

No. 24-44

In the
Supreme Court of the United States

WEST VIRGINIA SECONDARY
SCHOOL ACTIVITIES COMMISSION,
Petitioner,

v.

B.P.J., BY HER NEXT FRIEND AND
MOTHER, HEATHER JACKSON, ET AL.,
Respondents.

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

**BRIEF OF AMICI CURIAE ADVANCING AMERICAN
FREEDOM; CONCERNED WOMEN FOR AMERICA;
EAGLE FORUM; INDEPENDENT WOMEN'S FORUM;
MOMS FOR LIBERTY; WOMEN FOR DEMOCRACY IN
AMERICA, INC.; WOMEN'S LIBERATION FRONT;
SHAWNNA BOLICK, ARIZONA STATE SENATOR,
DISTRICT 2; PAMELA S. ROBERTS, IMMEDIATE PAST
PRESIDENT- KENTUCKY FEDERATION OF
REPUBLICAN WOMEN; ET AL.
IN SUPPORT OF PETITIONERS**
(List of Amici parties continued on inside cover)

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FOR JEWISH VALUES; FAMILY INSTITUTE OF
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THE FAMILY FOUNDATION (VIRGINIA); THE JUSTICE
FOUNDATION; THE TEMPUS COLLABORATIVE; YANKEE
INSTITUTE; AND YOUNG CONSERVATIVES OF TEXAS
IN SUPPORT OF PETITIONERS**

QUESTIONS PRESENTED

1. What are the indicia of ‘state actor’? And do they include action, entwinement and controlling authority?
2. Is private industry aggrieved by a baseless conversion into state actor, complete with heretofore unknown legal duties and no immunities?
3. Should courts be called upon to make state actor determinations within some meaningful, reproduceable, predictable framework or process?
4. Did the courts below apply this Court’s seven tests relative to West Virginia Secondary School Activities Commission (WVSSAC)? If they failed to do so, did they improperly convert this private corporation into ‘state actor’ for the first time in its 108-year history?

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.¹ AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,”² and believes that the differences between men and women, one of the beauties of the human experience, are real, and manifest themselves in physiological differences that demand that women and girls have athletic opportunities from which men are categorically excluded. AAF submits this amicus curiae brief on behalf of its 871 members living in West Virginia and 10,179 members living in the Fourth Circuit.

Amici Concerned Women for America; Eagle Forum; Independent Women’s Forum; Moms for Liberty; Women for Democracy in America, Inc.; Women's Liberation Front; Shawna Bolick, Arizona State Senator, District 2; Pamela S. Roberts, Immediate Past President- Kentucky Federation of Republican Women; AFA Action; Richard Allen, JCCWatch.org; AMAC Action; Alaska Family Action; American Constitutional Rights Union; American

¹ All parties received timely notice of the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

² Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

Encore; American Principles Project; American Values; Association of Mature American Citizens (AMAC); Brent Bozell; Brian S. Brown, President, National Organization for Marriage; Catholics Count; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Coalition for Jewish Values; Family Institute of Connecticut Action; JoAnn Fleming, Executive Director, Grassroots America - We the People PAC; Frontline Policy Council; Representative Steven E. Galloway, District 24, Montana House of Representatives; Charlie Gerow; Allen J. Hebert, Chairman, American-Chinese Fellowship of Houston; Idaho Freedom Foundation; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Fmr. Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Land Center for Cultural Engagement; Leadership Institute; Louisiana Family Forum; Maryland Family Institute; Lael “Sunny” Meagher, CEO/President, International Christian Ambassador Association; Men and Women for a Representative Democracy in America, Inc.; Mountain States Legal Foundation; National Center for Public Policy Research; National Religious Broadcasters; New Jersey Family Foundation; Orthodox Jewish Chamber of Commerce; Palmetto Promise Institute; Rhode Island Center for Freedom & Prosperity; Rio Grande Foundation; Setting Things Right; Paul Stam, Former Speaker Pro Tem, NC House; Stand for Georgia Values Action; The Family Foundation (Virginia); The Justice Foundation; The Tempus Collaborative; Yankee Institute; and Young Conservatives of Texas believe in the importance of women and girls-only sports.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Human dignity exists independent of physical variability in all its variety.³ A person's basic dignity would remain unchanged whether male or female, of whatever race, no matter how physically strong or weak, and no matter how intelligent or unintelligent. All people have the same fundamental dignity because that dignity is inherent to every human individual. Thus, the discussion of the athletic disparity between men and women no more reflects on the dignity of women than does the disparity between elite women athletes and their less athletic male counterparts. The question at issue in this case is not fundamentally about human dignity, it is about keeping sports fair for women and girls, and creating opportunities for them that will encourage the years of disciplined training necessary to achieve athletic success. Relatedly, because human dignity is inherent and not the product of external circumstances, the world need not contort itself to conform to the desires, however deeply felt they may be, of particular individuals.⁴

