No. ___

In the Supreme Court of the United States

THE STATE OF WEST VIRGINIA; WEST VIRGINIA STATE BOARD OF EDUCATION; WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION; W. CLAYTON BURCH, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT; AND LAINEY ARMISTEAD,

Applicants,

v.

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

Respondent.

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALLIANCE DEFENDING FREEDOM

JOHN J. BURSCH
CHRISTIANA M. KIEFER
440 First Street, NW, Suite 600
Washington, DC 20001
jbursch@ADFlegal.org
ckiefer@ADFlegal.org
(616) 450-4235

JOHANNES S. WIDMALM-DELPHONSE
44180 Riverside Pkwy.
Lansdowne, VA 20176
jwidmalmdelphonese@ADFlegal.org
(571) 707-4655

JONATHAN A. SCRUGGS
JACOB P. WARNER
15100 N. 90th Street
Scottsdale, AZ 85260
jscruggs@ADFlegal.org
jwarner@ADFlegal.org
(480) 444-0020

Counsel for Lainey Armistead

PATRICK MORRISEY
Attorney General

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS
Senior Deputy Solicitor General

CURTIS R. A. CAPEHART
Deputy Attorney General

GRANT A. NEWMAN
Assistant Solicitor General

OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

Counsel for State of West Virginia

[additional counsel listed after signature page]

PARTIES TO THE PROCEEDING

Applicants State of West Virginia and Lainey Armistead are Intervenor-Appellees below.

Applicants West Virginia State Board of Education, West Virginia Secondary School Activities Commission, and W. Clayton Burch are Defendants-Appellees below.

Respondent B.P.J., by next friend and mother, Heather Jackson, is the Plaintiff-Appellant below.

RELATED PROCEEDINGS

This application arises from these proceedings:

B.P.J. v. *W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021) (order granting preliminary injunction);

B.P.J. v. *W. Va. State Bd. of Educ.*, No. 2:21-cv-316, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023) (order granting motions for summary judgment and dissolving preliminary injunction);

B.P.J. v. *W. Va. State Bd. of Educ.*, No. 2:21-cv-316, 2023 WL 1805883, at *1 (S.D. W. Va. Feb. 7, 2023) (order denying motion for a stay pending appeal); and

B.P.J. v. *W. Va. State Bd. of Educ.*, No. 23-1078, Dkt. 50 (4th Cir. Feb. 22, 2023) (order granting motion for an injunction pending appeal).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

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)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

INTRODUCTION

Roughly two years ago, the West Virginia Legislature passed H.B. 3293—the Sports Act—to ensure equal opportunities and fair play for all student athletes. In recent years biological males identifying as female have increasingly competed against and beaten biological females in women's sports events across the country. High-school-girl sprinters in Connecticut, young women swimming in the Ivy League, teen volleyball players in Hawaii, young female runners in Alaska, and student athletes everywhere in between have found themselves falling behind or pushed aside for biologically male athletes. So echoing language from Title IX's implementing regulations, 34 C.F.R. § 106.41(b), the Sports Act reiterated that women's and girls' sports teams based on "competitive skill" or "involv[ing] a contact sport" should not be open to males, W. VA. CODE § 18-2-25d(c)(2). Instead, male students remain free to play on male or co-ed teams, while female students can play on all teams. *Id.* § 18-2-25d(c)(3). The Sports Act then drew an administrable line, defining "male" and "female" by looking to the student's "reproductive biology and genetics at birth." *Id.* § 18-2-25d(b).

Respondent B.P.J. sued to enjoin the Sports Act's enforcement, arguing that the law violates both the Equal Protection Clause and Title IX of the Education Amendments of 1972 because it defines "male" and "female" through biology. The district court was no early fan of the law—it granted B.P.J.'s request for a preliminary injunction and denied multiple motions to dismiss the complaint. Appendix to Applicants' App. to Vacate Inj. Pending Appeal (App.) 14a, 34a-48a. But then it made a 180-degree turn. After months of

discovery that resulted in over 525 docket entries with 3,000 pages of testimony and expert reports, the court reviewed "*all* the evidence in the record, including B.P.J.'s telling responses to requests for admission." App. 28a (emphasis added). And it then held that the Sports Act complies with both the Constitution and Title IX, dissolving the preliminary injunction and entering summary judgment for the defendants in a 23-page opinion. The Sports Act, the district court stressed, was "substantially related to an important government interest." App. 24a, 31a. The district court also declined to stay its judgment pending appeal, taking another seven pages in a separate opinion to walk through its analysis. In the end, it emphasized the parties' *agreement* that sex-separated sports benefit student athletes, and it concluded that "the state needed to adopt some definition to determine eligibility for participation on either team." App. 6a. The State's choice to define sex based on biology was constitutional and consistent with a long tradition of protecting fair play for women and girls.

Yet in a terse, clerk-entered order, a divided panel of the Fourth Circuit undid the district court's careful work. Only five days after expedited briefing closed, two judges granted an injunction pending appeal; one judge dissented. The majority did not provide any legal or factual reasoning for its decision. Nor did it question the district court's analysis or record review. Instead, it gave a one-sentence notice of the grant and entered an injunction on appeal. App. 1a-2a.

That unreasoned order unjustifiably upsets the way that things traditionally work in school sports. For as long as schools have offered sports teams, it has been the "norm" to designate student athletes to them by sex. *Cohen* v. *Brown Univ.*, 101 F.3d 155, 177 (1st

Cir. 1996). Without that separation, there is "a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor* v. *Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers); see also, *e.g.*, *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (*Clark I*). Separate teams also "aid in th[e] equalization" of athletics programs for men and women by "mak[ing] monitoring of the opportunities provided easier." *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Ed.* v. *Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 657 (6th Cir. 1981). And sometimes, co-ed teams cause a "detrimental effect on the safety of the participants." *Lafler* v. *Athletic Bd. of Control*, 536 F. Supp. 104, 107 (W.D. Mich. 1982). For these and other reasons, many have recognized that "commingling of the biological sexes in the female athletics arena would significantly undermine the benefits" that separate sports teams "afford[] to female student athletes." *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., specially concurring).

Nothing warrants the Fourth Circuit majority's radical approach, and this Court should vacate its unreasoned and incorrect injunction. Complete lack of analysis is the first tell that something is amiss, as federal courts should not enjoin democratically passed legislation without at least providing a rationale. What's more, B.P.J. will not succeed on the merits. All parties, B.P.J. included, agree that separated sports teams serve important interests. Consistent with that starting point, the Act makes the reasonable judgment that many have made before: Biological differences between males and females matter in sports. Both Title IX and the Fourteenth Amendment allow that judgment.

B.P.J. nevertheless suggests that "individual circumstances" should decide whether B.P.J. should be permitted to compete against female athletes—circumstances such as identifying as female, using hormone-impacting drugs, and performing poorly as an athlete in general. But if this approach were right, courts would need to micromanage on an athlete-by-athlete basis who belongs on which team whenever students allege that they have the same physiological characteristics or athletic ability as females. That individual theory of equal protection upends decades of precedent that says sex-based classifications needn't be a perfect fit in every case. It likewise tacitly turns over the countless cases upholding biologically based sex distinctions for bathrooms, prisons, physical-fitness tests, and more. And in the end, because B.P.J. concedes that male athletes who identify as male should not be permitted to compete in women's sports even if they have low testosterone or less athletic ability, in reality all the individual factors will fall by the wayside save one. Self-identification becomes decisive. The bottom line of B.P.J.'s view is that under the Constitution and Title IX, gender identity alone—not biological sex—*must* mark the line between male and female.

