In the Supreme Court of the United States

BRADLEY LITTLE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF IDAHO, ET AL.,
Petitioners,
v.
LINDSAY HECOX, ET AL.,
Respondents.

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,
v.
B.P.J., BY NEXT FRIEND AND MOTHER, HEATHER JACKSON,
Respondents.

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

BRIEF OF AMICI CURIAE 48 MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Amici Curiae are 48 Current Members of the United States Senate and House of Representatives, including Senator James E. Risch, Senator Jim Banks, and Rep. Riley M. Moore.[2] As members of Congress, they have an interest in the correct interpretation of federal law.

Title IX represents an important exercise of Congress's legislative power under the Spending Clause. Its meaning bears directly on the scope of Congress's lawmaking authority, and the promise Congress made to countless young women and men across multiple generations. If courts, in the normal course, expand statutory terms beyond their original meaning, they not only alter the careful balance struck by Congress but also usurp legislative prerogatives reserved to the policy-making branch of the United States government. As representatives of the people, Members of Congress are politically accountable for the policies embodied in federal law, whereas courts are not. That accountability makes it all the more critical that questions of social policy be resolved through the democratic process in Congress — not through judicial expansion of statutory text.

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[1] Pursuant to Sup. Ct. R. 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See* Appendix for full list.

The Members' interest is magnified here because the stakes are so high. If allowed to stand, the interpretation of the lower courts will unsettle the very promises that Congress made to generations of young women and men through Title IX. Departing from the statute's plain text risks transforming a law designed to secure equal educational opportunities on the basis of sex into one that undermines those very protections. Title IX's guarantee of fairness in athletics, privacy in facilities, and equal treatment in education rests on the stable and easily understood meaning of "sex." If courts redefine that term judicially, the carefully crafted safeguards of Title IX will be eroded, and the statute's core purpose — to prevent sex-based discrimination — will be turned on its head.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Title IX is an enduring promise to the young women and men of this Country. It was enacted with a clear and powerful purpose that is reflected in its text: to ensure equal educational opportunities by prohibiting discrimination "on the basis of sex." When Congress chose those words, it spoke plainly and did not invite the courts to redefine statutory text based on changing cultural norms and standards. In simple and direct language, Congress enacted a straightforward prohibition that protects against exclusion, inequality, and disadvantage in education and sports.

Although Title IX prohibits discrimination "on the basis of sex," it allows schools to operate athletic

teams separated by sex. 20 U.S.C. § 1681(a) (barring "discrimination under any education program or activity" "on the basis of sex"); 34 C.F.R. § 106.41(b) (1980) (authorizing schools to "operate or sponsor separate [athletic] teams for members of each sex"). That clarity matters. Congress characterized "sex" as a matter of biology. The Supreme Court and its members have arrived at the same conclusion in a wide variety of cases. That is, in part, because courts do not have license to expand statutory terms to encompass new and contested meanings that Congress has never adopted. To do otherwise wrests from the People's representatives the very policymaking function entrusted to them. Under the Constitution, the power to legislate rests solely with Congress — not with the President, the Judiciary, or the administrative state. Title IX's promise rests on the meaning of the words Congress chose. To suggest the meaning of those words shifts with time or cultural norms is not interpretation, but legislation by another name — an act that violates the separation of powers.

The principle of fixed meaning should animate Spending Clause legislation such as Title IX, where States and institutions accept federal funds contingent on compliance with clear, unmistakable conditions. If those conditions provided by Congress are allowed to be reformed with judicial innovation, the careful balance of federalism collapses: States and other funding recipients cannot knowingly consent to obligations that change after the fact.

In Title IX, Congress said what it meant and meant what it said: schools can limit participation in women's sports to *women*. Not only that, but through Title IX

Congress authorized schools to pursue profound government interests in protecting men and women in schools. These interests flow from "enduring" "[p]hysical differences between men and women." *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996).