In an effort to protect women's sports, West Virginia's legislature passed the Save Women's Sports Act. The district court in this case denied the West Virginia Secondary School Activities Commission's

³ For more on human dignity, see generally, *Being Human: Readings from the President's Council on Bioethics* (2003) available at: <https://bioethicsarchive.georgetown.edu/pcbe/bookshelf/index.html>.

⁴ To avoid confusion and in an effort to be faithful to reality, this brief uses pronouns that correspond to the referent person's biological sex.

(“the Commission) request for summary judgment on the issue of whether the Commission is a state actor, but then ruled against B.P.J, failing to address the specific state actor issue. *B.P.J. v. West Virginia State Bd. of Ed.*, No. 23-1078 at *11-12 (4th Cir. April 16, 2024). The Fourth Circuit found it had jurisdiction to review the district court’s determination but found that, “[b]ecause the Commission is not aggrieved by the district court’s judgment . . . the Commission has no basis to appeal it.” *Id.* at *12-13. If the Court grants certiorari in this case and finds that the Commission is a state actor, the Court should rule that the Save Women’s Sports Act is constitutional and thus that the Commission does not violate the Constitution if or when it acts under that law to protect women’s and girls’ sports.

West Virginia’s law codifies what, until sometime in the past decade, was not only uncontroversial but utterly unquestioned: girls sports are for girls. The distinction between girls and boys when it comes to athletic competition is neither arbitrary nor about affirming the identity of boys and girls. Those distinctions to ensure that girls and women are able to compete on a level playing field and that their efforts at athletic excellence will not be undermined by being forced to face male competition.

Further, the plaintiff in this case, B.P.J., is a boy who has been given puberty blockers. Whether the person in question in any given case has gone through male puberty is irrelevant to the question at issue. The relevant distinction is between male and female, not whether a person has gone through puberty. Further, it is not relevant because, when used to prevent puberty from occurring at the normal age in healthy

children, puberty blockers cause to children harm reminiscent of other forms of harm that have been considered socially acceptable in many different times and places throughout human history. The Court should grant certiorari in this case to ensure that States can protect women's and girls' sports from all male competition.

ARGUMENT

I. The Numbers Make Clear that if Women and Girls are to Have Meaningful Opportunities for Athletic Excellence, Girls' and Women's Sports Must be Preserved for Girls and Women Only.

Female-only sports provide women with opportunities they would not otherwise have. The biological differences between men and women are real and have significant consequences for athletic performance. If women and girls are to have the opportunity to compete and excel in fair competition, males must be excluded from women's and girls' sports. In many sports, measuring the differences between the two sexes would be difficult. In sports that are measured in time, however, the comparison of men and women is revealing.

A. Thousands of men have exceeded the women's world record in a sample of running events.

Martia Koch of East Germany set the women's 400 meter world record in 1985, running the single-lap race in 47.60 seconds.⁵ 3,873 different men have run

⁵ See 400 Metres Women, World Athletics, <https://worldathletics.org/records/all-time-toplists/sprints/400->

the 400 meters in 46.50 seconds or faster, over a second faster than the women's world record.⁶ Counting every time a man has run a particular time, men have run the 400 meter as fast or faster than 45.50, more than two seconds faster than the women's record, at least 8,874 times.⁷ The American high school boys' record in the 400 meters is 44.59 seconds, and the 10 fastest high school boy's 400 meter times are all faster than the women's 400 meter world record.⁸

Similarly, Gudaf Tsegay of Ethiopia set the women's outdoor track 5,000 meter record in 2023,

metres/all/women/senior?regionType=world&timing=electronic
&page=1&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229511&ageCategory=senior.

⁶ See 400 Meters Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/sprints/400-metres/all/men/senior?regionType=world&timing=electronic&page=40&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229631&ageCategory=senior>.

⁷ 400 Metres Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/sprints/400-metres/all/men/senior?regionType=world&timing=electronic&page=1&bestResultsOnly=false&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229631&ageCategory=senior>.