The Fourth Circuit's unreasoned injunction silently adopting this thinking also does real damage on the ground. It spurns West Virginia voters who deserve to have their laws enforced when their elected representatives respond to an identified problem. States should continue to have the right to legislate—even in politically controversial areas—without unexplained reversals from on high. And this decision harms biological female athletes, too, who will continue to be displaced as long as biological males join women's sport

teams. In that way, the majority's cursory decision doesn't advance equal protection—it undermines it.

The State appropriately exercised its discretion to manage its educational system, *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968), and the district court exercised its substantial "equitable discretion" based on the full record to refuse an injunction, *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 391 (2006). Nothing in that record justifies (much less explains) the panel majority's decision to upset those considered choices. This Court should vacate the Fourth Circuit's injunction and allow the Act to continue protecting West Virginia student athletes this spring and beyond.

BACKGROUND

1. Two years ago, West Virginia lawmakers had seen biological males increasingly competing against—and beating—females in women's sports events. App. 24a. Girls were sidelined. In Connecticut, for example, two biological males recently took 15 high school track championship titles that would have otherwise gone to nine different girls. Chelsea Mitchell lost to these competitors more than 20 times. Alanna Smith lost to them three times. Selina Soule lost to them at least four. Their experience was demoralizing. See Complaint, *Soule* v. *Conn Assoc. of Schs.*, No. 3:20-cv-00201-RNC (D. Conn. filed Feb. 12, 2020). And they were far from alone.

The shifting composition of women's sports also created safety concerns. In Hawaii, for example, a biologically male athlete had recently played varsity girls' volleyball. Female athletes were nervous and intimidated. Coaches cited safety concerns, see Robert Collias, *KSM Girls Volleyball Roster Includes Transgender Player*, THE MAUI NEWS (Aug. 14,

2019), https://bit.ly/3Yz0aji, while others questioned whether Hawaii's policies allowed girls to fairly compete, Nick Abramo, *Transgender Policy in Hawaii High School Sports Is Being Challenged*, HAWAII PREP WORLD (Mar. 8, 2020), http://bit.ly/3yqVeCh. This same athlete also competed in women's track, where one female athlete said she planned to quit after the male raced in her event.

College women fared no better. In 2018, CeCe Telfer competed on Franklin Pierce University's women's track team after previously competing on the men's team. App. 97a-98a. Telfer won an NCAA championship that year, placing first in the women's 400-meter hurdles. Gillian R. Brassil & Jere Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions,'* N.Y. TIMES (Aug. 18, 2020), http://bit.ly/3J3OdMz. Telfer had never made it to a championship event while competing for the men's team, App. 97a; later on, Telfer was deemed ineligible to compete in the U.S. Olympic trials because of testosterone levels, Jill Martin, *Transgender Runner CeCe Telfer Is Ruled Ineligible To Compete In US Olympic Trials*, CNN (June 25, 2021), http://bit.ly/3yrYSvO. Likewise, June Eastwood competed for the University of Montana's men's cross country and track teams for three seasons before switching to the women's teams in 2019. Athletes like Madison Kenyon, Mary Marshall, and Haley Tanne lost to Eastwood nine times. Then Eastwood won the women's mile at the 2020 Big Sky Championship meet. For the female athletes competing, the experience was "deflating," and it left them feeling defeated. See Melanie Wilcox, *Title IX, Which Paved the Way for Women's Sports, Now Threatens Its Gains*, VERILY (Dec. 8, 2020), https://bit.ly/3LgNACl.

Stories of defeat and "displace[ment]" like these worried the West Virginia Legislature. See W. VA. CODE § 18-2-25d(a)(3). So reasonably relying on "studies and anecdotes pertaining to different locales," *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995); see also *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986), state lawmakers passed the Sports Act to ensure that sports were as "safe" and "fair as possible," App. 301a. In short, the Act requires public schools to designate sports teams "based on biological sex" "at birth." See W. VA. CODE § 18-2-25d(c)(1), (b). It also ensures that biological males cannot compete against biological females in contact or competitive sports "designated for females, women, or girls." *Id.* § 18-2-25d(c)(2).

The Sports Act ensures fair and safe play in women's and girls' sports; it restricts no one from trying out for men's, boys', or co-ed teams. *Id.* § 18-2-25d(c)(3). The Act thus aims to "promote equal athletic opportunities for the female sex" due to "inherent differences" of biology that make it unfair or even dangerous for males to compete against female athletes. *Id.* § 18-2-25d(a)(1)-(5); App. 26a, 28a, 31a, 301a. And the West Virginia Legislature was not alone in its concern—seventeen more States have passed nearly identical laws. See *Girls Deserve Fair Play*, FAM. POL'Y ALL., https://bit.ly/3KAxW4n (last visited Mar. 7, 2023). These laws reflect the realities of interscholastic sports today; for instance, a sponsor of one of the first bills drew from her experience as a Division I athlete and coach.

2. The Act soon came under fire when B.P.J., a 12-year-old biological male who identifies as female, sued to enjoin enforcement of the law against B.P.J.

The trial court first entered a preliminary injunction based on an early and incomplete record. App. 34a-48a. It also denied the defendants' motions to dismiss. The parties then engaged in protracted discovery that included extensive expert testimony and other substantial evidence.

B.P.J. says sports designations should be based on gender identity, not biology. App. 24a-25a. B.P.J. also claims to be similarly situated to a female: Using puberty-suppressing drugs, B.P.J. expects to develop physiological characteristics that are consistent with a female's. But scientists disagree "on whether and to what extent" drugs like these will reduce male physiological advantages. App. 27a, 94a-109a, 151a-192a; see also, *e.g.*, Alison K. Heather, et al., *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19 INT'L J. ENV'T RES. PUB. HEALTH 9103 (2022). And not all males who identify as female take the intervention route. Some "choose to only transition socially." App. 27a; see also *Doe 2* v. *Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring in the result) ("[T]he transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex). Quite the opposite."). Thus, in the district court's words, "B.P.J. really argues that" biological males "are similarly situated to" biological females "for purposes of athletics at the moment they verbalize [that] they" identify as female—"regardless of their hormone levels." App. 28a.

Yet as multiple experts in the record recognized, and as the district court ultimately agreed, biology affects athletic performance. App. 27a-28a, 94a-109a, 151a-192a. Indeed, "due to average physiological differences, males would displace females to a substantial

extent if they were allowed to compete" against each other. *Clark I*, 695 F.2d at 1131; see also, *e.g.*, *B.C. ex rel. C.C.* v. *Bd. of Educ.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1987) ("[E]xcluding males from participation on female high school athletic teams ... prevents males from dominating and displacing females from meaningful participation in available athletic opportunities."). Even B.P.J.'s expert agreed that "gender identity … is not a useful indicator of athletic performance." App. 214a (167:22-168:1). So sex-specific sports classifications can help ensure equality for female athletes. See, *e.g.*, Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 124 (2017) ("[I]f sex classifications are abandoned here … in favor of classifications based on gender identity, female athletes would almost always lose to males and both sport and society would lose many of the practical and expressive benefits that inure from including and celebrating females in competitive sport.").

