No. 24-43

In the Supreme Court of the United States

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.*

America First Legal has a substantial interest in this case. First, it represents parents nationwide who are fighting, *inter alia*, to protect their daughters' physical safety, personal privacy, and access to sports and other educational opportunities. Second, as a participant in notice-and-comment rulemaking and an organization often engaged in litigation to protect the rule of law, it filed several briefs opposing the Biden Administration's attempts to enshrine the errors of the decision below into Title IX (and Title VII) regulations. Third, it sought to vindicate the rights of employers against the EEOC's prior misreading of Title VII liability. See *Braidwood Mgmt., Inc.* v. *EEOC*, 70 F.4th 914 (CA5 2023).

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Title IX, enacted in 1972 and titled "Sex," provides: "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. § 1681(a). Statutory and regulatory text and structure, this Court's precedents, and all other available evidence show that the ordinary public meaning of the term "sex" at the time of Title IX's enactment referred to biological male and female, not "gender identity." Under Title IX, "sex, like race and national origin, is an immutable characteristic determined solely by" biology. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Gender identity is a "distinct concept[] from sex." *Bostock* v. *Clayton County*, 590 U.S. 644, 669 (2020).

Congress did not blind itself to reality when enacting Title IX. Title IX recognizes that ensuring equality between men and women requires accounting for and accommodating biological differences through, for instance, "separate living facilities for the different sexes," "separate toilet, locker room, and shower facilities," and "separate [sports] teams." 20 U.S.C. § 1686; 34 C.F.R. §§ 106.33, 106.41(b).[1] In accord with the broader statutory

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[1] All references to Title IX regulations in this brief refer to the regulations as they existed before the Biden Administration's unlawful (and invalidated) Nondiscrimination on the Basis of

prohibition on sex discrimination, male and female facilities must be "comparable," and schools must provide "equal athletic opportunity for members of both sexes." 34 C.F.R. §§ 106.32(b), 106.33, 106.41(c). In short, Title IX forbids treating one sex worse than the other; it does not forbid (and sometimes mandates) recognizing that boys and girls have "inherent," "enduring" biological differences. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

The Fourth Circuit's decision, by contrast, upends the statutory scheme by forcing schools to disregard biological differences between boys and girls, nullifying all the ways that Congress sensibly recognized that boys and girls are not the same. The Fourth Circuit held that "discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX," so boys who identify as girls are "similarly situated" to girls for Title IX purposes. Pet. 39a.

That decision elides the critical, enduring distinctions between males and females that form the meaning of the statutory term "sex." In practically all relevant Title IX cases, including here, the issue presented has been whether a person with some different gender identity can engage in some sex-selective activity. Again, such activities and places—

Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024). See Exec. Order No. 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, 90 Fed. Reg. 8615 (Jan. 20, 2025); *Tennessee* v. *Cardona*, 737 F. Supp. 3d 510, 521 (E.D. Ky. 2024).

sports, living facilities, bathrooms—are statutorily permitted to be classified based on biological sex because it is relevant to all those situations. Presumably, that's why B.P.J. here "does not challenge the legality of having separate teams for boys and girls." Pet. 42a. B.P.J. wants to be considered a girl—but both Title IX and West Virginia's law care only about biological sex.

When biological sex is a relevant and permissible basis for differential treatment, "gender identity" does not flip the table. This is because biological sex is not the same as the recent notion of "gender identity." A rule that no boy may enter and use the girls' bathroom is permitted under Title IX. That a boy calling himself a girl (or anything else) also cannot use the girls' bathroom does not result in unlawful sex discrimination, for this person has been treated the same as any other boy. The boy's gender identity is irrelevant. To reach a contrary result, the Fourth Circuit's decision rewrites Title IX and overrides this Court's precedents.

The decision's conflation of biological sex and gender identity turns Title IX on its head. Rather than protect women's sports, for instance, the decision opens them to male domination. The decision makes physical differences between male and female irrelevant—rendering null even the possibility of preventing men who have gone through puberty from playing in girls' sports. Likewise, rather than protect privacy, the decision upends centuries of common practice and opens otherwise closed bathrooms and locker rooms to anyone at any time based on self-

proclaimed identities. By the Fourth Circuit's logic, gender identity trumps all.

