 302 (Gorsuch, J., concurring) (applying *Bostock* to Title VI). "[I]t is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150 (2009). Indeed, Title IX covers sexual harassment even though "[w]hen Title IX was enacted in 1972, the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis*, 526 U.S. at 663-64 (Kennedy, J., dissenting). Instead of artificially narrowing the plain statutory text, this Court has enforced *Pennhurst* by confining liability for damages under Title IX to acts of intentional discrimination, as opposed to vicarious liability. *Compare Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998), *with Davis*, 526 U.S. at 643.

Discrimination under Title IX occurs when sex-based conduct "effectively denie[s] equal access to an institution's resources and opportunities." *Id.* Establishing an effective denial does not require the plaintiff to show a literal "physical exclusion." *Id.* Whether such discrimination has occurred is instead based on "[t]he real social impact" of a particular action and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale*, 523 U.S. at 81-82; *see Davis*, 526 U.S. at 641 (adopting *Oncale* standard for purposes of Title IX).

Under that test, H.B. 3293 subjects B.P.J. to discrimination because it "effectively denie[s]" her "equal access to" the "resources and opportunities" of school. Title IX applies to school athletics precisely because "athletics constitute an integral part of the educational processes of schools and colleges." 40 Fed. Reg. 24,128, 24,134 (June 4, 1975). And H.B. 3293 is an exclusion from the entire athletic program. The ban is not limited to particular sports. Nor is it limited to high levels of competition, such as post-season championships or varsity sports. It applies to everything from team practices to intramural games to statewide competitions. And if a transgender girl is excluded from the girls' team in West Virginia, there are virtually no co-ed teams for her to join.[13]

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[13] West Virginia misleadingly asserts that boys' teams are effectively co-ed because any student may participate on them. In reality, WVSSAC's regulations prohibit cisgender girls from participating on boys' teams if a girls' team is available. J.A. 4094. The only "co-ed" team is cheerleading, and the other nominally co-ed teams are actually boys' teams in football,

"[C]onsidering all the circumstances," the "real social impact" of forcing B.P.J. to participate on a boys' team would be to deny her any participation at all. *See Oncale*, 523 U.S. at 81-82. B.P.J. has lived and been known as a girl since fourth grade. She is recognized as a girl at school. She has legally changed her name, and her birth certificate recognizes her as female. Not only has B.P.J. never gone through a typical male puberty, but she also takes estrogen, ensuring that she has experienced the physiological and musculoskeletal changes typical of other girls. Forcing her to play on a boys' team would be isolating, stigmatizing, and publicly humiliating. J.A. 449-50, 553, 4272-73. "Exclusion and isolation are harmful for all adolescents, but particularly so for transgender youth who face the additional burden of societal stigma." J.A. 2837. Under all the facts, "offering B.P.J. a 'choice' between not participating in sports and participating only on boys['] teams is no real choice at all." Pet. App. 41a.

In dismissing these harms to B.P.J., West Virginia fails to consider the exclusion from the perspective of a reasonable person in her shoes. *Cf.* Transcript of Oral Argument at 15:2-6, *Bostock v. Clayton County*, No. 17-1618 (Gorsuch, J.) ("[T]here are male and female bathrooms, there are dress codes that are otherwise innocuous, right, most—most people would find them innocuous. But the affected communities will not. And they will find harm."). West Virginia's assertion that B.P.J. could participate on the boys' team "is analogous to claiming [lesbian and gay]

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baseball, wrestling, and golf, which become de facto co-ed on the rare occasion that a girl participates. J.A. 4039.

individuals . . . could marry someone of a different sex." *Hecox v. Little*, 479 F. Supp. 3d 930, 984 (D. Idaho 2020). This Court rejected that argument, recognizing that for lesbians and gay men who seek to participate in the institution of marriage, "same-sex marriage is their only real path to this profound commitment." *Obergefell v. Hodges*, 576 U.S. 644, 658 (2015).

The same is true here. Participating on girls' teams is the "only real path" available to B.P.J. She cannot participate on boys' teams; it would "countermand her social transition, her medical treatment, and all the work she has done with her schools, teachers, and coaches for nearly half her life." Pet. App. 41a.[14]

2. Title IX's athletic regulations do not change the result. Pursuant to a special statutory delegation, the regulations establish a group-based method for measuring discrimination in the unique context of athletics. For cisgender students, the regulations reasonably implement Title IX by allowing differential treatment of individual boys and girls to ensure overall equal opportunity for boys and girls as groups. But construing the regulations to authorize the wholesale exclusion of transgender girls like B.P.J.

