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

## REPLY BRIEF FOR PETITIONERS


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## INTRODUCTION

Sex-specific sports ensure fair competition, equal opportunity, and safety for female athletes. So when athletes began appearing on teams based on self-identification—rather than sex—West Virginia legislators responded with the Act.

B.P.J. believes West Virginia cannot enshrine sex-specific sports into law. Instead, States must go student by student, assigning teams based on gender identity, age, medication use and medical treatment, physique, talent, perceived stigma, and more. And as B.P.J. sees it, States must treat each sport differently, too, considering "cuts," contact, and stakes, among other things. To B.P.J., some biological males must be treated as female, swapping sex-distinct teams for *gender*-distinct ones—all while ignoring any harm to female athletes.

But B.P.J. is mistaken. West Virginia's law satisfies both Title IX and the Constitution.

Title IX's text, context, and history allow sex-specific sports. Title IX forbids sex discrimination—treating one sex worse than the other. It does not forbid sex distinctions. B.P.J. interprets Title IX to permit sex-specific sports *except* as applied to biological males who identify as female. To get there, B.P.J. invokes a social-impact rule—found nowhere in Title IX—that redefines discrimination. Yet Title IX does not require schools to deny equal athletic opportunities to girls—including placements and post-season opportunities—in favor of biological males who identify as female. B.P.J.'s rewrite pits Title IX against itself.

The Equal Protection Clause likewise allows sex-specific sports teams. In sports, the two sexes are *not* similarly situated. Males are generally bigger, faster, and

stronger. The Act respects this biological reality, and the Constitution does not require the State to exempt boys who identify as girls. In holding otherwise, the Fourth Circuit misapplied intermediate scrutiny and misrelied on B.P.J.'s individual circumstances. And B.P.J. misreads West Virginia's law to categorically ban males who identify as girls from sports—even though sports remain available to every student athlete.

West Virginia may account for the "substantial risk that boys w[ill] dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor* v. *Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers). That risk has manifested across the country, including in this case. Under the lower courts' injunctions, West Virginia girls were pushed off podiums, forced out of post-season events, and compelled to forfeit matches because of the unfairness of competing against a biological male. Pet.Br.14. The Court shouldn't compel these outcomes to continue.

## ARGUMENT

### I. The Act satisfies Title IX.

Title IX forbids sex discrimination—treating one sex worse than the other. It does not forbid sex distinctions, or "women's sports" would be illegal. Yet B.P.J. still says sex distinctions can't apply to biological males who identify as girls. This insistence wrongly elevates gender identity over sex in an arena in which sex matters.

#### A. Title IX authorizes sex distinctions.

B.P.J. says Title IX mirrors Title VII and *Bostock*'s reasoning applies to Title IX. Resp.Br.25-26, 28-29. But Title IX "is a vastly different statute" from Title VII. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175

(2005). It's not a blanket non-discrimination law, either, as B.P.J. concedes. Resp.Br.31 ("Title IX does not concern itself with everything that happens because of sex." (cleaned up)). So Title VII and other statutory language mandating race- and sex-blindness mean little here. Contra Resp.Br.24-30.

Textualism is not word-match bingo or semantic isolationism. Courts interpret "text in its legal context," including how words in the statute "interact, as against relevant background understandings," not "in the abstract" based only on a "stripped-down phrase." *Pulsifer* v. *United States*, 601 U.S. 124, 140-41 (2024). Title IX's linguistic and legal context—unlike Title VI or Title VII—forbids discrimination only "on the basis of sex" in an "educational program," including athletics, dorms, locker rooms, restrooms, and showers. Pet.Br.18-21. The words are used in different contexts, providing "plausible reason" to read them differently. Resp.Br.28. That's why B.P.J. concedes that Title IX—unlike other non-discrimination laws—allows sex-specific sports, something *Bostock* would forbid. Only West Virginia's reading explains that result.

Start with first principles. B.P.J. does not seriously dispute that the term "sex" means biological sex throughout Title IX. Otherwise, "sex" would mean one thing in Section 1681(a)'s nondiscrimination rule and another everywhere else. But see Resp.Br.27. B.P.J.'s own authority accepts that "'sex' in Title IX" is likely genetically defined, "given [its] normal usage when [Title IX] was enacted." *A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 775 (7th Cir. 2023) (Easterbrook, J., concurring) (cited at Resp.Br.27 n.9). Even some of B.P.J.'s amici don't contest this idea. Title.IX.Scholars.Br.4, 6-7.