3. After taking seven months to review this weighty record, this January the district court entered summary judgment for the State and other defendants. Like many courts before it, the court held that biological males have physiological advantages over biological females (a reality even B.P.J. concedes). App. 26a-28a, 31a. These "inherent" advantages make "biological males … not similarly situated to biological females" in athletics. App. 26a, 31a. That one biological male—whether due to naturally low testosterone or pharmacological intervention—may lack typical testosterone levels does not negate the State's substantial interest in advancing equality for biological females. App. 27a-29a. The fact remains "that a transgender girl is biologically male and, barring medical intervention, would undergo male puberty like other biological males." App. 27a. So the trial court

declared the Sports Act constitutional, dissolved its prior injunction, and entered judgment for the defendants. App. 31a-32a.

B.P.J. then moved the trial court for an injunction pending appeal. Again, the court denied that request in a well-reasoned separate order. App. 3a-9a.

4. B.P.J. appealed and asked the Fourth Circuit to stay the district court's decision. Applicants vigorously opposed, but just five days after motion briefing closed and four days before B.P.J.'s requested deadline, a divided panel of the Fourth Circuit granted B.P.J.'s request. App. 1a-2a. The panel majority rightly considered B.P.J.'s request a motion for injunction pending appeal. But the order said little else. It did not discuss the scientific record evidence. It did not discuss the applicable law. It did not engage with the intermediate-scrutiny standard that B.P.J. acknowledges is appropriate or explain how the district court abused its discretion in applying it. Rather, the order consisted of one sentence saying that B.P.J.'s motion was granted and another noting the panel's divided vote. *Id.*

And although B.P.J. purported to request a narrow as-applied injunction, App. 27a-28a, granting that remedy would have forced the lower court to accept "sweeping" "logic," *United States* v. *Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting)—that is, allowing any person who identifies as female to compete in female sports, irrespective of biology. The result is that if the injunction below stands, sex-separated sports as they are traditionally understood will be functionally illegal in West Virginia public schools and universities.

To preserve the status quo, the Applicants now ask this Court to vacate the Fourth Circuit panel's extraordinary injunction. See App. to Vacate Inj., *Nebraska* v. *Biden*, 143 S. Ct. 477 (2022) (No. 22-506), 2022 WL 17330762 (application seeking immediate relief from court of appeals order entering injunction).

ARGUMENT

An injunction "is an extraordinary remedy never awarded as of right." *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Rather, a court may issue an injunction only "upon a *clear showing* that the plaintiff" deserves it. *Id.* at 22 (emphasis added). This burden is especially high when the plaintiff seeks to enjoin the "enforcement of a presumptively valid state statute." *Brown* v. *Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers). A request of that sort "demands a significantly higher justification"; the plaintiff's entitlement to relief must be "indisputably clear." *Lux* v. *Rodrigues*, 561 U.S. 1306, 1306-07 (2010) (Roberts, C.J., in chambers) (cleaned up); see also *Respect Maine PAC* v. *McKee*, 562 U.S. 996, 996 (2010) (same). Put another way, in cases like these courts afford the State the "widest latitude." *Rizzo* v. *Goode*, 423 U.S. 362, 378-79 (1976).

At minimum, a party seeking an injunction on appeal must prove (1) they are "likely to succeed on the merits"; (2) they will "suffer irreparable harm" without the injunction; (3) the "balance of equities" favors them; and (4) the "injunction is in the public interest." *Winter*, 555 U.S. at 20; *accord Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam). This standard should be even higher when, as here, Respondent sought an emergency injunction from the court of appeals after losing at summary

judgment based on an expansive record. The expedited timeframe made the request particularly ill-suited for an already rare, extraordinary injunction. Cf. *Louisiana* v. *United States*, 1966 WL 87237, at *1 (S. Ct. Aug. 12, 1966) (Black, J., in chambers) (declining to modify district court order concerning injunction in part because "[t]he time [was] entirely too short … to give this matter the consideration deserved as a prerequisite to … overturning the District Court's considered belief").

If the Fourth Circuit had conducted the proper analysis, it would have concluded that the factors favor preserving the status quo and leaving the presumptively constitutional Sports Act in force. The Court should vacate the panel's rush-job order to the contrary.

I. The Fourth Circuit's injunction lacks any reasoning.

The Fourth Circuit's summary order does not engage *any* of the relevant factors for issuing an injunction pending appeal. Even though the Applicants prevailed below, "one searches" the panel majority's order "in vain for any mention of [B.P.J.'s] likelihood of success on the merits." *Munaf* v. *Geren*, 553 U.S. 674, 690 (2008). Likewise, the panel never delved into the equities, even though the very purpose of "interim equitable relief" is to "balance the equities as the litigation moves forward." *Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

The Fourth Circuit's silence should be enough to warrant reversal. *Munaf*, 553 U.S. at 690. A court should undertake "[a] proper consideration" of each of the relevant factors before deciding to issue the extraordinary remedy of injunctive relief. *Winter*, 555 U.S. at 23. And the court should lay out that consideration so that it can be reviewed by a higher

court and reasoned judgment assured. Cf. *Adkins* v. *Nestle Purina PetCare Co.*, 779 F.3d 481, 483 (7th Cir. 2015) (Easterbrook, J.) (reversing an injunction where "[t]he district judge was silent about everything that matter[ed]" and thus "stymied" review). After all, unexplained orders may suggest that a court has exercised "will instead of judgment." *Pub. Citizen* v. *U.S. Dep't of Just.*, 491 U.S. 440, 471 (1989) (Kennedy, J., Rehnquist, C.J., O'Connor, J., concurring) (quoting THE FEDERALIST NO. 78 at 528 (A. Hamilton) (C. Rossiter ed. 1961)).

The Court could thus vacate the Fourth Circuit's order on that ground alone.

II. West Virginia is likely to succeed on the merits.

The Sports Act is also lawful. It affords equal protection to all because it treats similarly situated people alike—requiring biological males to compete with biological males, no matter how they self-identify. This biology-based distinction lawfully accounts for the physiological distinctions between males and females. Likewise, the Act advances Title IX's goals, as it ensures fair opportunities for female athletes.

A. The Sports Act satisfies equal protection.

B.P.J. says the Sports Act violates equal protection because it "discriminates on the basis of transgender status." App. 40a-41a. It doesn't—the Act does not mention transgender status. The Act distinguishes instead based on biological sex, a distinction that reflects "inherent differences between men and women." *Virginia*, 518 U.S. at 533 (cleaned up). The distinction is valid whether B.P.J. challenges the law facially or as applied.

1. The Sports Act designates sports teams based on biological sex, not gender identity.

To decide equal-protection claims, courts "begin with the statutory classification itself." *Califano* v. *Boles*, 443 U.S. 282, 293-94 (1979). Here, the Sports Act places students on athletic teams "based on biological sex." W. VA. CODE § 18-2-25d(c)(1). Under the Act, everyone born with male reproductive biology or genetics—whether they identify as male, female, nonbinary, or otherwise—competes on male or coed public-school teams. Teams designated for males may be open to females, but not vice versa. *Id.* § 18-2-25d(c)(2)-(3).

Laws may classify based on biological sex like this without unlawfully discriminating based on transgender status or gender identity. *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1746-47 (2020) (noting "transgender status" is a "distinct concept[] from sex"); see also *Adams*, 57 F.4th at 809. Nor does the fact that the Act may affect some transgender athletes mean that the law classifies based on gender identity. Many a law may "affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described." *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 271-72 (1979). A law that favors veterans isn't sex-based, for instance, even if veterans are 98% male. *Id.* at 270, 274. Nor does "[t]he regulation of a medical procedure" that affects only one sex trigger heightened scrutiny. *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245-46 (2022). And because the Act affects half the population (males), a "lack of identity" exists between its sex-based classification and transgender persons. *Adams*, 57 F.4th at 809.

