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

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QUESTIONS PRESENTED

West Virginia passed a law in 2021 categorically banning girls who are transgender from participating on all girls' sports teams from middle school through college. In this as-applied challenge, the Fourth Circuit addressed whether West Virginia's categorical ban could be "applied to prevent a 13-year-old transgender girl who takes puberty blocking medication and has publicly identified as a girl since the third grade from participating in her school's cross country and track teams." Pet. App. 13a–14a.

The questions presented are:

1. Does West Virginia's categorical ban violate Title IX as applied to B.P.J.?

2. Does West Virginia's categorical ban violate the Equal Protection Clause as applied to B.P.J.?

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INTRODUCTION

This case involves one transgender girl—14-year-old B.P.J.—and her as-applied challenge to H.B. 3293, a West Virginia law passed in 2021 that categorically bars transgender girls from playing on girls' sports teams. B.P.J. socially transitioned in third grade; she has a West Virginia birth certificate officially recognizing her as female; and she has never gone through endogenous puberty—meaning that she has never experienced the effects of testosterone on her body that cisgender boys typically experience. She was entering middle school when H.B. 3293 was passed, and she has been playing school sports since that time due to injunctions issued by the courts below. No other transgender girl is known to be affected by H.B. 3293 other than B.P.J. Particularly given the lack of any circuit split on the questions presented, forthcoming federal regulations addressing transgender participation in athletics, and the interlocutory posture of this as-applied challenge—which the Fourth Circuit remanded to the district court for further development of the record—there is no reason for this Court to step in.

Petitioners seek to create a false sense of national emergency when nothing of the sort is presented by this case. This case is neither a facial challenge nor an effort to create national policy. It is an as-applied challenge by one transgender girl who is too slow to make her school's track team and who has been working hard to learn and improve in field events. There is no need for the Court's intervention now, when there is no circuit split on either question presented, and when the courts below will be further developing the factual record with respect to whether a transgender girl who has never experienced

endogenous puberty—like B.P.J.—has an innate athletic "advantage" over cisgender girls. Contrary to Petitioners' misleading narrative, that question has not been resolved—either in this case or more generally. This Court should allow the record to develop before weighing in on this issue.

This Court will soon be addressing the standard of scrutiny for discrimination against transgender people in *United States v. Skrmetti*, 144 S. Ct. 2679 (U.S. June 24, 2023) (No. 23-477), a case involving a state law banning transgender adolescents from receiving healthcare "inconsistent with" their sex designated at birth. B.P.J. does not object to this Court holding the Petition for *Skrmetti*, and then either denying the Petition or vacating and remanding once this Court resolves that case. But in no event have Petitioners shown an independent basis for granting review in this case—either before or after *Skrmetti* is decided. To the extent that there are unresolved issues in the context of athletics following *Skrmetti*, there will be plenty of future vehicles for this Court to resolve those issues on a complete record and with further development of the issues in the lower courts.

The Petition should be denied or held for *Skrmetti*. If the Petition is held for *Skrmetti*, the Petition should then be denied, or the opinion below should be vacated and remanded in light of *Skrmetti*.

STATEMENT

A. B.P.J.

B.P.J. is a 14-year-old girl from West Virginia who is transgender. Like many children her age,

B.P.J. loves to run and play on sports teams with her friends. She relishes the friendships that sports have allowed her to build and the personal satisfaction that comes from trying her best. Joint App., *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. Mar. 27, 2023), ECF Nos. 53-1–53-8 ("C.A. App.") JA0069; JA0897; JA0899-0900; JA4286.

B.P.J. was designated male at birth but has known she is a girl for as long as she can remember. With her parents' love and support, she has been able to live consistently with her female identity from an early age. Since the third grade she has been recognized and treated as a girl by school staff and administrators, and she has an amended birth certificate from the State of West Virginia reflecting that her "sex" is "female." Pet. App. 40a; C.A. App. JA0482; JA0883; JA0876–0877; JA0894–0896; JA0898; JA0966; JA3086–3087; JA4256–4257.

B.P.J. also receives medical care enabling her to experience puberty as a girl. She began puberty-delaying treatment at the onset of puberty, which prevented her from experiencing any physiological changes typical of a male puberty, including those changes commonly associated with athletic advantage in boys. C.A. App. JA0877; JA4281. Then, when it was medically appropriate, she began receiving hormone therapy with estrogen, which has allowed her to develop physiological characteristics typical of other girls, such as "fat distribution, pelvic shape, and bone size." Pet. App. 40a; C.A. App. JA3088; JA4281; JA4284–4285.

In spring 2021, when she was 11 years old and a rising sixth grader, B.P.J. was preparing to start middle school and was looking forward to trying out

for the girls' cross-country team. C.A. App. JA0897; JA0899–0900. B.P.J. and her mother met with the principal of Bridgeport Middle School to develop a "gender support plan" ensuring that B.P.J. would continue to be recognized as a girl by her new school. C.A. App. JA0888; JA3087. During that meeting, the principal informed B.P.J. that she would not be allowed to participate on girls' school sports teams because of a new law passed by West Virginia. C.A. App. JA0879; JA1434–1435; JA3103; JA4257–4258.

B. H.B. 3293

School sports teams in West Virginia have long been separated into boys' teams and girls' teams under regulations established by the West Virginia Secondary Schools Athletic Commission (the "Commission"). Pet. App. 14a–15a; 20a. And for many years, pursuant to a Commission policy, transgender students could join teams matching their gender identity if their school determined, on a case-by-case basis, that "fair competition" would not be undermined by the student's participation. Pet. App. 14a; C.A. App. JA4214. Any other member school could appeal such determinations to the Commission's board of directors, which would decide whether the student's participation "would adversely affect competitive equity or safety of teammates or opposing players." C.A. App. JA4214.

Thus, although Petitioners at times have sought to frame H.B. 3293 as designed to simply ensure sex separation in sport, *see, e.g.,* Defendants-Intervenors' Motion for Summary Judgment at 7–9, *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 2:21cv00316 (S.D.W.V. Apr. 21, 2022), ECF No. 288, sex separation already existed in West Virginia prior to H.B. 3293.

