

# **SUPREME COURT OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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WEST VIRGINIA, ET AL., )  
Petitioners, )  
v. ) No. 24-43  
B.P.J., BY HER NEXT FRIEND AND )  
MOTHER, HEATHER JACKSON, )  
Respondent. )

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Pages: 1 through 103

Place: Washington, D.C.

Date: January 13, 2026

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1 IN THE SUPREME COURT OF THE UNITED STATES

3 WEST VIRGINIA, ET AL., )

4 Petitioners, )

5 v. )

6 B.P.J., BY HER NEXT FRIEND AND )

7 MOTHER, HEATHER JACKSON, )

10

11 Washington, D.C.

12 Tuesday, January 13, 2026

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3 West Virginia; on behalf of the Petitioners.

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7 Petitioners.

8 JOSHUA A. BLOCK, ESQUIRE, New York, New York; on  
9 behalf of the Respondent.

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# 1 PROCEEDINGS

2 (11:59 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 24-43, West Virginia  
5 versus B.P.J.

6 Mr. Williams.

7 ORAL ARGUMENT OF MICHAEL R. WILLIAMS

8 ON BEHALF OF THE PETITIONERS

11 States have long assigned students to  
12 sports teams by sex. West Virginia is no  
13 different. Maintaining separate boys' and  
14 girls' sports teams ensures that girls can  
15 safely and fairly compete in school sports.

1 schools can no longer designate teams by  
2 looking to biological sex. Instead, schools  
3 must place students on sports teams based on  
4 their self-identified gender. But that idea  
5 turns Title IX, a law Congress passed to  
6 protect educational opportunities for girls,  
7 into a law that actually denies those  
8 opportunities for girls.

9                   The Court should not embrace that  
10 backwards logic. Aside from its problems with  
11 Title IX, the decision below constitutionalizes  
12 one side's view of a hotly disputed issue. But  
13 West Virginia's law does not offend the Equal  
14 Protection Clause either. The West Virginia  
15 legislature reasonably and rationally defines  
16 sex based on biology and acknowledged the  
17 physical differences that biology creates.

18                   Given those differences, the law  
19 satisfies rational basis review. And the  
20 state's law satisfies even intermediate  
21 scrutiny because it is substantially related to  
22 the important governmental interest in ensuring  
23 fairness and safety in girls' sports.

24                   Respondent attacks the law by  
25 searching for a transgender classification that

1 simply isn't there. The law is indifferent to  
2 gender identity because sports are indifferent  
3 to gender identity.

4 Ultimately, West Virginia's law, like  
5 the laws of at least 26 other states, simply  
6 preserves the enduring structure on which  
7 girls' sports depends. It should be upheld.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: What's your view of  
10 what Title IX -- how it defined the separated  
11 sexes, male and female?

12 MR. WILLIAMS: So, under Title IX,  
13 Your Honor, we would look to the ordinary  
14 understanding of sex at the time that Title IX  
15 was passed, 1972, and I think also relevant  
16 would be 1974, when the Javits Amendment was  
17 passed. And at that time, the ordinary  
18 understanding of sex was biological sex,  
19 consistent with the understanding of sex  
20 reflected in West Virginia's statute.

21 I think that's also consistent,  
22 frankly, with this Court's own understanding of  
23 sex in -- in some of its own cases like  
24 *Frontiero*, where it likewise focused on things  
25 like reproductive function.

1 JUSTICE THOMAS: Well, with that  
2 definition, how would you square this challenge  
3 with the existence of, continued existence of,  
4 Title IX?

5 MR. WILLIAMS: So I think this  
6 challenge fails under Title IX and, in fact, it  
7 amounts to a back-door attack on Title IX in  
8 the sense that Title IX itself contemplates sex  
9 distinctions, and express regulations  
10 specifically applying to the context of  
11 athletics expressly contemplate the  
12 distinctions between sex of male and female  
13 sports teams.

14 JUSTICE THOMAS: In interpreting this  
15 definition, would it make a difference or does  
16 it make a difference that this is a Spending  
17 Clause statute?

18 MR. WILLIAMS: I think it absolutely  
19 does, Your Honor. Obviously, in the Spending  
20 Clause context, as this Court has somewhat  
21 recently reminded lower courts, it's important  
22 for Congress to speak with an even clearer  
23 voice because of the contractual nature of the  
24 conditions that are imposed.

25 States like West Virginia have to

1 understand exactly the obligations that they're  
2 assuming in -- in the context of a Spending  
3 Clause analysis. And so it amounts to  
4 effectively a canon of construction that  
5 requires that clearer statement in order for  
6 the condition to attach.

7 JUSTICE GORSUCH: Counsel, I -- I  
8 would have thought that's an interesting  
9 argument, that this is Spending Clause  
10 legislation in Title IX, and Congress has to  
11 speak with a particularly clear voice, and  
12 whatever it said here isn't clear enough.

13 You didn't raise that argument.

14 MR. WILLIAMS: So --

15 JUSTICE GORSUCH: And there's an  
16 argument from your friend on the other side  
17 that you waived the argument or forfeited it at  
18 least.

19 MR. WILLIAMS: Right.

20 JUSTICE GORSUCH: And it sure isn't  
21 the lead argument in your brief. Help me out.  
22 Why?

23 MR. WILLIAMS: So we, of course, start  
24 with the plain text of the statute, Your Honor,  
25 as this Court has told us to do several times.

1 JUSTICE GORSUCH: Yeah, well, the --  
2 you know, I might start with the -- the  
3 constitutional authority under which that  
4 statute was adopted, counsel.

5 MR. WILLIAMS: I think that's equally  
6 compelling authority for our understanding of  
7 the --

8 JUSTICE GORSUCH: Equally compelling?  
9 Constitution, equally?

10 MR. WILLIAMS: Perhaps -- perhaps  
11 greater compelling authority.

12 JUSTICE GORSUCH: Yeah, I would have  
13 thought, yeah.

16 JUSTICE GORSUCH: So why -- why isn't  
17 it in your brief?

18 MR. WILLIAMS: West Virginia is maybe  
19 uniquely a fan of clear statement rules, as  
20 Your Honor might know from past cases, but in  
21 the Spending Clause context, I think it is, in  
22 fact, the case that your Court has repeatedly  
23 stressed that Congress has to speak without  
24 exception --

25 JUSTICE GORSUCH: I know what we've

1 said. I'm wondering about what you didn't say.

2 MR. WILLIAMS: So I think, if you're  
3 looking at the way that West Virginia has  
4 characterized it, certainly, we have made that  
5 argument and presented that argument to this  
6 Court. I'd refer you to the topside brief.

7 It's clear and centered under a clear heading.

8 As -- I think what their suggestion is from the  
9 other side is that we didn't clearly enough  
10 raise that argument below.

11 We would take issue with that  
12 characterization. There was obviously binding  
13 contrary authority in the Fourth Circuit. And  
14 so I think, strategically, we decided not to  
15 make that the front-and-center argument because  
16 we understood that was dead on arrival in that  
17 particular court. But that's not to say that  
18 we waived the issue by any means. It's a canon  
19 of construction that continues to assist this  
20 Court in its application of the text of the  
21 statute.

22 JUSTICE JACKSON: But, counsel, can I  
23 just ask you about this, though? Have we ever  
24 applied the Spending Clause's notice  
25 requirement outside of the damages context?

1       Because, here, we're not talking about a  
2       situation in which B.P.G. is seeking damages,  
3       and I thought that was sort of a crux of the  
4       Spending Clause analysis.

5                    MR. WILLIAMS: I will concede, Your  
6       Honor, that many of the cases that talk about  
7       this arise in the context of -- or maybe even  
8       all of --

9                    JUSTICE JACKSON: All of them.

10                  MR. WILLIAMS: All of the cases arise  
11       in the context --

12                  JUSTICE JACKSON: Yes. Thank you.

13                  MR. WILLIAMS: I'll concede as much,  
14       yes, Your Honor. But I don't think the Court  
15       has ever suggested that the specific request  
16       for damages is the reason for its analysis.

17       And I think that actually would be  
18       inconsistent --

19                  JUSTICE JACKSON: But we would be  
20       having to address that, I guess, and extend it  
21       in the -- in this context if we were to take a  
22       Spending Clause tack.

23                  MR. WILLIAMS: I would respectfully  
24       disagree, Your Honor. I would say that just  
25       because the Court hasn't done so before doesn't

1 mean it's an extension per se. I think that  
2 what the Court has said is that you view the  
3 language of these statutes as effectively  
4 contractual agreements. And I think that that  
5 same sort of contractual logic applies whether  
6 you're asking the state to pay out damages or  
7 whether you're asking it to take specific  
8 action under compulsion of action.

9 JUSTICE JACKSON: So -- so who's  
10 the -- who -- who -- who is the contract  
11 between here? And -- and I thought the  
12 regulated party needs to know what it's  
13 agreeing to so it can consent, but, here, the  
14 regulated party is the schools and it's the  
15 state that's coming in. So I'm just trying to  
16 understand how the Spending Clause analysis  
17 works in this context.

18 MR. WILLIAMS: So I think the state is  
19 certainly one party that does receive federal  
20 educational funds, but it's also the many other  
21 Petitioners that stand before you, including  
22 the county school board and the state school  
23 board, are also Petitioners in this case.

24 I think there would certainly be -- if  
25 anybody were clearly bound by the conditions of

1       Title IX, it would be --

2                   JUSTICE JACKSON: So it would map on.

3       I mean, I guess I'm -- I'm worried that --

4                   MR. WILLIAMS: Right.

5                   JUSTICE JACKSON: -- this might  
6       actually implicate the question that we didn't  
7       resolve in Moyle, and so we'd have to kind of  
8       figure that out because it seems like it's a  
9       different set of facts than the typical  
10      Spending Clause application.

11                  MR. WILLIAMS: I think, if anything,  
12      Your Honor, this is maybe easier than your  
13      typical Spending Clause analysis because you've  
14      got everybody from the state all the way down  
15      to the local county school board, anybody and  
16      everybody who's involved in this case is a  
17      party to this action. In fact, you resolved a  
18      petition for cert from the Athletics Commission  
19      saying we're not actually a state actor, and  
20      the Fourth Circuit saw things quite  
21      differently.

22                  So I think there's really no concern  
23      in this case that you have an absent actor  
24      problem when it comes to the Spending Clause  
25      analysis. And, ultimately, of course, if it's

1 just a canon of construction, if you're looking  
2 for a clear statement, then I think it would  
3 apply regardless of the particular party who  
4 might be in front of you because the statute  
5 applies across the board. You know, the  
6 regulated party is going to be affected  
7 regardless of whether they happen to be in  
8 front of you in the given case.

9 JUSTICE BARRETT: Counsel, can I ask  
10 you a --

11 JUSTICE SOTOMAYOR: I presume --

12 JUSTICE BARRETT: Go ahead.

13 JUSTICE SOTOMAYOR: I'm sorry.

14 I presume that if it's statutory  
15 construction, a canon of statutory  
16 construction, it's hard to say you can waive  
17 that.

18 MR. WILLIAMS: It -- it's very hard to  
19 say you can waive that, Your Honor, yes.

20 JUSTICE BARRETT: I just wanted to ask  
21 if, on your understanding of Title IX, you  
22 could have separated by sex classrooms in  
23 biology or in math based on some evidence that  
24 you have that say men are better at math and  
25 science. What are the -- what are the the

1       limits to your Title IX theory?

2                    MR. WILLIAMS: So I -- I think your  
3       instinct there in part arises from the fact  
4       that we're skeptical of any notion that there  
5       are inherent differences. So I want to kind of  
6       acknowledge the -- the real reality of the  
7       situation.

8                    JUSTICE BARRETT: Well, your whole  
9       position in this case depends on there being  
10      inherent differences, right?

11                  MR. WILLIAMS: It does. And I think  
12       that that's exactly why discrimination in the  
13       Title IX context, where it acknowledges merely  
14       inherent biological differences, that that's  
15       not discrimination. That's a distinction.

16                  And I think that's consistent with  
17       this Court's longstanding understanding of what  
18       discrimination means. It looks to differential  
19       treatment of similarly situated individuals.

20                  So even in a case like North Haven,  
21       you're talking about differential treatment of  
22       similarly situated individuals. So, if we're  
23       talking about in an athletic context, you're  
24       not addressing similarly situated individuals.  
25       And I think, again, the Javits Amendment and

1 the regulations that flowed from the Javits  
2 Amendment are a realistic reflection of  
3 those --

4 JUSTICE SOTOMAYOR: Could you go --  
5 MR. WILLIAMS: -- meaningful  
6 biological differences.

7 JUSTICE SOTOMAYOR: What's your  
8 answer --

9 JUSTICE BARRETT: But the Javits  
10 Amendment gives you a reason in the sports  
11 context you need to do it.

12 MR. WILLIAMS: Right.

13 JUSTICE BARRETT: I'm just wondering  
14 whether, you know, your friends on the other  
15 side have basically conceded that Title IX  
16 allows sex-separated sports teams, so I don't  
17 know that we need to really get into that. I'd  
18 be a little bit concerned about what the  
19 ramifications of that might be.

