No. 24-43

In The Supreme Court of the United States

WEST VIRGINIA, ET AL., *PETITIONERS*

v.

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

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT AS AMICUS CURIAE SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

This case interests the ACR Project because it focuses on the proper interpretation of some of America's most important civil rights enactments.

SUMMARY OF ARGUMENT

This case asks whether Title IX of the Education Amendments of 1972 (as amended), the Equal Protection Clause of the Fourteenth Amendment, or both ban single-sex athletic programs. The Fourth Circuit held below that in at least most circumstances, both *do* at least likely ban single-sex programs, and moreover both *require* that programs be segregated by "gender identity" (or open to both sexes) instead.

The Court of Appeals' discovery of these bans on single-sex sports programs, on the one hand, and mandates for single-"gender identity" sports teams on the other (each open to "transgender children" of the opposite sex) depended on its redefinition of "sex" to mean "gender identity" instead of biological sex.

In fact, the court below flatly decreed that *any* use of sex as a basis for separating athletics amounts to

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[1] No counsel for a party authored any part of this brief. No one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

unconstitutional gender-identity discrimination when applied to people who identify as transgender. *See* App.28a. To get there, the circuit court relied on its own prior decisions attempting to read a purported version of *Bostock* into Title IX and the Fourteenth Amendment's Equal Protection clause.[2] This series of Fourth Circuit cases cumulatively insist on reading these fundamental civil rights enactments to forbid states from separating the sexes in bathrooms, locker-rooms, showers, or athletic competitions.

This purported application of *Bostock* follows some of its words, but little of its logic. *Bostock*, based on the statutory text of Title VII of the Civil Rights of 1964 (as amended), doesn't redefine "sex" (or authorize the Fourth Circuit to do so) in *any* context. To the contrary, its holding *depends* on "sex" meaning "sex," in the standard, universally understood, biologically-based, plain-meaning, English-language sense of the word. Because an employee fired for being transgender is fired for behavior his employer would have tolerated from an employee of

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[2] *See* App.37a; *Bostock v. Clayton Co.*, 590 U.S. 644 (2020). In *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), the Fourth Circuit asserted that: (1) *Bostock* had held all discrimination on the basis of transgender identity to be sex discrimination; (2) single-sex *anything* is "discrimination on the basis of transgender identity;" leaving (3) just about all single-sex policies banned by both Title IX and the Fourteenth Amendment.

another sex, the firing is—using the words in precisely that sense—"because of sex."

This brief explores how the Fourth Circuit got *Bostock* wrong in several steps:

(1) It outlines *Bostock*'s own account of its internal logic, as largely reiterated earlier this year by the Court in *U.S. v. Skrmetti*, 145 S.Ct. 1816, 1834 (2025) (Section I).

(2) It both: (a) uses Congress's unique actions in crafting and adjusting Title IX, including its passage of terms absent from Title VII of the Civil Rights Act of 1964, to show that *Bostock*'s logic *forbids* rather than requires reading Title IX to ban federal funding recipients from separately treating the two sexes in particular, specified contexts (including both the provision of separate "living facilities" like bathrooms and the maintenance of separate sports programs); and (b) explains how the actual history of Title IX renders the Fourth Circuit's reading of the statute utterly untenable (Section II).

(3) It flags that if the Fourth Circuit were right that the Equal Protection Clause banned single-sex athletics, then Title IX *as a whole* would likely be unconstitutional (Section III).

(4) It observes the linguistic impossibility and impracticality of the Fourth Circuit's version of Equal Protection (Section IV). This bizarro Equal

> Protection goes beyond barring what has long been practiced and celebrated to instead compel what cannot be described as "equal" anything. More, it would replace the clear rules of this Court's Equal Protection jurisprudence with a requirement to equalize treatment across an unmeasurable, ever-shifting quantum.

We conclude that federalism, an approach that finds support in the Constitutional (and statutory) text, offers a coherent and more flexible alternative (Section V).

This Court should resolve the deepening circuit split on the proper reading of *Bostock* in a way that assures the federal courts will follow both the reasoning of its major precedents and the on-point instructions of Congress. The Court should so preserve a central enactment of the modern Congress from a spurious Constitutional quandary. It should assure that our case law continues to present workable standards for the lower courts and the sovereign states to apply in assuring the fair treatment of Americans of all sexes.

