

# **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

II Washington, D.C.

12 Tuesday, January 13, 2026

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14 The above-entitled matter came on for

15 oral argument before the Supreme Court of the

16 United States at 11:59 a.m.

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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: But, 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 the context of a Spending Clause  
3 analysis. And so it amounts to effectively a  
4 canon of construction that requires that  
5 clearer statement in order for the condition to  
6 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 a specific request for  
16    damages is the reason for its analysis. And I  
17    think that actually would be inconsistent --

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

22                  MR. WILLIAMS: I would respectfully  
23    disagree, Your Honor. I would say that just  
24    because the Court hasn't done so before doesn't  
25    mean it's an extension per se. I think that

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

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

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

23 I think there would certainly be -- if  
24 anybody were clearly bound by the conditions of  
25 Title IX, it would be --

1 JUSTICE JACKSON: So it would map on.

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

3 MR. WILLIAMS: Right.

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

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

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

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

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

10 JUSTICE SOTOMAYOR: I presume --

11 JUSTICE BARRETT: Go ahead.

12 JUSTICE SOTOMAYOR: I'm sorry.

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

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

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

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

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

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

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

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

1 Amendment are a realistic reflection of  
2 those --

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

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

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

11 MR. WILLIAMS: Right.

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

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

1 move so much more quickly, seems to me like  
2 there would be some risk on your understanding  
3 that that would be okay.

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

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

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

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

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

21 JUSTICE KAGAN: -- I -- I -- I --

22 MR. WILLIAMS: Right.

23 JUSTICE KAGAN: You know, I -- I think  
24 that there's a sort of intuitive -- I think  
25 there are a lot of chess Grand Masters who

1 would tell you that women just like for  
2 whatever reason, they're -- you know, they  
3 don't -- they're not very -- they're not as  
4 good as this.

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

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

14 MR. WILLIAMS: Yes, Your Honor.

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

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

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

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

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

9 MR. WILLIAMS: So I think that --

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

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

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

25 But I think the -- the problem may be

1 with your --

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

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

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

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

1       themselves.

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

4                   JUSTICE KAVANAUGH: You --

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

7                   MR. WILLIAMS: Please.

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

10                  JUSTICE KAVANAUGH: Go ahead.

11                  (Laughter.)

12                  MR. WILLIAMS: I can do both.

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

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

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

1 in that basket.

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

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

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

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

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

15 MR. WILLIAMS: Fair enough.

16 JUSTICE GORSUCH: Thank you. Your  
17 turn.

18 MR. WILLIAMS: Thank you.

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

23 MR. WILLIAMS: So I think the  
24 relevance and significance is Your Honors are  
25 faced with a unique set of regulations and that

1      Congress was directly and intimately involved  
2      in both the instigation of the regulation in  
3      1974 and then sort of --

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

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

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

17                  MR. WILLIAMS: Right, exactly.

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

24                  MR. WILLIAMS: That's exactly right.  
25    And that's exactly why we were trying to make

1       your job easier in the sense that we took the  
2       language expressly from the regulations and  
3       mapped it over onto our own statute.

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

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

20                   JUSTICE SOTOMAYOR: What do you --

21                   JUSTICE KAVANAUGH: And what about  
22      Bostock?

23                   JUSTICE SOTOMAYOR: No, no, I --

24                   JUSTICE KAVANAUGH: Do you want to  
25      deal with Bostock?

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

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

7                   MR. WILLIAMS: Right.

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 In terms of Bostock, I understand that

1 to say that discrimination on the basis of  
2 transgender status is discrimination on the  
3 basis of sex.

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

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

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

25                   CHIEF JUSTICE ROBERTS: Justice

1 Thomas?

2 Justice Alito?

3 Justice Sotomayor?

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

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

18 JUSTICE SOTOMAYOR: Right.

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

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

24 MR. WILLIAMS: Right. Well, so, in  
25 answer to your question, I think that doesn't

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

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

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

14 MR. WILLIAMS: Right.

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

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

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

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

3                   (Laughter.)

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

10                  MR. WILLIAMS: So --

11                  JUSTICE SOTOMAYOR: -- Clause would  
12    not?

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

16                  JUSTICE SOTOMAYOR: Assume.

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

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

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

1 JUSTICE SOTOMAYOR: Yes.

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

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

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

13 MR. WILLIAMS: Exactly.

14 JUSTICE SOTOMAYOR: All right.

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

18 JUSTICE SOTOMAYOR: I -- I just --

19 MR. WILLIAMS: Right.

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

22 (Laughter.)

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

25 MR. WILLIAMS: Well --

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

4 MR. WILLIAMS: Right.

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

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

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

14 JUSTICE SOTOMAYOR: Right.

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

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

## 23 Justice Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: There are, as we

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

6                   On your theory of Title IX, Title  
7       IX --

8                   MR. WILLIAMS: Right.

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

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

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

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

24                  JUSTICE KAVANAUGH: Okay.

25                  MR. WILLIAMS: I think, under Title

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

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

10              JUSTICE KAVANAUGH: Mm-hmm.

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

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

25              JUSTICE KAVANAUGH: Right. I agree.

1 I'm just trying to know --

2 MR. WILLIAMS: Right.

3 JUSTICE KAVANAUGH: -- what's common.

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

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

6 they --

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

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

17 JUSTICE KAVANAUGH: Got it. Thank  
18 you.

19 MR. WILLIAMS: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: So I guess I'm  
24 trying to puzzle through whether or not there  
25 is some independent form of discrimination

1       against transgender women that is distinct from  
2       the sex separation that Title IX allows.

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

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

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

14               JUSTICE JACKSON: To some degree.

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

19               JUSTICE JACKSON: But the law -- but  
20       the law actually operates differently, I think,  
21       for cisgender women and transgender women.

22       That is, with respect to their desire to play  
23       on a team that matches their gender identity,  
24       cisgender women can do it, transgender women  
25       cannot.

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

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

7                   JUSTICE JACKSON: Yes.

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

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

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

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

21                  MR. WILLIAMS: Right.

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

25                  MR. WILLIAMS: Right. And I -- I

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

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

9 MR. WILLIAMS: Right.

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

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

15 JUSTICE JACKSON: No.

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

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

25 MR. WILLIAMS: There's not a

1 classification based on hair color.

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

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

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

1 requirements. And let's say Title IX  
2 defined -- then went on to define -- this is in  
3 my hypothetical --

4 MR. WILLIAMS: Mm-hmm.

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

8 I mean, is that a classification  
9 problem or a definition problem? I would say  
10 it would be a classification problem and you'd  
11 still have to apply all of the heightened  
12 scrutiny just because, you know, they are  
13 defining religious institutions in a certain  
14 way. Similarly here, you have the overarching  
15 classification, you know, everybody has to be  
16 -- play on the team that is the same as their  
17 sex at birth, but then you have a  
18 gender-identity definition that is operating  
19 within that, meaning a distinction, meaning  
20 that for cisgender girls, they can play  
21 consistent with their gender identity; for  
22 transgender girls, they can't.

23 MR. WILLIAMS: So I think that --  
24 okay.

25 Your -- as to the part about your

1       ability to pass over from boy to girl --

2                   JUSTICE JACKSON: Yes.

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

13                  JUSTICE JACKSON: No, I appreciate --

14                  MR. WILLIAMS: -- in any way  
15      inconsistent --

16                  JUSTICE JACKSON: -- that.

17                  MR. WILLIAMS: -- with their gender.

18                  JUSTICE JACKSON: I appreciate that.  
19      I guess I was getting at what I understood the  
20      Chief Justice to be trying to discuss --

21                  MR. WILLIAMS: Right.

22                  JUSTICE JACKSON: -- which was this  
23      notion that this is really just about the  
24      definition of who -- that we accept that you  
25      can separate boys and girls, and we are now

1 looking at the definition of a girl and we're  
2 saying only people who were girl assigned at  
3 birth qualify.

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

8 JUSTICE JACKSON: Yeah.

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

17 But then past that, the definitional  
18 question is evaluated through rationale basis  
19 review. And that's Jana-Rock.

