No. 24-43

IN THE

Supreme Court of the United States

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

B.P.J., by next friend and mother, Heather Jackson,
Respondent.

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

BRIEF FOR THE STATES OF ARKANSAS, ALABAMA, AND 24 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

The States of Arkansas, Alabama, Alaska, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming ("*Amici* States") submit this brief in support of Petitioners. *Amici* States have a strong interest in safeguarding the benefits of equal access to athletic opportunities for women and girls. That includes securing opportunities for female athletes to vie for recognition on a level playing field.

The *Amici* States all have laws and policies—like West Virginia's Sports Act—that bar biological males from trying out for women's and girls' sports teams or competing in women's and girls' athletic competitions. Those laws reflect basic biology; they also reflect the fact that ignoring basic biology robs women and girls of an equal opportunity to compete for athletic accolades.

Title IX does the same thing. For the last fifty years, it has guaranteed women and girls equal access to athletic opportunities. But decisions, like the panel's opinion below, that radically reinterpret Title IX do the opposite: turning a statute designed to give women and girls equal access into a law that actually bars States from doing exactly that whenever a biological male identifies as female. And worse still, the opinion below suggests that even if Title IX did not require denying women and girls a fair opportunity to compete, the Equal Protection Clause would.

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[1] *Amici* have provided the parties with ten days' notice of their intent to file this brief. *See* S. Ct. R. 37.2(a).

The *Amici* States have faced claims similar to B.P.J.'s here, and they have a strong interest in ensuring that federal courts properly interpret Title IX and apply the proper legal standard to resolve equal protection claims.

SUMMARY OF THE ARGUMENT

Neither Title IX nor the Equal Protection Clause compels West Virginia to classify biological males as girls. Yet that was the Fourth Circuit panel majority's holding below. That holding is profoundly wrong and has far-reaching consequences for States nationwide. The Court should grant certiorari and reverse that badly misguided decision.

I. Entrenching erroneous circuit precedent, the majority wrongly held that Title IX's protection against discrimination "on the basis of sex" applies to gender identity. But Title IX plainly adopts biology-based sex classifications, and contemporaneous dictionary definitions and regulations show that Congress protected women and girls based on biological sex, not gender identity.

As the panel dissent highlighted, the majority wrongly omitted analyzing whether B.P.J.—a biological male who identifies as a girl—is "similarly situated" to the biological girls for whom West Virginia has reserved girls' cross-country and track teams. Being a biological male makes B.P.J. differently situated than biological girls both physiologically and performance-wise. Indeed, this spring, B.P.J. has sensationally outperformed nearly all other competitors, displacing hundreds of girls in track events. Pet. 11. Because B.P.J. is not similarly situated to the female athletes on the girls' cross-country and track teams, B.P.J.'s Title IX claim cannot succeed.

Moreover, in conducting its Title IX analysis, the majority made an additional critical error when it failed to consider Title's IX status as Spending Clause legislation. That fact matters because gender identity largely did not exist as a concept when Congress adopted Title IX and no one—least of all States who accept federal funds—would have understood the statute to prohibit discrimination based not on sex but gender identity. Nor can Title IX be read to prohibit States from ensuring women and girls enjoy equal access to athletic opportunities.

II. The Fourth Circuit majority also got the Equal Protection analysis badly wrong. In particular, in vacating the district court's decision below, it relied on prior wrongly decided circuit precedent holding that "transgender persons constitute a quasi-suspect class." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020). But gender identity does not check any of the boxes required for a class to be suspect, and intermediate scrutiny does not apply to such classifications. And, in any event, West Virginia's law at most has a disparate impact on transgender persons, which is not enough to trigger heightened scrutiny for any class.

Thus, consistent with this Court's precedent, the Fourth Circuit should have applied rational-basis review and upheld West Virginia's law.

The Court should grant the petition, reverse the Fourth Circuit's decision, and hold that the district court correctly granted summary judgment to Petitioners on B.P.J.'s Title IX and equal-protection claims.

