

In the Supreme Court of the United States

K.M.K., by and through her mother and next friend,
Stephanie Lynne Brown, and STEPHANIE LYNN BROWN,

Applicants,

v.

WASHINGTON INTERSCHOLASTIC ACTIVITIES ASSOCIATION, et al.,

Respondents.

**OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION'S
AND CHRIS REYKDAL'S OPPOSITION TO THE
APPLICATION FOR AN INJUNCTION PENDING APPEAL**

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INTRODUCTION

Just last term, this Court held that decisions about how to include transgender students in sports are best left to States and school districts. *West Virginia v. B.P.J. ex rel. Jackson*, 146 S. Ct. 2356, 2378–80 (2026). In Washington State, the Legislature has long allowed transgender students to participate in sports based on their gender identity. But in less than a month, Washington voters will decide via ballot measure whether to reverse that policy. Applicants here ask this Court to pretermite that policy discussion in an emergency ruling and dictate a nationwide answer based on Title IX or substantive due process. But Applicants fail to meet the extraordinary burden to justify such relief. The Court should deny their motion.

A party seeking an injunction from a Justice of this Court “must demonstrate that the legal rights at issue are indisputably clear.” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (citation modified). They must “clearly establish[.]” that their “claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (per curiam). Applicants here make none of these showings.

First, they cannot clearly establish that they are likely to succeed on the merits of their claims. Indeed, they cannot cite a single case from *any* court accepting either of their substantive theories here. No court has held that Title IX prohibits sex-neutral policies like Washington’s that allow student athletes to participate on the team that best corresponds to their gender identity. And Title IX certainly does not *unambiguously* prohibit transgender athletes from competing on girls’ sports teams—this Court expressly left that question open. *B.P.J.*, 146 S. Ct. at 2367 n.1. As such, the Spending Clause would not permit such an application of Title IX to States.

As to Applicants' constitutional claim, while parents undoubtedly have a right to direct the upbringing of their children, no court has accepted Applicants' theory that parents have a substantive due process right to control who their child competes against in school sports. No such right is "deeply rooted in our history and tradition" and "essential to our Nation's scheme of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022) (citation modified).

Unable to point to any circuit conflict on the merits of their claims, Applicants claim that a decades-old circuit split about mandatory versus prohibitory injunctions justifies emergency relief. But this issue had no impact on the outcome here and Applicants exaggerate the conflict in any event.

Even if Applicants could show a likelihood of success on any of their claims, they cannot "clearly establish[] . . . that denying them relief would lead to irreparable injury." *Cuomo*, 592 U.S. at 16. What Applicants contend happened to K.M.K. at a wrestling match last December is terrible, but nothing this Court can do will go back in time and prevent that incident. And that incident was not an inevitable or even likely result of Washington's gender-inclusive sports policies; as Applicants admit, the type of cheating they allege has a long history in wrestling and occurs in matches that do not involve transgender students. Dkt. 1 at 14, ¶ 85.

At this point, the only future harm Applicants allege is the entirely speculative possibility that sometime this season K.M.K. might have to decide whether to forfeit a match. That is a far cry from the type of injury warranting this Court's emergency intervention. *Cf. B.P.J.*, 146 S. Ct. at 2373 (describing it as "*an unhappy occasion* whenever a student who wants to play school sports cannot do so"). And even that alleged injury may never come to pass given that Washington voters may prohibit transgender girls from participating in school sports next month.

Finally, Applicants have failed to “clearly establish[] . . . that granting relief would not harm the public interest.” *Cuomo*, 592 U.S. at 16. Applicants ask this Court to overturn longstanding Washington law, but a State is irreparably harmed “[a]ny time” it is “enjoined by a court from effectuating statutes enacted by representatives of its people.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (brackets in original) (citation omitted). That intrusion into State sovereignty is especially stark here, when Washington voters themselves are in the midst of deciding whether to change Washington law. *See, e.g., Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools.”). And the harms to the public go beyond Washington’s sovereign interests, because the relief Applicants seek would require the State to disclose highly sensitive medical information of other student athletes to K.M.K. and her team.

The Court should deny Applicants’ motion.

STATEMENT OF THE CASE

A. State Law Prohibits Discrimination Against Transgender Students

The Washington Law Against Discrimination (WLAD) prohibits discrimination on the basis of certain protected characteristics, including race, creed, national origin, sex, and gender identity. Wash. Rev. Code § 49.60.030(1). The Office of Superintendent of Public Instruction (OSPI) is required to ensure that public schools comply with state antidiscrimination laws, including the WLAD. Wash. Rev. Code §§ 28A.642.005, .010; *see also* Wash. Rev. Code § 49.60.040(2).

OSPI oversees K-12 education in Washington, Wash. Const. art. III, § 3; Wash. Rev. Code § 28A.300.010, while school districts are responsible for the day-to-day operation of public education, including interscholastic athletics. *See* Wash. Rev. Code §§ 28A.150.230, 28A.600.200. Most school districts have delegated their

authority to administer interscholastic sports to the Washington Interscholastic Athletic Association (WIAA), a private 501(c)(3) nonprofit organization that sets rules and regulations governing interscholastic athletics. Dkt. 48 at 2.¹ The WIAA is governed by its member schools, *id.*, and it must comply with state antidiscrimination laws, Wash. Rev. Code § 28A.600.200(1).

Washington’s Equal Education Opportunity Law expands on the protections granted by the WLAD and specifically addresses discrimination faced by transgender students. *See* 2019 Wash. Sess. Laws 984–87; Wash. Rev. Code § 28A.642.010. The Legislature directed the development of a model policy and procedure for eliminating discrimination based on gender identity and expression in Washington public schools to “address the unique challenges and needs faced by transgender students in public schools.” Wash. Rev. Code § 28A.642.080(3). Each public school district in Washington is required to adopt such a policy, Wash. Rev. Code § 28A.642.080(1)(a), and OSPI is responsible for enforcing this requirement, Wash. Rev. Code § 28A.642.030.

The model “Gender-Inclusive Schools” policy reiterates that Washington law provides “all students, including transgender and gender-expansive students, the opportunity to participate in physical education and athletic programs/opportunities in a manner that is consistent with their gender identity.” Dkt. 44-2 at 4. Accordingly, sports teams in Washington are separated based on gender identity, not birth-assigned sex, and all student athletes in Washington may participate on the team that best aligns with their gender identity. Dkt. 44-2 at 4; Dkt. 36-5 at 5.

¹ District court filings in *Stephanie Lynne Brown, et al. v. Washington Interscholastic Activities Association*, No. 3:26-cv-05616-DGE (W.D. Wash. 2026), will be short cited as Dkt. ___. Ninth Circuit filings in *Stephanie Lynne Brown, et al. v. Washington Interscholastic Activities Association*, No. 26-5488 (9th Cir. 2026), will be short cited as DktEntry ___. Page references are to the page numbers in the header appended by the ECF/CMS and ACMS systems.

This policy has been in effect for nearly two decades. In that time, OSPI has never received an official complaint regarding any particular transgender student's athletic participation. Dkt. 45 at 4. At the same time, the policy has made a significant difference for the handful of transgender kids who compete under it. *E.g.*, Dkt. 46 at 12–14 (enumerating benefits to transgender youth from participating in school sports including mental health, cardiovascular health, bone health, and cognitive development). Inclusion of transgender girls in girls' sports also benefits cisgender girls—states with such policies see *greater* participation in girls' sports and those with exclusionary policies see less. Dkt. 46 at 14.

In the upcoming election, Washington voters will decide whether this policy should continue. Initiative No. IL26-638 will appear on the ballot in the November 2026 general election. If passed, it would prohibit transgender girls from participating on girls' athletic teams. *See* Washinton Secretary of State, *Initiative Measure No. IL26-638*, https://www2.sos.wa.gov/_assets/elections/initiatives/finaltext_3276.pdf (last visited Oct. 12, 2026).

B. Incident Involving K.M.K. at December 2025 Wrestling Match

K.M.K. is a high school student who has participated in wrestling and soccer in the Puyallup School District. Dkt. 1 at 3. Applicants allege that, during a wrestling match in December 2025, K.M.K.'s opponent used a tactic known as an “oil check,” in which one wrestler inserts a finger into their opponent's anus or vagina. Dkt. 1 at 10–12. After the match, another team's coach told K.M.K. and her mother that K.M.K.'s opponent was a transgender girl. Dkt. 1 at 89. Brown complained to K.M.K.'s school and pulled K.M.K. from wrestling. Dkt. 1 at 15–16.