20 I recognize this Court has never gone  
21 as far as that, but I don't think the Court  
22 needs to go as far as that because, again, I  
23 think the way that you would do the analysis is  
24 to start by looking to the face of the statute.  
25 And if the face of the statute is engaged in a

1 conceded -- boy/girl sex classification is  
2 conceded to be legitimate, then at that point  
3 you kind of know which world you're operating  
4 in.

5 JUSTICE JACKSON: Thank you.

6 MR. WILLIAMS: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Mooppan.

10 ORAL ARGUMENT OF HASHIM M. MOOPPAN.

11 FOR THE UNITED STATES, AS AMICUS CURIAE  
12 SUPPORTING THE PETITIONERS

13 MR. MOOPPAN: Mr. Chief Justice and may it  
14 please the Court:

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

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

25 I think the simplest way to resolve

1 the Title IX claim in this case is as follows:  
2 The regs expressly authorize sex-separated  
3 teams. The other side isn't challenging those  
4 regs.

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

15                   So the difference that -- their claim  
16 that they eliminated the difference, just  
17 doesn't matter under the language of the regs.  
18 And that's enough to resolve the case.

19                   JUSTICE THOMAS: So your argument, as  
20 I understand it, is that they are not similarly  
21 situated?

22                   MR. MOOPPAN: So that's an additional  
23 argument you could make, is to say that even if  
24 you just focus on the language of the statute,  
25 the statute says discriminate on the basis of

1       sex. Discrimination, as this Court has  
2       repeatedly recognized, including in Bostock,  
3       means treating one person worse than someone  
4       who is similarly situated.

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

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

20               MR. MOOPPAN: Well, so the argument --  
21      so, again, we think that's a separate question.  
22      You should leave it separate. But the -- the  
23      argument we're making in those cases is the  
24      statute and the regs allow separation based on  
25      sex because of the biological difference

1       between men and women.

2           If you purport to separate based on  
3    biological sex, but then you allow some  
4    biological males to play on the female team,  
5    you have undermined the justification for  
6    separating in the first place.

7           JUSTICE SOTOMAYOR: So --

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

13           The reason you could separate for sex  
14    for sports is the biological difference. And  
15    if you then undermine that, you undermine the  
16    justification for separate --

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

21           If it's not clear the way you want it  
22    to be in terms of separating the sexes, I'm  
23    wondering why it's clear for your attempt to  
24    force those states who are choosing not to do  
25    this. You're now saying you must.

1                   MR. MOOPPAN: Again, that question is  
2 not presented in this case. And for this case,  
3 the factual dispute is irrelevant.

4                   JUSTICE GORSUCH: Mr. Mooppan, do you  
5 think that the Spending Clause should inform  
6 our analysis here?

7                   MR. MOOPPAN: I don't think this Court  
8 should invoke the Spending Clause analysis.

9                   JUSTICE GORSUCH: Why not?

10                  MR. MOOPPAN: For two reasons. One,  
11 we think that the statute and the regs clearly  
12 do not permit the claim.

13                  JUSTICE GORSUCH: I understand that.

14                  MR. MOOPPAN: And then the second is  
15 how the Spending Clause applies in the context  
16 of Title IX is, I think, a little more  
17 complicated than my friend suggested. It's not  
18 a clear statement requirement.

19                  I think if you look at some of these  
20 clear notice cases, cases like Jackson and  
21 Geyser, I don't think you would say that those  
22 statutes had a clear statement.

23                  JUSTICE GORSUCH: It's a clear notice  
24 requirement.

25                  MR. MOOPPAN: Right. But how that

1 applies is a little tricky. And I think in the  
2 case --

3 JUSTICE GORSUCH: Why? I mean, your  
4 argument is then in 1974 and 1960 -- sex meant  
5 biology, and that -- it's not clearly --  
6 there's not clear notices otherwise. Why isn't  
7 that the end of it?

8 MR. MOOPPAN: So I think the end of it  
9 is the statute clearly doesn't permit this  
10 claim. I'm just saying that I would be  
11 cautious about speaking about how the clear  
12 notice requirement applies because it is not a  
13 clear statement requirement and it's --

14 JUSTICE GORSUCH: I understand that.

15 You're -- you're -- you're not answering my  
16 question, which is --

17 MR. MOOPPAN: How would -- so -- so --

18 JUSTICE GORSUCH: If it's a clear  
19 notice requirement, at minimum, and a voluntary  
20 agreement, and sex at the time of the statute  
21 meant, as Bostock said, you know, there's good  
22 argument it's biology. And why wouldn't -- why  
23 wouldn't West Virginia be within its rights to  
24 say we didn't have clear notice otherwise?

25 MR. MOOPPAN: The scope of the clear

1 notice requirement is a tricky question. If  
2 you look at this Court's cases, I suspect --

3 JUSTICE GORSUCH: What's tricky about  
4 that?

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

9 JUSTICE GORSUCH: All right.

10 MR. MOOPPAN: And so I think it's a  
11 tricky issue.

12 JUSTICE GORSUCH: All right.

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

16 JUSTICE GORSUCH: Okay. And then --  
17 and then on the statute itself, it speaks of  
18 discrimination in program or activity. And in  
19 Davis we explained that that requires kind of a  
20 look at the whole of the institution because  
21 the definition of program activity is the whole  
22 institution, and so that's less  
23 individual-focused, it seems to me. Thoughts?

24 MR. MOOPPAN: Well, I -- I think  
25 that's true for the funding, but I don't think

1       that's true in terms of how the discrimination  
2       provision works. If you discriminate or  
3       exclude in one part of the school, I don't  
4       think you can justify that by saying, well, all  
5       the rest of the school, we treat everyone  
6       fairly.

7               I think those cases you're talking  
8       about, as long as you're receiving funding  
9       somewhere, the whole school's --

10              JUSTICE GORSUCH: All right.

11              MR. MOOPPAN: -- activities are  
12       covered.

13              JUSTICE GORSUCH: Okay. And so it  
14       really boils down to the living accommodations  
15       provision, which Congress anticipated there  
16       would be sex-separated living accommodations  
17       being permissible; the Javits Amendment; and  
18       then the regulations that are long-standing and  
19       then therefore entitled to some serious  
20       consideration?

21              MR. MOOPPAN: Well, no. So, you know,  
22       Your Honor asked why we run the similarly  
23       situated argument? Take, for example --

24              JUSTICE GORSUCH: No, don't -- don't  
25       bring that back up.

1 (Laughter.)

2 MR. MOOPPAN: Well, locker rooms and  
3 showers aren't covered by any of the things you  
4 just identified, not the living facilities  
5 provision, not the Javits Amendment. None of  
6 those things covered locker rooms and showers.

7 So unless you use a similarly-situated  
8 requirement, you would to have say that Title  
9 IX bans single-sex locker rooms and showers.

10 JUSTICE GORSUCH: Well, okay, all  
11 right. If that's your view, then let's talk  
12 about the similarly situated. I guess I have  
13 to.

14 What about the hypothetical I posed  
15 earlier that when it comes to high school  
16 performance, girls are sure a lot better than  
17 -- than boys. And so we're only going to have  
18 remedial classes for boys. And girls aren't  
19 free to attend.

20 MR. MOOPPAN: So I don't think those  
21 differences are based on inherent biological  
22 differences.

23 JUSTICE GORSUCH: Well, let's say --  
24 let's say I've got really good science. I  
25 mean, it's all about the science right? I've

1       got the science. You're fighting the  
2       hypothetical.

3                    MR. MOOPPAN: I'm not fighting the  
4       hypothetical, Your Honor. I think what I would  
5       say, Your Honor, is this Court has held in  
6       cases like VMI, that, in general,  
7       classification on sex is impermissible because,  
8       in general, men and women are similarly  
9       situated.

10                  Where that's not true is for the sorts  
11       of real enduring obvious differences that this  
12       Court talked about in cases like VMI, the  
13       differences in reproductive biology. I don't  
14       think the sort of pseudo-science you're  
15       suggesting has been baked into that.

16                  JUSTICE GORSUCH: Well, it's -- it's  
17       not pseudo.

18                  JUSTICE KAGAN: It's not pseudo  
19       science.

20                  JUSTICE GORSUCH: It's good science.

21                  JUSTICE KAGAN: It's not pseudo  
22       science to say --

23                  JUSTICE GORSUCH: Yeah.

24                  JUSTICE KAGAN: -- boys' brain  
25       development happens at a different stage than

1       girls does.

