NOS. 24-38, 24-43

IN THE

Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, ET AL.,
Petitioners,

v.

LINDSAY HECOX, ET AL.,
Respondents

WEST VIRGINIA, ET AL.,
Petitioners,

v.

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

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits

AMICUS CURIAE BRIEF OF NC VALUES INSTITUTE IN SUPPORT OF PETITIONERS

TAMI FITZGERALD
NC VALUES INSTITUTE
9650 Strickland Rd.
Suite 103-226
Raleigh, NC 27615

DEBORAH J. DEWART
Counsel of Record
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae urges this Court to reverse the Fourth and Ninth Circuit rulings.

NC Values Institute is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith. See https://ncvi.com.

The State of North Carolina has passed the *Fairness in Women's Sports Act* (effective August 16, 2023), a statute similar to the *West Virginia Save Women's Sports Act* at issue in this case. The legislation protects females from being forced to play against biological males on sports teams, which not only cheats them out of equal opportunities but can lead to serious injuries. In late 2022, a female high school volleyball player in Cherokee County, NC suffered severe head and neck injuries, resulting in long-term concussion symptoms, when a biological male spiked a ball in her face during a return play.[2]

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[1] *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

[2] https://www.dailywire.com/news/trans-athlete-severely-injures-girls-volleyball-player-with-spike-district-forfeits-games-for-girls-safety (last visited July 22, 2025).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The decisions of the Fourth (*B.P.J. v. West Virginia*) and Ninth (*Hecox v. Little*) Circuits are egregiously wrong and should be reversed. The Court is now positioned to address both the Title IX and the Equal Protection questions raised by the West Virginia and Idaho state laws at issue.

The West Virginia Act, passed by the state legislature in 2021, requires public schools to designate sports teams "based on biological sex" and prohibits biological males from participating on teams "designated for females, women, or girls." W. Va. Code § 18-2-25d. The District Court correctly held there was no violation of Equal Protection or Title IX, 20 U.S.C. §§ 1681-1688, because "separating athletic teams based on biology is substantially related to the state's important interest in providing *equal athletic opportunities to females*, who would otherwise be displaced if required to compete with males." *B.P.J. v. West Virginia State Bd. of Educ.*, 2023 U.S. Dist. LEXIS 20427 *7; 2023 WL 1805883 (4th Cir. 2023) (emphasis added). This Court's opinion in *Bostock v. Clayton County*, 590 U.S. 644 (2020) does not require otherwise. Athletic teams are not required to be separated based on gender identity.

Idaho lawmakers passed a similar bill that made Idaho "the first state to ban transgender athletes from participating on girls' sports teams at the primary, secondary, and college levels." Jacqualyn Gillen, *Comment: Striking the Balance of Fairness and Inclusion: The Future of Women's Sports After the*

Supreme Court's Landmark Decision in Bostock v. Clayton County, GA, 28 Jeffrey S. Moorad Sports Law Journal 415, 419-420 (2021). A federal judge issued a temporary injunction. *Hecox v. Little*, 479 F.Supp.3d 930, 988 (D. Idaho 2020). The Ninth Circuit upheld the injunction, holding the Idaho law likely violated the rights of transgender student athletes under the Equal Protection Clause of the Fourteenth Amendment. *Little v. Hecox*, 104 F.4th 1061, 1080-81 (9th Cir. 2024).

This Court's decision in *Bostock* "ushers in new threats to the safety, well-being, and constitutional rights of many Americans." Rena M. Lindevaldsen, *Article*: Bostock v. Clayton County: *A Pirate Ship Sailing Under a Textualist Flag*, 33 Regent U.L. Rev. 39 (2020-2021). This Court's review will help ensure that lower courts exercise judicial restraint rather than mechanically extending *Bostock* to other unrelated contexts, such as sports.

ARGUMENT

I. *BOSTOCK* MUST BE NARROWLY INTERPRETED AND APPLIED.

Bostock's reach should be limited to what this Court *did* decide—not what it *did not* decide. This case was a shocking departure from the understanding of the Congress that enacted Title VII, 42 U.S.C. § 2000e et seq., and the courts that interpreted it over several decades of litigation. The majority and dissenting opinions all acknowledged there were many issues the Court did *not* address. Lower courts should not hastily employ *Bostock* as a

band-aid to fix every perceived "discrimination" based on sexual orientation or gender identity. In the athletic arena, the results are illogical, absurd, and patently unfair to women.

