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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

B.P.J.'s brief mostly ignores the actual questions presented, instead shrinking the case down to its narrow facts to make it appear unworthy of review. But as the 19 amicus briefs underscore, this case is about more than one student in West Virginia. As Judge Agee recognized in dissent, this case involves "questions of national importance." Pet.App.74a. The decision below "rewrit[es] the Equal Protection Clause and nullif[ies] Title IX's promise of equal athletic opportunity for women." Pet.App.73a-74a. Thousands of female athletes in West Virginia and beyond will be harmed if it stands. Many already have been.

B.P.J. fails to refute that circuit splits abound on these critical issues—even if B.P.J. thinks the Court should take some other case to address them. Nor can B.P.J. contest that this case squarely presents the issues on a well-developed record built over years of litigation—even if B.P.J. wants still more time to make a case. And the decision below was egregiously wrong, reflecting untenable judicial lawmaking on irrelevant medical and scientific issues—issues that are meant to be decided by legislatures, not courts. Although B.P.J. dismisses essential truths as a "misleading narrative," that's cold comfort for the many student-athletes who will lose the chance to compete on an equal playing field in the 25 states directly or indirectly affected by the decision below.

The Court should grant the petition and affirm a state legislature's right to take measures to protect female athletes. For women and girls everywhere, time is of the essence.

ARGUMENT

I. The Fourth Circuit's Title IX Ruling Warrants Review.

A. The circuits are split over whether school policies based on sex-based differences violate Title IX.

As Judge Agee explained below, the Fourth Circuit's ruling "upend[ed] the essence of Title IX," Pet.App.44a, and must be reviewed "with all deliberate speed," Pet.App.74a. To stymie that review, B.P.J. redrafts the first question presented, then argues that no circuit split exists over the rewritten question. Opp.i, 15-16; contra Pet.I. In fact, two exist.

First, contrary to the Fourth Circuit's ruling, five circuits recognize that Title IX allows women's only sports teams. Pet.23-24 (citing *Cohen* v. *Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996); *Williams* v. *Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993); *Pederson* v. *La. State Univ.*, 213 F.3d 858, 871 (5th Cir. 2000); *Kelley* v. *Bd. of Trs.*, 35 F.3d 265, 269-70 (7th Cir. 1994); *Mansourian* v. *Regents of Univ. of Cal.*, 602 F.3 957, 973 (9th Cir. 2010); but see *Hecox* v. *Little*, 79 F.4th 1009 (9th Cir. 2023) (finding equal-protection violation)). B.P.J. does not address this split.

Second, the Fourth Circuit's ruling joins the Seventh Circuit and exacerbates a split with the en banc Eleventh Circuit over whether Title IX allows schools to separate students based on biological sex or requires them to do so based on only gender identity. Pet.23 (citing *A.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), and *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc)); see also *D.N.* v.

DeSantis, 701 F. Supp. 3d 1244, 1265 (S.D. Fla. 2023) (reading *Adams*'s reasoning to mandate the same result in sports).

B.P.J. urges the Court to wait and resolve this issue in the context of women's locker rooms. Opp.15-16. But as explained in section I.B., the Fourth Circuit's ruling harms women and girls every day it stands. It also causes harms—denial of access to competitive athletics and increased safety risks—that bathroom cases may not. These issues will recur, underscoring the need to act *now*, after years of waiting. See, *e.g.*, *Dodds* v. *U.S. Dep't of Educ.*, 845 F.3d 217, 224 (6th Cir. 2016) (Sutton, J., dissenting) ("The Supreme Court presumably will resolve the Title IX issue in 2017.").

B. The Fourth Circuit's Title IX ruling is ripe for review.

The Fourth Circuit entered judgment as a matter of law on B.P.J.'s Title IX claim, showing the dispute is purely legal and needs no further factual development. Pet.App.37a-38a. Although the Fourth Circuit remanded B.P.J.'s equal-protection claim, those proceedings—like this Court's decision in *Skrmetti*—would not affect the Title IX holding. That holding is ripe for review.