2                    MR. MOOPPAN: Well, with all respect I  
3    don't think there is any science anywhere that  
4    suggested that these sort of intellectual  
5    differences are traceable to biological  
6    differences. And I don't think that the  
7    statute should be read to --

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

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

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

16                  MR. MOOPPAN: Right.

17                  JUSTICE GORSUCH: You're saying, eh,  
18    it's okay, whether or not similarly situated.

19                  MR. MOOPPAN: And what --

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

22                  MR. MOOPPAN: Yeah.

23                  JUSTICE GORSUCH: Great, I appreciate  
24    that. I'm -- but I'm worried about math  
25    remedial class or the chess club or whatever.

1                   MR. MOOPPAN: Right. And so, look,  
2 let me say -- put it this way: The general  
3 rule is you have to treat men and women the  
4 same, and --

5                   JUSTICE GORSUCH: I would have  
6 thought. That's what the statute says.

7                   MR. MOOPPAN: And I think you have to  
8 be very careful about recognizing the  
9 exception. And so when you recognize an  
10 exception for what's similarly situated, I  
11 think you should tether it to the sorts of  
12 long-recognized differences that would have  
13 been recognized at the time the statute was  
14 enacted. At the time the statute was enacted,  
15 no one would have doubted that it said it  
16 didn't require --

17                  JUSTICE GORSUCH: Oh, I think at the  
18 time the statute was enacted, 1964, there are a  
19 lot of people who thought boys are better at  
20 certain things and girls at others --

21                  MR. MOOPPAN: Not based on --

22                  JUSTICE GORSUCH: -- that we don't  
23 believe anymore.

24                  MR. MOOPPAN: Not based on inherent  
25 biological differences.

1 JUSTICE GORSUCH: I think maybe in  
2 1964 they did.

3 JUSTICE BARRETT: They did.

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

6 JUSTICE GORSUCH: Well --

7 JUSTICE BARRETT: Mr. --

8 MR. MOOPPAN: Whereas -- whereas --

9 JUSTICE GORSUCH: I'm giving you a  
10 hypothetical where I have the science to prove  
11 it. And you're saying it's still not good  
12 enough.

18 JUSTICE BARRETT: Mr. Mooppan, do we  
19 have to -- I mean, I think these are very, very  
20 hard questions. I started with the math  
21 question before. I mean, I -- but do we have  
22 to -- because of the Javits Amendment, because  
23 the other side has conceded that Title IX  
24 permits sex-separated sports, can we avoid your  
25 whole --

1                   MR. MOOPPAN:  Absolutely.  That's --

2                   JUSTICE BARRETT:  -- similarly  
3                   situated argument that you're on?  Because I  
4                   don't really like it that much either.

5                   MR. MOOPPAN:  Absolutely.  That's why  
6                   when I stood it up here, the first thing I said  
7                   was the easiest way out of this case on this  
8                   claims is to say that the regs permit sex  
9                   separation.  They don't dispute that --

10                  JUSTICE BARRETT:  Save locker rooms  
11                  and all of that for another day.

12                  MR. MOOPPAN:  Right.  The only reason  
13                  I went into it is I -- I was nervous that any  
14                  sort of suggestion that there isn't a similarly  
15                  situated requirement could lead to results that  
16                  I don't think the Court would actually stand up  
17                  to, like locker rooms and showers.  And so I  
18                  think it's -- I have no problem if the Court  
19                  doesn't take the position on --

20                  JUSTICE BARRETT:  Okay, and I -- and  
21                  I'll say, I mean, I said I don't like the  
22                  argument.  At first blush, I don't like it.  
23                  I'm not trying to prejudice --

24                  MR. MOOPPAN:  Right.

25                  JUSTICE BARRETT:  -- anyone making

1 that argument later, but I mean, I think it  
2 opens a huge can of worms that maybe we don't  
3 need to get into here because the Javits  
4 Amendment and the concession --

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

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Thomas, anything further?

11 Justice Alito?

12 Justice Sotomayor?

13 Justice Kagan?

14 JUSTICE KAGAN: Mr. Mooppan, you --  
15 you talked about you have -- you have -- are  
16 litigating this case the opposite way among  
17 states that do not prohibit trans women and  
18 girls from participating in sports teams; is  
19 that correct?

20 MR. MOOPPAN: Yes.

21 JUSTICE KAGAN: So -- and you said,  
22 and I appreciate this, that we should not  
23 address that question. Are there arguments  
24 that -- that do suggest what the answer is on  
25 that question, that we should be careful about?

1 MR. MOOPPAN: I would --

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

4 MR. MOOPPAN: I think they're  
5 generally distinct. And what I could say,  
6 confidently say, is the argument that I  
7 identified at the outset and with Justice  
8 Barrett just now, if you just say that the regs  
9 means sex, sex doesn't mean circulating  
10 testosterone, and therefore you're not required  
11 to allow boys to play on girls' team regardless  
12 of the circulating testosterone level, that  
13 argument would not influence the outcome of  
14 those other cases one way or the other.

15 JUSTICE KAGAN: Are there any  
16 arguments that would influence the argument one  
17 way or the other?

18 MR. MOOPPAN: I don't think so. Maybe  
19 if you engage in discussion about what -- how  
20 -- what the regs meant with respect to things  
21 like equal opportunity, that might be the sort  
22 of issue where it might have implications for  
23 the other case.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: I just want to be  
4 crystal clear about that. If we say sex in  
5 Title IX is biological sex, then we get to the  
6 next case, the California case, or whatever it  
7 is, how would California still prevail if we've  
8 said that here?

9 MR. MOOPPAN: I think the argument  
10 they -- the over side would make would be that  
11 the regs don't prohibit them from accommodating  
12 transgender individuals. Even though the regs  
13 permit separation based on sex, they also don't  
14 forbid accommodation of transgender  
15 individuals, is the argument they would make.  
16 And they would say it doesn't matter that  
17 you're allowing some boys who are -- have a  
18 biological advantage to play on the girls'  
19 team.

20 JUSTICE KAVANAUGH: What's the  
21 argument you're currently making in opposition  
22 to that?

23 MR. MOOPPAN: That the justification  
24 for separating on the basis of sex is the  
25 biological difference, and so you're

1 undermining the justification for the  
2 separation.

3 JUSTICE KAVANAUGH: Right. And so we  
4 start with the separation. I think what you're  
5 saying is, once you separate boys and girls  
6 teams, which everyone does, and it may be even  
7 required in my view to have equal girls' teams,  
8 then California really doesn't have an argument  
9 if we say that sex in Title IX means biological  
10 sex, which may be okay. I just want to make  
11 sure I know what we're doing.

12 MR. MOOPPAN: Look, Your Honor,  
13 obviously, we don't think they can argue that,  
14 but I'm confident that California would stand  
15 up here and say that even if you ruled the way  
16 I just urged, they should be able to argue the  
17 opposite by saying essentially that they're  
18 allowed to accommodate on the basis of gender  
19 identity, even though the regs mean sex and sex  
20 means biological sex.

21 That's the argument they would make.  
22 Whether that argument is right or wrong is for  
23 another case, but I don't think if you adopt  
24 the argument I'm making here today, their hands  
25 are going to be tied.

1 JUSTICE KAVANAUGH: Okay. And then on  
2 this premise that has been conceded, I just  
3 want to make sure I understand your view, my  
4 understanding is that it's sex-separated sports  
5 teams, so long as they're equal opportunity for  
6 girls and boys, are perfectly constitutionally  
7 permissible. Is that not your understanding?

10 JUSTICE KAVANAUGH: Okay.

13 JUSTICE KAVANAUGH: I mean, it's  
14 conceded, but it's conceded because it's  
15 obvious.

16 MR. MOOPPAN: Right. Because there  
17 are obvious biological differences between men  
18 and women, and that's why you --

19 JUSTICE KAVANAUGH: Well, the why  
20 people may debate, but it's -- but it's -- it's  
21 obvious --

22 MR. MOOPPAN: Yeah.

23 JUSTICE KAVANAUGH: -- it's conceded.  
24 And so too Title IX because of the Javits  
25 Amendment, at least, even if not Title IX

1 originally.