As Applicants acknowledge, the “oil check” tactic, though prohibited under wrestling rules, is well-known, has long existed, and occurs between cisgender wrestlers. Dkt. 1 at 14. After K.M.K. and her mother complained about the conduct,

the Pierce County Prosecutor's Office investigated to determine if it constituted sexual assault. Dkt. 36-15 at 8. The prosecutor declined to file charges, noting that oil-check tactics were "somewhat common" in wrestling and that there was insufficient evidence to prosecute. Dkt. 36-15 at 9.

C. Courts Below Deny Preliminary Injunctive Relief

Six months after the incident, Applicants filed suit. *See generally* Dkt. 1. They challenged the gender-inclusive policies of OSPI, WIAA, and the school district, which allow students to participate on sports teams consistent with their gender identity. *See* Dkt. 1 at 59–65. A month later, Applicants asked the district court to enjoin Defendants from, among other things, allowing transgender athletes to compete with or against K.M.K. in wrestling or any other contact sport or sport involving athletic skill, unless Brown is given "notice" that K.M.K. will be competing against a transgender opponent, and K.M.K. is given the right to opt out of the match or game without penalty. Dkt. 36-1 at 4.

The district court denied the preliminary injunction. The court concluded that "[c]onsidering the nature of the legal rights asserted together with the limited record presented," Applicants had not established a likelihood of success on the merits. Appl. App. 2a. As to their parental rights claim, the court determined that Applicants attempted to stretch the constitutional right to parent too far by using it "as a sword (dictating the conduct of the school) rather than as a shield (choosing to remove her child from certain scenarios [Brown] deems inappropriate)[.]" Appl. App. 28a. Applicants' Title IX claims failed to show intentional discrimination against K.M.K. based on her sex, failed to state a claim under the Title IX regulations, and failed to establish deliberate indifference. Appl. App. 32a–34a, 35a–37a, 39a–49a. Finally, the court determined that the Spending Clause foreclosed Applicants' Title IX claims

because Defendants did not have clear notice that Title IX prohibited gender-inclusive policies like those required by Washington law. Appl. App. 50a–55a.

The district court also weighed the parties’ various expert reports and made factual findings as to the risk of harm transgender athletes posed to K.M.K. Appl. App. 14a–15a, 40a–42a; 56a–57a. The court found that “[Applicants’] evidence and expert reports are less than clear as to whether there is a higher risk of injury to cisgender girls when competing against transgender athletes.” Appl. App. 40a. The court concluded that Applicants were not likely to be irreparably harmed because “the evidence from [Applicants’] experts does not point to the conclusion that a greater risk of harm to cisgender girls inherently exists when transgender girls participate on girls’ teams.” Appl. App. 56a; *see also* Appl. App. 57a.

Applicants filed a motion for injunctive relief pending appeal before the Ninth Circuit and demanded a ruling by September 25, six weeks before the start of the wrestling season in mid-November. DktEntry 16.1, 17.1. The court denied Applicants’ motion. *See* Appl. App. 68a–78a. It concluded that Applicants failed to establish any basis for emergency relief and that this failure “alone would be sufficient to deny the request.” Appl. App. 71a. The Court also concluded that Applicants “have not made a strong enough showing on the merits to warrant the relief sought.” Appl. App. 72a. The Court distinguished the parental right asserted by Brown from those recognized in *Mahmoud* and *Mirabelli*. Unlike *Mahmoud*, Applicants did not argue that allowing K.M.K. to compete against transgender athletes burdened her religious exercise. Appl. App. 74a (citing *Mahmoud v. Taylor*, 606 U.S. 522, 568 (2025) (“It must be emphasized that what the parents seek here is not the right to micromanage the public school curriculum, but rather to have their children opt out of a particular educational requirement that burdens their well-established right to direct the religious upbringing of their children.”)). And unlike *Mirabelli*, which addressed

parents’ rights to information about their own children, Applicants asserted a “novel right” to demand private medical information about *other* children. Appl. App. 75a (citing *Mirabelli v. Bonta*, 607 U.S. 492, 497 (2026) (per curiam)). As to their Title IX claims, the Ninth Circuit noted that this Court in *B.P.J.*, 146 S. Ct. 2356, had expressly left open the relevant question in this case, and that the district court’s conclusion on the Title IX claims, largely based on its evaluation of the evidence and findings of factual disputes, was entitled to deference. Appl. App. 73a.

ARGUMENT

Applicants are not entitled to the “extraordinary relief” of an injunction pending appeal. See *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). They do not even attempt to meet the high bar for obtaining an injunction pending appeal, which requires an “indisputably clear” legal right to relief. *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers). Nor can they show that they are likely to succeed on the merits under any possible standard. Title IX does not prohibit sex neutral policies like Washington’s that allow student athletes to participate on the team that best corresponds to their gender identity. This Court *just* held that “sex” as used in Title IX means sex assigned at birth, not gender identity, so a policy that separates teams by gender identity, not sex, does not discriminate on the basis of sex. *B.P.J.*, 146 S. Ct. at 2373. And Title IX certainly does not *unambiguously* prohibit transgender athletes from competing on girls’ sports teams—this Court expressly left that question open. *Id.* at 2367 n.1. As such, the Spending Clause would not permit such an application of Title IX to States.

Applicants’ constitutional claim fares no better. There is no deeply engrained right buried in the Due Process Clause for parents to decide who their children compete against in school sports. Neither *Mahmoud*, 606 U.S. 522, nor *Mirabelli*, 607

U.S. 492, offers any support to Applicants. *Mahmoud* was a free exercise case—a claim that Applicants do not bring. And *Mirabelli* dealt with parents’ rights to medical information about their *own* children. It did not establish a parental right to bespoke rules governing public school sporting events.

Unable to point to any circuit conflict on the merits of their claims, Applicants claim that a decades-old circuit split about mandatory versus prohibitory injunctions justifies emergency relief. But this issue had no impact on the outcome here and Applicants exaggerate the conflict in any event. Despite using different language and approaches, all circuits view with skepticism the type of far-reaching relief that Applicants seek here.

Applicants cannot meet any other requisite for injunctive relief. They cannot establish irreparable harm based on the speculative possibility that K.M.K. might wrestle a transgender athlete or have to decide whether to forfeit a high school wrestling match. And the equities and public interest weigh strongly against the relief they seek, which would override Washington’s sovereign interests in governing its own public schools and expose private information of many student athletes. This case is also a poor vehicle, and in a poor posture, to evaluate an issue this Court has not deemed cert-worthy for over a quarter-century. And there are no grounds here to grant certiorari before judgment. The application should be denied.

A. Applicants Misstate the Legal Standard and There Is No Circuit Split that Would Affect the Outcome Here

Applicants ask this Court to grant an injunction pending appeal, but they invoke the standards applicable to *stays* of lower court orders. That is because they cannot possibly meet the standard that this Court applies under its only injunctive authority, the All Writs Act, 28 U.S.C. § 1651(a). They also suggest that review is warranted to resolve a circuit split regarding the treatment of requests for preliminary injunctions. But no circuit split exists that would affect the outcome

here—any different treatment is a matter of semantics, not substance, and is not outcome determinative anyway.

1. An injunction is not warranted under the All Writs Act

Applicants ground their request in Rule 23, *see* Appl. ii, but they seek an injunction—not a stay. An injunction from this Court is “extraordinary relief” that “‘demands a significantly higher justification’ than a request for a stay, because unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’” *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens*, 479 U.S. at 1313 (Scalia, J., in chambers)). “This power is used . . . ‘sparingly and only in the most critical and exigent circumstances.’” *S. Bay United Pentecostal Church v. Newsom*, 590 U.S. 965, 966 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (citation omitted). “The only source of authority for this Court to issue an injunction is the All Writs Act, 28 U.S.C. § 1651(a).” *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers).

To obtain an injunction from this Court, the applicant must show that the “legal rights at issue” in the underlying dispute are “indisputably clear” in its favor, *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers) (citation modified), and that an injunction is “necessary or appropriate” in aid of the Court’s jurisdiction, 28 U.S.C. § 1651(a). And, as with injunctive relief generally, the applicant must also satisfy all of the remaining factors relevant for such relief, namely “that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest,” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)—with the latter two factors merging where, as here, the injunction would run against the government, *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Applicants fail to satisfy any of these requirements.

