

*In the Supreme Court of the United States*

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THE STATE OF WEST VIRGINIA; WEST VIRGINIA STATE BOARD OF  
EDUCATION; WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES  
COMMISSION; W. CLAYTON BURCH, in his official capacity as State  
Superintendent, and LAINEY ARMISTEAD,

*Applicants,*

*v.*

B.P.J., by next friend and mother, HEATHER JACKSON,

*Respondent.*

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ON APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**BRIEF OF *AMICUS CURIAE*  
WOMEN'S LIBERATION FRONT IN SUPPORT OF APPLICANTS**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
INTRODUCTION AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
ARGUMENT .....	2
I. WOMEN’S SEX-BASED CIVIL RIGHTS CANNOT BE DIMINISHED BY SUBJECTIVE BELIEFS ABOUT GENDER IDENTITY. ....	2
A. Sex is objective and immutable, while gender is socially constructed and is harmful and oppressive to women and girls. ....	3
B. “Gender identity” and “transgender” are part of a belief system based on harmful sex stereotypes. ....	4
C. “Gender identity” and “transgender” are inconsistent concepts with no objective definitions. ....	6
D. Elevating gender identity above sex in the law privileges a personal, metaphysical belief over an objective, material characteristic like sex. ....	10
C. Subjective psychological distress is not a valid legal basis for diminishing protections for women under sex-based civil rights law. .	11
II. WOMEN AND GIRLS ARE DISADVANTAGED ON THE BASIS OF SEX; THEY LOSE CRITICAL PROTECTIONS IF THE LAW FAILS TO RECOGNIZE THE FEMALE SEX-CLASS. ....	13
A. The cultural, legal, and physical barriers to athletic participation for women are based on their sex.....	13
B. Sex stereotyping is not a permissible basis for sports segregation.....	16
III. <i>BOSTOCK</i> DOES NOT PROVIDE RELEVANT OR PERSUASIVE AUTHORITY IN THIS CASE.....	17
A. The Court was explicit that the holding was narrow and is not meant to other contexts.....	18
B. Title IX regulations permit differential treatment of the sexes to achieve equal opportunity for girls and women. ....	19

C. *Bostock* did not implicate the rights of other individuals under Title VII in the same manner that the decision below infringes on the rights of women and girls under Title IX..... 21

CONCLUSION..... 22

## TABLE OF AUTHORITIES

### Cases

<i>B.P.J. v. West Virginia State Bd. of Educ.</i> , 2023 U.S. Dist. LEXIS 20427 (S.D. W.Va. 2023) .....	7
<i>Bostock v. Clayton Cty., Georgia</i> , 140 S. Ct. 1731 (2020) .....	18, 19, 20, 21
<i>Clark ex rel. Clark v. Arizona Interscholastic Ass’n</i> , 695 F.2d 1126 (9 <sup>th</sup> Cir. 1982).....	17
<i>Cleveland Bd. of Ed. V. LaFleur</i> , 414 U.S. 632 (1974) .....	3
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	3
<i>Doe 2 v. Shanahan</i> , 917 F.3d 694 (D.C. Cir. 2019).....	7
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11 <sup>th</sup> Cir. 2011).....	22
<i>In the Matter of Jones David Hollister</i> , 470 P.3d 436 (Or. Ct. App. 2020) .....	11
<i>Michael M. v. Superior Court</i> , 450 U.S. 464 (1981).....	17
<i>Phillips v. Martin Marietta Corporation</i> , 400 U.S. 542 (1971) .....	3
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	3
<i>Rosa v. Park W. Bank &amp; Trust Co.</i> , 214 F.3d 213 (1 <sup>st</sup> Cir. 2000).....	22
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9 <sup>th</sup> Cir. 2000).....	22
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6 <sup>th</sup> Cir. 2004) .....	22
<i>Tennessee v. U.S. Dep’t of Educ.</i> , 2022 U.S. Dist. LEXIS 125684 (E.D. Tenn. 2022).....	21

*United States v. Virginia*, 518 U.S. 515 (1996)..... 17

**Constitutional Provisions**

U.S. CONST. amend. XIX..... 3

**Statutes**

WASH. ADMIN. CODE 246-490-075..... 7

**Regulations**

34 C.F.R. 106.41(b) ..... 19

Exec. Order No. 13988, 86 FR 7023 (2021)..... 21

**Other Authorities**

American Psychiatric Association, *Gender Dysphoria* (2013)..... 6

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (2013)..... 6

Asaf Orr, *et al.*, *Schools In Transition: A Guide for Supporting Transgender Students in K-12 Schools* (Human Rights Campaign Foundation 2015)..... 9