These ill-effects of the Fourth Circuit's decision will snowball. It is impossible to maintain two teams (or facilities) that are sex- *and* gender identity-separated. If a biological male is entitled to run girls' cross-country, it would presumably be impermissible sex discrimination to forbid *another* biological male (regardless of gender identity) from also playing on the girls' team. And what about the other "more than 100 gender identities"?[2] Ultimately, the decision below destroys Title IX: once one replaces "sex" with "gender identity" and defines "gender identity" as all varieties of fluid expression without connection to sex, every activity or facility must be open to a person based on their own self-described, outwardly-invisible, and ever-changing "identity."

Title IX does not require ending women's sports, throwing intimate facilities open to all, and otherwise disregarding the biological reality that boys and girls are different. The Court should reverse.

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[2] Trevor Project, *National Survey on LGBT Youth Mental Health 2019*, at 7, https://perma.cc/5MTL-GFBG.

ARGUMENT

I. The decision below conflates sex with gender identity.

When Title IX permits sex-based treatment, it cannot violate Title IX for institutions to act accordingly. In other words, when Title IX allows institutions to separate activities or facilities based on biological sex, then Title IX could not simultaneously make it unlawful to exclude opposite-sex individuals, no matter how they identify. Concluding otherwise, as the Fourth Circuit did, misreads the statute by conflating sex and gender identity.

A. Because Title IX refers to biological sex, there is no differential treatment here.

As even the Ninth Circuit recently explained, "from the time of the enactment of Title IX and its implementing regulations, the scheme has authorized schools to maintain sex-segregated facilities, and contemporary dictionary definitions commonly defined 'sex' in terms that refer to students' [biological sex]." *Roe* v. *Critchfield*, 137 F.4th 912, 929 (CA9 2025).

Only recently has anyone struggled with the meaning of sex. Sex has always, including at the time of Title IX, meant biological sex—"having the genes of a male or female." *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1856 (2025) (Alito, J., concurring in part and concurring in judgment); see *Bostock*, 590 U.S. at 655; *id.* at 734–44 (Alito, J., dissenting) (Appendix A); *Adams* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812–15 (CA11 2022) (en banc); *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632–34 (CA4 2020)

(Niemeyer, J., dissenting). Throughout, the statute articulates the distinction between the two sexes, *e.g.*, "both sexes," "Boy or Girl," "Father-son or mother-daughter activities," 20 U.S.C. § 1681(a)(2), (7), (8); see also *id.* § 1686. Longstanding regulations echo this distinction. *E.g.*, 34 C.F.R. §§ 106.32(b)(1), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61; see *McCormick* v. *Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (CA2 2004) (explaining that after congressional review shortly after the statute's enactment, Congress allowed many of these regulations to go into effect). The Fourth Circuit below did not appear to contest that "sex" in Title IX means biological sex.

Biological sex is real. It "is not a stereotype." *Adams*, 57 F.4th at 813. "Recognizing and respecting biological sex differences does not amount to stereotyping—unless Justice Ginsburg's observation in *United States* v. *Virginia* that biological differences between men and women 'are enduring' amounts to stereotyping." *L.W.* v. *Skrmetti*, 83 F.4th 460, 486 (CA6 2023) (quoting 518 U.S. at 533). "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Virginia*, 518 U.S. at 533.

This Court has likewise recognized that governmental policies can and often should recognize the inherent differences between the sexes. As it explained in one case, "[t]o fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen* v.

INS, 533 U.S. 53, 73 (2001); see also, *e.g., Virginia*, 518 U.S. at 550 n.19 (explaining that admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs"); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("A sign that says 'men only' looks very different on a bathroom door than a courthouse door.").

Where sex provides an appropriate basis for drawing distinctions—as in sports, facilities, and single-sex groups expressly protected by Title IX—a person is not excluded "because of" or "based on" gender identity. Instead, a person is excluded based on sex. A boy excluded from a girls' sports team is excluded for one reason: because he is a boy. His gender identity matters no more than the color of his shoes. That's why Judge Easterbrook explained that the question in cases like this boils down to whether "Title IX uses the word 'sex' in the genetic sense." *A.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 775 (CA7 2023) (opinion concurring in the judgment). As explained above, as Judge Easterbrook agrees, and as the Fourth Circuit did not dispute, Title IX's reference to "sex" means biological sex.