"On the basis of sex" means "for the sole reason of biological sex." Pet.Br.19-20. Relying on *Comcast Corp.* v. *National Association of African American-Owned Media*, 589 U.S. 327, 335 (2020), B.P.J. says this phrase denotes "a but-for causation standard." Resp.Br.24. But *Comcast* involved 42 U.S.C. § 1981, which—unlike Title IX—doesn't contain the phrase "on the basis of." Again, that difference in wording is central, as "using a definite article with a singular noun" implies "a discrete thing." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 166 (2021).

Title IX's context is different than any other non-discrimination statute because of Section 1686's rule of construction: "[N]othing [in Title IX] shall be construed to prohibit … maintaining separate living facilities for the different sexes." Section 1686 is no mere "exception" to Section 1681(a). Pet.Br.22; contra Resp.Br.28 n.10. Congress titled it an "[i]nterpretation" principle. This congressional directive means Section 1681(a), too, must "be construed" to allow sex distinctions. Section 1686 "reinforces what [Section 1681(a)'s] nouns and verbs independently suggest," *Dubin* v. *United States*, 599 U.S. 110, 121 (2023) (cleaned up)—that Section 1681(a) allows sex distinctions, see ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 221-24 (2012).

B.P.J. says Section 1686's introductory text—"[n]otwithstanding anything to the contrary contained in this chapter"—signals an "exception." Resp.Br.28 n.10. But Congress's "[i]nterpretation" label confirms that Section 1686 is not an exception but a tool of construction. The tool shows some sex distinctions are permitted even under Section 1681(a)'s non-discrimination rule. That's why the regulations can then permit sex-separated athletic teams. 34 C.F.R. § 106.41(b).

So even B.P.J. accepts that Title IX does not forbid "everything that happens because of sex." Resp.Br.31 (cleaned up). In athletics, B.P.J. assumes regulations implementing Title IX may not "conflict with Title IX itself" and admits they lawfully "establish a group-based method for measuring discrimination in … athletics." Resp.Br.34-35. Those regulations allow sex-specific athletic opportunities to prevent sex discrimination on a class basis. Resp.Br.36. That concession sinks any notion that Section 1681(a) forbids considering sex or that *Bostock* invariably controls as to Title IX. Either Section 1681(a) authorizes sex-specific athletic opportunities—as the 1975 regulations say, Pet.Br.24—or Section 1681(a) forbids considering sex, and those opportunities violate Title IX. The latter cannot be right. *Dep't of Educ.* v. *Louisiana*, 603 U.S. 866, 870 (2024) (Sotomayor, J., dissenting in part).

Title IX's structure reinforces this text-based conclusion. Congress accepts that Section 1681(a)'s non-discrimination rule allows sex distinctions. Pet.Br.24-25. After Congress listed less obviously permissible sex distinctions in Section 1681(a)'s exceptions, it clarified in Section 1686 that Section 1681(a)'s non-discrimination rule itself authorizes sex distinctions. That congressional confirmation ends the analysis.

### B. Title IX's text does not require West Virginia to favor gender identity over sex.

B.P.J. interprets Title IX to allow sex distinctions *except* as applied to male athletes who identify as female. In that world, Title IX cares most about the "social impact" of a school's action. Resp.Br.32 (citing *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)). It requires schools to allow biological males who identify

as girls to compete in girls' sports to avoid the possible embarrassment of competing in men's sports. Resp.Br.33. To B.P.J., this "social impact" supersedes any sex-based harm female athletes suffer from lost athletic opportunities and compromised safety.

Nothing in Title IX's text supports this reading. Not even the lower courts borrowed the phrase "real social impact" from *Oncale* to rewrite Title IX. Under Title VII, it's used only to test the "severity of harassment." *Oncale*, 523 U.S. at 81. For the first time, though, B.P.J. tries to use this language to redefine discrimination and establish a new rule that elevates gender identity over sex. Resp.Br.32-33. Displaced girls denied an opportunity to advance to postseason events are themselves "excluded" from an educational program "on the basis of sex" and "denied the benefits of" that program. That exclusion is the same no matter the gender identity of the biological male taking their place.