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[14] It is no response to say that B.P.J.'s inability to participate on the boys' team does not violate Title IX because it is caused by her gender identity, not her sex. *See* U.S. Br. 23 n.3. B.P.J.'s exclusion occurs "because of the confluence of two factors," her sex assigned at birth and her gender identity, but "[o]ften in life and law two but-for factors combine to yield a result." *Bostock*, 590 U.S. at 671-72. Her sex assigned at birth does not have to be "the only factor [causing harm], or maybe even the main factor, but [if] it [i]s one but-for cause," then "that [i]s enough." *Id.* at 667.

would not reasonably implement Title IX's prohibition on discrimination and would bring the regulations into conflict with Title IX itself.

Title IX's athletic regulations are governed by the Javits Amendment. Two years after Title IX's initial passage, Congress voted down proposals to exempt athletics from Title IX and instead passed a separate statute, known as the Javits Amendment, to provide greater flexibility in applying Title IX in the athletics context. The statute delegates responsibility to the U.S. Department of Health Education and Welfare ("HEW") to adopt regulations "implementing Title IX," including "reasonable provisions considering the nature of particular sports." Pub. L. 93-380, § 844, 88 Stat. 612.[15]

Using the flexibility provided by the Javits Amendment to adopt "reasonable provisions," HEW promulgated athletic regulations with three major elements. First, the regulations generally prohibit schools from providing "athletics separately" on the basis of sex. 34 C.F.R. § 106.41(a). Second, the regulations state that schools "may" (but need not) "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b). Third, the regulations require that however a school structures its athletic program—whether through co-ed teams, sex-

[15] Although the statute's text references only "intercollegiate athletics," courts have deferred to HEW's reliance on the Javits Amendment for middle-school and high-school sports too. *See, e.g.*, *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290-91 (2d Cir. 2004).

separated teams, or a combination of both—the school must provide "equal athletic opportunity to members of both sexes." 34 C.F.R. § 106.41(c). Finally, a longstanding "policy interpretation" adopted by HEW in 1979 sets forth detailed standards for measuring equal athletic opportunity under which "identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible." 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

The regulations take a unique approach to implementing Title IX because they protect "equal athletic opportunity" by comparing overall athletic opportunities for boys and girls as groups. Outside the context of athletics, Title IX prohibits unequal treatment of individuals on the basis of sex even when "motivated by a wish to achieve classwide equality." *Bostock*, 590 U.S. at 663-64. But, pursuant to the Javits Amendment, HEW concluded that, in the unique contexts of sports, "the rights of individuals [are] protected" adequately under the group-based approach because "[i]f women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby." *Id.* at 71,421.

For cisgender athletes, the regulation's "group based" approach for assessing discrimination is a "reasonable provision[]" for providing equal athletic opportunity while still allowing for sex-separated teams. *See, e.g.*, *Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7th Cir. 1994) (upholding group-based model and allowing school to eliminate men's swim team while retaining women's swim team). A cisgender boy who is excluded from the girls' team in a particular sport has

an equal overall set of athletic opportunities available to him, and his exclusion from the girls' team is consistent with the goal of providing equal athletic opportunities for everyone to participate in school athletics.

But that is not true when transgender girls like B.P.J. are excluded from all girls' teams under H.B. 3293. As already explained, when B.P.J. is excluded from girls' teams she is treated worse because she does not have a comparable set of overall athletic opportunities available to her; she has none. And there remains a disputed question of fact with respect to whether transgender girls like B.P.J. have any athletic advantages implicating fairness or safety. Excluding transgender girls even when there is no connection to fairness and safety harms transgender students while doing nothing to promote equal opportunity overall.

The athletics regulations were adopted to implement Title IX's prohibition on discrimination, not to undermine it. The Javits Amendment provides added flexibility to implement Title IX's prohibition on discrimination with "reasonable" regulations on participation that ensure overall athletic equality for all students. But excluding transgender girls like B.P.J. even when there are no relevant physiological differences bearing on safety or fairness between them and cisgender girls is manifestly *un*reasonable. Construing the athletics regulations to authorize such

an exclusion would bring the regulations into conflict with both the Javits Amendment and Title IX itself.[16]

3. In resisting the conclusion that B.P.J. has suffered discrimination prohibited by Title IX, West Virginia offers two arguments.