ARGUMENT

West Virginia's Save Women's Sports Act seeks to "promot[e] equal athletic opportunities for the female sex." W. Va. Code 18-2-25d(a)(5). West Virginia is one of at least twenty-six States that have codified the longstanding separation of girls' and boys' sports teams.[2] Recognizing that "[b]iological males would displace females to a substantial extent if permitted to compete on teams designated for biological females," *id.* 18-2-25d(a)(3), the law calls for public schools' sports teams to be "expressly designated" for either "[m]ales, men, or boys," "[f]emales, women, or girls," or "[c]oed or mixed" teams. *Id.* 18-2-25d(c)(1). Closely mirroring Title IX, athletic teams or sports designated for males are open to all sexes, but teams or sports "designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* 18-2-25d(c)(2)-(3); *accord* 34 C.F.R. 106.41(b) (recognizing that teams for activities involving "competitive skill" or "contact sport[s]"

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[2] *See* Ala. Code 16-1-52 (2021); Alaska Admin. Code tit. 4, 06.115(b)(5)(D) (2023); Ariz. Rev. Stat. Ann. 15-120.02 (2022); Ark. Code Ann. 6-1-107 (2021); Fla. Stat. Ann. 1006.205 (2021); Idaho Code 33-6201 (2020); Ind. Code Ann. 20-33-13-4 (2022); Iowa Code Ann. 261I.2 (2022); Kan. Stat. Ann. 60-5601 (2023); Ky. Rev. Stat. Ann. 164.2813 (2022); La. Stat. Ann. 4:442 (2022); Miss. Code Ann. 37-97-1 (2021); Mo. Rev. Stat. 163.048 (2023); Mont. Code Ann. 20-7-1306 (2021); H. 574 (N. C. 2023); N.D. Cent. Code 15-10.6.-01 (2023); Legis. Assembly 1249, 68th Legis. Assembly, Reg. Sess. (N.D. 2023); H.B. 1205, Gen. Ct. of N.H., Reg. Sess. (N.H. 2024); Ohio Rev. Code 3313.5320; Okla. Stat. Ann. tit. 70, 27-106 (2022); S.C. Code Ann. 59-1-500 (2022); S.D. Codified Laws 13-67-1 (2022); Tenn. Code Ann. 49-7-180 (2022); Tex. Educ. Code Ann. 33.0834 (2022); Utah Code Ann. 53G-6-902 (2022); *2023 Model Policies*, Va. Dep't of Educ., https://perma.cc/7YWM-WWFU; W. Va. Code Ann. 18-2-25d (2021); Wyo. Stat. Ann. 21-25-201 (2023).

may be separated). The baseline for these distinctions is "biological sex determined at birth." W. Va. Code 18-2-25d(b).

A divided Fourth Circuit panel wrongly concluded that Title IX requires West Virginia to allow B.P.J.—a biological male who identifies as a girl—to participate on the girls' cross-country and track teams. In reversing the district court's grant of summary judgment to West Virginia on both B.P.J.'s Title IX and equal-protection claims and directing the district court to enter summary judgment for B.P.J. under Title IX, App. 43a, "the majority inappropriately expand[ed] the scope of the Equal Protection Clause and upend[ed] the essence of Title IX," App. 44a (Agee, J., dissenting).

The Court should grant West Virginia's petition and hold that laws to protect girls' sports comport with the Constitution and laws of the United States.

I. Title IX Does Not Require West Virginia to Treat Biological Males as Girls.

The Fourth Circuit panel's majority opinion erroneously concluded that West Virginia "subjected [B.P.J.] to discrimination" on "the basis of sex" under Title IX. App. 38a; *see* 20 U.S.C. 1681(a). It misinterpreted Title IX's protections against discrimination based on biological sex as applying to gender identity, failed to analyze whether B.P.J. was similarly situated to biological girls, and refused to consider that, as Spending Clause legislation requiring a "clear statement" of its conditions, Title IX could not have addressed gender identity.

A. Title IX Protects Against Invidious Discrimination on the Basis of Biological Sex, Not Gender Identity.

The majority relied on erroneous circuit precedent to hold that Title IX prohibits discrimination based on gender identity. App. 39a (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020)). Its decision entrenched a 3-2 circuit split, as Petitioners note. *See* Pet. 23. And since the Petition was filed, the Sixth Circuit has joined the Eleventh, concluding that it is "likely" that gender-identity discrimination is beyond Title IX's coverage of discrimination on the basis of sex. *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *2 (6th Cir. July 17, 2024). The Court should grant certiorari to restore Title IX's long-understood meaning.

The long-accepted purpose of Title IX in sports is, as the district court recognized, to ensure that "overall athletic opportunities for each sex are equal." App. 94a; *see* 34 C.F.R. 106.41(c) (longstanding regulations under which schools must "provide equal athletic opportunity for members of both sexes."). "As other courts that have considered Title IX have recognized, although the regulation 'applies equally to boys as well as girls, it would require blinders to ignore that the motivation for the promulgation of the regulation' was to increase opportunities for women and girls in athletics." App. 94-95a (quoting *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993)).