B.P.J.'s reading of Title IX also makes fairness and safety irrelevant. B.P.J. defends summary judgment below while alleging "a disputed question of fact" over whether males "have any athletic advantages implicating fairness or safety." Resp.Br.37. But as the court of appeals recognized, biological males have athletic advantages. Pet.App.43a, 48a (awarding summary judgment despite "evidence that biological boys have" athletic advantages over "biological girls"). The court also understood that while its injunction was in place, B.P.J. bumped "at least one hundred girls" down the leaderboard—and prevented two girls from qualifying for conference championships. Pet.Br.13. It ruled for B.P.J. anyway. For that court, Title IX approves of sex-based harm to girls to ensure that biological males identifying as female can choose girls' sports.

Title IX should not be read to compel schools to "implement the very discriminatory [act] Congress sought to eradicate"; the statute must be more than "a largely empty command." *CSX Transp., Inc.* v. *Ga. State Bd. of Equalization*, 552 U.S. 9, 17-18 (2007).

### C. Title IX's context rejects favoring gender identity over sex.

Context-blind textualism pervades B.P.J.'s interpretation of Title IX and its regulations. For example, B.P.J. says Title IX "focuses on individuals, not groups," Resp.Br.24, then asserts that Title IX athletic regulations allow "group-based" protections based on sex, Resp.Br.34. This argument works only if one assumes Title IX regulations changed the statute's liability rule for sports. But they can't. See Pub. L. 93-380, § 844, 88 Stat. 612 (1974) (limiting agency authority to "regulations implementing" Title IX); Resp.Br.35 (assuming Title IX regulations cannot "conflict with Title IX").

So it's wrong to treat the Javits Amendment as an exception to Section 1681(a)'s non-discrimination rule. Contra Resp.Br.35. Title IX has no statutory exception for athletics. And the Javits Amendment "references only 'intercollegiate athletics,'" not K-12 sports. Resp.Br.35 n.15 (quoting Pub. L. 93-380, § 844, 88 Stat. 612 (1974)). If Section 1681(a) forbids class-based protections for sex, see Resp.Br. 36, then sex-specific K-12 athletic teams are illegal, see Title.IX.Scholars.Br.4-6.

Even if the Javits Amendment created a "group-based" exception for all sports, that choice would not explain why the regulation's sex-based line must apply differently to B.P.J. According to B.P.J., upholding West Virginia's law negates the "equal athletic opportunity" that Title IX requires because B.P.J. cannot play on male

teams for stigmatic reasons, whereas males identifying as males can. Resp.Br.36-37. But again: nothing in the regulation, Javits Amendment, or statute creates a gender-identity-based exception or requires schools to account for an individual student's concerns about stigma.

The regulation that Congress approved shows Congress desired separate teams "for members of each sex." 34 C.F.R. § 106.41(b). B.P.J.'s atextual reading discounts the hardships other excluded biological males face. A male with a disability or infirmity, for example, may not be able to play on any male sports team, finding it "isolating, stigmatizing, and publicly humiliating." Resp.Br.33. But Title IX's text and regulations give the only relevant consideration: sex. Courts can't selectively favor certain athletes based on their subjective circumstances.

B.P.J.'s reading threatens far more than athletics. By treating the Javits Amendment as an exception to a purported sex-blind mandate in Section 1681(a), B.P.J. calls into doubt every Title IX regulation allowing sex distinctions—including housing, 34 C.F.R. § 106.32(b); foreign scholarships, 34 C.F.R. § 106.31(c); physical education and human-sexuality classes, 34 C.F.R. § 106.34(a); and "toilet, locker room, and shower facilities," 34 C.F.R. § 106.33. Because B.P.J. rejects "classwide" Title IX analysis outside "athletics," all these regulations would fall as class-based, sex-conscious distinctions. Resp.Br.36; see also Title.IX.Scholars.Br.15 (suggesting that Title IX's "athletics regulation is a narrow exception" and does not allow "a categorical ban that the statute itself does not authorize").

Nor can these regulations be saved by reading Section 1686 as an exception to Section 1681(a), as B.P.J. does. Most of them go beyond "living facilities," including

the regulation on toilets and showers—which derives from Section 1681(a), not Section 1686. 40 Fed. Reg. 24,128, 24,139-43 (1975); see also Title.IX.Scholars.Br.7 (stating "[s]ection 1686 is explicitly confined to living facilities).

B.P.J.'s interpretation thus tramples on what Congress and the Executive branch have long understood Title IX to mean. What B.P.J. frames as an "unanticipated application[]" lurking in the shadows for 50 years, Resp.Br.31 n.12, is a plea for courts to disregard a statute's plain meaning as understood for decades by coordinate branches of government. Pet.Br.24-25. That long-held interpretation deserves the "very great respect" that West Virginia's more natural reading affords. *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 385 (2024).