Committee on Adolescent Health Care, *Female Athlete Triad*, American College of Obstetricians and Gynecologists, Committee Opinion No. 702 (June 2017) ..... 15

Declaration of Joshua D. Safer, MD, FACP, FACE Dkt. 201-4 ..... 5, 6

GLAAD, *Accelerating Acceptance* (2017)..... 8

Human Rights Campaign, *Understanding the Transgender Community*..... 7, 8

*In re. Connecticut Interscholastic Athletic Conference*, *et al.*,

Case No. 01-19-4025 (Aug. 31, 2020).....	20
Institute of Medicine (US) Committee on Assessing Interactions Among Social, Behavioral, and Genetic Factors in Health; Hernandez LM, Blazer DG, editors. <i>Genes, Behavior, and the Social Environment: Moving Beyond the Nature/Nurture Debate</i> . Washington (DC): National Academies Press (US); 2006. 5, Sex/Gender, Race/Ethnicity, and Health.....	4
Jason D. Vescovi, <i>The Menstrual Cycle and Anterior Cruciate Ligament Injury Risk</i> , SPORTS MEDICINE 41 (2011).....	15
M.S.C. Wallien, et al., <i>Psychosexual outcome of gender-dysphoric children</i> , JOURNAL OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, 47 (2008).....	6, 7
National Center for Transgender Equality, <i>What is Gender Dysphoria?</i> , (July 9, 2016) .....	6
Oral Arg. Tr., <i>R.G. &amp; G.R. Harris Funeral Homes, Inc. v. EEOC</i> , No. 18-107 .....	18
Rebecca Tuvel, <i>In Defense of Transracialism</i> , HYPATIA: A JOURNAL OF FEMINIST PHILOSOPHY (2017).....	12
Rebekka J. Findlay, <i>How the menstrual cycle and menstruation affect sporting performance: experiences and perceptions of elite female rugby players</i> , BRITISH JOURNAL OF SPORTS MEDICINE, VOL. 54, Issue 18 (2020).....	16
S.E. James, et. al., <i>The Report of the 2015 U.S. Transgender Survey</i> (National Center for Transgender Equality, 2015).....	7
Sex, Male, and Female, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003) .....	1
<i>Soul Definition</i> , Dictionary.com (based on Random House Unabridged Dictionary, 2020).....	11

Women’s Sport and Fitness Foundation,  
*Barriers to sports participation for women and girls* (2008)..... 14

Women’s Sports Foundation,  
*Chasing Equity: The Triumphs, Challenges and Opportunities in  
Sports for Girls and Women* (2020)..... 14, 15

World Health Organization,  
*Gender, Equity, and Human Rights in Western Pacific*..... 4

## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus* is the Women’s Liberation Front (“WoLF”), a non-profit radical feminist organization dedicated to the liberation of women by ending male violence, protecting reproductive sovereignty, preserving woman-only spaces, and abolishing gender and sex discrimination. WoLF has hundreds of members who live, work, attend school and play sports across the United States. WoLF’s interest in this case stems from its interest in empowering and protecting the safety and privacy of women and girls and preserving women’s sex-based civil rights.<sup>2</sup> Those rights are threatened when court decisions and agency policies embrace the vague concept of “gender identity” in a manner that overrides statutory and Constitutional protections that are based explicitly on “sex.” If, as a matter of law, “sex” is no longer understood to be an immutable characteristic, but instead merely a subjective self-declared and mutable “identity” – then the ability to protect women and girls from sex-based discrimination is greatly diminished.

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<sup>1</sup> No counsel for any party authored any part of this brief, and no party, their counsel, or anyone other than WoLF, has made a monetary contribution intended to fund its preparation or submission.

<sup>2</sup> *Amicus* uses “sex” throughout to mean exactly what Congress meant when it incorporated the longstanding meaning of that term into Title VII of the Civil Rights Act: “the fundamental distinction, found in most species of animals and plants, based on the type of gametes produced by the individual,” and the resulting classification of human beings into those two reproductive classes: female (women and girls) or male (men and boys). *See Sex, Male, and Female*, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003), <https://medical-dictionary.thefreedictionary.com>.