Bostock's implications are staggering. The employers in that case rightly worried that the Court's decision would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," including private facilities and dress codes. *Bostock*, 590 U.S. at 681. "But none of these other laws are before us," this Court assured them, and "we do not purport to address bathrooms, locker rooms, or anything else of the kind." *Ibid*. Those words now ring hollow. "Anything else" is now before the Court and must be addressed.

Title VII does not stand alone, nor does Title IX. There are "[o]ver 100 federal statutes" that "prohibit discrimination because of sex." *Bostock*, 590 U.S. at 724 (Alito, J., dissenting). It was not difficult to predict that private facilities would be next on the chopping block. "The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex." *Id*. at 725 (Alito, J., dissenting). Such concerns were hardly speculative, considering prior circuit court decisions and the 2016 advisory from the Department of Justice that purported to mandate public school bathroom policies based on gender identity. *Id*. at 726. Additionally, Justice Alito warned of a multitude of potential applications, with women's sports leading the list. "The effect of the Court's reasoning may be to

force young women to compete against students who have a very significant biological advantage . . . ." *Ibid*. Additional threats include housing (*see Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992 (8th Cir. 2022)), employment by religious organizations, healthcare,[3] sex reassignment procedures,[4] freedom of speech (*Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021)), and other constitutional claims such as Equal Protection—as in this case and *Hecox v. Little*. *Bostock*, 590 U.S. at 728-729 (Alito, J., dissenting). These concerns are very troubling and no longer speculative in view of post-*Bostock* judicial developments.

One Sixth Circuit ruling, citing this Court's caution about the many laws that were not before them, properly declined to extend *Bostock*'s rationale, explaining that "the rule in *Bostock* extends no further than Title VII and does not stretch to the ADEA." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021). This Court should confirm this reasoning and limit *Bostock*'s holding.

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[3] *See* Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 74, citing a district court holding that a hospital staff's refusal to use preferred pronouns violates the Affordable Care Act. *Prescott v. Rady Child.'s Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098-100 (S.D. Cal. 2017).

[4] This Court recently upheld the Tennessee statute challenged in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), an important law protecting minor children from dangerous sex transition procedures that may cause irreparable harm.

II. *BOSTOCK*'S EXTREME LITERALISM WARRANTS RESTRAINT.

Legal activists have begun using *Bostock* as a springboard to coerce sweeping social engineering in other unrelated contexts. Advocates demand that courts reinterpret a broad swath of anti-discrimination laws to include sexual orientation and gender identity within the definition of "sex." A fair reading of *Bostock* does not warrant these radical legal maneuvers. A coherent limiting principle is needed to distinguish these concepts and ensure that the word "sex" is not stretched beyond recognition.

The sole question before the *Bostock* Court was whether an employer discriminated "because of sex" by taking action against an employee "simply for being homosexual or transgender." *Bostock*, 590 U.S. at 681. This Court expressly disclaimed deciding whether "other policies and practices might or might not qualify as unlawful discrimination," even under Title VII (*id.*), let alone Title IX. Lower courts have failed to heed this warning.

A. *Bostock*'s extreme literalism confuses language, leading to absurd results.

"[C]ourts must avoid interpretations that would attribute different meanings to the same phrase or word in all but the most unusual of statutory circumstances." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 814 (11th Cir. 2022) (cleaned up); *see Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000).

The *Bostock* majority admitted that "homosexuality and transgender status are distinct concepts from sex." 590 U.S. at 669. Neither concept is "tied to either of the two biological sexes." *Id.* at 689 (Alito, J., dissenting). Yet this Court essentially treated them as synonymous. In addition to the massive public policy implications, "the potentially greater concern" with *Bostock*'s approach is "its characterization as a case decided on a plain meaning interpretation." Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 78. The "plain meaning" camouflage obscures this Court's failure to consider dictionary and medical definitions, common understanding, prior judicial rulings, or various statutes and Executive Orders. *Id.* Chaos ensued.

What Title VII prohibits—and presumably Title IX as well—is "discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, sex." *Bostock*, 590 U.S. at 694 (Alito, J., dissenting). It is inconceivable, for example, that federal law would prohibit an employer's consideration of an employee's record of sexual harassment, sexual assault, or sexual violence. *Ibid.* Would an employer be required to hire a registered sex offender for a position working with young children? *Bostock*'s extreme literalism does not immediately rule out such results and should not be replicated in the context of sports.