First, West Virginia argues it can exclude B.P.J. from girls' teams because the statute and regulations' reference to "sex" means "biological sex." *But see supra* at 26 n.9. But the lawfulness of H.B. 3293 does not depend on whether it has accurately or inaccurately defined "sex." It depends on whether H.B. 3293 subjects B.P.J. to "discrimination" or otherwise "den[ies] her the benefits of" or "exclude[s] her from participation in" an educational program, 20 U.S.C. § 1681(a), and whether doing so is a "reasonable provision[] considering the nature of particular sports," Pub. L. 93-380, § 844, 88 Stat. 612. Regardless of how West Virginia chooses to define "sex" for purposes of sex-separated teams, it cannot structure its athletic program to exclude transgender students who fall outside that definition even when they have no athletic advantage and their participation does not implicate fairness or safety.

Nor is there any inherent conflict between including transgender girls on girls' teams and providing equal athletic opportunity to cisgender girls. West Virginia argues that including even a single

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[16] The Fourth Circuit remanded with instructions to grant summary judgment to B.P.J. and to conduct "remedial proceedings." Pet. App. 38a. As previously discussed, *see supra* at 24 n.7, outstanding factual disputes about the existence (or non-existence) of athletic advantage can be taken into account in determining the proper scope of injunctive relief.

transgender girl on a girls' team—regardless of how well she performs and regardless of whether there are even competitive team tryouts—inherently denies an athletic opportunity to a cisgender girl. *See* Pet'rs Br. 11 (arguing that B.P.J.'s mere participation on "no cut" cross-country team "displaced" cisgender girls). But the regulations recognize that equal athletic opportunity can be provided in multiple ways, not solely through sex-separated teams. *See* NWLC Amicus. Merely participating on the same team as someone with a male sex assigned at birth does not *ipso facto* constitute a denial of athletic opportunity.[17]

Second, West Virginia argues that even if B.P.J. is harmed by the statute, that harm does not constitute "discrimination" because discrimination entails disparate treatment only between people who are "similarly situated." Pet'rs Br. 20-21, 27-28. And West Virginia says a transgender girl is similarly situated to a cisgender boy, not a cisgender girl.

Neither Title VII nor Title IX imposes a free-standing "similarly situated" requirement when a

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[17] West Virginia assumes that in the 1970s it was universally understood that sports would be separated based on what West Virginia refers to as "biological sex." But there is reason to doubt whether that is "really true." *Bostock*, 590 U.S. at 676. Two years after Title IX's regulations were issued, Renée Richards won the legal right to compete in the women's division of the U.S. Open Tennis Championship as a transgender woman under New York State's Human Rights Law. *See Richards v. U.S. Tennis Ass'n*, 93 Misc. 2d 713, 400 (N.Y. Sup. Ct. 1977). And she did so with the support of Billie Jean King, the founder of the Women's Sports Foundation. So "at least some people" in the 1970s did not share West Virginia's assumption that sex-separated teams for girls and women could not include girls and women who are transgender. *See Bostock*, 590 U.S. at 676.

policy explicitly classifies based on sex or there is otherwise direct evidence of discrimination. A "similarly situated" analysis comes into play only when there is no explicit sex classification, and "the absence of similarly situated individuals" is "simply a way of saying that the plaintiff failed at the first step to prove intentional discrimination" through indirect evidence. *SECSYS, LLC v. Vigil*, 666 F.3d 678, 689 (10th Cir. 2012) (Gorsuch, J.); *cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). But "circumstantial evidence" is unnecessary where, as here, "the challenged rule discriminates on its face." *SECSYS*, 666 F.3d at 689; *cf. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Imposing "atextual legal rules" like a freestanding "similarly situated" requirement would "distort the underlying statutory text, impose unnecessary burdens on litigants, and cause confusion for courts." *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 313 (2025) (Thomas, J., concurring).[18]

Moreover, even if a "similarly situated" requirement existed in the specific context of sex-separated sports teams, B.P.J. would satisfy it for the purpose of defeating summary judgment. West Virginia asserts that B.P.J. is not similarly situated to other girls because she has an innate competitive advantage. But that is the key disputed question of

[18] Nor did this Court impose a "similarly situated" requirement in *Bostock*. *Bostock* noted that "[t]o 'discriminate against' a person . . . would seem to mean treating that individual worse than others who are similarly situated." 590 U.S. at 657. But, as *Bostock* goes on to explain, Title VII declares that sex is irrelevant to employment, making men and women similarly situated as a matter of law. *Id.* at 660.

fact identified by the Fourth Circuit and left open under the district court's rulings.