Under both general equal protection and Title IX principles, a plaintiff alleging discrimination must show that he "was treated differently than a similarly situated" person. *Kuhn* v. *Washtenaw Cnty.*, 709 F.3d 612, 624 (CA6 2013); see Pet. 38a (Fourth Circuit agreeing); see also *Cleburne*, 473 U.S. at 439;

Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718, 723 & n.8, 724 (1982) (holding that a single-sex admissions policy imposed on men a burden that a "similarly situated female would not [be] required" to bear). Nondiscrimination laws "keep[] governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992). And for sex-based policies permitted by Title IX, "biological sex is the 'relevant respect' with respect to which persons must be 'similarly situated,' because biological sex is the sole characteristic on which" those policies are based. *Adams*, 57 F.4th at 803 n.6 (cleaned up). Thus, biological males are similarly situated to each other for purposes of these policies. Prohibiting a male who identifies as something else from using the girls' bathroom does not treat similarly situated people differently. Absent differential treatment, no Title IX claim exists.

B. The Fourth Circuit's decision mangles both "sex" and *Bostock*.

The Fourth Circuit's conclusion otherwise wrongly conflates gender identity with biological sex. Echoing *Bostock*, the Fourth Circuit said that "discrimination based on gender identity is discrimination 'on the basis of sex.'" Pet.39a. And, according to the Fourth Circuit, "the Act treats transgender girls differently from cisgender girls, which is—literally—the definition of gender identity discrimination." Pet. 25a.

But it makes no difference under West Virginia's Act whether a biological boy is a "transgender girl" or nonbinary or a eunuch or any of the other 100+ gender identities. *Bostock*'s inquiry is inapt, because we

already know the Act classifies based on sex. Even if "discrimination based on . . . transgender status necessarily entails discrimination based on sex," *Bostock*, 590 U.S. at 669, discrimination based on sex does not necessarily entail discrimination based on gender identity. Sex-separated activities obviously classify based on sex—and "B.P.J. does not challenge the legality of having separate teams for boys and girls." Pet. 42a. That should be the end of this case: when it comes to biological sex, B.P.J. is not similarly situated to girls.

The Fourth Circuit panel seemed particularly vexed that "[t]he Act also discriminates based on sex assigned at birth by forbidding transgender girls [biological boys]—but not transgender boys [biological girls]—from participating in teams consistent with their gender identity." Pet. 39a. But that is simply a restatement of the fact that the Act classifies based on sex: boys alone cannot play on teams of the other sex. Again, gender identity is irrelevant.

Bostock confirms that B.P.J. is not similarly situated to girls. That decision "proceed[ed] on the assumption" that the term "sex," as used in Title VII, "refer[red] only to biological distinctions between male and female." 590 U.S. at 655. Not only did *Bostock* proceed on that assumption, it *depends* on the understanding that gender identity is a "distinct concept[] from sex." *Id.* at 669. *Bostock* provided the hypothetical of "an employer who fires a transgender person" who is biologically male, explaining that "[i]f the employer retains an otherwise identical employee who" is biologically female, "the employer intentionally penalizes a [male] person . . . for traits

or actions that it tolerates in a[] [female] employee" and thus engages in sex discrimination. *Id.* at 660. If that is true—a puzzle considered below—it is only because the employee's sex is, in reality, male. Just as B.P.J.'s sex for Title IX purposes is male.

Presumably that's why the Fourth Circuit never tried applying *Bostock*'s "straightforward rule": "chang[e] the [person's] [gender identity]" and see if it "yield[s] a different choice by the" policy. 590 U.S. at 659–60. When it comes to sex-separated activities, the choice would remain the same: no matter a male's gender identity, they are not entitled to participate in the female activity. Again, that's because the policy classifies based on sex, not gender identity. And *sex*—biological sex—is the relevant classification under which individuals asserting a Title IX claim must be similarly situated. See *Adams*, 57 F.4th at 803 n.6.[3]

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[3] Of course, there could be many reasons not to apply *Bostock*'s reasoning in this context. Unlike Title VII, Title IX is not a "broad rule" lacking exceptions. *Bostock*, 590 U.S. at 669. The word "exceptions" is found within the first four words of Title IX. 20 U.S.C. § 1681(a). Title IX has a host of exceptions clarifying that "sex" is either male or female, and the two sexes can often be separated. See 20 U.S.C. § 1681(a)(1)–(9) (e.g., "Social fraternities or sororities; voluntary youth services organizations;" "Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations . . . limited to persons of one sex;" "Boy or Girl conferences;" "Boys State;" "Girls State;" and "'beauty' pageants"). These broad *exceptions* show that sex is often a permissible—and appropriate—consideration under Title IX. But the Fourth Circuit's reasoning fails even when fully applying *Bostock*'s logic, as explained.