This Court's immediate review is sorely needed. B.P.J. continues to displace hundreds of girls in field events while denying multiple girls spots and medals in conference championships, Pet.11, realities this Court should consider when deciding whether to grant this petition, FED. R. EVID. 201(b), (d) and advisory committee's note to subdivision (f); contra Opp.13. Moreover, B.P.J. has allegedly subjected A.C. and other female teammates to "offensive and inappropriate sexual comments" in the locker room. Pet.11. These continuing harms matter.

Whether in the locker room, on the track, or on the podium, every month that goes by without this Court's intervention means more girls will be harmed. These harms are not a reason to *deny* review, contra Opp.31, as the legal questions implicated here don't turn on those late-breaking facts anyway.

C. The Biden Administration's proposed Title IX regulations will have no impact here.

Ignoring the ongoing harm to West Virginia's female athletes, B.P.J. invites the Court to wait for anticipated new regulations, which are expected to govern participation in female sports by male athletes who identify as female. Opp.16-18. The Court should decline that invitation.

To start, the proposed regulations are *not* being developed and promulgated under the Javits Amendments, the mid-1970s process for proposing regulations that involved Congressional review. Contra Opp.17. They will receive no judicial deference, *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2273 (2024), and they will have no impact here. At most, regulations of this sort could "inform the judgment of the Judiciary"—but the proposed regulations here are not the kind of long-standing, contemporaneous regulations that serve even that function. *Id.* at 2258.

Next, no one knows when—or if—these controversial regulations will issue. OMB has delayed the proposal by converting it to a "long-term action" with no deadline; the agency will issue regulations in spring 2025 at best. Naaz Modan & Natalie Schwartz, *Title IX athletics rule delayed yet again*, HIGHER ED DIVE (July 9, 2024), https://bit.ly/3A4OcaX. A new administration may abandon them.

Most important, the Fourth Circuit's decision would render even the Biden Administration's proposed rule unlawful. The Department of Education's proposed regulations would allow males who identify as female to participate in women's sports while giving schools limited leeway to promote fairness in competition. See 88 Fed. Reg. 22,860 (Apr. 13, 2023). But the Fourth Circuit held that Title IX prohibits schools from *ever* excluding female-identifying males from women's sports teams, regardless of the male athletes' capabilities. Pet.App.37a-43a. So the Court must deal with the Fourth Circuit's logic regardless.

D. The Fourth Circuit's decision is egregiously wrong.

Over 50 years, schools have assigned sports teams based exclusively on the participating students' sex. The Fourth Circuit's reinterpretation of the statute is "miles away from the straightforward text" and historical understanding of Title IX. Pet.App.74a (Agee, J., dissenting).

B.P.J. leans mostly on *Bostock* v. *Clayton County*, 590 U.S. 644 (2020). Opp.18-19. But as the petition explains, *Bostock*'s text-driven analysis applies only to Title VII. Pet.21. The statutory texts are different. *Ibid.* And Title VII and Title IX have very different contexts. While Title VII prohibits all differential treatment for a variety of classifications, Title IX specifically *allows* schools to consider sex when assigning sports teams, showers, restrooms, locker rooms, and overnight accommodations. Pet.21-24.

The Fourth Circuit's reimagining of Title IX carries significant implications. Consider how it could be read to require schools to now assign athletic teams. When students show up for basketball tryouts, instead of two

tables marked "boys" and "girls," school officials could need to consider an indeterminate mix of subjective factors for each student, including how long a student has "publicly liv[ed] as a girl" and the student's "fat distribution, pelvic shape, and bone size." Pet.2 (quoting App.40a). What's more, these factors are relevant only to determining a student's internal sense of self. If a school official determines that a male student has a sufficient female identity, that could be enough to participate on the girls' team under the Fourth Circuit's ruling—no matter the male student's appearance or athletic performance. Pet.App.40a-41a. None of this makes sense.

Finally, the Fourth Circuit's reasoning conflicts with *Department of Education* v. *Louisiana*, 144 S. Ct. 2507 (2024) (per curiam). There, all nine Justices agreed that "plaintiffs were entitled to preliminary injunctive relief as to three provisions" of the Biden Administration's Title IX regulations for school privacy facilities, overnight accommodations, and speech, including Section 106.10. *Id.* at 2509-10; *id.* at 2510 (Sotomayor, J, dissenting in part). These rules redefined sex discrimination to reach results indistinguishable from the Fourth Circuit's rule. The Court should grant review and similarly restore Title IX's original meaning here.