Pet. App. 14a. West Virginia passed H.B. 3293 to overturn the Commission's policy of transgender inclusion. As the Fourth Circuit recognized, the statute's "sole purpose" and "sole effect" was to ensure that transgender girls could not participate on girls' teams. Pet. App. 13a. Petitioners vaguely dispute this notion, *see* Pet. 28, but at the same time admit that H.B. 3293 was motivated by anecdotes about transgender girls competing on girls' teams in Connecticut—not by any concern about sex separation in sport generally. *See* Pet. 6. According to Petitioners, these accounts of transgender girls "worried the West Virginia Legislature," which "relied on [these] studies and anecdotes pertaining to different locales" to pass H.B. 3293. Pet. 7–8 (internal quotation marks omitted). Likewise, the Chief Counsel of H.B. 3293's originating committee referred to H.B. 3293 as a "[t]ransgender participation in secondary schools bill," a "[t]ransgender originating bill," and a "bill regarding transgender participation in sports." C.A. App. JA3063; JA3094. And the Chairman of the originating committee described the "issue" addressed by H.B. 3923 as "two transgender girls" who "were allowed to compete in state track and field meetings in Connecticut." C.A. App. JA0153–0154; JA3095.

Consistent with its purpose of preventing transgender girls from participating on teams consistent with their gender identity, H.B. 3293 declares that "gender identity serve[s] no legitimate relationship" to participation on school sports teams and restricts participation on girls' teams based "solely" on "biological sex," which the statute newly defines as a person's "reproductive biology and genetics at birth." W. Va. Code §§ 18-2-25d(a)(4),

(b)(1). H.B. 3293's categorical ban on transgender girls playing on girls' teams applies to every school-sponsored sport at every level, including club and intramural activities. And it applies to every girl who is transgender—regardless of whether, like B.P.J., they are in middle school, legally recognized as a girl, and have not gone through endogenous puberty and have not experienced any of the physiological changes potentially associated with differences in athletic performance between cisgender men and women.

Despite the sweeping scope of the ban, "[t]he record makes abundantly clear . . . that West Virginia had no 'problem' with transgender students playing school sports and creating unfair competition or unsafe conditions. In fact, at the time it passed the law, West Virginia had no known instance of any transgender person playing school sports." C.A. App. JA4264 (Mem. Op. & Order re Mot. for Summ. J.). The West Virginia Department of Education testified before the legislature that it had received no complaints about transgender students participating in school athletics, C.A. App. JA3096; JA0087, and its general counsel referred to the bill as "much ado about nothing." C.A. App. JA3063; JA3067; JA3097. After signing the bill, Governor Justice admitted that he was not aware of "one example of a transgender child trying to get an unfair advantage"; he also stated that H.B. 3293 was not "a priority" for him, as "we only have 12 kids maybe in our state that are transgender-type kids." C.A. App. JA3067; JA3096–3097. To this day, B.P.J. is the only person known to be affected by H.B. 3293.

C. Proceedings in the District Court

When H.B. 3293 passed, B.P.J. was devastated at the prospect of not being able to participate in

middle school cross country and track just because she is transgender. C.A. App. JA0070–0071. She therefore brought an as-applied challenge to the law so she could try out for middle school sports like every other girl. B.P.J. claimed that H.B. 3293 violated Title IX and the Equal Protection Clause as applied to her because B.P.J. (a) had consistently and persistently identified as a girl for many years, and (b) has not gone through endogenous puberty and thus has never had levels of circulating testosterone akin to those of cisgender boys.

In July 2021, prior to B.P.J.'s starting sixth grade, the district court agreed that B.P.J. was likely to succeed on her claims under Title IX and the Equal Protection Clause and entered a narrow preliminary injunction prohibiting H.B. 3293 from being enforced against her (and only her). Pet. App. 15a–16a; C.A. App. JA0449; JA0452–0453. Because of the injunction, B.P.J. was able to participate on Bridgeport Middle School's girls' cross country (fall) and track-and-field (spring) teams as a sixth grader, and on the cross-country team (fall) as a seventh grader. C.A. App. JA0899–0900; JA3107–3108; JA4285–4286.

B.P.J. consistently placed in the back of the pack during both cross-country seasons—for example, placing 51 out of 66 and 123 out of 150 at two invitationals in 2021, C.A. App. JA3107; JA2955–2957, and placing 54 out of 55 for her first race of the 2022 cross-country season and 64 out of 65 in her final race of that season. Resp'ts Suppl. App. in Support of Opp'n to Appl. to Vacate the Inj., *West Virginia v. B.P.J. by Jackson*, No. 22A800 (U.S. Mar. 30, 2023) ("Supp. App.") at 218a. And, for her sixth-grade track-and-field season, she was too slow to make the team

for the girls' running events, so she learned shotput and discus and participated exclusively in those events. Supp. App. 213a, 217a. During sixth grade, B.P.J. regularly placed in the bottom half of shotput and discus participants at meets. Supp. App. 217a.

Despite being too slow to run track and never winning a competition in any event during the three seasons of play that the district court's preliminary injunction afforded her, B.P.J. considers those two years to be "the best of [her] life." C.A. App. JA4281; *see also* JA0900. B.P.J.'s mother had "never seen [B.P.J.] happier" than when she "pick[ed] her up from practices and [took] her to meets." C.A. App. JA4286.

After extensive discovery, the parties filed cross-motions for summary judgment, supported by expert declarations. Pet. App. 16a. Both parties also filed *Daubert* motions to exclude the other side's experts as unreliable under Federal Rule of Evidence 702, and, thus, inadmissible for purposes of summary judgment. *See* Fed. R. Civ. P. 56(c)(2); Pet. App. 37a.