2 MR. MOOPPAN: Well, I would say even  
3 without the Javits Amendment, because  
4 importantly the Javits Amendment --

5 JUSTICE KAVANAUGH: Let me just --

6 MR. MOOPPAN: -- is only  
7 intercollegiate. So --

8 JUSTICE KAVANAUGH: It has been  
9 interpreted in the regs so to go high school --

10 MR. MOOPPAN: Right.

11 JUSTICE KAVANAUGH: -- and no one is  
12 going to challenge that part. That's the part.  
13 Okay.

14 MR. MOOPPAN: Right.

15 JUSTICE KAVANAUGH: But -- but that  
16 also -- sex-separated sports teams are  
17 perfectly permissible under Title IX at least  
18 with the Javits Amendment, and probably  
19 without, correct?

20 MR. MOOPPAN: That's right.

21 JUSTICE KAVANAUGH: And that's  
22 conceded, but that's -- you know, it's  
23 conceded, again, because everyone accepts that,  
24 has accepted that for a long time, so long as  
25 the opportunities for boys and girls, men and

1 women are equal.

2 MR. MOOPPAN: That's right. And I  
3 think what the other side in this case is  
4 trying to argue -- do is say, yeah, that's fine  
5 but they're being excluded. And the problem  
6 with that is they are not being excluded from  
7 being -- participating on the boys' team.  
8 They're choosing not to participate on the  
9 boys' team.

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

13 And, Justice Sotomayor, this explains  
14 the confusion in the Fourth Circuit's opinion  
15 because I agree with you, it is very strange  
16 that the Fourth Circuit said --

17 JUSTICE KAVANAUGH: Okay. We've to  
18 get back. Sorry. We can -- well, finish that  
19 up.

20 MR. MOOPPAN: Yeah.

21 JUSTICE KAVANAUGH: Sorry.

22 MR. MOOPPAN: The reason why the  
23 Fourth Circuit found that there was a viable  
24 Title IX claim, even though they said that  
25 there was a factual dispute, is because they

1       bought into this notion that because the  
2       transgender boy doesn't want to play on the  
3       girls' team -- or, sorry, doesn't want to play  
4       on the boy's team and can't play on the girls'  
5       team, they're excluded, that's true even if  
6       they have a physical advantage.

7               And so the court said we don't care  
8       about the physical advantage; it's still a  
9       Title IX violation. And that's clearly wrong.  
10      That's a misinterpretation of the statute. And  
11     the error in it is that they're not being  
12     excluded from the boys' team; they're choosing  
13     not to participate on the boys' team.

14               JUSTICE KAVANAUGH: Sorry, one more.  
15      Bostock does not control here because? Fill in  
16     the blank.

17               MR. MOOPPAN: Because the law doesn't  
18     classify on the basis of transgender status.  
19     It classifies on the basis of sex, biological  
20     sex. Just like in Skrmetti, the law there  
21     classified on the basis of age and medical  
22     treatment. Here the law classifies on the  
23     basis of biological sex. The person's gender  
24     identity is wholly irrelevant to how the law  
25     applies.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

4 Justice Jackson?

5 JUSTICE JACKSON: But -- but they are  
6 being prevented from playing on the team that  
7 matches their gender identity, correct?

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

10 JUSTICE JACKSON: Yes.

11 MR. MOOPPAN: You said there is a  
12 cisgender woman, she could play on the team she  
13 wants.

14 JUSTICE JACKSON: Right.

15 MR. MOOPPAN: There is a boy who  
16 identifies as a girl, he can't play on the team  
17 he wants. Take that same boy and switch his  
18 gender identity but say he still wanted to play  
19 on the girls' team. Say he was a very  
20 unathletic boy. He, likewise, couldn't play on  
21 the team. So it's not the gender identity  
22 that's keeping him off the girls' team. It's  
23 his biological sex. His gender identity is  
24 wholly irrelevant to it.

25 Now, I agree with you there's a very

1 significant disparate impact on transgender  
2 individuals by this law because they are the  
3 boys --

4 JUSTICE JACKSON: I wonder if --

5 MR. MOOPPAN: -- who -- most likely to  
6 want to play on the team.

7 JUSTICE JACKSON: Have we said that  
8 Title IX never covers that kind of disparate  
9 impact in terms of its discriminatory effect?

10 MR. MOOPPAN: Oh, well, it certainly  
11 doesn't cover -- first of all, I don't think  
12 Title IX covers disparate impact, period,  
13 because it uses --

14 JUSTICE JACKSON: But in terms of its  
15 discriminatory effect, I'm just trying to  
16 understand it.

17 MR. MOOPPAN: Yes.

18 JUSTICE JACKSON: Is there something  
19 to this notion that some -- that differential  
20 treatment in effect, in this way could be  
21 something that Title IX cares about?

22 MR. MOOPPAN: A, I don't think Title  
23 IX covers disparate impact even on the basis of  
24 sex but certainly doesn't cover disparate  
25 impact on the basis of gender identity.

1 JUSTICE JACKSON: Okay.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Block.

5 ORAL ARGUMENT OF JOSHUA A. BLOCK

6 ON BEHALF OF THE RESPONDENT

7 MR. BLOCK: Mr. Chief Justice, and may  
8 it please the Court:

9 B.P.J. signed up for school sports  
10 because she was an 11-year-old girl starting a  
11 new middle school who wanted to meet people,  
12 make new friends, and be part of a team. West  
13 Virginia argues that to protect these  
14 opportunities for cisgender girls, it has to  
15 deny them to B.P.J.

16 But Title IX and the Equal Protection  
17 Clause protect everyone. And if the evidence  
18 shows there are no relevant physiological  
19 differences between B.P.J. and other girls,  
20 then there's no basis to exclude her.

21 In thinking through the Title IX claim  
22 in particular, it's important to distinguish --  
23 excuse me -- distinguish between how Title IX  
24 operates as a general matter and how it  
25 operates outside the context of athletics. And

1 I -- I'm glad that we're doing that this  
2 morning.

3 Instead of focusing on athletics, West  
4 Virginia argues more generally that this  
5 Court's reasoning in Bostock does not apply to  
6 Title IX. To distinguish Title VII from Title  
7 IX, West Virginia argues that Title IX protects  
8 groups instead of individuals and applies only  
9 when sex is the sole cause of adverse  
10 treatment.

11 That approach takes a wrecking ball to  
12 the text of Title IX and the structure of this  
13 Court's anti-discrimination precedents. It  
14 would dilute Title IX's protections for  
15 everyone, not just transgender students and not  
16 just in the context of sports.

17 West Virginia's law treats B.P.J.  
18 differently from other girls on the basis of  
19 sex and it treats her worse in a way that harms  
20 her. Outside the context of athletics, that's  
21 all B.P.J. would need to establish a Title IX  
22 violation.

23 But the Javits Amendment provides  
24 extra breathing room for reasonable regulations  
25 that take into account sex-based differences in

1      athletics to provide equal athletic opportunity  
2      for everyone. West Virginia's exclusion of  
3      B.P.J. does not fall within that framework.

4              Unlike the exclusion of -- of a  
5      cisgender boy, excluding B.P.J. doesn't advance  
6      any interest in ensuring overall fairness and  
7      safety. And unlike the case of a cisgender  
8      boy, excluding B.P.J. from the girls' teams  
9      excludes her from all athletic opportunity  
10     while stigmatizing and separating her from her  
11     peers.

12              I welcome the Court's questions.

13              JUSTICE THOMAS: Doesn't your claim  
14     ultimately depend on the existence of  
15     sex-segregated sports?

16              MR. BLOCK: No, I don't think so, Your  
17     Honor. I think this is similar to  
18     Morales-Santana, where the claim was an equal  
19     protection claim.

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

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

1 JUSTICE THOMAS: Well, permits.

2 MR. BLOCK: But, if there were no  
3 Title IX and all the sports were co-ed, then  
4 she wouldn't be subjected to disparate  
5 treatment on the basis of sex. So I think the  
6 claim's the discrimination, and it's perfectly  
7 possible to have it --

8 JUSTICE THOMAS: So doesn't that  
9 suggest that your subcategory of the sex --  
10 of -- of the relevant class of female athletes?  
11 Isn't that your point?