B.P.J. is also not similarly situated to cisgender boys regardless of whether those boys have low testosterone. B.P.J. has not gone through endogenous puberty *at all* and has instead gone through a hormonal puberty typical of cisgender adolescent girls. J.A. 1261-62, 4266, 4270. Transgender girls in her position do not have the muscle mass, bone density, or hormone levels of boys, either before or after puberty. J.A. 1621-22.

West Virginia and its *amici* assert that, under the Fourth Circuit's logic, a cisgender boy would also be able to participate on a girls' team if he took puberty delaying medication and then received hormones to undergo a female hormonal puberty. *See* U.S. Br. 28 (speculating that "mediocre athletes in men's sports could make themselves standout athletes in women's sports by using [that] medical procedure"). Those assertions rest on a false premise. Some cisgender boys may have medical conditions requiring suppression of testosterone, but West Virginia does not—and cannot—identify any condition other than gender dysphoria that would warrant a birth-assigned male undergoing a female hormonal puberty. Nor is there evidence that any cisgender boy has ever attempted to do so or viewed female hormonal puberty as a desirable option for becoming a "standout athlete[]."

III. AS APPLIED TO B.P.J., H.B. 3293 VIOLATES EQUAL PROTECTION.

The Court should also affirm the Fourth Circuit's decision to remand for further proceedings on B.P.J.'s

equal protection claim. As the Fourth Circuit properly held, there remains a disputed question of material fact with respect to whether transgender girls in B.P.J.'s position have any inherent athletic advantages simply by virtue of their sex assigned at birth. And, if those facts are viewed in B.P.J.'s favor, as they must be in the current posture, then H.B. 3293 violates the Equal Protection Clause as applied to her.

A. H.B. 3293 Triggers Heightened Scrutiny.

1. West Virginia admits that H.B. 3293 "draws a sex-based classification" and must, therefore, be tested under "intermediate scrutiny." Pet'rs Br. 41-42.

2. The statute also independently discriminates based on transgender status. It provides that participation on girls' teams shall be based "solely" on a person's "reproductive biology and genetics at birth." W. Va. Code § 18-2-25d(a)(4), (b)(1). And it contrasts "biological sex" as distinct from "gender identity," which it says should have no relationship to school sports.

That is a facial classification based on transgender status. H.B. 3293 may not use the term "transgender," but the definition of a transgender person is someone whose gender identity differs from their sex assigned at birth. West Virginia "may not circumvent the Equal Protection Clause by writing in abstract terms." *United States v. Skrmetti*, 605 U.S. 495, 514 (2025); *see also id.* at 553 (Barrett, J., concurring) (recognizing that heightened scrutiny for transgender status implicates "eligibility for boys' and girls' sports teams"); *id.* at 565 (Alito, J., concurring in the judgment) (recognizing that expressing an "identity inconsistent with one's sex would appear to be the

natural result or consequence of being transgender") (citation modified).

Moreover, even if H.B. 3293 were deemed to be facially neutral, the law was unquestionably enacted "at least in part, because of, not in spite of," its effects on transgender girls. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 276 (1979). West Virginia already excluded cisgender boys from girls' teams. The undisputed purpose of the new legislation was to stop transgender girls from playing girls' sports. That constitutes discrimination based on transgender status regardless of whether legislators did so because of "animus" or for ostensibly benign reasons.[19]

3. By treating students differently based on transgender status, H.B. 3293 independently triggers heightened scrutiny. Transgender status satisfies all the criteria for a classification warranting heightened scrutiny. Transgender people (1) have historically been subject to discrimination; (2) have a defining characteristic that bears no relation to their ability to contribute to society; (3) are defined by obvious, immutable, or distinguishing characteristics; and (4) are a minority lacking political power. *See Grimm v.*

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[19] Instead of engaging with evidence that H.B. 3293 was enacted to exclude transgender girls from girls' school sports, West Virginia recasts B.P.J.'s argument as one about animus. Pet'rs Br. 39. But that wrongly conflates two strands of equal protection doctrine: (a) showing a law was motivated, at least in part, because of its impact on a group, and (b) showing a bare desire to harm that group. The former goes to whether a law is subject to heightened scrutiny, *see Feeney*, 442 U.S. at 276; the latter goes to whether the law can survive even rational basis review, *see Romer v. Evans*, 517 U.S. 620, 635 (1996).