B. Bostock's extreme literalism ignores biological reality, including physiological differences between men and women that are relevant to athletic competition.

The West Virginia Act, like other comparable state laws, is based on relevant physiological differences between biological males and females. Accordingly, "[t]he Act declares a person's sex is defined only by their 'reproductive biology and genetics at birth.'" W. Va. Code § 18-2-25d(b)(1).

Bostock began with the correct assumption that "sex" "refer[s] only to biological distinctions between male and female." 590 U.S. at 655. "[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Adams*, 57 F.4th at 807, quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). When Title IX was enacted, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females." *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 574 (4th Cir. 2024) (Agee, J., dissenting), quoting *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J., dissenting) (collecting definitions). This "biological reality" was "repeatedly acknowledged" over the years, "that men and women fall into two distinct groups, most notably distinguishable by their reproductive capacities." Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 56, citing *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 202-08 (1978); *United States v. Virginia*, 518 U.S. 515, 588 (1996).

"To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). It does not require a medical degree to understand that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant." *Michael M. v. Superior Ct.*, 450 U.S. 464, 471 (1981); *see* Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 56. *Bostock*'s promising initial reassurance now rings hollow as litigants import its ultimate rationale and conclusions into other contexts. The relevance of physiological differences varies from one context to another. Separate restrooms for male and female are reasonable and constitutional (even though courts have given short shrift to the privacy concerns) while separate restrooms for black and white races are not, "because there are biological differences between the two sexes that are relevant with respect to restroom use in a way that a person's skin color is demonstrably not." *Grimm*, 972 F.3d at 535 (Niemeyer, J., dissenting). Similarly, biological differences between the two sexes are relevant with respect to *sports participation* "in a way that a person's skin color is demonstrably not." *Bostock* is not a one-size-fits-all test that can be blindly applied in every context.

The text and regulations for Title IX "repeatedly recognize a biological binary of male and female." Rachel N. Morrison, *Article: Gender Identity Policy*, *Gender Identity Policy Under the Biden Administration*, 23 Federalist Soc'y Rev. 85, 115 (2022); *see* 20 U.S.C. § 1681 ("one sex," "both sexes,"

"other sex," "boy or girl conferences"); 34 C.F.R. § 106.34 ("one sex," "boys and girls"); *id.* § 106.41 ("one sex," "both sexes," "other sex"); 20 U.S.C. § 1686 (providing for sex-segregated living facilities); 34 C.F.R. § 106.33 (separate toilet, locker room, and shower facilities). Although "Title IX's statutory language says nothing specifically about sports . . . the Title IX regulations that apply to sports . . . mirror the blanket-rule-with-specific-exception framework that Title IX statutorily applies to living facilities." *Adams*, 57 F.4th at 818 (Lagoa, J., concurring). These regulations provide explicitly for sex-segregated sports "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). It could hardly be more clear, and Title IX was initially "lauded for dramatically increasing athletic opportunities for women and girls" by effectively accommodating the "athletic interests and abilities of male and female students." Morrison, *Gender Identity Policy Under the Biden Administration*, 23 Federalist Soc'y Rev. at 123, citing Office for Civil Rights, U.S. Dep't of Educ., *Requirements Under Title IX of the Education Amendments of 1972*.[5]

C. Bostock's extreme literalism leads to illogical results as applied to athletics.

Since Title IX regulations explicitly permit sex separation for private facilities, what are the implications if "sex," "sexual orientation," and "gender identity" are treated as interchangeable

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[5] https://www2.ed.gov/about/offices/list/ocr/docs/interath.html (last modified Jan. 10, 2020).

terms? Should separate facilities be provided for homosexual women and heterosexual women? Should separate facilities be provided for men who identify as women, or for women who identify as men? Does the word "sex" have any coherent meaning after *Bostock*? Illogical results and absurdities abound.

Even if the extreme literalism employed in *Bostock* were the correct approach, it is risky to import it into other unrelated contexts. As Judge Niemeyer pointed out in *Grimm*, the majority's statement—that the provision for segregated bathrooms "cannot override the *statutory* prohibition against *discrimination* on the basis of sex" (emphasis added)—overlooks the express provision "*in the statute*" allowing schools to "maintain[] separate living facilities for the different sexes." *Grimm*, 972 F.3d at 635 (Niemeyer, J., dissenting); *see* 20 U.S.C. § 1686.