Last and more broadly, why did the Fourth Circuit assume that every transgender girl is a biological male? Recall that the decision below declares that "the Act treats transgender girls differently from cisgender girls, which is—literally—the definition of gender identity discrimination." Pet. 25a. But as explained in more detail below, we are now told that there are more than 100 gender identities, and transgender is an umbrella, dynamic term. See *infra* Part II.A; see also *Skrmetti*, 145 S. Ct. at 1867 (Alito, J., concurring in part and concurring in judgment) (noting that this "amorphous" term includes "individuals who might identify with a particular gender at a particular point in time and individuals who identify permanently or temporarily with both sexes, neither sex, or some other identity"); *Lange* v. *Houston Cnty.*, No. 22-13626, 2025 WL 2602633, at *30 (CA11 Sept. 9, 2025) (Abudu, J., dissenting) (defining "gender identity" as "a person's inner sense of their gender or lack thereof").

For instance, a prominent athlete who is biologically female and identifies as transgender and non-binary recently competed for the United States in the Olympics—in the female competition.[4] Nothing prohibits a biological female from identifying as a transgender female. And if gender identity is a person's internal sense of identity—nonbinary, two-spirit, genderflux, eunuch, bigender, agender—without necessary connection to sex, how could it be

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[4] I. Yip, *Nonbinary runner Nikki Hiltz advances to semifinals for Team USA*, NBC News (Aug. 6, 2024), https://perma.cc/47P8-LB53.

true that discrimination based on gender identity "is" discrimination based on sex? *Bostock* assumed a simpler definition: transgender means the opposite of one's biological sex. See 590 U.S. at 660–61 ("transgender status [is] inextricably bound up with sex"); see also *Skrmetti*, 145 S. Ct. at 1824 ("transgender" "mean[s] that [one's] gender identity does not align with [one's] biological sex"). The Fourth Circuit has used the same assumption. *Grimm*, 972 F.3d at 594 ("opposite to their assigned sex"). But once that stereotype is corrected, gender identity has no inherent connection with sex, and the Fourth Circuit's logic falls apart.

Of course, the Court need not go down the gender identity rabbit hole to grasp the simple point botched by the decision below: Title IX's operating principle is biological sex, West Virginia's Act is keyed to biological sex, and in terms of biological sex, B.P.J. is not similarly situated to students of the opposite sex. B.P.J.'s Title IX claim should thus fail. The decision below is egregiously wrong.

II. The Fourth Circuit's decision would nullify Title IX's protections for women.

Conflating "sex" and "gender identity" eviscerates Title IX, denying women and girls the legal protection that Congress intended to provide. As the Eleventh Circuit explained, if "sex" includes "gender identity," then "the various carveouts" for sex-separated activities like living facilities and sports teams "would be rendered meaningless." *Adams*, 57 F.4th at 813. Reading "sex" as "gender identity" "would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-

based carve-outs when the carve-outs come into conflict with a transgender person's gender identity"—even though Title IX's text and longstanding regulations permit sex-based carveouts, not "gender identity"-based ones. *Id.* at 814. The results would be both absurd and profoundly discriminatory against women.

A. The decision below renders Title IX's administration absurd.

Reading "sex" in Title IX as "gender identity" would result in many absurdities. First, it is impossible to maintain activities or facilities that are *both* sex-separated and gender identity-separated. As soon as a school permits a boy to run on the girls' cross country team, that team is no longer sex-separated. Then presumably it would also discriminate based on gender identity to keep males who identify as males from that formerly-female team. This interpretation would put schools "in an impossible situation," and in practice would seem to redefine "sex" in Title VII as "*only* gender identity"—contradicting text, history, and tradition. *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 737–38 (CA4 2016) (Niemeyer, J., concurring in part and dissenting in part) (emphasis added); see *supra* Part I.