ARGUMENT

I. *BOSTOCK* IS COHERENT; THE FOURTH CIRCUIT'S VERSION OF *BOSTOCK* IS NOT.

The Fourth Circuit's invocation of *Bostock* to justify its preferred outcome lacks fidelity to the decision. *Bostock* explicitly declined to reach beyond the Title VII (employment) context. *Bostock*, 590 U.S. at 681 (noting, of "other federal or state laws prohibit[ing] sex discrimination" and "sex-segregated bathrooms, locker rooms, and

dress codes[,]" that "none of these other laws are before us;" "we do not purport to address bathrooms, locker rooms, or anything else of the kind[;]" and concluding that "[w]hether other policies and practices might not qualify as unlawful discrimination or find justifications under other provisions of [even] Title VII are questions for future cases, not these.").

Moreover, it did not find a new protected class in Title VII 56 years after its passage. Instead, it assessed the treatment of employees exhibiting the same behavior and correctly noted that Title VII bans ***sex*** discrimination: if an employer would accept behavior from a biological woman (including identifying as a woman), then it must not differently treat an otherwise comparable biological man. *Skrmetti*, 145 S.Ct. at 1834 (citing *Bostock*, 590 U.S. at 650-52 and 656). This is a coherent approach.

II. *BOSTOCK*'S REASONING APPLIES DIFFERENTLY OUTSIDE TITLE VII.

A. Title IX's Carveouts Make It Different from Title VII

What happens when that logic is transposed to Title IX, whose carveouts distinguish it from Title VII?[3] Title IX generally forbids federally funded education programs or activities from engaging in sex discrimination. Its key provision states: "No person in the United States shall, on

[3] The analysis initially uses the facilities carveout of Title IX to demonstrate the proper analysis required by *Bostock*, but—as we demonstrate thereafter—the analysis underlying the lower court's anti-textual misapplication of *Bostock* below plays out the same in both contexts.

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). There is no other section of Title IX that forbids other kinds of discrimination. *If it isn't sex discrimination, it isn't forbidden by Title IX.*

Title IX contains an important clarification for its sweeping rule against sex discrimination. "[N]othing contained herein shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Congress expressly directs that, even if a recipient's policies of maintaining separate living facilities for the different sexes would otherwise qualify as sex discrimination, Title IX "shall [not] be construed to prohibit" that policy.

Without § 1686, *any* boarding-school boy (not just one who identifies as a girl) would be able to point to a girls' dorm and say, "if I were a girl, I would be allowed to sleep there. But since I am a boy, my school bars me from doing so. That's sex discrimination!" He would be right. It *would be* sex discrimination. Indeed, it *is* sex discrimination. But given § 1686, it is *lawful* sex discrimination.[4]

Soon after the passage of Title IX, in 1975, President Ford approved a related regulation, clarifying § 1686.[5] That regulation was codified as 34 C.F.R. § 106.33 (the

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[4] Exactly the same would be true if the sexes were reversed, regardless of how the individual "identified."

[5] § 1682 of Title IX requires that regulations promulgated under the statute receive direct Presidential approval in order to take effect.

"1975 Bathroom Regulation").[6] The 1975 Bathroom Regulation, which demonstrates how the original interpretive community understood § 1686 at its enactment, reads: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

The 1975 Bathroom Regulation simply interprets § 1686. It clarifies, (though no clarification was needed) that "living facilities" include "toilet, locker room, and shower facilities." This was not controversial in 1975 and has never been controversial since. We have searched and have found no examples of anyone: (a) interpreting § 1686 between Congress's passage of Title IX and President Ford's approval of the 1975 Bathroom Regulation as requiring the abolition of single-sex bathrooms, locker

