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

BRIEF FOR *AMICUS CURIAE* DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, *amici curiae* the Defense of Freedom Institute for Policy Studies ("DFI") respectfully submits this brief in support of Petitioners.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

DFI is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker, and to protecting the civil and constitutional rights of Americans at school and in the workplace. DFI was founded in 2021 by former senior leaders of the U.S. Department of Education who are experts in education law and policy. DFI contributes its expertise to policy and legal debates concerning the proper scope and interpretation of Title IX. As part of that effort, DFI was co-counsel for Mississippi, Louisiana, Montana, and Idaho, along with the Attorneys General for those four states, in *Louisiana v. U.S. Dep't of Educ.*, No. 24-30399, 2024 U.S. App. LEXIS 17886 (5th Cir. July 17, 2024), which challenged new regulations under Title IX published by the Department of Education on April 29, 2024, *see Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* 89 Fed. Reg. 33,474 (Apr. 29,

[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made any monetary contributions to fund the preparation or submission of this brief.

2024) (the "New Rule"). In addition, DFI submitted an *amicus* brief in *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024) on the issues presented here.

SUMMARY OF ARGUMENT

In *Bostock v. Clayton County*, 590 U.S. 644 (2020), this Court held that the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., on employment discrimination "because of [an] individual's . . . sex" included firing an employee "merely for being gay or transgender" because, under that statute's text, biological "[s]ex plays a necessary and undisguisable role" in the decision to terminate. *Id.* at 652, 661, 682. Like Respondents here, the decisions in *B.P.J.*, 98 F.4th 542 (4th 2024) and *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2023) relied heavily on *Bostock* for their holdings, concluding respectively that West Virginia Code § 18-2-25(d)(c)(3) & (c)(2) (2021), and Idaho Code Ann. §§ 333-6201-06 (2020) (collectively referred to herein as the "Women's Athletics Statutes") did not survive heightened scrutiny under the Equal Protection Clause. *See B.P.J.* 98 F.4th at 559; *Hecox* 104 F.4th at 1088. Also relying on *Bostock, B.P.J.* further concluded that the West Virginia law violated the prohibition on sexual discrimination in Title IX of the Education Amendment Acts of 1972, 20 U.S.C. 1681, et seq., as applied to B.P.J. *See B.P.J.*, 98 F.4th at 563. Because *Bostock*'s holding did not extend beyond Title VII, or the specific factual circumstances in the case, the Circuit Courts' reliance was misplaced.

First, *Bostock* itself made clear that its holding was driven by a close reading of Title VII's text, and did not apply to other legal prohibitions on sex discrimination. *Bostock* never claimed to offer some fundamental insight about the nature of sex discrimination that would control anywhere outside of Title VII. Rather, *Bostock* explicitly disclaimed any broad reach, and numerous courts have recognized its limitations.

Second, and consistent with this Court's disclaimer, a similar text-driven review of Title IX and the Equal Protection Clause establishes that they differ substantially from Title VII, making *Bostock* inapposite. *Bostock* interpreted specific statutory language in light of specific factual circumstances, and its reasoning does not apply to circumstances far afield from Title VII, such as in *B.P.J.* and *Hecox*.

Third, while *Bostock* acknowledged that Title VII had not previously been applied to transgender discrimination, Title IX does not allow for such new and unexpected applications. Unlike Title VII, Title IX was enacted pursuant to Congress's Spending Clause authority, which requires that a recipient of funding have clear notice of the conditions on its relationship with the federal government at the outset. Recipients had no such notice of the reading of Title IX put forth in *B.P.J.* and *Hecox*.