12 MR. BLOCK: Yes. Well, for the equal  
13 protection claim --

14 JUSTICE THOMAS: Well, but you're  
15 not -- my point is that you're challenging a  
16 category that does not exist in the statute but  
17 is dependent upon the existence of a category  
18 in the statute that you're not challenging.

19 MR. BLOCK: Well, I don't -- I  
20 wouldn't put it that way. I would put it the  
21 way as there's a classification that we think  
22 is valid as applied to most people but is  
23 invalid as applied to a discrete subset of  
24 those people.

25 But I don't think the success of that

1 equal protection claim hinges as an a priori  
2 matter on the existence of girls' teams. There  
3 are lots of ways to remedy an equal protection  
4 violation.

5 CHIEF JUSTICE ROBERTS: But I think,  
6 given the way you phrased it, the question  
7 becomes a little different because what it  
8 seems to me you have to establish is the basis  
9 for requiring an exception to the  
10 classification.

11 You're not challenging the idea of  
12 having boys and girls separate sports. You're  
13 saying that you cannot exclude transgender  
14 girls from the definition of girls. And it's  
15 an entirely different question than the equal  
16 protection question.

17 MR. BLOCK: I don't think we're  
18 arguing for an exception. I think we're  
19 bringing exactly the same argument in Caban.  
20 In Caban, the plaintiff wasn't saying this is  
21 valid for everyone, but I want an exception  
22 from it.

23 In Caban, the plaintiff was saying  
24 this is valid for other fathers, but it's not  
25 valid as applies to me.

1                   So I just think it's a -- it's an  
2 as-applied equal protection claim. I  
3 understand the Court might decide those claims  
4 don't exist, but I don't think it's a claim  
5 asking for an exception. It's a claim saying  
6 it's, as applied to them, it's okay. As  
7 applied to me, it's not.

8                   JUSTICE SOTOMAYOR: Counsel, how do  
9 you get to a Title IX violation? I know  
10 exactly how you get to an equal protection  
11 violation, okay? When the reg -- if you accept  
12 that the regulation does by its own terms  
13 permit sex-based separate sports, does permit  
14 schools to do this, how -- what in Title IX  
15 explicitly or even logically says that you have  
16 to give transgender --

17                   MR. BLOCK: Thank you. I  
18 appreciate --

19                   JUSTICE SOTOMAYOR: -- girls the same  
20 opportunity? Because the regulation said --  
21 it's not just a statute. It's the regulation  
22 said you can create separate-sex teams.

23                   MR. BLOCK: No, thank you. I take the  
24 point.

25                   I think there's always been a tension

1       between the underlying text of Title IX, which  
2       protects individuals, not groups, and the  
3       regulations, which are authorized by the Javits  
4       Amendment and have special leeway to make some  
5       group-based measurements.

6               But, if you look at the rationale for  
7       the regulations, Hugh, when it issued the  
8       regulations, said that we think that our  
9       group-based method, which otherwise would have  
10      been completely impermissible for Title IX,  
11      adequately protects the rights of individuals  
12      because, if boys and girls as groups are being  
13      given equal sets of overall opportunity, then  
14      every individual in the group also has a set of  
15      equal opportunity to choose from, and --

16               JUSTICE GORSUCH: Yeah, I think that's  
17      the problem. You know, you're -- you're  
18      absolutely right to worry about the wrecking  
19      ball, but I think we've kind of taken a  
20      wrecking ball to that.

21               There's no "solely" in this statute,  
22      all right? We're talking about individuals.  
23      But Javits changed Title IX and it said, you  
24      know, sports are different. And we've got  
25      these regulations that have been out there for

1 50-plus years. And, you know, normally,  
2 Skidmore kind of comes in there. And forget  
3 about the Spending Clause, I guess, but maybe  
4 I'll ask you about that too.

5 Why doesn't that make this case very  
6 different than Title VII?

7 MR. BLOCK: So I completely agree the  
8 Javits Amendment is what makes this different  
9 from Title VII. And I'm very happy with  
10 however this decision comes out to have a  
11 decision that's focused specifically on the  
12 unique context of athletics as opposed to these  
13 broad arguments about Bostock applying to Title  
14 IX as a general matter.

15 But I guess what I'd say is the  
16 regulations still require equal athletic  
17 opportunity. It's not a complete exception for  
18 sex-separated teams.

19 JUSTICE GORSUCH: Yeah, but Javits  
20 says it can be reasonable.

21 MR. BLOCK: Yes.

22 JUSTICE GORSUCH: And do you dispute  
23 that the Hugh regulation that has been on the  
24 books for 50-plus years is reasonable?

25 MR. BLOCK: I think it is absolutely

1 reasonable as applied to cisgender students. I  
2 think that as applied to transgender students,  
3 instead of providing them equal overall  
4 opportunity, it's a complete exclusion from the  
5 program. And so that -- so that's our  
6 argument, that it's reasonable as applied in  
7 the context of cisgender people, but  
8 interpreting the regulations to authorize this  
9 sort of categorical exclusion that doesn't give  
10 B.P.J. an equal set of opportunities to choose  
11 from would be an unreasonable way to implement  
12 Title IX.

13 JUSTICE GORSUCH: Okay. Got you.  
14 Thank you.

15 JUSTICE ALITO: It's unreasonable as  
16 to all transgender students?

17 MR. BLOCK: No. I think it's -- I  
18 think it's a combination. I think -- so  
19 reasonable -- a reasonableness test, I think  
20 that requires some sort of mend -- excuse me --  
21 ends-means-fit, and I think that that exists  
22 when it comes to cisgender students.

23 I think what makes B.P.J.'s case  
24 differently from a cisgender student is two  
25 things. First, she doesn't have any of the

1 physiological distinctions that justify the sex  
2 separation in the first place, and, second of  
3 all, the harm to her is of a material different  
4 kind. It's not -- it's one thing to say we're  
5 not going to let boys play volleyball because  
6 they have all these other sports to choose from  
7 or we're not going to let girls play football  
8 because they have all these other sports to  
9 choose from. It's another thing to say you  
10 don't get any sports.

11 JUSTICE KAGAN: But, in that argument,  
12 does it matter whether B.P.J. has a competitive  
13 advantage or not?

14 MR. BLOCK: Yes, we think it does.

15 And I appreciate the opportunity to clarify  
16 that we don't have any objection to vacating  
17 the grant of summary judgment in our favor. We  
18 did our best to defend the judgment below, but  
19 our argument before the Fourth Circuit for  
20 summary judgment was that there wasn't a  
21 genuine disputed fact about whether she had an  
22 advantage.

23 The Fourth Circuit sua sponte granted  
24 summary judgment to us based on the theory that  
25 that fact wasn't material. That's never been

1 our argument in this case.

2 JUSTICE KAGAN: So your argument  
3 depends on the -- depends on her not having a  
4 competitive advantage because she's not been  
5 through male puberty?

6 MR. BLOCK: That -- that -- and not  
7 just been through male puberty but also gone  
8 through a female hormonal puberty --

9 JUSTICE KAGAN: Right.

10 MR. BLOCK: -- with all the  
11 physiological changes accompanying it.

12 JUSTICE KAGAN: But the argument goes  
13 away if -- if that -- if those facts go away?

14 MR. BLOCK: Yes, yes, absolutely,  
15 which is -- at the beginning of the argument,  
16 Justice Kagan, you talked about this could be  
17 resolved based on a legal principle or based on  
18 the facts. And I really do want to make a  
19 pitch for resolving it based on the facts  
20 because, look, if they're right about the  
21 facts, then we should lose.

22 And the irony is that in order to win  
23 summary judgment in this posture when there's a  
24 disputed question of fact below is they can  
25 only win in this posture if we're right about

1 the facts and there aren't any advantages. And  
2 I -- I -- I don't think there's any need at  
3 this juncture for this Court to issue that  
4 broad a holding when, according to them, once  
5 the evidence comes in below, we're not going to  
6 get past summary judgment. I mean --

7 JUSTICE KAGAN: You're not suggesting  
8 that we decide the factual question?

9 MR. BLOCK: No, no, no. I'm -- I'm  
10 suggesting that the case be allowed to be  
11 decided on remand on the factual question,  
12 which I think, like, this is an important  
13 issue, it affects -- it may affect the whole  
14 country, and the Court wants to get it right.