Gloucester County Sch. Bd., 972 F.3d 586, 610-13 (4th Cir. 2020).

West Virginia's arguments against applying heightened scrutiny are meritless. *See* Pet'rs Br. 48-49. Transgender people face a long history of *de jure* discrimination, which includes criminal cross-dressing ordinances preventing transgender people from appearing openly in public. These laws date back to 1843 and were actively enforced until at least the 1980s. *See Doe v. McConn*, 489 F. Supp. 76, 81 (S.D. Tex. 1980) (invalidating Houston ordinance); Michelle Migdal Gee, *Validity of Law Criminalizing Wearing Dress of Opposite Sex*, 12 A.L.R.4th 1249 (1982). Transgender people were also subject to the full panoply of discriminatory laws targeting gay men and lesbians both because transgender people were perceived as gay and lesbian and because all LGBT people faced discrimination for departing from expectations of men and women. *See Little v. Hecox*, Respondent's Brief, at 28-32.

Today, transgender people remain a discrete minority who face substantial obstacles to achieving political power. *See id*. There is certainly a diversity of experiences among transgender people, but there is no requirement that all people within a group be identical or that a characteristic be "fixed and consistent" for classifications along the group line to be suspect. *Contra Skrmetti*, 145 S. Ct. at 1852 (Barrett, J., concurring); *see Little v. Hecox*, Respondent's Brief, at 32-33. A person's racial identity is not always visually discernable to others, and our understanding of racial categories has shifted over time. *See United States v. Bhagat Singh Thind*, 261 U.S. 204 (1926). A person's "illegitimacy" is also not

always immediately ascertainable and changes if their parents marry after birth. What ultimately matters is not whether a group is monolithic but "whether the characteristic of the class calls down discrimination when it is manifest." *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013).

B. As Applied to B.P.J., H.B. 3293 Fails Heightened Scrutiny.

1. Construing the current summary-judgment record in the light most favorable to B.P.J., West Virginia cannot show that H.B. 3293, as applied to B.P.J., is substantially related to an asserted governmental interest in providing "fair and safe athletic opportunities for" cisgender girls. Pet'rs Br. 44.

West Virginia says its classification survives heightened scrutiny because "[s]ex chromosomes determine the factors most relevant to performance differences between males and females." Pet'rs Br. 45. But that is precisely the factual dispute that is yet to be decided in the district court. It is not enough for West Virginia to say as a general matter that it classified based on "biology." West Virginia must justify classifying based on the specific biological characteristics it selected.

West Virginia also fails on the current record to show a substantial "fit" between its stated goals and the categorical exclusion. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001). Even "'[i]nherent differences' between men and women" may not be used "for artificial constraints on an individual's opportunity." *United States v. Virginia*, 518 U.S. 515, 533 (1996). But West Virginia's statute is not limited to particular

sports. Nor is it limited to highly competitive settings, such as post-season championships or varsity sports. It is a complete exclusion from the school's entire athletic program. And instead of providing equal overall athletic opportunity to everyone, H.B. 3293 subjects transgender girls to treatment that is not only different, but worse than everyone else.

2. Instead of justifying its exclusion of B.P.J. under heightened scrutiny, West Virginia's counterarguments dodge the central question.

First, West Virginia asserts that B.P.J. cannot bring an "as applied" challenge under heightened scrutiny. But its arguments boil down to semantics. Whether phrased as an "as applied" challenge or a "facial" one, the central function of heightened equal protection scrutiny is to protect individuals from "overbroad generalizations," *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017), which may be accurate for most people but harm individuals who fall "outside the average description," *Virginia*, 518 U.S. at 550. It follows that successful equal protection challenges will often be brought by plaintiffs who are atypical in the sense that class-based generalizations do not apply to them.

In arguing that H.B. 3293 cannot be constitutionally applied to her, B.P.J. brings the same type of as-applied challenge as the plaintiff in *Caban v. Mohammed*, 441 U.S. 380 (1979). In that case, this Court examined a New York law that gave unmarried mothers, but not unmarried fathers, the right to object to the adoption of their child. West Virginia (at 43) characterizes *Caban* as a facial challenge, but the Court did not hold that the statute was unconstitutional in all its applications. It held only

that the statute violated equal protection "[w]hen the adoption of an older child is sought" and "where the father has established a substantial relationship with the child and has admitted his paternity." *Id.* at 391. In all other situations, the statute could continue to "be enforced as usual." *Id.* at 416 (Stevens, J., dissenting). Indeed, the Court subsequently upheld the same statute as applied to a differently situated unmarried father in *Lehr v. Robertson*, 463 U.S. 248 (1983).