The judiciary's role is to respect — *not replace* — the reasonable legislative judgments of the People's representatives. Only by doing so can Title IX continue to serve its enduring purpose: ensuring fairness and equality for men and women in education and sports.

Amici — 48 members of the United States Senate and House of Representatives — submit this brief in defense of the meaning of the words of Title IX and the promise that Congress made to the past, present, and future young women and men of this Country.

ARGUMENT

I. The text of Title IX uses "sex" to mean biology — not gender identity

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The unambiguous plain language of the statutory provisions and the way those original provisions would have been understood by the interpretive community at that time make clear that the term "sex" means the fact of being a male or a female. *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277

(2018) ("our job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute'") (omission in original). To hold otherwise ignores the very reasons why Congress adopted Title IX, and the precedents of this Court. "Congress enacted Title IX in 1972 with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (cleaned up). Although there were attempts to limit the effect of the statute on athletics programs, those attempts failed. Instead, Congress enacted a provision known as the Javits Amendment, which instructed the Secretary of Health, Education, and Welfare ("HEW") to "prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition on sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Education Amendments of 1974, Pub.L. No. 93–380, § 844, 88 Stat. 484, 612 (1974). HEW proposed regulations, and "Congress had forty-five days to disapprove them." *Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities*, 40 Fed.Reg. 24,128 (June 4, 1975). Ultimately, hearings were held, and the regulations went into effect after Congress declined to disapprove them. *See* 40 Fed.Reg. at 24,137.

Since then, the "participation of girls and women in high school and college sports has increased dramatically." *McCormick ex rel. McCormick v. Sch. Dist. of*

Mamaroneck, 370 F.3d 275, 286 (2d Cir. 2004). "In 1971, before Congress enacted the statute, approximately 300,000 girls and 3.67 million boys played competitive high school sports nationwide." *Id.* More recently, "8,266,244 participants were involved in high school sports in 2024–25, which is up 203,942 from the previous year and . . . includes 4,726,648 boys and 3,539,596 girls – both record highs." *See* Press Release, National Federation of State High School Associations, *Participation in High School Sports Hits Record High with Sizable Increase in 2024–25* (Aug. 25, 2025), https://perma.cc/NXH3-5HKS.

This is real success. More girls and women now compete in high school and collegiate sports because of the text of Title IX. That is because when Title IX was enacted, the term "sex" was understood to mean the biological distinctions between males and females. Dictionaries from the time of Title IX's passage and implementation consistently define sex as binary. *See, e.g.*, *Sex*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966) ("the fact or character of being either male or female"); *Sex*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966) ("one of the two divisions of . . . human beings respectively designated male or female"); *Sex*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1976) ("[t]he property or quality by which organisms are classified according to their reproductive functions"); *Sex*, BLACK'S LAW DICTIONARY (5th ed. 1979) ("[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism"); *Sex*, RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1980) ("either the male or female division of a species, esp.

as differentiated with reference to the reproductive functions").

Nor do these dictionaries simply define sex as being male or female. They also tie "male" and "female" to reproductive function: Females bear children, and males fertilize the eggs that become children. *See, e.g.*, *Male*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966) ("of or belonging to the sex that begets young by fertilizing the female"); *Female*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966) ("a human being of the sex which becomes pregnant and gives birth to young"); *Male*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966) ("an individual that produces relatively small . . . motile gametes by which the eggs of a female are fertilized"); *Female*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966) ("an individual that bears young or produces eggs"). *See also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632–33 (4th Cir. 2020) (Niemeyer, J. dissenting) (collecting dictionary definitions) (discussing that in 1972, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females — particularly with respect to their reproductive functions."); *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 530 (E.D. Ky. 2024), appeal dismissed *sub nom. Tennessee v. McMahon*, No. 24-5588, 2025 WL 848197 (6th Cir. Mar. 18, 2025).