Bostock's approach spawns a multitude of confusion and questions. What about a biological male who is *not* transgender playing on the women's team? This second possibility has already been addressed. *Att'y Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 290, 296 (Mass. 1979) (holding that exclusion of males from girls' teams is prohibited under state equal rights amendment). After this ruling, the Executive Director of the Massachusetts Interscholastic Athletic Association testified to the disastrous results, allowing male dominance and displacing girls in sports where they previously participated—much like what is happening now as a consequence of transgender ideology. Michael E. Rosman, *Article: Gender Identity, Sports, and*

Affirmative Action: What's Title IX Got to Do With It?, 53 St. Mary's L. J. 1093, 1140 (2022). *See B.C. ex rel. C.C. v. Bd. of Educ., Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059, 1063 (N.J. Super. Ct. App. Div. 1987) (upholding athletic association's regulation barring boys from participating in girls' sports, because it would risk injury to the girls and discourage their participation).

D. *Bostock*'s extreme literalism leads to a bizarre rewriting of the legal standard for "facial discrimination."

The Fourth Circuit concluded that the "undisputed purpose" and effect of the Act's definitions was to exclude transgender "girls" (biological *boys* who identify as girls) from girls' sports teams by excluding them from the definition of "female." *B.P.J.*, 98 F.4th at 556. The court then concluded that this is "a facial classification based on gender identity." *Ibid.* But "[t]he Act does not facially discriminate based on transgender status"—it simply and reasonably "places athletes on sports teams based on their biological sex." *Id.* at 569 (Agee, J., dissenting). The *effect* is "irrelevant to a facial challenge under the Equal Protection Clause." *Id.* at 570. As Petitioners observe, "distinctions drawn with an eye towards biological sex" in the Fourth Circuit "are assumed to target those who self-identify with a different gender." Pet. 27. In *Hecox*, similarly, the Ninth Circuit held that Idaho's use of "biological sex" in its statute functioned as a form of "proxy discrimination." *Little v. Hecox*, 104 F.4th at 1078, quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir.

2013). Thus, using the "seemingly neutral criteria" in the statute was "*constructively*, facial discrimination against the disfavored group." *Ibid*. (emphasis added).

This inexplicable revision of "facial discrimination" seems like something from a parallel legal universe where words can be bent to mean whatever the writer desires—even the precise opposite of reality.

E. *Bostock*'s extreme literalism destroys the whole concept of *women's* sports.

The expanded application of *Bostock* is on a collision course with the very purpose of Title IX and its provision for sex-specific sports—to ensure equal athletic opportunities for women. "It is no understatement to say that the inclusion of transgender girls on girls' teams will drive many biological girls out of sports and eviscerate the very purpose of Title IX." *B.P.J.*, 98 F.4th at 573 (Agee, J., dissenting), citing *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993) (stating that "it would require blinders to ignore that the motivation for" enacting Title IX and its sports regulations was to promote opportunities for girls in sports). Allowing biological males to participate undermines not only the purpose of Title IX but the very idea of *women's* sports. Morrison, *Gender Identity Policy Under the Biden Administration*, 23 Federalist Soc'y Rev. at 124; 34 C.F.R. § 106.41(c). Ironically, it is precisely *because of sex*, i.e., the physiological differences between men and women that cannot be blithely dismissed, that sex-separated athletic teams and

competitions are necessary and explicitly permissible under federal law.

One commentator explained that if the Equal Rights Amendment were ever passed and the government adopted an anti-classification approach, viewing the *classification* itself as the constitutional evil, rather than the *subordination* of a protected group, "[t]he effect would be that laws and government policies designed to improve women's opportunities would likely be subject to strict scrutiny—because they necessarily take account of sex—and likely struck down." Kim Forde-Mazrui, *Article: Why the Equal Rights Amendment Would Endanger Women's Equality: Lessons From Colorblind Constitutionalism*, 16 Duke J. Const. Law & Pub. Pol'y 1, 35 (Spring 2021). Sex classification in "extracurricular activities such as sports" would be vulnerable under strict scrutiny. *Id*. at 38. That is essentially what *Bostock* has already foisted upon us, erasing distinctions between male and female and allowing transgender rights to run roughshod over all others. The result is to destroy the equal opportunities Title IX was enacted to provide, using "gender identity" to create a severe *disadvantage* for biological women and an unfair *advantage* for biological men who identify as women. This is blatant *inequality*.