At most, B.P.J.'s challenge amounts to a claim that the Sports Act "has a disparate impact" on transgender students—but that claim doesn't render the Act unlawful, either.

Feeney, 442 U.S. at 273. For one thing, "[t]he Equal Protection Clause … prohibits only intentional discrimination; it does not have a disparate-impact component." *Ricci* v. *DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting). And here, any disparate impact would be "plausibly explained on a neutral ground." *Feeney*, 442 U.S. at 275. Sex-based distinctions often overlap or contradict a person's gender identity. So disparate impacts are "an unavoidable consequence of a legislative policy that has … always been deemed to be legitimate." *Id.* at 279 n.25. In short, "[t]oo many men are affected by [the law] to [say] that the statute is but a pretext" for disfavoring transgender people. *Id.* at 275; see also *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974) ("nonpregnant" category "includes members of both sexes").

2. The Sports Act validly distinguishes based on sex because biology matters in athletics.

More generally, the Equal Protection Clause does not eliminate the State's power to classify, but "measure[s] the basic validity of the legislative classification." *Feeney*, 442 U.S. at 271-72. The Sports Act passes muster. Sex is not "a proscribed classification." *Virginia*, 518 U.S. at 533. Instead, sex-based distinctions trigger intermediate scrutiny. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Equal protection in this context just demands that a sex-based distinction serve an "important" government "objective[]" and that the "means" used "substantially relate[] to" the state's goal. *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 60 (2001). A perfect fit is not required, only a substantial one. *Id.* at 70; see *Michael M.* v. *Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 473 (1981) (plurality op.) (relevant inquiry is "not whether the statute is drawn as precisely as it might have been, but whether the line chosen … is within constitutional limitations").

The Sports Act easily meets intermediate scrutiny's requirements.

To start, the Act promotes the important goal of equal athletic opportunities for biological females. Designating sex-specific sports to promote this end helps "advance full development of the talent and capacities" of women and girls. *Virginia*, 518 U.S. at 533. In this way the Act tracks Title IX, which "paved the way for significant increases in athletic participation for girls and women." *Adams*, 57 F.4th at 818 (Lagoa, J., specially concurring) (quoting Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 15 (2000)); see also, *e.g.*, *Petrie* v. *Ill. High Sch. Ass'n*, 394 N.E.2d 855, 864 (Ill. App. Ct. 1979) ("[T]o furnish exactly the same athletic opportunities to boys as to girls would be most difficult and would be detrimental to the compelling governmental interest of equalizing general athletic opportunities between the sexes."). And "[t]here is no question that" these goals are an "important governmental interest." *Clark I*, 695 F.2d at 1131 (rejecting equal-protection challenge to sex-specific sports for this reason). Indeed, B.P.J. does not contest that sex-specific sports further the State's interest in protecting female athletes; B.P.J. neither "challenge[s] sex-separation in sports" generally nor "argue[s] that teams should be separated based on some other factor." App. 19a, 23a.

The Sports Act also tightly fits this interest—the district court explained that the Act validly distinguishes based on sex because "the physical characteristics that flow from it[] are substantially related to athletic performance and fairness in sports." App. 27a-28a. This Court, too, "has consistently upheld statutes" when the sex distinction "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael*

M., 450 U.S. at 469. Laws may punish males more harshly for having sex with underage females because of pregnancy risks. *Id.* at 471-73. Statutes may impose "a different set of rules" to prove biological parenthood because of "the unique relationship of the mother to … birth." *Nguyen*, 533 U.S. at 63-64. And "biological sex … is the driving force behind [this] Court's sex-discrimination" cases. *Adams*, 57 F.4th at 803 n.6.

The fit is particularly apt when it comes to sports; in this expressly physical context, "[t]he difference between men and women … is a real one." *Nguyen*, 533 U.S. at 73. Athletics are "distinctly different" from "admissions," "employment," or even school facilities—each of which may "require[]" different analysis. *Cohen*, 101 F.3d at 177. So yes, federal circuits have split over whether the government may designate separate spaces based on biological sex out of concern for privacy. Compare *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 614 (4th Cir. 2020) (holding that designating sex-specific bathrooms was "not substantially related" to ensuring bodily privacy), with *Adams*, 57 F.4th at 809-11 (holding opposite). But even B.P.J.'s counsel has suggested that the answer to that separate question should not dictate the outcome here. App. 49a-50a.

So this case is easier than others working their way through the courts. Males and females are not "the same for the purposes of physical" activities. *Bauer* v. *Lynch*, 812 F.3d 340, 350 (4th Cir. 2016). "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" together. *Clark I*, 695 F.2d at 1131. And many biological "females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement" without distinct teams. *Cape* v. *Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam).

B.P.J. mistakenly claims that biological-based classifications come up short because students become "similarly situated" to "girls" when they identify as female and take drugs to mitigate male puberty. App. 27a-31a. But there is significant scientific disagreement about whether and to what extent this intervention mitigates biological advantages. App. 27a, 94a-109a, 151a-192a; see also, *e.g.*, Lidewij Sophia Boogers, et al., *Transgender Girls Grow Tall: Adult Height Is Unaffected by GnRH Analogue and Estradiol Treatment*, 107 J. OF CLIN. ENDOCRINOLOGY & METABOLISM 3805 (2022), https://bit.ly/3jW1PRK; cf. Timothy A. Roberts, et al., *Effect of Gender Affirming Hormones on Athletic Performance In Transwomen and Transmen: Implications for Sporting Organisations and Legislators*, 55 BRITISH J. OF SPORTS MED. 577, 577 (2021), https://bit.ly/3kKDVJl (finding that transgender women ran 12% faster than biological women even after two years of hormone treatments).

Biological sex is also "not a stereotype" that unfairly separates people otherwise similarly situated. *Nguyen*, 533 U.S. at 68; accord *Adams*, 57 F.4th at 809; see also *id.* at 819 (Lagoa, J., specially concurring) ("[I]t is neither myth nor outdated stereotype that there are inherent differences between … male[s] and … female[s] and that those born male … have physiological advantages in many sports."). Again, the physiological differences between the sexes are real and "enduring." *Virginia*, 518 U.S. at 533. And B.P.J. concedes that biological males can be excluded from female sports even when they might have naturally low testosterone levels, carry a disability that affects performance, or just perform poorly in sports generally. App. 28a. So B.P.J.'s theory would make self-declared identity the decisive factor. But *that* would require West Virginia to discriminate

based on gender identity—low testosterone, male-identifying students, no; low testosterone, female-identifying students, yes—a classification that, according to B.P.J.'s own experts, is not "useful" for indicating "athletic performance." App. 214a (167:22-168:1). And if designating sex-specific sports is valid to accommodate the average physiological differences between males and females, it cannot be invalid because it draws a biology-based distinction. The line validly applies to 99% of males because they are biologically male, so it is an appropriate line for the state Legislature to draw for everyone. See *Nguyen*, 533 U.S. at 70 ("None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.").

In sum, the Sports Act serves the important interest of promoting fair and safe athletic opportunities for female athletes, and it appropriately accommodates physiological differences between the sexes rooted in biology by using a biology-based sex classification to designate school teams. See *O'Connor*, 449 U.S. at 1306-08 (Stevens, J., in chambers); *Nguyen*, 533 U.S. at 68. Especially when the parties all agree that there are real advantages to sex-differentiated sports, App. 6a, 23a, using a biology-based distinction to draw the line does not make the classification unconstitutional.