15 And I don't think the best way to get  
16 it right is to rely on, you know, cherry-picked  
17 studies or assertions in amicus briefs. I  
18 think the way to get it right is to let all the  
19 facts they're trying to put in the record  
20 actually be put in the record. And then we'll  
21 have the facts in front of us. And maybe  
22 they'll make the issue go away.

23 But I think it's unnecessary to, you  
24 know, intervene at this instance with a  
25 sweeping legal conclusion to something that

1 might actually be a narrow factual dispute.

2 JUSTICE BARRETT: Counsel, can you  
3 explain whether or why your theory would allow  
4 a cisgender boy who just couldn't make the  
5 boys' team -- I mean, he doesn't have an equal  
6 opportunity, he can't play, there's no team he  
7 can play on. And let's say that his athletic  
8 ability can be shown that he has no competitive  
9 advantage and he wants to be on the girls'  
10 team.

11 Why can't he on your theory?

12 MR. BLOCK: No, I appreciate the  
13 question. I think -- I just want to be clear  
14 about what we think the -- the justification  
15 for the separate teams is.

16 We don't think the boys' team is for  
17 better athletes and you have a backup team for  
18 athletes that aren't as good. I think the  
19 purpose of the teams is to control for the  
20 variable of sex-based advantages so that  
21 talented women athletes have all the same  
22 opportunities as talented male athletes. But  
23 also, untalented male athletes should be  
24 compared to untalented women athletes.

25 So the -- if they're not being

1       separated based on how good you are, right, the  
2       whole point is to allow female athletes to have  
3       all the same opportunities as men by  
4       controlling for the sex-based differential that  
5       comes through puberty.

6               And so that's why I don't think that  
7       the claim is the same there. I think that's  
8       what -- what's happened here is, by virtue of  
9       her medical care, B.P.J. has already  
10      effectively controlled for those sex-based  
11      advantages, and so she is completely in the  
12      position that she would have been if her  
13      birth-assigned sex had been female.

14               As opposed to a cisgender boy who's  
15      just not very good at sports, and if his  
16      birth-assigned sex were female, maybe he'd be  
17      even worse, I don't know, but -- but, again,  
18      the purpose is to control for the variable with  
19      sex to provide equality, not to have a good  
20      team and a team for people that can't cut it.

21               Now I'm happy to address --

22               JUSTICE KAVANAUGH: Can I ask a  
23      question on the law --

24               MR. BLOCK: Yes.

25               JUSTICE KAVANAUGH: -- on Title IX? I

1 mean, I hate -- hate that a kid who wants to  
2 play sports might not be able to play sports.  
3 I hate that. But we have -- it's kind of a  
4 zero-sum game for a lot of teams. And someone  
5 who tries out and makes it, who is a  
6 transgender girl, will bump from the starting  
7 lineup, from playing time, from the team, from  
8 the all league -- and those things matter to  
9 people big time -- will bump someone else.

10 And so one way to resolve it, as you  
11 say, is the facts, try to figure out is there  
12 really a competitive advantage. I think we're  
13 going to get a lot of scientific uncertainty  
14 about that, a lot of debate about that, a lot  
15 of different district courts.

16 The other way on the law, one way on  
17 the law is, okay, well, sex in Title IX and in  
18 Javits meant biological sex, and it's up to  
19 Congress to adjust that going forward if they  
20 want, given, as you say and your co-counsel  
21 said earlier, you know, people are learning  
22 more about this and maybe there really is no  
23 advantage.

24 Well, if that's true, and some states  
25 are operating under that basis, that's --

1       that's -- that's the way to go. But, for now,  
2       at least the law says biological sex. And I  
3       think we have to recognize on both sides the  
4       zero sum. It's not like, oh, just add another  
5       person to the team. That's not how sports  
6       works. It's -- it's someone else is going to  
7       get disadvantaged. So I just want you to  
8       address that.

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

11                  And the first is I -- I completely  
12          understand that many parts of sports are zero  
13          sum. But this law isn't limited to zero-sum  
14          opportunities. So B.P.J. played on the  
15          cross-country team, where there were no cuts.  
16          She came in near the back. It wasn't --

17                  JUSTICE KAVANAUGH: Well, but -- I'm  
18          sorry to interrupt, but you wouldn't have a  
19          different rule if she was finishing in the top  
20          5.

21                  MR. BLOCK: No, no, no, but it wasn't  
22          a zero sum.

23                  JUSTICE KAVANAUGH: Or if they had  
24          cuts.

25                  MR. BLOCK: But what I'm saying is

1 there -- there are --

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

5 Usually, with teams, there are cuts --

6 MR. BLOCK: Yes.

7 JUSTICE KAVANAUGH: -- which mean a  
8 lot to people. There are starting lineups.  
9 Those mean a lot to people. There's who  
10 makes -- who gets a college recruit. That  
11 means a lot to people.

12 MR. BLOCK: Yes. Yes, yes. I -- I  
13 just want to say that there still are some  
14 areas where there are win/win solutions. I  
15 think even being able to be on practices with  
16 the team consistent with your gender identity  
17 instead of your sex assigned at birth can be  
18 enormously important.

19 So I -- I -- I think some -- some  
20 scenarios are zero sum, but not everything  
21 having to do with sports is. And I do think  
22 that one of the vices of this law is that it  
23 sweeps so broadly that even win/win solutions  
24 are taken off the table.

25 In terms of aspects where it's zero

1       sum, you know, no one likes to lose. No one  
2       likes to not make the team. And people often  
3       don't make the team. Cisgender girls don't  
4       make the team when competing against other  
5       cisgender girls all the time.

6               And the question I think is whether  
7       it's an unfair advantage to not make the team  
8       because a transgender girl participated. And  
9       if there is no sex-based biological distinction  
10      there, then I think it's an unfortunate  
11      situation, but I think it's the unfortunate  
12      situation that comes with having a zero-sum  
13      game, not inherent unfairness.

14              Then the third thing is I think  
15      however the Court resolves this case, I -- I  
16      really urge the Court not to do it based on a  
17      definition-of-sex argument. We are not  
18      disputing in this case that West Virginia can  
19      have its definition of sex. Our argument is  
20      it's using this definition to inflict  
21      discrimination and deny equal athlete  
22      opportunity. But we are not saying their  
23      definition of sex is wrong.

24              However, I don't think it follows that  
25      Title IX created some national definition of

1 sex that preempted a state's ability to say,  
2 you know, actually, we are most concerned about  
3 discrimination that happens through gender  
4 roles. We think --

5 JUSTICE KAVANAUGH: Can I ask you  
6 something? That's a very important point here,  
7 I think, for what happens in the future, what  
8 you just said.

9 Do you think sex and Title IX can  
10 reasonably be interpreted to allow different  
11 states to take different understandings of that  
12 in their sports leagues?

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

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

16 MR. BLOCK: Right. Because I don't  
17 think the purpose of Title IX is to have an  
18 accurate definition of sex. I think the  
19 purpose is to make sure that sex isn't being  
20 used to discriminate by denying opportunities,  
21 just -- just as I don't think we need to -- to  
22 define race in order to enforce Title VI.

23 So I think I wouldn't look to whether  
24 or not it's accurate to classify, you know,  
25 B.P.J. as -- as male or female. I think the

1 question is, is she being denied an opportunity  
2 because of that classification?

3                   But, obviously, sex can mean more than  
4 just the --

5                   JUSTICE KAGAN: So, if we didn't want  
6 to prevent a different state from making a  
7 different choice from West Virginia, what  
8 should we not say or what should we say to  
9 prevent that from happening?

10                  MR. BLOCK: Well, I wrote down the  
11 answer to that when you asked Mr. Mooppan. I  
12 have two things. I wrote: Don't give  
13 definition of sex. And I also said I wouldn't  
14 decide this by assuming that Title IX provides  
15 a right to single-sex teams.