20 And the Javits Amendment in the  
21 context of sports makes a difference anyway,  
22 but more broadly, I mean, if -- if -- if  
23 some -- if a state produced some studies  
24 saying, listen, you know, women's presence in,  
25 you know, calculus is holding men back because

1       they're so much more capable and they can just  
2       move so much more quickly, seems to me like  
3       there would be some risk on your understanding  
4       that that would be okay.

5                    MR. WILLIAMS: I think, again,  
6        realistically, Your Honor, that would almost  
7       certainly fail on the lack of --

8                    JUSTICE KAGAN: Well, how about chess  
9        club?

10                  MR. WILLIAMS: A chess distinction, I  
11        think, again, might fail because there's an  
12       actual lack of evidence of meaningful  
13       physiological differences that are reflected in  
14       the existence of the express regulations in the  
15       athletics context.

16                  JUSTICE KAGAN: I mean, I think a lot  
17       of people would say, you know, if you look at  
18       the ranks of chess Grand Masters, there are not  
19       a whole lot of women there, and, you know, what  
20       does that mean? Well --

21                  MR. WILLIAMS: Well, I -- I think --

22                  JUSTICE KAGAN: -- I -- I -- I --

23                  MR. WILLIAMS: Right.

24                  JUSTICE KAGAN: You know, I -- I think  
25       that there's a sort of intuitive -- I think

1       there are a lot of chess Grand Masters who  
2       would tell you that women just like for  
3       whatever reason, they're -- you know, they  
4       don't -- they're not very -- they're not as  
5       good as this.

6                    MR. WILLIAMS: I -- I think chess is  
7       an interestingly closer question. I've come to  
8       understand just recently, in fact, that there  
9       are sex distinctions in the elite --

10                  JUSTICE GORSUCH: Well, let's --  
11       let's -- you're fighting that hypothetical.  
12       And I -- I guess the question really is, okay,  
13       Title IX says you can't discriminate on the  
14       basis of sex.

15                  MR. WILLIAMS: Yes, Your Honor.

16                  JUSTICE GORSUCH: I understand what  
17       that means. I think I do, right? Can't treat  
18       men and women differently. Okay, all right,  
19       fine.

20                  You're saying, ah, but it matters  
21       whether they're similarly situated. And your  
22       friends in the government like that line too.

23                  Well, there's -- you know, I've got a  
24       lot of evidence that -- that girls perform a  
25       lot better in high school than boys, okay?

1       There's a lot of scientific evidence, whatever,  
2       all right? Let's just posit that, all right?  
3       Well, so I'm going to have a special remedial  
4       program for boys and the women can't come  
5       and -- because they're not similarly situated.

6               Why on earth would Title IX care about  
7       that? It says you can't discriminate on the  
8       basis of sex in a program or activity of your  
9       educational institution.

10              MR. WILLIAMS: So I think that --

11              JUSTICE GORSUCH: Why -- why put that  
12       gloss on it?

13              MR. WILLIAMS: And -- and, Your Honor,  
14       I want to be clear. I think the task for the  
15       Court today is somewhat easier in part because  
16       of the express regulations that they have  
17       actually not challenged and that do expressly  
18       contemplate exactly what West Virginia has  
19       done.

20              So I think your -- your hypothetical,  
21       yes, of course, is there, but I think the  
22       reality is that Congress and the agency have  
23       together kind of addressed this specific  
24       question in a way that makes this Court's task  
25       much easier.

1                   But I think the -- the problem may be  
2 with your --

3                   JUSTICE GORSUCH: There may be another  
4 answer. We don't need to rely on this  
5 similarly situated argument? Is that what  
6 you're trying to tell me, counsel?

7                   MR. WILLIAMS: I think you could also  
8 take that approach, yes, Your Honor. And I  
9 think the reality is that that hypothetical  
10 addresses a situation that's much closer to the  
11 sort of exclusion and the specific context that  
12 gave rise to Title IX in the first place.

13                  And so I think that the Court would be  
14 much more legitimately concerned that that  
15 would detect the very problem that Congress  
16 trying to head off in passing Title IX in the  
17 first place.

18                  But I think that really kind of puts  
19 the lie to the -- the position that -- that  
20 West Virginia is somehow discriminating because  
21 it's advancing the very same purpose that  
22 Congress itself was trying to advance in  
23 enacting Title IX in the first place. I mean,  
24 that's why West Virginia somewhat deliberately  
25 made its -- its -- its law mirror the exact

1 same language from the express regulations  
2 themselves.

3 JUSTICE GORSUCH: I'm afraid I've  
4 got --

5 JUSTICE KAVANAUGH: You --

6 JUSTICE GORSUCH: -- one more  
7 question -- oh, I'm sorry, please.

8 MR. WILLIAMS: Please.

9 JUSTICE GORSUCH: Go ahead. No,  
10 you're --

11 JUSTICE KAVANAUGH: Go ahead.

12 (Laughter.)

13 MR. WILLIAMS: I can do both.

14 JUSTICE GORSUCH: No, you can't do  
15 both. That's not fair. That's not fair, I  
16 mean, even -- even by our standards.

17 You -- you -- you make the argument  
18 that "on the basis of" means "solely because  
19 of," solely. We have long said that "because  
20 of" means but-for, not "solely because of."

21 The rehab act speaks of "solely  
22 because of." It seems to me an awful big  
23 stretch, counsel, to say that "on the basis of"  
24 imports anything other than but-for causation.  
25 And, you know, Comcast is against you there.

1       And I just wonder why -- why you put your eggs  
2       in that basket.

3                    MR. WILLIAMS: So three answers, Your  
4       Honor.

5                    JUSTICE GORSUCH: And -- and -- and,  
6       by the way, isn't -- isn't -- isn't the -- the  
7       distinction here solely because of sex anyway?

8                    MR. WILLIAMS: Well, let me take  
9       each -- each of those in turn or I'll try.

10                  I don't think that the case turns on  
11       the Court accepting the idea that it's solely  
12       on the basis of sex, so I think you could  
13       stop --

14                  JUSTICE GORSUCH: That's a sufficient  
15       answer right there.

16                  MR. WILLIAMS: Fair enough.

17                  JUSTICE GORSUCH: Thank you. Your  
18       turn.

19                  MR. WILLIAMS: Thank you.

20                  JUSTICE KAVANAUGH: Can you explain  
21       the relevance and significance of the Javits  
22       Amendment to distinguishing sports from all  
23       these other hypotheticals?

24                  MR. WILLIAMS: So I think the  
25       relevance and significance is Your Honors are

1 faced with a unique set of regulations and that  
2 Congress was directly and intimately involved  
3 in both the instigation of the regulation in  
4 1974 and then sort of --

5 JUSTICE KAVANAUGH: And in that law  
6 referred to the nature of particular sports,  
7 right?

8 MR. WILLIAMS: It -- it did. So what  
9 they said was we want you, the agency, HEW, to  
10 go ahead and implement Title IX writ large.  
11 And the -- it called out one specific problem  
12 that I -- I think arose on the floor about  
13 whether Title IX applies to intercollegiate  
14 athletics, in particular, intercollegiate  
15 athletics. And I would say --

16 JUSTICE KAVANAUGH: And that's been  
17 extended to high school by the regulations.

18 MR. WILLIAMS: Right, exactly.

19 JUSTICE KAVANAUGH: But -- but ruling  
20 for you on sports does not open the door in my  
21 view given the Javits Amendment to the chess  
22 club necessarily. That could be separately  
23 analyzed, but it doesn't follow from a -- a law  
24 that says sports.

25 MR. WILLIAMS: That's exactly right.

1       And that's exactly why we were trying to make  
2       your job easier in the sense that we took the  
3       language expressly from the regulations and  
4       mapped it over onto our own statute.

5                   So there's really no debate, if it's  
6       outside the context of Title IX, it's outside  
7       the context of our statute. So, at that point,  
8       the Court's analysis is done.

9                   But I think, when you have a  
10      regulatory scheme where Congress was  
11      specifically involved, you know, in fact,  
12      undertook a review, then that's exactly the  
13      sort of regulation that even in a post-Loper  
14      Bright world continues to have importance  
15      because it's longstanding, continuous,  
16      contemporaneously issued, all those sorts of  
17      check boxes that this Court under a Skidmore  
18      framework continues to place substantial weight  
19      on. So I think that makes the Court's task  
20      relatively straightforward.

21                   JUSTICE SOTOMAYOR: What do you --

22                   JUSTICE KAVANAUGH: And what about  
23      Bostock?

24                   JUSTICE SOTOMAYOR: No, no, I --

25                   JUSTICE KAVANAUGH: Do you want to

1 deal with Bostock?

2 MR. WILLIAMS: I -- I think -- so I  
3 guess it depends on the way in which you mean  
4 does it deal in Bostock. I think it --

5 JUSTICE KAVANAUGH: Well, if -- if an  
6 employer said we're going to fire all the  
7 transgender women --

8 MR. WILLIAMS: Right.

9 JUSTICE KAVANAUGH: -- that would be a  
10 violation. If a school says we're not going to  
11 allow the transgender women to play sports, you  
12 say that's not a violation. Both statutes use  
13 the term "sex." Can you explain?

14 MR. WILLIAMS: I think the reason why  
15 is, well, to be clear, our -- our statute is  
16 very different from a specific choice to say a  
17 transgender person shall not participate  
18 because of their transgender status.

19 And I think that really is what makes  
20 the difference between this case and Bostock,  
21 is Bostock is attacking status-based  
22 discrimination, and West Virginia would, I  
23 think, be in a much different position if we  
24 had just said transgender persons shall not  
25 compete. But that's not what West

1       Virginia did.

2                   JUSTICE KAVANAUGH: What if it said  
3       transgender women and girls shall not compete  
4       in women's and girls' sports?

5                   MR. WILLIAMS: I think, again, that's  
6       a much closer question. I -- I think, if we're  
7       talking about engaging with the actual status  
8       of --

9                   JUSTICE KAVANAUGH: Do you think you  
10       could lose under Title IX with a statute that  
11       said that?

12                  MR. WILLIAMS: I think -- Bostock, I  
13       think, is -- now I understand Your Honor's  
14       question.

15                  I think Bostock raises an interesting  
16       question as to whether that reference to  
17       transgender status would in turn implicate the  
18       sex status that Title IX is meant to address.

19                  But, ultimately, I think the Court  
20       doesn't need to address that because you can  
21       stop at the first step, right? You don't have  
22       an actual transgender exclusion that would give  
23       rise to that kind of linkage of analysis.

24                  CHIEF JUSTICE ROBERTS: Thank you,  
25       counsel.

1                   In terms of Bostock, I understand that  
2 to say that discrimination on the basis of  
3 transgender status is discrimination on the  
4 basis of sex.

5                   But the question here is whether or  
6 not a sex-based classification is necessarily a  
7 transgender classification, and I wonder if  
8 that is consistent with your understanding.

9                   MR. WILLIAMS: It's entirely  
10 consistent I would say on the equal protection  
11 side in particular and also in the Title IX  
12 context, I think, for some of the reasons I  
13 just discussed with Justice Kavanaugh. I think  
14 the Court can stop and say that a sex  
15 definition and a reference to biological sex is  
16 not the same as a transgender classification.

17                  And I think, even if we engage in --  
18 in the sort of but-for causation analysis, I  
19 think it's as simple as saying does the result  
20 change if you change the gender identity of the  
21 individual involved? And the reality is, if  
22 you apply the West Virginia statute to someone  
23 identifying as a -- you know, a biological boy  
24 identifying as a boy applies in the very same  
25 way as a biological boy identifying as a girl.

1 CHIEF JUSTICE ROBERTS: Justice

2 Thomas?

3 Justice Alito?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: I find it strange  
6 that the district court and the court below did  
7 find a Title IX violation but not an equal  
8 protection violation and remanded for the equal  
9 protection violation. I'm not sure how it  
10 could do that because it would seem to me that  
11 if the evidence is not sufficient to justify  
12 finding an equal protection violation, it's not  
13 sufficient to find a Title IX violation.