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[6] When the Biden administration sought to amend Title IX's regulations, including the 1975 Bathroom Regulation, numerous federal courts issued at least eight preliminary injunctions or stays pending appeal, cumulatively blocking the alteration from taking effect in more than half of the states. See, *Louisiana v. U.S. Dep't of Educ.*, W.D. La. Case No. 3:24-cv-563; *Alabama v. U.S. Dep't of Educ.*, 11th Cir. Case No. 24-12444-G; *Arkansas v. U.S. Dep't of Educ.*, E.D. Mo. Case No. 4:24-cv-636; *Kentucky v. U.S. Dep't of Educ.*, E.D.Ky. Case No. 2:24-cv-72; *Okla. v. U.S. Dep't of Educ.*, 5:24-cv-461; *Texas v. U.S.*, N.D. Tex. Case No. 2:24-cv-86; *Caroll I.S.D. v. U.S. Dep't of Educ.*, N.D. Tex. Case No. 4:24-cv-461; and *Kansas v. U.S. Dep't of Educ.*, D. Kan. Case No. 5:24-cv-4041. More recently, the District Court for the Eastern District of Tennessee issued summary judgment vacating the Biden Administration's proposed rule in its entirety. *Tennessee v. Cardona*, 762 F.Supp.3d 615, 628 (E.D. Ky. 2025). That judgment has since become final, leaving the 1975 Bathroom Regulation operative.

rooms, and showers;[7] or (b) contending in the years since that President Ford overstepped his regulatory authority or misinterpreted § 1686 in issuing the 1975 Bathroom Regulation.[8, 9]

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[7] Indeed, we have been unable to identify: (a) any court case whatsoever referencing § 1686 prior to 1995; (b) any article or treatise referencing § 1686 at all, published prior to 1985; or (c) any article or treatise referencing § 1686 in conjunction with bathrooms, locker rooms, or showers prior to 1995.

[8] Even when the Fourth and Seventh Circuit Courts of Appeals applied what they wrongly described as *Bostock*'s reasoning to find that sex-specific restrooms violate Title IX, they did so by side-stepping the 1975 Bathroom Regulation, rather than by contending that the 1975 Bathroom Regulation was arbitrary or capricious. *See Metropolitan Sch. Dist. of Martinsville v. A.C.*, 75 F.4th 760, 770 (7th Cir. 2023); *Grimm v. Gloucester Co. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020).

[9] Without so impugning the 1975 Bathroom Regulation, the Biden Administration asserted that it was unrelated to § 1686 (89 Fed. Reg. 33,474, p. 33819, pp. 33820-21 (Apr. 29, 2024)). Their faulty argument relied entirely on a scrivener's error.

When the Department of Health, Education, and Welfare ("HEW") promulgated the original set of Title IX regulations in 1975, it cited as authority for 45 C.F.R. § 86.32—its housing rule—"Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. [§§] 1681, 1682, 1686[.]" 40 Fed. Reg. 24,141 (June 4, 1975). A paragraph later, HEW cited as its authority for 45 C.F.R. § 86.33 (the antecedent of the 1975 Bathroom Rule) "Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374[.]" *Id.* The Biden Administration sought to infuse the distinction with meaning. But the rabble-scrabble nature of HEW's citations *throughout* the publication demonstrate why this evidence failed to refute that HEW issued the 1975 Bathroom Regulation as an interpretive clarification of § 1686.

Similarly, in 1974, Congress passed the Javits Amendment. Education Amendments of 1974, § 844. Some, including the U.S. Department of Education, have read the Javits Amendment to enact an additional exception to Title IX, specifically for athletics. *E.g.*, 34 CFR 106, Docket ID ED -2022-OCR-0143) [Fed. Reg. Vol 88, No. 71, pp. 22860-22891] [RIN 1870-AA19], pp. 22863 ("Congress indicated in the Javits Amendment that a different approach to athletics was appropriate and that the Title IX regulations should include 'reasonable' provisions governing intercollegiate athletic activities in light of the 'nature of particular sports.'").

In explaining the authority it sought to effectuate through § 86.32, HEW noted that "Secs. 901, 902, [and] 907" had been codified at "20 U.S.C. [§§] 1681, 1682, 1686[.]" But in explaining what authority it sought to effectuate through the 1975 Bathroom Regulation, HEW made no reference to the codification of "Secs. 901, 902, Education Amendments of 1972"—this doesn't reflect an administrative assertion that these provisions were never codified, it's just sloppiness. Similarly, a page later in the Federal Register, when explaining its authority to promulgate the rule concerning pregnancy-related discrimination, HEW cited "Secs. 901, 902 Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. [§§] 1681, 1683[.]" But neither § 1681 nor § 1683 grants any agency any regulatory authority, and § 1683 concerns the judicial review of agency actions taken pursuant to Title IX. Does this mean that HEW lacked the authority to regulate pregnancy-related discrimination or suggest that HEW understood itself to lack such regulatory authority?