III. *BOSTOCK*'S APPROACH SHOULD NOT BE IMPORTED INTO A MUCH DIFFERENT CONTEXT.

One of the problems with cases like *Bostock*, where courts fashion legal rules never contemplated

or considered by the original legislative body, is the concerns that arise when the newly minted rule is imported into a much different context. Title VII regulates discrimination in *employment—not* education, *not* access to bathrooms or other private facilities, and *not* athletic competitions. These contexts highlight specific differences between male and female that are not necessarily relevant in every employment relationship. It is even more dangerous to play "leap frog" with a novel judicial fiat—first applying *Bostock*'s rationale to bathrooms with a blind eye to privacy and then leaping to ballgames, where obvious physiological differences have drastic and even dangerous consequences. The results of this "leap frog" game are astonishing, "turn[ing] Title IX on its head and revers[ing] the monumental work" the statutory scheme has accomplished. *B.P.J*, 98 F.4th at 572 (Agee, J., dissenting).

A. Unlike the *individual* treatment *Bostock* stressed, athletic competitions mandate consideration of women as a *group*.

Bostock concluded that "an employer cannot escape liability" under Title VII "by demonstrating that it treats males and females comparably as *groups*." 590 U.S. at 665. The Court explained that "Congress's key drafting choices—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 injuries—virtually guaranteed that unexpected applications would emerge over time." *Id*. at 680 (emphasis added). This generally makes sense; employers hire individual employees, not entire groups. But even in

hiring employees, "at least one court has said that an employer does not violate Title VII by having separate physical requirements for men and women." Rosman, *Gender Identity, Sports,* 53 St. Mary's L. J. at 1104-1105. In *Bauer v. Lynch*, the Fourth Circuit validated "the FBI's gender-normed standards for physical fitness for its trainees" (*id*. at 1105), acknowledging that "the physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness." 812 F.3d 340, 351 (4th Cir. 2016).

Bostock admitted that "[t]he employers might be onto something if Title VII only ensured equal treatment between *groups* of men and women." *Bostock,* 590 U.S. at 671 (emphasis added). In athletics, that is precisely where the concerns arise. Allowing biological males to compete on women's teams virtually guarantees inequality at the group level, "invidiously relegating the *entire class of females* to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero*, 411 U.S. at 686-87. Under the Fourth Circuit's approach, Title IX "provide[s] more protection against discrimination on the basis of transgender status . . . than it would against discrimination on the basis of sex." *Id*. at 580, quoting *Adams*, 57 F.4th at 814. Consider also that "[t]he logic of the Court's decision could even affect *professional* sports." *Bostock*, 590 U.S. at 728 (Alito, J., dissenting) (emphasis added). *Bostock* did not address that situation and indeed *could not* because none of the parties were professional athletes. Under Title IX, there are express provisions for sex segregation that do protect entire groups of men and women. Indeed,

"if one accepts the propriety of sex segregation," as Title IX does, "it becomes quite difficult to identify a case of *individual* sex discrimination." Rosman, *Gender Identity, Sports*, 53 St. Mary's L. J. at 1110. The provision of separate but comparable athletic teams for men and women is a commonsense solution to ensure equal treatment at both levels—groups and the individuals that comprise them.

In contrast to the clear protection Title IX provides for *groups*—biological women specifically—the Fourth Circuit explicitly contended that "Title IX protects the rights of individuals, *not groups*, and does not ask whether the challenged policy treats [one sex] generally less favorably than [the other]." *B.P.J.*, 98 F.4th at 559 (emphasis added), *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130 (4th Cir. 2022) (en banc).

B. Bathrooms and ballgames are not analogous.

"Gender identity . . . has nothing to do with sports. It does not change a person's biology or physical characteristics. It does not affect how fast someone can run or how far they can throw a ball. Biology does." *B.P.J.*, 98 F.4th at 568 (Agee, J., dissenting).

In this troubling game of legal "leap frog," courts and even administrative agencies[6] have radically

[6] For example, the Civil Rights Division of the Department of Justice issued a memorandum claiming that Title IX protects transgender students from discrimination based on gender identity in the context of single-sex restrooms. Memorandum from Pamela Karlan, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (March 26, 2021).

reinterpreted the simple word "sex" through a breathtaking expansion of *Bostock*. The first frontier was single-sex bathrooms.

