Nos. 24-43, 24-38

IN THE

Supreme Court of the United States

WEST VIRGINIA, *et al.*,

Petitioners,

v.

B. P. J., BY HER NEXT FRIEND AND MOTHER, HEATHER JACKSON, *et al.*,

Respondents.

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

Petitioners,

v.

LINDSAY HECOX, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* WOMEN'S DECLARATION INTERNATIONAL USA IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

Women's Declaration International (WDI, of which WDI USA, Inc. is one chapter) is an all-volunteer global organization of women who fight to protect women and girls as a sex class. We are women from every walk of life—from law and government to the hard sciences, the culture-shaping professions, and the nation-building trades. We are lesbians, heterosexual women, and bisexual women. We are mothers and child-free women. We are women of all races, ethnicities, and religions. Globally, we are more than 39,000 individuals and 547 organizations from 160 nations. But in our diversity, we have a single message: Never again will we return to a world where women are defined by the patronizing, regressive, and oppressive stereotypes of gender, of which "gender identity" is one form.

WDI USA works to advance the Declaration on Women's Sex-Based Rights (the Declaration)[2] throughout U.S. law, policy, and practice. WDI USA is a nonpartisan organization, but its supporters generally consider themselves to be liberal, very liberal, or progressive. Of the roughly 7000 U.S. signatories to the Declaration, around 30 percent are Democrats and 34 percent are Independents (many having left the Democratic Party, no doubt due to opposition to the Party's support for "gender

1. No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund preparing or submitting this brief. No person—other than WDI USA, its members, or its counsel—contributed money intended to fund preparing or submitting this brief.

2. Declaration on Women's Sex-Based Rights (March 2019).

identity"). Seven percent are Republicans and the rest are either unaffiliated or prefer not to say.

Pertinent to the matters currently before the Court, the Declaration reaffirms women's sex-based rights, including women's rights to physical and reproductive integrity and the elimination of all forms of discrimination against women and girls that result from the redefinition of the category of sex to include "gender identity."[3] The Declaration contains nine Articles. Article I reaffirms that the rights of women are based on the category of sex and asserts that states should "maintain the centrality of the category of sex, and not 'gender identity', in relation to women's and girls' right to be free from discrimination."[4] Article VII reaffirms women's rights to the same opportunities as men to participate actively in sports and physical education and, to that end, urges states to "include the provision of opportunities for girls and women to participate in sports and physical education on a single-sex basis."[5] It continues: "To ensure fairness and safety for women and girls, the entry of boys and men who claim to have female 'gender identities' into teams, competitions, facilities, or changing rooms, inter alia, set aside for women and girls should be prohibited as a form of sex discrimination."[6] Article VIII reaffirms the need for the elimination of violence against women.[7]

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3. *See id.*, Introduction.

4. *Id.*, Article I.

5. *Id.*, Article VII.

6. *Id.*

7. *See id.*, Article VIII.

It asserts that states should take measures that "include the provision of single-sex services and physical spaces for women and girls to provide them with safety, privacy, and dignity."[8] It elaborates that such provisions should "include prisons, health services and hospital wards, substance misuse rehabilitation centres, accommodation for the homeless, toilets, showers and changing rooms, and any other enclosed space where individuals reside or may be in a state of undress. Single sex facilities designed to meet the needs of women and girls should be at least equal in availability and quality to those provided to men and boys. These facilities should not include men who claim to have female 'gender identities'."[9]

The state laws at issue here are consistent with Articles I, VII, and VIII of the Declaration.[10]

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8. *Id.*

9. *Id.*

10. *See* W. Va. Code §§ 18-2-25d(b)(3) & (c)(2) (the Save Women's Sports Act), providing that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex," and defining "male" as "an individual whose biological sex determined at birth is male;" Idaho Code §§ 33-6201–06(1) & (2) (the Fairness in Women's Sports Act), providing: "Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school of institution of higher education shall be expressly designated as one (1) of the following based on biological sex: (a) Males, men, or boys; (b) females, women, or girls; or (c) Coed or mixed;" "Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex."

WDI USA is interested in this matter first because, as an organization, we cannot protect women and girls from harmful sex discrimination, invasions of privacy, and sex-based violence unless sex can be maintained as a discrete category in the law. More plainly, we care about women and girls as a sex class and think that both Title IX of the Educational Amendments of 1972 and the Equal Protection Clause of the 14th Amendment to the Constitution, as this Court has construed it, do a good job of protecting women and girls. We would like this Court to rule now that the word "sex" has an unambiguous meaning in Title IX and that "transgender status" and its derivatives ("transgender people," "transgender athletes," and the like) do not constitute a quasi-suspect classification under the Equal Protection Clause. Finally, the linguistic destabilization caused by use of words like "transgender" (including in this Court's decision in *Bostock v. Clayton Cty.*, 590 U.S. 644 (2020)) is producing profound confusion throughout society, as well as in law, about what basic words like "women," "girls," "men," "boys," "sex," and "gender" mean, and WDI USA has expertise in how the Court can resolve such damaging and unnecessary confusion. In view of its work on these issues, WDI USA has a meaningful perspective to offer the Court.