14 Is that correct at least on the record  
15 as it exists now?

16 MR. WILLIAMS: Right. And so, to be  
17 clear, the district court actually ruled for  
18 West Virginia on both Title IX and --

19 JUSTICE SOTOMAYOR: Right.

20 MR. WILLIAMS: And so the Fourth  
21 Circuit said you lose on Title IX and we're not  
22 sure about equal protection.

23 JUSTICE SOTOMAYOR: But assume the  
24 Fourth Circuit is right.

25 MR. WILLIAMS: Right. Well, so, in

1 answer to your question, I think that doesn't  
2 make sense, and I think the reason why it  
3 doesn't make sense is because the Fourth  
4 Circuit effectively stripped out -- what they  
5 said is Title IX doesn't leave room for any  
6 kind of justification or any kind of analysis  
7 of whether -- what -- what the reasons might  
8 have been for the state's action.

9 And I think, respectfully,  
10 particularly when you look at the -- again, the  
11 regulations themselves, it does -- actually  
12 does contemplate exactly that sort of analysis.

13 JUSTICE SOTOMAYOR: I -- I agree with  
14 you on the regulations.

15 MR. WILLIAMS: Right.

16 JUSTICE SOTOMAYOR: And so could you  
17 not have a Title IX violation but still have --  
18 let's assume -- and I know you're going to  
19 fight the factual premise.

20 MR. WILLIAMS: I'll try to embrace it,  
21 Your Honor.

22 JUSTICE SOTOMAYOR: All right, embrace  
23 it. All the scientific evidence showed that  
24 there's no difference between cisgender girls  
25 and trans girls. I know there's a fight about

1 that.

2 MR. WILLIAMS: It -- it hurts, but  
3 yeah.

4 (Laughter.)

5 JUSTICE SOTOMAYOR: I know it hurts,  
6 but assume it. Could you not still have  
7 violated? Could you still -- could we hold  
8 that on -- as the regulation stands, the  
9 regulation would permit you to discriminate,  
10 but the Equal Protection --

11 MR. WILLIAMS: So -- okay.

12 JUSTICE SOTOMAYOR: -- Clause would  
13 not?

14 MR. WILLIAMS: So, under -- let me --  
15 let me try to get my head in the framework of  
16 assuming.

17 JUSTICE SOTOMAYOR: Assume.

18 MR. WILLIAMS: I think the regulation  
19 would still allow us under its express terms,  
20 right?

21 JUSTICE SOTOMAYOR: Assume -- I'm  
22 assuming yes.

23 MR. WILLIAMS: Right. And so you're  
24 asking, even assuming our compliance with the  
25 regulation, could we still have a potential

1 equal protection problem?

2 JUSTICE SOTOMAYOR: Yes.

3 MR. WILLIAMS: In that world, I think  
4 we would still be fine under the equal  
5 protection analysis, frankly, for some of the  
6 reasons that you heard from the Solicitor  
7 earlier today, where it's because the -- even  
8 if you assume the heightened level of scrutiny,  
9 let's assume that we're in intermediate  
10 scrutiny world, it's still a reasonable fit.

11 It's still -- it's not a perfect fit.

12 JUSTICE SOTOMAYOR: Then we're back to  
13 that point.

14 MR. WILLIAMS: Exactly.

15 JUSTICE SOTOMAYOR: All right.

16 MR. WILLIAMS: And I know we've had a  
17 long colloquy about that today, but,  
18 ultimately, I think that's what I answered.

19 JUSTICE SOTOMAYOR: I -- I just --

20 MR. WILLIAMS: Right.

21 JUSTICE SOTOMAYOR: -- destroyed that  
22 by saying --

23 (Laughter.)

24 JUSTICE SOTOMAYOR: -- that the  
25 science has said there's no difference.

1 MR. WILLIAMS: Well --

2 JUSTICE SOTOMAYOR: And we know that's  
3 not true. But assuming the science said there  
4 was no difference --

5 MR. WILLIAMS: Right.

6 JUSTICE SOTOMAYOR: -- how could you  
7 ever say it's reasonable?

8 MR. WILLIAMS: So I'm assuming a world  
9 in which there's no difference between your --  
10 so you're saying testosterone-suppressed  
11 individuals? Is that --

12 JUSTICE SOTOMAYOR: No, I'm saying --

13 MR. WILLIAMS: Or you're saying all --  
14 all men and women, full stop?

15 JUSTICE SOTOMAYOR: Right.

16 MR. WILLIAMS: Oh, okay. I apologize  
17 for misunderstanding the hypo. If we're  
18 assuming a world in which there's really no  
19 biological difference, full stop, as to men and  
20 women, full stop, then I think, right, the  
21 legitimate governmental interest falls away. I  
22 agree with you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 Justice Gorsuch?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: There are, as we  
2 discussed, a bunch of states that allow  
3 biological males who identify as female,  
4 transgender women and girls, to play women and  
5 girls' sports. We were talking about that with  
6 the Solicitor General earlier.

9 MR. WILLIAMS: Right.

10 JUSTICE KAVANAUGH: -- are those  
11 states violating Title IX rights of the  
12 biological females?

13 MR. WILLIAMS: I think it's a much  
14 closer question under Title IX than it is under  
15 equal protection, and I think the reason being  
16 is that the regulations specifically say  
17 there's the --

18 JUSTICE KAVANAUGH: Well, what do you  
19 think the answer is under equal protection? I  
20 might as well ask that.

21 MR. WILLIAMS: So, under equal  
22 protection, I think we agree with our friends  
23 in Idaho that there's enough room for  
24 California to make a different determination.

25 JUSTICE KAVANAUGH: Okay.

1                   MR. WILLIAMS: I think, under Title  
2   IX, the reason why it's a closer question is  
3   because of the existence of the regs, and the  
4   regs start by saying you have -- you start with  
5   co-ed teams and then you can move down to  
6   sex-separated teams in the context of contact  
7   and competitive skill.

8                   And it really contemplates a real,  
9   genuine sex distinction in that move down (b)  
10   provision.

11                  JUSTICE KAVANAUGH: Mm-hmm.

12                  MR. WILLIAMS: And then, of course, it  
13   pivots -- it also has the catchall where it  
14   says: But, actually, in the contact sports,  
15   you can't even -- you can't move back in the  
16   co-ed world.

17                  So I think, if a state is moving away  
18   from a genuine sex distinction, as the  
19   regulator contemplated and as Congress  
20   ultimately contemplated, then maybe they're  
21   kind of, if you think of (b) as a safe harbor  
22   in a sense, they're outside the scope of that  
23   safe harbor and now they're running into the  
24   problem in (a). So I don't think the Court  
25   needs to get into any of that if --

1 JUSTICE KAVANAUGH: Right. I agree.

2 I'm just trying to know --

3 MR. WILLIAMS: Right.

4 JUSTICE KAVANAUGH: -- what's common.

5 MR. WILLIAMS: But I think that is --

6 it's -- it's a closer question at least than

7 they --

8 JUSTICE KAVANAUGH: Because your  
9 theory is that sex is biological sex in Title  
10 IX, or is that not your theory?

11 MR. WILLIAMS: No, that is. And it's  
12 not our theory, Your Honor. It's just the  
13 simple -- it's the ordinary understanding of  
14 what "sex" meant both in '72 and '74, when the  
15 regulations were themselves implemented. So I  
16 think we're just trying to be consistent with  
17 that.

18 JUSTICE KAVANAUGH: Got it. Thank  
19 you.

20 MR. WILLIAMS: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Barrett?

23 Justice Jackson?

24 JUSTICE JACKSON: So I guess I'm  
25 trying to puzzle through whether or not there

1       is some independent form of discrimination  
2       against transgender women that is distinct from  
3       the sex separation that Title IX allows.

4               So I appreciate that your argument is  
5       that because the regulations permit sex --  
6       excuse me -- sex separation and that hasn't  
7       been challenged, that that should be the end of  
8       this inquiry basically.

9               And I think you get there because you  
10      say you're sort of picking up on this idea that  
11      maybe this is just about a definition of who is  
12      a male or a woman. Is that right?

13               MR. WILLIAMS: I think to some degree,  
14      but it's also, Your Honor --

15               JUSTICE JACKSON: To some degree.

16               MR. WILLIAMS: -- it's just because  
17      we're -- we're indifferent to a person's gender  
18      identity in applying the law. I think  
19      that's --

20               JUSTICE JACKSON: But the law -- but  
21      the law actually operates differently, I think,  
22      for cisgender women and transgender women.  
23      That is, with respect to their desire to play  
24      on a team that matches their gender identity,  
25      cisgender women can do it, transgender women

1 cannot.

2 And so we do appreciate a distinction,  
3 I think, that is being drawn on the basis of  
4 your gender status, gender identity status,  
5 trans or cis, right?

6 MR. WILLIAMS: So -- and I want to  
7 make sure I understand --

8 JUSTICE JACKSON: Yes.

9 MR. WILLIAMS: -- if we're operating  
10 in Title IX world or equal protection world  
11 because I think it might make a difference to  
12 the answer, but --

13 JUSTICE JACKSON: Okay. Title --  
14 let's start with Title IX then.

15 MR. WILLIAMS: So -- so Title IX, I  
16 think the question of -- I look at this statute  
17 and see a distinction between boy and girl  
18 indifferent to gender identity. And I think  
19 that --

20 JUSTICE JACKSON: Right, but I'm  
21 testing that proposition, right?

22 MR. WILLIAMS: Right.

23 JUSTICE JACKSON: You see that  
24 distinction and I see it too on the  
25 separation-of-teams level at the beginning.

1                   MR. WILLIAMS: Right. And I -- I  
2 think what I'm hearing is that that distinction  
3 arises from a difference in effect. And I  
4 don't see a disparate impact analysis that's  
5 sort of hidden away in Title IX.

6                   JUSTICE JACKSON: But why is that a  
7 difference in effect? So it's like a  
8 second-order discrimination, right? The first  
9 order is separating male from female.

10                  MR. WILLIAMS: Right.

11                  JUSTICE JACKSON: The second order is  
12 separating transgender women from cisgender  
13 women, right?

14                  MR. WILLIAMS: Respectfully, I would  
15 disagree, Your Honor.

16                  JUSTICE JACKSON: No.

17                  MR. WILLIAMS: The reason why is just  
18 because I think anytime you have a  
19 classification, you could divide it into  
20 classifications, and I don't think that then  
21 becomes -- like, the law in the same way  
22 applies to brown-haired biological girls and  
23 blond-headed biological girls.

24                  JUSTICE JACKSON: No, I understand,  
25 but I don't think you can get --

1                   MR. WILLIAMS: There's not a  
2 classification based on hair color.

3                   JUSTICE JACKSON: I'm not sure -- and  
4 maybe this is switching to the equal  
5 protection. I don't think you can get out of  
6 the implications of making a classification by  
7 setting it up as a definition, you know, as a  
8 subclass. And so we've already okayed the  
9 classification because it's really all about  
10 classification. You can't distinguish in that  
11 way, right?

12                  MR. WILLIAMS: Well, I think what the  
13 Court said on the equal protection side is you  
14 look at the facial classification, and I think,  
15 here, it's effectively un conceded that the  
16 facial classification is between boy and girl.  
17 And I think, at that point, if -- maybe you  
18 have a situation where you think that the  
19 classification is somehow a proxy for some sort  
20 of secret secondary classification, but I don't  
21 hear them suggesting that.

22                  JUSTICE JACKSON: No, but the -- the  
23 definition implicates another division. So  
24 here -- here's an example. So suppose that we  
25 have Title IX exempting, and I think it does

1 this, certain religious institutions from its  
2 requirements. And let's say Title IX  
3 defined -- then went on to define -- this is in  
4 my hypothetical --

5 MR. WILLIAMS: Mm-hmm.

6 JUSTICE JACKSON: -- religious  
7 institutions to include only those institutions  
8 that proselytize.

9 I mean, is that a classification  
10 problem or a definition problem? I would say  
11 it would be a classification problem and you'd  
12 still have to apply all of the heightened  
13 scrutiny just because, you know, they're  
14 defining religious institutions in a certain  
15 way.

16 Similarly, here, you have the  
17 overarching classification, you know, everybody  
18 has to be -- play on the team that is the same  
19 as their sex at birth, but then you have a  
20 gender-identity definition that is operating  
21 within that, meaning a distinction, meaning  
22 that for cisgender girls, they can play  
23 consistent with their gender identity; for  
24 transgender girls, they can't.

