No. 24-43

In the Supreme Court of the United States

WEST VIRGINIA, ET AL.,
Petitioners,

v.

B.P.J. BY HER 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 PARENTS DEFENDING EDUCATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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August 15, 2024 *Attorneys for Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[*]

Parents Defending Education is a national, nonprofit, grassroots association. Its members include many parents with school-aged children. Launched in 2021, it uses advocacy, disclosure, and litigation to combat the increasing politicization and indoctrination of K-12 education.

PDE has a substantial interest in this case. Title IX was enacted to prevent discrimination against, and ensure equal opportunities for, female students. By any metric, it has been wildly successful in achieving that purpose. Over the past five decades, Title IX has "precipitated a virtual revolution for girls and women in sports" and spurred "significant increases in athletic participation" at "all levels of education." Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J. L. Reform 13, 15 (2000). Indeed, "the number of girls playing high school sports [increased] from one in twenty-seven" in 1972 to "one in three" by 2000. *Id.*

This new era of opportunity has provided measurable benefits for adolescent girls, young women, and their families. "Girls who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs. They are also more likely to lead." Brooke-

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[*] Under Rule 37.2, *amicus curiae* provided timely notice of its intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Marciniak & de Varona, *Amazing Things Happen When You Give Female Athletes the Same Funding as Men*, World Econ. F. (Aug. 25, 2016), perma.cc/G2QX-7GLN.

But the Fourth Circuit's decision will reverse this progress by effectively eliminating single-sex athletics throughout that circuit, including West Virginia. In concluding that Title IX mandates permitting biological boys to play on girls' teams or against girls, the Fourth Circuit's decision will reverse progress in women's sports and harm vulnerable families by preventing access to "equal athletic opportunity for members of *both sexes*," including PDE's members and their children. 34 C.F.R. §106.41 (emphasis added).

SUMMARY OF ARGUMENT

Congress overwhelmingly passed Title IX in 1972. *See* 118 Cong. Rec. 6,277 (Mar. 1, 1972) (Senate: 88-6); 118 Cong. Rec. 16,842 (May 11, 1972) (House: 275-125). Title IX's core prohibition is only 37 words and states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a).

When Congress approved that language in 1972, no one was voting to let biological men play women's sports. Quite the opposite, Congress sought to promote women's sports, even passing an amendment requiring the implementing agency to equalize the opportunities for female athletics. *See* 88 Stat. 484, 612 (1974). Indeed, "'it would require blinders to ignore

that the motivation for' enacting Title IX … was to promote opportunities for girls in sports." *B.P.J. ex rel. Jackson v. W.V. State Bd. of Educ.*, 98 F.4th 542, 573 (4th Cir. 2024) (Agee, J., dissenting).

In fact, a bill that imposed this policy wouldn't even pass today. Nearly 70% of Americans "say transgender athletes should only be allowed to compete on sports teams that conform with their birth gender"—a number that is growing over time. Jones, *More Say Birth Gender Should Dictate Sports Participation*, Gallup (June 12, 2023), perma.cc/F78B-ATGV.

But the Fourth Circuit has imposed a view of Title IX that neither its text, its history, nor its purpose supports. Under the panel majority's decision, recipients must allow biological males who identify as transgender to participate in women's sports. They must allow biological females to be routinely displaced on teams and from competition podiums by transgender athletes because these athletes have immutable biological advantages. They must allow biological males to share private spaces like locker rooms with female athletes. And they must allow biological males to injure female athletes more often and more severely than otherwise because their biologically male competitors are naturally bigger, faster, and stronger than their female counterparts. Title IX—which before the Fourth Circuit's decision, transformed women's sports for the better—could not possibly require these absurd results. "By compelling schools to allow transgender girls to participate on biological girls' teams," the Fourth Circuit "uses Title IX

to deny the very benefits it was enacted to protect." *B.P.J.*, 98 F.4th at 573 (Agee, J., dissenting).

Without this Court's intervention, female athletes in West Virginia and in States across the Fourth Circuit will be robbed of Title IX's benefits. The Court should grant the petition, restore Title IX's original public meaning, and reject the "highly counterintuitive result" that the Fourth Circuit decision requires. *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. 338, 360 (2021).