The undisputed record evidence established that the largest known biological cause of average differences in athletic performance between cisgender boys and cisgender girls is the difference in circulating testosterone beginning with puberty. Pet. App. 90a. As B.P.J.'s expert explained, there is no reliable scientific information to support the notion that transgender girls like B.P.J.—who have never experienced elevated levels of testosterone from puberty—have athletic advantages simply by virtue of having a male sex designated at birth. C.A. App. JA2143–2144. Petitioners' expert speculated that there may be athletic advantages before puberty, C.A. App. JA2512–2525, but had previously conceded that

no significant advantages exist. C.A. App. JA3102; JA2266; JA2144.[1]

The district court granted summary judgment for Petitioners without resolving the *Daubert* motions or determining whether there was a triable question of fact with respect to whether B.P.J. had any athletic advantage. Pet. App. 37a. Petitioners refer to the "thousands of pages" in the record before the district court, Pet. 9, but fail to acknowledge that the district court granted summary judgment against B.P.J. largely without any reference to that record. The district court concluded that a transgender girl, "barring medical intervention, would undergo male puberty," and it stated that "there is much debate over whether and to what extent hormone therapies *after puberty* can reduce a transgender girl's athletic advantage over cisgender girls." Pet. App. 92a (emphasis added). But the court did not cite any evidence regarding the situation presented by this as-applied challenge: a transgender girl who *does* receive medical intervention and as a result *does not* undergo endogenous puberty.

[1] The expert testimony submitted by B.P.J. and Petitioners is substantially similar to expert testimony submitted in a successful challenge to a similar categorical ban against transgender girls' participation on girls' sports teams enacted by Arizona. *See Doe v. Horne*, No. 23-16026, 2024 WL 4113838 (9th Cir. Sept. 9, 2024) (affirming preliminary injunction and holding that the district court did not clearly err in crediting the testimony of plaintiffs' experts and concluding that transgender girls who do not go through endogenous puberty do not have athletic advantages compared to cisgender girls).

D. Proceedings on Appeal

1. Emergency Motions

The district court's summary judgment ruling came shortly before B.P.J.'s seventh-grade spring track-and-field season. When B.P.J.'s mother told her about the ruling, she was crushed. She "cried in [her] bed the whole night," because she "was terrified about not being able to continue doing the thing that she loves with her friends." C.A. App. JA4282; JA4287. B.P.J. thus sought emergency relief from the Fourth Circuit so she could participate in spring track-and-field, and the Fourth Circuit granted an injunction pending appeal, staying the district court's dissolution of the preliminary injunction. Order Granting Mot. to Stay Pending Appeal, *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. Feb. 22, 2023), ECF No. 50. Petitioners then filed an emergency application with this Court to lift the injunction, claiming that B.P.J. had "displaced [cisgender] girls 105 times" (counting as an instance of displacement each time that B.P.J. placed ahead of any other individual girl in any competition, regardless of finishing rank). Appl. to Vacate Inj. at 36, *West Virginia, et al. v. B.P.J. by Jackson*, No. 22A800 (U.S. Mar. 9, 2023). This Court denied that application, over two dissents. *See* Order Den. Appl. to Vacate Inj., No. 22A800 (U.S. Apr. 6, 2023).

As a result of the Fourth Circuit's injunction, B.P.J. was able to participate on the girls' track-and-field team as a seventh grader. Once again, she was too slow to compete in the track events, so continued with shotput and discus. C.A. App. JA4285. She worked hard to improve her performance, practicing for hours after school and on weekends to better her

throwing form. *Id.* As a result, B.P.J.'s shotput and discus improved in seventh grade. App. in Support of State of Virginia and Lainey Armistead's Mot. to Suspend the Inj. Pending Appeal at 1–2, *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. July 11, 2023), ECF No. 142-2.

In July 2023—before the Fourth Circuit heard oral argument—Petitioners filed a motion with the Fourth Circuit to lift the injunction pending appeal, citing B.P.J.'s improved performance in shotput and discus between sixth and seventh grade as a claimed basis to lift the injunction entirely. State of Virginia and Lainey Armistead's Mot. to Suspend the Inj. Pending Appeal at 6, *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. July 11, 2023), ECF No. 142-1. The Fourth Circuit denied that motion, questioning whether "a young athlete's ordinary, year-over-year athletic improvement is the sort of *significant* factual development" that warrants lifting the injunction. Order Den. Mot. to Suspend the Inj. Pending Appeal at 3–4, *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. Aug. 4, 2023), ECF No. 169. The court also explained that Petitioners had "present[ed] little reason or evidence why plaintiff's improvement in field throwing events would generate similar improvement in cross-country running events." *Id.* at 4. Thus, the injunction remained in place for B.P.J. in eighth grade while the Fourth Circuit considered the merits of the appeal.

2. The Fourth Circuit's Ruling

The Fourth Circuit issued its merits ruling in April 2024, vacating the grant of summary judgment to Petitioners on the equal protection claim, and reversing the grant of summary judgment to

Petitioners on the Title IX claim. Pet. App. 1a–43a. Judge Agee dissented on the merits. *Id.* at 44a–74a.

With respect to Title IX, the Fourth Circuit held, in accordance with circuit precedent, that H.B. 3293 discriminated against B.P.J. on the basis of sex in violation of Title IX. Pet. App. 39a, 42a–43a (following *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020)). The court explained that adverse treatment on the basis of transgender status is necessarily adverse treatment based on sex. Pet. App. 39a. It further explained that H.B. 3293 treated B.P.J. worse than similarly situated students, by not allowing her to play on the girls' team because of her sex designated at birth. Pet. App. 38a–41a. The court concluded that B.P.J. is similarly situated to other girls, including due to her longstanding identity as a girl, her social transition, her school gender support plan, her name change and updated identity documents, and her medical treatments. "Given these facts, offering B.P.J. a 'choice" between not participating in sports and participating only on boys['] teams is no real choice at all," and excluding B.P.J. from girls' teams was "effectively 'exclud[ing]' her from 'participation in' all non-coed sports entirely." Pet. App. 41a (quoting 20 U.S.C. § 1681(a)).