In some cases, persons who are not transgender assert privacy rights to challenge policies that *allow* transgenders to use facilities that do not correspond with biological sex. Some courts have found pro-transgender policies permissible but not necessarily mandatory. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-535 (3d Cir. 2018) (School District *may* allow use of bathrooms and locker rooms that align with gender identity); *Parents for Priv. v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020) (sex-segregated bathrooms permissible but not mandatory). In *Barr*, the Ninth Circuit reasoned that the statute does not "explicitly state, or even suggest, that schools may not allow transgender students to use the facilities that are most consistent with their gender identity." *Id.*

In other cases, transgender persons assert the right to use the bathroom corresponding to "gender identity" rather than sex. Ignoring the express statutory language of Title IX and its regulations, litigants challenge the use of biological sex as the sole criteria for separation of private facilities. Perhaps the most prominent of these cases is *Grimm*, which "join[ed] a growing consensus of courts in holding" that "equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender." 972 F.3d at 593. Parroting *Bostock*, 590 U.S. at 660, the Fourth Circuit reasoned that a discriminator "necessarily refer[s] to the individual's sex to

determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions." *Grimm,* 972 F.3d at 616. Judge Niemeyer pointed out the statutory allowance for "separate living facilities for the different sexes," 20 U.S.C. § 1686, including "toilet, locker room, and shower facilities," 34 C.F.R. § 106.33. *Grimm*, 972 F.3d at 628 (Niemeyer, J., dissenting). The majority departed from the "commonplace and universally accepted" practice "across societies and throughout history" to separate "on the basis of sex" private facilities designed for use by multiple persons at one time. *Id.* at 634. Abundant case law affirms the right to bodily privacy, which is "broader than *the risks of actual* bodily exposure" and extends to "*intrusion created by mere presence*." *Id.* at 633-634 (collecting cases) (emphasis in original). The shocking result of the Fourth Circuit's ruling is that it "renders on a larger scale any separation on the basis of sex nonsensical." *Id.* at 628. "There simply is no limiting principle to cabin [the *Grimm* majority's] definition of 'sex' to ... bathrooms under Title IX, as opposed to ... the statutory and regulatory carve-outs for living facilities, showers, and locker rooms." *B.P.J.*, 98 F.4th at 579 (Agee, J., dissenting), citing *Adams*, 57 F.4th at 818.

Radical reinterpretations began with bathrooms, where massive privacy concerns are ignored, but then leaped into the sports arena. Athletics involves physiological differences between men and women that are not implicated in bathroom cases. In both contexts, courts have "ensure[d] that policy preferences prioritizing transgender persons take precedence." *B.P.J.*, 98 F.4th at 580 (Agee, J.,

dissenting). *Bostock* does not require or even support these bizarre results, as this Court explicitly declined to address bathrooms or any other issues beyond employment per se. "Physical differences between men and women" are "enduring" and render "the two sexes ... not fungible." *United States v. Virginia*, 518 U.S. at 533, 550 n.19. Even a commentator sympathetic to transgender rights admits that "[c]ircumstances that involve strength and other athletic differences . . . might justify sex-exclusive sports." Forde-Mazrui, *Why the Equal Rights Amendment Would Endanger Women's Equality*, 16 Duke J. Const. Law & Pub. Pol'y at 39.

IV. THE UNHINGED EXTENSION OF *BOSTOCK* RAISES CONSTITUTIONAL CONCERNS THAT WARRANT JUDICIAL RESTRAINT.

Lower courts should not rush to expand *Bostock*'s "novel and creative argument" that "because of sexual orientation" and "because of sex" are "not separate categories of discrimination after all." *Bostock*, 590 U.S. at 783 (Kavanaugh, J., dissenting). *Bostock* upset decades of precedent and expectation. Its holding should be carefully confined and not expanded to new territory. "The interpretation of statutes as important as Title IX should not be subjected so easily to shifts in policy by the executive branch." *Grove City Coll. v. Bell*, 465 U.S. 555, 603 (1984) (Brennan, J., concurring in part).