25 MR. WILLIAMS: So I think that --

1       okay. Your -- as to the part about your  
2       ability to pass over from boy to girl --

3 JUSTICE JACKSON: Yes.

4 MR. WILLIAMS: -- or you can go from  
5 one way but not the other, I want to be clear  
6 that B.P.J. is not challenging that specific  
7 classification. I think that's important to  
8 start with. But I think, if anything, that's  
9 useful evidence as to the lack of a  
10 transgender-based discrimination because, if  
11 the legislature were just sort of unsettled by  
12 the notion of transgender athletes, I think the  
13 answer would have been to then bar them from --

14 JUSTICE JACKSON: No, I appreciate --

15 MR. WILLIAMS: -- passing over in any  
16 way inconsistent --

17 JUSTICE JACKSON: -- that.

18 MR. WILLIAMS: -- with their gender.

19 JUSTICE JACKSON: I appreciate that.

20 I guess I was getting at the -- what I  
21 understood the Chief Justice to be trying to  
22 discuss --

23 MR. WILLIAMS: Right.

24 JUSTICE JACKSON: -- which was this  
25 notion that this is really just about the

1 definition of who -- that we accept that you  
2 can separate boys and girls, and we are now  
3 looking at the definition of a girl and we're  
4 saying only people who were girl assigned at  
5 birth qualify.

6 MR. WILLIAMS: And there is authority  
7 cited in our brief. This Court, I don't think,  
8 has ever phrased it quite as in the way of this  
9 definitional framing --

10 JUSTICE JACKSON: Yeah.

11 MR. WILLIAMS: -- that we're talking  
12 about right now, but, certainly, cases like  
13 Jana-Rock in the Second Circuit do approach it  
14 from this sort of definitional framing. And  
15 they say that if you -- if you effectively  
16 concede that there is an initial ability to  
17 draw a classification, then that suffices to  
18 satisfy the intermediate scrutiny question.

19 But then past that, the definitional  
20 question is evaluated through rational basis  
21 review. And that's Jana-Rock.

22 I recognize this Court has never gone  
23 as far as that, but I don't think the Court  
24 needs to go as far as that because, again, I  
25 think the way that you would do the analysis is

1 to start by looking to the face of the statute,  
2 and if the face of the statute is engaged in  
3 a -- a conceded -- boy/girl sex classification  
4 is conceded to be legitimate, then, at that  
5 point, you kind of know which world you're  
6 operating in.

7 JUSTICE JACKSON: Thank you.

8 MR. WILLIAMS: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Mooppan.

12 ORAL ARGUMENT OF HASHIM M. MOOPPAN  
13 FOR THE UNITED STATES, AS AMICUS CURIAE  
14 SUPPORTING THE PETITIONERS

15 MR. MOOPPAN: Mr. Chief Justice, and may it  
16 please the Court:

17 So there have been a lot of different  
18 arguments made this morning, and so I think it might  
19 be helpful to just focus on what I think are the  
20 easiest way to resolve both of the claims in this  
21 case.

22 On the equal protection claim, it's  
23 the arguments we discussed this morning about  
24 intermediate scrutiny doesn't work on this  
25 as-applied basis. So let me focus for the

1 Title IX claim.

2 I think the simplest way to resolve  
3 the Title IX claim in this case is as follows:  
4 The regs expressly authorize sex-separated  
5 teams. The other side isn't challenging those  
6 regs.

7 When those regs use the word "sex,"  
8 they obviously use the word "sex" to mean  
9 biological sex in the reproductive biology  
10 sense. That's the ordinary meaning of the --  
11 the term in 1972 and 1974. As a result,  
12 whether or not they are right that taking  
13 testosterone suppression eliminates any  
14 physical advantage doesn't matter because the  
15 regs define separation based on sex, based on  
16 biology, not based on circulating testosterone  
17 levels.

18 So the difference that -- their claim  
19 that they've eliminated the difference just  
20 doesn't matter under the language of the regs,  
21 and that's enough to resolve the case.

22 JUSTICE THOMAS: So your argument as I  
23 understand it is that they're not similarly  
24 situated?

25 MR. MOOPPAN: So that's an additional

1 argument you could make, is to say that even if  
2 you just focus on the language of the statute,  
3 the statute says discriminate on the basis of  
4 sex. Discrimination, as this Court has  
5 repeatedly recognized, including in Bostock,  
6 means treating one person worse than someone  
7 who is similarly situated.

8 And, yes, we don't think a man taking  
9 performance-altering drugs is similarly  
10 situated to a woman, but you don't even have to  
11 reach that question because, under the regs,  
12 the question is the regs say you can separate  
13 based on sex. Everyone agrees that sex in  
14 those regs means biological sex. Therefore,  
15 the circulating testosterone levels are just  
16 legally irrelevant under the regs.

17 JUSTICE SOTOMAYOR: So why do you  
18 read -- you say you can separate the sexes.  
19 Why do you -- are you now taking the position  
20 in other cases that if states choose not to  
21 separate the sexes in the way you want, that  
22 they're violating Title IX?

23 MR. MOOPPAN: Well, so the argument --  
24 so, again, we think that's a separate question  
25 and you should leave it separate. But the --

1 the argument we're making in those cases is the  
2 statute and the regs allow separation based on  
3 sex because of the biological differences  
4 between men and women.

5 If you purport to separate based on  
6 biological sex, but then you allow some  
7 biological males to play on the female team,  
8 you've undermined the justification for  
9 separating in the first place.

10 JUSTICE SOTOMAYOR: So what --

11 MR. MOOPPAN: Because, normally, you  
12 can't separate. For -- if you take, for  
13 example, world history class, you can't have  
14 world history class for men and women. That's  
15 generally prohibited by the statute.

16 The reason you could separate for sex  
17 for sports is the biological difference. And  
18 if you then undermine that, you undermine the  
19 justification for separate --

20 JUSTICE SOTOMAYOR: So we're not back  
21 always to the science, is there really a  
22 difference and a difference for this kind of  
23 person?

24 If it's not clear the way you want it  
25 to be in terms of separating the sexes, I'm

1       wondering why it's clear for your attempt to  
2       force those states who are choosing not to do  
3       this. You're now saying you must.

4                    MR. MOOPPAN: Again, that question is  
5       not presented in this case. And for this case,  
6       the factual dispute is irrelevant.

7                    JUSTICE GORSUCH: Mr. Mooppan, do you  
8       think --

9                    JUSTICE KAVANAUGH: But --

10                  JUSTICE GORSUCH: -- do you think that  
11       the Spending Clause should inform our analysis  
12       here?

13                  MR. MOOPPAN: I don't think this Court  
14       should invoke the Spending Clause in this case.

15                  JUSTICE GORSUCH: Why not?

16                  MR. MOOPPAN: For two reasons. One,  
17       we think that the statute and the regs clearly  
18       do not permit the claim.

19                  JUSTICE GORSUCH: I understand that.

20                  MR. MOOPPAN: And then the second is  
21       how the Spending Clause applies in the context  
22       of Title IX is, I think, a little more  
23       complicated than my friend suggested. It's not  
24       a clear statement requirement.

25                  I think, if you look at some of these

1 clear notice cases, cases like Jackson and  
2 Geyser, I don't think you would say that those  
3 statutes had a clear statement.

4 JUSTICE GORSUCH: It's a clear notice  
5 requirement.

6 MR. MOOPPAN: Right. But how that  
7 applies is a little tricky. And I think, in a  
8 case --

9 JUSTICE GORSUCH: Why? I mean, your  
10 argument is that in -- in 1974 and 1960 -- sex  
11 meant biology, and that -- it's not clearly --  
12 there's not clear notice otherwise. Why isn't  
13 that the end of it?

14 MR. MOOPPAN: So I think the end of it  
15 is the statute clearly doesn't permit this  
16 claim. I'm just saying that I would be  
17 cautious about speaking about how the clear  
18 notice requirement applies because it is not a  
19 clear statement requirement and it's --

20 JUSTICE GORSUCH: I understand that.  
21 You're -- you're -- you're not answering my  
22 question with respect.

23 MR. MOOPPAN: How would -- so -- so I  
24 just want to --

25 JUSTICE GORSUCH: If it's a clear

1 notice requirement at minimum and a voluntary  
2 agreement and sex at the time of the statute  
3 meant, as Bostock said, you know, there's good  
4 argument it's biology, why wouldn't -- why  
5 wouldn't West Virginia be within its rights to  
6 say we didn't have clear notice otherwise?

7 MR. MOOPPAN: The scope of the clear  
8 notice requirement is a tricky question. If  
9 you look at this Court's cases, I suspect Your  
10 Honor --

11 JUSTICE GORSUCH: What's tricky about  
12 that?

13 MR. MOOPPAN: I suspect Your Honor  
14 would think a lot of the cases where this Court  
15 has found Title IX to apply, you would think  
16 there's not clear notice.

17 JUSTICE GORSUCH: All right.

18 MR. MOOPPAN: And so I think it's a  
19 tricky issue.

20 JUSTICE GORSUCH: All right.

21 MR. MOOPPAN: And I think it's a case  
22 that should be briefed. And I don't think it's  
23 an issue you need to resolve in this case.

24 JUSTICE GORSUCH: Okay. And then --  
25 and then, on the statute itself, it speaks of

1 discrimination in program or activity. And in  
2 Davis, we explained that that requires kind of  
3 a look at the whole of the institution because  
4 the definition of "program activity" is the  
5 whole institution, and so that's less  
6 individual-focused, it seems to me. Thoughts?

7 MR. MOOPPAN: Well, I -- I think  
8 that's true for the funding, but I don't think  
9 that's true in terms of how the discrimination  
10 provision works. If you discriminate or  
11 exclude in one part of the school, I don't  
12 think you can justify that by saying, well, all  
13 the rest of the school, we treat everyone  
14 fairly.

15 I think those cases you're talking  
16 about, as long as you're receiving funding  
17 somewhere, the whole school's --

18 JUSTICE GORSUCH: All right.

19 MR. MOOPPAN: -- activities are  
20 covered.

21 JUSTICE GORSUCH: Okay. And so it  
22 really boils down to the living accommodations  
23 provision, which Congress anticipated there  
24 would be sex-separated living accommodations  
25 being permissible; the Javits Amendment; and

1 then the regulations that are longstanding and,  
2 therefore, entitled to some serious  
3 consideration?

4 MR. MOOPPAN: Well, no. So, you know,  
5 Your Honor asked why we run the similarly  
6 situated argument. Take, for example --

7 JUSTICE GORSUCH: Don't -- don't --  
8 don't bring that back up.

9 (Laughter.)

10 MR. MOOPPAN: Well, locker rooms and  
11 showers aren't covered by any of the things you  
12 just identified, not the living facilities  
13 provision, not the Javits Amendment. None of  
14 those things covered locker rooms and showers.  
15 So, unless you use a similarly situated  
16 requirement, you would to have say that Title  
17 IX bans single-sex locker rooms and showers.

18 JUSTICE GORSUCH: Well, okay, all  
19 right. If that's your view, then let's talk  
20 about the similarly situated. I guess I have  
21 to.

22 What about the hypothetical I posed  
23 earlier that when it comes to high school  
24 performance, girls are sure a lot better  
25 than -- than boys and so we're only going to

1 have remedial classes for boys and girls aren't  
2 free to attend?

3 MR. MOOPPAN: So I don't think those  
4 differences are based on inherent biological  
5 differences.

6 JUSTICE GORSUCH: Well, let's say --  
7 let's say I've got really good science. I  
8 mean, it's all about the science, right? I've  
9 got the science. You're fighting the  
10 hypothetical.

11 MR. MOOPPAN: I'm not fighting the  
12 hypothetical, Your Honor. I think what I would  
13 say, Your Honor, is that this Court has held in  
14 cases like VMI that, in general, classification  
15 on sex is impermissible because, in general,  
16 men and women are similarly situated.

17 Where that's not true is for the sorts  
18 of real, enduring, obvious differences that  
19 this Court talked about in cases like VMI, the  
20 differences in reproductive biology. I don't  
21 think the sort of pseudo-science you're  
22 suggesting has been baked into that.

23 JUSTICE GORSUCH: Well, it's not  
24 pseudo.

25 JUSTICE KAGAN: It's not pseudo

1 science.

2 JUSTICE GORSUCH: It's good science.

3 JUSTICE KAGAN: It's not pseudo  
4 science to say --

5 JUSTICE GORSUCH: Yeah.

6 JUSTICE KAGAN: -- boys' brain  
7 development happens at a different stage than  
8 girls' does.

9 MR. MOOPPAN: Well, with all respect,  
10 I don't think there's any science anywhere that  
11 has suggested that these sort of intellectual  
12 differences are traceable to biological  
13 differences. And I don't think the statute  
14 should be read to --

15 JUSTICE GORSUCH: Well, with respect,  
16 I don't think you're a Ph.D. in this stuff.  
17 And -- and neither -- I know I'm not. But I'm  
18 asking you to deal with the hypothetical.

