

No. 24-43

In the Supreme Court of the United States

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 OF 96 WEST VIRGINIA LEGISLATORS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

As framed by Petitioners, the questions presented are:

1. Whether Title IX prevents a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth.
2. Whether the Equal Protection Clause prevents a state from offering separate boys' and girls' sports teams based on biological sex determined at birth.

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**IDENTITY AND INTEREST OF *AMICI*
WEST VIRGINIA LEGISLATORS¹**

Amici are current and former West Virginia legislators. As elected representatives of the people of West Virginia, amici have a strong interest in upholding the constitutionality of the Save Women's Sports Act, 2021 W.V. Acts, Ch. 105 ("H.B. 3293"), codified at W.V. CODE § 18-2-25d. Amici also have a strong interest in stable, predictable rules to guide future lawmaking.

Amici Delegate Adam Burkhammer and Senator Amy Nichole Grady advocated for H.B. 3293, and each spoke on behalf of the bill in the West Virginia legislature. Additional amici are:

Delegates: James Robert Akers II, S. Chris Anders, Bill Bell, Jordan Bridges, Eric Brooks, Ryan Browning, Jim Butler, Jeff Campbell, David Cannon, Jared Cannon, Geno Chiarelli, Wayne Clark, Elias Coop-Gonzales, Kathie Hess Crouse, Mark Dean, Michael Devault, Henry Dillon, Lori Dittman, Sarah Drennan, Joe Ellington, Dana Ferrell, Dave Foggin, Geoff Foster (former), Joe Funkhouser, Mary Gearheart, David Green, Roger Hanshaw (Speaker) Scot C. Heckert, Rick Hillenbrand, Michael Hite, Josh Holstein, Michael Hornby, Chuck Horst, John Paul Hott, Gary G. Howell, Tresa Howell, Dean Jeffries, Laura Kimble, Jonathan Kyle, Tristan Leavitt, Daniel Linville, Patrick Lucas, Phil Mallow, Carl

¹ No counsel for any party to this case authored this brief in whole or in part. No party to this case and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici and their counsel made such a monetary contribution.

Martin, Jordan Maynor, Margitta Mazzochi, David McCormick, Pat McGeehan, Erica Moore, Joe Parsons, Chris Phillips, Jonathan Pinson, David Elliot Pritt, Bill Ridenour, Clay Riley, Matthew Rohrbach, Charles Sheedy, Doug Smith, Brandon Steele, George Street, Christopher Toney, Adam Vance, Bryan Ward, Lisa White, Jimmy Willis, Evan Worrell, Mark Zatezalo

Senators: Michael Azinger, Jason Barrett, Kevan Bartlett, Craig P. Blair (former Senate President), Laura Chapman, Anne Charnock, Charles Clements, Vince Deeds, Bill Hamilton, Craig Hart, Brian Helton, Glenn Jeffries, Patrick Martin, Mark Maynard, Robbie Morris, Rupie Phillips, Ben Queen, Chris Rose, Patricia Rucker, Randy Smith (current Senate President), David "Bugs" Stover (former), Tom Takubo, Eric J. Tarr, Jay Taylor, Darren Thorne, Tom Willis, Jack David Woodrum

SUMMARY OF ARGUMENT

Males and females have innate physiological differences. As a result, males dominate almost any athletic competition with females. Those differences played out in widely-covered events in Connecticut, where two boys who self-identify as girls won multiple state track and field championships from 2017 to 2019, thereby displacing and demoralizing female athletes.

More than half the states in the union responded by regulating biological males' participation in female sports. In West Virginia, the legislature enacted H.B. 3293, which generally limits participation in female sports to biological females. That act was the result of extensive legislative debate, which included

supporting statements by a physician, multiple parents, former athletes, and a high school coach. The spirit of H.B. 3293 was fair competition and safety. The act advances the state’s interest in preserving equal athletic opportunity for girls and women, and it is tailored to that interest.

The Court “must be wary of plaintiffs who seek to transform federal courts into weapons ... that will deliver victories that eluded them in the political arena.” *Alexander v. S.C. Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024). That’s precisely what respondents seek in this case, with the upshot of constitutionalizing disputed scientific questions and upending decades of Title IX law.

ARGUMENT

I. Boys competing in girls track and field events highlight innate differences in athletic ability.

To state the obvious: males and females have physiological differences. Those differences—including size, strength, and speed—mean that males dominate almost any athletic competition against females.