Of course not. The omissions of related detail from one or another explicatory cite is unfortunate. It is not meaningful. A statutory interpreter should seek stronger evidence of the original understanding of these enactments than what amount to typos.

In 1975, the Education Department followed through on the Javits Amendment, promulgating 34 CFR § 106.41 (the "1975 Sports Regulation"), which President Ford promptly approved. § 106.41(b) expressly authorized funding recipients "[n]otwithstanding the" general prohibition on sex separation to "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;" §106.41(c) added the condition that such separation was permissible only where the "recipient . . . operates or sponsors . . . equal athletic opportunity for members of both sexes."

If this common contention is right, the Javits Amendment and the 1975 Sports Regulation created a parallel to § 1686 and the 1975 Bathroom Regulation for sports. This would mean that Congress exempted the maintenance of equal men's and women's sports programs from the otherwise applicable general prohibition on separating the sexes.

Meanwhile, *Bostock* was of course a Title VII case, not a Title IX case. It did not hold that when Title VII says "sex," it really means "sex or sexual orientation or gender identity." To the contrary, as this Court has now told us at least twice (both in *Bostock* itself and in its explanation of *Bostock* from *Skrmetti*), Congress's prohibition on sex discrimination prohibited discrimination based on sex—"an employer who fires a transgender person who was identified as a male at birth but who now identifies as female" while "retain[ing] an otherwise identical employee who was identified as female at birth . . . penalizes" the fired employee "for traits or actions that it tolerates in an

employee identified as female at birth. [That] employee's sex plays an unmistakable and impermissible role in the discharge decision." *Bostock*, 590 U.S. at 660. *See also U.S. v. Skrmetti*, 145 S.Ct. at 1834.

The transgender plaintiff prevailed in *Bostock* ***precisely because***, however the plaintiff "identified," the plaintiff's sex had not changed. Title VII only applied because an employer who fires a biologically *male* employee who identifies as a woman, but would not have fired a biologically *female* employee identifying as a woman, definitionally makes the fired employee's sex a "but-for cause" of the termination. *Bostock*, 140 S.Ct. at 1741-42; see also *U.S. v. Skrmetti*, 145 S.Ct. at 1834. The plaintiff's gender identification was relevant only as a behavior the employer accepted from a woman, but not from a man, not as an additional form of discrimination whose prohibition had been newly discovered in Title VII's 56-year-old text. *Id.* at 1739 (noting that "[t]he *only* statutorily protected characteristic at issue in today's cases is '*sex*,'" and stipulating that "sex" in Title VII "refer[s] *only* to biological distinctions between male and female" (emphasis added)).

Bostock's logic is entirely consistent with the analysis above. Like the hypothetical boarding-school student, a hypothetical transgender child would be entirely right to say: "I am a biological boy who identifies as a girl, but am not allowed to use the showers, locker rooms, and bathrooms my school provides for girls. If I were a biological girl who identified as a girl, I would be able to use them.

That is sex discrimination!"[10] That student would be correct. It is sex discrimination. But it is precisely the kind of sex discrimination expressly authorized by Congress in § 1686 and by President Ford in the 1975 Bathroom Regulation, and that type of sex discrimination does not violate Title IX.

Precisely the same would remain true if the same boarding school student declared a preference for competing on that school's girls' basketball team—were the student to say: "I am a biological boy who identifies as a girl and plays basketball. My school does not allow me to compete on the girls' team. If I were a biological girl, I would be able to play on that team. That's sex discrimination!" Again, that assertion would clearly be right. But so long as the school maintained equal teams for both boys and girls, it would be precisely the kind of sex discrimination that Congress and the Ford Administration protected in law in the 1970s.

In both cases, the actions of Congress and the Ford Administration distinguish our boarding school hypothetical from *Bostock.*

It would be no answer for that hypothetical transgender child to insist that "I really *am* a girl," either in arguing that, as such, the child "should have access to the school's single-sex girls' showers, locker rooms, and bathrooms" or that the child should be allowed onto the girls' basketball team. *Title IX prohibits sex discrimination, not discrimination between different kinds of girls*

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[10] Again, this example would work precisely the same with all roles reversed.