⁸ High School All-Time top 10s-Boys, Track and Field News (records up to date as of July 10, 2024) <https://trackandfieldnews.com/tfn-lists/high-school-all-time-top-10s-boys/#400>.

covering the distance in 14:00.21.⁹ This time has likely been exceeded by more than 6,000 different men.¹⁰ Further, men have run the 5,000 meters in 13:30 or less at least 9,249 times.¹¹ The American high school boys' record for the 5,000 meters is 13:25.86, and at least the top 10 high school boys' times exceed the women's world record.¹²

The numbers for the marathon likewise demonstrate the need for women's sports. Tigst Assefa of Ethiopia set the women's marathon world record in

⁹ See 5000 Metres Women, World Athletics, <https://worldathletics.org/records/all-time-toplists/middlelong/5000-metres/all/women/senior?regionType=world&page=1&bestResultsOnly=false&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229514&ageCategory=senior>.

¹⁰ See 5000 Metres Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/middlelong/5000-metres/all/men/senior?regionType=world&page=60&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229609&ageCategory=senior>.

¹¹ See 5000 Metres Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/middlelong/5000-metres/all/men/senior?regionType=world&page=93&bestResultsOnly=false&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229609&ageCategory=senior>.

¹² High School All-Time Top 10s-Boys, Track and Field News (records up to date as of July 10, 2024) <https://trackandfieldnews.com/tfn-lists/high-school-all-time-top-10s-boys/#1500>.

2023, running the 26.2 miles in 2:11:53.¹³ Men have matched or exceeded that record 8,823 times¹⁴ and 2,568 different men have matched or exceeded her time.¹⁵ Assefa is the only woman to ever break 2:12 in the marathon, with the second fastest marathon ever run by a woman being Sifan Hassan's 2:13:44.¹⁶ On the other hand, men have broken 2:12:00 well over 9,000 times,¹⁷ with 4,023 different men having

¹³ Marathon Women, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/women/senior?regionType=world&page=1&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229534&ageCategory=senior>.

¹⁴ See 5000 Metres Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=89&bestResultsOnly=false&firstDay=1899-12-27&lastDay=2024-07-25&maxResultsByCountry=all&eventId=10229634&ageCategory=senior>.

¹⁵ See Marathon Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=26&bestResultsOnly=true&firstDay=1899-12-28&lastDay=2024-07-26&maxResultsByCountry=all&eventId=10229634&ageCategory=senior>.

¹⁶ Marathon Women, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/women/senior?regionType=world&page=1&bestResultsOnly=true&firstDay=1899-12-27&lastDay=2024-07-25&maxResultsByCountry=all&eventId=10229534&ageCategory=senior>.

¹⁷ See Marathon Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=93&>

matched or exceeded the second fastest marathon ever run by a woman.¹⁸

In races of the 400 meters (one lap of the track), outdoor track 5,000 meters, and the marathon, thousands of men have exceeded the women's world record times. These races demonstrate the pattern at various distances. They are not a selective sample. To take a few more examples, in the outdoor track 1,500 meter and 10,000 meter races, well over 5,000 men have exceeded the women's world record time. In the 800 meter race, at least 3,148 men have exceeded the women's world record time, though the slowest time recorded by World Athletics is five seconds faster than the women's world record.

The women who run competitively at the international level are incredibly fast athletes who would leave the average person, male or female, in the dust. But all it would take for these elite women to lose out on opportunities is for one of the thousands of men who are faster than them to begin competing as a woman. The numbers in swimming discussed below follow the same pattern.

bestResultsOnly=false&firstDay=1899-12-27&lastDay=2024-07-25&maxResultsByCountry=all&eventId=10229634&ageCategory=senior.

¹⁸ See Marathon Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=41&bestResultsOnly=true&firstDay=1899-12-27&lastDay=2024-07-25&maxResultsByCountry=all&eventId=10229634&ageCategory=senior>.

B. The best boy swimmers in the world become competitive with the best women swimmers in the world when the boys hit puberty.

Virtually every swimming National Age Group (NAG) 13–14-year-old boys’ long course meters (“LCM”) record is faster than the women’s world records in the same events.¹⁹ United States age group swimming is split into five age group categories: 10 and under, 11-12, 13-14, 15-16, and 17-18. Each age group has its own records for each swimming event, including short course yards (“SCY”) and LCM.²⁰ In the 13-14 age group, every LCM age group record is faster than the women’s overall world record. In the 50 meter-freestyle, Thomas Heilman’s boy’s 13-14 NAG record is 22.95, set in 2021.²¹ The women’s world record in the same event was set by Sarah Sjostrom’s in 2023 at 23.61.²²

In the 200 meter individual medley, a race in which the athlete swims 50 meters of each stroke (butterfly, backstroke, breaststroke and freestyle), Shareef Elaydi’s boy’s 13-14 NAG 200 meter-

¹⁹ National Age Group Records LCM 13-14, USA Swimming, <https://www.usaswimming.org/times/popular-resources/national-age-group-records/lcm/13-14>. Even the existence of age groups indicates the importance of creating space for fair competition. Eleven- and twelve-year-old boys should not be competing against fifteen- and sixteen-year-old boys.