First, Applicants’ entitlement to relief is not “indisputably clear” because they fail even to clear the bar to show they are likely to succeed on the merits. *See infra* pp. 16–35.

And second, Applicants fail even to argue that an injunction is necessary or appropriate to aid this Court’s jurisdiction. “Even without an injunction pending appeal, the applicants may continue their challenge to the [policies] in the lower courts.” *Hobby Lobby*, 568 U.S. at 1404 (Sotomayor, J., in chambers). Indeed, Applicants’ appeal of the district court’s denial of the preliminary injunction is currently being briefed at the Ninth Circuit.

Applicants elide these requirements, instead citing two cases where this Court granted injunctions and explained its reasoning under the *Winter* factors. *See* Appl. 13. But Applicants should not get a hall pass for failing to address the statutory condition under 28 U.S.C. § 1651(a) or the repeated admonition from this Court that parties seeking injunctions pending appeal must meet a higher “indisputably clear” standard to obtain relief. *Hobby Lobby*, 568 U.S. at 1403 (Sotomayor, J., in chambers); *Lux*, 561 U.S. at 1307 (2010) (Roberts, C.J., in chambers); *see also Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Alito, J., dissenting). Indeed, it is the very standard Applicants’ counsel set out in *B.P.J.* in urging this Court to vacate the Fourth Circuit’s injunction pending appeal in that case. *See* Appl. to Vacate the Inj. at 11, *West Virginia v. B.P.J.*, No. 22A800 (U.S. Mar. 9, 2023).

2. There is no circuit split affecting the outcome here or meriting this Court’s intervention generally

With no arguable circuit split on the merits, Applicants cast about for any noteworthy issue, ultimately conjuring up a procedural conflict over the circuits’ treatment of “mandatory” preliminary injunctions. But that issue is not outcome-

determinative and Applicants cannot identify any meaningful conflict in the circuits' jurisprudence.

At the outset, the mandatory injunction standard does not warrant this Court's review because resolving it would have no effect on the outcome here. Before turning to its heightened test for mandatory injunctions, the Ninth Circuit first analyzed Applicants' request under the traditional injunction factors and concluded they were not entitled to preliminary relief. *See* Appl. App. 73a–78a. Specifically, it found that Applicants cannot show a likelihood of success on the merits on either of their Title IX claims or their substantive due process claim. *Id.* So under any possible standard, Applicants cannot meet the central requirement for an injunction—a showing that the movant is likely to prevail on the merits. *See Ohio Citizens*, 479 U.S. at 1312 (Scalia, J., in chambers). While the Ninth Circuit went on to note that Applicants also failed to meet the heightened standard for mandatory injunctions, *see* Appl. App. 77a–78a, that determination only added to Applicants' failures of proof—it did not dictate the outcome.

Applicants also overstate the depth and strength of the supposed conflict over mandatory injunctions. They contrast nine circuits' skepticism of mandatory injunctions with the Sixth and D.C. Circuits' purportedly more neutral stance. *See* Appl. 14–17. But this superficial tension in the circuits' jurisprudence is largely semantic. Every circuit requires preliminary injunctions to clear *Winter's* high bar. And circuits on both sides of the purported split have urged caution toward the type of far-reaching relief Applicants seek here.

As this Court has explained, a preliminary injunction is “an extraordinary remedy”, *Winter*, 555 U.S. at 22, to “preserve the relative positions of the parties until a trial on the merits can be held,” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Courts can typically accomplish this with a “‘prohibitory’ injunction which . . . freezes

the positions of the parties” during litigation. *Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983) (Rehnquist, J., in chambers). But if that’s not enough, courts turn to mandatory injunctions, which “disrupt” the status quo, *North American Soccer League, LLC v. U.S. Soccer Federation, Inc.*, 883 F.3d 32, 36–37 (2d Cir. 2018), direct parties to “take action,” *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996), or both.

Because mandatory injunctions go further than typical forms of preliminary relief, courts on both sides of the purported split have questioned their use. Four circuits have urged generalized restraint. The First and Seventh Circuits advise caution before issuing mandatory relief, see *Braintree Laboratories, Inc. v. Citigroup Global Markets Inc.*, 622 F.3d 36, 41 (1st Cir. 2010); *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020); the Fourth Circuit imposes “more searching” review, *PSEG Renewable Transmission LLC v. Arentz Family, LP*, 185 F.4th 497, 508 (4th Cir. 2026) (quoting *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004)); and the Eighth Circuit describes such injunctions as “[dis]favored,” *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984).

Five others—the Second, Third, Fifth, Ninth, and Tenth Circuits—have required movants to make stronger showings on the *Winter* factors. See *N. Am. Soccer League, LLC*, 883 F.3d at 36–37 (requiring “a clear or substantial likelihood of success on the merits” (citation omitted)); *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 320 (3d Cir. 2020) (endorsing “heightened standard,” including “substantial likelihood of success on the merits”); *TitleMax of Tex., Inc. v. City of Dallas*, 142 F.4th 322, 328–29 (5th Cir. 2025) (permitting mandatory injunctions where “facts and law are clearly in favor of the moving party” (citation modified)); *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017) (reserving mandatory relief for cases where “extreme or very serious damage will result” and “the merits of the case are not

doubtful” (citation modified)); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc) (requiring “strong showing” of “likelihood of success on the merits” and “balance of harms”).

Though the Sixth and D.C. Circuits have facially rejected “differing legal standards” for “mandatory and prohibitory injunctive relief[,]” as a practical matter, their approach is similar to the majority of circuits. *United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998); accord *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 73 (D.C. Cir. 2016). The D.C. Circuit, for example, recently affirmed the denial of a “longstanding-status-quo-altering injunction that” would have “effectively give[n the plaintiff] the full relief he would receive if he won on the merits.” *Hanson v. District of Columbia*, 120 F.4th 223, 247 (D.C. Cir. 2024). The circuit reasoned that the plaintiff had not “shown the type of irreparable harm and favorable balancing of equities and interests that c[ould] warrant the exceptional relief” he sought. *Id.* at 248. And it counseled courts to “be ‘institutionally wary of granting relief that disrupts, rather than preserves, the status quo[.]’” *Id.* at 247 (quoting *Singh v. Berger*, 56 F.4th 88, 95 (D.C. Cir. 2022)). That analysis could just as easily appear in a decision on the other side of the purported split.

The Sixth Circuit also acknowledges the role of injunctions as limited to “preventing irreversible mischief during . . . litigation.” *EOG Res., Inc. v. Lucky Land Mgmt., LLC*, 134 F.4th 868, 885 (6th Cir. 2025). Its primary objection to the majority approach is that the “mandatory” category can be ambiguous. See *United Food & Com. Workers Union*, 163 F.3d at 348. Still, like its sister circuits, the Sixth has long avoided “grant[ing] temporary relief which would finally dispose of the case on its merits.” *Dunn v. Retail Clerks Int’l Ass’n, AFL-CIO, Loc. 1529*, 299 F.2d 873, 874 (6th Cir. 1962); see, e.g., *Miami Beach Fed. Sav. & Loan Ass’n v. Callander*, 256 F.2d 410,

415 (5th Cir. 1958). This is consistent with other circuits’ practice of upsetting the status quo only where the plaintiff makes an especially strong showing under *Winter*.

Even if some daylight remains between the circuits’ treatment of mandatory preliminary relief, the issue is irrelevant here (as detailed above) and provides no basis for emergency relief, as it indisputably doesn’t demand urgent resolution. This purported split first emerged with the Sixth Circuit’s 1998 decision in *United Food & Commercial Workers Union*, 163 F.3d 341. Over the decades since, this Court has sidestepped better opportunities to address the mandatory preliminary injunction standard. Chief among those is *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d 973—the en banc Tenth Circuit case that grappled with mandatory injunctions, their disfavored status, and the appropriate standard in three fractured concurring opinions. Despite granting certiorari, the Court declined to address those issues. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). This Court has also denied certiorari in multiple cases involving mandatory injunctions. *See, e.g., Mays*, 974 F.3d at 818, *cert. denied*, 142 S. Ct. 69 (2021); *Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160–63 (9th Cir.), *cert. denied*, 565 U.S. 1058 (2011); *E. Tenn. Nat. Gas Co.*, 361 F.3d at 830, *cert. denied sub nom. Joyce v. E. Tenn. Nat. Gas Co.*, 543 U.S. 978 (2004), and *cert. denied sub nom. Goforth v. E. Tenn. Nat. Gas Co.*, 543 U.S. 978 (2004). Applicants identify no compelling grounds for addressing such a stale issue now.