B.P.J.'s arguments on the "similarly situated" analysis don't change things. Resp.Br.39-41. Petitioners raised that issue to rebut the court of appeals' analysis below; relying on circuit precedent, that court held that "discrimination [under Title IX] means treating an individual worse than others who are similarly situated." Pet.App.38a (cleaned up). Under that framework, a male is never similarly situated to a female for purposes of athletics, despite the male's efforts to suppress natural biology. Contra Resp.Br.40-41. But the Court need not even engage that reasoning here. Title IX authorizes sex distinctions. It does not require West Virginia to favor gender identity over sex—full stop.

### D. Federalism supports the Act.

Spending Clause concepts confirm that B.P.J.'s reading of Title IX is mistaken. It is not "unmistakably clear" that Title IX favors gender identity over sex. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); Pet.Br.31-33. That interpretation would be "unanticipated"—not

despite "clear" text, Resp.Br.31 n.12, but because clear text shows it is wrong. See Section I.B. And it is at least "surprising" given that the public and coordinate branches have not "understood" the statute that way. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 25 (1981). Indeed, B.P.J. can find only a single example of a biological male competing in women's sports in 1970s, Resp.Br.39 n.17, further demonstrating that sex and gender were not treated synonymously when Title IX was enacted.

So the Spending Clause clear-statement rule applies here. It is not "confin[ed]" to reducing rather than erasing "liability." Resp.Br.31 n.12. States can and do raise it against requests for injunctive relief. See, *e.g.*, *Pennhurst*, 451 U.S. at 6, 17. Nor did West Virginia forget to raise it below; Fourth Circuit precedent rejected its application there. *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 n.18 (4th Cir. 2020). And the clear-statement rule is not a waivable defense, anyway. Contra Resp.Br.30 n.12. It is a tool of statutory construction, *Pennhurst*, 451 U.S. at 24, that cannot be waived or forfeited, cf. *Bondi* v. *VanDerStok*, 604 U.S. 458, 480-81 (2025) (courts exercise "independent judgment" to interpret statutes).

* * *

B.P.J. insists male participation in girls' sports doesn't always harm girls. Resp.Br.38-39. Title IX doesn't require proof of harm to establish sex-based teams—were that so, less athletic males could claim a right to girls' sports. But harm abounds here. B.P.J. has displaced hundreds of girls, collectively moved them down the leaderboard more than a thousand spots, deprived them of dozens of medals, and more. Pet.Br.13-14. Girls suffer harm every time they lose to a male athlete. *Clark ex rel.*

*Clark* v. *Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th Cir. 1989). Congress designed Title IX to prevent such outcomes. West Virginia's statute is consistent with that aim, and the Fourth Circuit was incorrect in thinking otherwise.

## II. The Act satisfies the Equal Protection Clause.

The Court should also reverse the Fourth Circuit's equal-protection holding.

### A. The Act withstands rational-basis review.

**1.** The Act draws just one line between boys' and girls' sports teams. B.P.J. errs in thinking the Act "independently discriminates based on transgender status." Resp.Br.42. The Act prescribes "one rule for [women]"—they can play on any team—"[and] another for [men]"—they cannot play on women's teams. *Sessions* v. *Morales-Santana*, 582 U.S. 47, 58 (2017). That commonsense line is a sex classification that B.P.J. does not challenge. And the Act tracks other textbook examples of permissible sex classifications, such as "[a] law imposing different citizenship requirements for children with citizen fathers compared to children with citizen mothers." *United States* v. *Skrmetti*, 605 U.S. 495, 560 (2025) (Alito, J., concurring).

The Act's sex classification does not require intermediate scrutiny here, and West Virginia did not "admit" otherwise. Resp.Br.42; see Pet.Br.42 (saying "at most" intermediate scrutiny applies). B.P.J.'s response confirms that B.P.J. does *not* object to the sex-based line the Legislature drew; B.P.J. defines the claim as a wish to "participat[e] in school sports on girls' and women's teams." Resp.Br.1. B.P.J.'s real complaint is with how West Virginia has defined "girls" and "women" for

purposes of sports. That characterization proves decisive. See *Clark* v. *Sweeney*, No. 25-52, 2025 WL 3260170, at *1-2 (U.S. Nov. 24, 2025) (stressing the importance of the party-presentation principle).