²⁰ SCY races are held in 25-yard-long pools. LCM races are those that take place in Olympic sized (50 meter) pools.

²¹ USA Swimming, *supra* note 19.

²² Women Freestyle World Records, World Aquatics, <https://www.worldaquatics.com/swimming/records?recordCode=WR&eventTypeId=®ion=&countryId=&gender=F&pool=LCM>.

individual-medley record is 2:03.73.²³ Katinka ‘Iron Lady’ Hosszú’s women’s world record in this event is 2:06.12, set at the World Championships in 2015.²⁴

Katie Ledecky, widely considered the greatest women’s swimmer of all time, has two world records: the 800 meter freestyle and the 1,500 meter freestyle. Luka Mijatovic’s boy’s 13-14 NAG 800 meter freestyle record is 7:59.64,²⁵ compared to Ledecky’s 8:04.97 in the same event.²⁶ Ledecky’s 1,500 meter freestyle world record is the one exception to the rule that the 13-14 boys exceed the women’s world record times. Nonetheless, Ledecky’s world record of 15:20.48²⁷ is slower than the 15-16 boy’s record.²⁸ Further, Mijatovic’s 1,500 meter freestyle 13-14 record of 15:26.73²⁹ is faster than any woman’s time except Ledecky’s.³⁰

By the time male swimmers have reached physical maturity, a mediocre male swimmer can make himself highly competitive by swimming against women. Such a situation is not hypothetical. In the 2021 season for National Collegiate Athletic

²³ USA Swimming, *supra* note 19.

²⁴ World Aquatics, *supra* note 22.

²⁵ USA Swimming, *supra* note 19.

²⁶ World Aquatics, *supra* note 22.

²⁷ *Id.*

²⁸ USA Swimming, *supra* note 19.

²⁹ *Id.*

³⁰ Ledecky holds the twenty fastest women’s 1,500 meter LCM times in history. The fastest time of the second fastest woman ever, Lotte Friis, is 15:38.88. Anya Pelshaw, *Katie Ledecky Now Holds Top 20 Performances All-Time in Women’s 1500 Freestyle After 15:30.02*, SwimSwam (July 31, 2024). Mijatovic’s 13-14 record is also faster than Ledecky’s 15:30.02 Olympic record set in Paris this year. *See id.*

Association (NCAA) swimming, University of Pennsylvania swimmer Will Thomas was ranked 554th in the NCAA, all divisions, in the men's 200 meter freestyle.³¹ The next year, Lia Thomas (the same person, now swimming in women's races) finished 5th in the nation in the women's 200 meter freestyle,³² famously being given the nod by the NCAA over Riley Gaines, with whom he tied in that race.³³ Somewhat less dramatically, but even more tragically for the women he competed against, Thomas was ranked 65th nationally in the 500 meter freestyle when swimming against men, but "won" the NCAA women's title in 2022 at that same distance,³⁴ depriving Emma Weyant of the University of Virginia, the fastest woman in that race and now two-time Olympian, of the top trophy.³⁵

In every sport, both men's and women's records continue to improve as training techniques and other technologies improve. But the disparity between men's and women's times remains. Gretchen Walsh's 50 meter freestyle NCAA record from March 21, 2024, would have been the Men's NCAA record in 1970. In

³¹ John Lohn, *A Look at the Numbers and Times: No Denying the Advantages of Thomas*, *Swimming World* (April 5, 2022 9:05AM).

³² *Id.*

³³ Riley Gaines, *Testimony Before the House Subcommittee on Health Care and Financial Services: "The Importance of Protecting Female Athletics and Title IX"*, *Independent Women's Voice* (Dec. 5, 2023) <https://oversight.house.gov/wp-content/uploads/2023/12/Testimony-Gaines.pdf>.

³⁴ *Id.*

³⁵ See, James Sutherland, *2022 Women's NCAA Championships: Results & Records Summary*, *SwimSwam* (March 22, 2022).