Nor do variations in the circuits’ formulations of the standard create the type of disparities Applicants suggest. *See* Appl. 17. Courts routinely reach decisions that would be the same under a straight application of *Winter* or a heightened standard. *See, e.g., TitleMax of Tex., Inc.*, 142 F.4th at 328–29; *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d at 1011; *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 159 F.3d 636 (Table) (D.C. Cir. 1998); *Friends for All*

Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 834 n.31 (D.C. Cir. 1984). This case is but one more example.

B. Applicants Fail to Show They Are Likely to Succeed on the Merits

Applicants are unlikely to succeed on the merits. Their Title IX claim will not succeed because neither the statute nor its implementing regulations clearly inform Washington that it was forbidden from allowing transgender girls to play on girls' sports teams as a condition of receiving federal funds. Further, Applicants cannot show intentional discrimination where the policy separates sports teams by gender identity and not sex. Applicants' novel Due Process claim is not likely to succeed either because there is no parental right grounded in the Fourteenth Amendment to obtain medical information about other children and dictate the terms of participation in school sports.

1. Applicants are unlikely to succeed on their Title IX claim

a. The Spending Clause bars Applicants' Title IX claim

Applicants' Title IX claim fails at the threshold because the Spending Clause bars their requested relief. Washington State did not have "clear and unambiguous notice" that transgender girls could not participate in girls' sports when it received federal funds as a condition of complying with Title IX. *See Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357, 385 (2025).

Congress enacted Title IX pursuant to the Spending Clause. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions[.]" and "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Landor v. La. Dep't of*

Corrs. & Pub. Safety, 609 U.S. 59, 69 (2026) (“Congress must clearly and unambiguously alert a grant recipient to any condition on federal funds.”). Accordingly, a recipient of federal funding may be liable for violating Spending Clause legislation “only if [it] is on notice that, by accepting federal funding, it exposes itself to liability of that nature.” *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) (emphasis omitted).

Neither Title IX nor its implementing regulations notify States that gender-inclusive sports policies are unlawful. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity[.]” 20 U.S.C. § 1681(a). The statute nowhere provides that permitting participation of transgender girls on girls’ sports teams constitutes discrimination against other students on the basis of sex; it does not address athletics at all. *Cf. B.P.J.*, 146 S. Ct. at 2383 (Gorsuch, J., concurring) (observing that Title IX does not clearly and unambiguously prohibit “restricting a school-sponsored sports team to biological women or girls” and so Title IX liability could not be imposed for doing so).

Title IX’s implementing regulations specifically address athletics, providing that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against” in athletics. 34 C.F.R. § 106.41(a). The regulations permit, but do not require, separate teams for each birth-assigned sex when selection for such teams is based on competitive skill or the activity is a contact sport. 34 C.F.R. § 106.41(b). The regulations also require equal athletic opportunity based on factors such as effective accommodation, equipment, scheduling, travel, coaching, facilities, and the like. 34 C.F.R. § 106.41(c). As with the statute, nothing in the implementing

regulations even mentions transgender athletes, much less prescribes eligibility requirements for their participation on sports teams.

In *B.P.J.*, this Court expressly left open the question relevant here, which is whether Title IX “allow[s] biological males who identify as female to participate on girls’ and women’s sports teams.” 146 S. Ct. at 2367 n.1 (emphasis omitted). Based on this open question and the findings of factual disputes reviewed for clear error, the lower courts have found Applicants are unlikely to succeed on the merits of their Title IX claim. *See* Appl. App. 75a; 37a–39a. Applicants ignore all of this, instead claiming that when this Court construed Title IX in *B.P.J.*, it “sa[id] what the [statute] has ‘always meant,’” and therefore Washington State was somehow always on notice that Title IX prohibits allowing transgender athletes to compete on teams aligned with their gender identity. Appl. 33 (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). But Applicants cannot explain how what this Court deemed an open question just a few months ago is actually a clear and unambiguous condition the State had sufficient notice of under the Spending Clause. *See Pennhurst*, 451 U.S. at 25. Their claim is foreclosed by the Spending Clause.

b. Applicants cannot show intentional discrimination

Even if Applicants could overcome the Spending Clause problem (which they cannot) their claim would still fail because Title IX bars only “intentional sex discrimination.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). That means Title IX bars only disparate *treatment*, not disparate *impact*. *See Female Athletes United v. Ellison*, 172 F.4th 1019, 1027 (8th Cir. 2026).

To prove intentional sex discrimination, Applicants must show either that OSPI’s policy classifies based on sex (*i.e.*, it treats male and female students differently) or that, although OSPI’s policy is sex-neutral, OSPI adopted the policy “because of, not merely in spite of, its adverse effects upon” cisgender girls. *Pers.*

Adm’r of Mass. v. Feeney, 442 U.S. 256, 274–79 (1979) (citation modified). The district court’s factual finding that “the current record does not support a finding that Defendants intentionally discriminated against” girls, Appl. App. 32a–34a, is not clearly erroneous, and Applicants’ arguments raised only on appeal are forfeited. *Timbs v. Indiana*, 586 U.S. 146, 155 (2019).

(1) Washington’s policy is sex neutral

OSPI’s policy is clearly sex-neutral because it separates teams by gender-identity, not sex. Dkt. 44-2 at 4. As this Court recently held, under Title IX, distinctions based on gender identity are *not* distinctions based on sex. *B.P.J.*, 146 S. Ct. at 2373. In fact, Applicants concede that “the policy divides based on gender identity,” Appl. 29, and that it “allow[s] participation on teams by members of *either* sex on grounds *unrelated to sex*,” Dkt. 1 at 39 (emphasis added). The policy also applies equally to male and female students: boy’s teams cannot exclude transgender boys, and girls’ teams cannot exclude transgender girls. Because the policy “treats all students—male and female—the same” it does not discriminate based on sex. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020); *accord United States v. Skrmetti*, 605 U.S. 495, 517 (2025) (“But where a law’s classifications are neither covertly nor overtly based on sex . . . we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose[.]” (first citing *Feeney*, 442 U.S. at 271–74; then citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977))).

Applicants argue that the policy “treats [girls] . . . worse than [boys]” because, in practice, transgender girls have a physical advantage over cisgender girls. Appl. 20. So, they say, transgender girls will “dominate” and may injure cisgender girls where the opposite is not true for transgender boys in boys’ sports. Appl. 20. But the district court found as a fact, reviewed for clear error, that Applicants did not

meet their burden of proving this. Appl. App. 40a–44a. Applicants did not introduce *any* evidence comparing the policy’s effects on cisgender girls to cisgender boys. And after analyzing dueling expert reports, the district court found that “there are questions of fact as to whether transgender athlete participation increases the risk of physical injury or competitive disadvantage to girls[,]” because the medical evidence is “unclear” and “disputed.” Appl. App. 40a–44a; *see also, e.g.*, Dkt. 46 at 16.

Recognizing that the district court’s factual findings are not clearly erroneous, Applicants argue that the facts don’t matter because this Court made universal factual findings in *B.P.J.* that “transcend any factual record.” Appl. 22.² But this Court actually *rejected* Applicants’ position:

Not *every* biological male athlete is bigger, stronger, faster, or otherwise more athletically able than *every* biological female athlete. Some percentage of biological males . . . possess physical and athletic capabilities that fall within (or below) the range of typical female physical and athletic capabilities.