SUMMARY OF ARGUMENT

"[W]hen we apply first principles of constitutional and statutory interpretation, this appeal largely resolves itself. The Equal Protection Clause claim must fail because, as to the sex discrimination claim, the bathroom policy clears the hurdle of intermediate scrutiny and because the bathroom policy does not discriminate against transgender students. The Title IX claim must fail because

Title IX allows schools to separate bathrooms by biological sex." *Adams v. St. Johns County*, 57 F.4th 791, No. 18-13592 at 12 (11th Cir. 2022). That was the Eleventh Circuit opining, *en banc*, in a case about the "unremarkable—and nearly universal" practice of separating bathrooms by sex in schools. *Id.* at 3. The cases at issue here are not about bathrooms; they are about sports. However, because sports participation involves locker room usage, these cases also implicate the interests of students in maintaining single-sex intimate facilities. And in any event, the principle is the same. If this Court "applies first principles," the matter should largely resolve itself. "There are two sexes: male and female." *Tennessee, et al. v. Cardona, et al.*, No. 2:2024cv00072, 1 (E.D. Ky. 2024).

Our entire society—globally, including the U.S. judiciary—appears to be gripped by the notion that there is a category of people called "transgender" who are somehow members of the opposite sex, members of a nonexistent third sex, or for whom the category of sex is irrelevant, even though most people know sex is real and relevant in various situations.[11] More often than not, when people say they believe in the concept of "gender identity," they are doing so in order to avoid discord with their peers.[12]

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11. *See, e.g.*, SurveyUSA, *Strong Majorities Prefer Female-Only Interactions for Women, Girls, in Athletics, Restrooms, Other Situations* ("4 of 5 Nationwide Say Word 'Women' Means Adult Humans Who are Biologically Female") (Sept. 28, 2023).

12. *See, e.g.,* Forest Romm and Kevin Waldman, *Performative virtue-signaling has become a threat to higher-ed*, The Hill (August 12, 2025) ("Seventy-eight percent of students told us they self-censor on their beliefs surrounding gender identity… Perhaps most telling:

Sex is a material reality, even if some people claim to have identities inconsistent with their sex.

This phenomenon is happening because there is a deepening conflict over meaning in the English-speaking world concerning the use of words that define some of our most basic realities. What is a woman? What is a man? What is sex – or gender? Academics, therapists, doctors, journalists, and legislators continue to ask these questions.

The primary reason for the confusion about our basic biology is that there has been an ongoing attempt over the past 30 years to redefine the terms "woman" and "man" (and related terms, such as "girl" and "boy" or "sex" and "gender"), and in so doing, to change the way we think about ourselves. Is a "transgender woman" a woman or a man? Does performing the stereotypical actions of the opposite sex cause you to become the opposite sex, or are you simply a mimic?

For serious users of (and people who care about the accurate use of) language, "woman" is a time-stable noun that references one of the most basic categorical distinctions society must acknowledge: sex. A woman is an adult human female, possibly a mother, or a sister, or a lover. This basic, commonsense word, spoken or written for centuries to refer to an essential member of the human family, is now being usurped and redefined by believers in "gender identity" to mean whatever any man wants it to mean. Worse, our words for female members of the

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77 percent said they disagreed with the idea that gender identity should override biological sex in such domains as sports, healthcare, or public data — but would never voice that disagreement aloud.").

human community are being hollowed out simply to serve as vessels for the creation of new "gender identities" with a seemingly endless set of behavioral and costume possibilities. Woman, man, boy, girl, sex, and gender are all words warped by "transgenderism" and its unending, boring fascination with sex stereotypes.

The difficult truth, which it is time for this Court to recognize, is that the very word "transgender" is a linguistic sleight of hand that obscures the material reality of sex and entrenches regressive sex stereotypes. Although this Court used the word "transgender" and the phrase "transgender status" repeatedly, uncritically, and without definition in its 2020 decision in *Bostock*, those words in fact do not have a coherent or stable meaning. *Amicus* assumes that by "transgender" and "transgender status" in *Bostock*, the Court meant something along the lines of "not conforming to sex stereotypes" because Aimee Stephens, one of the employees in that case who was terminated by his employer, was a man who did not conform to the stereotypes typically associated with masculinity.[13]

It is time to put this matter to rest. Sex is not "assigned at birth." It simply is. Sex is established at conception, when an X sperm or a Y sperm fertilizes an egg.[14] It is easily identifiable and recorded with nearly

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13. This Court has already and rightly ruled, in 1989, that employment discrimination on the basis of nonconformity with sex stereotypes violates Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

14. *See* Risa Aria Schnebly, *Sex Determination in Humans*, The Embryo Project Encyclopedia (Jul. 16, 2021).