1970, the men's 50 meter freestyle NCAA record for collegiate swimming was clocked at 20.5 seconds by David Edgar,³⁶ one of the greatest short course swimmers of the 1970s. As of March 2024, Gretchen Walsh holds the women's 50 meter freestyle NCAA Division I record of 20.37 seconds, which was also an American record.³⁷ Walsh is also the only woman to ever break 20 seconds in the 50 meter freestyle, which she did at the 2024 ACC Championship swim meet when she swam a 19.95 second split in a relay.³⁸ Although she is the fastest woman in sprinting history, her current NCAA record of 20.37 seconds would only exceed the men's record from over 50 years ago.

While sports like swimming and running where the measurements are objective and men's and women's performances can easily be compared, the physical advantage men enjoy is relevant in every athletic competition. If women are not to be excluded from their own sports and denied opportunities for achievement, biological males must be kept out of women's sports. The Equal Protection Clause cannot mean that biological males must be allowed to compete against women. If it did, it would be the death knell for women's and girls' sports.

³⁶ William F. Reed, *Fastest Man Afloat*, Sports Illustrated (Mar. 1, 1971) <https://vault.si.com/vault/1971/03/01/fastest-man-afloat>.

³⁷ Dan D'Addona, *Gretchen Walsh Lowers NCAA 50 Free Record: 'She is Doing Things No One Has Ever Done'*, Swimming World (Mar. 21, 2024).

³⁸ Nick Pecoraro, *Race Video: Watch Gretchen Walsh Splits 19.95 in the 50 Free, First Woman to Break 20 Seconds*, SwimSwam (Feb. 21, 2024).

II. The Use of Puberty Blockers to Address Gender Dysphoria in Young People Will Rightly be Remembered Alongside Other Forms of Harm to Children.

Causing children physical harm is an evil that has, no doubt, existed in every society throughout human history. Even more tragically, different forms of harm have been considered socially acceptable and even obligatory in many societies at different times in history. In America, such harm is, rightly, nearly universally criminalized. However, one form of such harm, the chemical or surgical manipulation of children in response to gender dysphoria, is not only accepted by many, but has been used to justify allowing boys to compete against girls.

As the Fourth Circuit explained in *B.P.J. v. West Virginia State Board of Education*, the eighth-grader challenging West Virginia's Save Women's Sports Act here has never gone through the stage of puberty during which testosterone production increases resulting in many of the physical differences between men and women. No. 23-1078 at 28 (4th Cir. April 16, 2024). That the bodies of males may be prevented chemically or otherwise from developing naturally should not and cannot be allowed to act as a conduit to participation in girls' and women's sports. That children in this country are being subjected to this sort of bodily mutilation based on their self-impression is an outrage. But it is not surprising in the context of history. Parents have the right to direct the upbringing of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high

duty, to recognize and prepare him for additional obligations.”). However, they do not have the right to knowingly cause permanent and significant damage to their children such as the inability to breast-feed, or even bear future children.

A. Throughout history, children’s bodies have been subjected to various horrors.

Throughout human history, for a variety of reasons, many different peoples have treated children and their bodies with brutality. For example, different societies throughout history have engaged in child sacrifice and child abandonment.³⁹ Different societies have also engaged in many forms of non-lethal, physical child abuse. Emasculated men, eunuchs, had sometimes been castrated in childhood. This practice continued into the relatively recent past. A Chinese man named Sun Yaoting who died in 1996, known as the last eunuch of China after the book that documents his story, suffered the procedure as a child at the hands of his father.⁴⁰ Yaoting convinced his father to perform the procedure with the hope of ultimately gaining influence in the emperor’s palace and then using that influence to exact revenge on a local landlord who had wronged his family.⁴¹

³⁹ See, e.g., *Ancient Carthaginians Really Did Sacrifice Their Children*, University of Oxford (Jan 23, 2014) <https://www.ox.ac.uk/news/2014-01-23-ancient-carthaginians-really-did-sacrifice-their-children>.

⁴⁰ Yinghua Jia, *The Last Eunuch of China: The Life of Sun Yaoting* 12, 14 (Sun Haichen trans. 2008) <https://archive.org/details/lasteunuchofchin0000jiay/mode/2up>.

⁴¹ *Id.* at 10-12.