The question in this case is whether men and boys who self-identify as women and girls and wish to play on female-only teams are more deserving than women and girls who wish to benefit from existing civil rights protections based on sex. If the Court rules for Respondents, it will threaten safe and fair play for female student athletes, undercut the means by which women and girls can achieve educational equality, and ultimately work to erase women and girls under the law. It would not only revoke the very rights and protections that specifically secure women’s educational access, but would do so in order to extend those rights and protections to men claiming to be women.

WoLF urges the Court to rule in favor of Applicants, vacate the injunction, and affirm the long-standing legal principle that women and girls have civil rights protections under Title IX and the Equal Protection Clause on the basis of sex.

## **ARGUMENT**

### **I. WOMEN’S SEX-BASED CIVIL RIGHTS CANNOT BE DIMINISHED BY SUBJECTIVE BELIEFS ABOUT GENDER IDENTITY.**

While feminism has sought to improve women’s status by dismantling sex-stereotyping, the concept of “transgender” depends on the continued existence of these same sex-stereotypes. Women and girls are generally protected in the U.S. from being subject to laws founded in sex stereotypes (such as whether and how they

should work, parent, or vote, and how they ought to look and behave).<sup>3</sup> This protection is in conflict with efforts to adopt laws that privilege the concepts of “gender identity” and “transgender” over sex.

Subjective beliefs may not be imposed on the public nor used to justify eroding civil rights protections against sex-based discrimination. Women and girls are female whether or not they look, act, or live their lives in a stereotypically feminine manner. To believe that sex is determined by a gendered soul or feminine appearance is to believe that femininity is the same thing as being female. This belief is offensive and harmful to women and antithetical to civil rights jurisprudence.

**A. Sex is objective and immutable, while gender is socially constructed and is harmful and oppressive to women and girls.**

“Sex” and “gender” both have distinct definitions and criteria.

Sex is an immutable characteristic based in reality. It is defined by reproductive function; a male produces sperm and a female produces eggs, gestates, and gives birth. The National Institute of Health (NIH) describes sex as “a classification based on biological differences . . . between males and females rooted in their anatomy and physiology. By contrast, gender is a classification based on the social construction

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<sup>3</sup> U.S. CONST. amend. XIX (the right to vote cannot be limited on the basis of sex); *Cleveland Bd. of Ed. V. LaFleur*, 414 U.S. 632 (1974) (mandatory leave for pregnant teachers violates due process); *Craig v. Boren*, 429 U.S. 190 (1976) (different drinking ages for men and women violates the 14th amendment); *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971) (refusal to hire women with preschool-age children violates the Civil Rights Act of 1964); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (sex stereotyping is a form of sex discrimination).

(and maintenance) of *cultural* distinctions between males and females.” Institute of Medicine (US) Committee on Assessing Interactions Among Social, Behavioral, and Genetic Factors in Health; Hernandez LM, Blazer DG, editors. *Genes, Behavior, and the Social Environment: Moving Beyond the Nature/Nurture Debate*. Washington (DC): National Academies Press (US); 2006. 5, Sex/Gender, Race/Ethnicity, and Health (emphasis added).<sup>4</sup> The World Health Organization (WHO) agrees, defining “gender” as “the socially constructed roles, behaviour, activities and attributes that a particular society considers appropriate for men and women.” World Health Organization, *Gender, Equity, and Human Rights in Western Pacific*.<sup>5</sup> WHO further notes that these socially constructed roles “give rise to gender inequalities, i.e., differences between men and women that systematically favor one group.” *Id.*

**B. “Gender identity” and “transgender” are part of a belief system based on harmful sex stereotypes.**

A person who believes in gender identity believes that a woman is a person (male or female) who “identifies” as a woman. But a man identifying as a member of the female *sex* would mean identifying as a member of the reproductive class that produces eggs, gestates, and gives birth. Of course, that is impossible.

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<sup>4</sup> <https://www.ncbi.nlm.nih.gov/books/NBK19934/>

<sup>5</sup> <https://www.who.int/westernpacific/health-topics/gender-equity-and-human-rights>

Rather, “identifying as a woman” means embracing the socially constructed gender roles that are imposed upon women. According to the Respondent’s “scientific” evidence, the embrace of a gender role and its accompanying stereotypes is not just indicative of that person’s gender identity, it is also a “biological attribute” that partly determines whether that person is male or female. Declaration of Joshua D. Safer, MD, FACP, FACE Dkt. 201-4, ¶ 23.