If that weren't enough, the Supreme Court has repeatedly and consistently characterized sex exactly like the dictionaries of the 1970s — that is, as binary, immutable, and tied to reproductive function. *See Sessions v. Morales-Santana*, 582 U.S. 47, 65 (2017) (a "mother establishes" "a biological parent-child relationship . . . by giving birth"); *Nev. Dep't. of Hum. Res. v.*

Hibbs, 538 U.S. 721, 731 (2003) (noting the "differential physical needs of men and women"); *Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001) ("the fact that a mother must be present at birth but the father need not be" is among "our most basic biological differences"); *VMI*, 518 U.S. at 533 ("[p]hysical differences between men and women . . . are enduring"); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 133 (1994) ("the two sexes are not fungible"); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993) ("only women can become pregnant"); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991) (noting "female workers[']" "capacity to bear children"); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 n.17 (1983) (quoting S.Rep. No. 95–331, 95th Cong., 1st Sess. 2–3 (1977), Leg. Hist. n.16 at 7–8) ("only women can become pregnant"); *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 467 (1981) (plurality opinion) ("[o]nly women may become pregnant"); *Parham v. Hughes*, 441 U.S. 347, 351 (1979) ("gender" is an "immutable human attribute[]"); *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978) ("There are . . . real . . . differences between women and men."); *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) (sex "carr[ies] an obvious badge"); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134 (1976) ("only women can become pregnant"), superseded by statute on other grounds, Pregnancy Discrimination Act, Pub. L. 95–555, 92 Stat. 2077 (1978), as recognized in *Newport News*, 462 U.S. at 685; *Taylor v. Louisiana*, 419 U.S. 522, 532 (1975) ("the two sexes are not fungible"); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("only women can become pregnant"); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality

opinion) ("sex . . . is an immutable characteristic determined solely by the accident of birth"); *Ballard v. United States*, 329 U.S. 187, 193 (1946) ("the two sexes are not fungible").

Throughout the years, individual justices, concurring or dissenting in a variety of cases — many taking place near the time of Title IX's drafting and passage — have linked sex to biology. *See, e.g.*, *United States v. Skrmetti*, 145 S. Ct. 1816, 1856 (2025) (Alito, J., concurring in part) (what the Supreme Court's "equal protection precedents . . . have always meant by 'sex' is the status of having the genes of a male or female"); *Skrmetti*, 145 S. Ct. at 1851 (Barrett, J., concurring) ("transgender status is not marked by the same sort of 'obvious, immutable, or distinguishing characteristics' as race or sex") (internal quotation marks omitted); *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 56 (2012) (Ginsburg, J., dissenting) ("childbearing is . . . a biological function unique to women"); *Nguyen*, 533 U.S. at 89 (O'Connor, J., dissenting) (criticizing sex classifications that "find[] support not in biological differences but instead in a stereotype"); *Miller v. Albright*, 523 U.S. 420, 445, 485 (1998) (Breyer, J., dissenting) ("I believe that biological differences between men and women would justify" some special rules for proving paternity); *J.E.B.*, 511 U.S. at 156 (Rehnquist, C.J., concurring) ("the two sexes differ . . . biologically"); *Manhart*, 435 U.S. at 727 (Burger, C.J., concurring in part and dissenting in part) ("sex" is "the one acknowledged immutable difference between men and women"); *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) ("Gender, like race, is a highly visible and immutable characteristic."); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, J.,

concurring in part and dissenting in part) ("gender" "is an immutable characteristic which its possessors are powerless to escape or set aside"); *Craig v. Boren*, 429 U.S. 190, 212 n.2 (1976) (Stevens, J., concurring) ("sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth").

These justices have disagreed on a wide range of fundamental issues. But they have all agreed that there are enduring and inherent differences between men and women.

According to the Respondents and the lower courts, "sex" means whatever each individual believes it to mean. They ask the Court to import into Title IX an interpretation that would erase the very purposes for which Congress adopted Title IX: to level the playing field for girls and women. The Court should reject such an "unrestrained reading." *Yates v. United States*, 574 U.S. 528, 536 (2015). Under this Court's precedents, it must.