Finally, although *Bostock*'s statutory interpretation was clear, the case has animated much confusion in areas of transgender law outside Title VII. For example, like the Fourth and Ninth Circuits,

the federal Department of Education mistakenly relied on *Bostock* to promulgate the New Rule, which, *inter alia*, expanded the definition of sex discrimination to include gender identity discrimination. *See* 89 Fed. Reg. 33,802 (Apr. 29, 2024) (vacated and disavowed by the Department of Education). Ensuing legal challenges to New Rule in federal courts across the country (including in this Court), *see Dep't of Educ. v. Louisiana*, 603 U.S. 866, 871 n.3 (Sotomayor, J., dissenting) (2024) (listing cases, and collectively referred to herein as the "New Rule Litigation") were uniformly successful. *B.P.J.* and *Hecox* exemplify post-*Bostock* confusion, including over the very language used to litigate this area of law. The two cases now offer a chance for much-needed clarification from this Court.

ARGUMENT

The fact that under Title VII, "sex plays an unmistakable . . . role" in the termination of a transgender employee, *Bostock*, 590 U.S. at 660, sheds little if any light on either unlawful sex discrimination under Title IX or the constitutionality of state statutes under the Fourteenth Amendment. *Bostock's* text-driven analysis centered exclusively on Title VII, and the efforts of the Fourth and Ninth Circuits to impose its holding onto Title IX and the Equal Protection Clause simply try to force a square peg into a round hole.

I. *BOSTOCK* DISCLAIMED ANY APPLICATION OF ITS HOLDING BEYOND TITLE VII TO OTHER LEGAL PROHIBITIONS ON SEX DISCRIMINATION.

This Court made clear in *Bostock* that besides Title VII, no other law prohibiting sex discrimination was before it, and expressly declined to "prejudge" whether *Bostock* would "sweep beyond Title VII" to affect such other laws. 590 U.S. at 681; *see also id.* ("The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

The Court further clarified that even in the Title VII context, *Bostock* did "not purport to address bathrooms, locker rooms, or anything else of the kind." *Id.* Given that locker rooms exist to facilitate athletic activity, the extension of *Bostock* to strike down the Women's Athletics Statutes under Title IX should have been a non-starter.[2]

The Fourth and Ninth Circuits notwithstanding, numerous courts have accepted *Bostock*'s disclaimer. *See, e.g., Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318,

[2] Nonetheless, there was concern that *Bostock* could lead to the issue "under both Title VII and Title IX [of] the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex." *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting).

324 (6th Cir. 2021) (rejecting claim under Age Discrimination Enforcement Act ("ADEA"). These include courts in the New Rule Litigation. *See, e.g., Alabama v. Sec'y of Educ.*, No. 24-12444, 2024 U.S. App. LEXIS 21358, at *12-13 (11th Cir. Aug. 22, 2024); *Tennessee v. Cardona*, 737 F. Supp. 3d, at 558-59, 571-72 (E.D. Ky. 2024); *State v. Cardona*, 743 F. Supp. 3d 1314, 1324 (W.D. Okla. 2024); *Arkansas v. Dep't of Educ.*, 742 F. Supp. 3d 919, 938-38, 944-45 (E.D. Mo. 2024); *Kansas v. Dep't of Educ.*, 739 F. Supp. 3d 902, 920-21 (D. Kan. 2024); *Louisiana v. Dep't of Educ.*, 737 F. Supp. 3d 377, 397 (W.D. La. 2024). And when the argument that *Bostock* controlled interpretation of Title IX was presented on this Court's emergency docket in the New Rule Litigation, it did not prevail. *Louisiana*, 603 U.S. at 866-68.

More recently, this Court stated that it has "not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context," and did not "need [to] do so" to hold that a state ban on gender transition treatment for minors did not violate the Equal Protection Clause. *United States v. Skrmetti*, 145 S. Ct. 1816, 1834 (2025) (finding that Tennessee statute classified based not on sex, but on age and purpose for medical treatment). Thus, to the extent lower courts in the New Rule Litigation and elsewhere overread *Bostock*'s disclaimer, and the door remains open to applying the case beyond Title VII, this Court should now shut it based on the significant differences between that statute, on the one hand, and Title IX and the Equal Protection Clause, on the other.