One might respond that the answer is *four* teams: for females who identify as females, females who identify as males, males who identify as males, and males who identify as females. Beyond being administratively impossible, that solution would *still* discriminate, at least applying the decision below. The World Professional Association for Transgender Health refers to "gender identity" as a "person's

deeply felt, internal, intrinsic sense of their own gender."[5] Transgender advocacy groups say there are at least 100 such identities. See *supra* note 2. Further confusing the matter is that, according to the American Psychological Association, "some people" "experience their gender identity as fluid."[6]

Likewise, the American Academy of Pediatrics says that being transgender is not limited to those "whose gender identity does not match their assigned sex," but "also encompasses many other labels individuals may use to refer to themselves" and "can be fluid, shifting in different contexts."[7] Being "transgender," the AAP explains, is "not [a] diagnos[i]s," but a "personal" and "dynamic way[] of describing one's own gender experience."[8] The AAP

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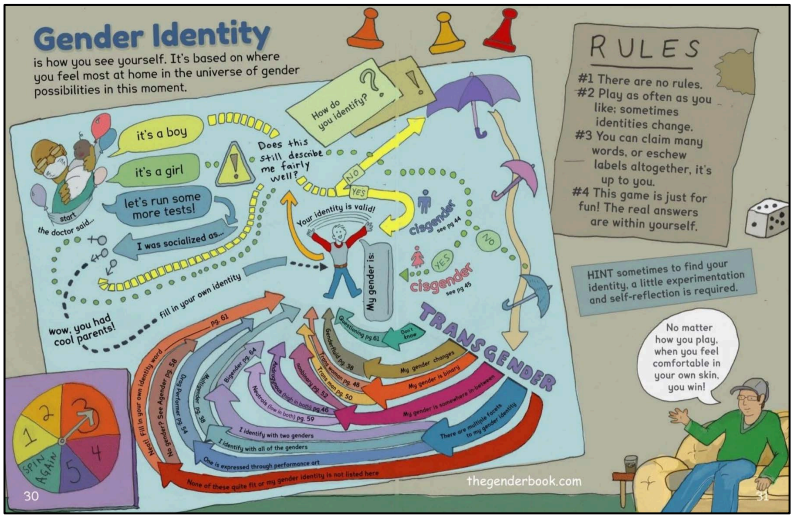
[5] *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, S252 (2022), https://perma.cc/KM5L-F26V ("WPATH Standards").

[6] *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 836 (Dec. 2015), https://perma.cc/6FAS-676M; see K. Camburn, *9 Young People Explain what Being Non-binary Means to Them* (July 14, 2019), https://perma.cc/SSD6-ZFML ("I choose to see my gender as a creature that exists not *because* of me or *for* me, rather, it exists *through* me. I am merely a conduit of expression for the multitude of ways gender takes form. Each day is different.").

[7] J. Rafferty, *Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, 142 Pediatrics no. 4, at 2 (Oct. 2018), https://perma.cc/8PYT-CGUG.

[8] *Id.* at 3.

suggests the following "explanation" of "gender identity"[9]—note especially the "Rules":[10]



If these definitions are part of Title IX, per the Fourth Circuit's decision, the statute loses all meaning. Take a biological boy who has a "gender identit[y] that encompass[es] or blend[s] elements of other genders"—and one "that changes over time."[11] He wishes to use the girls' locker room. Under the Fourth Circuit's decision, how would a school avoid federal government investigation and a Title IX violation? By excluding him, the school has not treated him differently from other males, but evidently that is not good enough. The school has no other students with this gender identity to compare him to, at least that day, much less a female student

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[9] *Ibid.*
[10] *The Gender Book*, https://perma.cc/42WU-KRLX.
[11] WPATH Standards, *supra* note 5, at S80.

with this gender identity. But that's no matter: to use the Fourth Circuit's language, the school "treats [blending/changing persons] differently from cisgender girls, which is—literally—the definition of gender identity discrimination." Pet. 25a. Put *anything* in those brackets, and voilà: "gender identity discrimination"—"literally." *Ibid.*

That makes the consequences of the Fourth Circuit's decision clear: if a school does not give a student access to the locker room (or team or sex-separated activity) that he desires that day, but gives it to students with other gender identities, Title IX has been violated. Every program or activity would be open on demand to any person "at the moment they verbalize" any gender identity, whatever that identity might mean, regardless of its relation to biological sex, and no matter if it changed from the moment before. Pet. 93a (district court). According to the decision below, Title IX demands the same funding for eunuch and genderqueer sports teams as male and female sports teams. All those teams, of course, would be open to anyone who demanded access at any time. Likewise, bathrooms, locker rooms, and living facilities could not be subject to any meaningful rules at all. See generally *Neese* v. *Becerra*, 640 F. Supp. 3d 668, 680 (N.D. Tex. 2022) ("If 'on the basis of sex' included 'sexual orientation' and 'gender identity,'" "Title IX and its regulations would be nonsensical.").