II. The Fourth Circuit's Equal Protection Ruling Warrants Review.

A. The circuits are split over whether biology-based distinctions necessarily trigger heightened scrutiny.

B.P.J. concedes this case implicates multiple circuit splits on equal-protection issues. Opp.23. For good reason. Courts disagree about whether a law affecting

transgender status triggers heightened scrutiny. Pet.25-27. And they disagree about whether laws making biology-based distinctions facially discriminate based on transgender status. Pet.27. Those issues alone would justify granting the petition.

B.P.J. says these other cases did not involve identical facts. But the Court doesn't need identical facts to decide the textual questions this case presents. B.P.J. tacitly concedes this by arguing that "cases involving transgender students' use of restrooms provide better vehicles for resolving" the splits. Opp.23. If bathroom cases are worthy vehicles to resolve a split, they're equally worthy to establish it.

B. The Fourth Circuit's Equal Protection ruling is ripe for review.

This claim is ripe. It doesn't matter that this case is in an "'interlocutory posture.'" Opp.29. This Court often grants certiorari in an interlocutory posture where the case does not turn on record facts. See, *e.g.*, *Free Speech Coal., Inc.* v. *Paxton*, 144 S. Ct. 2714 (2024); *NetChoice, LLC* v. *Paxton*, 144 S. Ct. 477 (2023). And while B.P.J. says this Court's review "relies on disputed empirical factual assertions about athletic advantage," Opp.29, any dispute here is about legislative, scientific findings that do not depend on anything about B.P.J. in particular. Regardless, no one disputes that B.P.J. has displaced biological girls in competition.

Nor does the State's claim "rel[y] extensively on data outside the record." Opp.30. B.P.J.'s recent results simply confirm the evidence and arguments already presented, which show that female athletes have been harmed by B.P.J.'s participation. Pet.10-11. In the same way, female athletes sharing their negative experiences competing

against biological males show this issue is profoundly disruptive for female sports throughout the country and should not "be disregarded." Opp.14; see 102 Female Athletes Amicus.Br.9-23; A.C. Amicus.Br.1-3. And if the Fourth Circuit had *correctly* analyzed the claim before it, any remaining factual disputes over B.P.J.'s irrelevant personal circumstances would have been beside the point.

C. The Fourth Circuit's decision is egregiously wrong.

B.P.J.'s brief confirms that, when it comes to Equal Protection, the Fourth Circuit erred in *at least* two fundamental ways.

First, the Fourth Circuit botched the as-applied framework. The majority required West Virginia to show a perfect fit for its law as to every student. Pet.29-30. Put aside for a moment the overwhelming administrability concerns that such a system creates—it's also inconsistent with the basics of constitutional scrutiny. The entire point of intermediate scrutiny is to provide a safety valve from onerous, perfect-fit strict scrutiny. *Adams*, 57 F.4th at 801 ("[T]he Equal Protection Clause does not demand a perfect fit between means and ends when it comes to sex."). Yet the Fourth Circuit now requires that any sex-based classification be justified case by case, even where, as here, the use of sex as a dividing line is concededly appropriate. Contra *Jana-Rock Constr., Inc.* v. *N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006) ("Once it has been established that the government is justified in resorting to the [ordinarily suspect] classifications, strict scrutiny has little utility in supervising the government's definition of its chosen categories."). In other words, the State must now offer individual exceptions. This ad hoc approach "raise[s] entirely new problems related to

fairness, official discretion, and equal administration of the laws." *Bonidy* v. *U.S. Postal Serv.*, 790 F.3d 1121, 1128 (10th Cir. 2015).