19 MR. MOOPPAN: And so I guess what I  
20 would say about that, Your Honor, is --

21 JUSTICE GORSUCH: I mean, the statute  
22 says no discrimination on the basis of sex.

23 MR. MOOPPAN: Right.

24 JUSTICE GORSUCH: And you're saying,  
25 eh, it's okay when they're not similarly

1 situated.

2 MR. MOOPPAN: And what --

3 JUSTICE GORSUCH: And I'm giving  
4 you -- you're worried about locker rooms.

5 MR. MOOPPAN: Right.

6 JUSTICE GORSUCH: Great. I appreciate  
7 that. I'm -- but I'm worried about that math  
8 remedial class or the chess club or whatever.

9 MR. MOOPPAN: Right. And so, look,  
10 let me say -- put it this way: The general  
11 rule is you have to treat men and women the  
12 same, and --

13 JUSTICE GORSUCH: I would have  
14 thought. That's what the statute says.

15 MR. MOOPPAN: And I think you have to  
16 be very careful about recognizing an exception.  
17 And so, when you recognize an exception for  
18 what's similarly situated, I think you should  
19 tether it to the sorts of long-recognized  
20 differences that would have been recognized at  
21 the time the statute was enacted. At the time  
22 the statute was enacted, no one would have  
23 doubted that it said it didn't require --

24 JUSTICE GORSUCH: Oh, I think, at the  
25 time the statute was enacted, 1964, there are a

1      lot of people who thought boys are better at  
2      certain things and girls at others --

3                    MR. MOOPPAN: Not based on --

4                    JUSTICE GORSUCH: -- that we don't  
5      believe anymore.

6                    MR. MOOPPAN: Not based on inherent  
7      biological differences.

8                    JUSTICE GORSUCH: I think that maybe  
9      in 1964 they did.

10                  JUSTICE BARRETT: They did.

11                  MR. MOOPPAN: And if they did, they  
12      didn't have any basis for it.

13                  JUSTICE GORSUCH: Well --

14                  JUSTICE BARRETT: Mr. --

15                  MR. MOOPPAN: Whereas -- whereas,  
16      for -- for --

17                  JUSTICE GORSUCH: And I'm giving you a  
18      hypothetical where I have the science to prove  
19      it and you're saying it's still not good  
20      enough.

21                  MR. MOOPPAN: I guess, if you're  
22      asking me a hypothetical where the science  
23      existed in 1972 and everyone agreed with it,  
24      then it might be a different inquiry. That  
25      really is a hypothetical because there

1       wasn't --

2                   JUSTICE BARRETT: Mr. Mooppan, do we  
3       have to -- I mean, I think these are very, very  
4       hard questions. I started with the math  
5       question before. I mean, I -- but do we have  
6       to -- because of the Javits Amendment, because  
7       the other side has conceded that Title IX  
8       permits sex-separated sports, can we avoid your  
9       whole --

10                  MR. MOOPPAN: Absolutely. That --

11                  JUSTICE BARRETT: -- similarly  
12       situated argument that you're on? Because I  
13       don't really like it that much either.

14                  MR. MOOPPAN: Absolutely. That's why,  
15       when I stood it up here, the first thing I said  
16       was the easiest way out of this case on this  
17       claim is to say that the regs permit sex  
18       separation. They don't dispute that sex --

19                  JUSTICE BARRETT: Save locker rooms  
20       and all of that for a different day.

21                  MR. MOOPPAN: Right. The only reason  
22       I went into it is I -- I was nervous that any  
23       sort of suggestion that there isn't a similarly  
24       situated requirement could lead to results that  
25       I don't think the Court would actually stand up

1 to, like locker rooms and showers. And so I  
2 think it's -- I have no problem if the Court  
3 doesn't take a position on --

4 JUSTICE BARRETT: Okay. And I -- and  
5 I'll say, I mean, I said I don't like the  
6 argument. At first blush, I don't like it.  
7 I'm not trying to prejudice --

8 MR. MOOPPAN: Right.

9 JUSTICE BARRETT: -- anyone making  
10 that argument later, but, I mean, I think it  
11 opens a huge can of worms that maybe we don't  
12 need to get into here because the Javits  
13 Amendment and the concessions here are --

14 MR. MOOPPAN: That's right. As -- as  
15 long as you don't cut it off the other way, I  
16 think that's perfectly fine.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas, anything further?

20 Justice Alito?

21 Justice Sotomayor?

22 Justice Kagan?

23 JUSTICE KAGAN: Mr. Mooppan, you --  
24 you talked about you were -- you have -- are  
25 litigating this case the opposite way among

1 states that do not prohibit trans women and  
2 girls from participating in sports teams, is  
3 that correct?

4 MR. MOOPPAN: Yes.

5 JUSTICE KAGAN: So -- and you said,  
6 and I appreciate this, that we should not  
7 address that question. Are there arguments  
8 that -- that do suggest what the answer is on  
9 that question that we should be careful about?

10 MR. MOOPPAN: I would --

11 JUSTICE KAGAN: Or do you think that  
12 they're really self-contained boxes?

13 MR. MOOPPAN: I think they're  
14 generally distinct. And what I could say,  
15 confidently say, is the argument that I  
16 identified at the outset and with Justice  
17 Barrett just now, if you just say that the regs  
18 mean sex, sex doesn't mean circulating  
19 testosterone, and, therefore, you're not  
20 required to allow boys to play on girls' team  
21 regardless of their circulating testosterone  
22 level, that argument would not influence the  
23 outcome of those other cases one way or the  
24 other.

25 JUSTICE KAGAN: Are there any

1 arguments that would influence the outcome one  
2 way or the other?

3 MR. MOOPPAN: I don't think so.

4 Maybe, if you engage in discussion about  
5 what -- how -- what the regs meant with respect  
6 to things like equal opportunity, that might be  
7 the sort of issue where it might have  
8 implications for the other case.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Gorsuch?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: I just want to be  
14 crystal-clear about that. If we say sex in  
15 Title IX is biological sex and then we get to  
16 the next case, the California case or whatever  
17 it is, how would California still prevail if  
18 we've said that here?

19 MR. MOOPPAN: I think the argument  
20 they -- the other side would make would be that  
21 the regs don't prohibit them from accommodating  
22 transgender individuals. Even though the regs  
23 permit separation based on sex, they also don't  
24 forbid accommodation of transgender  
25 individuals, is the argument they would make.

1 And they would say it doesn't matter that  
2 you're allowing some boys who are -- have a  
3 biological advantage to play on the girls'  
4 team.

5 JUSTICE KAVANAUGH: What's the  
6 argument you're currently making in opposition  
7 to that?

8 MR. MOOPPAN: That the justification  
9 for separating on the basis of sex is the  
10 biological difference, and so you're  
11 undermining the justification for the  
12 separation.

13 JUSTICE KAVANAUGH: Right. And so we  
14 start with the separation. I think what you're  
15 saying is, once you separate boys' and girls'  
16 teams, which everyone does, and it may be even  
17 required in my view to have equal girls' teams,  
18 then California really doesn't have an argument  
19 if we say that sex in Title IX means biological  
20 sex, which may be okay. I just want to make  
21 sure I know what we're doing.

22 MR. MOOPPAN: Look, Your Honor,  
23 obviously, we don't think they can argue that,  
24 but I'm confident that California would stand  
25 up here and say that even if you ruled the way

1 I just urged, they should be able to argue the  
2 opposite by saying essentially that they're  
3 allowed to accommodate on the basis of gender  
4 identity even though the regs mean sex and sex  
5 means biological sex.

6 That's the argument they would make.  
7 Whether that argument is right or wrong is for  
8 another case, but I don't think, if you adopt  
9 the argument I'm making here today, their hands  
10 are going to be tied.

11 JUSTICE KAVANAUGH: Okay. And then,  
12 on this premise that has been conceded, I just  
13 want to make sure I understand your view, my  
14 understanding is that it's sex-separated sports  
15 teams so long as they're equal opportunity for  
16 girls and boys are perfectly constitutionally  
17 permissible. Is that not your understanding?

18 MR. MOOPPAN: Yes. Yes. Yeah,  
19 that --

20 JUSTICE KAVANAUGH: Yes? Okay.

21 MR. MOOPPAN: -- per the arguments in  
22 both cases.

23 JUSTICE KAVANAUGH: I mean, it's  
24 conceded, but it's conceded because it's  
25 obvious.

1                   MR. MOOPPAN: Right, because there are  
2                   obvious biological differences between men and  
3                   women, and that's why you can have --

4                   JUSTICE KAVANAUGH: Well, the why  
5                   people may debate, but it's -- but it's -- it's  
6                   obvious --

7                   MR. MOOPPAN: Yeah.

8                   JUSTICE KAVANAUGH: -- it's conceded.  
9                   And so too Title IX, because of the Javits  
10                  Amendment at least, even if not Title IX  
11                  originally.

12                  MR. MOOPPAN: Well, I would say even  
13                  without the Javits Amendment because,  
14                  importantly, the Javits Amendment --

15                  JUSTICE KAVANAUGH: But let me just --

16                  MR. MOOPPAN: -- is only  
17                  intercollegiate. So --

18                  JUSTICE KAVANAUGH: And it's been  
19                  interpreted in the regs, though, to go to high  
20                  school --

21                  MR. MOOPPAN: Exactly.

22                  JUSTICE KAVANAUGH: -- and no one's  
23                  ever challenge that part. That's the part.  
24                  Okay.

25                  MR. MOOPPAN: Right.

1 JUSTICE KAVANAUGH: But -- but that  
2 also -- sex-separated sports teams are  
3 perfectly permissible under Title IX at least  
4 with the Javits Amendment and probably without,  
5 correct?

6 MR. MOOPPAN: That's right.

7 JUSTICE KAVANAUGH: And that's  
8 conceded, but that's -- you know, it's  
9 conceded, again, because everyone accepts that,  
10 has accepted that for a long time, so long as  
11 the opportunities for boys and girls, men and  
12 women, are equal.

13 MR. MOOPPAN: That's right. And I  
14 think what the other side in this case is  
15 trying to do is say that's fine, but they're  
16 being excluded. And the problem with that is  
17 they are not being excluded from being --  
18 participating on the boys' team. They're  
19 choosing not to participate on the boys' team.

Now, for understandable reasons, given their gender identity, but the state is not excluding them from the boys' team.

23 And, Justice Sotomayor, this explains  
24 the confusion in the Fourth Circuit's opinion  
25 because I agree with you, it is very strange

1 that the Fourth Circuit said --

2 JUSTICE KAVANAUGH: Okay. We've to go  
3 back. Sorry. You can -- well, finish that up.

4 MR. MOOPPAN: Yes.

5 JUSTICE KAVANAUGH: Sorry.

6 MR. MOOPPAN: The reason why the  
7 Fourth Circuit found that there was a viable  
8 Title IX claim, even though they said that  
9 there was a factual dispute, is because they  
10 bought into this notion that because the  
11 transgender boy doesn't want to play on the  
12 girls' team -- sorry, doesn't want to play on  
13 the boy's team and can't play on the girls'  
14 team, they're excluded, that's true even if  
15 they have a physical advantage.

16 And so the court said we don't care  
17 about the physical advantage; it's still a  
18 Title IX violation. And that's clearly wrong.  
19 That's a misinterpretation of the statute. And  
20 the error in it is that they're not being  
21 excluded from the boys' team; they're choosing  
22 not to participate on the boys' team.

23 JUSTICE KAVANAUGH: Sorry, one more.

24 Bostock does not control here because? Fill in  
25 the blank.

1                   MR. MOOPPAN: Because the law doesn't  
2 classify on the basis of transgender status.  
3 It classifies on the basis of sex, biological  
4 sex. Just like in Skrmetti, the law there  
5 classified on the basis of age and medical  
6 treatment, here, the law classifies on the  
7 basis of biological sex. The person's gender  
8 identity is wholly irrelevant to how the law  
9 applies.

10                  JUSTICE KAVANAUGH: Thank you.

11                  CHIEF JUSTICE ROBERTS: Justice  
12 Barrett?

13                  Justice Jackson?

14                  JUSTICE JACKSON: But -- but they are  
15 being prevented from playing on the team that  
16 matches their gender identity, correct?

17                  MR. MOOPPAN: That's the effect. So  
18 let me use your example from earlier.

19                  JUSTICE JACKSON: Yes.

20                  MR. MOOPPAN: You said there is a  
21 cisgender woman, she could play on the team she  
22 wants.

23                  JUSTICE JACKSON: Right.

24                  MR. MOOPPAN: There is a boy who  
25 identifies as a girl, he can't play on the team

1       he wants. Take that same boy and switch his  
2       gender identity but say he still wanted to play  
3       on the girls' team. Say he was a very  
4       unathletic boy. He, likewise, couldn't play on  
5       the team. So it's not the gender identity  
6       that's keeping him off the girls' team. It's  
7       his biological sex. His gender identity is  
8       wholly irrelevant to it.