Heightened scrutiny does not apply to how West Virginia *defines* sex (even as applied to B.P.J.), Pet.Br.47-48—a point to which B.P.J. never responds. "[T]he mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex." *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1326 (11th Cir. 2021) (Pryor, C.J., dissenting), rev'd en banc, 57 F.4th 791 (11th Cir. 2022).

**2.** B.P.J. cannot get to intermediate scrutiny by fashioning a transgender classification, either. Even B.PJ. concedes the Act does "not use the term 'transgender.'" Resp.Br.42. So any "transgender" classification is not "explicit." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). And the Act doesn't "turn[] on" gender identity, either. *Skrmetti*, 605 U.S. at 511. It assigns *all* students to sports teams based on the same biological criteria. "That is the definition of equal treatment." U.S.Br.3.

Consider, for example, a biological male identifying as a boy. He can play only on male and coed teams. Now change his gender identity. He *still* can play only on male and coed teams. Thus, a "lack of identity" exists between transgender status and team assignments. *Skrmetti*, 605 U.S. at 519. The Act divides players into two groups based on biology: males and females. Transgender-identifying athletes fall into both camps, confirming the Act doesn't target gender identity as a classification. B.P.J. would need to rewrite the Act to find some transgender line buried within it.

B.P.J. says the Act is a mere pretext for invidious discrimination "based on transgender status." Resp.Br.43. At best, B.P.J. refashions an assumed disparate impact into a suggestion of intentional discrimination. But a party can't establish equal-protection violations by "relying solely on the disparate impact." *Harris* v. *McRae*, 448 U.S. 297, 323 n.26 (1980) (cleaned up). It would be especially wrong here, as biological boys identifying as girls aren't the only students who feel the Act's effects. All players—no matter their gender identity—must abide.

The Act's stated purpose, limited scope, and operation show it is not pretextual. Its purpose is "to promote equal athletic opportunities for the female sex" by keeping men from "displac[ing] females" in sports. W. VA. CODE § 18-2-25d(a)(1)-(5). The Act operates as intended and goes no further. See, *e.g.*, Resp.Br.4 (listing ways in which West Virginians have accepted B.P.J.'s gender identity outside sports). The harm of a male competing on a girls' team is the same regardless of identity; that's why the Act treats gender identity as irrelevant. W. VA. CODE § 18-2-25d(a)(4).

The Act also appropriately reaffirmed that sex does in fact mean sex. See W. VA. CODE ST. R. § 127-2-3(3.8) (2018) (providing for similar sex separation even before the Act in an unchallenged legislative rule). Before the Act, the status quo was sex-specific sports teams. The Legislature acted because girls began to lose fair opportunities in sports to biological boys. See, *e.g.*, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (sanctioning reliance even on experiences elsewhere). The goal was not to harm anyone but to protect girls' opportunities and safety in athletics.

**3.** Even if the Court could find a transgender classification here, it would still subject the Act to only rational-basis review. Transgender status does not "satisf[y] all the criteria for a classification warranting heightened scrutiny." Resp.Br.43.

Rather than meaningfully engage with the argument, B.P.J. largely incorporates Respondent's brief in *Little* v. *Hecox*. Resp.Br.44-45. "Such a practice has been consistently and routinely condemned." *United States* v. *Orrego-Martinez*, 575 F.3d 1, 8 (1st Cir. 2009) (cleaned up). Given that B.P.J. "chose not to include developed arguments" on this issue, the Court would do well to ignore it. *Medtronic, Inc.* v. *Teleflex Life Scis. Ltd.*, 86 F.4th 902, 907 (Fed. Cir. 2023).

On the merits, B.P.J. fails to meet the "high bar" to show transgender status is a suspect trait. *Skrmetti*, 605 U.S. at 549 (Barrett, J., concurring). That status is not an "obvious, immutable or distinguishing characteristic" that defines a "discrete group." *Id.* at 549-50 (cleaned up). B.P.J. concedes the "diversity of experiences among transgender people" and admits transgender status is not a "fixed and consistent" characteristic. See Resp.Br.44 (cleaned up). And B.P.J. doesn't deny that transgender status is mutable. That's because it is not "definitively ascertainable at the moment of birth," and "some transgender individuals 'detransition' later in life." *Skrmetti*, 605 U.S. at 550-51 (Barrett, J., concurring) (cleaned up). That concession ends the discussion, as "[i]mmutability is one of the factors most consistently present in Equal Protection cases." *K.C.* v. *Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 620 n.3 (7th Cir. 2024) (collecting authorities).