The Fourth Circuit correctly recognized that "not every act of sex-based classification is enough to show legally relevant 'discrimination' for purposes of Title IX." App. 38a. Instead, a plaintiff must "experience[] worse treatment than a similarly situated comparator" and establish "that the 'improper discrimination caused

her harm.'" *Id.* at 38-38a (quoting *Grimm*, 972 F.3d at 616) (alteration omitted). If the plaintiff makes that showing, "no showing of a substantial relationship to an important government interest can save an institution's discriminatory policy." *Id.* at 39a (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 309 (2023) (Gorsuch, J., concurring)).

The majority badly misapplied that test. Relying on its prior holding in *Grimm*, the Fourth Circuit reaffirmed its view that "discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX." App. 39a (citing *Grimm*, 972 F.3d at 616). It then held that West Virginia's law "facial[ly] classifi[es] based on gender identity" because it defines "a person's sex only by their 'reproductive biology and genetics,'" App. 24a (quoting W. Va. Code 18-2-25d(b)(1)), and thereby "excludes transgender girls from the definition of 'female' and thus … from participation on girls sports teams." *Id.*

For the majority, then, the relevant classification was not the sex separation of teams (because "B.P.J. does not challenge the legality of having separate teams for boys and girls," App. 42a), but the exclusion of male students claiming a female identity from female-designated teams. Thus, far from staying faithful to Title IX's guarantee that female students must enjoy equal treatment with their male peers, the Fourth Circuit held that individuals are entitled to be treated like whatever gender they profess.

"Sex" in Title IX does not stretch that far; it does not include non-biological, self-professed notions of gender identity. Instead, a plaintiff must show that he or she has been subjected to, and harmed by, a classification drawn on the basis of biological sex. Only that approach is consistent with "[r]eputable dictionary definitions of

'sex' from the time of Title IX's enactment," which "show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, *i.e.*, discrimination between males and females." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc) (collecting dictionary definitions). "Sex" was unambiguous, *see id.* at 813, and "[t]here simply is no alternative definition of 'sex' for transgender persons as compared to nontransgender persons under Title IX." *Id.* at 814.

The structure of Title IX further underscores this reading. Title IX's text is replete with instances where "sex" is used in binary terms, unquestionably referring to the two biological classifications, demonstrating that's what Congress meant when it prohibited sex discrimination. For example, the statute excepts from its coverage:

> a. A public undergraduate institution with a historic "policy of admitting only students of *one sex*," 20 U.S.C. 1681(a)(5) (emphasis added);
>
> b. Organizations like boy scouts or girl scouts whose memberships have "traditionally been limited to persons of *one sex*," *id.* 1681(a)(6) (emphasis added);
>
> c. "[F]ather-son or mother-daughter activities," so long as opportunities provided for "*one sex*" are similar to those provided for "*the other sex*," *id.* 1681(a)(8) (emphases added); and
>
> d. Scholarships associated with participation in a beauty pageant "limited to individuals of *one sex* only," *id.* 1681(a)(9) (emphasis added).

The statute also broadly provides that "nothing contained" in it "shall be construed to prohibit" covered entities

"from maintaining separate living facilities for the different sexes." 20 U.S.C. 1686. And Title IX's longstanding regulatory framework similarly adopts biology-based sex classifications and insulates from liability various forms of sex separation—including "separate teams for members of each sex." 34 C.F.R. 106.41(b); *see also id.* 106.32 (housing), 106.33 (facilities).

Those provisions make sense only if "sex" refers to the male-female binary and the associated physiological differences. And the statute's explicit allowances for varying types of sex classifications only make sense if those classifications can actually be *enforced* based on biological sex, rather than self-professed gender identity.

But far from reading Title IX in the most logical manner or consistent with longstanding regulations, the panel majority did the opposite. It read "sex" to mean gender identity and thereby—far from reading Title IX consistent with the "carve-outs" discussed above—rendered those provisions "meaningless" any time someone "felt that she or he had been discriminated against by the sex-based separation authorized by the carve-outs." *Adams*, 57 F.4th at 814 n.7 (cleaned up). That makes no sense, and it's not how we read statutes.