3. The Sports Act satisfies equal protection as applied.

B.P.J. incorrectly suggests that despite these general principles, reviewing courts should narrowly tailor the analysis to a student's individual circumstances because the claim here is as-applied. Not so. Labeling a claim "facial or as-applied … does not speak at all to the substantive rule of law." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1127 (2019). For equal-protection claims, courts consider whether the state "action premised on a particular

classification is valid *as a general matter*, not merely to the specifics of the case before" it. *Cleburne*, 473 U.S. at 446 (emphasis added). And West Virginia need not use a classification "capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 63, 70; accord *Clark I*, 695 F.2d at 1132. So the Sports Act's validity turns on how it relates "to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989); *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 430 (1993); *accord Califano*, 434 U.S. at 55 (equal protection considers "characteristics typical of the affected classes rather than … focusing on selected, atypical examples"). B.P.J.'s likelihood of success on the merits does not turn on the facts of just this particular case.

Make no mistake: Endorsing B.P.J.'s approach would dispense with four decades of equal protection precedent in this Court. It would require all laws that make sex distinctions to be a perfect fit in "every instance," converting intermediate scrutiny into strict. *Nguyen*, 533 U.S. at 70. But B.P.J. cited below no case to support this notion except the Fourth Circuit's decision in *Grimm*, a case on restrooms, App. 23a, and even *Grimm* did not purport to apply a higher standard for as-applied claims. No surprise there. The Equal Protection Clause's meaning cannot vary "depending only on how broad a remedy the plaintiff chooses to seek." *Bucklew*, 139 S. Ct. at 1127-28; see *Gross* v. *United States*, 771 F.3d 10, 14-15 (D.C. Cir. 2014) ("'[T]he substantive rule of law is the same for both [facial and as-applied] challenges.'"). B.P.J.'s argument conflates the substantive rule (the law's treatment across a class generally) with the scope of relief (tailoring injunctions to the

actual party before the court). The Act passes the Equal Protection Clause's well-settled test.

B. The Sports Act satisfies Title IX.

Moving from constitutional to statutory claims, B.P.J. fares no better. Title IX forbids schools from treating individuals "worse than others who are similarly situated" based on sex. *Bostock*, 140 S. Ct. at 1740. B.P.J. is not "similarly situated" to biological females, and that dissimilarity dooms B.P.J.'s claim. So does Title IX's text.

1. Title IX deals with sex, not gender identity.

Title IX prohibits "discrimination" in educational programs and activities "on the basis of sex." 20 U.S.C. § 1681(a). But Title IX does not define "sex," so the Court looks to the "ordinary meaning" in 1972, when "Congress enacted the statute." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018). And this ordinary 1972 meaning was "biological sex." *Id.* (collecting sources); accord *Neese* v. *Becerra*, No. 2:21-cv-163-Z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022). As this Court put it just one year after Congress passed Title IX, "sex" is "an immutable characteristic" determined by "birth." *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973).

Throughout Title IX, "sex" is used as a binary concept, referring to male and female. 20 U.S.C. § 1681, *et seq.*; see also *Neese*, 2022 WL 1265925, at *12 (Title IX "presumes sexual dimorphism"); accord 85 Fed. Reg. 30,026, 30,178 (May 19, 2020) ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification."). For example, Title IX allows schools to change from admitting "only students of *one sex*" to admitting "students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphases added); see also *id.* § 1681(a)(6)(B) (referring to "Men's" and "Women's" associations and

organizations for "Boy[s]" and "Girl[s]," "the membership of which has traditionally been limited to persons of one sex"). Title IX also exempts "father-son or mother-daughter activities … but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*." *Id.* § 1681(a)(8) (emphases added). This provision not only speaks of "the" other sex—rather than "another" sex—but it uses biology-linked terms like "father-son" and "mother-daughter." In contemporary dictionaries, mother was defined as "a female parent," WEBSTER'S NEW INTERNATIONAL DICTIONARY 1474 (3d ed. 1968); "father" as "a male parent," *id.* at 828; "son" as a "male offspring," *id.* at 2172; and "daughter" as "a human female," *id.* at 577. None of this would make sense if "sex" included the non-binary concept of gender identity.

If sex *did* include gender identity in Title IX, then many of the statute's exemptions would be illogical. Courts should construe a statute "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009). Many provisions would offend that principle if B.P.J.'s logic were right. For example, Title IX exempts institutions "traditionally" limiting their admissions to "only students of one sex," 20 U.S.C. § 1681(a)(5); sororities and fraternities "limited to persons of one sex," *id.* § 1681(a)(6); "living facilities for the different sexes," *id.* § 1686; "separation of students by sex within physical education classes" for contact sports, 34 C.F.R. § 106.34(a)(1); and human sexuality classes and choirs separated by "sex," *id.* § 106.34(a)(3)-(4). If sex includes gender identity, transgender students "would be able to live in both living facilities associated with their biological sex and living facilities

associated with their gender identity." *Adams*, 57 F.4th at 813. Transgender (but not cisgender) individuals could move back and forth between living facilities because gender (unlike sex) "is fluid." App. 25a. And as for sports, the regulations contemplate "separate [sports] teams for members of each sex," 34 C.F.R. § 106.41(b), and they direct schools to "provide equal athletic opportunity for … *both* sexes" to "effectively accommodate the interests and abilities of members of *both* sexes," *id.* § 106.41(c) (emphases added). Title IX's exemptions make sense only if sex means biological sex.

Title IX's purpose further confirms that sex focuses on physiological and anatomical characteristics instead of self-identity. A text "cannot be divorced from the circumstances existing at the time [the statute] was passed, and from the evil which Congress sought to correct and prevent." *United States* v. *Champlin Refin. Co.*, 341 U.S. 290, 297 (1951). And naturally, "a textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012). Here, the law's purpose, "which is evident in the text itself, is to prohibit the discriminatory practice of treating women worse than men." *Neese*, 2022 WL 1265925, at *10 (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 334 (2011)). After all, Title IX was "enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick* v. *Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); see also *N. Haven Bd. of Ed.* v. *Bell*, 456 U.S. 512, 523 n.13 (1982); *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 704 & n.36 (1979). Whatever other concerns might arise in similar contexts later, "[t]he

circumstances and the evil" that motivated Title IX "are well-known." *Champlin*, 341 U.S. at 297. They had nothing to do with gender identity, and everything to do with sex.

In sum, Title IX's text, statutory context, and purpose all focus solely on biology, not gender identity—a distinction this Court recently recognized. *Bostock*, 140 S. Ct. at 1746-47 (noting "transgender status" is a "distinct concept[] from sex").

2. Title IX allows sex distinctions for sports teams.

When it comes to sex classifications, Title IX sometimes allows or even requires them—especially in sports. Again, start with the text. Title IX doesn't forbid the State from noticing sex; it says that no person "shall, on the basis of sex, be excluded from participation in, [or] be denied the benefits of, … any education program or activity." 20 U.S.C. § 1681(a). To "exclude" meant (and means) "to shut out," "hinder the entrance of," or "bar from participation, enjoyment, consideration, or inclusion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 793 (1966). To "deny" meant "to turn down or give a negative answer to." *Id.* at 603. And these words must be understood as applying to an "education program or activity," including sports. Together, these words forbid schools from shutting out or hindering females from enjoying, participating in, or reaping educational benefits.