Mutability aside, transgender status has none of the other suspect-class elements. People who identify as

transgender have not suffered a history of de jure discrimination like that experienced by racial minorities and women. A couple surveys spanning two years aren't enough to prove such history. Const.L.Profs.Br.8-9. Nor is lumping this class in with "gay men and lesbians," Resp.Br.44, given that the Act has nothing to do with sexual orientation. And those who identify as transgender aren't politically powerless. They have achieved remarkable success—particularly in "convincing many lawmakers to address their problems," *Skrmetti*, 605 U.S. at 576 (Alito, J., concurring), and driving "change in policies, practices and laws at every level of government," Ctr.Am.Liberty.Br.16-17. Just tally the many amicus supporters that Respondent marshalled here. "These are not the hallmarks of a skewed or unfair political process." *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023). Thus, even assuming a gender-based classification, rational-basis review applies because transgender people are not a suspect or quasi-suspect class.

**4.** The Act satisfies that deferential standard. Under rational-basis review, this Court must uphold the Act "so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Skrmetti*, 605 U.S. at 522 (cleaned up). Provided the State has "plausible reasons for the relevant government action," a court's "inquiry is at an end." *Id.* (cleaned up).

The Act prevents *any* males from competing on female teams to advance the important government interest of providing equal athletic opportunities and safety for girls. See Pet.App.93a. It does not matter where a particular male places against girls—allowing males in girls' sports based on ad hoc exceptions "raise[s] entirely new problems related to fairness, official discretion, and equal

administration of the laws." *Bonidy* v. *USPS*, 790 F.3d 1121, 1128 (10th Cir. 2015). While B.P.J. dismisses most harmful effects on girls, Resp.Br.49, the fact remains that many of them have suffered real harm just during this case.

B.P.J. tries to recast the notion that student athletes should not be pushed aside by those with inherent advantages as evidence of animus. But the Legislature didn't act with a desire to harm when it preserved school sports as they have existed for decades. W.Va.Leg.Br.5-11; cf. *Trump* v. *Orr*, No. 25A319, 2025 WL 3097824, at *1 (U.S. Nov. 6, 2025) (finding the federal government's choice to "display biological sex" on passports was not shown to have been motivated by animus). Both lower courts recognized the same. B.P.J.'s conclusory assertions are no reason to hold otherwise.

### B. The Act withstands intermediate scrutiny.

Even if the Court subjected the Act to intermediate scrutiny, it would pass. Its sex-based distinction "serves important governmental objectives" and the "means" chosen are "substantially related to the State's goals." *Skrmetti*, 605 U.S. at 510.

**1.** B.P.J. frames the question incorrectly. B.P.J. labels this suit an "as applied" challenge, focusing on how the Act applies to students "like B.P.J." Resp.Br.47-48. B.P.J. measures the law's constitutionality against the circumstances of *one* student: a middle school student on "puberty-delaying medication," who competes in "noncontact" sports and finishes within a "range" of biological girls' performance. *Id.* at 1-2. This focus strays so far from traditional, class-based, intermediate scrutiny, equal-protection analysis that it resembles a wholly different claim: a rational-basis class-of-one equal-

protection claim. *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000).

Intermediate scrutiny for traditional equal-protection claims does not permit such a constricted analysis. It considers the *entire* affected class—not one lone member. "If the classification is reasonable in substantially all of its applications," the policy cannot "be said to be unconstitutional simply because it appears arbitrary in an individual case." *O'Connor*, 449 U.S. at 1306. "[B]road legislative classification[s] must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977).

Even in as-applied cases, the Court "look[s] to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before [it]." *City of Cleburne*, 473 U.S. at 446. In *Caban*, for example, the Court used "the facts of [a specific] case" to "illustrate" how the challenged law generally discriminated against certain "unwed fathers" through "overbroad generalizations in gender-based classifications." *Caban* v. *Mohammed*, 441 U.S. 380, 394 (1979) (cleaned up). It did not ask whether the statute's operation against *the plaintiff* was substantially related to the government's interest. See also, *e.g.*, *Lehr* v. *Robertson*, 463 U.S. 248 (1983); *Michael M.* v. *Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 475-76 (1981) (plurality op.).