1. Take track and field, which is perhaps the most objective measure of athletic performance. In 2021, high school senior Torrence Walker was the fastest boy in West Virginia, with a time of 10.43 seconds in the 100m race. In the 1600m, senior Josh Edwards was cruising along with a time of 4:05. Compare those times with women’s world records. Florence Griffith Joyner’s 100m time of 10.49 seconds in the 1988 Olympic trials remains unbeaten. And in the 1600m, Faith Kipyegon holds the women’s record, with a time

of 4:07. Put succinctly, good high school boys in a small state like West Virginia can best the fastest women in the world.²

2. Disparities in male and female times aren't unusual. Particularly relevant here, the difference in athletic performance between males and females played out as expected in the 2017 Connecticut high school track and field finals. A 15-year-old freshman boy “who identifies as a girl” but had “yet to undergo any hormonal treatment” dominated two of the races. Jeff Jacobs, *As We Rightfully Applaud Yearwood, We Must Acknowledge Many Questions Remain*, HARTFORD COURANT (June 1, 2017), <https://tinyurl.com/2fay8ea3>. Even the fawning press acknowledged the obvious: the boy was “clearly more powerfully built” than his competitors. *Id.* He won the 100m and the 200m that day, leaving the previous year's 200m girls champion in second place. *Id.* The former champion—high school junior Sarah Hall—was left “to deal with the repercussions of a year of improvement on the track [but] a step back in her final result...” Cam Smith, *Connecticut transgender sprinter Andraya Yearwood wins two state titles*

² The outcome is much the same in sports where skills are added. The U.S. National Women's Soccer Team was defeated 5-2 by a U15 boys club team in 2017. Nicholas McEntyre, *USWNT legend Carli Lloyd admits team lost to 'bunch' of 15-year-old boys before World Cup run*, N.Y. POST (Nov. 10, 2023), <https://tinyurl.com/p4e2azau>. Photos show one lad towering over the star players of the women's team. That wasn't an isolated event. Just this June, the Swiss National Women's Soccer Team was similarly defeated 7-1 by a U15 boys club team. Oliver Taliku, *Alisha Lehmann has her say on 7-1 loss to FC Luzern's under-15's: "We've prepared ourselves as best we can"*, SHEKICKS (June 30, 2025), <https://tinyurl.com/bdadm99z>.

amidst controversy, USA TODAY HIGH SCHOOL SPORTS (June 7, 2017), <https://tinyurl.com/47ahnrx>.

The same followed in 2018. In both the girls 100m and the girls 200m, boys identifying as girls took first and second place, excluding two girls from the winner’s podium. Ryan Mayer, *Transgender Track Athlete Wins CT State Championship, Debate Ensues*, CBS NEWS (June 13, 2018), <https://tinyurl.com/42vkn8v8>. The same two boys did it again in the 55m indoor championship in 2019, with one setting a “girls” record. Andy Berg, *Transgender Girls Win State Track Championships*, ATHLETIC BUSINESS (Feb. 25, 2019), <https://tinyurl.com/y3h5c44v>. As one competitor put it: “We all know the outcome of the race before it even starts; it’s demoralizing.” *Id.*

II. H.B. 3293 protects equal athletic opportunity, fair competition, and safety.

The events in Connecticut were the start of a national debate. Laine Higgins, *Debate Over Transgender Athletes Sweeps Through U.S. Statehouses*, THE WALL STREET JOURNAL (Apr. 30, 2021), <https://bit.ly/3K8ekpP>. In West Virginia, that debate was the genesis of H.B. 3293.

1. West Virginia has long-required anyone seeking to enroll in a public school to present a copy of an original birth record confirming his or her identity and age, or present an affidavit explaining the inability to produce that birth record. *See* 1991 W.V. Acts, ch. 138 (codified as amended at W.V. CODE § 18-2-5c). As originally introduced, H.B. 3293 modified that requirement to specify that the birth record must confirm the prospective pupil’s sex at the time of

birth, and it added alternative methods of proving that fact. The bill then made the pupil's sex at birth the pupil's sex "for the purposes of participating in single-sex secondary interscholastic athletic events...."

In the House of Delegates, H.B. 3293's lead sponsor was Dr. Joe Ellington, an obstetrician and gynecologist with over 30 years of experience.³ Dr. Ellington explained that the issue addressed by H.B. 3293 emerged "when two [boys who identify as] girls were allowed to compete in state track and field meets in Connecticut," then "won a combined 15 girls state indoor and outdoor championship races from 2017 to 2019."⁴ He also explained that states had responded to the issue in different ways, with 27 states regulating participation in sports based on sex at birth, 17 states requiring inclusion of transgender individuals, and 6 states—including West Virginia—having adopted no policy.⁵

Discussing the risk of sports, Dr. Ellington said the bill's goal was to make sports "as safe as possible" and "as fair as possible."⁶ He noted that large differences in strength and physical build risk injury to participants.⁷ On that point, the line drawn by H.B. 3293 was pragmatic. Young children are about the same size, and they don't pose a safety problem when boys and girls play together.⁸ So H.B. 3293 "was

³ *West Virginia Legislative Coverage* (YouTube, Mar. 25, 2021), <https://tinyurl.com/46r7axdv>.