100% accuracy.[15] Human beings are sexually dimorphic mammals, and every single human being on the face of the planet is either female or male. Sex is recorded at birth and can be observed in utero. It is *recorded* at birth (notwithstanding some state laws and regulations that permit people to have that record changed because they claim to have opposite-sex "gender identities"). In contrast, the expression "assigned at birth" was developed to indicate that medical professionals had "assigned" a sex to members of a tiny class of babies whose sex could not easily be determined because they had both male and female reproductive characteristics, but who were nonetheless genetically either female or male.[16] The concept that all human beings have a sex that is "assigned at birth" is an *activist* concept that is scientifically inaccurate and has no legitimacy being enshrined in law.

In a unanimous decision, the Supreme Court of the U.K. ruled earlier this year that the terms "man," "woman," and "sex" in pertinent U.K. civil rights law refer to biological sex. *See For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)* [2025] UKSC 16 (Apr. 16, 2025). *Amicus* now urges this Court to rule similarly. Women and girls are female, men and boys are male, and women and girls have a right to be recognized as such under U.S. law and the U.S. Constitution. Further, female athletes are entitled to fairness in competition and

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15. *See* Colin Wright, *A Biologist Explains Why Sex Is Binary*, The Wall Street Journal (Apr. 9, 2023) (refuting arguments that the existence of intersex people renders "sex" indeterminate).

16. *See* Jessica A. Clarke, *Sex Assigned at Birth*, 122 Colum. L. Rev. 1821, 1834-36 (2022).

privacy and dignity in bathrooms and locker rooms. West Virginia and Idaho have taken steps to ensure that female athletes in those states have such fairness, privacy, and dignity.

Amicus argues that states (including West Virginia and Idaho) may, consistent with Title IX and the Equal Protection Clause of the 14th Amendment, maintain single-sex sports because: (1) sex is unambiguous under Title IX; (2) "transgender" is not (and must not become) a quasi-suspect classification for purposes of the Equal Protection Clause and both state laws at issue here satisfy rational basis review; and (3) to do the opposite, by allowing men and boys to compete in sports designated for women and girls, states and schools *violate* both Title IX and the Equal Protection Clause. *Amicus* urges the Court to rule accordingly, in an opinion reversing the decisions below and using clear, accurate, sex-based language, free from linguistic sleights of hand that sow confusion.

ARGUMENT

There is no doubt that male athletes have been competing in, and dominating, sports that are designed for women and girls across the U.S.

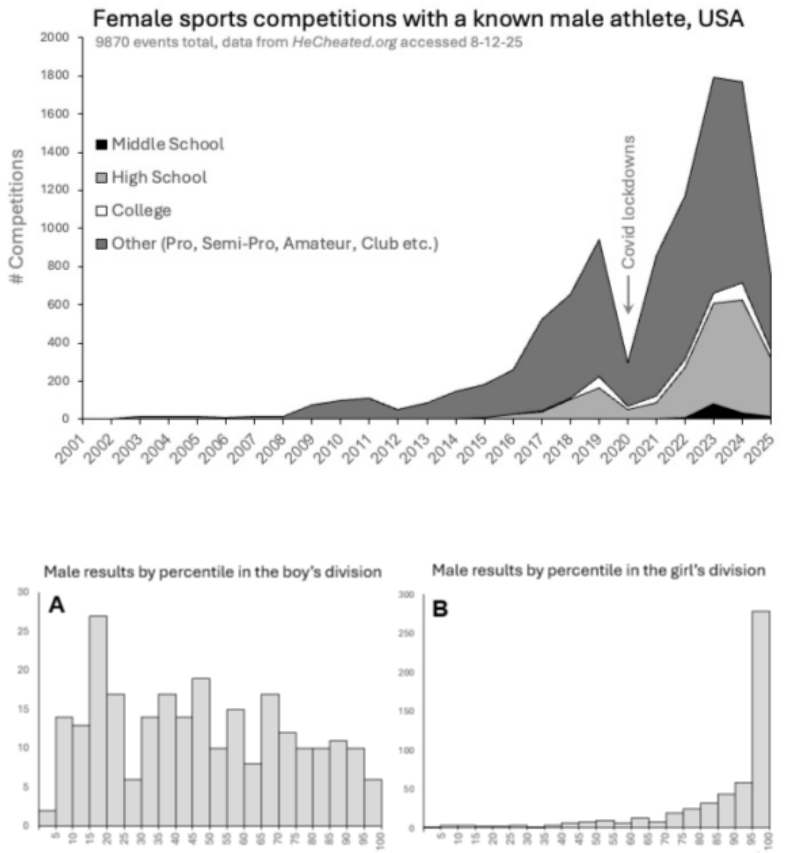

Figure 2: Percentile rankings for 13 males when they competed in track and field and cross-country events in the boy's division (**A**, 252 events, mean = 47th %, median = 45th %) and later when the same males compete in the girl's division (**B**, 530 events, mean = 88th %, median = 97th %). Notably, when males switched to the girls division they ranked in the 95th % or higher 53% of the time. Data from *Athletic.net* and *MileSplit.com*.

This brief focuses specifically on the radical feminist objections to "gender identity" and the reasons for protecting women and girls as a sex class in federal law and under the U.S. Constitution.

1. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 DOES NOT PREVENT A STATE FROM CONSISTENTLY DESIGNATING GIRLS' AND BOYS' SPORTS TEAMS BASED ON BIOLOGICAL SEX RECORDED AT BIRTH

Before 1972, and for some time thereafter, women faced a clear disadvantage in the educational arena in the U.S.

> Equal opportunity has also been problematic for women throughout our country's history. In the colonial days, it was commonly accepted that women needed only to be prepared to be effective wives and mothers; consequently, their education was most often confined to emulating their mothers and obeying their fathers within the home. During the Revolution, Americans placed immense emphasis on the role of mothers in educating their daughters in the values of the Republic. Historian Linda K. Kerber argues, "Motherhood was discussed almost as if it were a fourth branch of government." The education of girls began to focus on increased literacy and skills beyond those needed to become good wives. The Revolution's daughters had to be educated so that they could someday protect the country by teaching their children to be defenders of the newly achieved independence

> and keeping their husbands in line with the characteristics of "civic virtue." As common schools developed in the 1800s, a somewhat greater acceptance of educating girls also emerged, resulting in increased enrollments. Although the contention that women were less capable than their male counterparts persisted, liberals began to believe that additional education for women might not be harmful. However, the benefits of education continued to be viewed in terms of helping women raise children and be better companions to their husbands. In addition, those who did receive education tended to come from families with the financial means to allow them to participate in school rather than to assist in the home or farms.[17]

No one is confused about what the words "women," "girls," "wives," and "mothers" mean in the paragraph above.

Title IX of the Education Amendments of 1972 reads, simply: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 38 § 1681 *et seq.*

It was enacted into law and signed by President Nixon in 1972. Although it has come to be associated primarily with women's sports, its original intention was to protect

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17. Amity L. Noltemeyer, Julie Mujic, and Caven S. McLoughlin, *The History of Inequality in Education*, 10-11, in Disproportionality in Education and Special Education (2012).

women and girls throughout the educational arena. One of its primary authors and fiercest proponents was Representative Patsy Mink, a Japanese-American woman born on a Hawaii sugar plantation who eventually made her way to the House of Representatives. When she died in 2002, the law was renamed in her honor. So although it is commonly known as Title IX, its official name is the Patsy Mink Equal Opportunity in Education Act. Pretending that this law was somehow meant to protect men who claim to have woman "gender identities" is an insult to her memory.

In 1975, under President Ford, the U.S. Department of Health, Education, and Welfare (today, the Department of Education, or "Department") promulgated implementing regulations to govern enforcement of Title IX in the nation's schools. *See* 34 C.F.R. Part 106, *et seq.* These regulations explicitly permit sex separation under certain circumstances. For example, recipients of federal funding under Title IX were permitted to maintain sex-specific housing facilities, 34 C.F.R. § 106.32(b)(1); toilet, locker room, and shower facilities, 34 C.F.R. § 106.33; human sexuality classes, 34 C.F.R. §106.34(a)(3); scholarships, 34 C.F.R. § 106.37(c)(2); and sports teams, "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). In other words, in 1975, the Department understood that when equality of the sexes in law and policy is the goal, separating students by sex makes sense under certain circumstances.

As the Court of Appeals for the Eleventh Circuit held in 2022, the meaning of the word "sex" was unambiguous at the time of enactment, and remains so.

Reputable dictionary definitions of "sex" from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of "sex" in education, it meant biological sex, i.e., discrimination between males and females. *See, e.g.*, Sex, American Heritage Dictionary of the English Language (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Sex, American Heritage Dictionary of the English Language (1979) (same); Sex, Female, Male, Oxford English Dictionary (re-issued ed. 1978) (defining "sex" as "[e]ither of two divisions of organic beings distinguished as male and female respectively, "female" as "[b]elonging to the sex which bears offspring," and "male" as "[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation"); Sex, Webster's New World Dictionary (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions."); Sex, Female, Male, Webster's Seventh New Collegiate Dictionary (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function"); Sex, Random House College Dictionary (rev. ed. 1980) ("[E]ither the male or female division of

> a species, esp. as differentiated with reference to the reproductive functions").

Adams, 57 F.4th at 812. This is true even if some people (including the respondents in these cases) claim to have opposite-sex "gender identities."

The Biden Administration's Department of Education created havoc for the federal judiciary when it finalized a proposed rule change to redefine sex to include the sexist, homophobic, and nebulous concept of "gender identity" in April 2024, *see* "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024). Fortunately for women and girls as a sex class and for the material reality of sex, that rule was vacated in January of this year. *See Cardona*, No. 24-072-DCR (E.D. Ky. Jan. 9, 2025).

States such as West Virginia and Idaho do not run afoul of Title IX by enacting laws that protect female-only sports by limiting participation to female athletes on the basis of sex. In fact, the opposite is true: as explained in Section III, *infra*, schools that allow men and boys to participate in sports intended for female athletes *violate* Title IX.

