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 OF AMICUS CURIAE EMPOWERED COMMUNITY COALITION, UA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

Amicus Empowered Community Coalition, UA, is an unincorporated association of 105 parents with school-aged children in the Elkhorn Area School District in Wisconsin.[1] A middle school male student who identifies as a girl recently sued the District to gain access to the girls' bathrooms and locker rooms, based on a flawed interpretation of Title IX that mirrors the Fourth Circuit's reasoning in this case. The members formed the association to demonstrate parental support of the school district's policy to separate bathrooms and locker rooms based on biological sex, and they participated in that litigation to show that they and their young children have significant safety and privacy concerns if their children are forced to share facilities with members of the opposite sex. They have an interest in this case because redefining the word "sex" in Title IX has implications far beyond the sports context, including with respect to sex-separated spaces.

As parents of school-aged children, many of whom do or will participate in sports, Amicus's members also have a strong interest in preserving safety and fairness in girls' sports. Amicus's members oppose any radical interpretation of Title IX, including the long-standing practice of separate sports teams for boys and girls. Declining to grant the petition may harm all

[1] As required by Supreme Court Rule 37.6, Amicus states as follows: No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus or its counsel made such a monetary contribution. Counsel of record received timely notice of intent to file this brief under Supreme Court Rule 37.2.

of these students and their parents by subverting the athletic opportunities that Title IX was meant to protect.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit Court of Appeals and decisions like it imperil state laws intended to ensure safety and fairness for women and girls in sports. The petition provides numerous examples of the harms that occur when boys are allowed to compete on girls' sports teams.

This amicus brief supports the petition and provides three short reasons for why this Court should take this case. First, the decision below is egregiously wrong: Title IX explicitly permits sex-separated sports to protect safety and fairness in girls' sports, and it has for decades. Second, if this Court clarifies that "sex" means "sex" in Title IX, it will have implications beyond the sports context and will resolve an entrenched circuit split over whether Title IX allows sex-separated bathrooms and locker rooms, protecting Amicus's members and their children. Third, and finally, both states and interscholastic athletic associations need clarity and uniformity on whether girls' sports can be limited to biological girls.

ARGUMENT

I. Title IX Explicitly Permits Sex-Separated Sports Teams.

Congress enacted Title IX to guarantee that female students in the United States have equal access to the benefits and opportunities available to male students. To that end, Title IX has long explicitly permitted sex-separated sports. The regulations implementing Title

IX expressly allow school districts to "sponsor separate teams *for members of each sex*." 34 C.F.R. § 106.41(b). (emphasis added). At the time the regulations were adopted, "sex" undisputedly referred to "biological sex." Indeed, "the overwhelming majority of dictionaries" at the time "defin[ed] 'sex' on the basis of biology and reproductive function." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (listing the definitions from various dictionaries).

Both Congress and this Court have clarified several times that "sex" refers to biological sex. Just one year after Congress passed Title IX, this Court stated that "sex" is "an immutable characteristic" determined by "birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Congress used the phrases "one sex" or "both sexes" throughout Title IX, illustrating that it was referring to biology, not some ambiguous and ill-defined social concept like gender identity. This Court has also recognized in *United States v. Virginia* that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." 518 U.S. 515, 551 (1996). The history of Title IX clearly indicates that it was enacted with a biological binary in mind. "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004).

In light of that plain text and history, the Fourth Circuit's decision is clearly wrong. The Fourth Circuit effectively concluded that Title IX *prohibits* what it explicitly *permits*—separating sports by biological sex. If that decision is correct, "the world is truly

upside down." *Cf. Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 866 (11th Cir. 2020). And Title IX will have been re-written entirely by judicial fiat. It will mean that school districts in the Fourth Circuit must allow any male student who asserts a female gender identity to play on the girls' sports team. Even this Court in *Bostock* noted that its decision was limited to the Title VII context. *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 681 (2020) ("None of these other laws are before us; … we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.").

Denying the petition will allow continued confusion about how far the reasoning extends. If every other male student who seeks to play on a girls' sports team may do so, it will impact students from kindergarten through higher education in potentially every state. This Court should not allow the desires of a few students who assert a different identity to trump the rights and opportunities of female student-athletes throughout the country. The Fourth Circuit's decision casts doubt on many other state laws and school district policies that are designed to preserve the safety and fairness of girls' sports.