The panel majority echoes the Department of Education's recent rulemaking redefining "sex" in Title IX to include "gender identity." *See* 34 C.F.R. 106.1 et seq. But as the Fourth Circuit should have done here, multiple courts have rejected that approach, enjoining the Department's rulemaking, and holding that "sex" in Title IX means biological sex. *See Tennessee*, 2024 WL 3453880, at *2 (denying stay because Title IX sex discrimination likely does not extend to gender-identity discrimination); *Louisiana v. U.S. Dep't of Educ.*, No. 24-30399, 2024 WL 3452887, at *3 (5th Cir. July 17, 2024) (denying stay because injunction "does

not prevent the DOE from enforcing Title IX or long-standing regulations to prevent sex discrimination."); *Arkansas v. U.S. Dep't of Educ.*, No. 4:24-CV-636 RWS, 2024 WL 3518588, at *15 (E.D. Mo. July 24, 2024) ("At the time Title IX was enacted in 1972, the term "sex" was understood to mean the biological distinctions between males and females."); *Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342, at *6 (N.D. Tex. July 11, 2024) ("Title IX does not address gender identity."); *Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, No. 4:24-CV-00461-O, 2024 WL 3381901, at *5 (N.D. Tex. July 11, 2024) (claiming "gender identity is one in the same as sex" goes "beyond Title IX's scope and even conflicts with its anti-discrimination mandate."); *Kansas v. U.S. Dep't of Educ.*, No. 24-4041-JWB, 2024 WL 3273285, at *9 (D. Kan. July 2, 2024) ("[I]t is clear from [Title IX's] statutory language that the term 'sex' refers to the traditional binary concept of biological sex."); *Tennessee v. Cardona*, No. CV 2: 24-072-DCR, 2024 WL 3019146, at *9 (E.D. Ky. June 17, 2024) ("[T]he language Congress employed [in Title IX] presumes that males and females will be separated based on biological sex."); *Louisiana v. U.S. Dep't of Educ.*, No. 3:24-CV-00563, 2024 WL 2978786, at *3 (W.D. La. June 13, 2024) ("The text of Title IX confirms that Title IX was intended to prevent biological women from being discriminated against in education in favor of biological men.").

Only that approach reflects Title IX's long-understood meaning and the fact that sex separation is, in some instances, necessary to protect equal educational opportunities for females. *See Kansas*, 2024 WL 3273285, at *10. The Fourth Circuit's contrary conclusion turns Title IX's purpose of protecting women on its head. *See Louisiana*, 2024 WL 2978786, at *19 (recognizing that "by allowing biological men who identify as a female

into locker rooms, showers, and bathrooms, biological females risk invasion of privacy, embarrassment, and sexual assault").

Ultimately, as the district court below concluded, "[t]here is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex." App. 95a. It was written to protect against invidious discrimination on the basis of biological sex, and the majority's failure to recognize that biological males and biological females are not "in all relevant respects alike," *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992), due to their differing biological-sex characteristics is a radical departure from Title IX.

B. The Majority Wrongly Omitted a "Similarly Situated" Analysis.

The panel majority recognized that an essential element of a Title IX claim is that "an individual" has been treated "worse than others who are similarly situated." App. 38a (cleaned up). But it failed to meaningfully analyze whether B.P.J. is "similarly situated" to the biological girls for whom West Virginia has reserved girls' cross-country and track teams. *Id.* That was a critical error.

The panel majority did not explain how it thought B.P.J. was similarly situated to biological girls when analyzing either of B.P.J.'s claims. It was forced to acknowledge West Virginia's evidence of "significant physiological differences[] and significant male athletic performance advantages in certain areas." App. 36a; *see also* App. 49a (Agee, J., concurring in part and dissenting in part). Yet it still expressed uncertainty over whether "people whose sex is assigned as male at birth enjoy a meaningful competitive athletic advantage" over biological girls. App. 34a. And in the

end, rather than analyze whether B.P.J. is similarly situated to any female athlete, the majority instead relied on circuit precedent in an earlier Title IX case concerning a transgender-identifying girl who was prohibited from using the boy's bathroom to conclude that the Sports Act operates "on the basis of sex." App. 39a (citing *Grimm*, 972 F.3d at 616).

In that earlier case, *Grimm*'s majority concluded that a biological girl was similarly situated to biological boys for the purposes of bathroom use. *Id.* at 618. Grimm "alone could not use the restroom corresponding with his gender," it said, and "[u]nlike the other boys, [Grimm] had to use either the girls restroom or a single-stall option." *Id.*

Like the majority decision below, *Grimm*'s majority opinion lacks any reasoned analysis supporting the conclusion that the plaintiff was similarly situated to boys using the boys' room. But implicit in the *Grimm* majority's contrasting Grimm to "other boys," *id.*, is the suggestion that by *identifying* as a boy, Grimm must be *deemed* a boy for Title IX purposes. That sleight of hand problematically begs the question of what facts are material to the "similarly situated" analysis, treating mere gender identity as not only relevant but fully determinative, and reducing sex to gender identity.