2. THE EQUAL PROTECTION CLAUSE OF THE 14th AMENDMENT DOES NOT PREVENT A STATE FROM OFFERING SEPARATE BOYS' AND GIRLS' SPORTS TEAMS BASED ON BIOLOGICAL SEX RECORDED AT BIRTH

Women and girls have the right to equal protection of the law. This is the legacy of the late Justice Ruth Bader

Ginsburg, and this Court should uphold that legacy by ruling that states such as West Virginia and Idaho may constitutionally enact laws protecting female-only sports. It should not upend that legacy by pretending that women and girls do not exist as a discrete sex class.

A. "TRANSGENDER STATUS" (AND ITS DERIVATIVES) IS NOT—AND MUST NOT BECOME—A QUASI-SUSPECT CLASSIFICATION FOR EQUAL PROTECTION PURPOSES, SO RATIONAL BASIS APPLIES

The word "transgender" exists because some people claim it as an identity. Its first known use was in the 1965 book *Sexual Hygiene and Pathology*, by John Oliven.[18] However, its widespread usage today does not negate the material reality of sex, nor does it describe a coherent category of human beings. In fact, it simply relies on regressive stereotypes. Gender *is* a prison of regressive stereotypes.[19] According to adherents of "gender identity," or "transgender" ideology, a man is essentially a "transgender woman" if he wears dresses, has long hair, dons lipstick, attempts to walk in high heels, calls himself a woman, and/or consumes exogenous estrogen and has his penis removed and face surgically reconstructed. A "transgender man" is essentially a woman who wears

18. *See* John F. Oliven, Sexual Hygiene and Pathology: A Manual for the Physician and the Professions (J.B. Lippincott Company 1965).

19. *See, e.g.,* Sheila Jeffreys, Gender Hurts: A Feminist Analysis of the Politics of Transgenderism 1-2, 4 (Routledge ed. 2014).

cargo pants, has short hair, likes trucks, calls herself a man, and/or consumes exogenous testosterone and has her breasts removed. It's regressive, sexist, homophobic, and barbaric.

In the words of Janice Raymond, professor emerita at the University of Massachusetts Amherst: "The ideal of transgender is provocative. On a personal level, it allows for a continuum of gendered expression. On a political level, it never moves off this continuum to an existence in which gender is truly transcended. Its supposedly iconoclastic rebellion against traditional gender confinement is more style than substance. What good is a gender outlaw who is still abiding by the law of gender?"[20]

This Court has never held that "transgender" is a quasi-suspect classification for the purpose of examining claims of sex discrimination under the Equal Protection Clause, and for good reason. It should not do so now.

In 1971, the Supreme Court held for the first time that the promise of equal protection under the Constitution applies to women. *See Reed v. Reed*, 404 U.S. 71 (1971). In that matter, an Idaho statute expressly granted men an advantage over women in the administration of probate estates. The law stated: "Of several persons claiming and equally entitled to administer, *males must be preferred to females*, and relatives of the whole to those of the half blood" (emphasis added). *Reed*, 404 U.S. at 72-3 n.2.

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20. Janice Raymond, THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE, Introduction xxxv (Beacon Press 1979, reprinted 1994 Teacher's College Press).

The parties were Sally and Cecil Reed, the parents of Richard Reed, who had died intestate. Because Richard had no spouse or children, the administration of his estate would fall either to Sally or Cecil, and because of the law's provision preferring males over females, the probate court granted the privilege to Cecil. Sally challenged that decision. Cecil prevailed throughout the lower courts, but this Court eventually ruled that the Idaho law unconstitutionally deprived Sally of her right to equal protection of the law on the basis of sex. In its ruling, the Court stated: "By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." *Id.* at 77.

The Idaho law at issue there blatantly and explicitly expressed a preference for male people over female people. This Court held, rightfully, that this preference violated the Constitution. So-called "gender identity" had nothing to do with it. If "gender identity" were in fact a subcategory of sex, Sally Reed could simply have saved everyone a lot of time and declared to the probate and higher courts that she had the right to a preference in administering Richard's estate because she "identified as" male.

The argument, as valid today as it was in 1971, was that the Equal Protection Clause protects women and girls on the basis of sex because women and girls have historically been discriminated against on that very basis. This Court explicitly ruled that sex-based discrimination was subject to legal scrutiny and this court should now uphold that legacy. Society cannot pretend that sex-based oppression, both historical and contemporary, does not exist by simply ignoring the fact that women and girls exist as a coherent category of people.

Notably, in arguing that the Equal Protection Clause protects women and girls as a sex class, Sally Reed's legal team (which included the late Justice Ruth Bader Ginsburg) reminded the Court that equal legal rights for women and girls need not, and constitutionally must not, come at the expense of the privacy rights of women and girls. *See* Appellant Br. at 19, n.13, *Reed*, 404 U.S.[21]

Reed proved to be the beginning of the Supreme Court's long and venerable history of applying intermediate scrutiny to claims of sex-based discrimination under the Equal Protection Clause for the purpose of protecting women and girls from unfair treatment under the law. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

The Court should now respect that important legacy by maintaining the material reality of sex as a quasi-suspect class and by ruling explicitly that "transgender status" (and its derivatives, including "transgender athletes") is not a similar quasi-suspect class to sex for equal protection purposes (let alone a suspect class).