The Fourth Circuit suggested that its ruling does not "require[ ] schools to allow every transgender girl to play on girls teams, regardless of whether they have gone through puberty and experienced elevated levels of circulating testosterone." App. 43a. But the decision fails to provide clarity on how school districts are supposed to draw lines between different transgender students. Do they have to test the testosterone levels of every male transgender student who seeks to play on the girls' team? And re-test as the student's body

changes? Are school districts required to consider "fat distribution, pelvic shape, and bone size"? App. 35a. Or do they have to wait to see if the student dominates the competition? It is untenable to take this issue on a case-by-case, student-by-student basis. States and school districts cannot reasonably allow some, but not all, transgender students to play on whatever sports team they want, otherwise they would risk litigation every time they said no.

It would also encumber the court system if every transgender student had to litigate this. As a practical matter, this is an all-or-nothing proposition. Either sports can be sex-separated, or every student who asserts a transgender identity must be permitted to play on whatever team they want; in which case sex-separated sports will cease to exist. That is precisely why Title IX has long contained a blanket rule authorizing "separate teams for members of each sex." 34 C.F.R. § 106.41(b).

To be clear, transgender students, like B.P.J., of course should be able to participate in sports. But the West Virginia law offers B.P.J. the option of competing on male or co-ed teams, as even the Fourth Circuit acknowledged. App. 26a. That B.P.J. may experience some "emotional and dignitary harm," App. 40a, because he cannot compete against girls as he wants to, simply does not compare to eliminating safety and fair competition for all of the other (actually) female athletes. The Fourth Circuit simply brushed aside the rights of female athletes who will lose out on a fair shot at competitive success by being forced to compete against biological boys, with all of their physical advantages.

In short, the Fourth Circuit has flipped Title IX on its head. The law that was designed to create equal opportunities for girls has become a means for boys to compete in girls' sports and reduce or eliminate girls' chances of success in athletic competition. This Court should grant the petition and correct this obviously incorrect interpretation.

II. Review Is Urgently Needed to Correct Misinterpretations of Title IX—and Circuit Splits—in Other Contexts.

The Fourth Circuit's decision transforms Title IX by dramatically redefining the word "sex." This is a problem, not only in the sports context, but also in other contexts as well. School districts in Wisconsin, Illinois, and Indiana have, for seven years now, been burdened by the same faulty interpretation of Title IX with respect to bathrooms and locker rooms at school.

In *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), the Seventh Circuit redefined the word "sex" to hold that school districts must permit transgender students to use whatever bathrooms and locker rooms they identify with—even though, as in the sports context, Title IX expressly allows school districts to "provide separate toilet, locker room, and shower facilities *on the basis of sex*." 34 C.F.R. § 106.33 (emphasis added). Like the Fourth Circuit, the Seventh Circuit emphasized that its decision was limited to the facts of the case. Subsequent history has proved otherwise.

After *Whitaker*, each individual school district was left with the burden of interpreting and applying the confusing decision. At least at first, it was not clear whether the rule applied universally. Did the Seventh Circuit mean to require that a student must have "a

medically diagnosed and documented condition"? *Whitaker*, 858 F.3d at 1050. Does a student have to "consistently live[ ] in accordance with his gender identity"? *Id.* Can schools require some sort of verification before immediately allowing any student that asserts a transgender identity to use the opposite-sex bathroom? *Id.* at 1053. How does the reasoning in the decision apply to students who identify as nonbinary or gender fluid? *Whitaker* does not address these questions and has ultimately created further confusion.

Multiple school districts have since attempted to distinguish *Whitaker*, but every case so far has lost, even on very different facts, illustrating that this is, ultimately, an all-or-nothing proposition. *E.g.*, *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), cert. denied, 144 S. Ct. 683 (2024); *Doe v. Elkhorn Area School District*, No. 24-CV-354-JPS, 2024 WL 3617470 (E.D. Wis. Aug. 1, 2024); *Doe v. Mukwonago Area Sch. Dist.*, 681 F. Supp. 3d 886 (E.D. Wis. 2023); *B.E. v. Vigo Cnty. Sch. Corp.*, 608 F. Supp. 3d 725, 727 (S.D. Ind. 2022); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833 (S.D. Ind. 2019).