B.P.J., 146 S. Ct. at 2376. And this Court acknowledged that there is an “ongoing medical and scientific debate” regarding transgender girls’ physical attributes that “is not settled[.]” *Id.* at 2379. Contrary to Applicants’ suggestion, Appl. 23, the Court did not survey the expert reports and issue a judgment purporting to resolve that debate. And the Court was careful to use qualified language. For instance, the Court notes that mixed sex sports “*can*” raise safety concerns and “*can*” raise fairness

² Applicants attempt to drum up a circuit split where none exists. *Contra* Appl. 22. Like the Seventh Circuit, the Ninth Circuit recognizes legislative facts, *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026–29 (9th Cir. 1992), and deference to controlling Supreme Court precedent, *United States v. Esqueda*, 88 F.4th 818, 828 (9th Cir. 2023). *Frank v. Walker* does not create a split or require district courts to disregard the evidence in a particular case in favor of qualified generalizations from a court of review. Indeed, *Frank* itself recognizes that state-specific findings “do matter to some issues” and a district court may properly rely on record evidence if there are material variations across cases. *Frank*, 768 F.3d 744, 750–51 (7th Cir. 2014).

concerns. *B.P.J.*, 146 S. Ct. at 2367 (emphasis added); *see also id.* at 2372 (“safety and competitive fairness issues . . . *can* arise” (emphasis added)). The Court said why it was cautious: “The legislatures and the schools are better equipped—and under the Constitution, are the more appropriate entities—to assess the competing medical and scientific considerations and draw appropriate lines.” *Id.* at 2378. And again, this Court expressly stated that “[n]othing in this opinion is intended to decide t[he] question” of whether “schools may *allow*” transgender girls “to participate on girls’ and women’s sports teams.” *Id.* at 2367 n.1 (first emphasis added).

Regardless, even if Applicants had shown that OSPI’s gender-inclusive policy disproportionately impacts cisgender girls, that is a disparate *impact* claim, not a disparate *treatment* claim. To prove disparate *treatment*, Applicants must show that “the law *itself* treats [a group] . . . differently[.]” *Feeney*, 442 U.S. at 272 (emphasis added), not just that the policy, although “neutral in [its] treatment of different groups . . . in fact fall[s] more harshly on one group than another[.]” *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Here, the policy does no such thing.

Applicants assert, without elaboration, that “the policy places *only* females at a disadvantage—which distinguishes this case from” *Feeney*. Appl. 26. Applicants failed to prove that. But, even if they had, that a policy impacts cisgender girls disproportionately—even *exclusively*—does not prove intentional discrimination. This Court has rejected Applicants’ argument at least twice over: first in *Geduldig v. Aiello*, where the Court held that California’s exclusion of coverage for pregnancy-related disabilities from its disability insurance program did not prove sex discrimination, 417 U.S. 484, 496 n.20 (1974), and again in *Skrametti*, where the Court held that a ban on minors using puberty blockers to treat gender dysphoria did not

discriminate against transgender people even though only transgender people use that medication to treat gender dysphoria, 605 U.S. at 517–19.

In a last-ditch effort, Applicants confusingly argue that WIAA’s handbook actually sorts, in part, by sex. Appl. 4–5, 21, 25–27. The district court found differently, Appl. App. 31a–32a (“WIAA’s policy merely implements state law”), but, regardless, this is a red herring. To start, OSPI and WIAA are distinct entities. OSPI is a state agency charged with enforcing state antidiscrimination law. WIAA is a private nonprofit organization school districts contract with to administer interscholastic athletics. *See supra* pp. 3–4. So even if there were some flaw in WIAA’s handbook, that would not justify an injunction against OSPI’s enforcement of state law. And Applicants make no argument that state policy, which provides that “all students” must be allowed to participate in sports “in a manner that is consistent with their gender identity,” is based on sex, even in part. Dkt. 44-2 at 4.

Applicants are also wrong about WIAA’s policy: under WIAA rules, “All students have the opportunity to participate in WIAA athletics . . . consistent with their gender identity.” Dkt. 36-6 at 43. Stray references to “boys’ and girls’ teams,” Dkt. 36-6 at 92, do not negate the fact that sports teams in Washington are separated by gender identity, not sex. *Contra* Appl. 4–5, 21, 25–27. Applicants introduced no evidence showing that WIAA in fact sorts students by sex and not gender identity.³

(2) OSPI’s policy was not adopted for a discriminatory purpose

Because OSPI’s policy is sex-neutral, Applicants can demonstrate likelihood of success on their intentional discrimination claim only by making a clear showing that

³ Even if WIAA *were* improperly separating teams based on sex in violation of Washington law and OSPI policy, that would not entitle Applicants to the remedy they seek here: enforcement of strictly sex separated teams. The appropriate remedy, if any, would be an injunction against WIAA to ensure that it did not discriminate on the basis of sex, which could include separating teams exclusively based on gender identity and not sex.

the policy was adopted because of the “gender-based discriminatory purpose” of disadvantaging cisgender girls. *Feeney*, 442 U.S. at 276. To do so, Applicants must demonstrate “more than intent as volition or intent as awareness of consequences.” *Id.* They must instead prove that OSPI “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon” girls. *Id.* Put differently, “*Feeney* holds that it is not enough to show that state actors knew that women would fare worse than men under an official policy; instead the plaintiff must show that the state actors adopted that policy because of, not in spite of or with indifference to, its effect on women.” *Bond v. Atkinson*, 728 F.3d 690, 693 (7th Cir. 2013).

The district court did not clearly err in finding that Applicants failed to show that OSPI enacted the gender-inclusive policy “because of, not merely in spite of, its adverse effects upon” cisgender girls. *Feeney*, 442 U.S. at 279 (citation modified); Appl. App. 32a–34a. In the district court, Applicants attempted to prove discriminatory intent based exclusively on OSPI’s alleged awareness of the disparate impact of the policy. *See* Dkt. 36 at 23–29. They argued that because OSPI knew that gender-inclusive policies allegedly disparately impact cisgender girls, adopted the policy anyway, and then refused to repeal it, OSPI *must* have adopted and maintained the policy for the purpose of disadvantaging cisgender female students. *See id.* Applicants maintain the same argument here. But the district court correctly held that awareness of a disparate impact does not prove intentional discrimination.

The district court found as a fact, reviewable for clear error, that Applicants did not make a clear showing that OSPI knew of a disparate impact on girls. Appl. App. 44a (“there is no evidence in the record Defendants were aware of such risks and chose to implement their transgender-inclusive athletics policies anyway”). But even if Applicants *had* shown that OSPI was aware of a disparate impact, this Court has

held, as a matter of law, that knowledge or “awareness of consequences” is not enough. *Feeney*, 442 U.S. at 279. “[P]urpose rather than knowledge is required to impose . . . liability . . . for . . . discrimination.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

While disparate impact can sometimes lead to an inference of intentional discrimination, “an inference is a working tool, not a synonym for proof.” *Feeney*, 442 U.S. at 279 n.25. Aside from “rare” cases where there is no plausible neutral ground for the policy, disparate impact may serve only as a “starting point,” it “is not determinative,” and “the Court *must* look to other evidence” to find discriminatory purpose. *Arlington Heights*, 429 U.S. at 266 (emphasis added). Here, there is a sex-neutral ground on the face of the policy: barring discrimination based on “gender expression, gender identity, or sex.” Dkt. 44-1 at 2; *see also* Wash. Rev. Code § 49.60.010 (legislative purpose of the Washington Law Against Discrimination). So, to prove intentional sex discrimination, Applicants were required to make a clear showing, based on “the totality of legislative actions establishing” the policy, that OSPI’s true purpose was to disadvantage cisgender girls, not to protect transgender students. *Feeney*, 442 U.S. at 279. *Arlington Heights* suggests several non-exclusive factors, including the “historical background of the decision[,]” the “specific sequence of events leading up to the challenged decision[,]” whether there were “[d]epartures from the normal procedural sequence[,]” and the “legislative and administrative history[.]” *See Arlington Heights*, 429 U.S. at 267–68.

Despite these clear requirements and the pages Applicants spend on them here, Appl. 26–29, they never made *any* argument on these points in the district court (they did not cite *Arlington Heights* once), so the district court did not reach these issues. *See* Dkt. 36 at 23–26. Because these arguments were “neither pressed nor

passed upon below,” they are forfeited, and the Court should not consider them. *Timbs*, 586 U.S. at 155.

In any event, Applicants’ analysis focuses on the wrong actors. Washington’s *Legislature* barred discrimination against transgender students twenty years ago, and since then OSPI has implemented and enforced State law, which WIAA is also required to follow.⁴ So, to assess whether Washington’s protections for transgender students were secretly enacted for the purpose of harming cisgender girls, one must look to *the Legislature’s* motives. Applicants do not even try. Even if OSPI were the relevant decisionmaker, nothing Applicants point to proves that OSPI enforces the gender-inclusive policy “because of, not merely in spite of, its adverse effects upon” cisgender girls. *Feeney*, 442 U.S. at 279 (citation modified). All of it is consistent with an effort to protect transgender students from discrimination.