As the Court of Appeals for the Sixth Circuit explained in *United States v. Skrmetti*, "[t]he bar for recognizing a

21. *See Document 20: Melvin L. Wulf, Ruth Bader Ginsburg, Allen R. Derr, Pauli Murray, and Dorothy Kenyon, Brief for Appellant, Reed v. Reed, no. 70-4 (1971).* In How and Why Was Feminist Legal Strategy Transformed, 1960-1973? (Binghamton, NY: State University of New York at Binghamton, 2007).

new suspect class is a high one." *L.W., et al. v. Skrmetti, et al.*, 83 F.4th 460, No. 23-5600 at 33 (6th Cir. 2023). That court ruled that "transgender status" is not a quasi-suspect class because "transgender" is not immutable, because so-called "transgender people" do not constitute a politically powerless group, and because the law at issue there was not driven by animus. *See id.* at 34-35 (*citing City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 at 442 (1985), declining to grant "the mentally retarded" quasi-suspect classification status).[22]

It was right to do so.

A majority of this Court declined to rule similarly conclusively when it took the matter up on *certiorari*, *see United States v. Skrmetti*, 605 U.S. ___ (June 18, 2025), but three concurring Justices would have voted to do so, *see id.* (Barrett, J., Thomas, J., and Alito, J., concurring separately). *Amicus* agrees with the Sixth Circuit and the *Skrmetti* concurring Justices. *See especially*, Barrett, J., "The Equal Protection Clause does not demand heightened judicial scrutiny of laws that classify based on transgender status." *Id.*

Even according to the American Civil Liberties Union, which represents the respondents in both of these matters, the word "transgender" means "a broad range of identities and experiences that fall outside of the traditional understanding of gender."[23] It continues:

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22. That matter was decided in 1985, when the phrase "mentally retarded" was in common usage; we would surely use different language today.

23. ACLU, Transgender people and the law, at 19-20.

"Some of those identities and experiences include people whose gender identity is different from the sex they were assigned at birth, people who transition from living as one gender to another or wish to do so (often described by the clinical term 'transsexual'), people who 'cross-dress' part of the time, and people who identify outside the traditional gender binary (meaning they identify as something other than male or female). Some transgender people describe themselves as gender variant or gender nonconforming. Not everyone who doesn't conform to gender stereotypes, however, identifies as transgender. Many people don't conform to gender stereotypes but also continue to identify with the gender assigned to them at birth, like butch women or femme men."[24]

This venerable Court should not become the court that establishes a quasi-suspect class for a group of people that, at least according to the ACLU, includes part-time cross-dressers.

If "transgender status" (or, in this case "transgender athletes") is not a quasi-suspect or a suspect class for the purpose of examining a claim of sex discrimination under the Equal Protection Clause (and *amicus* maintains that it is not), then rational basis review applies. *See Romer v. Evans*, 517 U.S. 620 at 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). This Court will "generally afford such laws 'wide latitude' under this rational basis review, acknowledging that 'the Constitution presumes that even improvident decisions

24. *Id*. at 20.

will eventually be rectified by the democratic processes.'" *Skrmetti*, 605 U.S. ___ at 8, quoting *Cleburne*, 473 U.S. at 440.

B. WEST VIRGINIA'S SAVE WOMEN'S SPORTS ACT AND IDAHO'S FAIRNESS IN WOMEN'S SPORTS ACT SURVIVE RATIONAL BASIS REVIEW

Under this standard, the Court "will uphold a statutory classification so long as there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Skrmetti*, 605 U.S. ___ at 21, quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

There are countless "reasonably conceivable" states of facts that provide a rational basis for separating sports by sex. As other *amici* will surely explain in detail, male athletes enjoy a competitive advantage over female athletes in most, if not all, sports. This is true even if, as in the case of one of the respondents, said male athlete has had his puberty suppressed. That is reason enough for this Court to rule that laws such as those at issue in this matter do not run afoul of the Equal Protection Clause.

There are numerous other rational reasons to separate sports by sex.

One is locker rooms. During the 2021-2022 school year, the University of Pennsylvania permitted Lia (formerly Will) Thomas to compete on the women's swimming team. In July 2023 testimony before the U.S. House Judiciary Committee, former University of Pennsylvania swimmer

Paula Scanlan stated: "My teammates and I were forced to undress in the presence of Lia, a six-feet four-inch tall biological man fully-intact with male genitalia, 18 times per week. Some girls opted to change in bathroom stalls and others used the family bathroom to avoid this. When we tried to voice our concern to the Athletic Department, we were told that Lia swimming and being in our locker room was non-negotiable and we were offered psychological services to attempt to re-educate us to become comfortable with the idea of undressing in front of a male."[25]

This situation is not at all unusual. In the U.S. today, and for the past several years, men and boys have been given access to what are intended to be female-only locker rooms (and other intimate spaces) if they call themselves "transgender," including in one of the matters being considered here.

In the matter of *Tennessee, et al. v. Cardona, et al.*, discussed *supra*, a girl known as A.C. in court documents moved to intervene, and her motion was granted. In Exhibit A to the motion, A.C. stated, under oath:

> In sixth through eighth grade, I attended Bridgeport Middle School (BMS). In seventh grade (the 2021–22 school year), I joined the girls' track and field team.