With respect to B.P.J.'s as-applied equal protection claim, the Fourth Circuit held that the district court granted summary judgment prematurely before resolving the parties' pending *Daubert* challenges. Pet. App. 34a–35a. The court held that B.P.J. brought a cognizable as-applied challenge, rejecting Petitioners' assertion that "B.P.J. can only win by making the same showing needed to demonstrate the Act is facially invalid." Pet. App. 27a. It explained that "[b]ecause B.P.J. has never felt the

effects of increased levels of circulating testosterone," the physiological differences that manifest during endogenous puberty "provide[] no justification—much less a substantial one—for excluding B.P.J. from the girls['] cross country and track teams." Pet. App. 34a. And it further explained that there remained a disputed question of fact with respect to whether any meaningful athletic advantages exist for transgender girls "without undergoing [endogenous] puberty." *Id.* It thus vacated the grant of summary judgment regarding equal protection and remanded for further proceedings, including resolution of the parties' pending *Daubert* motions. Pet. App. 37a.

E. Petitioners' Extra-Record Allegations

On remand to the district court, Petitioners did not seek to supplement the record or reopen discovery. Instead, they asked the district court to stay all proceedings until resolution of their forthcoming petition for a writ of certiorari, and the court granted that request. Mot. to Stay Proceeding Pending Resolution of Pet. for Writ of Cert., *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 2:21cv00316 (S.D.W.V. May 21, 2024), ECF No. 543; Mem. Op. and Order (June 7, 2024), ECF No. 547.

Petitioners' recitation of facts to this Court includes new extra-record allegations that B.P.J. continued to improve in shot put and discus events during eighth grade. *See* Pet. 11. This material is not in the record and is not properly before this Court. Due to her continued hard work and practice in these field events (because she remains too slow to qualify for running events) B.P.J. ultimately placed third in the state for middle school discus (behind two cisgender girls) and sixth in the state in middle school

shot put (behind five cisgender girls). Petitioners ignore B.P.J.'s performance in cross-country, where she placed 67 of 68 in her one cross-country meet of her eighth grade year.[2]

Petitioners also refer to a hearsay-filled declaration from another student, identified as A.C. *See* Pet. 11. This document is also not part of the record in this case and should be disregarded. A.C.'s declaration makes various assertions about events and conversations that purportedly occurred while A.C. attended the same middle school as B.P.J. *See id.* That declaration was submitted in *separate litigation* in a *different* district challenging a federal Title IX regulation. *See* Decl. of A.C., *Tennessee* v. *Cardona,* No. 24-cv-072 (E.D. Ky. May 3, 2024), ECF No. 21-5. B.P.J. was not involved in the *Tennessee* litigation and therefore has had no opportunity to cross-examine A.C., respond to A.C.'s allegations, or otherwise defend herself. And notably, A.C. is represented by the same counsel representing Petitioners here, but A.C. has never been disclosed in this case as someone with discoverable information. In all events, this Court is not the proper forum to address this issue.

[2] These results are available at: https://perma.cc/A4X9-JXSU, https://perma.cc/5MT9-LYZA, and https://perma.cc/DK97-GHET.

REASONS FOR DENYING THE PETITION

I. THE TITLE IX CLAIM DOES NOT WARRANT REVIEW.

A. No Other Circuit Has Addressed Title IX's Protections for Transgender Students in School Sports.

The decision below is the first *and only* court of appeals decision to address Title IX's protections for transgender students participating in school sports. This Court should "follow [its] ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493 (2019) (per curiam).[3]

Petitioners argue that the Court should bypass its ordinary practice because of an alleged circuit split concerning Title IX's application to transgender students' use of sex-separated restrooms. Pet. 20. But that argument merely highlights that a restroom case would be a much better vehicle for addressing Title IX's application to transgender students in the context of otherwise permissible sex separation. The courts of appeals have been considering and deciding restroom-related cases for the past seven years, often with the benefit of robust factual records. *See A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F. 4th 760 (7th Cir. 2023), *cert. denied*, (Jan. 16, 2024) (No. 23-392);

[3] In *Tennessee v. Department of Education*, 104 F.4th 577, 609 (6th Cir. 2024), the Sixth Circuit held that a guidance document concerning athletics was procedurally invalid because it was legislative rule that should have gone through notice-and-comment rulemaking. But the court emphasized it was not "deciding any substantive merits question." *Id.* at 610.

Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty., 57 F.4th 791 (11th Cir. 2022) (en banc); *Grimm*, 972 F.3d 586. By contrast, Title IX's application to athletics raises different interests and has a different regulatory framework. *See* Pet. App. 71a–73a (Agee, J., dissenting) (distinguishing between restrooms and sports); *Soule v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 63 (2d Cir. 2023) (en banc) (Menashi, J., concurring) ("[B]athrooms are not athletic competitions.").

This Court will have its pick of vehicles to consider Title IX's application to transgender students' use of the restrooms should it choose to review that question, including as the courts of appeals consider challenges to the Department of Education's new regulations concerning restroom use. *See, e.g.*, *Louisiana v. U.S. Dep't of Educ.*, No. 24-30399 (5th Cir.); *Tennessee v. Cardona*, No. 24-5588 (6th Cir.); *Kansas v. U.S. Dep't of Educ.*, No. 24-3097 (10th Cir.); *Alabama v. U.S. Dep't of Educ.*, No 24-12444 (11th Cir.). This is not one of those cases.

B. The Department of Education's Forthcoming Athletics Regulations May Materially Alter the Legal Landscape.

Review of the Title IX question presented by the Petition would also be premature because the United States Department of Education is poised to issue new regulations governing transgender students' participation in school sports. Those regulations could significantly change the legal landscape, possibly mooting some of Petitioners' criticisms of the Fourth Circuit's decision, or otherwise altering the issues. Moreover, those regulations would provide a more

appropriate vehicle for this Court's review than a single circuit court's decision absent any split.