Castrati were singers who had been castrated before puberty, and thus who had unique and sought-after voices. Poor Italian families would choose this path as both an immediate financial relief—the boys were sent away from the family and thus no longer needed to be fed—and as a path to future financial success.⁴² Gelding was outlawed on pain of excommunication by Pope Sixtus V in 1587, but continued to be practiced.⁴³ Part of the decline of the demand for castrati was Pope Pius VI's 1798 revocation of the ban against women performers.⁴⁴ In the late nineteenth century, “violent diatribes were uttered against a custom which had ‘dishonored’, it was thought, the two previous centuries . . . In future no anathema was too strong for the condemnation of this ‘barbarous’ custom which outraged ‘morality, humanity, and nature.’”⁴⁵ Finally, in 1902, Pope Leo XIII “banished castrati from the Sistine Chapel for ever.”⁴⁶

For a thousand years in China, girls had their feet bound, a brutal process that forced their feet to be as small as possible and into the desired shape.⁴⁷ “Once the foot had been crushed and bound, the shape

⁴² Alanna Skuse, *Surgery and Selfhood in Early Modern England* 17 (Cambridge University Press 2021).

⁴³ *Id.*

⁴⁴ Patrick Barbier, *The World of the Castrati* 227 (Margaret Crosland trans. 1996).

⁴⁵ *Id.* at 236.

⁴⁶ *Id.* at 126.

⁴⁷ Amanda Foreman, *Why Footbinding Persisted in China for a Millennium*, *Smithsonian Magazine* (Feb. 2015) <https://www.smithsonianmag.com/history/why-footbinding-persisted-china-millennium-180953971/>.

could not be reversed without a woman undergoing the same pain all over again.”⁴⁸

Female genital mutilation (“FGM”), or female circumcision, remains a common practice in some countries today as well as among some migrant groups in the west, and “[o]ver 100 million women and young girls living today have experienced some form of FGM with millions more being affected annually.”⁴⁹ According to the Office of Women’s Health within the U.S. Department of Health and Human Services, the medical concerns immediately after FGM is performed include severe pain, serious bleeding, infection, psychological trauma, difficulty using the restroom, and death.⁵⁰ The long term health risks include several types of infections, difficulty with intercourse including pain, “depression and anxiety,” “problems urinating and painful menstrual periods,” “urinary problems,” “fistula, an opening between the urethra and vagina that lets urine run into the vagina,” and “[p]roblems during and after childbirth.”⁵¹ Congress has found that “[FGM] is recognized internationally as a human rights violation and a form of child abuse, gender discrimination, and violence against women and girls.”⁵² As Congresswoman Pat Schroeder

⁴⁸ *Id.*

⁴⁹ Jewel Llamas, *Female Circumcision: The History, the Current Prevalence, and the Approach to a Patient* at 1 (April 2017) <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf>.

⁵⁰ Fact Sheet on Female Genital Mutilation or Cutting, Office of Women’s Health, Department of Health and Human Services, <https://owh-wh-d9-dev.s3.amazonaws.com/s3fs-public/documents/fact-sheet-fgmc.pdf>.

⁵¹ *Id.*

⁵² 18 U.S.C. § 116 note.

explained, FGM can cause, “bleeding, chronic urinary tract and pelvic infections, build-up of scar tissue, and infertility[,] . . . severe trauma, painful intercourse, higher risk of AIDS, and childbirth complications,” and thus, “FGM has no medical purpose and is contrary to our beliefs about women's equality and place in society.”⁵³

What people in a society find acceptable changes over time and from place to place, sometimes for the better but sometimes for the worse. Carthage was a city-state in modern Tunisia that existed from about 800 BC until 146 BC.⁵⁴ An article published in the journal *Antiquity* in 2013 argued that, despite claims in the preceding decades, the Carthaginians really had engaged in child sacrifice, as the Romans and Greeks had alleged.⁵⁵

Dr. Josephine Quinn of Oxford University, one of the study's authors, explained at the time that the view that was increasingly common in the 20th century, that the Greek and Roman claims about Carthaginian child sacrifice were “racist propaganda,” is an anachronistic judgment.⁵⁶ Dr. Quinn said, “We think of it as a slander because we view it in our own terms. But people looked at it differently 2,500 years ago . . . We should not imagine that ancient people thought like us and were horrified by the same things.”⁵⁷ The history of the twentieth century should disabuse us of the assumption that

⁵³ 141 Cong. Rec. 1691, 1695 (1995).

⁵⁴ *Ancient Carthaginians Really Did Sacrifice Their Children* *supra* note 39.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

human nature has changed such that these ancient horrors are no longer possible.

In fact, certain horrors of the past are resurfacing today under the guise of care.

B. The administration of puberty blockers to healthy preteens to prevent natural and normal puberty is an unproven practice with the potential to seriously harm children.