Making sure these educational benefits are available equally sometimes requires States to account for sex. After all, an educational program "made up exclusively of one sex is different from a community composed of both." *Virginia*, 518 U.S. at 533 (cleaned up). So recognizing sex differences can be necessary for students to fully enjoy educational programs and activities. This Court acknowledged that fact when it said admitting women to the Virginia Military Institute "would undoubtedly require alterations necessary to

afford members of each sex privacy from the other sex in living arrangements." *Id.* at 550 n.19. As then-Professor Ruth Bader Ginsburg explained, "Separate places to disrobe, sleep, [and] perform bodily functions are permitted, [and] in some situations required [to respect] privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST (Apr. 7, 1975), https://bit.ly/3J42s4b. Or as Title IX's principal sponsor put it, sometimes sex separation is "absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved." 118 CONG. REC. 5,807 (1972).

In sports, too, sex designation is necessary to give females "the chance to be champions." *McCormick*, 370 F.3d at 295. "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" together. *Clark I*, 695 F.2d at 1131. Time and again, Title IX "explicitly permit[s] differentiating between the sexes in certain instances," *Adams*, 57 F.4th at 814.

Title IX's sex-cognizant and education-focused text distinguishes it from other laws, like Title VII. *Adams*, 57 F.4th at 811 ("Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes."); see also *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title VII … is a vastly different statute" than Title IX). Though "[a]n individual employee's sex is not relevant to the selection, evaluation, or compensation of employees," *Bostock*, 140 S. Ct. at 1741 (cleaned up), courts and Congress agree that sex *is* relevant "in the athletics context," *Cohen*, 101 F.3d at 178; accord *Kelley* v. *Bd. of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ.*

of the Comm. on Educ. and Lab., 94th Cong. 1st Sess. 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 CONG. REC. 5,807 (1972); 117 CONG. REC. 30,407 (1971) (making clear that Title IX was not intended to compel integration of athletics and facilities for men and women). Unlike Title VII, then, Title IX self-consciously employs awareness of sex to help "allocate opportunities separately for male and female students." *Cohen*, 101 F.3d at 177.

So Title IX's purposes and distinctions from related laws mean that it cannot mandate governmental blindness to sex-based distinctions in some cases—athletics being the case-in-point. Otherwise, sex-specific sports would be illegal in covered schools. Schools could no longer use "biology-based classification[s] to separate physical education classes involving contact sports like boxing or rugby." *Neese* v. *Becerra*, No. 2:21-CV-163-Z, 2022 WL 16902425, at *11 (N.D. Tex. Nov. 11, 2022). And the harms would undo Title IX's noteworthy success: A "[sex]-blind approach" "marginalizes and subordinates women" because it "would help only those women who are most 'like' men in their athletic interests and abilities and who are able to succeed in a world of sport structured on men's terms." Deborah L. Brake, *Title IX As Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 535 (2007).

In fact, the history behind the current "sports exception" in Title IX confirms that Congress never intended Title IX to require sex-blindness. Shortly after passing Title IX, Congress passed the Javits Amendments, which directed the Health, Education, and Welfare department (the Department of Education's predecessor) to publish athletics regulations. Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). HEW proposed regulations that included provisions identical to the sports exception now codified at 34 C.F.R. 106.41(b). Compare Nondiscrimination on the Basis of Sex Under Federally Assisted

Education Programs and Activities, 40 Fed. Reg. 24,128, 24,142-43 (1975), with 34 C.F.R. § 106.41. Congress then allowed the regulations to take effect and has left them in place for five decades now. See *McCormick*, 441 U.S. at 287. Thus, Congress ratified the regulations' understanding of Title IX—an understanding that allows educational institutions to recognize biological sex (and the corresponding physiological differences that result from it) when necessary to ensure equal access in education, such as in sports. Congress endorsed this understanding again in 1987, defining Title IX's educational programs to cover all education programs, including sports. See 20 U.S.C. § 1687(2)(A); *Cohen* v. *Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) (explaining import of Restoration Act to sports). In all these ways, Congress reaffirmed that Title IX allows for sex-specific sports. See SCALIA & GARNER, *supra*, at 322-26; see also, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction."). In much the same way, Congress' choice to refrain from amending Title IX's "sports exception" or treatment of the word "sex" in the face of many court cases endorsing sex-specific sports implies that Congress has adopted those constructions itself. See *Tex. Dep't of Hous. & Cmty. Affs.* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 536 (2015).

Finally, B.P.J. agrees as well that Title IX allows for this distinction, at least sometimes. App. 19a, 23a ("B.P.J. does not challenge sex-separation in sports."). So the only question is what distinction Title IX allows "for members of each sex" in sports. The answer is biological sex. See Section II.B.1, *supra*. This differentiation makes sense in the athletic context, where biology matters most. The Sports Act accounts for this reality by

giving space for women to compete fairly. So it cannot violate Title IX when Title IX contemplates this precise distinction. A contrary gender-identity-focused view of Title IX would mean that any biological male who identifies as female could play female sports, even without taking hormone-impacting drugs. In any event, Title IX does not speak to the challenging question of how much hormonal or other intervention a student athlete must undertake to participate in an educational program designated for "the other" sex. 20 U.S.C. § 1681(a)(8). All the more reason to conclude that Title IX is designed to address sex-based challenges, not those grounded in gender identity.

3. *Bostock* does not forbid the Sports Act.

Bostock does not support B.P.J.'s interpretation of Title IX, either.

First, *Bostock* doesn't mean Title IX forbids sex-specific sports. *Bostock* expressly limited its ruling to Title VII employment cases. *Bostock*, 140 S. Ct. at 1753. As already explained, Title VII "is a vastly different statute" than Title IX. *Jackson*, 544 U.S. at 168; see *Neese*, 2022 WL 16902425, at *8.

And *Bostock*'s logic does not work when applied to sex-specific sports. While *Bostock* interpreted Title VII to forbid considering sex when hiring and firing, Title IX often allows or even requires sex distinctions to accommodate physiological differences between males and females. See Section II.B.2, *supra*. And there is a significant difference between firing employees because of their gender identity and providing student athletes sex-specific sports opportunities: Sex is "not relevant to the selection, evaluation, or compensation of employees," *Bostock*, 140 S. Ct. at 1741 (cleaned up), but in athletics, "gender is not an irrelevant characteristic," *Cohen*, 101 F.3d at 176-78. The extensive

record below confirms this truth; after all the evidence was in, the trial court changed its initial judgment and held that sex makes a difference in sports. App. 26a (Sex "dictates physical characteristics that are relevant to athletics."); see also App. 27a-31a. B.P.J.'s counsel accepts this possibility too. App. 49a-50a. In fact, to achieve Title IX's purpose of giving women equal opportunity in athletics, some courts say that Title IX *must* treat the sexes differently by designating specific teams for females—a mandate that would put West Virginia in a bind if B.P.J.'s view were correct. See *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th Cir. 1989) (*Clark II*). That's why courts have often refused to read Title VII's requirements into Title IX's athletic context. See *Cohen*, 101 F.3d at 177.