II. *BOSTOCK* WAS DRIVEN BY A CLOSE READING OF TITLE VII'S TEXT, WHICH DIFFERS MATERIALLY FROM THAT OF TITLE IX AND THE EQUAL PROTECTION CLAUSE.

Besides *Bostock*'s disclaimer, *BPJ* and *Hecox* also ignored crucial textual differences between the laws at issue.

A. Title VII and Title IX Are Vastly Different Statutes.

Notwithstanding some superficial similarities, Titles VII and IX are "vastly different" statutes. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-84 (1998)). They have never been considered in lockstep, which is not surprising given that Title VII focuses exclusively on hiring and firing in employment, while Title IX's fundamental purpose is to ensure equal educational opportunities for women and girls.

Read in their respective statutory contexts, the prohibitions on sex discrimination operate in vastly different ways. *See Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) ("[W]ords 'must be read' and interpreted 'in their context,' not in isolation."); *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.). A notable example is their contrasting treatment of differences between the sexes. Title VII is premised

on the principle that sex is "not relevant to the selection, evaluation, or compensation of employees," with only a single exception – "in those very narrow circumstances" where sex is a bona fide occupational qualification. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 244 (1989); *accord Bostock*, 590 U.S. at 660. By contrast, multiple exceptions immediately follow Title IX's general anti-discrimination mandate, *see* 20 U.S.C. §§ 1681(a)(3) – (9), and Title IX instructs that sex-specific living quarters are non-discriminatory, *see id.* § 1686 (allowing schools to "maintain[] separate living facilities for the different sexes"). Indeed, Title IX makes clear that in certain circumstances, differential treatment based on biological sex is essential to achieving equal opportunities in education for girls and women.

In addition, Title VII expressly provides a list of distinct employment-related defenses to claims under it, which are absent from Title IX and would make little sense in the education context. *See, e.g.,* 42 U.S.C. § 2000e-12(b) (employer relied in good faith on opinions and interpretations of Equal Employment Opportunity Commission); *id.* § 2000e-2(h) (employer utilizes bona fide seniority system); *id.* § 2000e-1(c)(2) (exemption for foreign employers).

B.P.J. conceded that its reading of Title IX ran counter to the statute's historical interpretation, acknowledging that "regulations introduced soon after Title IX's enactment say recipients of federal funds 'may operate . . . separate teams for members of each sex.'" *B.P.J.*, 98 F.4th at 564 (quoting 34 C.F.R. § 106.41(b); *see also* U.S. Dep't of Health, Educ., &

Welfare, *Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities*, 40 Fed. Reg. 24,128, 24,141 (June 4, 1975) (codified at 45 C.F.R. Pt. 86) (allowing the "separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact"). *B.P.J.* went on to argue that B.P.J. did "not challenge the legality of having separate teams for boys and girls," but that because he identified as a transgender girl, he should be allowed on girls' teams, 98 F.4th at 564; however, this breaks with *Bostock*, which "proceed[ed] on the assumption that 'sex' . . . referr[ed] only to biological distinctions between male and female," *Bostock*, 590 U.S. at 655. It makes no sense for *B.P.J.*'s ultimate legal conclusion to turn on *Bostock* while rejecting its fundamental, factual assumption.

Furthermore, *Bostock*'s assumption is consistent with longstanding, widely-shared notions that sex is based on biology exclusively. *See Bostock*, 590 U.S. at 702-716 (Alito, J., dissenting). And relying on this understanding for the half century since Title IX was enacted, schools have invested in athletic facilities and other support for biological girls and women, and biological girls and women themselves have spent countless blood, sweat and tears training and preparing to compete athletically against other biological girls and women, *see, e.g., Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818-19 (11th Cir. 2022) (en banc) (Lagoa, J., concurring) (discussing skyrocketing participation in girls' and women's

sports resulting from Title IX), while no similar reliance interests were at issue under Title VII in *Bostock*.