It likewise stands in stark contrast to the district court's well-reasoned opinion below rejecting the argument "that transgender girls are similarly situated to cisgender girls … at the moment they verbalize their transgender status, regardless of their hormone levels." App. 93a. As the district court explained, "biological males are not similarly situated to biological females for purposes of athletics" because "biological males generally outperform females athletically." *Id.* at 92a, 95a.

Ultimately, those sex differences, by themselves, are sufficient to conclude that B.P.J. is not similarly situated to biological girls: B.P.J. was born, and remains, a biological male. B.P.J.'s circumstances, therefore, are materially different from the circumstances of students who are biological females. *Cf. Grimm*, 972 F.3d at 628 (Niemeyer, J., dissenting) (explaining that a biological female is not similarly situated to biological males for purposes of restroom usage). Indeed, sex differences naturally produce performance differences that set biological males like B.P.J. apart. And underscoring the point here, "[t]his spring, B.P.J. placed in the top three in every track event B.P.J. competed in, winning most. B.P.J. beat over 100 girls, displacing them over 250 times while denying multiple girls spots and medals." Pet. 11. "B.P.J. won the shot put by more than three feet while placing second in discus. B.P.J. also took two of the limited spots in the conference championships. In all, B.P.J. has displaced 283 girls some 704 times." *Id.* (citations omitted).

Because "B.P.J. is not similarly situated to biological girls" competing on girls' cross-country and track teams, "it is of no consequence that B.P.J. is treated differently than them." App. 50a n.2 (Agee, J., concurring in part and dissenting in part). B.P.J. has not been treated "worse than others who are similarly situated," App. 57a (quotation omitted), and West Virginia's reservation of girls' sports teams for biological girls does not conflict with Title IX.

C. Title IX is Spending Clause Legislation.

In conducting its Title IX analysis, the panel majority also erroneously ignored the fact that Title IX is Spending Clause legislation and that, as a result, if Congress intended to preempt laws like West Virginia's Sports Act, that condition needed to be unambiguously clear.

Under the Spending Clause, Congress may "pay the Debts and provide for the ... general Welfare of the United States." U.S. Const. art. I, sec. 8, cl. 1. Using that power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). "[I]n return for federal funds, the recipients agree to comply with federally imposed conditions." *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568, 1570 (2022) (cleaned up). A spending-power law thus must "furnish clear notice" of what it requires. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). And under the Spending Clause's clear-statement rule, "[t]he crucial inquiry [is] … whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981); *see also Dole*, 483 U.S. at 206-07.

So if Congress intended to condition Title IX spending on States' acquiescence to a non-biological definition of sex (contrary to all historical evidence), it would have had to "unambiguously" state those "conditions" and "consequences of … participation." *Dole*, 483 U.S. at 207; *see also, e.g.*, *Cummings*, 142 S. Ct. at 1570 (explaining States must "clearly understand" in advance the obligations that they are undertaking in exchange for federal funds). Only such clarity keeps Spending Clause legislation from undermining the States' status as "independent sovereigns." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576-77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

Title IX does not come close to providing "clear notice" that it extends to gender-identity discrimination. *Arlington Cent.*, 548 U.S. at 296. After all, Congress could hardly have been clear about lumping in gender

identity with sex since "the term 'sex,' as of 1972, bore no logical relationship to notions of 'gender identity.'" *Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342, at *6 (N.D. Tex. July 11, 2024) (surveying dictionaries, opinions, and other sources and concluding that at that time or Title IX's adoption "'sex' meant only a person's biological sex"); *accord, e.g.*, *Adams*, 57 F.4th at 815-17. As explained above, the statute speaks unambiguously in terms of biological sex. *See supra* pp. 7-8. That understanding persisted uncontested for decades, including in Title IX's regulatory framework. *See supra* pp. 8-9. As the Sixth Circuit recently noted, "[i]t can't be that sexual orientation and gender identity have always been protected given the clear evidence of prior contrary agency positions." *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 612 (6th Cir. 2024). And not a shred of evidence supports the idea that any state in 1972 remotely understood that Title IX would be read to—far from securing equal athletic opportunities for female athletes—require females to compete alongside males.