Dr. Safer defines "gender identity" as "a person's internal, innate sense of belonging to a particular sex," and defines "gender roles" as traits and behaviors that society "designates as masculine or feminine" such as "girls wear pink and have longer hair." *Id.* at ¶ 20. Dr. Safer then defines "gender expression" as how a person communicates their gender identity, such as a person with a "female gender identity" might communicate it by "wearing longer hair or more typically feminine clothing." *Id.* at ¶ 22. Dr. Safer, expert endocrinologist, appears to be saying that the same feminine stereotype can be imposed on women (but not men) by society on the basis of sex, causing her harm, yet also cheerfully adopted as an expression of her female gender identity. *Id.* He reiterates here that gender identity is a “biological phenomenon” without citation or further elaboration. *Id.* at ¶ 21.

It is not completely clear what Dr. Safer tries to accomplish in his definition section, but it is interesting that an endocrinologist spends so much time grappling

with these sociocultural concepts (and labeling some of them “innate,” “durable,” and based in biology). *Id.* at ¶ 17, 18, 23.

**C. “Gender identity” and “transgender” are inconsistent concepts with no objective definitions.**

Misconceptions are fostered by using “gender dysphoria” (and/or arguments about mental health) and “transgender” more or less interchangeably, because the terms are quite separate and distinct. Many people diagnosed with gender dysphoria do not identify as transgender, since the former is marked by clinically significant distress and impairment, while the latter is a personally defined identity (which does not resonate with many people who experience that distress). National Center for Transgender Equality, *What is Gender Dysphoria?*, (July 9, 2016).<sup>6</sup> *See also* American Psychiatric Association, *Gender Dysphoria* (2013), (discussing the criteria contained in the APA’s Diagnostic and Statistical Manual of Mental Disorders (DSM-5) (2013)).<sup>7</sup> Gay and lesbian individuals are unsurprisingly at disproportionate risk of a gender dysphoria diagnosis, at least at some point in their lives, since few things are more “gender non-conforming” than rejecting heterosexuality. M.S.C. Wallien, et al., *Psychosexual outcome of gender-dysphoric children*, *JOURNAL OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY*, 47, 1413–1423 (2008). Most people

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<sup>6</sup> <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>

<sup>7</sup> [https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA\\_DSM-5-Gender-Dysphoria.pdf](https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf)

who experience gender dysphoria do so for a limited time, especially if they are young.  
*Id.*

A core concept of gender identity ideology is that the sole criteria for whether somebody is transgender is that he or she says that he or she is transgender. *See Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019). Evidence offered to the court about dysphoria, cross-sex hormones, or “transitioning” is irrelevant because being “transgender” — not only for B.P.J., but also increasingly in culture and in law — is increasingly a matter of self-declaration. *B.P.J. v. West Virginia State Bd. of Educ.*, 2023 U.S. Dist. LEXIS 20427, \*19 (S.D. W.Va. 2023) . *See, e.g.* WASH. ADMIN. CODE 246-490-075 (revised in 2018 to permit a legal change of the sex designation on one’s birth certificate by completing a simple form).

Nearly half of all respondents to the National Transgender Discrimination Survey (NTDS) identify as neither exclusively male nor exclusively female, but instead adopt a “non-binary” identity such as genderfluid. S.E. James, *et. al.*, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, 2015). The Human Rights Campaign reported that three-quarters of trans-identified youth identified as something other than “boy” or “girl” and instead using

any label that “reflects [one’s] personal experience.” Human Rights Campaign, *Understanding the Transgender Community*.<sup>8</sup>

The lack of a discrete identifiable class of persons claiming some form of “transgender” identity is further evidenced by the drastically different population numbers reported by different sources. It is most commonly estimated to be roughly 1% of the general population. A study by the University of Connecticut and the Human Rights Campaign concluded that a “larger portion of this generation’s youth is identifying somewhere on the broad trans spectrum.” *Understanding the Transgender Community, supra*. GLAAD, Inc. (formerly the Gay & Lesbian Alliance Against Discrimination) reported in 2017 that 12% of millennials claim to have a gender identity that does not align with their biological sex. GLAAD, *Accelerating Acceptance* at 4 (2017).<sup>9</sup>