Finally, critical to *Bostock*'s holding is its causation analysis, and the relevant language in Title VII differs from that in Title IX. *Compare* 42 U.S.C. § 2000e-2(a)(1) (discrimination "because of" sex) and 20 U.S.C. §1681(a)(1)) (discrimination "on the basis of" sex). While Title IX prohibits discrimination on "*the* basis" of sex alone, Title VII more broadly allows a discrimination claim where sex is only one of several motivating factors, *see* 42 U.S.C. § 2000e-2(a)(unlawful employment practice exists where impermissible consideration of race, color, religion, sex, or national origin "was *a* motivating factor . . . even though other factors also motivated") (emphasis added).

Neither *Bostock* nor the decisions it relied on for its causation analysis had anything to do with Title IX. *See Bostock*, 590 U.S. at 656. *Univ. of Tex. Southwestern Med. Ctr. v. Nassar* and *Gross v. FBL Financial Services, Inc.* analyzed causation standards applicable to federal employment statutes, with *Nassar* holding that under the specific text of Title VII, retaliation had to be the "but for" cause of an adverse employment decision in order to make a claim. *See Nassar*, 570 U.S. 338, 352-53 (2013) (noting that same "but for" standard applied under ADEA, which was at issue in *Gross*); *Gross*, 557 U.S. 167, 176-77 (2009) (discussing causation under ADEA). *Burrage* relied on *Nassar* and *Gross* to hold that the use of the phrase "results from" in the federal Controlled Substances Act also required "but for" causation in the

same way that "because" and "because of" did in Title VII and the ADEA, respectively.[3] *Burrage v. United States*, 571 U.S. 204, 212-13 (2014). Neither "because," "because of," or "results from," the relevant phrases in the statutes at issue in *Bostock*, *Nassar*, *Gross*, and *Burrage*, appear in Title IX (or, as discussed, *infra*, the Equal Protection Clause).

B. Title VII and the Equal Protection Clause Share No Relevant Language

Comparing Title VII and the Equal Protection Clause is even more straightforward, as the two have entirely different texts. *Compare* 42 U.S.C. § 2000e-2(a)(1) and U.S. CONST. amend. XIV, § 1. Most notably, "sex" and "because of" (or any similar causative language) are not in the Fourteenth Amendment. "That such differently worded provisions should mean the same thing is implausible on its face." *Students for Fair Admissions Inc. v. Presidents & Fellows of Harv. Coll.,* 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) (comparing Equal Protection Clause with Title VI); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976) ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII."). Although

[3] While both *Nassar* and *Gross* held that retaliation and age, respectively, had to be "*the* but-for-cause" of the adverse employment event, *Burrage* replaced the definite article in quoted material from each case with the indefinite article, thereby lowering the standard. 571 U.S at 212, 213 & 213 n.4.

not express like in Title IX, the Equal Protection Clause recognizes that "[p]hysical differences between men and women . . . are enduring," and that "'[i]nherent differences' between men and women . . . remain cause for celebration." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Sex separation in athletics is wholly consistent with this recognition.

Title VII is "'more than a simple paraphrasing' of the Equal Protection Clause." *Students for Fair Admissions*, 600 U.S. at 308 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416 (1978)) (Gorsuch, J., concurring). The two operate differently and their goals are not identical. Title VII focuses on discrimination against individuals, *see Bostock*, 590 U.S. at 658, while equal protection is most concerned with disparities in the treatment of different groups, *see Enquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008). The Equal Protection Clause "operates on States" and "does not purport to regulate the conduct of private parties;" Title VII "applies to recipients of federal funds – covering not just many state actors, but many private actors too." *Students for Fair Admissions*, 600 U.S. at 308 (Gorsuch, J., concurring). While Title VII reaches entities and organizations that the Equal Protection Clause does not, "[i]n other respects, . . . the relative scope of the two provisions is inverted." *Id.*

Title VII's "but for" causation element also distinguishes it from the Equal Protection Clause. Neither "because of" or any similar language is present in the Equal Protection Clause, which prohibits government "den[ial] . . . of equal protection of the laws" without reference to its cause. And rather

than a "but for" standard derived directly from statutory language, causation under the Equal Protection Clause relies on the judicially-supplied standard that some discriminatory purpose was "a motivating factor" for the challenged governmental action. *See Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265-66 (1977).