16                  In the regulations, single-sex teams  
17 are optional. They're not mandatory. And  
18 the -- in addition to the -- we've been talking  
19 about the regulations, but on the ground, the  
20 way this plays out in practice is you have a  
21 1979 policy statement, a sub-regulatory  
22 document, that has a complicated test for  
23 determining when a sex-separated team is or is  
24 not required.

25                  And so I think that both because I --

1 I think saying there's a right to a  
2 sex-separated team, like, would predetermine  
3 some of the questions in that other case,  
4 that's so I -- that's one reason why I don't  
5 think you should do that. But, second, I think  
6 the more the Court gets into questions that are  
7 handled in this -- these complex regulatory  
8 documents, I think the more I'd be worried  
9 about this Court accidentally saying something  
10 about how Title IX works that doesn't actually  
11 map onto how it is actually playing out on the  
12 ground.

13 JUSTICE ALITO: Title IX prohibits  
14 discrimination on the basis of sex. It's a  
15 statutory term. It must mean something.  
16 You're arguing that, here, there's  
17 discrimination on the basis of sex.

18 And how can we decide that question  
19 without knowing what sex means in Title IX? I  
20 mean, it could mean biological sex. It could  
21 mean gender identity. It could mean whatever a  
22 state wants to define it to mean but it has to  
23 mean something.

24 How can we decide that without knowing  
25 what the statutory term means?

1                   MR. BLOCK: Well, I -- I think there  
2    are a whole range of sex-based characteristics  
3    that can give rise to discrimination. I think  
4    if someone said I'm going to discriminate  
5    against anyone who acts in a feminine manner,  
6    like anyone with limp wrists, I don't care who  
7    they are, but I'm going to discriminate against  
8    them, like I think that would be sex  
9    discrimination. It would be sort of gender  
10   presentation. I would -- but I wouldn't say  
11   that's not covered by Title IX.

12                  And so I just -- I -- I'm not saying  
13    that biological differences aren't part of sex,  
14    but I'm saying that sex also has broader  
15    connotations and there's no reason to keep that  
16    out of the statute.

17                  And I'm certainly not saying that sex  
18    means gender identity. I just want to be very  
19    clear about that. I don't think that, you  
20    know, just as -- I -- I would say this. Our  
21    argument is that there's a group of people who  
22    are assigned male at birth who -- for whom  
23    being placed on the boy's team is harmful,  
24    right?

25                  We happen to have a world for those

1 people. It is transgender girls, but I don't  
2 think that means that where elevating gender  
3 identity to be the new definition of sex.

4 Just as in Phillips versus Martin  
5 Marietta, there's a subset of women, you know,  
6 who are harmed by the policy, not all women,  
7 but there's a subset of women who had young  
8 children. And there's a name for them. It's  
9 mothers but that doesn't mean that we're  
10 replacing the word "sex" with mothers.

11 I think this issue --

12 JUSTICE JACKSON: How -- how do you --  
13 how -- how do you respond to or deal with the  
14 other side's characterization of that harm as  
15 just the disparate impact of this regulation,  
16 that really, you know, it's not discrimination,  
17 I think they're saying, but it is just the  
18 downstream effect of the application of the  
19 classification that the Javits Amendment allows  
20 and that's just the way it goes.

21 MR. BLOCK: Yeah. So -- so I guess I  
22 would say this. I think this Court has  
23 dealt -- dealt with the issue of things like  
24 constructive denials and constructive  
25 discharges in a variety of contexts. And under

1       Title IX, an outright denial isn't required.

2                   Javits says a constructive denial also  
3       counts. And whenever there's a question of  
4       constructive denials, the Court applies a  
5       standard that's reasonable person in the  
6       plaintiff's position under all the  
7       circumstances.

8                   And they use that for constructive  
9       denials, you can use that for retaliation  
10       claims. And if you look at Burlington versus  
11       White, I think it's very on point here because  
12       one of the points that Burlington versus White  
13       said is that there's some actions that aren't  
14       going to be harmful to most people but they  
15       might be harmful to some people.

16                  So Burlington -- again, Burlington  
17       versus White used a mother with young children  
18       might find a change in her work schedule to be  
19       incredibly harmful, right? That doesn't mean  
20       that, you know, we're arguing that, you know,  
21       this is a disparate impact classification on  
22       people who have young children. It's a sex  
23       classification. The sex classification is just  
24       harming some people and not harming other  
25       people.

1                   So that's how we would view it. I  
2    don't think it's -- I think this is a facial  
3    sex classification any way you cut it. And --

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

7                   Now, I understand the idea that --  
8    well, the question then becomes not whether or  
9    not there's discrimination on the basis of sex  
10   but whether there's discrimination on the basis  
11   of whatever characteristic you think should be  
12   included in a definition of sex.

13                  Now when it's used as a statutory  
14    term, I'm not sure you have that kind of  
15    flexibility. The question then would be  
16    instead what does Congress thinks -- think the  
17    words -- word means?

18                  MR. BLOCK: Well, Your Honor, I guess  
19    I'd say I think Congress prohibited  
20    discrimination based on sex. I don't think --

21                  CHIEF JUSTICE ROBERTS: Then -- I'm  
22    sorry, go ahead.

23                  MR. BLOCK: Yeah. And, so -- so I  
24    don't think that just as I don't think Congress  
25    adopted a definition of -- of race, you know,

1       in Title XI in order to prohibit discrimination  
2       on the basis of race. I think -- I think we're  
3       not trying to police the accuracy of the  
4       terminology that's being used.

5               All I'm saying is that what's being  
6       prohibited is using this classification to  
7       discriminate, not --

8               CHIEF JUSTICE ROBERTS: So, you --  
9       well, but without really knowing what the  
10      distinction is?

11              MR. BLOCK: Well, I -- I -- you know,  
12       I think -- I don't think the examples I've  
13       given about sex-based characteristics, like,  
14       fall outside the common understanding of things  
15       that are related to sex.

16              CHIEF JUSTICE ROBERTS: Well, related  
17       to sex. I -- I guess what you're saying is  
18       then we do have to accept for your position  
19       that we're not dealing, when -- when Congress  
20       says sex, we're not dealing with biological sex  
21       but we're deal with other characteristics that  
22       people might associate with sex?

23              MR. BLOCK: No, no, no. I think for  
24       this case you can accept for the sake of this  
25       case that -- that we're talking about what

1       they've termed to be biological sex. I think  
2       that resolves this case.

3               I was just talking about in addressing  
4       other potential cases --

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

8               MR. BLOCK: Exactly. Just like in  
9       Bostock, I think you can proceed for argument's  
10       sake without taking a definitive position here  
11       because it might have downstream consequences  
12       in other cases that even the United States  
13       doesn't want the Court to pre-judge here.

14               Now, I -- I would like to say one  
15       quick thing on Justice Barrett's reference to  
16       separate classrooms. I mean, it is true, and,  
17       you see all these litigated cases about  
18       theories that there's different brain sexes for  
19       women versus boys and that's why you need  
20       separate classrooms.

21               I don't think -- I think the instinct  
22       was completely correct that you can have a lot  
23       of scientific justifications for  
24       discrimination, that doesn't mean that the  
25       discrimination is allowed or immune from

1       scrutiny.

2               And, in -- in fact, some of the states  
3        -- some of the studies that are cited in the  
4        amicus briefs say boys are naturally more  
5        aggressive, right, and -- and favor competition  
6        more because that's in their DNA.

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

11               I'd also -- I -- I'm -- I -- I -- to  
12        the extent that we're -- we want to go back to  
13        Caban, I -- I do want to just make a couple of  
14        quick things clear. Caban is not a facial  
15       challenge. It -- it wasn't.

16               And neither was -- some of the First  
17        Amendment cases they were talking about weren't  
18        equal protection First Amendment cases. They  
19        were commercial speech cases. Michael M. also  
20       wasn't a facial challenge. He wasn't saying I  
21       should have an exception because a prepubertal  
22       girl was involved. He was saying the statute  
23       is overbroad because it in theory it could  
24       apply to a prepubertal girl. So I -- I do  
25       think that some of the characterization of the

1 cases doesn't hold up to our reading of them.

2 JUSTICE JACKSON: So how does a  
3 Caban-type as-applied intermediate scrutiny  
4 analysis work in your view? It -- it is an  
5 under-developed area of the law. Is it enough  
6 for one person to show that she bucks the trend  
7 or -- or not?