B.P.J.'s as-applied challenge is also fundamentally the same as the challenge to women's exclusion from VMI in *Virginia*. The Court did not resolve that case by looking at the "treatment of men and women *as a whole*." Pet'rs Br. 42. It held that group-based generalizations that were accurate for most women were insufficient to sustain the discriminatory policy because the "dispositive realit[y]" was that "some women, at least, would want to attend VMI if they had the opportunity" and "some women are capable of all of the individual activities required of VMI cadets and can meet the physical standards VMI now imposes on men." *VMI*, 518 U.S. at 550. The Court emphasized that "[i]t is on behalf of these women"—not all or even most women—"that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit." *Id.* at 550-51.

So too here. Whether B.P.J.'s challenge is styled as facial or as-applied, the proper question under heightened scrutiny in this case is not whether H.B. 3293 can be applied to all people with a male sex assigned at birth or even to all transgender girls. It is

whether H.B. 3293 can be constitutionally applied to transgender girls like B.P.J.

Second, West Virginia asserts that B.P.J. seeks to "convert[] intermediate scrutiny into strict" by requiring "a sex-based classification to be a perfect fit in every instance." Pet'rs Br. 44. To be sure, under heightened scrutiny, the "fit" does not have to always be perfect. But it does in every instance have to be "substantial," which requires the court to consider not just the accuracy of a generalization but also the severity of the burden imposed.

For example, West Virginia relies heavily on *Nguyen*, but the statute upheld in that case used sex distinctions to impose modest procedural requirements for unmarried fathers to transmit citizenship to their children, not categorical bans that prohibited unmarried fathers from ever doing so. *See* Katie Eyer, *As-Applied Equal Protection*, 59 Harv. C.R.-C.L. L. Rev. 49, 57 (2024). *Nguyen* emphasized that the burden placed on unmarried fathers was "minimal," and that "Congress has not erected inordinate and unnecessary hurdles . . . in furthering its important objectives." 533 U.S. at 70-71.[20]

The obstacles imposed by H.B. 3293 can hardly be characterized as "minimal." The statute's categorical exclusion is deliberately drawn based on criteria that are impossible for transgender people to overcome. Instead of designing a screening mechanism

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[20] This Court has adhered to the same distinction between procedural requirements and categorical bans in its decisions evaluating classifications based on "illegitimacy." *Compare Trimble v. Gordon*, 430 U.S. 762, 770-71 (1977), *with Lalli v. Lalli*, 439 U.S. 259, 273 (1978).

responsive to the claimed interest in eliminating unfair advantages, West Virginia deliberately adopted a categorical ban to exclude transgender girls in every circumstance, even when there is no evidence a competitive advantage exists. Those "inordinate and unnecessary" burdens do not have the requisite substantial relationship that heightened scrutiny requires. *Nguyen*, 533 U.S. at 70-71.

Third, West Virginia argues that B.P.J. is no different from a cisgender boy who is excluded from the girls' team. But as already explained, B.P.J. is not similarly situated to cisgender boys either with respect to her physiology or with respect to the harms of the exclusion. The existence of "separate but equal [athletic teams] in schools on a male/female basis . . . says nothing about what happen[s]" when transgender girls are categorically banned from participating in athletics altogether. *Grimm*, 972 F.3d at 625 (Wynn, J., concurring).

C. As Applied to B.P.J., H.B. 3293 Also Fails Rational Basis Review.

West Virginia's statute fails even rational basis review on the current record. Instead of rationally responding to asserted differences in athletic performance rooted in biology, the statute is drafted to categorically exclude transgender girls even when no athletic advantage exists and in contexts where there is no connection to fairness or safety. West Virginia's assertion that B.P.J. "displaces" cisgender girls even when B.P.J. finishes at the back of the pack on "no cut" teams reveals that West Virginia's real objection is to B.P.J.'s mere presence regardless of any actual fairness or safety concern.

Excluding transgender girls simply for the sake of excluding them is not an "independent and legitimate legislative end." *Romer*, 517 U.S. at 633. A mere desire to "favor[] one group at the expense of another" is not a legitimate basis for unequal treatment. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985). And "negative attitudes" or "undifferentiated fears" about members of a disfavored group are also insufficient. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448-49 (1985). Without anything else to support it, West Virginia's statute violates equal protection as applied to B.P.J. under any standard of scrutiny.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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