"When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021) (citing *Wisconsin Central*, 585 U.S. at 277) ("As usual, our job is to interpret the words consistent with their "ordinary meaning . . . at the time Congress enacted the statute."). The definition of "sex," as used in Title IX, has not changed. Its meaning was and is fixed — even if parts of American society and culture *now* embrace a fluid understanding of *gender*. "Justice Scalia was perfectly clear on this point. The words of a law, he insisted, 'mean what they conveyed to reasonable people at the

time.'" *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 704 (2020) (Alito, J. dissenting) (quoting A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) (emphasis added)); *See also Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of [a statutory] text as any ordinary Member of Congress would have read them . . . and apply the meaning so determined"). Thus, "[s]licing a statute into phrases while ignoring . . . the setting of the enactment . . . is a formula for disaster." *Bostock*, 590 U.S. at 705 (Alito, J. dissenting).

Of course, in the past "many judges . . . abhorred 'plain meaning' and preferred instead to elevate 'legislative history' and their own curated accounts of a law's 'purposes' over enacted statutory text." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 443 n.6 (2024) (cleaned up). That time is gone. Today, "judges are, to one degree or another, 'all textualists now.'" *Kisor v. Wilkie*, 588 U.S. 558, 622 (2019) (Gorsuch, J. concurring). Moreover, if the courts suggest that words have an ever-evolving meaning and that those newly ascribed meanings may stretch the text adopted by Congress beyond its original meaning, "[t]he rule of law begins to bleed into the rule of men." *Id.* at 613. Yet it is the Court's solemn duty, as *Marbury v. Madison* recognized, "to say what the law is" — not to rewrite it according to its own preferences. That duty is essential to maintaining the separation of powers. Of course, the judiciary possesses "neither force nor will, but merely judgment," as Hamilton explained in THE FEDERALIST No. 78 (Alexander Hamilton). When courts abandon that role and substitute their own evolving meanings, they stop interpreting the law and

begin to exercise the very legislative power the Constitution withholds from them.

The "statutory language means what its terms most naturally suggest." *Feliciano v. Dep't of Transp.*, 145 S. Ct. 1284, 1296 (2025). That is, States and schools may provide equal opportunities to boys and girls using separate teams based on biological sex. Title IX was revolutionary for girls and women. The text used by Congress to launch that revolution should not now be used to sideline the girls and women for whom it was enacted.

II. Legislative and regulatory context confirm that Title IX used "sex" to mean biology

"Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick*, 370 F.3d at 286. Senator Birch Bayh, Title IX's primary sponsor, explained that the statute sought to "provide for the *women of America* something that is rightfully theirs — an equal chance . . . to develop the skills that they want." 118 Cong. Rec. 5808 (1972) (emphasis added). That core purpose—"equal opportunity to participate," *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) — is "evident in the text" of Title IX. *Cf. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Regulations implementing Title IX shortly after its passage provide further proof. *See Loper Bright Enter.*, 603 U.S. at 394 (courts interpreting a statute may "seek aid from the interpretations of those responsible for implementing particular statutes"). When the first Title IX regulations were promulgated in 1975, they confirmed the sex binary, requiring that schools match opportunities for one sex with comparable

opportunities for the "the other sex." 45 C.F.R. §§ 86.31(c) (study abroad scholarships), *id.* 32(b)(2) (housing), *id.* 33 (bathrooms, locker rooms, and showers) (1975) (emphasis added). The next set of regulations, from 1980, required "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c) (1980) (emphasis added).

Recognizing the purpose of Title IX, the 1975 regulations further permit schools to offer sex-specific vocal choruses and physical education classes that involve contact sports. 45 C.F.R. § 86.34(c), (f). The regulators first tasked with implementing Title IX understood the relevance of sex differences for sex-specific activities. The preamble to the 1975 regulations references the "physical differences between the sexes." *Nondiscrimination on the Basis of Sex In Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 Fed. Reg. 24128, 24133 (June 4, 1975). The preamble even defends one provision — the prohibition in 45 C.F.R. § 86.34(d) (1975) on physical education standards that adversely affect one sex — on grounds that "the difference in strength between average persons of each sex," 40 Fed. Reg. at 24132, would make certain standards less favorable to women. *See also id.* ("where a goal-oriented standard is used to assess skill or progress, women will almost invariably score lower than men").