At the end of the day, if Title IX is to require States to separate competitors based on self-professed gender identity rather than biological sex, Congress—not the courts—must make that choice. Anything less undermines the States' ability to make informed choices about how to best protect women's and girls' access to athletics.

II. The Constitution Does Not Require West Virginia to Treat Biological Males as Girls.

The Equal Protection Clause of the Fourteenth Amendment prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, sec. 1. This Court has explained that laws "giv[ing] a mandatory preference to members of either sex over members of the

other" warrant heightened scrutiny. *Reed v. Reed*, 404 U.S. 71, 76 (1971); *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (heightened scrutiny applies when litigants seek to eliminate "official action that closes a door or denies opportunity to women (or to men)").

But "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). And "B.P.J.'s issue here is not with the state's offering of girls' sports and boys' sports. It is with the state's definitions of 'girl' and 'boy.'" App. 84a. Thus, although a challenge to the State's decision to separate sports teams by sex might in some circumstances warrant heightened scrutiny, *see, e.g., Virginia*, 518 U.S. at 532-33, the majority recognized that "B.P.J. has disavowed any challenge to sex separation in sports." App. 23-24a (cleaned up). In fact, the relief B.P.J. seeks—"to play on the girls' team," App. 24a—*presumes* the constitutionality of sex-separated sports teams.

The panel majority recognized that intermediate scrutiny was satisfied here because West Virginia's "requirement that all teams be designated male, female, or coed … is conceded to be valid and is necessary to the relief B.P.J. seeks (being allowed to participate in girls cross country and track teams)." App. 26a.

As a result, B.P.J.'s claim is not subject to heightened review. B.P.J. does not ask West Virginia to dismantle sex-segregated sports, but for the State to segregate *differently*: to broaden its definition of "girl" to include some biological males so B.P.J. can take advantage of the classification. That is not a sex-discrimination challenge, but an underinclusiveness challenge—a challenge to how far the classification "extend[s] … relief." *Katzenbach v. Morgan*, 384 U.S. 641, 656-57 (1966). It is subject only to rational-basis review.

But based on wrongly decided circuit precedent, *Grimm*, 972 F.3d 586, the majority concluded the Sports Act also classified "based on gender identity," App. 24a, and conducted "another round of intermediate scrutiny review" to examine "the way the State has chosen to implement its decision to establish separate athletic teams for boys and girls." *Id.* (applying heightened scrutiny to "how and where the[]" lines of West Virginia's sex classification "may fall").

That's wrong for at least two reasons. First, classifying by biological sex is not classifying by gender identity. To the contrary, "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." *Adams*, 57 F.4th at 809. And that's certainly true here because transgender status plays no role in determining whether an individual may compete on a girls' sports team. Rather, that depends solely on biological sex: males may not try out for a girls' sports team (*regardless* of whether they identify as transgender) and females may try out for a girls' sports team (again, *regardless* of whether they identify as transgender).

Second, contrary to the panel's decision (and earlier Fourth Circuit precedent), transgender persons do not constitute a quasi-suspect class. Indeed, in stark contrast to recognized suspect classifications, transgender individuals do not share an immutable characteristic, do not constitute a discreet group, and unlike groups suffering long discrimination are far from politically powerless. *L. W. by & through Williams v. Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023) ("considerations that the Court has highlighted when recognizing a new suspect class" do not justify heightened scrutiny for transgender individuals); *see also Grimm*, 972 F.3d at 636-37 (Niemeyer, J., dissenting) (noting majority took 20

pages to discuss plaintiffs' transgender status). And even if transgender persons were a suspect class, a sex-based law that has a disparate impact on them would still not trigger heightened scrutiny. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979) (recognizing that "a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact").

In the end, applying the appropriate level of scrutiny, the Fourth Circuit should have upheld the Sports Act. And this Court should grant certiorari on the equal-protection question and reverse the Fourth Circuit. Otherwise, this erroneous analysis might spread—threatening the laws of both the Amici States here and others.

CONCLUSION

This case is about whether States may objectively classify "[f]emales, women, or girls" based on biology. W. Va. Code 18-2-25d(b), (c). Because no federal law compels otherwise, the answer is yes. Like Judge Agee below, *Amici* States urge the Court to "take the opportunity" presented by the petition "to resolve the[] questions of national importance" presented by this case. App. 74a (Agee, J., concurring in part and dissenting in part).

Respectfully submitted,

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