⁴ *Id.* at 4:19:35 – 4:20:15.

⁵ *Id.* at 4:20:04 – 4:20:25.

⁶ *Id.* at 4:20:15 – 4:21:00.

⁷ *Id.* at 3:08:09 – 3:08:40; 3:08:59 – 3:09:04.

⁸ *Id.* at 4:21:18 – 4:21:36.

targeted mainly toward secondary school age children” because “that’s where there were big differences” in size and strength.⁹ “The ability to play sports is still there, it’s just a matter of what team they play on.”¹⁰

Multiple delegates spoke in support. Take Delegate Chris Phillips, who alluded to his daughter’s efforts as a high school athlete. He began by comparing track and field records, then concluded the obvious: there are “innate physiological advantages” for males such that “it’s not a fair competitive” environment when girls are forced to compete against boys.¹¹ And he squarely rejected arguments that allowing males to play on female teams didn’t threaten anyone. “It does threaten kids ... who work incredibly hard to get their spot on the team, to get their playing time on the court, and for many of them to get a college scholarship and further their education.”¹² He explained that “we are seeing cases around the country of girls records being decimated by biological males ... who totally dominate competition.”¹³

Delegate Dana Ferrell weighed in with his experience as a high school coach. “The net on [the] volleyball court for the girls is seven foot, four inches and a quarter.”¹⁴ “For the guys ... it’s eight foot.”¹⁵ Similarly, high school girls use a smaller basketball

⁹ *Id.* at 4:21:59 – 4:22:05.

¹⁰ *Id.* at 4:21:50 – 4:21:55.

¹¹ *Id.* at 3:48:54 – 3:50:43.

¹² *Id.* at 3:50:12 – 3:51:26.

¹³ *Id.* at 3:51:25 – 3:51:40.

¹⁴ *Id.* at 4:09:12 – 4:09:30.

¹⁵ *Id.*

because their hands are smaller.¹⁶ “We could go on and on about the differences that are already in place to try to [provide] some sense of fairness.”¹⁷

To be sure, there was also opposition. As the bill’s sponsor, Dr. Ellington took questions from other delegates. Opponents repeatedly posed what appeared to be litigation-scripted queries about the absence of complaints to the West Virginia Secondary Schools Activities Commission. A few grandstanded. And some simply disagreed about the differences in physical ability between males and females.

Toward the end of the debate, Dr. Ellington aptly summarized his position, and the position expressed by many of his colleagues: “The spirit [of H.B. 3293] is fair competition and safety.” H.B. 3293 then passed the House overwhelmingly, 78-20.

The West Virginia Senate substantially reworked H.B. 3293 to be a standalone code section. In doing so, the Senate inserted a series of legislative findings; directly provided for separate male, female, and coed teams; expanded its coverage to include college teams; and provided that “athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” Even H.B. 3293’s opponents acknowledged appreciation for those changes.¹⁸

¹⁶ *Id.* at 4:09:30 – 4:09:41.

¹⁷ *Id.*

¹⁸ *West Virginia Senate in Session* (Apr. 8, 2021), <http://bit.ly/46mV1Rd> at 12:31:48 – 12:32:05; 12:49:10 – 12:49:18.

Patricia Rucker—a mom and self-professed former tomboy—was the bill’s lead sponsor in the Senate. She explained that H.B. 3293 was “not about transgender individuals. It’s about women’s and girl’s sports and our interest in protecting sports for women and girls.”¹⁹ Indeed she repeatedly referenced the State’s obligations under Title IX to provide that protection.²⁰

Senator Rucker voiced both subjective and objective arguments supporting the bill. Subjectively, she described her own experience as an athlete: “I was the captain of my cross-country team, and I was really good.... Even though I was the fastest girl on the girl’s team, the slowest boy on the boy’s team could still beat me.”²¹

Objectively, Senator Rucker reviewed the science that explained her experience as a cross country runner, albeit acknowledging the ever-present possibility of new information.²² She explained “there is a very big physical difference and advantage for biological males.”²³ “Males have larger lungs and denser alveoli in the lungs, enabling faster oxygen uptake.”²⁴ Males “have larger hearts and per stroke pumping volume,” as well as an “increased number of muscle fibers and muscle mass.”²⁵ They have “larger bones, longer bones, [and] increased mineral density in bones.”²⁶ Indeed, “U.S. adult males are 5 inches

¹⁹ *Id.* at 12:37:52 – 12:38:05.