A. *Bostock* raises concerns about the Constitution's separation of powers.

Bostock did an "end-run around the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes." *Bostock*, 590 U.S. at 783 (Kavanaugh, J., dissenting). Lower courts should not repeat this error and perpetrate an even greater distortion of law, logic, and reality by "[u]surping the constitutional authority of the other branches." *Id*. at 684 (Alito, J., dissenting). Such joining of judge and legislator is a serious threat to life and liberty: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." The Federalist No. 47, at 326 (citing Montesquieu); *see Bostock*, 590 U.S. at 782 (Kavanaugh, J., dissenting), quoting James Madison.

B. *Bostock* raises concerns about democratic accountability and the rule of law.

Title IX concerns public education, a matter entrusted primarily to state and local governments. Local control over public education is "deeply rooted" in American tradition. Indeed, "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974). Judicial restraint should characterize any sort of federal intervention. Extension of *Bostock* would remove decisions about education from the elected representatives closest to the people and most

responsive to their concerns, depriving individuals of their liberty to participate in a contentious matter of public concern. "The United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself." Stephen Breyer, Active Liberty (Vintage Books 2006), at 3.

Justices Alito and Kavanaugh both recognized this concern. "If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests," but instead "the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution." *Bostock*, 590 U.S. at 725 (Alito, J., dissenting). Justice Kavanaugh lamented the negative impact on "the rule of law and democratic accountability . . . when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning." *Id.* at 785 (Kavanaugh, J., dissenting). This extreme literalism "deprives the citizenry of fair notice of what the law is." *Ibid.* Lower courts should not replicate this questionable approach in litigating Title IX.

V. THE WORD "DISCRIMINATION" BEGS FOR CLARIFICATION.

In *Bostock*, this Court asked and then answered its own question: "What did 'discriminate' mean in 1964? As it turns out, it meant then roughly what it means today: 'To make a difference in treatment or favor (of one as compared with others).'" *Bostock*, 590 U.S. at 657. But this quick question-answer only

invites further inquiry: Is *every* "difference in treatment or favor" *unlawful* discrimination? Is every such difference *invidious*, subject to legal prohibition? This question is critical, "[y]et, the definition of discrimination gets very little attention in recent Title IX literature, particularly in comparison with words like sex, gender identity, female, male." Rosman, *Gender Identity, Sports*, 53 St. Mary's L. J. at 1100. The same statutory language is used by some to argue that transgender participation is *mandatory*, while others assert it is *prohibited*. *Id.* at 1096.

Here, the Fourth Circuit claimed to have "already held that discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX," citing *Grimm*, 972 F.3d at 616 and concluding that "this Act discriminates based on gender identity." *B.P.J.*, 98 F.4th at 563. Discrimination purportedly "mean[s] treating [an] individual *worse than* others who are similarly situated." *Id.* at 563, quoting *Grimm*, 927 F.3d at 618 (internal quotation marks omitted) (emphasis added) (quoting *Bostock*, 590 U.S. at 657). The court goes on to erroneously find that B.P.J., a biological *male*, is similarly situated to biological *girls*, and then "incorrectly determines that the Act discriminates against transgender athletes on its face." *B.P.J.*, 98 F.4th at 567 (Agee, J., dissenting in part and concurring in part). But how exactly is a biological male *who identifies as a female* "in all relevant respects" like a biological female and therefore "similarly situated"?

It arguably undermines Title VII (and similarly Title IX) to include gender identity in the scope of "sex discrimination," "because the employee would be

asking for protection *not* because he or she is a member of one of the two identifiable groups but because he or she desires to *switch from one group to another*." Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 62. This effectively allows an individual to claim simultaneous membership in both sexes (one according to biology, the other by subjective identification) and then "assert a discrimination claim either as a man or as a woman." *Id*. at 63. Could not such favoritism itself be deemed "discrimination"? As one commentator observes, the idea that non-discrimination "requires a set-aside for biological females," due to their physiological disadvantage, differs from "virtually every other concept of non-discrimination." Rosman, *Gender Identity, Sports*, 53 St. Mary's L. J. at 1096. Surely we have fallen down the rabbit hole in Alice's Wonderland.

VI. THE FOURTH CIRCUIT RULING VIOLATES CONSTITUTIONAL RESTRICTIONS ON THE USE OF CONGRESSIONAL SPENDING POWER.

The Fourth Circuit majority concluded that West Virginia violated Title IX by enacting a policy that separates sports teams by biological sex. That flawed conclusion is inconsistent not only with the text and regulations of Title IX, but also with the Constitution's Spending Clause, U.S. Const., art. 1, § 8, cl.1. Title IX provides that "[n]o person . . . shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). West Virginia's

law cannot be invalidated without stretching *Bostock* like a rubber band and radically redefining the word "sex."