REASONS FOR GRANTING THE PETITION

I. Title IX doesn't require recipients to allow biological males to participate in women's sports.

The Fourth Circuit's sole justification for turning Title IX on its head is *Bostock v. Clayton County*, 590 U.S. 644 (2020). But *Bostock*'s reasoning about Title VII must *clearly* apply to Title IX, and it does not.

Unlike Title VII, Title IX is authorized only under the Spending Clause. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). Because the Constitution requires Congress to give recipients clear notice of what they are agreeing to when they take federal funds, Title IX cannot "impose" any "condition" unless the statute does so "unambiguously." *Pennhurst v. Halderman*, 451 U.S. 1, 17 (1981). So unlike in *Bostock*, the Fourth Circuit's interpretation that Title IX doesn't allow sex-separated sports must overcome a clear-statement rule. It doesn't.

"As many jurists have explained," *Bostock* does not extend to Title IX because Title VII and Title IX "use materially different language," "serve different goals," and "have distinct defenses." *Tennessee v. Cardona*, 2024 WL 3453880, at *2-3 (6th Cir. July 17).

Unlike Title VII, Title IX takes a more nuanced approach to discrimination "on the basis of sex" in the educational context. 20 U.S.C. §1681(a). Title IX sometimes allows complete segregation, like in traditionally single-sex schools (§1681(a)(5)), sororities and fraternities (§1681(a)(6)), and Boys and Girls State (§1681(a)(7)). Other times it allows sex separation, so long as males and females are treated equally on a group level. *E.g.*, §1681(a)(8) (father-son and mother-daughter activities). And other times it says it's not discriminatory to treat males and females differently based on physical differences or privacy concerns. *E.g.*, §1681(a)(4) (military academies); §1686 (living facilities). Thus, "Title IX, unlike Title VII, includes express statutory … carve-outs for differentiating between the sexes." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (en banc).

Taken together, these statutory provisions reflect that "Congress clearly intended to affirm certain aspects of sex separation in education—like in restrooms, showers, locker rooms, and sports—within its overall prohibition on sex discrimination." *B.P.J.*, 98 F.4th at 580 (Agee, J., dissenting). Sex discrimination under Title IX doesn't include treating males and females differently based on actual differences that

are rooted in biology, safety, and privacy. For good reason: It's beneficial and sometimes necessary to ensure equal opportunities for women. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring.").

Under the Fourth Circuit's interpretation, Title IX permits biological males who identify as transgender to participate in girls' sports and use the girls' locker room. But there's no evidence that Congress intended this result. For example, Congress would not have wanted to stop biological males from attending Girls State (a statutory exception) but let them endanger females in athletic competitions (no statutory authorization per the Fourth Circuit). Nor would Congress have wanted to exempt scholarships for "beauty" pageants but not sports. *See* §1681(a)(9). Bedrock principles of statutory interpretation do not require accepting the Fourth Circuit's "highly counterintuitive result[s]." *Yellen*, 594 U.S. at 360.

To the contrary, those principles support the opposite. If *Bostock* applied to Title IX, as the Fourth Circuit concluded, then it "would swallow the carveouts and render them meaningless." *Adams*, 57 F.4th at 814 n.7; *see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128 (2018) ("Absent clear evidence that Congress intended this surplusage, the Court rejects an interpretation of the statute that would render an entire subparagraph meaningless."). It would ignore that "schools are unlike the adult workplace." *Davis*, 526 U.S. at 651. And it would mean that Title IX

strangely provides "more protection against discrimination on the basis of transgender status" than "against discrimination on the basis of sex." *Adams*, 57 F.4th at 814. In other words, the Fourth Circuit's wholesale importation of *Bostock* means "ensuring that transgender individuals get access to the restrooms and sports teams of their choosing is more important than biological females' rights to privacy and to play competitive sports." *B.P.J.*, 98 F.4th at 580 (Agee, J., dissenting). "No Congress has ever intended such a result." *Id.*