Second, *Bostock* did not conflate gender identity and biological sex. It said only that gender-identity discrimination necessarily considered sex, so that type of discrimination in turn constituted sex discrimination under Title VII. *Bostock*, 140 S. Ct. at 1748. The Court did not consider the converse question—whether considering sex is always gender-identity discrimination. Yet another reason Title VII principles do not "automatically apply" to Title IX. *Meriwether* v. *Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). And here, the Sports Act's sex-based line-drawing exercise does not treat B.P.J. "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. Like all males, B.P.J. can participate on male and co-ed teams. Like all males, B.P.J. cannot play on female teams. West Virginia's choice to promote equal competitive opportunity for female athletes in this way does not run afoul of Title IX. To the contrary—that is what Title IX is all about.

4. B.P.J.s' reading of Title IX offends federalism.

B.P.J.'s approach to Title IX also clashes with notions of federalism. The federal government is one "of limited powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991). "The powers not delegated to the United States" are reserved to the individual States and the people. U.S. CONST. AMEND. X. And though the Supremacy Clause gives the federal government "a decided advantage" to "impose its will on the States," States still "retain substantial sovereign authority" owing to our system's "constitutionally mandated balance of power." *Gregory*, 501 U.S. at 457-60 (citation omitted). This decentralized structure "preserves to the people numerous advantages," and helps to protect "our fundamental liberties." *Id.* at 458.

Considering federalism's importance, federal courts should "be certain of Congress' intent before finding that federal law overrides' this balance." *Gregory*, 501 U.S. at 460 (cleaned up). Courts thus "insist on a clear" statement "before interpreting" even "expansive language in a way that intrudes on the police power of the States." *Bond* v. *United States*, 572 U.S. 844, 860 (2014); see also *Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (requiring "exceedingly clear language" before construing a statute to alter the balance of federal and state power); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (requiring "clear and manifest purpose" to override the "historic police powers of the States"). Separately, courts also require that "Congress speak with a clear voice" when it imposes conditions on the receipt of federal funds. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). "'Legislation enacted pursuant to the spending power is much in the nature of a contract,' and therefore, to be

bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006); see also *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty.* v. *Rowley*, 458 U.S. 176, 190 n.11 (1982) (explaining that Congress cannot impose "a burden of unspecified proportions and weight").

Both federalism "clear statement" rules apply here. *Bond*, 572 U.S. at 858. B.P.J.'s claim asks the federal courts to dictate core aspects of education—the State's "high responsibility." *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972). In fact, public education is "the very apex of the function of a State." *Id.* The Legislature's judgment also rests on biology and physiology; these subjects often fall within the state's historic "police power," too. Meanwhile, "Title IX was enacted as an exercise of Congress' powers under the Spending Clause." *Jackson*, 544 U.S. at 181. So before construing Title IX to reach sexual-orientation and gender-identity discrimination, the court below should have looked for undeniably clear intent that that's what Congress had in mind. See *Cummings* v. *Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1570 (2022).

It did not. Nor does B.P.J.'s interpretation sit well with either clear-statement rule. By dictating the fine points of how a State can set eligibility for school sports, B.P.J.'s reading offends core state responsibilities and upends settled quasi-contractual expectations. And given how B.P.J.'s view challenges notions of privacy, fairness, and biological differences that have "been commonplace and universally accepted … across societies and throughout history," *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting), it would have been particularly important for Congress to be clear about what it wanted if it

had meant for Title IX to break that new ground. In other words, a shift from a focus on sex to a focus on gender identity cannot be tacitly assumed. Yet Congress did not address gender identity when it codified Title IX, let alone in a "clear" or "unambiguous" way. And for 50 years, everyone has accepted that schools may recognize biological differences between males and females. *Id.* B.P.J.'s new approach to the statute would produce an unfair "surpris[e]" to States and their residents in every sense. *Pennhurst*, 451 U.S. at 25.

Bostock does not help B.P.J. on this point, either. Title IX's "contractual framework" further "distinguishes [it] from Title VII, which is framed in terms not of a condition but of an outright prohibition." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). "Title IX's contractual nature" is one more reason to distinguish this case from *Bostock*. *Id.* at 287.

So federalism canons confirm that Title IX means what it has always meant: The law guarantees equal opportunities for men and women according to biological sex. Sports are no exception. On the merits, West Virginia has the better of this argument, too.

III. The remaining factors favor the Applicants.

The remaining factors also favor vacating the injunction on appeal. The Fourth Circuit's unexplained injunction disrupts the status quo, thwarts West Virginia voters, and irreparably harms female athletes.

A. The injunction unjustifiably upsets the status quo.

As the Fourth Circuit recognized, B.P.J. sought an "injunction pending appeal"—not a stay. App. 2a. A stay "suspend[s] judicial alteration of the status quo," while an injunction requires it. *Nken* v. *Holder*, 556 U.S. 418, 430 (2009). And the district court's earlier preliminary injunction did not set the status quo, state law did. After all, "it is the

state's action—not any intervening federal court decision—that [sets] the status quo." *Wise* v. *Circosta*, 978 F.3d 93, 98 (4th Cir. 2020) (en banc) (citing *Andino* v. *Middleton*, 141 S. Ct. 9 (2020) (mem.)). As lower courts have recognized, "[i]njunctions that alter the status quo are not granted unless extreme or very serious damage will result and are not issued in doubtful cases." *Roman* v. *Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (cleaned up); see also, *e.g.*, *Att'y Gen. of Okla.* v. *Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (requiring a "heightened showing"). All the more so when, as here, the district court has already refused an injunction—in that case the applicant's motion becomes a request for a "partial summary reversal." *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers) (refusing injunction even for statute later found unconstitutional).

This application seeks to restore the status quo—preserving the voters' will and protecting West Virginia female athletes while this case is litigated on appeal. Indeed, because the State has been ordered to affirmatively allow B.P.J. to compete in female athletics (by reinstating the dissolved preliminary injunction), the Fourth Circuit's order constitutes a disfavored "mandatory" injunction. *Whitcomb*, 409 U.S. at 1235. Adding to what should have been an already heavy burden for B.P.J., this type of injunction issues properly "only in the most unusual case," where "the applicants' right to relief [is] indisputably clear." *Id.* This case does not hit that mark. The Fourth Circuit had no basis to upend the status quo pending appeal.

B. The injunction spurns West Virginia voters and the public interest.

Granting any injunction is an "extraordinary" event. *Winter*, 555 U.S. at 24. It should be even more rare when the injunction forbids a State from enforcing a validly enacted law. Indeed, courts are rightly slow to enjoin the "enforcement of a presumptively valid state statute." *Brown*, 533 U.S. at 1303. The reason is simple: "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). And that harm is intensified here, where the Fourth Circuit did not even explain itself before second-guessing a trial court that entered summary judgment for the defendants after considering a record spanning thousands of pages. The result is that West Virginia voters suffer every day the Sports Act is enjoined for no lawful reason. Cf. *Va. Ry. Co.* v. *Sys. Fed'n No. 40*, 300 U.S. 515, 551 (1937) (explaining how legislation is "the judgement" of the populace as "deliberately expressed in [the challenged] legislation").

Conversely, this Court's "ordinary practice" "[w]hen courts declare state laws unconstitutional and enjoin state officials from enforcing them … is to suspend those injunctions from taking effect pending appellate review." *Strange* v. *Searcy*, 574 U.S. 1145 (2015) (Thomas, J., dissenting from denial of the application for a stay). Yet the Fourth Circuit majority gave no weight to how States "take care" to "comply with the Constitution … when they enact their laws." *Id.* (quoting *King*, 567 U.S. at 1303); cf. W. VA. CODE § 18-2-25d (legislative findings for the Sports Act referring to several decisions of this Court). And it overlooked that the Sports Act, like similar presumptively constitutional state laws, reflects the policy preferences of the States' people on a

challenging and sensitive issue. See W. VA. CODE § 18-2-25d (legislative findings about policy concerns underlying the legislation); see also *Adams*, 57 F.4th at 820 (Lagoa, J., specially concurring) (discussing the "significant questions of general public concern" over whether "women and girls are given the equal opportunity to compete in sports").