*United States* v. *Virginia*, 518 U.S. 515 (1996), doesn't change things. See Resp.Br.47. There, Virginia based its blanket ban on women entering military school on unsupported "generalizations about women." *Virginia*, 518 U.S. at 550. Obviously, "stereotype-based beliefs" can't justify sex distinctions. *Nev. Dep't of Hum. Res.* v.

*Hibbs*, 538 U.S. 721, 730 (2003). But West Virginia passed its law because of evidence-based, biological dissimilarities across the class—and increasing evidence from "the experience of other jurisdictions" that problems were arising across the country. *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 297 (2000).

If B.P.J.'s as-applied analysis were correct, whole swaths of sex-based classifications would fall. For various reasons, any male can take medicines that will affect his hormone levels or physical abilities. Similarly, unathletic males could challenge sex separation if the lone criterion is competitive comparability. Eventually, sex separation would give way, and the State would be compelled to make unworkable ad hoc judgments. Fortunately, "case-by-case adjudication … has little, if any role to play in equal protection analysis." David H. Gains, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1382-83 (2005). The Court must look beyond B.P.J.'s specific circumstances.

**2.** So the real question under intermediate scrutiny is: Is assigning biological males to only male or coed sports substantially related to an important state interest? Yes. The Act's means—sex-specific sports—is substantially related to West Virginia's important interest in fair and safe athletic opportunities for women.

A pending *Daubert* motion on one scrap of evidence doesn't change how biology and athletic performance are intertwined. Pet.App.33a-34a, 48a. B.P.J. agrees that post-puberty, "biological males have physiological advantages over biological females that significantly impact athletic performance." Pet.App.48a (Agee, J., dissenting) (citing B.P.J.'s brief). Other scientific evidence supports that idea—and extends it to pre-pubertal students. Pet.App.48a (Agee, J., dissenting); *Adams* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819

(11th Cir. 2022) (Lagoa, J., concurring) (recognizing that pre-puberty advantages aren't "negligible"); JA2515-26; U.S.Br.14-16; Am.Coll.Peds.Br.14-33; Sports.Med.Drs. Br.4-31; Sports.Scientists.Br.3-13; Profs.Auchus.Br.6-23; Sports.Physiologists.Br.6-29. Even B.P.J. conceded below that evidence exists to show that athletic advantage begins pre-puberty. 4CCA Op. Br. 42 n.7.

Any debate about whether pre-pubertal boys have an athletic advantage shows the Legislature was the right body to decide the issue. The Legislature need not show its law is the "single best disposition" even under immediate scrutiny. *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 632 (1995). And the State can use "history, consensus, and simple common sense," *id.* at 628 (cleaned up), to justify its choice, provided that the choice is based on a "reasonable inference[]." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997). After all, the Legislature "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Id.* (cleaned up). Where studies do not conclusively provide an answer, the Legislature can still act. "[T]he federal courts do not mediate medical debates." *K.C.*, 121 F.4th at 634.

And make no mistake, West Virginia can invoke studies to show the state of the science regardless of whether they were cited below, as they convey legislative rather than adjudicative facts. See, *e.g.*, *Hall* v. *Florida*, 572 U.S. 701, 721-22 (2014) (considering views of medical experts on intellectual disability); *Muller* v. *Oregon*, 208 U.S. 412, 420-21 (1908) (taking "judicial cognizance" of compilation of scientific information and social science literature); *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954). That's why B.P.J., too, relies on studies outside the record. Resp.Br.20-22.

This Court can also consider recent developments in various sports leagues. B.P.J. says the Court should ignore new athletic rules because "most … were compelled by" politics. Resp.Br.21-22. That's wrong. Those developments show "the open questions regarding basic factual issues before … regulatory bodies." *Skrmetti*, 605 U.S. at 524-25; Pet.Br.47. Even if some governing bodies acted based on politics, that political flavor reinforces how this issue is a "legislative and not a judicial responsibility." *Feeney*, 442 U.S. at 272.

B.P.J. admits organizations have adopted policies mirroring the Act based on new research. See Resp.Br.21 (arguing that "most" changes stemmed from politics). For instance, World Athletics required gene testing after "[n]ew evidence clarifie[d] that there is already an athletically significant performance gap before the onset of puberty." *World Athletics Planning Amendments to Female Eligibility Guidelines*, REUTERS (Feb. 10, 2025, 8:32 PM EST), https://perma.cc/DM5S86WD. The International Olympic Committee, too, is set to prohibit males who identify as female from competing with females based on a science-based review of evidence about males' permanent physical advantages. Martyn Ziegler, *Transgender women to be banned from all female Olympic events*, THE TIMES (Nov. 10, 2025, 11:15 AM GMT), https://tinyurl.com/2mj7kjb2.