B. The Fourth Circuit's decision threatens women's opportunities—and safety.

Under the Fourth Circuit's decision, Title IX could not fulfill its goal of combatting "pervasive discrimination against women with respect to

educational opportunities." *McCormick*, 370 F.3d at 286. By elevating gender identity over sex, the decision below would strip women of opportunities, deprive them of private spaces, undermine their pursuit of equality, and endanger their physical safety.

Title IX's enactment has led to a flourishing environment in girls' sports. "The girls' high school participation rate is greater than 11 times what it was when Title IX was passed" in 1972.[12] And increased high school participation naturally boosted college participation: over 215,000 women athletes competed for NCAA institutions in 2020–21 compared to around 30,000 in 1971–72.[13] Increased female athletic participation leads to benefits beyond the field. Studies have found that "[s]tudents who play sports are more likely to graduate from high school, score higher on standardized tests, and have higher grades."[14]

Yet still today, girls' participation numbers are below what boys' participation numbers were in 1972 at Title IX's passage.[15] The decision below would undermine this progress: "It takes little imagination to realize that were play and competition not

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[12] A. Wilson, *NCAA Title IX 50th Anniversary: The State of Women in College Sports*, at 15, NCAA (2022), https://perma.cc/4CDW-PLQZ.

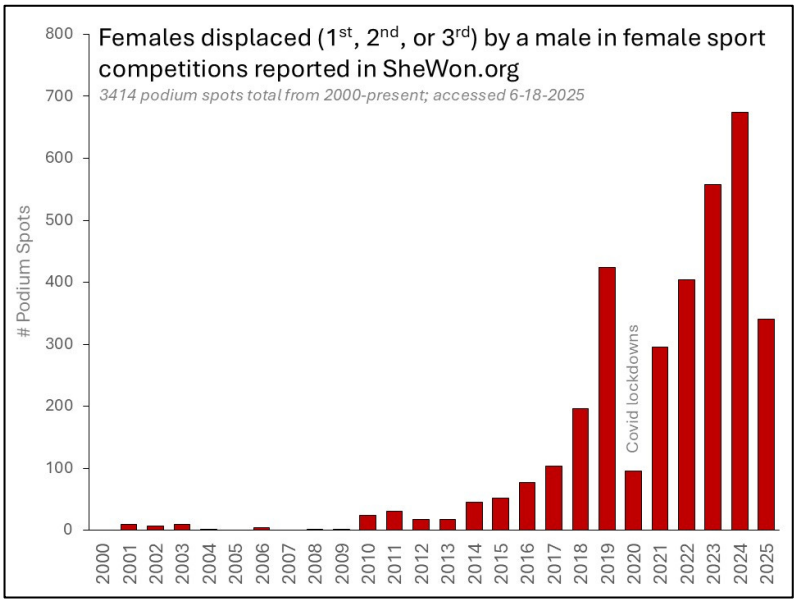
[13] E. Stauroswky et al., *50 Years of Title IX: We're Not Done Yet*, at 12, Women's Sports Found. (May 2022), https://perma.cc/J2DP-CF64.

[14] E. Tang et al., *Title IX at 50*, at 34, Nat'l Coalition for Women & Girls in Education (2022), https://perma.cc/26TB-FJ4Q.

[15] Wilson, *supra* note 12, at 15.

separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape* v. *Tennessee Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (CA6 1977).

Even partial reporting shows that thousands of girls have been displaced from podium spots in female sports competitions:[16]



This inevitable result can be seen in this case, too. As Judge Agee highlighted, "over one hundred biological girls participating in these events were displaced and

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[16] *Guest Column by SheWon: The Impact of Male Inclusion in Female Sports*, Women's Sports Pol'y (June 23, 2025), https://perma.cc/3VNJ-CWWW.

denied athletic opportunities." Pet. 46a (opinion concurring in part and dissenting in part).