Applicants first argue that because the WIAA did not sponsor girls’ sports before 1967, there is a “history of discrimination against girls’ high school sports,” which, they contend, proves that the purpose of adopting the gender-inclusive policy was to disadvantage cisgender girls. Appl. 27 (citation modified). Not so. WIAA’s past practices are not attributable to OSPI, and, in any event, any alleged discrimination forty years before Washington’s legislature amended the WLAD and the gender-inclusive policy was adopted has little bearing on the contemporary decision-makers’ motives. *Arlington Heights* instructs courts to look to “[t]he specific sequence of events leading up to the *challenged decision*,” 429 U.S. at 267 (emphasis added), and “past

⁴ Contrary to Applicants’ suggestion that Washington law actually allows schools to bar transgender students from participating in sports consistent with their gender-identities, Appl. 29, Washington law is clear that schools must allow transgender students to participate on teams consistent with their gender identities. Wash. Rev. Code § 49.60.030(1)(b). But to the extent a federal court finds this issue material and Washington law unclear, that court could certify the question to the Washington Supreme Court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997).

discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful,” *Abbott v. Perez*, 585 U.S. 579, 603 (2018) (citation modified).

Applicants next argue that the fact that Washington switched from sex-separated teams to gender identity separated teams itself establishes a discriminatory purpose. Appl. 27. But simply pointing to the change and an alleged disparate impact does not prove that the *purpose* of the change was to disadvantage cisgender girls, or else the requirement of showing intent would become meaningless.

Applicants next cite a newspaper article to argue that the WIAA’s amendment of *its* initial gender-inclusive policy to omit a requirement that transgender students undergo surgeries and hormone therapy proves a “disregard for [girls] and girls’ sports.” Appl. 28. This argument was never presented to the district court and was waived, but besides that, it fails for at least two reasons. First, WIAA’s amendments to *its* policy have no bearing on OSPI’s motivation in adopting its *separate* policy. That alone is fatal. Second, the article itself explains why WIAA made the changes, and it was not to disadvantage cisgender girls. It was because the earlier version of the policy was “considered . . . too steep for a child and assumed that transgender equated surgery” and then the “Department of Justice and Department of Education sent letters to all athletic associations with its suggestions.” Jayda Evans, *Ten years on, WIAA’s transgender policy keeps conversation going*, Seattle Times (Apr. 4, 2017), <https://perma.cc/C6GZ-R689>.

Finally, Applicants argue that OSPI’s refusal to repeal the policy after receiving informal complaints about the alleged disparate impact on girls “suggests Defendants d[id] not care about girls’ sports as much as boys’ sports.” Appl. 28–29. It does not. Applicants are just repackaging their argument—foreclosed by *Feeney*—that OSPI *must* have intended to harm girls because it knew the policy could have a

disparate impact. But awareness of consequences is not enough, and that is so regardless of whether the awareness occurs before a policy is enacted or afterward. Courts cannot “assume unconstitutional legislative intent even when statutes produce harmful results.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

c. Applicants fail to show any deliberate indifference

Without evidence that Washington’s gender inclusive sports policies themselves are intentionally discriminatory, Applicants attempt to prove intentional discrimination via an allegation that OSPI is deliberately indifferent to the, supposedly, discriminatory effects of those policies. Appl. 30. But because, as shown above, Washington’s gender-inclusive school sports policies do not discriminate in the first place, it is not possible for Washington State officials to have been deliberately indifferent to discrimination caused by those policies. Deliberate indifference is a way to prove that an entity bound by its agreements under Title IX violated federal law by allowing discriminatory acts to continue. *See Davis*, 526 U.S. at 641–42. It is not a way to bootstrap a claim without proving intentional discrimination.

To prove deliberate indifference, a plaintiff must show, among other things, that the defendant was deliberately indifferent “to discrimination.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *see also* Appl. 30 (conceding the point). Deliberate indifference to a disparate impact on a particular group is not enough. *Feeney*, 442 U.S. at 279; *Luft v. Evers*, 963 F.3d 665, 670 (7th Cir. 2020); *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1139 (9th Cir. 2023). Recognizing as much, Applicants now argue that OSPI has “a distinct policy of deliberate indifference” to reports of “sex discrimination,” and that OSPI’s purported policy of “ignoring” these reports violates Title IX. Appl. 30. But Applicants never raised this argument in the district court, *see* Dkt. 36 at 26–29, so their new deliberate indifference is waived, *Timbs*, 586 U.S. at 155.

In any event, Applicants’ allegations do not come close to meeting their burden. Applicants must prove, among other things, that OSPI maintained an “official policy” of deliberate indifference to reports of sex discrimination. *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1112 (9th Cir. 2020); *see also* Appl. 30 (citing *Karasek*, 956 F.3d at 1112). For example, an official policy of pairing men’s college football prospects with female ambassadors during recruiting visits, promising the prospects an opportunity to have a good time by having sex, and then ignoring complaints from the ambassadors of sexual assault once the visits conclude makes out such a claim. *See Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007).

To meet their burden, Applicants rely on media coverage about transgender girls participating in girls’ sports, complaints that the policy impacts girls’ ability to compete successfully in sports, and allegations that the policy violates Title IX. Appl. 30–31. These attempts fall flat because they establish, at most, that some people *believe* that Washington’s laws violate Title IX due to the *disparate impact* that the laws have. But they do not establish deliberate indifference to sex discrimination. The media reports and competitiveness concerns go only to show the alleged disparate impact, which is insufficient to prove intentional discrimination. *See supra* pp. 19–22. And assertions that a policy violates Title IX, even by the federal government, do not prove that it *actually* violates Title IX. *Female Athletes United*, 172 F.4th at 1029. The previous administration argued that West Virginia’s policy violates Title IX, yet this Court upheld it. *See Br. for the United States as Amicus Curiae* at 27–29, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. Apr. 3, 2024). At bottom, Applicants attempt to prove deliberate indifference by showing that “Defendants know what their policy is doing to” cisgender girls. Appl. 9 (citing same facts cited for deliberate indifference claim). But knowledge of a disparate impact

caused by an official policy—even if there were such an impact—does not prove intentional discrimination.

d. Title IX’s regulations do not ban transgender athletes from girls’ sports

Washington’s gender-inclusive athletics policies also comply with Title IX’s regulations. For more than fifty years, Title IX has been interpreted to *allow*, but not require, sex-separated teams. Indeed, the default rule under Title IX is that athletics must *not* be separated by sex. 34 C.F.R. § 106.41(a). Applicants do not meet their burden to show that this default rule should be flipped on its head.

In the relevant regulations, “[s]ubsection (a) establishes a baseline prohibition against sex discrimination[.]” *Mercer v. Duke University*, 190 F.3d 643, 646 (4th Cir. 1999), and provides that “no recipient shall provide any . . . athletics separately” based on sex. 34 C.F.R. § 106.41(a). As shown above, OSPI’s gender-inclusive policy complies with subsection (a) because it separates teams by gender identity, not sex. *See supra* pp. 19–22. Again, Applicants concede that OSPI allows “participation on teams by members of *either sex on grounds unrelated to sex*.” Dkt. 1 at 39 (emphasis added). This is not sex discrimination any more than separating teams by height or weight would be.

Applicants argue, however, that subsection (b) governs and requires teams to be *completely* separated by sex. Appl. 21. Applicants are wrong because 34 C.F.R. § 106.41(b) is an *exception* to § 106.41(a)—so a violation of (a) must be found before the exception in (b) is relevant. Because Washington’s laws and policies *do not* discriminate on the basis of sex, § 106.41(b) has no place in the analysis at all. *See Mercer*, 190 F.3d at 646. Applicants next suggest in passing that gender-inclusive policies, as applied to contact sports, violate language buried in the Department of Education’s 1979 policy guidance. *See* Appl. 21. That language provides that “if an institution sponsors a team for members of one sex in a contact sport, it must do so

for members of the other sex under [certain] circumstances.” 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). But again, OSPI’s policy is consistent with this guidance because athletes participate on the team that corresponds with their gender identity, not sex.