All told, the Sports Act is a validly enacted law representing the State's considered judgment about the harms of allowing biological males to compete in female sports. After much debate, lawmakers chose to protect fair play and safety for females. That choice deserved more respect than the Fourth Circuit's cursory order gave it—and the harms to West Virginia and the public interest from keeping that order in place justify jettisoning the injunction entirely.

C. The balance of harms supports vacating the injunction.

"Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only to prevent irreparable injury which is clear and imminent." *Am. Fed'n of Lab.* v. *Watson*, 327 U.S. 582, 593 (1946) (cleaned up). Here, evidence of harm *supporting* the injunction largely focused on fear of losing the opportunity to play on the team B.P.J. prefers for the upcoming school year. App. 35a, 44a-47a. Lower courts "have routinely rejected the notion that a student suffers irreparable harm by not being permitted to participate in interscholastic athletics." *McGee* v. *Va. High Sch. League, Inc.*, 801 F. Supp. 2d 526, 531 (W.D. Va. 2011). The district court was right in declining to tinker with the West Virginia Code because of B.P.J.'s fears of that harm.

Even without an injunction, B.P.J. can compete in sports; the injunction decides only who B.P.J.'s competitors and teammates might be this spring while the Fourth Circuit considers the merits. B.P.J. has a strong preference, but where biological females across

the country have often sought to compete on male teams because they desire more competition, *O'Connor*, 449 U.S. at 1301 (Stevens, J, in chambers), the chance to play on a different team at least mitigates claims of irreparable harm. Potential stigma is also not a valid ground for an injunction. See, *e.g.*, *Peeples* v. *Brown*, 444 U.S. 1303, 1305 (1979) (Rehnquist, J., in chambers) (holding that "stigmatization" and "traumatic rejection" did not establish "the necessary irreparable injury" for an injunction); *Sampson* v. *Murray*, 415 U.S. 61, 91 (1974) (holding that "humiliation" and other alleged harms did not support injunction). Thus, even if B.P.J. could get over the significant threshold of likelihood of success on the merits, the claim of irreparable harm was not enough for an injunction, either.

On the other side of the scale, it is not true (as B.P.J. argued below) that an injunction would harm no one. It will harm biological female athletes who compete against and lose to B.P.J.—and any other athletes who ask for the injunction's logic to extend to them—this spring and beyond. Just during the time that the preliminary injunction was in place, for instance, B.P.J. displaced girls 105 times across eleven events.

True, B.P.J. may finish "near the end of the pack" sometimes, App. 5a, but bumping other girls down the standings at other times harms them. Placements matter to athletes. While losing is a part of every sport, athletes want to earn their spot fair and square. And puberty can boost a child's athleticism quickly. So as B.P.J. grows, more girls will fall behind more often. Although B.P.J. says that drugs can mitigate male puberty, evidence says no—or at least not entirely. See App. 27a, 94a-109a, 151a-192a; Part II.A.2, *supra*. In

sports like track where placement can be measured in seconds or less, "not entirely" can have big effects.

Further, as long as B.P.J. is on the team, another girl won't be. Last year, according to the County, B.P.J.'s school did not accept all students who tried out for girls' track. If that holds true this year, B.P.J. will prevent a female classmate from competing in girls' track altogether this spring. When biological males displace females "even to the extent of one player … the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Clark II*, 886 F.2d at 1193; see also *B.C.*, 531 A.2d at 1062 (describing evidence showing that allowing just a few boys to participate in girls' sports in Massachusetts caused serious negative consequences for high-school athletics). These girls will also experience their middle-school years only once.

And while B.P.J. asks for a lone exception, the underlying rule has no limiting principle. See *Elgin* v. *Dep't of Treasury*, 567 U.S. 1, 15 (2012) (declining to adopt a rule that depended on "amorphous distinctions" between "facial and as-applied challenges"). If this Court does not vacate the injunction, what should schools say to the male student who identifies as female but takes no other steps to reflect that identity? Or the male with low testosterone? Or the male who lacks athletic talent? The injunction offers no reason to exclude these students if the State must offer an exception to B.P.J. And given the injunction, other schools may be driven to allow biological males who identify as female to compete in female sports. Choices like these could in turn deter girls from pursuing athletics *anywhere*, as their narrowing opportunities in school sports would dissuade them from pursuing sports more generally. See Dionne L. Koller, *How the Expressive Power of*

Title IX Dilutes Its Promise, 3 HARV. J. SPORTS & ENT. L. 103, 132 (2012) ("[E]ducation-based sports opportunities have important symbolic force, as [they] provide the most significant number of athletic participation opportunities in the United States."). This Court should consider *all* "the public consequences" that leaving the injunction in place would bring. *Winter*, 555 U.S. at 24. The best balance comes from applying the Sports Act consistently to everyone while the appeal is pending.

* * * *

This case implicates a question fraught with emotions and differing perspectives. That is all the more reason to defer to state lawmakers pending appeal. *Andino*, 141 S. Ct. at 10 (Kavanaugh, J., concurring). The decision was the West Virginia Legislature's to make. The end of this litigation will confirm that it made a valid one. In the meantime, the Court should set aside the Fourth Circuit's unreasoned injunction and allow the State's validly enacted law to go back into effect.

CONCLUSION

This Court should vacate the Fourth Circuit's injunction pending appeal.

Respectfully submitted.

ALLIANCE DEFENDING FREEDOM

JOHN J. BURSCH
CHRISTIANA M. KIEFER
440 First Street, NW, Suite 600
Washington, DC 20001
jbursch@ADFlegal.org
ckiefer@ADFlegal.org
(616) 450-4235

JOHANNES S. WIDMALM-DELPHONSE
44180 Riverside Pkwy.
Lansdowne, VA 20176
jwidmalmdelphonese@ADFlegal.org
(571) 707-4655

JONATHAN A. SCRUGGS
JACOB P. WARNER
15100 N. 90th Street
Scottsdale, AZ 85260
jscruggs@ADFlegal.org
jwarner@ADFlegal.org
(480) 444-0020

Counsel for Lainey Armistead

SHUMAN MCCUSKEY SLICER

ROBERTA F. GREEN
KIMBERLY M. BANDY
1411 Virginia St. E., Suite 200
Charleston, WV 25301
(304) 345-1400
rgreen@shumanlaw.com
kbandy@shumanlaw.com

Counsel for West Virginia Secondary School Activities Commission

PATRICK MORRISEY
Attorney General

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS
Senior Deputy Solicitor General

CURTIS R. A. CAPEHART
Deputy Attorney General

GRANT A. NEWMAN
Assistant Solicitor General

OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

Counsel for State of West Virginia

BAILEY & WYANT, PLLC

KELLY C. MORGAN
MICHAEL W. TAYLOR
KRISTEN V. HAMMOND
500 Virginia St. E., Suite 600
Charleston, WV 25301
(303) 345-4222
kmorgan@baileywyant.com
mtaylor@baileywyant.com
khammond@baileywyant.com

Counsel for West Virginia State Board of Education and W. Clayton Burch, State Superintendent