Consider a choir. A mixed-sex choir does not usually limit opportunities for either sex. A men's chorus, however, sounds different from a women's chorus, and a boys' chorus from a girls' chorus. Each sounds different from a full choir. The driving factor is, again, biology, which varies male pitch from female pitch. *See* Jean Abitol et al., *Sex Hormones and the Female Voice*, 13

J. VOICE 424 (1999). Schools may want all of their choirs to reflect the mixed pitches of male and female voices, or to offer some vocal ensembles that showcase the different sounds. Either way, biology justifies their options — as well as the option to limit a mezzo-soprano from joining a boys' choir or a tenor to join a women's ensemble.

The stakes are different in sports. In some sports, men may have natural physical differences, and to *require* mixing the sexes in those sports would dramatically limit women's ability to compete. Across eleven track and field events, "hundreds and thousands of males out-perform[ed]the best results" of the top woman in each event "thousands and tens of thousands of times." Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE CTR. FOR SPORTS L. & POL'Y 3 (2018). Hundreds of males under eighteen outperformed the top elite woman's result in five events. *Id*. at 2.

Sex differences also matter for living facilities like housing, bathrooms, and locker rooms, as well as classes involving sexuality. Men and women have dignitary, privacy, and safety interests in separate intimate spaces. Members of one sex often have a desire not to be seen by the opposite sex in a state of undress or to see a member of the opposite sex in a state of undress, even if that person's "gender identity" differs from his or her biological sex. This desire "is entirely reasonable." Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J. L. & PUB. POL'Y. 310, 322 (2018). It is also reasonable for members of one sex to not want to risk exposure of private body parts to someone of the opposite sex in a bathroom, or to discuss graphic differences between male and female

biology in mixed company. This is especially true for students in K-12 schools undergoing puberty and bodily changes. *See id.*, at 323.

Permitting sex differentiation in these instances makes sense only if sex entails maleness and femaleness, and if males and females are biologically distinct. They are, and Congress knew that when it adopted Title IX. The original public meaning is bolstered by the regulations adopted close in time to the adoption of Title IX.

As this Court has observed, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001); *see also*, *e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (same). If Congress meant to prohibit gender identity discrimination, it would have said so in Title IX. *Cf. Beck v. Prupis*, 529 U.S. 494, 500–01 (2000) ("As we have said, when Congress uses language with a settled meaning at common law, Congress . . . presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.").

In other contexts, Congress has done exactly that. Take the Violence Against Women Act. The Violence Against Women Act at first did not mention gender identity. Later, in 2013 when reauthorizing VAWA, Congress decreed:

> No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity* (as defined in paragraph 249(c)(4) of Title 18), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act[.]

34 U.S.C.A. § 12291(b)(13)(A) (emphasis added). Or consider the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act. There, Congress made it a federal hate crime if a person "willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, *gender identity*, or disability of any person." 18 U.S.C. § 249(a)(2) (emphasis added).

Finally, the legislative context confirms something else too. Title IX should be interpreted the same as Title VI when it comes to the Spending Clause. That is so because Title IX was modeled on Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by recipients of federal funds, 42 U.S.C. §§ 2000d–2000d-7, and the "two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 524 U.S. at 286; *see also* William E. Thro, M.A., J.D. and Brian A. Snow, M.A., J.D., *The Conflict Between the*

Equal Protection Clause and Cohen v. Brown Univ., 123 ED. LAW REP. 1013, 1037 (1998) (citing *Grove City College v. Bell*, 465 U.S. 555, 566 (1984); *Sex Discrimination Regulations*: *Hearings Before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor*, 94th Cong., 1st Sess. 16, 150 (1971) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (comments of Senator Bayh)). This Court has said that Title VI is coextensive with the Equal Protection Clause. *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001). That leads to a simple syllogism: because Title VI is coextensive with the Equal Protection Clause as it applies to race, and Title IX is interpreted the same as Title VI as it applies to sex, then Title IX logically must also be coextensive with the Equal Protection Clause as it applies to sex as well.