(or different kinds of boys). Whatever one chooses to call this kind of discrimination, it can't be called *sex* discrimination, because—even accepting the hypothetical transgender individual's assertion—it would remain discrimination between individuals stipulated to share the same sex. It cannot, then, violate Title IX, because it would not differentiate the treatment of anyone because of their sex, as *Bostock* requires to undergird an instance of sex discrimination.

B. The Fourth Circuit Swaps Out "Sex" for "Gender Identity and Not 'Sex'" in Ways Irreconcilable with This Court's Reasoning in *Bostock*

The Fourth Circuit reverses all of this reasoning, in nominal reliance on this Court's work in *Bostock*. The core of the Fourth Circuit's reasoning attacks West Virginia for:

> . . . insisting the Act does not discriminate based on gender identity because it treats all "biological males"—that is, cisgender boys and transgender girls—the same. . . . But that is just another way of saying the Act treats transgender girls differently from cisgender girls, which is—literally—the definition of gender identity discrimination."

App. 25a.

This completely ignores the text of Title IX (and of the Equal Protection clause). It utterly fails to apply

Bostock's reasoning. It rejects *Bostock*'s search for differences in treatment of men and women as biologically separated classes, distinguished by a categorical sex difference. It replaces *Bostock*'s application of an enacted prohibition on the differential treatment of men and women behaving the same with a categorical prohibition on the recognition of men and women as legal categories.

Put more directly, the Fourth Circuit declares it illegitimate for any governmental actor to make a legal result turn on biological sex. The Supreme Court is a governmental actor. In *Bostock*, the Supreme Court made the legal result turn on the treatment of individuals of different biological sexes.

The Fourth Circuit's nominal application of *Bostock* would render this Court's *Bostock* decision itself unconstitutional.

C. Historical Context Gives the Lie to the Fourth Circuit's Pseudo-Textual Interpretation of Title IX

Thankfully, a robust history renders the Fourth Circuit's reading of Title IX, below and in *Grimm*, utterly untenable.

On the one hand, again, we have searched and have found no examples of anyone: (a) interpreting § 1686 between Congress's passage of Title IX and President Ford's approval of the 1975 Bathroom Regulation as requiring the abolition of single-sex bathrooms, locker rooms, and showers;[11] (b) contending in the years since

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[11] See n. 7, supra.

that President Ford overstepped his regulatory authority or misinterpreted § 1686 in issuing the 1975 Bathroom Regulation,[12] or (c) arguing that President Ford committed either kind of error in approving the 1975 Sports Regulation.

On the other hand, the 1970s *did* see an intense fight over whether the federal government *should* prohibit the maintenance of separate-sex bathrooms, locker rooms, and showers. It just wasn't a fight over the meaning of Title IX or its regulations. Instead, that fight unfolded in the *late* 1970s, as part of the debate over and defeat of the proposed Equal Rights Amendment.

At the same time that Congress passed Title IX, it also passed the ERA and sent it off to the states for consideration of ratification.[13] The language of the ERA's core provision was familiar: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." As far as public federal funding recipients operating educational enterprises would have been concerned, its impact would not have been notably different from that of § 1681. Or rather, the impact of the ERA would not have been notably different from that of § 1681, except for the fact that Title IX included statutory

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[12] See n. 8, supra.

[13] E.g., Neil J. Young, *How the Bathroom Wars Shaped America: It's Not Just North Carolina. Some of America's Great Political Struggles Have Pivoted Around Who Uses Which Toilet*; POLITICO HISTORY DEPT., May 18, 2016 ("A proposed constitutional amendment guaranteeing sex equality under the law, the ERA had been passed by Congress in 1972 and set to the states for ratification.").

limitations (like § 1686) while the ERA included no exceptions at all.

Still, "[b]y 1974, 33 states had passed the ERA, just five short of the number needed for full ratification. Though the odds of stopping the amendment looked poor, [Phyllis] Schlafly quickly organized a national movement to block the ERA's adoption." *Id.*

The ERA never made it to the requisite 38 ratifying states, before the game-clock ran down to zero in 1979.[14] One of the most salient issues its opponents advanced to prevent that result was an assertion that its sweeping language (lacking any exceptions) would require the transformation of all bathrooms into unisex facilities.[15]

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[14] While at its relevant high-water mark, the ERA seemed to have secured the ratification of 35 states, it subsequently saw 5 revoke their ratification.