The girls who have been displaced do not stand a chance. If they continue to compete in the female category, they lose. And they lose more than just competitions, they lose opportunities. Coaches will recruit biological males for women's teams. Schools will be forced to allocate scholarships away from biological females to males. See *Meriwether* v. *Hartop*, 992 F.3d 492, 510 n.4 (CA6 2021) ("[U]nder Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c)."). As this Court discussed in *NCAA* v. *Alston*, athletics provide a host of opportunities: "paid internships," "athletic awards," "academic and graduation awards," "graduate degrees," "vocational school," "tutoring," and much more. 594 U.S. 69, 104–06 (2021). If Title IX is redefined, female athletes will routinely be blocked from these opportunities.

Ignoring differences between sexes will also endanger women. There is no shortage of recent examples. For instance, Payton McNabb, a North Carolina volleyball player, recently dealt with partial paralysis and a traumatic brain injury due to a "spike by a male athlete who identified as transgender." Payton was in high school when the injury occurred.[17]

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[17] A. McClure, *After a Male Caused Her Partial Paralysis, Female Volleyball Player Payton McNabb Now Fights to Protect Women's Sports*, Independent Women's Forum, https://perma.cc/FFC3-68QV.

In 2023, a female field hockey player "was hit in the mouth by [a] shot from a boy" and "suffered 'significant facial and dental injuries.'"[18] The incident left "horror in the eyes" of her teammates who "sobb[ed] not only in fear for their teammate, but also in fear that they had to go back out onto the field and continue a game, playing against a male athlete who hospitalized one of our own."[19]

Nicholas Morgan, a man playing on a women's rugby team, "folded a girl like a deckchair during a game."[20] The team nicknamed Nicholas "Beast," and its coach joked that Nicholas will be a "good player for the next few years, as long as we can stop her from injuring players in training."[21]

Safety, of course, goes beyond the field of play. If biological males are allowed to compete because of their gender identity, they will be allowed to access the girls' showers, locker rooms, and bathrooms. The NCAA is currently being sued for allowing a biological male "complete and unrestricted access to the women's locker rooms, showers, and restrooms,"

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[18] *Massachusetts School Calls for Change after Female Field Hockey Player Hurt by Boy's Shot*, CBS News (Nov. 6, 2023), https://perma.cc/NRM2-LTJW.

[19] *Ibid.*; L. Gilbert, *Female Athlete's Injury Creates Outrage Around Coed Sports*, The Daily Signal (Nov. 7, 2023), https://perma.cc/G4F8-35YL.

[20] C. Coleman-Phillips, *Transgender Rugby Player Playing with 'A Smile on my Face'*, BBC (Aug. 22, 2019), https://perma.cc/JZ3K-WQ3G.

[21] *Ibid.*

causing girls to be anxious, "stressed out," and feeling their "privacy and sense of safety was violated."[22]

Likewise, a "registered child sex offender" in Virginia was granted access to the women's locker room at a public pool where he "exposed his fully naked body in front of" a nine-year-old girl.[23] The pool was located in Washington Liberty High School and open to the public after hours, and it followed the Arlington Public Schools policy of permitting locker room access based on gender identity.[24] So the staff granted the man access simply because he told them he "identified as transgender."[25]

A girl in Fairfax County, represented by America First Legal, recently sued the school board because its gender-mixing bathroom policy left her with an unfair dilemma: share the bathroom with boys (never mind religious beliefs or privacy concerns) or be cast off to use a special, single-stall bathroom.[26]

Good-faith objections to these ideological policies are often crushed with an iron fist. For example, three Loudoun County high school boys recently expressed religious objections to sharing a locker room with a

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[22] Am. Compl. ¶ 477, *Gaines* v. *NCAA*, No. 1:24-cv-01109-MHC, Doc. 64 (N.D. Ga. June 26, 2024).
[23] N. Minock, *Child Sex Offender Visited 2 Schools, 2 Rec Centers in Arlington and Fairfax Counties*, NBC News (Feb. 6, 2025), https://perma.cc/39R2-3Z7H.
[24] *Ibid.*
[25] *Ibid.*
[26] Am. Compl. ¶ 36, *Doe* v. *Fairfax Cnty. Sch. Bd.*, No. 24-3171 (Fairfax Cnty. Cir. Ct. Aug. 22, 2024).