Puberty blockers have been approved by the FDA for treating precocious puberty, the condition in which children begin puberty earlier than is normal or healthy. They are used in such cases to delay puberty until the normal age at which puberty should begin. However, they are being prescribed to arrest the natural pubertal process not because that process has begun too early or to address some other physical malady, but to address gender dysphoria in young people.

As is explained in the Cass Review, a review of gender medicine conducted in Great Britain by Dr. Hilary Cass, the safety of puberty blockers as a temporary fix for gender dysphoria cannot be extrapolated from their safety as a treatment for precocious puberty.⁵⁸ When used to delay natural puberty, puberty blockers “are blocking the normal rise in hormones that should be occurring into teenage years, and which is essential for psychosexual and other developmental processes.”⁵⁹

⁵⁸ Dr. Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People* 174. The full report is available for download at <https://cass.independent-review.uk/home/publications/final-report/>.

⁵⁹ *Id.*

Several justifications have been offered for administering puberty blockers to physically healthy children.⁶⁰ As the information reviewed by the Cass report shows, the data supporting these justifications ranges from inconclusive to nonexistent.

First, puberty blockers may be intended to help those taking them “pass” as the opposite sex when they are adults. The Cass Review notes that “since most young people are not starting puberty blockers until the age of 15 and above, it is unclear how helpful they might be” for allowing those on them to “pass” later on in life.⁶¹ Further, since a desire to “pass” depends on the continued experience of gender dysphoria, and because the prevalence of its persistence appears to be greatly increased by the

⁶⁰ If doctors who prescribe puberty blockers to address gender incongruence are confident that there are no unreasonable dangers associated with administering puberty blockers to physically healthy children and adolescents, would such doctors be willing to sign a waiver of the statute of limitations, giving themselves some skin in the game for the risk of future harm to the young people they profess to help? After all, as even one critic of the Cass Review has noted, so-called “gender-affirming medical care for adolescents” is “a particularly fraught and contested area of medicine.” Lydia Polgreen, *The Strange Report Feuling the War on Trans Kids*, The New York Times (Aug. 13, 2024) <https://www.nytimes.com/2024/08/13/opinion/cass-report-trans-kids.html>. Polgreen’s New York Times article has been criticized for “studiously avoid[ing] handling any uncomfortable realities, like what the medical ‘autonomy’ she advocates actually entails or what patients are being asked to consent to: sterility, the loss of sexual pleasure, and life as a guinea pig in an unregulated medical experiment.” Eliza Mondgreen, *NYT Columnist Refuses to Accept Cass Review Findings*, UnHerd (Aug. 14, 2024 1:00 PM) <https://unherd.com/newsroom/nyt-columnist-refuses-to-accept-cass-review-findings/>.

⁶¹ Cass *supra* note 58 at 177.

administration of puberty blockers, even if puberty blockers did help adults with gender dysphoria “pass,” that would not indicate that the administration of puberty blockers had been acceptable.

Second, puberty blockers are presented as giving children more time to consider whether they want to continue gender transition. That claim grows out of Dutch research, the reliability of which has been seriously challenged.⁶² Some studies have found that over 90% of those who begin taking puberty blockers will eventually take cross-sex hormones.⁶³ While advocates of this approach may suggest that this merely indicates accuracy in the initial diagnosis of gender dysphoria, they have the burden to show that that is in fact the best explanation for the high rate of persistence.

As the Cass Review explains, “A formal diagnosis of gender dysphoria is frequently cited as a prerequisite for accessing hormone treatment. However, it is not reliably predictive of whether that young person will have longstanding gender incongruence in the future, or whether medical intervention will be the best option for them.”⁶⁴ It is at least as plausible, if not significantly more so, that suppressing natural puberty locks in discomfort with gender that may have otherwise subsided with time. As the Cass Review concludes, the “data suggest that puberty blockers are not buying time to think, given

⁶² E. Abbruzzese, Stephen B. Levine, Julia W. Mason, *The Myth of “Reliable Research” in Pediatric Gender Medicine: A Critical Evaluation of the Dutch Studies—and Research That Has Followed*, 49 *Journal of Sex and Marital Therapy* 673 (2023).

⁶³ Cass *supra* note 58 at 176.

⁶⁴ *Id.* at 193.

that the vast majority of those who start puberty suppression continue to masculinising/feminising hormones, particularly if they start earlier in puberty.”⁶⁵ The question, of course, is whether without this intervention, the person’s gender dysphoria would have persisted after natural puberty.