9               Now I agree with you there's a very  
10      significant disparate impact on transgender  
11      individuals by this law because they are the  
12      boys --

13               JUSTICE JACKSON: But I wonder if --  
14               MR. MOOPPAN: -- who are most likely  
15      to want to play on.

16               JUSTICE JACKSON: Have we said that  
17      Title IX never covers that kind of disparate  
18      impact in terms of its discriminatory effect?

19               MR. MOOPPAN: Oh, well, it certainly  
20      doesn't cover disparate -- first of all, I  
21      don't think Title IX covers disparate impact,  
22      period, because it uses --

23               JUSTICE JACKSON: But, in terms of its  
24      discriminatory effect, I'm just trying to  
25      understand it.

1 MR. MOOPPAN: Yes.

2 JUSTICE JACKSON: Is there something  
3 to this notion that some -- that differential  
4 treatment in effect in this way could be  
5 something that Title IX cares about?

6 MR. MOOPPAN: No. A, I don't think  
7 Title IX covers disparate impact even on the  
8 basis of sex. It certainly doesn't cover  
9 disparate impact on the basis of gender  
10 identity.

11 JUSTICE JACKSON: Okay.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Block.

15 ORAL ARGUMENT OF JOSHUA A. BLOCK  
16 ON BEHALF OF THE RESPONDENT

17 MR. BLOCK: Mr. Chief Justice, and may  
18 it please the Court:

19 B.P.J. signed up for school sports  
20 because she was an 11-year-old girl starting a  
21 new middle school who wanted to meet people,  
22 make new friends, and be part of a team. West  
23 Virginia argues that to protect these  
24 opportunities for cisgender girls, it has to  
25 deny them to B.P.J.

1                   But Title IX and the Equal Protection  
2    Clause protect everyone. And if the evidence  
3    shows there are no relevant physiological  
4    differences between B.P.J. and other girls,  
5    then there's no basis to exclude her.

6                   In thinking through the Title IX claim  
7    in particular, it's important to distinguish --  
8    excuse me -- distinguish between how Title IX  
9    operates as a general matter and how it  
10   operates outside the context of athletics. And  
11   I -- I'm glad that we're doing that this  
12   morning.

13                  Instead of focusing on athletics, West  
14    Virginia argues more generally that this  
15    Court's reasoning in Bostock does not apply to  
16    Title IX. To distinguish Title VII from Title  
17    IX, West Virginia argues that Title IX protects  
18    groups instead of individuals and applies only  
19    when sex is the sole cause of adverse  
20    treatment.

21                  That approach takes a wrecking ball to  
22    the text of Title IX and the structure of this  
23    Court's anti-discrimination precedents. It  
24    would dilute Title IX's protections for  
25    everyone, not just transgender students and not

1 just in the context of sports.

2 West Virginia's law treats B.P.J.  
3 differently from other girls on the basis of  
4 sex and it treats her worse in a way that harms  
5 her. Outside the context of athletics, that's  
6 all B.P.J. would need to establish a Title IX  
7 violation.

8 But the Javits Amendment provides  
9 extra breathing room for reasonable regulations  
10 that take into account sex-based differences in  
11 athletics to provide equal athletic opportunity  
12 for everyone. West Virginia's exclusion of  
13 B.P.J. does not fall within that framework.

14 Unlike the exclusion of -- of a  
15 cisgender boy, excluding B.P.J. doesn't advance  
16 any interest in ensuring overall fairness and  
17 safety. And unlike the case of a cisgender  
18 boy, excluding B.P.J. from the girls' teams  
19 excludes her from all athletic opportunity  
20 while stigmatizing and separating her from her  
21 peers.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Doesn't your claim  
24 ultimately depend on the existence of  
25 sex-segregated sports?

1                   MR. BLOCK: No, I don't think so, Your  
2 Honor. I think this is similar to  
3 Morales-Santana, where the claim was an equal  
4 protection claim.

5                   JUSTICE THOMAS: Well, I mean, the --  
6 let's say there were no Title IX requirement  
7 for sex-segregated sports.

8                   MR. BLOCK: Well, if there were no  
9 Title IX requirement and -- well, I don't think  
10 Title IX requires sex-segregated sports.

11                  JUSTICE THOMAS: Well, permits.

12                  MR. BLOCK: But, if there were no  
13 Title IX and all the sports were co-ed, then  
14 she wouldn't be subjected to disparate  
15 treatment on the basis of sex. So I think the  
16 claim's the discrimination, and it's perfectly  
17 possible to have it --

18                  JUSTICE THOMAS: So doesn't that  
19 suggest that your subcategory of the sex --  
20 of -- of the relevant class of female athletes?  
21 Isn't that your point?

22                  MR. BLOCK: Yes. Well, for the equal  
23 protection claim --

24                  JUSTICE THOMAS: Well, but you're  
25 not -- my point is that you're challenging a

1 category that does not exist in the statute but  
2 is dependent upon the existence of a category  
3 in the statute that you're not challenging.

4 MR. BLOCK: Well, I don't -- I  
5 wouldn't put it that way. I would put it the  
6 way as there's a classification that we think  
7 is valid as applied to most people but is  
8 invalid as applied to a discrete subset of  
9 those people.

10 But I don't think the success of that  
11 equal protection claim hinges as an a priori  
12 matter on the existence of girls' teams. There  
13 are lots of ways to remedy an equal protection  
14 violation.

15 CHIEF JUSTICE ROBERTS: But I think,  
16 given the way you phrased it, the question  
17 becomes a little different because what it  
18 seems to me you have to establish is the basis  
19 for requiring an exception to the  
20 classification.

21 You're not challenging the idea of  
22 having boys and girls separate sports. You're  
23 saying that you cannot exclude transgender  
24 girls from the definition of girls. And it's  
25 an entirely different question than the equal

1 protection question.

2 MR. BLOCK: I don't think we're  
3 arguing for an exception. I think we're  
4 bringing exactly the same argument in Caban.  
5 In Caban, the plaintiff wasn't saying this is  
6 valid for everyone, but I want an exception  
7 from it.

8 In Caban, the plaintiff was saying  
9 this is valid for other fathers, but it's not  
10 valid as applies to me.

11 So I just think it's a -- it's an  
12 as-applied equal protection claim. I  
13 understand the Court might decide those claims  
14 don't exist, but I don't think it's a claim  
15 asking for an exception. It's a claim saying  
16 it's, as applied to them, it's okay. As  
17 applied to me, it's not.

18 JUSTICE SOTOMAYOR: Counsel, how do  
19 you get to a Title IX violation? I know  
20 exactly how you get to an equal protection  
21 violation, okay? When the reg -- if you accept  
22 that the regulation does by its own terms  
23 permit sex-based separate sports, does permit  
24 schools to do this, how -- what in Title IX  
25 explicitly or even logically says that you have

1 to give transgender --

2 MR. BLOCK: Thank you. I  
3 appreciate --

4 JUSTICE SOTOMAYOR: -- girls the same  
5 opportunity? Because the regulation said --  
6 it's not just a statute. It's the regulation  
7 said you can create separate-sex teams.

8 MR. BLOCK: No, thank you. I take the  
9 point.

10 I think there's always been a tension  
11 between the underlying text of Title IX, which  
12 protects individuals, not groups, and the  
13 regulations, which are authorized by the Javits  
14 Amendment and have special leeway to make some  
15 group-based measurements.

16 But, if you look at the rationale for  
17 the regulations, HEW, when it issued the  
18 regulations, said that we think that our  
19 group-based method, which otherwise would have  
20 been completely impermissible for Title IX,  
21 adequately protects the rights of individuals  
22 because, if boys and girls as groups are being  
23 given equal sets of overall opportunity, then  
24 every individual in the group also has a set of  
25 equal opportunity to choose from, and --

1 JUSTICE GORSUCH: Yeah, I think that's  
2 the problem. You know, you're -- you're  
3 absolutely right to worry about the wrecking  
4 ball, but I think we've kind of taken a  
5 wrecking ball to that.

6 There's no "solely" in this statute,  
7 all right? We're talking about individuals.  
8 But Javits changed Title IX and it said, you  
9 know, sports are different. And we've got  
10 these regulations that have been out there for  
11 50-plus years. And, you know, normally,  
12 Skidmore kind of comes in there. And forget  
13 about the Spending Clause, I guess, but maybe  
14 I'll ask you about that too.

17 MR. BLOCK: So I completely agree the  
18 Javits Amendment is what makes this different  
19 from Title VII. And I'm very happy with  
20 however this decision comes out to have a  
21 decision that's focused specifically on the  
22 unique context of athletics as opposed to these  
23 broad arguments about Bostock applying to Title  
24 IX as a general matter.

25 But I guess what I'd say is the

1 regulations still require equal athletic  
2 opportunity. It's not a complete exception for  
3 sex-separated teams.

4 JUSTICE GORSUCH: Yeah, but Javits  
5 says it can be reasonable.

6 MR. BLOCK: Yes.

7 JUSTICE GORSUCH: And do you dispute  
8 that the HEW regulation that has been on the  
9 books for 50-plus years is reasonable?

10 MR. BLOCK: I think it is absolutely  
11 reasonable as applied to cisgender students. I  
12 think that as applied to transgender students,  
13 instead of providing them equal overall  
14 opportunity, it's a complete exclusion from the  
15 program. And so that -- so that's our  
16 argument, that it's reasonable as applied in  
17 the context of cisgender people, but  
18 interpreting the regulations to authorize this  
19 sort of categorical exclusion that doesn't give  
20 B.P.J. an equal set of opportunities to choose  
21 from would be an unreasonable way to implement  
22 Title IX.

23 JUSTICE GORSUCH: Okay. Got you.  
24 Thank you.

25 JUSTICE ALITO: It's unreasonable as

1 to all transgender students?

2 MR. BLOCK: No. I think it's -- I  
3 think it's a combination. I think -- so  
4 reasonable -- a reasonableness test, I think  
5 that requires some sort of mend -- excuse me --  
6 ends-means-fit, and I think that that exists  
7 when it comes to cisgender students.

8 I think what makes B.P.J.'s case  
9 differently from a cisgender student is two  
10 things. First, she doesn't have any of the  
11 physiological distinctions that justify the sex  
12 separation in the first place, and, second of  
13 all, the harm to her is of a material different  
14 kind. It's not -- it's one thing to say we're  
15 not going to let boys play volleyball because  
16 they have all these other sports to choose from  
17 or we're not going to let girls play football  
18 because they have all these other sports to  
19 choose from. It's another thing to say you  
20 don't get any sports.

21 JUSTICE KAGAN: But, in that argument,  
22 does it matter whether B.P.J. has a competitive  
23 advantage or not?

24 MR. BLOCK: Yes, we think it does.  
25 And I appreciate the opportunity to clarify

1 that we don't have any objection to vacating  
2 the grant of summary judgment in our favor. We  
3 did our best to defend the judgment below, but  
4 our argument before the Fourth Circuit for  
5 summary judgment was that there wasn't a  
6 genuine disputed fact about whether she had an  
7 advantage.

12 JUSTICE KAGAN: So your argument  
13 depends on the -- depends on her not having a  
14 competitive advantage because she's not been  
15 through male puberty?

16 MR. BLOCK: That -- that -- and not  
17 just not been through male puberty but also  
18 gone through a female hormonal puberty --

19 JUSTICE KAGAN: Right.

20 MR. BLOCK: -- with all the  
21 physiological changes accompanying it.

22 JUSTICE KAGAN: But the argument goes  
23 away if -- if that -- if those facts go away?

24 MR. BLOCK: Yes, yes, absolutely,  
25 which is -- at the beginning of the argument,

1       Justice Kagan, you talked about this could be  
2       resolved based on a legal principle or based on  
3       the facts. And I really do want to make a  
4       pitch for resolving it based on the facts  
5       because, look, if they're right about the  
6       facts, then we should lose.

7               And the irony is that in order to win  
8       summary judgment in this posture when there's a  
9       disputed question of fact below is they can  
10       only win in this posture if we're right about  
11       the facts and there aren't any advantages. And  
12       I -- I -- I don't think there's any need at  
13       this juncture for this Court to issue that  
14       broad a holding when, according to them, once  
15       the evidence comes in below, we're not going to  
16       get past summary judgment. I mean --

17               JUSTICE KAGAN: You're not suggesting  
18       that we decide the factual question?

19               MR. BLOCK: No, no, no. I'm -- I'm  
20       suggesting that the case be allowed to be  
21       decided on remand on the factual question,  
22       which I think, like, this is an important  
23       issue, it affects -- it may affect the whole  
24       country, and the Court wants to get it right.