girl who identified as male.[27] Violating school policy, the girl secretly filmed the boys voicing their concerns with her presence in the locker room.[28] The school used that video to open a Title IX investigation against the boys, culminating in a determination by the school district that the boys were "responsible for sexual harassment and sex-based discrimination," along with a suspension, no-contact order, and a notation on their permanent school records.[29]

This cluster of insanity in Northern Virginia should come as no surprise, for the schools in these cases inevitably invoke the precursor to the decision below: the Fourth Circuit's lawless decision in *Grimm* v. *Gloucester County School Board*. See Pet. 24a, 39a–40a; see also, *e.g.*, *Grimm*, 972 F.3d at 620 ("The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community. It is time to move forward." (citations omitted)).

Every aspect of *Grimm*—and its regurgitation in the decision below—was wrong, from its invention of a new suspect classification based on gender identity,

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[27] N. Augenstein, *After Investigation into Loudoun Co. Schools' Handling of Locker Room Incident, Miyares Refers Case to Federal Government*, WTOP News (June 3, 2025), https://perma.cc/7JZQ-6WW2.

[28] N. Minock, *Loudoun Schools Suspend Boys Uncomfortable with Biological Female Student in Locker Room*, ABC News (Aug. 18, 2025), https://perma.cc/4BCK-7MQJ.

[29] *Ibid.*

to its determination that a girl was "similarly situated" to boys, to its dismissal of harms to the opposite sex from sex-mixing policies. See, *e.g.*, Pet. 62a–73a (Agee, J., concurring in part and dissenting in part); *Skrmetti*, 145 S. Ct. at 1849–55 (Barrett, J., concurring); *id.* at 1859–67 (Alito, J., concurring in part and concurring in judgment).

In short, the Fourth Circuit's approach flings the door open to destructive consequences for girls and women seeking an equal opportunity to compete, learn, and live.

C. The Fourth Circuit's flimsy effort to disclaim these consequences fails.

Perhaps aware of some of these problems, the Fourth Circuit majority hinted that its conclusion might be different for other biological boys with B.P.J.'s gender identity, explaining that "whether other transgender girls undergo different 'medical intervention[s]' that prevent them from being 'similarly situated' to cisgender girls for purposes of participating in sports is irrelevant to B.P.J.'s individual case." Pet. 42a. "We also do not hold," the majority intoned, "that Title IX requires schools to allow every transgender girl to play on girls teams." Pet. 43a.

"Do not believe it." *Lawrence* v. *Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting). "More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed" by the decision below. *Ibid.* All that decision requires for a Title IX violation is differential treatment based on sex—read, gender identity—and vague stigma. *Anyone* who

invokes a different gender identity could by default "show both worse treatment based on [gender identity]"—in the sense that they could not play on their desired team or enter their desired space—and resulting "emotional and dignitary harm." Pet. 39a–40a; see also, *e.g.*, *Hecox* v. *Little*, 104 F.4th 1061, 1083 (CA9 2024) (quoting a purported expert: "forcing [transgender students] to play on a sports team that does not match their gender identity would damage their mental health").

The majority's sprinkled references to "circulating testosterone," "fat distribution, pelvic shape, and bone size" (Pet. 40a–41a) are red herrings to highlight the facts of a purportedly sympathetic case and disguise the unambiguous nature of the Court's holding: "discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX." Pet. 39a. Nothing else matters.

That's why the Fourth Circuit ruled for B.P.J. on Title IX even as it acknowledged an outstanding factual dispute over whether B.P.J. has "a significant advantage in athletic performance" by virtue of biological sex. Pet. 37a. That dispute matters not one whit for the majority's Title IX holding. As Judge Agee explained, that B.P.J. "*identified* as a girl [wa]s sufficient." Pet. 57a–58a (concurring in part and dissenting in part). Accordingly, any boy who goes through puberty and has all the resulting, undisputed physical advantages of maleness (Pet. 90a–91a)—but identifies as a girl, or anything else—can choose to be on the girls' team. And then every other boy could too. *That* is the result of the decision below, in every case. "[L]iterally." Pet. 25a.

CONCLUSION

For these reasons, the Court should reverse.

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