These staggeringly different statistics are one more result of having no concrete definition of what it means to be transgender. The fact that dramatically higher numbers are primarily reported from one demographic — teens and young adults — could not solely be the result of an increase in formal gender dysphoria diagnoses. It is widely-established that younger generations are increasingly adopting a quasi-

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<sup>8</sup> <https://www.hrc.org/resources/understanding-the-transgender-community>

<sup>9</sup> [https://www.glaad.org/files/aa/2017\\_GLAAD\\_Accelerating\\_Acceptance.pdf](https://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf).

spiritual philosophy regarding one's relationship with their sexed body and with society at large.

A document called "Schools In Transition: A Guide for Supporting Transgender Students in K-12 Schools" was created and widely distributed by several professional organizations including the ACLU and the Human Rights Campaign. Asaf Orr, *et al.* (Human Rights Campaign Foundation 2015). This guide instructs schools to permit male students to play on girls' sports teams "without posing additional requirements." *Id.* at 24. It tells schools that "there is no reason to doubt the sincerity" of a male athlete who asserts a transgender identity to compete against females, and they should be allowed to do so with no restrictions at all. *Id.* at 28. It informs schools that requiring male athletes to take hormones to "participate in [female] sports is inappropriate." *Id.* (On this *amicus* agrees, only because it is inappropriate for *any* person, especially a child, to be given medically-unnecessary and harmful exogenous hormones for the purpose of creating a more "feminine" or "masculine" superficial appearance.)

Ironically, in justifying this position, they misappropriate concerns about sexism toward women, describing single-sex athletics as "grounded in sex stereotypes about the differences and abilities of males versus females," claiming that mixed-sex teams do not pose safety risks to female athletes, since "the safety rules of each sport are designed to protect players of all sizes and skill levels." *Id.* At 28.



Under this principle, a male student who identifies as bigender (both male and female), demiboy/demigirl (mostly but not entirely male or female), gender-fluid (sometimes male, sometimes female), genderqueer or non-binary (neither male nor female) could choose to compete with females. At what point on the “gender spectrum” does a person of the male sex become “female enough” to assert a claim to female athletics?

Many courts have relied on longstanding but somewhat conservative estimates of trans-identification population rates to posit that male athletes who identify as female are unlikely to substantially displace female athletes. Putting aside that male athletes should not be permitted to displace even one female on the basis of his self-identity, the actual number of transgender-identified individuals is no doubt much greater, especially in the age groups that compose student athletics. Because the definition of “transgender” is both subjective and capacious, the true potential for female displacement is unknown, and cannot be dismissed as insubstantial.

**D. Elevating gender identity above sex in the law privileges a personal, metaphysical belief over an objective, material characteristic like sex.**

The disconnect of the metaphysical “gender identity” from the physical sexed body is comparable to the religious concept of a soul: “the principle of life, feeling, thought, and action in humans, regarded as a distinct entity separate from the body, and commonly held to be separable in existence from the body; the spiritual part of

humans as distinct from the physical part.” *Soul Definition*, Dictionary.com (based on Random House Unabridged Dictionary, 2020).<sup>10</sup>

Some states now recognize a person’s declared gender identity based solely on self-identification, including Oregon, which permits individuals changing the sex designation on their legal documents to choose male, female, or non-binary. *In the Matter of Jones David Hollister*, 470 P.3d 436, 439 (Or. Ct. App. 2020). The court in ruling for Hollister noted that the statute’s previous requirement for medical “transition” was rescinded, thereby “shifting the focus away from physical anatomy to affirming gender identity.” *Id.* at 443.

**C. Subjective psychological distress is not a valid legal basis for diminishing protections for women under sex-based civil rights law.**

Subjective distress about one’s sex has never previously served to define a class of persons protected under civil rights laws, and no law justifies or requires that the Court end female-only sports now because some male athletes experience distress. This would actually lead to doctors essentially “prescribing” a legal remedy: that transgender-identifying males must be permitted to play on girls’ and women’s sports teams as part of the treatment for gender dysphoria. The Fourth Circuit’s injunction order goes along with that approach, placing on women and girls the burden of giving

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<sup>10</sup> <https://www.dictionary.com/browse/soul>

up athletic and education opportunities supposedly to “treat” male students’ mental health needs.