Athletics is a unique context in which the Department of Education's regulations have received considerable deference. Instead of addressing athletics in the text of Title IX, Congress passed a separate statute in 1974 directing the Department of Education's predecessor agency to promulgate "regulations implementing the provisions of Title IX" that "shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. 93-380, § 844, 88 Stat. 484, 612 (1974) (the "Javits Amendment"). This delegation confers a strong degree of deference, because it "empower[s] an agency . . . to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'" *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

The Department of Education's forthcoming regulations could materially affect the scope of Title IX claims regarding the participation of transgender students in school sports. According to the notice of proposed rulemaking, the regulations could provide greater flexibility for schools to restrict the participation of transgender athletes depending on the nature of each sport, the level of competition, and the grade level. *See* Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860, 22873 (Apr. 13, 2023) (to be codified at 34 C.F.R. pt. 106). For example, whereas schools would not be able to exclude girls who are transgender from sports in elementary school or "no cut" teams that prioritize student participation and skill building, schools would have greater leeway to regulate the

participation of transgender athletes in high school or at elite levels of competition. *See id.* at 22874–76.

The Court should not rush to grant certiorari before the new regulations are issued and courts have an opportunity to review them. Especially in an area in which Congress has tasked the agency with the responsibility "to fill up the details of a statutory scheme," this Court should not prematurely decide an important statutory question without "the agency's body of experience and informed judgment . . . at its disposal." *Loper Bright*, 144 S. Ct. at 2247, 2263 (internal quotation marks omitted).

C. The Fourth Circuit's Title IX Ruling Was Correct.

The Fourth Circuit's Title IX ruling was also correct on the merits. Excluding B.P.J. from the same teams as other girls subjected her "to 'discrimination' 'on the basis of sex'" under Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a)). In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), this Court held that discrimination against a person because they are transgender is a form of discrimination "because of . . . sex" under Title VII. To discriminate based on transgender status, the Court reasoned, "requires an employer to intentionally treat individual employees differently because of their sex," even if sex is interpreted to mean sex designated at birth or "biological" sex. *Id.* at 1742. This Court explained that its holding was compelled by two of "Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries." *Id.* at 1753.

Congress made the same choices when it wrote Title IX. That statute also focuses on discrimination against individual "person[s]," not groups. 20 U.S.C. § 1681(a). And Title IX's prohibition of discrimination "on the basis of" sex requires no more than but-for causation. *Id.*; *cf. Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020) (explaining that the phrase "on the basis of" is "strongly suggestive of a but-for causation standard"). Thus, as with Title VII, even if this Court assumes "for argument's sake" that the term "sex" in Title IX "refer[s] only to biological distinctions between male and female," when a student is discriminated against for being transgender, "[s]ex plays a necessary and undisguisable role in the decision." *Bostock*, 140 S. Ct. at 1737; *see Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (Callahan, J.) ("Given the similarity in language prohibiting sex discrimination in Titles VII and IX, we do not think *Bostock* can be limited" to Title VII).[4]

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[4] Although the Petition contends that the Fourth Circuit's ruling conflicts with *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), *see* Pet. 24–25, Petitioners forfeited that argument by failing to raise it below, *see* Pet. App. 43a n.3 (noting Petitioners' failure to raise the argument). Excusing that forfeiture at this juncture would deprive this Court of the benefit of the lower court's analysis. In any event, Petitioners' newfound reliance on *Pennhurst* is misguided. Title IX is drafted "broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 183; *cf. Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) ("Title IX does not limit its coverage at all, outlawing discrimination against any 'person,'" which is "broad language the Court has interpreted broadly."). For example, this Court has held that Title IX prohibits sexual harassment even though the drafters of Title IX likely did not anticipate that result. *See Franklin v. Gwinnett Cnty. Pub. Schs.*,

The Fourth Circuit also properly concluded that B.P.J.'s exclusion subjected her to unlawful "discrimination" under Title IX. Under both Title VII and Title IX, unlawful discrimination entails more than mere differential treatment. It "mean[s] treating that individual worse than others who are similarly situated" and employing "distinctions or differences in treatment that injure protected individuals." *Bostock* 140 S. Ct. at 1740, 1753 (incorporating standard from *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)). Unlike the other girls at her school, B.P.J. alone is prohibited from participating on the girls' sports team; by excluding her from the team consistent with her gender identity, H.B. 3293 treats B.P.J. worse than all her peers, and specifically, worse than those who were designated female at birth. As the district court recognized when granting its preliminary injunction, "[a]ll other students in West Virginia secondary schools—cisgender girls, cisgender boys, [and] transgender boys . . .—are permitted to play on sports teams that best fit their gender identity." C.A. App. JA0450. B.P.J. alone may not—and solely "on the basis of" her birth-designated sex.

Petitioners assert that B.P.J. is not similarly situated to other girls because she was designated male at birth. *See* Pet. 2, 33. But that argument assumes—incorrectly—that a cisgender girl and a

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503 U.S. 60, 75 (1992). The mere fact that broad language can result in unanticipated applications does not demonstrate ambiguity; "instead, it simply demonstrates the breadth of a legislative command." *Bostock*, 140 S. Ct. at 1749 (internal quotation marks and brackets omitted); *see Soule*, 90 F.4th at 61 (Menashi, J., concurring) (explaining that *Pennhurst* "does not establish a standard resembling qualified immunity" and "a plaintiff need not demonstrate that the rights are 'clearly established'").

transgender girl who has not gone through endogenous puberty have any relevant physiological differences for purposes of athletics. Petitioners also repeatedly analogize B.P.J. to a cisgender boy with low testosterone. *See* Pet. 9–10, 33. But that too is incorrect: a pubescent boy with low testosterone is not the same as a transgender girl who has not gone through endogenous puberty and has been receiving gender-affirming estrogen. Those treatments cause transgender girls "to develop the outward physical characteristics—including fat distribution, pelvic shape, and bone size—of an adolescent female." Pet. App. 40a.