In the face of an ongoing debate, West Virginia chose to protect biological women and girls. The Court should respect that judgment. While "not toothless," intermediate scrutiny is "deferential." *Free Speech Coal., Inc.* v. *Paxton*, 606 U.S. 461, 495 (2025). "[C]ourts must accord substantial deference to the predictive judgments of" lawmakers. *Turner Broad. Sys.*, 512 U.S. at 665.

**3.** For the first time, B.P.J. also complains about team-by-team and sport-by-sport fit. B.P.J. also thinks the Act should be "limited to highly competitive settings, such as post-season championships or varsity sports." Resp.Br.46. Without such tailoring, "the severity of burden imposed" is said to be too great. *Id.* at 48.

Here again, B.P.J. is trying to ratchet the test up toward strict scrutiny. For equal-protection claims, the Court considers whether the "means" are "substantially related" to achieving the government's important objectives. *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 60 (2001) (cleaned up). The means need not be "minimal[ly]" "burden[some]," as B.P.J. suggests. Resp.Br.48. B.P.J.'s sole authority, *Nguyen*, adds no such element. There, only *after* concluding that the statute met intermediate scrutiny did the Court mention in dicta that it was "mindful" the "obligation" the statute "impose[d]" was "minimal." 533 U.S. at 70. Imposing a "minimal burden" requirement would violate the principle—with which B.P.J. agrees, Resp.Br.48—that the fit doesn't have to be perfect under intermediate scrutiny.

B.P.J. also overstates the complained-of "burden." The Act does not exclude males who identify as girls "from the school's entire athletic program." Resp.Br.46. It applies only to girls' sports teams based on "competitive skill" or "involv[ing] … a contact sport," W. VA. CODE § 18-2-25d(c)(2), tracking Title IX's implementing regulations, 34 C.F.R. § 106.41(b). That limit ensures the Act applies only when sex is relevant. And every athlete, B.P.J. included, can play on male and co-ed teams.

Limiting the Act to only "highly competitive settings" is also unworkable.

*First*, "highly competitive" is subjective. B.P.J. gives examples, but it's unclear why a girl's last regular-season game as a senior is less competitive than a post-season game as a freshman. Homecoming or a rival game might be especially weighty (and thus "competitive") to a particular student. And an otherwise ordinary meet might take on new importance if a college rep attends.

*Second*, fairness and safety are relevant at any level of competition. No matter the competitive stakes, girls should be allowed to compete without fear of being hurt by a male. And early success encourages continued participation; unfair losses may halt a sports career before it starts.

*Third*, courts have rejected challenges to sex-based sports classifications based on this ground before, even while acknowledging that athletic opportunities could be better equalized by adding "a junior varsity squad." *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); accord *Petrie* v. *Ill. High Sch. Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979). The line can be drawn less than perfectly; that flexibility does not mean "the required substantial relationship" is lacking. *Clark*, 695 F.2d at 1131.

The facts here show why B.P.J.'s proposed test wouldn't work. B.P.J. is competing in both post-season championships and varsity sports. See Pet.App.46a; Pet.Br.13-14. And B.P.J. is excelling—displacing hundreds of girls and causing many to forfeit or protest. Pet.Br.13-14. Even without considering B.P.J.'s most recent statistics, B.P.J. had displaced "at least one hundred girls" in the standings and blocked two girls from the conference championships by the time the Fourth Circuit decided the case. Pet.App.46a (Agee, J., dissenting); JA4414-17 (Agee, J., dissenting).

In contrast, the Act imposes an easy-to-administer line based on sex. This fit is a substantial one, and under intermediate scrutiny, that's all the State needs. Theoretical alternatives do not invalidate the Act, especially when the one alternative B.P.J. suggests—assignment by gender identity—"is not a useful indicator of athletic performance." App.1743. In the end, the law's "validity does not turn on [the Court's] agreement with the [L]egislature concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Free Speech Coal.*, 606 U.S. at 496 (cleaned up). The Legislature gets room to choose, as "a handful of federal judges [cannot] begin to match the collective wisdom the American people possess." *City of Grants Pass* v. *Johnson*, 603 U.S. 520, 560 (2024).

* * *

West Virginia can protect "women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate." *Neal* v. *Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999). That's all the Act does. The Court should not upset that effort.

## CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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