The conceptual illogic of this approach becomes even more obvious when applied to other characteristics such as race. Imagine a white person suffering severe psychological distress due to his race, submitting to this Court numerous declarations from highly regarded medical experts averring that his personal distress would be relieved if he was legally recognized by his “racial identity” of Black and allowed to access services reserved for that group.

There is no precedent or legal authority for conscripting resources of one group to give to another, especially when those resources only exist to maintain an even playing field between the two groups.

“Transracialism” is not a hypothetical concept, and it has received support — albeit controversially — from pro-transgender academics. Rebecca Tuvel, *In Defense of Transracialism*, HYPATIA: A JOURNAL OF FEMINIST PHILOSOPHY at 263 (2017). Those who are white but (earnestly) “identify” as other races have received justified backlash when displacing even a small number of people for things like scholarships and leadership positions. *Id.*

## **II. WOMEN AND GIRLS ARE DISADVANTAGED ON THE BASIS OF SEX; THEY LOSE CRITICAL PROTECTIONS IF THE LAW FAILS TO RECOGNIZE THE FEMALE SEX-CLASS.**

The biological distinction between men and women has been the criteria by which women have been discriminated against, excluded from public life, exploited, enslaved, sexually abused, and disenfranchised all throughout history. Women are not asked how they identify or how they see themselves before they experience these things. Women's feelings are wholly irrelevant to their condition and standing in this world.

### **A. The cultural, legal, and physical barriers to athletic participation for women are based on their sex.**

From the moment they are identified as female at or before birth, many girls enter a pipeline of disparate treatment from their family, community, and the law. In families with limited resources, a son may receive higher quality nutrition and better health care than a daughter. A male child is more likely to attend school, and less likely to be withdrawn by his family before graduation. In no country on earth is he denied – on account of his sex – the right to vote, to work, to own property, to move about society, or to speak his mind freely. In contrast, girls do not have the same advantageous treatment. Even in the U.S., despite ostensible legal equality between the sexes, there are still significant disadvantages to being born female, including

many barriers to women's participation in sports. Women's Sport and Fitness Foundation, *Barriers to sports participation for women and girls*, (2008).<sup>11</sup>

Practical barriers include lack of funding (including low pay for female athletes and many fewer sponsorship opportunities), personal safety, transportation, and facilities access. *Id.* Cultural barriers include religious constraints on "modesty," negative messaging from parents and other adults, and ideas about femininity and competition. *Id.* See also Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges and Opportunities in Sports for Girls and Women*, (2020).<sup>12</sup> One particularly insidious barrier is sexual harassment and abuse from coaches and officials. One advocacy group reported that some girls and women drop out in response to abuse, and others endure it for the sake of competing, or because of fear, low self-esteem, or isolation. *Id.*

As of 2020, girls in American high schools and colleges still participate in sports at a rate 7-10% lower than boys, and 87% of NCAA schools offered more and higher-quality athletic opportunities to male students. *Id.* Coaches face barriers of their own: 31% of female coaches believed they would risk their job if they spoke up about Title

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<sup>11</sup> <https://www.lrsport.org/uploads/barriers-to-sports-participation-for-women-girls-17.pdf>

<sup>12</sup> <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>

IX and sex-based disparities, 60% reported being paid less than male coaches, and 63% reported facing sex discrimination in the workplace. *Id.*

There has been significant discussion of the differences between men and women in areas such as size, speed, and strength, which necessitate single-sex teams for safety and fair play. But girls and women have additional physiological challenges. Female athletes are far more prone to severe injury even in single-sex competition, especially during the first few weeks of their menstrual cycle. Jason D. Vescovi, *The Menstrual Cycle and Anterior Cruciate Ligament Injury Risk*, SPORTS MEDICINE 41, 91-101 (2011). They are also vulnerable to a condition called Female Athlete Triad, which causes osteoporosis, increases in fractures, and psychological issues such as depression, anxiety, body dysmorphia, and eating disorders. Committee on Adolescent Health Care, *Female Athlete Triad*, American College of Obstetricians and Gynecologists, Committee Opinion No. 702 (June 2017).<sup>13</sup> Male athletes lack the same vulnerabilities and thus enjoy a significant competitive advantage over female athletes.