²⁰ *Id.* at 12:38:05 – 12:38:10.

²¹ *Id.* at 12:41:20 – 12:41:38.

²² *Id.* at 1:59:50 – 2:00:10.

²³ *Id.* at 12:40:59 – 12:41:13.

²⁴ *Id.* at 2:00:10 – 2:01:20.

²⁵ *Id.*

²⁶ *Id.*

taller on average than U.S. women”²⁷ “The reason ... we’re having this discussion ... is because that it matters. There is a difference between ... biological men and biological women.”²⁸

Senator Rucker also explained the state’s interest in accounting for those differences. H.B. 3923 furthers the state’s “important government interest in ensuring equal athletic opportunity for biological females,” including an opportunity to excel.²⁹ “These athletic opportunities ... make a difference in [girls’] lives....”³⁰ “You’re talking about scholarships. You’re talking about opportunities to get into schools. You’re talking about opportunities to demonstrate leadership ... and be part of a team. It is exactly that that we are wanting to protect for our women and our girls. This isn’t against anyone. It is for the policy of helping our girls, helping our women, have the opportunity.”³¹

Finally, Senator Rucker noted the link between H.B. 3923 and the requirements of Title IX.³² “This bill does nothing more than codify what is already well-established under federal and state ... law. That biological females and biological males are not similarly situated in certain circumstances, and one of those circumstances is in sports.”³³ She accordingly made clear how narrow the bill is: “It does not affect

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 12:30:45 – 12:31:00.

³⁰ *Id.* at 2:03:00 – 2:03:53

³¹ *Id.*

³² *Id.*

³³ *Id.* at 2:04:00 – 2:04:12.

male sports. It does not affect co-ed sports.”³⁴ “It only talks about women’s sports.”³⁵

H.B. 3923 passed the Senate 18-15. The House subsequently concurred in the Senate’s version, and the bill was signed into law.

2. This Court has long-cautioned against divining the intent of a statute from “what fewer than a handful of [legislators] said about it.” *United States v. O’Brien*, 391 U.S. 367, 384 (1968). But to the degree the Court does examine legislative statements, statements by the bill’s sponsors make clear that the purpose of H.B. 3923 was to preserve equal opportunity for female athletes, including by ensuring athletic competitions are safe and fair.

³⁴ *Id.* at 2:01:20 – 2:01:30.

³⁵ *Id.*

III. The Court should be wary of constitutionalizing political and scientific disputes, with the upshot of upending decades of Title IX pronouncements.

1. In many ways, the West Virginia Legislature’s consideration of H.B. 3293 was an ideal exercise of representative government. The bill was proposed and debated. Legislators from all walks of life weighed in: a doctor sponsored it, then moms, dads, former athletes, and a high school coach supplied information and gave their views. The bill was extensively amended to make it better. There was yet more debate. And H.B. 3293 was ultimately enacted into law.

2. Having lost in West Virginia’s political branches, opponents of H.B. 3293 now ask the federal courts to grant them a win. The Court “must be wary of [such] plaintiffs who seek to transform federal courts into weapons ... that will deliver victories that eluded them in the political arena.” *Alexander v. S.C. Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024). The Court should be even more wary of plaintiffs who seek never-ending judicial oversight by replacing a pragmatic, readily administered line with deference to ever-changing scientific arguments. *Cf. Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992). Put simply, legislative acts should not be subjected to the whim of expert-dependent litigation. That the question is hormones instead of viability makes no difference.

3. The legislative debate makes clear that members of the West Virginia were cognizant of Title IX, and the believed H.B. 3293 was consistent with

the State’s obligations under that law. There is good support for their view. For decades, federal courts have instructed states that the measure of Title IX compliance is participation and proportionality—not interest—because interest depends on opportunity for participation. The Fifth Circuit, for example, explained that “of course fewer women participate in sports, given the voluminous evidence that [the university] has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students.” *Pederson v. La. State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000). But such destruction of athletic opportunity and corresponding negative impact to participation is precisely what the Fourth Circuit held Title IX demands. *B.P.J. v. West Va. State Bd. of Educ.*, 98 F.4th 542, 562-565 (4th Cir. 2024). That can’t be right. And Title IX certainly can’t require both creating and destroying opportunity for females. To the extent that Title IX does demand such a bizarre result, that’s the opposite of the clarity required of Spending Clause conditions.

CONCLUSION

H.B. 3293 furthers the State’s important government interest in ensuring equal athletic opportunity for girls and women, and it is tailored to that interest. It is fully consistent with both the Equal Protection Clause and Title IX. The Fourth Circuit should be reversed.

September 19, 2025 Respectfully submitted,

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