[15] *See, e.g, Id.* ("Once gender equity had been guaranteed under the Constitution, Schlafly cautioned, no laws could prevent men from entering women's bathrooms."), Emily Crockett, *Phyllis Schlafly Started the War on Women. But It Will Outlive Her*; VOX (Sep. 7, 2016) ("Schlafly started a ruthlessly effective grassroots movement to convince housewives that the ERA would erase all legal differences between men and women, leading to horrors like . . . unisex bathrooms[.]"); Amanda Terkel, *Bathroom Panic Has Long Stood in the Way of Equal Rights: The Women's Movement and Now the LBGT Movement Have Run Up Against Restroom Fears*, HUFFPOST POLITICS (Mar. 24, 2016) (". . . supporters weren't ready for Phyllis Schlafly, the conservative activist who successfully mobilized against the ERA by warning that it would lead to … the proliferation of public unisex bathrooms. Then, as now, scaring people about what could happen behind closed stall doors proved to be very effective, as even ERA supporters admitted.").

Indeed, in the years between Title IX's passage and the ERA's defeat, the fight over single-sex bathrooms, locker rooms, and showers, grew so intense that the President of the United States (an ERA supporter) was drawn into the argument. President Carter insisted that there had "been a lot of distortions about the equal rights amendment.... It doesn't say anything about bathrooms.... It says that the Federal Government nor (sic) a State government shall not (sic) take away equal rights from a person because they're a woman. That's all it says." *Public Papers of the Presidents of the United States: Jimmy Carter, 1980-1981*, Best Books (1981), p. 2006.

So, starting 2 years after Title IX's passage, and ranging over the next five year, the nation focused ever more intently on the fight over ratification of the proposed ERA and, specifically, its potential impact on single-sex bathrooms, locker rooms, and showers. President Ford approved the 1975 Bathroom Regulation in the midst of that fight. No one, literally no one, complained that in doing so he was overriding Congress's decisions in Title IX. No one—literally *no one*—in that nationwide battle between Phyllis Schlafly and ERA advocates argued that, actually, these most radical and controversial potential applications of the Amendment had already been realized with the enactment of Title IX in 1972.

This history concords no better with the Fourth Circuit's contentions concerning athletics. Just as Phylis Schlafly highlighted the risk to women's spaces posed by the exceptionless text of the proposed ERA, she similarly raised the specter that the ERA would force women and girls to compete against men and boys in sports. Joanna

Wuest, *A Conservative Right to Privacy: Legal, Ideological, and Coalitional Transformations in US Social Conservatism*, 46 LAW & SOC. INQUIRY 964, 968 (Nov. 2021) (contending Schlafly defeated the ERA "by leveraging arguments about how the ERA would make sex-segregated…sports…constitutionally impermissible.") (citing Donald T. Critchlow, *Phylis Schlafly and Grassroots Conservatism: A Woman's Crusade*, Princeton University Press (2005). No defender of the ERA contended she was streets behind, since Title IX had already abolished separate-sex athletics. No, instead, Americans of all stripes have celebrated Title IX as the foundation for modern girls' and women's sports for more than half a century.[16]

That's simply inconceivable if the Fourth Circuit were even *arguably* right as to the original public meaning of Title IX. Its overreaching misconstrual of Title IX was not shared by anyone, *at all*, in the original interpretative

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[16] *See, e.g.*, Paula Lavigne, *Education Secretary Miguel Cardona on Title IX compliance: 'It shouldn't be that the federal government has to watch – it's everyone's job*,' ESPN, June 15, 2022 (https://www.espn.com/college-sports/story/_/id/34084273/education-secretary-miguel-cardona-title-ix-compliance-the-federal-government-watch-everyone-job) (describing as "greatest impact" of Title IX as women's "access"—"if it weren't for Title IX, we might not know of some of these amazing athletes because they might not have had the opportunity."); Press release, U.S. Dep't of Educ., *Secretary McMahon Celebrates 53rd Anniversary of Title IX at "Her Game, Her Legacy" Event in New Mexico* (June 23, 2025) (https://www.ed.gov/about/news/press-release/secretary-mcmahon-celebrates-53rd-anniversary-of-title-ix-her-game-her-legacy-event-new-mexico) (quoting IWF Sports Ambassador Payton McNabb at Secretary McMahon's event as "forever thankful I had the opportunity to compete because of Title IX.").

community because it was the same nonsense when that text was enacted that it remains today.