Girls contend with female biological functions even in peak health. Most menstruate once they reach puberty, which can cause regular disturbances in training schedules and impair performance, particularly if the athlete experiences

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<sup>13</sup><https://www.acog.org/en/Clinical/Clinical%20Guidance/Committee%20Opinion/Articles/2017/06/Female%20Athlete%20Triad>

common symptoms such as premenstrual dysphoric disorder, pain, or heavy bleeding. Rebekka J. Findlay, *How the menstrual cycle and menstruation affect sporting performance: experiences and perceptions of elite female rugby players*, BRITISH JOURNAL OF SPORTS MEDICINE, VOL. 54, Issue 18 (2020), (reporting that three quarters of elite rugby players and half of elite female runners and rowers report that menstrual symptoms adversely affected their performance). Women can get pregnant, intentionally or not, which can disrupt their participation and even their careers.

With all of this in mind, it is important to remember two facts. One, a female athlete does not escape any of these obstacles, nor does she gain any competitive advantage, by self-identifying as male. Two, a male athlete's self-identification as female does not subject him to this same myriad of obstacles female athletes face, so he retains an innate competitive advantage regardless of his subjective identity claims.

**B. Sex stereotyping is not a permissible basis for sports segregation.**

Sex is a permissible basis by which most sports can be segregated, because the substantial, enduring physical differences in male and female physiology (and attendant competitive advantage conferred on males) means that the sexes are “not similarly situated in certain circumstances.” *Michael M. v. Superior Court*, 450 U.S.

464, 469 (1981); *United States v. Virginia*, 518 U.S. 515, 533 (1996). Conversely, if there were no innate competitive advantages associated with male physiology, then all sex-segregation in sports would be legally questionable.

B.P.J. seeks a declaration from the Court that exclusively female teams are no longer permissible despite settled law because they must include males with a “feminine” gender expression or identity. This is directly contrary to the spirit and letter of Title IX and the Equal Protection Clause, under which sex stereotyping has long been recognized as a form of prohibited sex discrimination. Courts are not compelled by the Equal Protection Clause to disregard sex differences. *Michael M.*, 450 U.S. at 481; *See also Clark ex rel. Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9<sup>th</sup> Cir. 1982). Segregating sports by masculine and feminine sex stereotypes is no more permissible or logical than segregating by race or sexual orientation.

### **III. BOSTOCK DOES NOT PROVIDE RELEVANT OR PERSUASIVE AUTHORITY IN THIS CASE.**

*Bostock v. Clayton Cty., Georgia* declares that “for an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex,” and that doing so is a violation of Title VII of the Civil Rights Act. 140 S. Ct. 1731,



1743 (2020). Applying the *Bostock* decision to this case would be a significant error, and this Court should not strain to extend that ruling to the setting of school athletics.

**A. The Court was explicit that the holding was narrow and is not meant to other contexts.**

*Bostock* narrowly addressed only the issue of firing an employee who asserts a transgender status. This Court dismissed any suggestion that the holding applied to other state or federal sex discrimination laws, saying: “none of [them] are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.” *Bostock* at 1753.

A narrow interpretation of *Bostock* is further supported by the record. The late Justice Ginsburg asked Plaintiff’s counsel during oral arguments whether their arguments extended to permissible sex segregation in athletics under Title IX, and counsel responded that it: “would not be affected even by the way that the Court decides this case.” Oral Arg. Tr., *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, at 17-18.<sup>14</sup> Since neither the Plaintiffs nor this Court attempted to address Title IX in that decision, a broad construction of *Bostock* extending unreservedly to Title IX is completely unsupported.

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<sup>14</sup> [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_c18e.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf)

**B. Title IX regulations permit differential treatment of the sexes to achieve equal opportunity for girls and women.**

The logic used by this Court in the *Bostock* decision is this: The employee's sex in that case was generally not relevant to employment decisions under Title VII, so self-identification as the opposite sex was also not relevant to employment decisions. *Bostock* at 1737. In contrast, an athlete's sex is expressly relevant under Title IX regulations, which in some cases *require* differential treatment on the basis of sex in order to assure equal opportunity. 34 C.F.R. 106.41(b). The Appellees' argument that sex should be determined by a person's internal sense of their own identity is antithetical to the reasoning behind single-sex teams. *Id.*

Not long after the *Bostock* decision, the U.S. Department of Education's Office of Civil Rights (OCR) affirmed in a Revised Letter of Impending Enforcement Action (relating to a separate matter) that *Bostock* is inapplicable to Title IX athletics, stating:

The logic that an employer must treat males and females as similarly situated comparators for Title VII purposes necessarily relies on the premise that there are two sexes, and that the biological sex of the individual employee is necessary to determine whether discrimination because of sex occurred. Where separating students

based on sex is permissible—for example, with respect to sex-specific sports teams—such separation must be based on biological sex.