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25. Paula Scanlan, *Testimony before the House Judiciary Subcommittee on the Constitution and Limited Government on 'The Dangers and Due Process Violations of 'Gender-Affirming Care' for Children* (July 27, 2023).

I competed in the 100-meter dash, pole vault, shot put, and discus. Sometimes I filled in for my teammates in other events, too, like the 200-meter dash and relay events.

To my surprise, another BMS student named B.P.J. joined the girls' track and field team. B.P.J. is almost two years younger than me, and one year behind me in school. Because I know B.P.J.'s older brother from school, I knew at the beginning of the 2021–22 school year that B.P.J. is a male who identifies as a girl.

…

When B.P.J. was first put on the girls' team, I decided to change clothes in the girls' restroom instead of the locker room to have more privacy. But when my school closed the gym locker rooms, the entire girls' team had to change in the girls' bathrooms.

I have never minded changing clothes in front of other girls. We are the same. But when B.P.J. started changing clothes with us girls in the girls' bathroom, I felt uncomfortable and decided that I should change in the bathroom stall whenever I could for more privacy.

…

I don't want to use a restroom or locker room to change, or use a restroom generally, with a boy in there. When I use a restroom or when

I change my clothes in the locker room for a meet, I don't want to be seen by a person of the opposite sex. I don't want to change in front of a boy or want a boy to change in front of me.

I also do not want to shower in a locker room with a male nearby. It would make me feel extremely unsafe, anxious, and embarrassed to shower in the girls' locker room if males are allowed in.

…

B.P.J. made several offensive and inappropriate sexual comments to me. At first, it did not occur often, and I tried my best to ignore it.

But during my final year of middle school, B.P.J. made inappropriate sexual comments a lot more often; it increased throughout that year; and the comments became much more aggressive, vile, and disturbing.

Sometimes B.P.J.'s comments were just annoying, like commenting that I have a "nice butt."

But other times, I felt really embarrassed, and I didn't want to repeat the gross things B.P.J. said to me.

During the end of that year, about two to three times per week, B.P.J. would look at me and say "suck my d***." There were usually other girls

> around who heard this. I heard B.P.J. say the same thing to my other teammates, too.
>
> B.P.J. made other more explicit sexual statements that felt threatening to me. At times, B.P.J. told me quietly "I'm gonna stick my d*** into your pu***." And B.P.J. sometimes added "and in your a**" as well. These comments were disturbing and caused me deep distress.
>
> B.P.J. made these vulgar comments towards me in the locker room, on the track, and in the throwing pit for discus and shotput.
>
> I felt confused and disgusted when I heard these vulgar and aggressive comments. It was especially confusing because I was told that B.P.J. was on the girls' team because B.P.J. identifies as a girl, but the girls on the team never talked like that.

Tennessee, No. 2:2024cv 00072, Motion to Intervene Exhibit A at 2-3, 8-10 (May 3, 2024).

No woman or girl, let alone a teenage middle school student, should have to put up with this. Preventing situations like this is another rational reason for maintaining single-sex sports.

There are countless others. According to the Women's Sports Foundation, high school girls who play sports are less likely to become unintentionally pregnant, more likely to get better grades in school, and more likely to

graduate than girls who do not; girls and women who play sports have higher levels of confidence and lower levels of depression; and girls and women who play sports experience higher states of psychological well-being than girls and women who do not.[26]

But as noted in the Summary of Argument section, *supra*, men and boys are replacing women and girls in sports across the country. If that continues to happen, these benefits for women and girls will stop.

All of these reasons, and others, demonstrate that West Virginia's and Idaho's laws at issue here are rationally related to a legitimate government interest and should be allowed to stand under the Equal Protection Clause.

3. THE PRACTICE OF ALLOWING MEN AND BOYS TO COMPETE IN SPORTS INTENDED FOR WOMEN AND GIRLS VIOLATES TITLE IX AND THE EQUAL PROTECTION CLAUSE

The U.S. Department of Justice has sued the states of Maine and California for failing to protect women and girls by permitting men and boys to compete in sports intended for women and girls. *See United States v. Maine Department of Education*, No. 1:25-cv-00173 (D. Me. 2025); *United States v. California Department of Education*, No. 8:25-cv-01485 (C.D. Ca. 2025). Both allege that allowing men and boys to compete in sports intended

26. *See* Women's Sport Foundation, "Benefits – Why Sports Participation for Girls and Women" (Aug. 30, 2016).

for women and girls violates the express terms of both Title IX and its implementing regulations.[27]

Amicus agrees. The Title IX question presented in *West Virginia v. B.P.J.* is whether Title IX *prevents* a state from consistently designating girls' and boys' sports teams based on biological sex. As argued in Section I, *supra*, *amicus* argues that the Court should answer that question in the negative. For all the same reasons, *amicus* encourages the Court to take one step further and rule that Title IX *requires* states to consistently designate girls' and boys' sports teams based on biological sex (which *amicus* would refer to simply as "sex").