Since *Whitaker*, the en banc Eleventh Circuit has rightfully rejected the Seventh Circuit's reasoning, holding that Title IX means what it says—that schools *can* provide sex-separated facilities. *Adams*, 57 F.4th 791. Thus, there is a well-established circuit split on the meaning of "sex" in Title IX with respect to bathrooms and locker rooms. In a concurrence in a subsequent appeal, Judge Easterbrook wrote that, while he believes *Whitaker* was wrongly decided, only this Court can "produce a nationally uniform

approach." *A.C.*, 75 F.4th at 775 (Easterbrook, J., concurring). Indeed.

If this Court takes this case and clarifies the obvious—that "sex" means "sex," and not "gender identity"—it will hopefully abrogate the Seventh Circuit's erroneous decisions in *Whitaker* and *A.C.*, and it will also resolve the circuit split around Title IX's application to bathrooms and locker rooms.

To further illustrate the importance of this issue, in both *Whitaker* and *A.C.*, the Seventh Circuit based its opinion on the lack of "evidence of how [a] preliminary injunction [would] harm [the District], or any of its students or parents." *Whitaker*, 858 F.3d at 1039; *A.C.*, 75 F.4th at 772 (concluding that privacy concerns "appear[ ] entirely conjectural" because "[n]o [other] students complained."). To suggest that minor girls have no privacy-related concerns about a biological boy in their bathrooms and locker rooms is, at best, naïve, and, at worst, disingenuous.

In any event, in a subsequent, recent case against the Elkhorn Area School District, Amicus here—an association of 105 parents all with children in that school district—took the Seventh Circuit at its word and submitted evidence that numerous students are, in fact, afraid to use the bathroom knowing that a biological boy may be present in the bathroom with them. *Doe v. Elkhorn Area Sch. Dist.*, No. 24-CV-354-JPS, 2024 WL 3617470, at *10–*11. And multiple members explained that they are considering withdrawing their children from the district to protect them. *Id.* Nevertheless, the district court granted a preliminary injunction to the plaintiff based on *Whitaker*'s and *A.C.*'s erroneous interpretation of Title IX, which directly mirrors the Fourth Circuit's

erroneous interpretation in the case on review here. *Id.* at *22. The district court even acknowledged the circuit split on this issue and intimated that clarification from this Court would be beneficial. The district court emphasized that it was bound by the law in the Seventh Circuit and stated that "any speculation about what the law may be if this issue goes to the Supreme Court has no bearing on this Order." *Id.* at *17.

All that is to say, this case has far-reaching implications, even beyond the sports context. This Court should take the case to clarify that "sex" means "sex" in Title IX, both to protect girls' opportunities in sports *and* their privacy in intimate spaces.

III. Interscholastic Athletic Associations and States Require Clarity and Uniformity.

Interscholastic athletic associations and various states will also benefit from clarity and uniformity. Many have developed policies related to participation in athletics by transgender students. *See, e.g.*, *Transgender Participation Policy*, Wisconsin Interscholastic Athletic Association (WIAA), https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf. States need clarity and have a clear "interest in the continued enforceability of [their] own statutes." *Maine v. Taylor*, 477 U.S. 131, 137 (1986). Rather than leaving states and interscholastic athletic associations to create their own criteria, which will invariably differ across the country, this Court has an opportunity to provide uniformity and clarity.

Most state interscholastic athletic associations also have the authority to impose penalties for rules violations, including, but not limited to, suspension of

membership by a school and forfeiture of contests won by the school. In states whose interscholastic athletic associations allow males to play on girls' sports teams and compete against girls, if a particular school decided not to comply, they would risk student-athletes losing opportunities and forfeiting wins. If this Court grants the petition, it should eliminate the need for such policies to be litigated in numerous states.

Similarly, twenty-six states have girls' sports laws similar to the West Virginia law involved in this case. *States Act to Protect Women's Sports,* Concerned Women for America, Legislative Action Committee, https://bit.ly/3zCv9nJ (last visited August 9, 2024). This case is an ideal vehicle to protect basic fairness for girls and to address whether laws that divide sports based on biological differences violate Title IX. This court should grant the petition and resolve these issues, which concern Title IX, a "major federal statute." *United States v. Donovan*, 429 U.S. 413, 422 (1977). For over fifty years, Title IX has historically allowed sports to be separated based on sex and not gender identity. The Fourth Circuit's ruling threatens this. If its decision is allowed to stand and its logic spreads across the country, the impact will be substantial. School districts, states, and interscholastic athletic associations nationwide will be unable to protect fairness in girls' sports.

CONCLUSION

Amicus respectfully requests this court grant the Petitioner's petition for writ of certiorari.

Dated: August 14, 2024.

Respectfully submitted,

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