*In re. Connecticut Interscholastic Athletic Conference, et al*, Case No. 01-19-4025 (Aug. 31, 2020) (“Revised OCR letter”) at 35.<sup>15</sup> OCR stated further that, if *Bostock* does apply, then under the logic of that case:

[S]pecial exceptions from single-sex sports teams based on homosexuality or transgender status would themselves generally constitute unlawful sex discrimination, because homosexuality and transgender status are not physiological differences relevant to the separation of sports teams based on sex. In other words, if *Bostock* applies, it would require that a male student-athlete who identifies as female not be treated better or worse than other male student-athletes. If the school offers separate-sex teams, the male student-athlete who identifies as female must play on the male team, just like any other male student-athlete.

*Id.* at 36. This logical and obvious interpretation was later speciously abandoned by the next administration in a series of executive orders, guidance documents, and other non-official actions that institute the opposite policy without any real attempt

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<sup>15</sup> <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>

to rebut its arguments. Exec. Order No. 13988, 86 FR 7023 (2021). This policy and similar ones in other federal agencies are currently enjoined in twenty states for “fail[ing] to cabin themselves to *Bostock’s* holding,” the Court admonished. *Tennessee v. U.S. Dep’t of Educ.*, 2022 U.S. Dist. LEXIS 125684, \*60 (E.D. Tenn. 2022).

Moreover, the court in *Bostock* failed to define “transgender” in any meaningful way beyond a person’s assertion that they have a “gender identity” at odds with their sex. The court reasoned that merely self-identifying as a woman – if a plaintiff alleges that identification was the basis for termination of employment – is sufficient to provide protection from termination. *Bostock* at 1741. The Court thus did not find it necessary to define what it means to be “transgender” beyond that lowest of etymological bars.

**C. *Bostock* did not implicate the rights of other individuals under Title VII in the same manner that the decision below infringes on the rights of women and girls under Title IX.**

A critical difference between the provisions of Title VII at issue in *Bostock* and the provisions of Title IX at issue here makes them inapposite: Unlike the harms that flow from reinterpreting Title IX to prohibit single-sex athletic competitions, extending protection on the basis of “gender identity” in *Bostock* did not violate another employee’s rights under Title VII.

Similarly, restoring a transgender-identified plaintiff’s position with the Georgia General Assembly’s Office of Legislative Counsel under the Equal Protection Clause,

as in *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011), did not infringe the Equal Protection rights of anyone else. Holding that a fire department’s adverse employment action on the basis of transgender identity was cognizable under Title VII, as in *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004), did not violate anyone else’s Title VII rights. Deciding that refusal to give a cross-dressing man a loan application was discrimination “on the basis of sex” under the Equal Credit Opportunity Act, as in *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000), did not violate anyone else’s rights to equal credit opportunity. And applying the Gender Motivated Violence Act to an attempted rape of a transgender-identified prisoner by a prison guard, as in *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000), did not infringe on anyone else’s rights under that Act.

But Title IX is different. Congress enacted Title IX as a remedial statute for the benefit of women. Granting Title IX rights to men who self-identify as women necessarily violates the rights Congress gave women in this law.

## CONCLUSION

If the words “women” and “girls” and “female” have no clear meaning — if women and girls do not face barriers to athletic participation because of their sex — if women and girls would have the same opportunity for safe, fair play on co-ed sports teams

— if women are not a discrete legally-protectable category — then one might rightly wonder why the Title IX regulations exist in the first place.

The outcome of this case is a statement on whether the courts will honor the plain text and original intent of Title IX, which is to prohibit discrimination on the basis of sex. Women and girls deserve more than what the Fourth Circuit’s ruling gives them, and we urge the Court to vacate the injunction and to reverse the decision to undermine fair play for women and girls subject to it.

Respectfully submitted,

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