Roughly contemporaneous regulations still intact today confirm what the text suggests: *Bostock*'s reasoning doesn't apply to Title IX, and sex-separated sports are permitted. When Title IX was passed in 1972, Congress directed the relevant agency to implement Title IX by promulgating regulations, including "with respect to intercollegiate athletic activities[,] reasonable provisions considering the nature of particular sport." *See* 88 Stat. 484, 612 (1974). After the agency wrote those regulations, it submitted them to Congress, Congress held six days of hearings on them, and Congress did not disapprove of them. *See N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 531-33 (1982); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286-88 (2d Cir. 2004). These regulations explain, among other things, that schools can separate males and females in all sports after school, and in contact sports like "boxing, wrestling, … [and] basketball" during school. 34 C.F.R. §§106.34(a)(1), 106.41(b).

These early Title IX regulations "accurately reflect" the statute's original public meaning. *Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984). These regulations are "especially useful in determining the statute's meaning" when, as here, they are "roughly contemporaneou[s] with the enactment" of Title IX and have "remained consistent over time." *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2258, 2262 (2024).

The Fourth Circuit disagreed, claiming that its reading was consistent with these longstanding regulations. In its view, the plaintiff "does not challenge the legality of having separate teams for boys and girls" under 34 C.F.R. §106.41 but "challenges the Act's requirement that [the plaintiff] may compete only on boys or coed teams." *B.P.J.*, 98 F.4th at 564. But no matter how the Fourth Circuit spins it, the plaintiff is challenging the ability to have sex-separated teams. If the plaintiff wins, then the girls' sports competition is no longer sex separated: A biological male (who identifies as a transgender girl) can participate on the girls' sports team and in their athletics competitions. It's meaningless to understand Title IX to authorize recipients to merely label one team the "girls' team" and another the "boys' team" and then force recipients to have the "girls' team" include a biological male. For the Fourth Circuit to be right, these longstanding regulations like 34 C.F.R. §106.41 must be illegal interpretations of Title IX. That result dooms the Fourth Circuit's statutory interpretation.

The best reading of Title IX is that it allows recipients to separate sports based on sex. But if any

doubts remained, the Spending Clause's clear-statement requirement extinguishes them. Again, unlike Title VII, Title IX is authorized only under the Spending Clause and thus must provide funding recipients with "unambiguous notice of the conditions they are assuming when they accept" Title IX funds. *Davis*, 526 U.S. at 637, 640. As the Eleventh Circuit explained, "schools across the country separate bathrooms based on biological sex"; "colleges and universities across the country separate living facilities based on biological sex"; and schools, colleges, and universities separate "sports teams" based on biological sex. *Adams*, 57 F.4th at 816-17. Yet the Fourth Circuit's interpretation of Title IX "call[s] into question the validity" of all these longstanding practices that are the core of Title IX. *Id.* at 817. The idea that schools, colleges, and universities "could or should have been on notice" that these practices violate Title IX "is untenable." *Id.* at 816. As Judge Agee put it in dissent below, "[i]t defies logic to conclude that Congress actually meant to prohibit gender identity discrimination *sub silentio* when enacting Title IX in 1972. Or that [States] should have been aware that that is what Congress meant to do." *B.P.J.*, 98 F.4th at 574.

It is no answer to say, as the Fourth Circuit did, that "*Bostock* foreclose[d] that 'on the basis of sex' is ambiguous as to discrimination against transgender persons." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 n.18 (4th Cir. 2020); *see B.P.J.*, 98 F.4th at 565 n.3 (dodging the Spending Clause argument but approving of *Grimm*'s analysis). After all, *Bostock* itself refused to "prejudge" whether its analysis of Title VII governs "other federal … laws that prohibit sex

discrimination." 590 U.S. at 681. And *Bostock* itself made clear that it didn't "purport to address bathrooms, locker rooms, or anything else of the kind" under Title VII, let alone Title IX. *Id.* *Bostock* cannot *both* disclaim addressing locker rooms, sports, and Title IX generally *and* clearly answer those questions. Especially when as explained, Title VII (*Bostock*) critically differs from Title IX (this case).