B.P.J. has no real answer to any of this. It does not matter, for instance, that some of these principles derive from First Amendment cases, Opp.25; in this context, First Amendment and equal-protection concepts operate in much the same way, having developed together. See, *e.g.*, *Hutchins* v. *District of Columbia*, 188 F.3d 531, 564 n.24 (D.C. Cir. 1999) ("Intermediate scrutiny emerged from equal protection and First Amendment jurisprudence."); *Thorne* v. *U.S. Dep't of Def.*, 916 F. Supp. 1358, 1370 (E.D. Va. 1996) (calling the standards "quite similar"). And it would be capricious to impose higher scrutiny in this context than the First Amendment context.

B.P.J. admits the Court endorsed Petitioners' view in the equal-protection context in *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53 (2001). Opp.25-26. B.P.J. tries to distinguish *Nguyen* because this case purportedly involves a "categorical exclusion," Opp.26, but that distinction is nowhere in the decision. And B.PJ.'s heavy emphasis on "categorical" gives away the game—B.P.J.'s grievance is with the statute's facial classification, not its application in specific circumstances.

Second, the Fourth Circuit erred on the merits. B.P.J. leads not with the Fourth Circuit's reasoning but an animus theory *no* court has accepted. Opp.27; see Pet.App.95a ("[T]here is not a sufficient record of legislative animus."). But B.P.J. cannot rightfully claim that evidence of animus lies in parts of the law that *disclaim* the consideration of gender identity and trans-genderism, Opp.27 (citing W. VA. CODE §§ 18-2-25d(a)(4), (b)(1))—especially after B.P.J.'s expert agreed gender

identity is not linked to athletic performance, Appl.App.214a. Selective and misleading quotations from the petition change nothing. Opp.28. West Virginia's Sports Act "stops" no one from participating in sports.

As to the Fourth Circuit's actual analysis, B.P.J. seems to insist that the statute *facially* classifies based on transgender status, which obviates the need for B.P.J. to identify a similarly situated student who is treated differently. But that's wrong as a matter of fact and law. Factually, the statute distinguishes only based on biological sex. Legally, this Court has never said that courts can skip the similarly situated analysis when a court finds a particular statute distasteful. Quite the opposite: legislatures are empowered to pass laws that "realistically reflect[] the fact that the sexes are not *similarly situated* in certain circumstances." *Michael M.* v. *Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (emphasis added).

III. The Court Should Grant the Petition, Not Hold It for *Skrmetti*.

The Court should not hold this petition for *Skrmetti*. *Skrmetti* is a constitutional case that cannot resolve the Title IX issue presented here. Nor does *Skrmetti* present the Court with an opportunity to pass on the unique equal-protection considerations in the athletics context. *Skrmetti* does not involve a biological classification of the sort seen here—nor does it implicate issues of access to sports and safety issues for one sex. It instead considers certain medical conditions often associated with transgender status. That difference explains why the Fourth Circuit's decision has such broad impact—by repudiating basic distinctions turning on biology, the decision imperils all manner of sex-separated activities. A

hold would further delay resolution of these important issues—by at least a year, or, in the case of a subsequent remand, *three* years—subjecting female athletes to substantial ongoing harm.

B.P.J. says *Skrmetti* could "shed light" on the Title IX issue here, because the Court's decision may confirm that "*Bostock*'s reasoning applies 'only to Title VII.'" Opp.33. But the Court already said that in *Bostock*. See 590 U.S. at 681. And the Fourth Circuit rightly did not base its Title IX holding on *Bostock*'s Title VII interpretation. So *Skrmetti* does not create a "reasonable probability" that the court below would reconsider its Title IX holding. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

As for the equal-protection issue, B.P.J. apparently concedes *Skrmetti* will not resolve the question for athletics cases and instead advocates for further percolation. But again, such percolation is unwarranted—and makes no sense when the Title IX issue is ripe for review. The two issues are birds of a feather. They should be resolved together to preserve judicial resources and the equal playing field women have fought so hard to secure.

Holding the petition will neither aid this case's ultimate resolution nor serve the interests of justice. At bottom, this case is critical to both female athletes and the rule of law. And given how often students graduate, change schools, and move, postponing review could amount to foreclosing review. See, *e.g.*, *Univ. of Texas* v. *Camensich*, 451 U.S. 390, 394 (1981). So the Court should "take the opportunity with all deliberate speed to resolve these questions of national importance." App.74a (Agee, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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