25               And I don't think the best way to get

1       it right is to rely on, you know, cherry-picked  
2       studies or assertions in amicus briefs. I  
3       think the way to get it right is to let all the  
4       facts they're trying to put in the record  
5       actually be put in the record. And then we'll  
6       have the facts in front of us. And maybe  
7       they'll make the issue go away.

8               But I think it's unnecessary to, you  
9       know, intervene at this instance with a  
10       sweeping legal conclusion to something that  
11       might actually be a narrow factual dispute.

12              JUSTICE BARRETT: Counsel, can you  
13       explain whether or why your theory would allow  
14       a cisgender boy who just couldn't make the  
15       boys' team -- I mean, he doesn't have an equal  
16       opportunity, he can't play, there's no team he  
17       can play on. And let's say that his athletic  
18       ability can be shown that he has no competitive  
19       advantage and he wants to be on the girls'  
20       team.

21              Why can't he on your theory?

22              MR. BLOCK: No, I appreciate the  
23       question. I think -- I just want to be clear  
24       about what we think the -- the justification  
25       for the separate teams is.

1           We don't think the boys' team is for  
2 better athletes and you have a backup team for  
3 athletes that aren't as good. I think the  
4 purpose of the teams is to control for the  
5 variable of sex-based advantages so that  
6 talented women athletes have all the same  
7 opportunities as talented male athletes. But  
8 also, untalented male athletes should be  
9 compared to untalented women athletes.

10           So the -- they're not being separated  
11 based on how good you are, right? The whole  
12 point is to allow female athletes to have all  
13 the same opportunities as men by controlling  
14 for the sex-based differential that comes  
15 through puberty.

16           And so that's why I don't think that  
17 the claim is the same there. I think that's  
18 what -- what's happened here is, by virtue of  
19 her medical care, B.P.J. has already  
20 effectively controlled for those sex-based  
21 advantages, and so she is completely in the  
22 position that she would have been if her  
23 birth-assigned sex had been female.

24           As opposed to a cisgender boy who's  
25 just not very good at sports, and if his

1 birth-assigned sex were female, maybe he'd be  
2 even worse, I don't know, but -- but, again,  
3 the purpose is to control for the variable with  
4 sex to provide equality, not to have a good  
5 team and a team for people that can't cut it.

6 Now I'm happy to address --

7 JUSTICE KAVANAUGH: Can I ask a  
8 question on the law --

9 MR. BLOCK: Yes.

10 JUSTICE KAVANAUGH: -- on Title IX? I  
11 mean, I hate -- hate that a kid who wants to  
12 play sports might not be able to play sports.  
13 I hate that. But we have -- it's kind of a  
14 zero-sum game for a lot of teams. And someone  
15 who tries out and makes it, who is a  
16 transgender girl, will bump from the starting  
17 lineup, from playing time, from the team, from  
18 the all league -- and those things matter to  
19 people big time -- will bump someone else.

20 And so one way to resolve it, as you  
21 say, is the facts, try to figure out is there  
22 really a competitive advantage. I think we're  
23 going to get a lot of scientific uncertainty  
24 about that, a lot of debate about that, a lot  
25 of different district courts.

1                   The other way on the law, one way on  
2 the law is, okay, well, sex in Title IX and in  
3 Javits meant biological sex, and it's up to  
4 Congress to adjust that going forward if they  
5 want, given, as you say and your co-counsel  
6 said earlier, you know, people are learning  
7 more about this and maybe there really is no  
8 advantage.

9                   Well, if that's true, and some states  
10 are operating under that basis, that's --  
11 that's -- that's the way to go. But, for now  
12 at least, the law says biological sex. And I  
13 think we have to recognize on both sides the  
14 zero sum. It's not like, oh, just add another  
15 person to the team. That's not how sports  
16 works. It's -- it's someone else is going to  
17 get disadvantaged. So I just want you to  
18 address that.

19                   MR. BLOCK: I'm -- I'm happy to, and I  
20 guess I have three answers.

21                   And the first is I -- I completely  
22 understand that many parts of sports are zero  
23 sum. But this law isn't limited to zero-sum  
24 opportunities. So B.P.J. played on the  
25 cross-country team, where there were no cuts.

1 She came in near the back. It wasn't --  
2 JUSTICE KAVANAUGH: Well, but -- I'm  
3 sorry to interrupt, but you wouldn't have a  
4 different rule if she was finishing in the top  
5 5.

6 MR. BLOCK: No, no, no, but it wasn't  
7 a zero sum.

8 JUSTICE KAVANAUGH: Or if they had  
9 cuts.

10 MR. BLOCK: But what I'm saying is  
11 there -- there are --

12 JUSTICE KAVANAUGH: In this particular  
13 case, but, usually, with teams -- I don't mean  
14 to -- I just don't want to get out of that.

15 Usually, with teams, there are cuts --

16 MR. BLOCK: Yes.

17 JUSTICE KAVANAUGH: -- which mean a  
18 lot to people. There are starting lineups.  
19 Those mean a lot to people. There's who  
20 makes -- who gets a college recruit. That  
21 means a lot to people.

22 MR. BLOCK: Yes. Yes, yes. I -- I  
23 just want to say that there still are some  
24 areas where there are win/win solutions. I  
25 think even being able to be on practices with

1 the team consistent with your gender identity  
2 instead of your sex assigned at birth can be  
3 enormously important.

4 So I -- I -- I think some -- some  
5 scenarios are zero sum, but not everything  
6 having to do with sports is. And I do think  
7 that one of the vices of this law is that it  
8 sweeps so broadly that even win/win solutions  
9 are taken off the table.

10 In terms of aspects where it's zero  
11 sum, you know, no one likes to lose. No one  
12 likes to not make the team. And people often  
13 don't make the team. Cisgender girls don't  
14 make the team when competing against other  
15 cisgender girls all the time.

16 And the question I think is whether  
17 it's an unfair advantage to not make the team  
18 because a transgender girl participated. And  
19 if there is no sex-based biological distinction  
20 there, then I think it's an unfortunate  
21 situation, but I think it's the unfortunate  
22 situation that comes with having a zero-sum  
23 game, not inherent unfairness.

24 Then the third thing is I think  
25 however the Court resolves this case, I -- I

1 really urge the Court not to do it based on a  
2 definition-of-sex argument. We are not  
3 disputing in this case that West Virginia can  
4 have its definition of sex. Our argument is  
5 it's using this definition to inflict  
6 discrimination and deny equal athletic  
7 opportunity. But we are not saying their  
8 definition of sex is wrong.

9                   However, I don't think it follows that  
10 Title IX created some national definition of  
11 sex that preempted a state's ability to say,  
12 you know, actually, we are most concerned about  
13 discrimination that happens through gender  
14 roles. We think --

15                   JUSTICE KAVANAUGH: Can I ask you  
16 something? That's a very important point here,  
17 I think, for what happens in the future, what  
18 you just said.

19                   Do you think sex and Title IX can  
20 reasonably be interpreted to allow different  
21 states to take different understandings of that  
22 in their sports leagues?

23                   MR. BLOCK: I do because I don't --

24                   JUSTICE KAVANAUGH: And why is that?  
25 That's real important, I think, going forward.

1                   MR. BLOCK: Right. Because I don't  
2 think the purpose of Title IX is to have an  
3 accurate definition of sex. I think the  
4 purpose is to make sure that sex isn't being  
5 used to discriminate by denying opportunities,  
6 just -- just as I don't think we need to -- to  
7 define race in order to enforce Title VI.

8                   So I think I wouldn't look to whether  
9 or not it's accurate to classify, you know,  
10 B.P.J. as -- as male or female. I think the  
11 question is, is she being denied an opportunity  
12 because of that classification?

13                  But, obviously, sex can mean more than  
14 just the --

15                  JUSTICE KAGAN: So, if we didn't want  
16 to prevent a different state from making a  
17 different choice from West Virginia, what  
18 should we not say or what should we say to  
19 prevent that from happening?

20                  MR. BLOCK: Well, I wrote down the  
21 answer to that when you asked Mr. Mooppan. I  
22 have two things. I wrote: Don't give  
23 definition of sex. And I also said I wouldn't  
24 decide this by assuming that Title IX provides  
25 a right to single-sex teams.

1                   In the regulations, single-sex teams  
2 are optional. They're not mandatory. And  
3 the -- in addition to the -- we've been talking  
4 about the regulations, but on the ground, the  
5 way this plays out in practice is you have a  
6 1979 policy statement, a sub-regulatory  
7 document, that has a complicated test for  
8 determining when a sex-separated team is or is  
9 not required.

10                  And so I think that both because I --  
11 I think saying there's a right to a  
12 sex-separated team, like, would predetermine  
13 some of the questions in that other case,  
14 that's so I -- that's one reason why I don't  
15 think you should do that.

16                  But, second, I think the more the  
17 Court gets into questions that are handled in  
18 this -- these complex regulatory documents, I  
19 think the more I'd be worried about this Court  
20 accidentally saying something about how Title  
21 IX works that doesn't actually map onto how it  
22 is actually playing out on the ground.

23                  JUSTICE ALITO: Title IX prohibits  
24 discrimination on the basis of sex. It's a  
25 statutory term. It must mean something.

1       You're arguing that, here, there's  
2       discrimination on the basis of sex.

3               And how can we decide that question  
4       without knowing what sex means in Title IX? I  
5       mean, it could mean biological sex. It could  
6       mean gender identity. It could mean whatever a  
7       state wants to define it to mean, but it has to  
8       mean something.

9               How can we decide that without knowing  
10      what the statutory term means?

11              MR. BLOCK: Well, I -- I think there  
12      are a whole range of sex-based characteristics  
13      that can give rise to discrimination. I think,  
14      if someone said I'm going to discriminate  
15      against anyone who acts in a feminine manner,  
16      like anyone with limp wrists, I don't care who  
17      they are, but I'm going to discriminate against  
18      them, like, I think that would be sex  
19      discrimination. It would be sort of gender  
20      presentation. I would -- but I wouldn't say  
21      that's not covered by Title IX.

22              And so I just -- I -- I'm not saying  
23      that biological differences aren't part of sex,  
24      but I'm saying that sex also has broader  
25      connotations and there's no reason to keep that

1 out of the statute.

2 And I'm certainly not saying that sex  
3 means gender identity. I just want to be very  
4 clear about that. I don't think that, you  
5 know, just as -- I would say this. Our  
6 argument is that there's a group of people who  
7 are assigned male at birth who -- for whom  
8 being placed on the boys' team is harmful,  
9 right?

10 We happen to have a word for those  
11 people. It is transgender girls, but I don't  
12 think that means that we're elevating gender  
13 identity to be the new definition of sex.

14 Just as in Phillips versus Martin  
15 Marietta, there's a subset of women, you know,  
16 who are harmed by the policy, not all women,  
17 but there's a subset of women who had young  
18 children, and there's a name for them. It's  
19 mothers, but that doesn't mean that we're  
20 replacing the word "sex" with mothers.

21 I think this issue --

22 JUSTICE JACKSON: How -- how do you  
23 deal -- how -- how do you respond to or deal  
24 with the other side's characterization of that  
25 harm as just the disparate impact of this

1 regulation, that really, you know, it's not  
2 discrimination, I think they're saying, but it  
3 is just the downstream effect of the  
4 application of the classification that the  
5 Javits Amendment allows and that's just the way  
6 it goes?

7 MR. BLOCK: Yeah. So -- so I guess I  
8 would say this. I think this Court has  
9 dealt -- dealt with the issue of things like  
10 constructive denials and constructive  
11 discharges in a variety of contexts. And under  
12 Title IX, an outright denial isn't required.

13 Davis says a constructive denial also  
14 counts. And whenever there's a question of  
15 constructive denials, the Court applies a  
16 standard that's reasonable person in the  
17 plaintiff's position under all the  
18 circumstances.

19 And they use that for constructive  
20 denials, you've used that for retaliation  
21 claims. And if you look at Burlington versus  
22 White, I think it's very on point here because  
23 one of the points that Burlington versus White  
24 said is that there's some actions that aren't  
25 going to be harmful to most people, but they

1       might be harmful to some people.

2                   So Burlington -- again, Burlington  
3       versus White used a mother with young children  
4       might find a change in her work schedule to be  
5       incredibly harmful, right? That doesn't mean  
6       that, you know, we're arguing that, you know,  
7       this is a disparate impact classification on  
8       people who have young children. It's a sex  
9       classification. The sex classification is just  
10      harming some people and not harming other  
11      people.