The Fourth Circuit's version of Title IX, announced in *Grimm* and reiterated below, cannot explain its actual public history. The clearly established public meaning of Title IX unavoidably rebuts the Fourth Circuit's contention.

III. OTHERWISE, TITLE IX WOULD BE UNCONSTITUTIONAL.

If—as the Fourth Circuit contends—Title IX prohibited as "sex discrimination" the exclusion of a biological boy (who identifies as a girl) from the girls' facilities or from the girls' basketball team, then it follows that *all* boys must be allowed to use the "girls'" facilities and to play on the "girls'" team. Title IX would then prohibit the maintenance of single-sex facilities and athletics *entirely* and *require* that *all* facilities and sports programs be unisex.

Bearing in mind that the Constitution imposes precisely the same constraints on the federal government that the Fourteenth Amendment's Equal Protection Clause imposes on the states,[17] the Fourth Circuit's

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[17] At least seven (7) of the current Justices have recognized this parallelism. The Chief Justice did so, at least, in *Sessions v. Morales-Santana*, 582 U.S. 47, 52 n. 1 (2017), and—with Justice Alito—in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Justices Sotomayor and Kagan have done so repeatedly, including in *Sessions*. In *U.S. v. Madero*, 596 U.S. 159, 167 (2022), Justice Thomas agreed, anchoring this constraint in the Fourteenth Amendment's citizenship clause, but continuing to find it subject to the same limits. Justice Gorsuch's

analysis *cannot* remain localized only to invalidate the state statute at issue. What is bad for the state-goose will be bad for the federal-gander.

If *Bostock* means that the Equal Protection Clause bans single-sex athletic teams, as the Fourth Circuit held below, it would equally dictate that the Constitution bans—in whole or in part—Title IX, which (together with its implementing regulations) explicitly *permits* single-sex facilities such as locker rooms and "separate teams for

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concurrence in *Madero*, slightly less explicitly, recognizes the same contours. *See Id.* at 183 (noting that the majority, on the theory that the relevant Constitutional provision of the Fifth Amendment was "fundamental," had applied Fourteenth Amendment jurisprudence, and had held it to have been satisfied, and writing separately only to object to any analysis of what portions of the Constitution are sufficiently "fundamental" to apply). In 2021, Justice Kavanaugh joined a concurrence to a denial of certiorari, which agreed (by citation to *Sessions* and other authorities) that the "Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating" in terms paralleling the Court's application of the Equal Protection Clause of the Fourteenth Amendment. *Nat'l Coal. for Men v. Selective Srv. Sys.*, 141 S.Ct. 1815, 1815 (2021). The remaining Justices appear to have not yet taken a position since their investitures.

members of each sex [that provide] equal athletic opportunity for members of both sexes."

IV. BIZZARO EQUAL PROTECTION WOULD BE BOTH LINGUISTICALLY UNTENABLE AND COMPLETELY IMPRACTICABLE.

Decisions like the one below inevitably leave the thoughtful reader feeling gaslit. He might ask, incredulously:

> Wait. Title IX's text and related regulations specifically and explicitly endorse segregation by sex in various contexts. Can it be that after *Bostock*'s specific focus on the text of a different statute, courts must now read Title IX's statutory language to *ban* segregation by sex in those same contexts *and* to require segregation according to a different criterion popularized only decades after it was enacted? *Bostock* relies on standard English usage of "sex" to mean "sex," but you're telling me that, nonetheless, courts "following" it should understand that "sex" means not even "sex and gender identity," but "***not*** sex ***and instead*** gender identity"?

Such a reader is neither nut nor naif. The emperors of the Fourth Circuit really do have no clothes.

The road away from *Bostock*'s logical textualism and toward the Fourth Circuit's linguistic shell-game doesn't choose the lesser of two evils or accept inevitable tradeoffs. Instead, it declares that "x=not-x, because x,"

a rule that could be drawn straight from the pages of Lewis Carroll or Hans Christian Anderson, if not Kafka.

Consider two independently disqualifying features of the Fourth Circuit's general move to redefine "sex" as "not sex, but gender identity": (i) internal incoherence; and (ii) the impossibility of citizens, states, or courts applying the resulting rules to order their lives, public and private institutions, and future cases.