Similarly, the Equal Protection question presented in both current matters is whether the Equal Protection Clause *prevents* a state from offering separate boys' and girls' sports teams based on sex. As argued in Section II, *supra*, *amicus* argues that the Court should answer that question in the negative. For all the same reasons, *amicus* encourages the Court to take one step further and rule that the Equal Protection Clause *requires* states to offer separate boys' and girls' sports teams based on sex.

It does not make sense to treat America's women and girls differently for the purpose of designating female-only sports and spaces depending on which state they live in. Women and girls in California and Maine are just as entitled to single-sex sports and spaces as women and girls in West Virginia and Idaho. Title IX and the Equal

27. In a separate case, Minnesota has sued the Department of Justice, arguing that the opposite is true. *See Minnesota v. Trump, et al.*, No. 4:25-cv-00173 (D. Mn. (2025).

Protection Clause are, after all, nationwide laws that apply across all fifty states and the District of Columbia.

In his dissent in *Bostock*, Justice Alito stated that "the entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning." *Bostock*, 590 U.S. at ___, Alito, J., dissenting. He was right.

As a Title VII case, *Bostock* was expressly limited to the employment context. However, that has not stopped people from arguing that people should have special rights on the basis of their opposite-sex "gender identities" in numerous other contexts. The Federal Judiciary has, indeed, been "mired for years" in disputes about whether Title IX and/or the Equal Protection can be used as tools to shred the sex-based rights of women and girls.

There has been near constant and contentious litigation about whether the law and the Constitution entitle women and girls to single-sex sports and spaces, which inevitably raises the question of whether women and girls exist as a discrete sex class. *See, e.g., Doe v. Boyertown Area School District*, 897 F.3d 518 (3rd 2018) (*cert. denied* May 28, 2019) ; *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) (*cert. denied* June 29, 2021); *Whitaker v. Kenosha Unified School District,* 2017 WL 2331751 (7th Cir. 2017); *Adams v. St. Johns County*, 57 F.4th 791 (11th Cir. 2022); *A.C. v. Metropolitan School District of Martinsville*, 75 F.4th 760 (7th Cir. 2023) (*cert. denied* Jan. 16, 2024); and *D.P. v. Mukwonago Area School District*, No. 23-2568 (7th Cir. 2025) (dismissed as moot). Those cases all involved the question of whether Title IX and the Equal Protection Clause permit schools

to maintain single-sex bathrooms. That list does not even include the twenty or so federal lawsuits filed in the summer of 2024 to address the legality of the Department of Education's 2024 Final Rule regarding the Title IX implementing regulations.

Outside the Title IX and Equal Protection contexts, federal courts have been asked to address similar questions under various state and federal laws in the contexts of sororities, *see Westenbroek, et al. v. Kappa Kappa Gamma, et al.*, No. 23-8065 (10th Cir. 2024); spas, *see Olympus Spa v. Armstrong*, No. 23-4031 (9th Cir. 2025) (court currently considering motion for panel rehearing and rehearing *en banc*); beauty pageants, *see Green v. Miss United States of America, LLC*, 52 F.4th 773 (9th Cir. 2022); and healthcare, *see Neese v. Becerra*, 123 F.4th 751 (5th Cir. 2024). All of these cases, in one way or another, boil down to the question of whether sex is real.

On August 16, 2024, this Court issued an opinion declining to issue partial stays in the matters of *Department of Education, et al. v. Louisiana, et al.* and *Cardona, et al. v. Tennessee, et al.* Nos. 24A78 and 24A79 (U.S. 2024) (*per curiam*). Those were two of the cases addressing the lawfulness of the Department of Education's 2024 rewrite of the Title IX implementing regulations redefining the word "sex" to include "gender identity." District Courts in Louisiana and Kentucky agreed with the plaintiffs and preliminarily enjoined enforcement of the rule in the plaintiff States, and the Courts of Appeals for the Fifth and Sixth Circuits then declined to stay the injunctions.

This Court was then asked to stay the injunctions. The Court was divided on the question of whether that redefinition was severable from the remainder of the Final Rule, with four Justices believing that the redefinition was severable. However, the Court was unanimous that the "plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity." *Id.* at 2.[28] Enjoining the redefinition was the right outcome in that case, as every member of this Court agreed.

CONCLUSION

In these matters, the Court has an opportunity to put this entire discussion to rest. Sex means sex, even if some people claim to have "gender identities" that are somehow inconsistent with their sex. Women and girls are entitled to be acknowledged as a sex class and to single-sex sports and spaces.

Accordingly, *amicus* urges the Court to reverse the decisions below and rule that both Title IX and the Equal Protection Clause not only do not prevent, but *require* states to guarantee access to sports and spaces on a single-sex basis, in an opinion that uses clear, accurate,

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28. *Amicus* takes no issue with efforts to define sex to include "sexual orientation," though we do not think doing so is necessary, because discrimination on the basis of sexual orientation *necessarily* involves discrimination on the basis of sex.

and sex-based language, free from linguistic sleights of hand that sow confusion.

Respectfully submitted,

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