III. UNLIKE TITLE VII, "UNEXPECTED APPLICATIONS" OF TITLE IX RENDER IT CONSTITUTIONALLY INFIRM UNDER THE SPENDING CLAUSE.

Besides applying *Bostock* to Title IX, *B.P.J.* also cited it to reject defendants' "arguments that emphasize the historical expectations surrounding Title IX's application and the regulations that have implemented it." *B.P.J.*, at 564. The court stated that "legislators' 'expected applications' of a statute "can never defeat unambiguous statutory text." *Id.* (quoting *Bostock,* 590 U.S. at 674). *B.P.J.* ignored the fact that Congress enacted Titles VII and IX pursuant to substantially different sources of constitutional authority.

Congress enacted Title IX under its Spending Clause authority, *see Davis v. Monroe Cnty, Sch. Bd.*, 526 U.S. 629, 640 (1999), and Title VII under the Commerce Clause, *see Bakke*, 438 U.S. at 367. While Title VII regulates employers directly pursuant to power expressly enumerated at Article I, Section 8, *see Students for Fair Admissions,* 600 U.S. at 256-57, Title IX creates an arrangement in the nature of a contract between the federal government and recipients

accepting funds offered under the statute, *see Jackson*, 544 U.S. at 181-82. "That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition." *Gebser*, 524 U.S. at 286.

Although Congress's Commerce Clause authority is plenary, the contractual arrangements created between the federal government and funding recipients through the Spending Clause do not allow for "unexpected applications." A recipient must have clear notice of the expected statutory applications it is agreeing to at the time it enters into the contractual "bargain" with the federal government. *See Davis,* 526 U.S. at 640; *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The same is not true of Title VII. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-53 (1976). Thus, "the requirement that recipients receive adequate notice of Title IX's proscriptions also bears on" the proper understanding of that statute, *Davis*, 526 U.S. at 651, while the issue of "whether a specific application was anticipated is irrelevant" under Title VII, *Bostock*, 590 U.S. at 677 (cleaned up).

When Title IX was enacted in 1972, it did not clearly and unambiguously encompass gender identity discrimination, such that recipients would have had notice of the condition. *Tennessee*, 737 F. Supp. 3d at 510. For some fifty years, no one ever thought the statute covered transgender discrimination, with the first suggestion that it might coming in a "2016 Dear Colleague Letter" from the Department Letter. *See* Dep't of Educ. & Dep't of Justice, *Dear Colleague Letter on Transgender Students* (May 13, 2016)

https://tinyurl.com/usz67w3h (opining that Title IX prohibits discrimination based on student's transgender status). Thus, unlike Title VII, the unexpected application of Title IX to transgender discrimination would run afoul of the Constitution.

Furthermore, *Bostock* did not involve an "unexpected application" that was based on an interpretation that would do violence to the original, publicly-understood meaning of the statute at issue.[4] It is universally acknowledged that Title IX was intended to increase opportunities in education for girls and women, *see Davis*, 526 U.S. at 650, and over time, the biggest area for such increased opportunities has turned out to be in athletics. Transgender students like B.P.J. displace biological girls in athletics, undermining the purpose of Title IX.

IV. THIS CASE OFFERS AN OPPORTUNITY FOR NEEDED CLARIFICATION IN THE AREA OF TRANSGENDER LAW.

Clarifying *Bostock*'s scope will help to eliminate confusion in the many remaining uncharted areas of transgender law. *See Fowler v. Stitt*, 104 F.4th 770, 804 (10th Cir. 2024) (Hartz, J., dissenting). For example, during the New Rule Litigation, school districts across the country were whipsawed between

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[4] Increasingly, there are examples of girls and women suffering actual violence because of this "unexpected application." *See, e.g.*, Holt Hackney, *Professor: 'Trans Athletes Causing Life-Altering Injuries'*, Sports Law Expert (Apr. 17, 2025) https://tinyurl.com/56t7t8xk.

various post-*Bostock* interpretations of Title IX, before courts ruled uniformly against the New Rule.