First, the lower courts' gnostic version of *Bostock* is incoherent. The lower courts assure us that in Title IX, "sex" doesn't denote the human trait described by all the past standard usage of the English word "sex," but instead means "gender identity," a concept which has—since its 1964 invention—always been understood entirely in *dichotomy* with sex.[18]

Incoherence is frankly inevitable here, because the logic of *Bostock* forbids what wayward appellate courts *really* want to say: "the law requires that the United States of America pretend that some members of the male sex are members of the female sex (and vice versa)."

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[18] *See* Stoller, Robert J., *The Hermaphroditic Identity of Hermaphrodites*, THE JOURNAL OF NERVOUS AND MENTAL DISEASE, 139(5) November 1964 (originating term and concept) (https://journals.lww.com/jonmd/citation/1964/11000/the_hermaphroditic_identity_of_hermaphrodites.5.aspx) (last accessed August 15, 2024)). The term would later be popularized by John Money, but the human experiments for which he'd later achieve infamy were hardly underway when Title IX passed in 1972. *See* Burkeman, Oliver and Younge, Gary, *Being Brenda*, THE GUARDIAN (12 May 2004) (https://www.theguardian.com/books/2004/may/12/scienceandnature.gender) (last accessed August 15, 2004).

The courts below reject *Bostock*'s *logic* in order to jam its squarely text-based *holding* into a Title-VII-shaped hole that simply doesn't exist in Title IX or the Constitution. *Bostock* cannot coherently serve the purposes for which these courts seek to repurpose it. The Fourth Circuit dares this Court to raise and address the real issue out loud—this Court should accept and announce that male and female Americans exist and matter, and the law may reasonably recognize them as separate categories for some purposes.

Second, the incoherence of the regime makes it useless. Countless American actors at all levels of public and private life must structure their institutions and lives around the Constitution's constraints and the requirements that civil rights law imposes on educational institutions. These laws best serve their purpose when regulated parties can determine what conduct is and is not required of them or permitted to them. The Fourth Circuit's approach fails spectacularly to satisfy this goal of predictability in every respect. Consider:

- What are the implications as new genders develop and multiply? What is the relationship of these genders and others yet to come to "sex" in the law if "sex" means "gender identity?"

- How many athletic divisions are schools required to create and maintain to treat not only male and female "boys" identically to one another, but also male and female students who

are "girls," "intersex," "genderfluid," and "two-spirit?"

- How many scholarships may or must a college trying to comply with its legal obligations allot to its students who are "boys," "girls," "intersex," "genderfluid," and "two-spirit?" Will that answer change over the course of a day as the latter two's preferred pronouns shift?

These problems are insoluble. If the Court were to leave standing the rule announced below, it would assure that actors cannot safely plan their affairs to comply, that lower courts will have no bright lines to gauge the merits of future lawsuits, and that this Court will face an unending stream of future cases plumbing the unmeasurable depths of this new-found deep.

The Court should head off this morass. It should reassert, plena voce, that neither the Equal Protection Clause, nor Title IX, prevent the operation of single-sex athletic programs.

V. THERE IS A BETTER WAY: FEDERALISM.

It hasn't been so long since the Ninth Circuit (of all places) pointed in a better direction: federalism. In *Parents for Privacy v. Barr*, 949 F.3d 1210, 1257 (9th Cir. 2020), that court rightly observed that

> just because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot

> accommodate gender identity. Nowhere does the statute explicitly state, or even suggest, that schools may not allow transgender students to use the facilities that are most consistent with their gender identity. That is, Title IX does not specifically make actionable a school's decision not to provide facilities segregated by "biological sex[.]"

The Ninth Circuit was right (though wrong to disregard its precedent and declare Idaho's law paralleling West Virginia's here at issue illegal and unconstitutional).

Let the people of West Virginia (and Idaho) decide how West Virginia (and Idaho) will regulate their own athletics. Let the people of Virginia (and California) decide the same for their own.

The Constitution does not dictate a different result. Congress has not done so. That leaves these decisions to properly be made by the elected representatives of the separate states.

CONCLUSION

The Court should clarify that the existence of single-sex athletic programs violates no Constitutional provision and no federal law.

Respectfully submitted,

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