Third, puberty blockers are supposed to provide psychological and mental health benefits. However, the Cass Review found that the data to support this supposition are mixed and inconclusive.⁶⁶ Further, the Cass Review suggests that the results may have been impacted by the lack of a randomized control and a “strong belief that the treatment is effective.”⁶⁷

These supposed benefits are offset by several risks. First, as the Cass Review notes, the administration of puberty blockers may alter “the trajectory of development of sexual and gender identity.”⁶⁸ Sadly, puberty blockers may well prevent a natural resolution of young people’s gender identity issues. By preventing the natural pubertal process, young people may well be locked into their mental state rather than developing out of it. Further, even if used as intended, cross-sex hormones may lead to sexual dysfunction and, by biological necessity, to sterility.⁶⁹ It is increasingly clear that starting kids on

⁶⁵ *Id.*

⁶⁶ *See id.* at 176-77.

⁶⁷ *Id.* at 177.

⁶⁸ *Id.* at 178.

⁶⁹ And, as Dr. Marci Bowers, president of the World Professional Association for Transgender Health (WPATH) said, the administration of puberty blockers before a certain stage of pubertal development leads to sexual dysfunction. Hannah Grossman, *Influential Trans Care Doctor Once Warned Puberty*

puberty blockers constitutes not a singular intervention, but rather starting them down an unproven path with a high risk of harm.

Second, puberty blockers may well hinder neurocognitive development. As the Cass Review explains:

[A]dolescent sex hormone surges may trigger the opening of a critical period for experience-dependent rewiring of neural circuits underlying executive function (i.e. maturation of the part of the brain concerned with planning, decision making and judgement). If this is the case, *brain maturation may be temporarily or permanently disrupted by the use of puberty blockers, which could have a significant impact on the young person's ability to make complex risk-laden decisions, as well as having possible longer-term neuropsychological consequences.*⁷⁰

The research on this issue is, at best, inconclusive. One study found no cognitive difference between those adolescents given puberty blockers for less than a year and those not given puberty blockers at all, “but found worse executive functioning in those treated for more than one year compared to those not treated.”⁷¹

Blockers Could Cause Permanent Sexual Dysfunction, Fox News (May 23, 2022 4:24 AM)

<https://www.foxnews.com/media/influential-trans-care-doctor-once-warned-puberty-blockers-could-cause-permanent-sexual-dysfunction>.

⁷⁰ Cass, *supra* note 58 at 178 (emphasis added).

⁷¹ *Id.*

Common sense suggests that delaying puberty, one of the most important physiological and psychological developmental milestones in a person's life, would have lifelong impacts.

Next, the Cass Review argues that, “[i]f puberty suppression is started too early in birth-registered males it can make subsequent vaginoplasty (creation of a vagina and vulva) more difficult due to *inadequate penile development*.”⁷² Puberty blockers can prevent a child's sexual development such that, as an adult, he will not have properly developed genitalia.⁷³ Such destruction of young bodies is not unlike those mutilations discussed above of young boys' and girls' bodies now rightly seen as barbaric relics.

Thus, while the evidence for the supposed benefits of puberty is slim and unreliable, the risks are serious for the many children whose normal development is being prevented. States have the authority and responsibility to prevent such harmful practices.

While the rights of parents, including their religious rights, correctly give them broad control over the upbringing of their children, parental rights are no justification for allowing a child to undergo life-altering chemical or surgical interventions that destroy normal bodily function for no medically necessary reason. No child can consent to procedures

⁷² *Id.* (emphasis added).

⁷³ That these interventions could permanently close doors the importance of which the child or adolescent in question could not possibly understand at his age is not the exercise of autonomy, but its destruction. See, generally, Moti Gorin, *What is the Aim of Pediatric “Gender-Affirming” Care?*, 54 *Hastings Center Report* 15 (2024).

that will radically alter their natural development, especially where such procedures often leave the person infertile and with other physical disabilities.⁷⁴

For all of these reasons, that some boys have been given puberty blockers is no excuse for allowing those children to participate in female sports. That one child is being harmed is no reason to harm others. States must be allowed to protect children from abuse. For that reason, the Court should grant certiorari in this case and rule for petitioners.

CONCLUSION

The petition for a writ of certiorari should be granted.

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⁷⁴ After all, as Bill Maher has noted, “Kids are fluid about everything. If they know at age 8 what they wanted to be, the world would be filled with cowboys and princesses. I wanted to be a pirate. Thank God no one took me seriously and scheduled me for eye removal and peg leg surgery.” Bill Maher, *New Rule: Along for the Ride*, at 08:39 (May 20, 2022), <https://www.youtube.com/watch?v=mMBzfUj5zsg>.