As a last resort, Applicants turn to subsection (c), which provides for two types of equal opportunity claims: an “effective accommodation” claim and an “equal treatment claim.” *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 964–65 (9th Cir. 2010). An effective accommodation claim is based on § 106.41(c)(1), and concerns “the opportunity to participate in athletics,” while an equal treatment claim is based on § 106.41(c)(2)–(10) and concerns “sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics.” *Id.*; see also *Pederson v. La. State Univ.*, 213 F.3d 858, 865 n.4 (5th Cir. 2000). Applicants do not argue that OSPI’s policy treats girls differently in terms of “equipment and supplies,” “scheduling,” “travel and per diem allowance,” etc. See 34 C.F.R. § 106.41(c)(2)–(10). That leaves an effective accommodation claim. “Whether a funding recipient has met its ‘effective accommodation’ obligation is determined using a ‘three-part test’ drawn from OCR’s 1979 Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979), and further elaborated in OCR’s 1996 Clarification.” *Mansourian*, 602 F.3d at 965; see also *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) (adopting the same guidance). But Applicants have never addressed any of the three effective accommodation elements because this is “a distinct breed of Title IX claim separate from [Applicants’] claims of discrimination.” Appl. App. 35a–36a. Nor could they succeed if they had. Washington has a proud historical tradition of promoting sex and gender equality, including in sports. See *supra* pp. 3–5.

At bottom, “the regulations permit, but do not require, aid recipients to organize their athletic programs and facilities by biological sex [T]hey could also

separate programs and facilities by gender identity.” *Tennessee v. Dep’t of Educ.*, 104 F.4th 577, 610–11 (6th Cir. 2024).

e. Applicants do not show a private right of action for nonintentional discrimination under Title IX

Finally, to the extent Applicants urge an interpretation of the Department of Education’s guidance or regulations that extends beyond the statute and forbids gender-inclusive policies that the statutory text permits (*i.e.*, those that are not intentional discrimination), this Court could not accept that argument without revisiting its prior suggestions that there is no private right of action to enforce guidance or regulations that go beyond Title IX’s text. *Jackson*, 544 U.S. at 178 n.2 (“[P]laintiffs may not assert claims under Title IX for conduct not prohibited by that statute”); *see also Alexander v. Sandoval*, 532 U.S. 275, 285 (2001) (holding that there is no private right of action to enforce regulations that “forbid conduct” that statute “permits”); *Garland v. Cargill*, 602 U.S. 406 (2024) (invalidating rule that exceeded agency’s statutory authority); *see also Niblock v. Univ. of Ky.*, 165 F.4th 460, 469–75 (6th Cir. 2026) (Sutton, J., concurring) (observing that “we are skeptical of this guidance’s validity” and that “Title IX likely does not provide a private cause of action for conduct proscribed only by the Department’s regulations and interpretive guidance”).

2. Applicants are unlikely to succeed on their Due Process claim

Applicants argue that a heretofore unknown right to demand that public schools conduct athletics according to rules acceptable to all parents inheres in the Due Process Clause of the Fourteenth Amendment. Appl. 35. But such rights must be “deeply rooted in our history and tradition” and “essential to our Nation’s scheme of ordered liberty.” *Dobbs*, 597 U.S. at 237 (citation modified); *see also Mirabelli*, 607 U.S. at 499 (Barrett, J., concurring) (“the Court has crafted a demanding test for recognizing unexpressed rights”). Courts must “carefully formulate[] the interest at

stake in substantive-due-process-cases” to be “precise.” See *Washington v. Glucksberg*, 521 U.S. 702, 722–23 (1997).

Applicants attempt to anchor their asserted due process interest in the general right of parents “to direct the upbringing and education of [their] children.” Appl. 34 (brackets in original) (quoting *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925)). But this is far too general a formulation to be useful. Applicants really allege that parents have a fundamental right, “deeply rooted in this Nation’s history and tradition[,]” to control rules of competition for school sports. See *Glucksberg*, 521 U.S. at 703. They insist that parents should get to decide how their children should “avoid harm” and the “safety risks they face ‘during school hours.’” Appl. 35 (quoting *Mirabelli*, 607, U.S. at 497). And they simultaneously argue that they should not be forced to forego participation in school sports when the rules of the game do not suit them—instead demanding to opt out “without penalty” in particular situations where the rules operate to their asserted detriment. Appl. 38. There is, obviously, no such deeply rooted constitutional right.

Courts have long recognized that parental rights to direct the “upbringing” of their children must often give way in the school context, where parents’ authority may be restricted “by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (footnotes omitted); see also *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (rejecting parental right to send children to a racially segregated private school); *Herndon ex rel. Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (rejecting parental right to opt children out of community service requirement to graduate high school); *Leebaert v. Harrington*, 332 F.3d 134, 141–43 (2d Cir. 2003) (rejecting parental right grounded in the due process clause to opt child out of health and safety curriculum).

None of the cases Applicants cite for the general proposition that the Constitution protects parental interests support the particular right they assert. *See Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (striking down law prohibiting English-only education in *any* school, but preserving “the state’s power to prescribe a curriculum for institutions which it supports”); *Pierce*, 268 U.S. at 534–35 (invalidating state statute prohibiting private school instruction, but preserving “the power of the state reasonably to regulate all schools”); *Prince*, 321 U.S. at 166 (“Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.” (footnotes omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (“the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests”); *Parham v. J.R.*, 442 U.S. 584, 603–08 (1979) (holding that parents have the dominant role in deciding for a child whether to seek inpatient mental health treatment at state run institutions, but acknowledging the state’s interest in making an independent judgment concerning the need for treatment as well as how to allocate limited resources); *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (limiting its holding to the visitation context and refusing to “define today the precise scope of the parental due process right in the visitation context”).

Reading parental rights too broadly in the school context risks undermining the viability of public schools entirely, in part because different “parents would often likely . . . prefer opposite and contradictory outcomes.” *Barr*, 949 F.3d at 1233; *see also Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995) (holding due process clause does not protect a parental “right to dictate individually what the schools teach their children”) *abrogation on other grounds recognized by Martinez v. Cui*, 608 F.3d 54, 63–64 (1st Cir. 2010). For example, wrestling is divided by weight

class. Weighing in too heavy can disadvantage an athlete by requiring them to wrestle opponents who are bigger and stronger. K.M.K. wrestles in the 190 pound class. Dkt. 1 at 10. If she measures 195 pounds, she would compete in the 235 pound class, facing opponents up to forty pounds heavier. To avoid this, parents might demand that the weight classifications be drawn differently, or that their child not wrestle any heavier opponent. But the Constitution does not entitle parents to bespoke athletic rules. *See Runyon*, 427 U.S. at 178 (parents “have no constitutional right to provide their children with private school education unfettered by reasonable government regulation”).

Neither *Mahmoud* nor *Mirabelli* supports Applicants. This Court decided *Mahmoud* on free exercise grounds, which Applicants do not assert. *Mahmoud*, 606 U.S. at 545. There, this Court held particular instruction had “‘a very real threat of undermining’ the religious beliefs that the parents wish to instill in their children,” and so parents had a right to notice and opt-out from that instruction. *Id.* at 553 (quoting *Yoder*, 406 U.S. at 218). Applicants make no argument that wrestling transgender athletes will undermine Brown’s ability to guide the religious development of K.M.K. Further, while *Mahmoud* held that a parent cannot be required to entirely forego public education to preserve their right to instill religious values in their children, *id.* at 561–62, no one is suggesting that K.M.K. forego public education altogether. Brown’s objection is to the *wrestling* rules, which allow athletes to participate on the team that corresponds to their gender identity. If Brown feels it necessary, she can decline permission for K.M.K. to participate in wrestling and still obtain the benefits of a public education.

Mirabelli is similarly inapposite. There, the Court concluded applicants were likely to succeed on the merits of parents’ substantive due process right to medical information about their *own* children. *Mirabelli*, 607 U.S. at 497. The Court vacated

an order staying an injunction over policies that “shut [parents] out of participation in decisions regarding their children’s mental health.” *Id.* But here, Washington’s policies do not require any school to keep secrets *about K.M.K.* from Brown. Instead, Brown seeks sensitive information about the biology and gender identity of *other* parents’ children. No decision of this Court establishes any such right—which would pit the rights of parents who would want to keep their children’s information private directly against Brown’s purported right to this information. Applicants’ objection that whether K.M.K. “is set to wrestle a male opponent is information *about K.M.K.*,” Appl. 36, would make any sensitive information about a child at school subject to disclosure if they came into contact with a child whose parent demanded it. Brown fails to show that her claimed parental right has any grounding in the Due Process Clause.