Even more fundamentally, B.P.J. and a hypothetical cisgender boy with low testosterone are not similarly situated with respect to the harms of being excluded from girls' teams. Courts have upheld sex-separated teams if—and only if—the overall athletic opportunities for boys and girls are equal. *See, e.g., Clark, ex rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1130 (9th Cir. 1982); 34 C.F.R. § 106.41(c) (requiring "equal athletic opportunity for members of both sexes"). A cisgender boy who is not allowed to participate on girls' teams is still provided equal athletic opportunity through participation on boys' teams (and he need not deny his gender identity to do so). But that is not true for B.P.J. As the Fourth Circuit explained, by excluding B.P.J. from girls' teams, H.B. 3293 was "effectively 'exclud[ing]' her for 'participation in' all non-coed sports entirely." Pet. App. 41a (quoting 20 U.S.C. § 1681(a)). And even if she could make the boys' team, B.P.J. would have to deny her gender identity to do so. Moreover, playing on a co-ed team is not an option: there is no co-ed cross-country or track team at Bridgeport Middle

School or at any other public secondary school in West Virginia. C.A. App. JA0920–0921; JA3104.

"[O]ffering B.P.J. a 'choice' between not participating in sports and participating only on boys['] teams is no real choice at all." Pet. App. 41a. B.P.J. socially transitioned in third grade; she has gender support plan at school; she has changed her name and updated her identity documents to reflect her gender as female; and she has received puberty delaying medication and gender-affirming hormones. As the district court recognized in issuing a preliminary injunction, "[f]orcing a girl to compete on the boys' team when there is a girls' team available would cause her unnecessary distress and stigma [and] would also be confusing to coaches and teammates." C.A. App. JA0451. By contrast, excluding cisgender boys from girls' teams does not entail any of these serious harms.

The Fourth Circuit's Title IX decision faithfully applied this Court's precedents and does not warrant review.

II. THE EQUAL PROTECTION CLAIM DOES NOT WARRANT REVIEW.

A. There Is No Circuit Split with Respect to the Equal Protection Clause's Protections for Transgender Students in School Sports.

As with the Title IX claims, there is no circuit split on whether categorically excluding transgender girls from girls' teams because of their sex designated at birth violates equal protection. The only other court of appeals to opine on that issue is the Ninth Circuit, and it agreed with the Fourth Circuit that categorical

exclusions may violate the Equal Protection Clause. *See Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024), *as amended* (June 14, 2024), *petition for cert. filed* (U.S. July 11, 2024) (No. 24-38); *Horne*, 2024 WL 4113838.

In addition, the decision below and the two Ninth Circuit decisions are all in an interlocutory posture with respect to the equal protection issue, further counseling hesitation in granting certiorari at this stage. In this case, the Fourth Circuit has not issued a final decision with respect to the Equal Protection Clause. The court has merely remanded the case for the district court to rule on the admissibility of evidence and assemble a factual record with respect to whether transgender girls who have not gone through endogenous puberty have an innate athletic advantage compared to cisgender girls. Pet. App. 22a, 37a, 38a, 43a. The two Ninth Circuit cases have similarly acknowledged the need for additional factfinding on remand. *Hecox*, 104 F.4th at 1091; *Horne*, 2024 WL 4113838, at *20. If a circuit conflict arises, the Court will surely have opportunities to take up the question on review of final judgment on a complete record.

Petitioners argue that this case implicates a broader circuit split with respect to the standard of scrutiny for discrimination against transgender people. *See* Pet. 25–27. But, as discussed below, this Court is already poised to resolve that question in *Skrmetti*, 144 S. Ct. 2679. And if a circuit split remains after *Skrmetti*, other cases involving transgender students' use of restrooms provide better vehicles for resolving it. *See, e.g.*, *Roe v. Critchfield*, No. 23-2807 (9th Cir.) (challenge to Idaho restroom ban); *Bridge v. Oklahoma*, No. 24-6072 (10th Cir.) (challenge to Oklahoma restroom ban); *D.H. v.*

Williamson Cnty. Bd. of Educ., No. 3:22-cv-00570 (M.D. Tenn.) (challenge to Tennessee restroom ban). This is not one of those vehicles.

B. The Fourth Circuit's As-Applied Analysis Follows This Court's Equal Protection Precedent.

Petitioners incorrectly assert that the Fourth Circuit's as-applied analysis conflicts with this Court's precedents. Pet. 30–33. According to Petitioners, if H.B. 3293 is facially valid under heightened scrutiny, then it is also automatically valid as applied to B.P.J, and she may not challenge H.B. 3293's constitutionality as applied to her. Pet. 29–30. "In essence," as the Fourth Circuit explained, Petitioners "claim there is no such thing as an as-applied equal protection challenge because a plaintiff like B.P.J. can only win by making the same showing needed to demonstrate the Act is facially invalid." Pet. App. 27a.

The Fourth Circuit properly rejected that argument because it conflicts with a host of this Court's decisions holding that "a statute can violate the Equal Protection Clause as applied to some without being facially invalid." Pet. App. 27a. Indeed, an as-applied challenge is "the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985); *see Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (explaining that certain adoption laws treating unmarried mothers different from unmarried fathers are constitutional as applied to fathers who never establish a substantial relationship with the child, but unconstitutional as applied to fathers who have established that relationship).

Petitioners cite no decision from this Court to the contrary. Instead of citing cases applying heightened scrutiny under the Equal Protection Clause, Petitioners rely on a First Amendment case applying "intermediate scrutiny" to content-neutral regulations of speech, *see* Pet. 29 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989)), and a First Amendment case applying "intermediate scrutiny" to commercial speech, *see id.* (citing *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993)). But this Court's various forms of intermediate scrutiny for First Amendment cases involve different tests designed to vindicate different constitutional principles. Unlike intermediate scrutiny for content-neutral regulations and restrictions of commercial speech, the central function of heightened scrutiny in the equal protection context is to protect against "overbroad generalizations," *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017), that may be accurate for most people but harm individuals who fall "outside the average description." *United States v. Virginia*, 518 U.S. 515, 517 (1996). These anti-stereotyping principles are particularly well suited for as-applied adjudication.