In sum, nothing in the text, history, or implementing regulations of Title IX contemplates sports separated by gender identity rather than biological sex. But even if some doubt remained, it favors Petitioners' reading because the Spending Clause requires Congress to speak clearly in Title IX.

II. The Fourth Circuit's ruling endangers female athletes.

The Fourth Circuit's interpretation of Title IX to eliminate sex-separate sports turns Title IX on its head. Safety, fairness, and privacy risks abound when biological males play women's sports—undermining the very purpose of Title IX.

"Title IX 'precipitated a virtual revolution for girls and women in sports.'" *Adams*, 57 F.4th at 818 (Lagoa, J., concurring). It "'has paved the way for significant increases in athletic participation for girls and women at all levels of education.'" *Id.* "There can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports" *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996). "Title IX has had a dramatic and positive impact on the capabilities

of our women athletes, particularly in team sports." *Id.* And it has led to other benefits as well: Girls who participate in sports "stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs." *Adams*, 57 F.4th at 820 (Lagoa, J., concurring) (cleaned up).

But the Fourth Circuit's reasoning threatens to eliminate these benefits and turn female sports into a fundamentally unfair and unsafe enterprise. Biological males have innate advantages over females that tilt the playing field and increase the risk of injury in contact sports. "[C]ommingling both biological sexes in the realm of female athletics," as the Fourth Circuit has, "would threaten to undermine one of Title IX's major achievements, giving young women an equal opportunity to participate in sports" and would "hinde[r] biological women and girls … from experiencing these invaluable benefits and learning these traits." *Id.* at 818, 821 (cleaned up).

Recent experience has shown that transgender athletes that participate in female sports frequently dominate the competition. *See, e.g.*, McCaughey, *Transgender Weightlifter Shatters Women's Deadlifting Record, Trounces Competitors in Canadian Championship*, New York Sun (Aug. 16, 2023), perma.cc/T7B3-RS4X; Steinbuch, *Tennis Star Martina Navratilova Slams Trans Cyclist Austin Killips' Victory*, N.Y. Post (May 5, 2023), perma.cc/8UBD-Y7VF; Prestigiacomo, *Another Women's Sport Sees Trans Athletes Rise to Top, and Competitors Are Speaking Out*, Daily Wire (Oct. 1, 2022), perma.cc/5ZVV-L5EU (listing sports where

transgender girls eclipsed biological girls, including "disc golf").[1]

Experience has also shown that transgender athletes put females at risk for greater injury. Males possess "categorically different strength, speed, and endurance." Coleman & Shreve, *Comparing Athletic Performances the Best Women to Boys and Men*, Ctr. for Sports Law & Policy, perma.cc/3Z7R-W6Q2. These physical differences increase the risk to females to compete against males, particularly in contact sports. Recognizing this distinction, Title IX's existing regulations expressly address "contact sports," separating contact sports by sex to promote the physical wellbeing of athletes. 34 C.F.R. §106.41(b).

For example, in a recent high-school field-hockey game, a biological male took a shot and hit an opposing female player in the face, causing her to "'shrie[k] and screa[m]'" in "'fear and pain.'" Gaydos, *High School Field Hockey Captain Speaks Out Against Rule Allowing Boys on Girls Teams After Horrific Injury*, Fox News (Nov. 5, 2023), perma.cc/34J9-FLKM. The shot caused "'significant facial and dental injuries'" and "'required hospitalization.'" Morik, *Massachusetts*

[1] *See also, e.g.*, Craig, *Transgender Girl Makes History with Victory at Cross Country Regional*, Portland Press Herald (Oct. 21, 2023), perma.cc/D458-YYDK; Munro, *A Male Athlete is Putting Girls' Nordic Ski at Risk — Is the Sport Too Polite to Save Itself?*, Independent Women's Forum, perma.cc/746Y-8KQ9; Hadfield, *Male Cyclists Dominate Events in Two Female Races in Switzerland and Washington State*, The Publica (Aug. 21, 2023), perma.cc/4282-W2CA.