8 MR. BLOCK: Yeah. I -- I don't think  
9 so. I think -- I -- I agree with my co-counsel  
10 that I think we're talking about a -- a  
11 discrete, like, definable group that will  
12 reliably not serve the government's interest.

13 And I don't think Nguyen is a  
14 counterpoint to that because the whole point in  
15 Nguyen was that men who were not similarly  
16 situated had an opportunity to demonstrate  
17 that. There were three very easy methods of  
18 transmitting citizenship and Nguyen emphasized  
19 that in order to do it, that those were minimal  
20 burdens.

21 And that is the key fact in Nguyen  
22 that distinguishes it from this case. This is  
23 a categorical ban. And Nguyen and Caban and  
24 all the Court's cases distinguish between  
25 categorical bans and more narrow procedural

1 requirements that do treat men and women  
2 differently but still provide the opportunity  
3 for demonstrating that you're not similarly  
4 situated.

5 JUSTICE KAGAN: I -- I think a hard  
6 question that Ms. Hartnett got, maybe the  
7 hardest questions on these -- on these lines  
8 was if we recognize these sorts of as-applied  
9 challenges, doesn't that effectively turn  
10 intermediate scrutiny into strict scrutiny.

11 MR. BLOCK: Right.

12 JUSTICE KAGAN: What would your answer  
13 be to that? Would it be any different or do  
14 you want to elaborate?

15 MR. BLOCK: No, and I think -- I think  
16 the answer is it absolutely wouldn't. We still  
17 are only looking for a substantial relationship  
18 which means that you can have these sorts of  
19 requirements where there are a lot of -- under  
20 Caban and under Lehr, there's still a lot of  
21 fathers that are out of luck that they  
22 actually, like, probably do have a good  
23 relationship with their kid but they didn't  
24 figure out -- fill out the right paperwork,  
25 they didn't do this, they didn't do that.

1                   And heightened scrutiny doesn't  
2 require that they be excused from those  
3 procedural burdens. So I do think that  
4 heightened scrutiny allows you to have, like,  
5 procedural requirements that people have to go  
6 through and those can be enforced. Strict  
7 scrutiny does not allow that.

8                   But that's different from saying that  
9 if the complete rationale for a classification  
10 just doesn't apply to you, that there's no  
11 equal protection claim you can bring.

12                  And -- and some of the -- I -- it's --  
13 it's complicated to talk about the difference  
14 between facial and as-applied post-CASA because  
15 I think a lot of the things that we called  
16 facial -- facial challenges now would be viewed  
17 as over-breadth challenges, right, where  
18 someone is trying to say the law is so  
19 overbroad in general, it has to all be struck  
20 down and we have that for First Amendment. I  
21 don't think we have that anymore for most equal  
22 protection claims.

23                  And so I think taking this facial  
24 as-applied framework from before CASA where we  
25 allowed these facial attacks on statutes and

1 then just transporting it into as-applied cases  
2 post-CASA doesn't necessarily work. I think  
3 some of the terminology might need to be  
4 rethought.

5 And -- and so, again, that's another  
6 reason why there's not a lot of precedent in  
7 this area, as several of you all have  
8 acknowledged. And that's another reason why I  
9 don't think this should be the case that makes  
10 that precedent when it's unnecessary to do so.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: Would you address  
17 a little bit the quantum of certainty or  
18 uncertainty that would have to exist in the  
19 science? Your co-counsel -- or the counsel on  
20 the other case said that if it's 50 percent,  
21 the state loses. But I don't -- I'm always  
22 hesitant about these percentage cases because  
23 it's never quality -- quantity -- it's not --  
24 never quantitative; it's qualitative.

25 So what do you think the qualitative

1 standard is?

2 MR. BLOCK: Well, to be clear, I don't  
3 actually think there's uncertainty in the case  
4 of someone who's had puberty blockers and then  
5 gender-affirming hormones. Our position is  
6 there's zero uncertainty. It's actually  
7 clearly in our favor.

8 So I -- but, in general, I think it's  
9 hard to give, you know, a quantitative answer  
10 to that. I think part of heightened scrutiny  
11 involves taking all of these factors into  
12 account. This Court, you know, has said on  
13 several occasions that heightened scrutiny can  
14 accommodate deference. And I think -- I  
15 honestly think it's a case-by-case decision  
16 that also looks at how harmful the  
17 classification is, how burdensome it is.

18 I don't think it's just -- I don't  
19 think you just look at the accuracy of the  
20 classification and add a number value for how  
21 certain we are that it's accurate. I think  
22 many other factors come into play.

23 JUSTICE SOTOMAYOR: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?  
25 Justice Gorsuch?

## 1 Justice Barrett?

## 2 Justice Jackson?

3 Thank you, counsel.

4 Rebuttal, Mr. Williams?

5 REBUTTAL ARGUMENT OF MICHAEL R. WILLIAMS

6 ON BEHALF OF THE PETITIONERS

7 MR. WILLIAMS: I think you've now

8 heard Respondent abandon the Fourth Circuit's  
9 logic on Title IX. And I think in many ways  
10 that makes this Court's task that much easier.

11 Congress authorized regulations

12 allowing sex-separated athletics. West

13 Virginia's definition of sex tracks the

14 ordinary meaning in 1972 and 1974 and the

15 regulatory framework that Congress endorsed.

16 I -- I think, Mr. Chief Justice, your  
17 question really highlighted how B.P.J.'s  
18 approach unmoors this -- the statute and the  
19 regulation under Title IX from on the basis of  
20 sex. B.P.J.'s test in turn begins to look more  
21 towards other characteristics that aren't on  
22 the basis of biological sex. And I think  
23 that's not consistent with what we see there.

24 I also think the answer to Justice

25 Barrett's question reflected how under B.P.J.'s

1 theory this really isn't about competitive  
2 advantage, that really what this does turn on  
3 is gender identity because B.P.J. continues to  
4 maintain that a cisgender boy who continues to  
5 not have those same biological advantages would  
6 nevertheless still be kept off of the boy -- of  
7 the -- of the girls' sports team.

8 So if you endorse that philosophy,  
9 that would require the Court to hold  
10 long-standing Title IX athlete regulations are  
11 unlawful. It would eliminate sex-separated  
12 athletics entirely. And I think it would  
13 defeat Title IX's core purpose of ensuring  
14 equal athletic opportunity for both sexes.

15 On the equal protection side of the  
16 house, the question is whether the  
17 classification is substantially related to an  
18 important governmental interest. And I think  
19 that B.P.J. ultimately wants to rewrite the  
20 classification to be something that it is not.  
21 Biological sex substantially relates to  
22 athletic performance. That's exactly why, in  
23 fact, Title IX regulations authorize  
24 sex-separated teams in the first place.

25 Respondent's test effectively ratchets

1 up the intermediate scrutiny standard into a  
2 perfect fit, best fit, best disposition case  
3 that this Court has repeatedly said is not the  
4 standard under intermediate scrutiny cases.

5 That is the standard for strict  
6 scrutiny cases. You have heard it several  
7 times today.

8 Justice Sotomayor, you asked about  
9 deference. I think this Court has also  
10 repeatedly recognized that in areas of evolving  
11 science and medicine, especially involving  
12 children, legislatures have the primary  
13 responsibility for weighing competing evidence  
14 and making the policy judgments.

15 I think the Court just recently said  
16 that in Skrmetti, but I certainly don't think  
17 that case stands alone in recognizing that  
18 especially when you have competing balances of  
19 harms, Justice Kavanaugh, when you're weighing  
20 these sorts of zero-sum games, that's a choice  
21 that's a policy judgment that ultimately rests  
22 in the hands of the legislature.

23 In the end, this Court has  
24 "recognized" physical differences between men  
25 and women. They are enduring. And inherent

1       differences between men and women are cause for  
2       celebration. That is all that West Virginia's  
3       law does here. It should be upheld.

4               Thank you.

5               CHIEF JUSTICE ROBERTS: Thank you,  
6       counsel. The case is submitted.

7               (Whereupon, at 1:22 p.m., the case was  
8       submitted.)

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