The Fourth Circuit's decision is also consistent with *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001). Petitioners cite *Nguyen* for the proposition that a sex classification does not have to be "capable of achieving its ultimate objective in every instance" to survive heightened scrutiny. Pet. 29 (quoting *Nguyen*, 533 U.S. at 70). But *Nguyen* makes clear that the government must still show that the "fit between the means and the important end is 'exceedingly persuasive,'" and that means-end fit depends not only on whether the government's classification serves as

an accurate proxy for achieving an important interest, but also based on the burdens and harms imposed by the law. *See Nguyen*, 533 U.S. at 70–71 (citing *Virginia*, 518 U.S. at 533). In upholding federal law that placed additional procedural requirements on fathers seeking to transmit U.S. citizenship to their children born in other countries outside of marriage, *Nguyen* emphasized that the statutory scheme imposed only a "minimal" burden without "inordinate and unnecessary hurdle[s]," *id.* at 70, and that there were good reasons for establishing paternity to require more of a showing than establishing maternity, *id.* at 64–67.

A sex-based classification that is constitutional when used to impose modest procedural requirements may fail heightened equal protection scrutiny when used—as here—to impose a categorical exclusion. *Compare Trimble v. Gordon*, 430 U.S. 762, 770–71 (1977) (stating that problem of proving paternity may justify more tailored distinctions based on "legitimacy" but invalidating "complete exclusion"), with *Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (upholding narrower statute where "procedural demands . . . bear an evident and substantial relation to the particular state interests this statute is designed to serve"). Indeed, the Third Circuit has already held that the same statute upheld in *Nguyen* is unconstitutional as applied to a situation in which the unmarried father had no legal method to "legitimate" his child and thereby transmit United States citizenship. *Tineo v. Att'y Gen. U.S.*, 937 F.3d 200, 214–15 (3d Cir. 2019). The statute failed heightened scrutiny as applied to those circumstances because "the burden imposed on [the] father to demonstrate the existence of a

relationship to [the child] was not only onerous, it was impossible." *Id.*

As discussed above, categorically excluding B.P.J. inflicts severe harms on her that are not shared by cisgender boys—even those with "low testosterone." *See supra* Section I.C. A person's sex designated at birth may be a constitutionally adequate proxy in the context of determining whether a cisgender student will be provided equal athletic opportunity through the boys' teams or the girls' teams. But when used as a basis for completely excluding transgender girls from athletics, regardless of her circumstances, heightened scrutiny requires a much closer means-end fit. *Nguyen*, 533 U.S. at 70.

C. The Fourth Circuit's Equal Protection Analysis was Correct.

The Fourth Circuit's equal protection analysis was also correct on the merits. Petitioners assert that the Fourth Circuit improperly analyzed H.B. 3293 as drawing a distinction between transgender and cisgender girls, and that it should have instead analyzed the statute as drawing a distinction between all people designated male at birth (*i.e.* cisgender boys and transgender girls) and all people designated female at birth (*i.e.* cisgender girls and transgender boys). *See* Pet. 27–28. But H.B. 3293 is not, as Petitioners contend, "indifferent" to gender identity. Pet. 27. The statute specifically declares that "gender identity serve[s] no legitimate relationship" to participation on school sports teams. W. Va. Code §§ 18-2-25d(a)(4), (b)(1).

The Fourth Circuit did not need to speculate that the purpose of the statute was to prevent transgender girls from participating on girls' sports teams (as

opposed to excluding cisgender boys), and it appropriately analyzed that statutory classification as discriminating on that basis. Indeed, the petition itself repeatedly recognizes that stopping girls who are transgender from participating was the statute's *raison d'etre*. *See* Pet. 5–9. According to Petitioners, "[b]iological males identifying as females have increasingly competed against females" in women's sports, and West Virginia acted to address that "problem[]." Pet. 1.

For all the same reasons that B.P.J. is similarly situated to cisgender girls for purposes of Title IX, she is also similarly situated for purposes of the Equal Protection Clause. Petitioners argue that heightened scrutiny is unnecessary because H.B. 3293 reflects "the fact that the sexes are not similarly situated," Pet. App. 77a. But, when the government draws a classification based on sex and transgender status, it cannot evade heightened scrutiny by simply asserting that people with different sexes designated at birth are not similarly situated. Those asserted differences might be relevant to whether the government can *satisfy* heightened scrutiny, but they do not allow the government to evade heightened scrutiny altogether. Because sex discrimination has too often been justified by claims that women were differently situated, *see, e.g., Goesart v. Cleary*, 335 U.S. 464, 466 (1948), this Court's precedents apply heightened scrutiny to ensure that such claims of difference are supported—not simply asserted. That is the whole point of the exercise. *See Nguyen*, 533 U.S. at 64 (determining that mothers and fathers were not

similarly situated as a result of applying heightened scrutiny, not before doing so).[5]

III. THIS CASE IS A POOR VEHICLE FOR REVIEW BECAUSE OF UNRESOLVED AND EXTRA-RECORD FACTS.

Certiorari should be denied because the questions presented do not warrant this Court's review. But even if the Court wished to answer either question presented, this case is not a proper vehicle for resolving those questions given its "interlocutory posture" and the further factual development that will occur below. *See, e.g.*, *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096–97 (2022) (Alito, J., respecting denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting denial of certiorari). Despite purporting to present pure questions of law, Petitioners' request for this Court's review in fact relies on disputed empirical factual assertions about athletic advantage that will be addressed in further proceedings on remand. Review should be denied because those factual assertions have not yet been addressed by the lower courts and, in some respects, are not even part of the record.

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[5] To the extent that a "similarly situated" inquiry plays any role before applying heightened equal protection scrutiny, it is not to determine the validity of a classification, but to assess whether a protected characteristic is a but-for cause of discrimination—that is, to determine whether a plaintiff is similarly situated in *other* respects to people who were treated differently. Pet. 33 (citing cases involving indirect proof of discrimination through identification of similarly situated comparators). Here, there is no need to apply that sort of similarly situated analysis because the statute facially discriminates on the basis of sex and transgender status.