Superintendent Calls for Change After Male Sends Female to Hospital in Field Hockey Game, Fox News (Nov. 3, 2023), perma.cc/5Y6V-Y5KS. After the incident, "players and coaches" were "horrif[ied]," *id.*; they were "visibly distraught over the injury," Pollina, *High School Girl's Field Hockey Player Loses Teeth, Injured by Shot from Male Opponent*, N.Y. Post (Nov. 4, 2023), perma.cc/Z9L3-HTSC. In the words of one player: "'Following the injury, my teammates were sobbing not only in fear for their teammate but also in fear that they had to go back out onto the field and continue a game, playing against a male athlete who hospitalized one of our own.'" Gaydos, *supra*. "'By trying to create equality,'" the player explained, the league is "'only creating inequalities.'" *Id.*

Other anecdotal evidence points out the obvious: Males and females have important biological differences that make them compete differently. For example, a student competing in varsity-level volleyball reported significant mental and physical delays in recovery after experiencing a severe neck injury caused by a transgender athlete. Downey, *Female Volleyball Player Testifies to Physical, Mental Trauma Since Injury by Trans Athlete*, National Review (Apr. 20, 2023), perma.cc/D2W5-QGWE; McClure, *After a Male Caused Her Partial Paralysis, Female Volleyball Player Payton McNabb Now Fights to Protect Women's Sports*, IWF, perma.cc/4WEA-YC63. Mixed Martial Arts's first transgender athlete fractured a biological female's skull in a fight. Purohit, *When Transgender Fighter Fallon Fox Broke Her Opponent's Skull in MMA Fight*, Sportskeeda (Sept. 30, 2021),

perma.cc/G876-K6KA. The biological female was concussed, fractured a portion of her skull, and had to receive seven staples in her head. *Id.* And a biological female athlete suffered a significant injury from a transgender soccer player in Australia. Flower, *Parents Upset at 'Unfair Advantage' of Trans Woman in Female Soccer League Will Be Offered Training to Better Understand 'Lived Experience' of Transgender Players*, UK Daily Mail (Apr. 2, 2023), perma.cc/H95F-TZUE.

None of these stories show "fair" or "safe" athletic competitions. And they show why Title IX distinguishes between the two sexes. Yet the Fourth Circuit's reasoning forbids this commonsensical distinction between the sexes.

The Fourth Circuit's ruling also risks compromising the privacy rights of student athletes, especially in private spaces like locker rooms and lodging accommodations for competitive sports travel. "There has been a long tradition in this country of separating sexes" in many circumstances, particularly in "public bathrooms" and locker rooms. *Adams*, 57 F.4th at 801. And this Court "has long recognized the need for privacy in close quarters, bathrooms, and locker rooms to protect individuals with anatomical differences—differences based on biological sex." *Bear Creek Bible Church v. EEOC*, 571 F.Supp.3d 571, 625 (N.D. Tex. 2021) (citing *Virginia*, 518 U.S. at 550 n.19).

But recent deviations from this country's long tradition have shown how allowing biological males to participate in women's sports causes invasions of pri-

vacy. For example, many students raised privacy concerns after the NCAA permitted a biological male who identifies as transgender to occupy the same locker room as biological females without any warning at a swim competition. *See* Berrien, *'18 Times Per Week': Former Teammate of Lia Thomas Recalls Humiliation of Undressing*, Daily Wire (July 27, 2023), perma.cc/86L8-R8NJ. Many students raised the same privacy concerns over a similar incident in Wisconsin. *See* Schemmel, *Trans Student Exposed Girls to Male Genitalia in School Locker Room, Legal Group Claims*, Fox 25 (Apr. 21, 2023), perma.cc/EKW8-QXTF. These situations will only increase under the Fourth Circuit's reading of Title IX to require letting biological males play women's sports.

At bottom, this case involves "an important issue that this Court is likely to be required to address in the near future, namely, whether … Title IX … prohibits a State from restricting participation in women's or girls' sports based on genes or physiological or anatomical characteristics." *West Virginia v. B.P.J.*, 143 S.Ct. 889, 889 (2023) (Alito, J., dissenting, joined by Thomas, J.). The answer is that Title IX requires no such thing. The consequences from leaving the Fourth Circuit's contrary conclusion in place are untenable.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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