12                  So that's how we would view it. I  
13      don't think it's -- I think this is a facial  
14      class -- sex classification any way you cut it.  
15      And some --

16                  CHIEF JUSTICE ROBERTS: Well, I -- I'm  
17      sorry. You don't think we should have an  
18      operating definition of sex in Title IX?

19                  Now I understand the idea that --  
20      well, the question then becomes not whether or  
21      not there's discrimination on the basis of sex  
22      but whether there's discrimination on the basis  
23      of whatever characteristic you think should be  
24      included in the definition of sex.

25                  Now, when it's used as a statutory

1 term, I'm not sure you have that kind of  
2 flexibility. The question then would be  
3 instead what does Congress thinks -- think the  
4 words -- word means?

5 MR. BLOCK: Well, Your Honor, I guess  
6 I'd say I think Congress prohibited  
7 discrimination based on sex. I don't think --

8 CHIEF JUSTICE ROBERTS: Then -- I'm  
9 sorry, go ahead.

10 MR. BLOCK: Yeah. And so -- so I  
11 don't think that just as I don't think Congress  
12 adopted a definition of -- of race, you know,  
13 in Title VI in order to prohibit discrimination  
14 on the basis of race. I think -- I think I'm  
15 not trying to police the accuracy of the  
16 terminology that's being used.

17 All I'm saying is that what's being  
18 prohibited is using this classification to  
19 discriminate, not --

20 CHIEF JUSTICE ROBERTS: So you --  
21 well, but without really knowing what the  
22 distinction is?

23 MR. BLOCK: Well, I -- I -- you know,  
24 I think -- I don't think the examples I've  
25 given about sex-based characteristics, like,

1 fall outside the common understanding of things  
2 that are related to sex.

3 CHIEF JUSTICE ROBERTS: Well, related  
4 to sex. I -- I guess what you're saying is  
5 then we -- we do have to accept for your  
6 position that we're not dealing -- when -- when  
7 Congress says sex, we're not dealing with  
8 biological sex, but we're dealing with other  
9 characteristics that people might associate  
10 with sex?

11 MR. BLOCK: No, no, no. I think, for  
12 this case, you can -- you can accept for the  
13 sake of this case that -- that we're talking  
14 about what they've termed to be biological sex.  
15 I think that resolves this case.

16 I was just talking about in addressing  
17 other potential cases --

18 JUSTICE GORSUCH: So we don't have to  
19 say anything about the matter. You're willing  
20 for us to proceed on that assumption?

21 MR. BLOCK: Exactly. Just like in  
22 Bostock, I think you can proceed for argument's  
23 sake without taking a definitive position here  
24 because it might have downstream consequences  
25 in other cases that even the United States

1 doesn't want the Court to pre-judge here.

2 Now I -- I would like to say one quick  
3 thing on Justice Barrett's reference to  
4 separate classrooms. I mean, it is true, and  
5 you see all these litigated cases about  
6 theories that there's different brain sexes for  
7 women versus boys and that's why you need  
8 separate classrooms.

9 I don't think -- I think the instinct  
10 was completely correct that you can have a lot  
11 of scientific justifications for  
12 discrimination. That doesn't mean that the  
13 discrimination is allowed or immune from  
14 scrutiny.

15 And, in -- in fact, some of the  
16 states -- some of the studies that are cited in  
17 the amicus briefs say boys are naturally more  
18 aggressive, right, and -- and favor competition  
19 more because that's in their DNA.

20 So I -- I do think, even in these  
21 studies, the idea that you're completely, you  
22 know, just basing it on pure biology and not on  
23 other generalizations doesn't quite hold up.

24 I'd also -- I -- I'm -- I -- I -- to  
25 the extent that we're -- we want to go back to

1 Caban, I -- I do want to just make a couple  
2 quick things clear. Caban was not a facial  
3 challenge. It -- it wasn't.

4 And neither was -- some of the First  
5 Amendment cases they were talking about weren't  
6 equal protection First Amendment cases. They  
7 were commercial speech cases. Michael M. also  
8 wasn't a facial challenge. He wasn't saying:  
9 I should have an exception because a  
10 prepubertal girl was involved. He was saying  
11 the statute is overbroad because, in theory, it  
12 could apply to a prepubertal girl. So I -- I  
13 do think that some of the characterization of  
14 the cases doesn't hold up to our reading of  
15 them.

16 JUSTICE JACKSON: So how does a  
17 Caban-type as-applied intermediate scrutiny  
18 analysis work in your view? It -- it is an  
19 under-developed area of the law. Is it enough  
20 for one person to show that she bucks the trend  
21 or -- or not?

22 MR. BLOCK: Yeah. I -- I don't think  
23 so. I think -- I -- I agree with my co-counsel  
24 that I think we're talking about a -- a  
25 discrete, like, definable group that will

1 reliably not serve the government's interest.

2 And I don't think Nguyen is a  
3 counterpoint to that because the whole point in  
4 Nguyen was that men who were not similarly  
5 situated had an opportunity to demonstrate  
6 that. There were three very easy methods of  
7 transmitting citizenship and Nguyen emphasized  
8 that in order to do it, that those were minimal  
9 burdens.

10 And that is the key fact in Nguyen  
11 that distinguishes it from this case. This is  
12 a categorical ban. And Nguyen and Caban and  
13 all the Court's cases distinguish between  
14 categorical bans and more narrow procedural  
15 requirements that do treat men and women  
16 differently but still provide the opportunity  
17 for demonstrating that you're not similarly  
18 situated.

19 JUSTICE KAGAN: I -- I think a hard  
20 question that Ms. Hartnett got, maybe the  
21 hardest question on these -- on these lines  
22 was, if we recognize these sorts of as-applied  
23 challenges, doesn't that effectively turn  
24 intermediate scrutiny into strict scrutiny.

25 MR. BLOCK: Right.

1 JUSTICE KAGAN: What would your answer  
2 be to that? Would it be any different, or do  
3 you want to elaborate?

4 MR. BLOCK: No, I -- I think -- I  
5 think the answer is it absolutely wouldn't.  
6 You still are only looking for a substantial  
7 relationship, which means that you can have  
8 these sorts of requirements where there are a  
9 lot of -- under Caban and under Lehr, there's  
10 still a lot of fathers that are out of luck  
11 that they actually, like, probably do have a  
12 good relationship with their kid, but they  
13 didn't figure out -- fill out the right  
14 paperwork, they didn't do this, they didn't do  
15 that.

16 And heightened scrutiny doesn't  
17 require that they be excused from those  
18 procedural burdens. So I do think that  
19 heightened scrutiny allows you to have, like,  
20 procedural requirements that people have to go  
21 through and those can be enforced. Strict  
22 scrutiny does not allow that.

23 But that's different from saying that  
24 if the complete rationale for a classification  
25 just doesn't apply to you, that there's no

1 equal protection claim you can bring.

2 And -- and some of the -- I -- it's --  
3 it's complicated to talk about the difference  
4 between facial and as-applied post-CASA because  
5 I think a lot of the things that we called  
6 facial -- facial challenges now would be viewed  
7 as overbreadth challenges, right, where someone  
8 is trying to say the law is so overbroad in  
9 general it has to all be struck down, and we  
10 have that for First Amendment. I don't think  
11 we have that anymore for most equal protection  
12 claims.

13 And so I think taking this facial  
14 as-applied framework from before CASA, where we  
15 allowed these facial attacks on statutes, and  
16 then just transporting it into as-applied cases  
17 post-CASA doesn't necessarily work. I think  
18 some of the terminology might need to be  
19 rethought.

20 And -- and so, again, that's another  
21 reason why there's not a lot of precedent in  
22 this area, as several of you all have  
23 acknowledged, and that's another reason why I  
24 don't think this should be the case that makes  
25 that precedent when it's unnecessary to do so.

1                   CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3                   Justice Thomas?

4                   Justice Alito?

5                   Justice Sotomayor?

6                   JUSTICE SOTOMAYOR: Would you address  
7 a little bit the quantum of certainty or  
8 uncertainty that would have to exist in the  
9 science? Your co-counsel -- or the counsel on  
10 the other case said that if it's 50 percent,  
11 the state loses. But I don't -- I'm always  
12 hesitant about these percentage cases because  
13 it's never quality -- quantity -- it's not --  
14 never quantitative, it's qualitative.

15                  So what do you think the qualitative  
16 standard is?

17                  MR. BLOCK: Well, I mean, to be clear,  
18 I don't actually think there's uncertainty in  
19 the case of someone who's had puberty blockers  
20 and then gender-affirming hormones. Our  
21 position is there's zero uncertainty. It's  
22 actually clearly in our favor.

23                  So I -- but, in general, I think it's  
24 hard to give, you know, a quantitative answer  
25 to that. I think part of heightened scrutiny

1 involves taking all of these factors into  
2 account. This Court, you know, has said on  
3 several occasions that heightened scrutiny can  
4 accommodate deference. And I think -- I  
5 honestly think it's a case-by-case decision  
6 that also looks at how harmful the  
7 classification is, how burdensome it is.

8 I don't think it's just -- I don't  
9 think you just look at the accuracy of the  
10 classification and add a number value for how  
11 certain we are that it's accurate. I think  
12 many other factors come into play.

13 JUSTICE SOTOMAYOR: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 Justice Gorsuch?

16 Justice Barrett?

17 Justice Jackson?

18 Thank you, counsel.

19 Rebuttal, Mr. Williams.

20 REBUTTAL ARGUMENT OF MICHAEL R. WILLIAMS

21 ON BEHALF OF THE PETITIONERS

22 MR. WILLIAMS: I think you've now  
23 heard Respondent abandon the Fourth Circuit's  
24 logic on Title IX, and I think, in many ways,  
25 that makes this Court's task that much easier.

1                   Congress authorized regulations  
2   allowing sex-separated athletics. West  
3   Virginia's definition of "sex" tracks the  
4   ordinary meaning in 1972 and 1974 and the  
5   regulatory framework that Congress endorsed.

6                   I -- I think, Mr. Chief Justice, your  
7   question really highlighted how B.P.J.'s  
8   approach unmoors this -- the statute and the  
9   regulation under Title IX from on the basis of  
10   sex. B.P.J.'s test in turn begins to look more  
11   towards other characteristics that aren't on  
12   the basis of biological sex, and I think that's  
13   not consistent with what we see there.

14                  I also think the answer to Justice  
15   Barrett's question reflected how, under  
16   B.P.J.'s theory, this really isn't about  
17   competitive advantage, that really what this  
18   does turn on is gender identity because B.P.J.  
19   continues to maintain that a cisgender boy who  
20   continues to not have those same biological  
21   advantages would nevertheless still be kept off  
22   of the boy -- of the -- of the girls' sports  
23   team.

24                  So, if you endorse that philosophy,  
25   that would require the Court to hold that

1 longstanding Title IX athletic regulations are  
2 unlawful. It would eliminate sex-separated  
3 athletics entirely. And I think it would  
4 defeat Title IX's core purpose of ensuring  
5 equal athletic opportunity for both sexes.

6 On the equal protection side of the  
7 house, the question is whether the  
8 classification is substantially related to an  
9 important governmental interest. And I think  
10 that B.P.J. ultimately wants to rewrite the  
11 classification to be something that it is not.  
12 Biological sex substantially relates to  
13 athletic performance. That's exactly why, in  
14 fact, Title IX regulations authorize  
15 sex-separated teams in the first place.

16 Respondent's test effectively ratchets  
17 up the intermediate scrutiny standard into a  
18 perfect fit, best fit, best disposition case  
19 that this Court has repeatedly said is not the  
20 standard under intermediate scrutiny cases.

21 That is the standard for strict  
22 scrutiny cases. You have heard it several  
23 times today.

24 Justice Sotomayor, you asked about  
25 deference. I think this Court has also

1       repeatedly recognized that in areas of evolving  
2       science and medicine, especially involving  
3       children, legislatures have the primary  
4       responsibility for weighing competing evidence  
5       and making the policy judgments.

6               I think the Court just recently said  
7       that in Skrmetti, but I certainly don't think  
8       that case stands alone in recognizing that  
9       especially when you have competing balances of  
10      harms, Justice Kavanaugh, when you're weighing  
11      these sorts of zero-sum games, that's a choice  
12      that's a policy judgment that ultimately rests  
13      in the hands of the legislature.

14               In the end, this Court has  
15      "recognized" physical differences between men  
16      and women. They are enduring. And inherent  
17      differences between men and women are cause for  
18      celebration. That is all that West Virginia's  
19      law does here. It should be upheld.

20               Thank you.

21               CHIEF JUSTICE ROBERTS: Thank you,  
22      counsel.

23               The case is submitted.

24               (Whereupon, at 1:22 p.m., the case was  
25      submitted.)

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