First, as the Fourth Circuit explained in partially remanding the case, the district court has not yet made critical findings regarding the admissibility of expert evidence on a central factual dispute: "Even without undergoing Tanner 2 stage puberty, do people whose sex is designated as male at birth enjoy a meaningful competitive athletic advantage over cisgender girls?" Pet. App. 34a. Petitioners acknowledge that this issue was the subject of "voluminous expert testimony," Pet. 9, but disputes regarding that testimony have yet to be resolved. Both sides have filed *Daubert* motions to exclude the other side's experts as unreliable, but the district court has not yet ruled on those motions, much less resolved the disputed factual questions. And of course, nor has the Fourth Circuit had an opportunity to weigh in on these issues. This Court should not attempt to definitively resolve what Petitioners characterize as "an exceptionally important issue," Pet. 14, when the lower courts have not even determined what evidence is properly in the record on that question.

Second, the Petition relies extensively on data outside the record about B.P.J.'s performance in discus and shotput during eighth grade—during which she—unsurprisingly, in light of her hard work—improved over her earlier years. Notably, Petitioners do not argue that B.P.J. made similar improvements in running, and, indeed, B.P.J. continues to be too slow to compete in track events and continues to place near the back of the pack in cross country. Yet she is barred from all track and field and cross-country events by the challenged law.

In any event, when discovery closed in early 2022, B.P.J was still in sixth grade and Petitioners did

not submit any evidence that B.P.J. personally possessed any sort of athletic advantage. Petitioners' belated argument that B.P.J. possesses an athletic advantage is based on B.P.J.'s seventh and eighth grade performance in discus and shotput, which are extra-record matters that have not been the subject of any testing in court. Petitioners speculate that B.P.J.'s performance must be attributable to some innate advantage. But an obvious alternative explanation is that B.P.J.'s hard work and dedication improved at the same rate that a cisgender girl would have improved with the same amount of practice. This is a factual question that, to the extent legally relevant, is the proper subject of expert testimony, and should not be decided on the basis of Petitioners' unsupported speculation and innuendo. The parties can explore that question on remand, but this Court's intervention at this point would necessarily be predicated on extra-record evidence and untested claims.

IV. B.P.J. DOES NOT OBJECT TO THIS COURT HOLDING THE PETITION PENDING RESOLUTION OF *SKRMETTI*.

Although certiorari should be denied for all the reasons above, B.P.J. acknowledges that this Court currently has before it a case presenting the application of the Equal Protection Clause to discrimination against transgender people. *See Skrmetti*, 144 S. Ct. 2679. B.P.J. thus does not object to the Petition being held by the Court pending its resolution of *Skrmetti*, at which point the Court should either deny the petition or vacate and remand in light of *Skrmetti*.

In *Skrmetti*, this Court will address whether a law banning transgender adolescents from receiving healthcare "inconsistent with" their sex designated at birth violates the Equal Protection Clause. *See* Brief for the Petitioner at I, *United States v. Skrmetti* (Aug. 27, 2024) (No. 23-477). A central question in *Skrmetti* is whether the law triggers heightened equal protection scrutiny, either because the law classifies based on sex, including under this Court's reasoning in *Bostock*, or because discrimination against transgender people independently warrants heightened scrutiny as a quasi-suspect classification. *See id.* at 30–31.

Petitioners repeatedly invoke the Sixth Circuit's decision in *Skrmetti* as the basis for the circuit split they claim in support of their request for certiorari in this case (*see* Pet. 21, 25), but—in addition to there being no circuit split regarding athletics—the cited splits may be resolved in *Skrmetti* itself. There is thus no reason for a grant in this case. For the Title IX claim, Petitioners argue that the Fourth Circuit's application of *Bostock*'s reasoning to Title IX conflicts with the Sixth Circuit's statement in *Skrmetti* that *Bostock*'s "text-driven reasoning applies only to Title VII." Pet. 21 (quoting *L.W. by & through Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023), *cert. granted sub nom United States v. Skrmetti*, 144 S. Ct. 2679 (U.S. June 24, 2024)). And, for equal protection, Petitioners argue that the Fourth Circuit's application of heightened scrutiny to discrimination against transgender people conflicts with *Skrmetti*'s holding that anti-transgender discrimination receives only rational basis review. Pet. 25 (citing *L.W.*, 83 F.4th at 408). This Court's resolution of *Skrmetti* will likely

shed light on these questions, and therefore there is no need to grant this case to address them.

Petitioners' arguments against holding this case for *Skrmetti* fall flat. Petitioners argue that *Skrmetti* will not specifically address whether *Bostock*'s reasoning applies to Title IX. Pet. 17. But the Sixth Circuit held in *Skrmetti* that *Bostock*'s reasoning applies "only to Title VII." *L.W.*, 83 F.4th at 484. Indeed, that is precisely why West Virginia points to *Skrmetti* as establishing a circuit split. *See* Pet. 21. Depending on how the Court answers that question in *Skrmetti*, it should either deny the Petition here, or vacate and remand the Fourth Circuit's decision.

Petitioners also argue that *Skrmetti* will not resolve B.P.J.'s equal protection claim because "the importance of a state's interest, and the relative 'fit' between that interest and the state's solution are different" here and in *Skrmetti*. Pet. 17. But, as explained, *see supra* Section II.A., there is no circuit split regarding whether laws banning transgender girls from girls' sports violate equal protection. Petitioners' only alleged circuit split—and the basis for its petition for certiorari—concerns the level of scrutiny for discrimination against transgender people in general, *see id.*, which is a question squarely presented in *Skrmetti*. If the Court resolves that question in *Skrmetti*, lower courts will apply that standard in the context of athletics going forward, allowing for further percolation in the ordinary course. There is no good reason to short-circuit that percolation by granting certiorari in this as-applied challenge.

CONCLUSION

The Petition should be denied or held for *Skrmetti*. If the Petition is held for *Skrmetti*, the Petition should then be denied, or the opinion below should be vacated and remanded in light of *Skrmetti*.

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