This Court has characterized Spending Clause legislation as "much in the nature of a contract." *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 576-577 (2012); *see Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). When Congress exercises its spending power to enact legislation (U.S. Const., art. 1, § 8, cl.1), the legitimacy of that exercise "rests on whether the State voluntarily and knowingly accepts the terms" of the "contract" established. *NFIB*, 567 U.S. at 577 (quoting *Pennhurst*, 451 U.S. at 17). Clarity is imperative when Congress attaches conditions to the grant of federal funds, because it "enable[s] the States to exercise their choice . . . knowingly, cognizant of the consequences of their participation," i.e., to "knowingly decide whether or not to accept those funds." *Pennhurst*, 451 U.S. at 17, 24. This critical safeguard ensures that spending legislation does not "undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 567 U.S. at 577. This Court has repeatedly struck down federal legislation that "*commandeers* a State's legislative or administrative apparatus for federal purposes." *NFIB*, 567 U.S. at 577 (emphasis added) (citing cases). This "prohibition against federal commandeering of the States" is a "bedrock constitutional" principal." *Medina v. Planned Parenthood*, 222 L. Ed. 2d 567, 595 (2025) (Thomas, J., concurring). Here, advocates use the federal judiciary to commandeer states, like West Virginia

and Idaho, to essentially rewrite Title IX in compliance with radical transgender ideology. But unlike legislation that "imposes congressional policy" on regulated parties involuntarily, spending legislation is based on informed consent. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022). Absent clear and unambiguous notice, "that consent cannot be fairly inferred." *Medina*, 222 L. Ed. 2d at 585.

Congress may not alter the "usual constitutional balance between the States and the Federal Government" without using "unmistakably clear" language. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). There cannot be "knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17. West Virginia, Idaho, and other states have not "knowingly and willingly," as a condition of receiving Title IX funds, waived their right to employ the time-honored definition of "sex" that no one questioned when Title IX was enacted in 1972—53 years ago. At that time, "virtually every dictionary definition of sex referred to the *physiological* distinctions between males and females." *B.P.J.*, 98 F.4th at 574 (Agee, J., concurring in part and dissenting in part), citing *Grimm*, 972 F.3d at 632 (Niemeyer, J., dissenting) (collecting definitions) (internal quotations and citations omitted). Indeed, early Title IX regulations explicitly provided that funding recipients "may operate . . . separate teams for members of each sex." 34 C.F.R. § 106.41(b). Although the Fourth Circuit cited efforts to revise the relevant regulations to address the situation presented in this case (*B.P.J.,*

98 F.4th at 564),[7] the broad congressional authority to legislate under the spending power "does not include surprising participating States with post-acceptance or 'retroactive' conditions." *NFIB*, 567 U.S. at 584 (citing *Pennhurst*, 451 U.S. at 25). "It defies logic to conclude that Congress actually meant to prohibit gender identity discrimination *sub silentio* when enacting Title IX in 1972." *B.P.J.*, 98 F.4th at 574 (Agee, J., concurring in part and dissenting in part). The Fourth Circuit, relying on an expansive interpretation of *Bostock*, erroneously concluded otherwise in *Grimm*, contending that "the Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination." *Grimm*, 972 F.3d at 619 n. 18. That assertion blinks reality. No state could reasonably be expected to foresee the dramatic transformation of the word "sex" demanded in recent years by transgender advocates. No state has assumed an affirmative legal duty to adopt a novel definition that upends the very reason for Title IX. It is imperative that this Court grant certiorari and halt the runaway application of *Bostock* so far beyond its contours.

CONCLUSION

This Court should reverse the Fourth and Ninth Circuit decisions.

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[7] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023) (to be codified at 34 C.F.R. § 106.41).

Respectfully,

Deborah J. Dewart
Counsel of Record
111 Magnolia Lane
Hubert, NC 28539
lawyerdeborah@outlook.com
(910) 326-4554

Tami Fitzgerald
NC VALUES INSTITUTE
9650 Strickland Rd.
Ste. 103-226
Raleigh, NC 27615

Counsel for Amicus Curiae
NC Values Institute