B.P.J. is another example of an unfortunate ripple effect coming from misreading *Bostock*. To conclude that the West Virginia law discriminated against B.P.J. under Title IX, the Fourth Circuit relied on its earlier decision in *Grimm v. Gloucester Cty. Sch Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). *See B.P.J.*, 98 F.4th at 563 (citing *Grimm,* 972 F.3d at 616, 618). *Grimm* held that a Virginia school board's policy prohibiting transgender students from using bathrooms that did not match their biological sex violated Title IX and, like *B.P.J.*, relied on *Bostock* for its holding. *Grimm*, 972 F.3d at 616-19. *Grimm* acknowledged that *Bostock* interpreted Title VII, but stated that the case "guides our evaluation of claims under Title IX," without any consideration of *Bostock*'s disclaimer, textual differences between the statutes, or the other issues discussed in this brief. *See Grimm*, 972 F.3d at 616 (citations omitted). Guidance here would help to stop such errors from compounding.

Since *Grimm*, litigation over transgender access to bathrooms and locker rooms continues to arise frequently, and more clarity would be beneficial. Another transgender bathroom case – again, from the Fourth Circuit – recently appeared on this Court's emergency docket, *see Doe v. South Carolina,* No. 25-1787, 2025 U.S. App. LEXIS 20849 (4th Cir. Aug. 15, 2025), *stay pending appeal denied*, No. 25A234, 2025 U.S. LEXIS 2784 (Sept. 10, 2025), and lower courts show confusion in this area, *see*, *e.g., D.P. v. Mukwonago Area Sch. Dist.*, No. 23-2568, 2025 U.S.

App. LEXIS 16097 (7th Cir. June 30, 2025) (sua sponte granting panel rehearing to consider whether *Whitaker v. Kenosha United Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) should be overruled in light of *Skrmetti*).

Even the language used in this area of law can be muddled and imprecise, increasing uncertainty. For example, are "sex" and "gender" synonymous? This Court has sometimes used them interchangeably, *see, e.g., Grimm*, 972 F.3d at 607 n.8 (citing *Miss Universe for Women v. Hogan*, 458 U.S. 718 (1982), and *Virginia*, 518 U.S. at 515), but it is unclear whether they can still be used that way, *see, e.g., Skrmetti*, 145 S. Ct. at 1816 n.2; *Bostock*, 590 U.S. at 686-87, 693-95 (Alito, J., dissenting).

Hecox exemplifies the potential confusion bred by such muddled language. In fact, *Hecox* observed that "'such seemingly familiar terms as "sex" and "gender" can be misleading,'" *Hecox*, 104 F.4th at 1068 (quoting *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018)); thus, at the outset of the opinion, the court provided a glossary defining terms used in the decision, including "gender identity," "sex," "cisgender," and "transgender," *Hecox*, 104 F.4th at 1068-69; *see also Fowler*, 104 F.4th at 789 n.13 ("[i]n our analysis, we use 'sex' to mean sex assigned at birth"). That *Hecox* believed it necessary to include such definitions shows courts do not share a common understanding of these terms.

Also, in its heightened scrutiny review, *Hecox* raises concerns about Idaho's law subjecting "young girls" (that is, young biological boys with male genitalia

who want to participate in girls' sports) to traumatizing gynecological exams. *Hecox*, 104 F.4th at 1087-88. This seems farfetched and the result of confusing terms.

Precision in language is critical to legal analysis and, unless words have commonly-accepted meanings throughout the legal community, it is impossible. This Court's decision here can help to corral the relevant language, so that courts and litigants do not end up talking past one another in this area of law, and minimizing the potential for disconnect between this Court's precedent and subsequent decisions in the lower courts.

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioners' brief, this Court should reverse the decisions of the Fourth and Ninth Circuits.

Respectfully submitted,

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