This approach makes sense. Congress used nearly identical language in Title VI and Title IX. This Court has and should continue to treat the statutes the same.

III. Because Title IX was enacted under the Spending Clause, its requirements must be clear and unambiguous, and those provisions say nothing about gender identity

Sometimes "statutory terms can carry meanings that depart from their ordinary ones. Congress may, for example, define a word or phrase in a specialized way or employ a term of art with long-encrusted connotations in a given field." *Feliciano*, 145 S. Ct. at 1291.

Yet there is "no evidence of anything like that here." *Id.* "And absent such evidence, those whose lives are governed by law" — or the benefit of a bargain made under the Spending Clause [U.S. Const. art. I, § 8, cl. 1]—"are entitled to rely on its ordinary meaning, not left to speculate about hidden messages." *Id.*

"Title IX was enacted as an exercise of Congress' powers under the Spending Clause." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005). "When Congress enacts legislation under its spending power, that legislation is in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 181–82. In that context, Congress must "speak with a clear voice," and "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). As this Court has held, "there can be no knowing acceptance of the terms of the contract if a State is unaware of the conditions imposed by the legislation on its receipt of funds." *Jackson*, 544 U.S. at 182 (cleaned up).

The implementing regulations — adopted with the consent of Congress — prove the point. Notwithstanding the broad promise of Title IX, 34 C.F.R. § 106.41(b) provides that "a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."

IV. Congress should be given the option and ability to consider the policy implications of importing gender identity into the text of Title IX

Finally, policy should be left to the policymakers. The policy consequences of judicially importing "gender identity" into the text of Title IX are dramatic. Title IX was enacted with the clear and limited purpose of prohibiting discrimination "on the basis of sex" to ensure equal educational opportunities for women and girls. Recasting that statutory term to include gender identity — an idea never contemplated by the members of Congress then enacting Title IX — would not only stretch the statute beyond its original meaning but would also reshape education policy nationwide. Such a reinterpretation would carry significant consequences for athletics, facilities, privacy, and parental rights — touching the daily lives of millions of students. To adopt such a transformative policy shift by judicial fiat risks undermining the stability and predictability that the rule of law requires. *Cf. Loper Bright Enters.*, 603 U.S. at 411 (overruling Chevron because, among other reasons, it fostered unwarranted instability in the law).

These consequences underscore why the courts should not rewrite Title IX to cover gender identity. The Constitution vests legislative power in Congress alone, and it is Congress that has both the institutional capacity and democratic legitimacy to weigh the competing values and policy interests at stake. Courts are ill-suited to resolve such contentious social questions through strained interpretation of statutory text. *Cf. W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 737 (2022) (Gorsuch, J. concurring) ("In Article I, 'the

People' vested '[a]ll' federal 'legislative powers . . . in a Congress.' Preamble; Art. I, § 1. As Chief Justice Marshall put it, this means that 'important subjects . . . must be entirely regulated by the legislature itself[.]"). Because the meaning of Title IX is clear, judicial fidelity to that meaning preserves the separation of powers and ensures that any expansion of the statute's reach comes from the branch of government accountable to the People. This Court should resist the invitation to embrace what Justice Scalia excoriated—"the theory that courts should 'update' old statutes so that they better reflect the current values of society." *Bostock*, 590 U.S. at 685 (Alito, J. dissenting). That is the role of Congress — not this Court or any inferior courts.

CONCLUSION

Title IX says what it means and means what it says: it prohibits discrimination on the basis of sex — not on the basis of gender identity.

Respectfully submitted,

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