3. Applicants fail to show irreparable harm

The “irreparable” nature of Applicants’ claimed harm is manufactured. Applicants have sought emergency relief three times despite there not being any true emergency. And Applicants’ own litigation delays undermine their claimed emergency. They waited six months after the alleged assault to file suit, and then waited another month before moving for a preliminary injunction. *See* Dkt. 1, 36. Their claimed basis for an emergency has also shifted over time. First, they claimed an emergency based on the start of soccer season on August 24, Dkt. 36 at 36, then the start of the school year on September 2, Dkt. 63 at 2, and now the start of the wrestling season in mid-November, Appl. 3; Appl. App. 73a; Dkt. 36-6 at 90. But “a litigant whose claim of urgency is belied by its own conduct should not expect discretionary emergency relief from a court.” *B.P.J.*, 143 S. Ct. 889 (2023) (J. Alito, dissenting from denial of emergency application).

The district court did not clearly err in finding Applicants failed to establish irreparable harm, Appl. App. 56a–57a, nor did the court of appeals err in reaching the same conclusion, Appl. App. 73a. Even setting aside the Applicants’ delay in seeking relief, the claimed harm here is speculative because it “necessarily rests on an ‘attenuated chain of inferences.’” *Trump v. California*, 609 U.S. ----, No. 26A124, 2026 WL 2473573, at *4 (U.S. Aug. 24, 2026) (quoting *Clapper v. Amnesty Int’l USA*, 586 U.S. 398, 414–15 n.5 (2013)). Applicants allege that K.M.K. was assaulted by a transgender student in a wrestling match through the use of a prohibited but well known wrestling move, then leap to the conclusion that permitting *any* transgender girls to participate in any girls’ sports necessarily puts K.M.K. at a tangible risk of significant physical harm. But this type of misconduct can and does occur in matches between cisgender wrestlers, as Applicants concede, and they offered no evidence that transgender girls are more likely to engage in it than others. Dkt. 1 at 14.

Even if the mere participation in sports with a transgender competitor constituted an automatic irreparable injury warranting emergency relief—which is untenable, *see West Virginia v. B.P.J. ex rel. Jackson*, 143 S. Ct. 889 (2023)—Applicants fail to show that such a competition is likely to occur here. *See* Appl. App. 76a (Applicants are aware of only two transgender wrestlers that K.M.K. might compete with and she “is able to forfeit a match against them even absent” an injunction pending appeal). By contrast, *B.P.J.* presented the factual reverse of these circumstances and thus, if one accepts Applicants’ theory of harm, presented a stronger case for emergency relief. There, the respondent was a transgender girl challenging a state law prohibiting her from playing on the girls’ team. The lower court’s injunction meant that a transgender girl necessarily was competing against cisgender girls. *See B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078, 2023 WL 2803113, at *1 (4th Cir. Feb. 22, 2023) (granting injunction pending appeal).

Yet this Court still denied the emergency request to vacate that injunction. *B.P.J.*, 143 S. Ct. 889. The likelihood of alleged harm is far more speculative here and weighs against this Court’s intervention.

4. The remaining factors weigh against injunctive relief

The public interest and balance of equities also weigh against an injunction. Just last term, this Court affirmed that state legislatures are “the more appropriate entities” to assess evidence and draw lines for transgender student participation in sports. *B.P.J.*, 146 S. Ct. at 2378. That’s what happened here. The Washington Legislature assessed competing considerations, deemed it necessary to prohibit gender-identity discrimination in public schools, *see* 2019 Wash. Sess. Laws 984–87 and Wash. Rev. Code § 28A.642.010, and directed OSPI to develop “rules and guidelines” to eliminate such discrimination, Wash. Rev. Code § 28A.642.020. Pursuant to that mandate, OSPI enforces the policy at issue. Applicants seek to substitute their policy preferences for the judgment of Washington’s Legislature. This Court should not allow its equitable powers to be used that way.

An injunction pending appeal is especially inappropriate here, because the people of Washington will speak directly on this issue in voting on next month’s ballot initiative. A state is irreparably harmed “any time” it is “enjoined by a court from effectuating statutes enacted by representatives of its people.” *Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers). Equitable intrusion upon state authority exacts greater harm in the area of education, which is traditionally left to the States. “No single tradition in public education is more deeply rooted than local control over the operation of schools.” *Milliken*, 418 U.S. at 741–42. Indeed, this Court has warned that “[j]udicial interposition in the operation of the public school system” requires “care and restraint” because “public education in our Nation is committed to the control of state and local authorities.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

Washington’s policies on this question, including those implemented by OSPI to execute a statutory mandate enacted by the people’s representatives, and the people’s voice on that same issue to be heard next month, should not be short circuited by judicial intervention here.

C. Certiorari Before Judgment is Not Warranted

This case does not present an issue of “imperative public importance” requiring “immediate determination by this Court.” *See* Rule 11 (citing 2 U.S.C. § 2101(e)). This case is far afield from the types of cases in which this Court has previously granted certiorari before judgment, which generally involve issues with dire consequences on large swaths of the public or other urgent issues of extraordinary national importance. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (recognizing the “great significance” of addressing constitutional authority of executive action to secure release of hostages held by Iran within timelines set by bilateral agreement between Iran and the United States, “demand[ing] prompt resolution” by the Court); *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (citing the “imperative public importance” of resolving constitutionality of federal sentencing guidelines governing more than 40,000 criminal sentences per year and causing “disarray among the Federal District Courts”); *Biden v. Nebraska*, 600 U.S. 477, 489 (2023) (recognizing national importance of clarifying the legality of student loan forgiveness policy “to avoid prolonging [financial] uncertainty for the millions of affected borrowers”).

Applicants’ primary argument for certiorari before judgment demonstrates the lack of extraordinary public import or urgency here. Applicants ask this Court to act immediately to resolve a decades-old conflict over standards governing preliminary injunction motions. Appl. 41. But to the extent this issue can be considered a conflict at all, it has lasted nearly thirty years without intervention by this Court. *See supra* pp. 11–16. That Applicants use this stale conflict as a Trojan Horse for seeking

immediate review of complex legal issues of first impression further weighs against this Court’s intervention now. Given the posture here, Applicants have not yet obtained any substantive ruling on the merits of their Title IX and due process parental rights claims by the appellate court, and instead ask this Court to address the merits in the first instance. But this Court is one “of review, not of first view,” *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017) (citation modified). Consistent with this principle, this Court prefers to consider questions with “the benefit of a well-developed record and a reasoned opinion on the merits[.]” *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988). That preference applies with particular force here because, as the Ninth Circuit noted, the district court’s findings about the merits of Applicants’ Title IX claim “rested largely on its evaluation of the evidence and findings of factual disputes.” Appl. App. 75a.

The legal issues that Applicants raise are also exactly the types of legal issues that would benefit from percolation among district and circuit courts around the country. Notably, Applicants fail to cite a single case from any district or circuit court in the country that has held that Title IX bars transgender girls from participating in girls’ sports programs, or that due process requires parental notice of other children’s medical information and control over school programming. If adopted, Applicants’ extraordinarily broad theories would have transformative impacts not just on parental control over all aspects of school sports and curricula, but on virtually any law that arguably impacts a parent’s right to control or parent their child. Further percolation of such claims would clearly aid this Court in evaluating the far-reaching implications of these arguments.

Moreover, contrary to Applicants’ arguments, their Title IX claim is not just the logical extension of this Court’s holding in *B.P.J.*, 146 S. Ct. at 2371–72. If this Court believed that *B.P.J.* mandated exclusion of transgender students from girls’

sports programs, it could easily have stated so explicitly. But this Court expressly declined to decide whether, under Title IX, “schools may *allow* biological males who identify as female to participate on girls’ and women’s sports teams,” implicitly inviting consideration of this issue by lower courts. *Id.* at 2367 n.1. This Court should allow this legal development to continue so that, if this Court ever considers the legal issues presented here, it will benefit from robust consideration by lower courts of the legal issues and the potential impacts of the dramatic changes in the law that Applicants seek.

CONCLUSION

The application for an injunction pending appeal and certiorari before judgment should be denied.

RESPECTFULLY SUBMITTED, October 13, 2026.

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