NO. 24-43

In the
Supreme Court of the United States

WEST VIRGINIA, *et al.*,

Petitioners,

v.

B.P.J., by next friend and mother Heather Jackson,

Respondents.

On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICA CURIAE* OF A.C., A MINOR, BY HER NEXT FRIEND AND MOTHER ABIGAIL CROSS

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IDENTITY AND INTEREST OF *AMICA CURIAE*[1]

Pursuant to the district court's preliminary injunction in this case, the plaintiff B.P.J. has competed for multiple years now on the girls' track and field team at Bridgeport Middle School in Bridgeport, West Virginia. *Amica* A.C. is a biological girl, one grade ahead of B.P.J., who was on the same team and participated in some of the same events for two years. Despite being younger, B.P.J. frequently defeated A.C. in those events. In addition, A.C. experienced privacy concerns from changing clothes in shared locker rooms with B.P.J., and from sexual remarks that B.P.J. made during practices. For the 2024-25 school year and future years, the lower courts' injunctions would mean that A.C. and B.P.J. will potentially again be teammates, this time on the high-school track team.

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[1] No counsel for any party to this case authored this brief in whole or in part. No party to this case and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, and their counsel made such a monetary contribution. Counsel of record received timely notice of the intent to file this brief under this Court's Rule 37.2.

STATEMENT

In this Petition for Certiorari, West Virginia seeks this Court's determination of the validity of its legislation reserving women's and girls' sports for women and girls, defined with reference to biological criteria.

A.C. is currently litigating a very similar issue in another case, including before this Court. Six States, including A.C.'s home State of West Virginia, sued the Department of Education to block the implementation of a new regulation that purports to restrict "discrimination on the basis of … gender identity," and to bar participating schools from "prevent[ing] a person from participating in an education program or activity consistent with the person's gender identity."[2] A.C. intervened in that case on the basis that, as the Sixth Circuit put it, "a student who was assigned male at birth but identifies as female"—B.P.J., the plaintiff-respondent here—"was allowed to compete against, and share facilities with, A.C. and the rest of the girls' track and field team." *Tennessee v. Cardona*, 2024 WL 3453880, at *1 (6th Cir. July 17, 2024). That participation occurred as a result of the preliminary injunction entered by the district court in this case.

In the *Tennessee* case, the district court granted a preliminary injunction against the regulation, the Sixth Circuit declined to stay the injunction pending appeal, *see generally id*, and the Department of Education has asked this Court for a stay. *Cardona v. Tennessee,* No. 24A79 (U.S.) (application filed July 22,

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[2] *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* 86 Fed. Reg. 33,886-87 (Apr. 29, 2024)

2024). A.C. is among the respondents who have filed oppositions to that application. Resp. in Opp. to Application for Partial stay, *id.* (filed July 26, 2024).

As A.C. has explained in that filing, she is a female athlete and high-school student. (*Id.* at 7.) She throws shot put and discus, runs track, and plays in the marching band. *Ibid.* When A.C. was in middle school, the district court's preliminary injunction in this case allowed B.P.J. to compete on A.C.'s school track team. *Ibid.* B.P.J. regularly outperformed A.C. and other girls on the field, changed clothes in the girls' locker room, and made sexual remarks to A.C. and her teammates. *Ibid.* In upcoming school years, B.P.J. and A.C. would likely be on the same high-school track team. A.C. does not want to compete with or share private spaces with any biological male, regardless of gender identity. *Ibid.*

SUMMARY OF ARGUMENT

In most areas, women's rights are safeguarded by ensuring that all citizens can participate in public life in the same ways, regardless of their sex. But special concerns arise with respect to private spaces such as locker rooms and restrooms, and with respect to physical competitions such as athletics. In these areas, our nationwide consensus has been that equal opportunity for women requires providing separate facilities and programs for them.

This need is predicated on biological differences between women and men. Consequently, there are powerful reasons why access to women's private spaces and athletic competitions should be determined by the biological characteristics that make a person female.

In many other areas, sex distinctions are properly regarded as immaterial, and the law can protect both women (defined biologically) and transgender people (defined by gender identity) in enjoying the same rights as all other citizens. But a conflict arises with respect to areas that our society recognizes should be reserved for women. The very premise of the concept of "gender identity" is that a person's interior sense of being a woman bears no necessary relationship to the person's physical characteristics. Thus, these areas present an inescapable choice: they can be reserved for biological women, *or* they can be reserved for people who identify as women. Because the separate existence of women's sports is justified by biological differences between women and men, there are exceedingly strong reasons to continue defining eligibility for

women's sports with reference to biological differences between women and men.

In these areas, advocacy for replacing a biological-sex eligibility criterion with a gender-identity criterion cannot logically be grounded in this Court's decision in *Bostock v. Clayton County*. That decision holds that distinctions based on transgender status are a logical subset of distinctions based on sex—and so, where sex distinctions are illegal, transgender-status distinctions are illegal as well. That reasoning has no application to women's private spaces and athletic competitions, where sex-based distinctions are *not* illegal or impermissible, but enjoy a widespread social and legal consensus in their favor.

West Virginia is one of a near-majority of States that have now made eligibility for women's sports programs turn on biological criteria. Those laws protect the opportunities and privacy of real girls and women, like A.C. It is a serious error for the courts to strike down these measures as somehow inconsistent with federal law. The Fourth Circuit's decision to that effect here should not stand. This Court should grant review.

ARGUMENT

I. It Is Widely Recognized That, In Athletics, Equal Opportunities For Women Require Separate Opportunities Reserved For Women.

The 150-plus-year struggle for women's rights has mostly focused on achieving equal treatment under the law. Since our country's founding, women have overcome and removed legal barriers to their voting or holding public office on the same terms as men, *see Frontiero v. Richardson*, 411 U.S. 677, 685 (1973); to their owning, inheriting, or managing their own property, *ibid.*; to their accepting paying work or entering a profession, *see Nevada Dep't of Hum. Res. v. Hibbs,* 538 U.S. 721, 729 (2003); and to their engaging in many other important activities. They have overcome countless additional social and cultural barriers to their equal participation in public life. Although room for improvement remains, our nation has made great progress toward offering all Americans "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities," without regard to their sex. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

At the same time, Americans have come to agree that in some areas, equal opportunity for women requires separate spaces or programs that are reserved for women alone. These fall primarily into two categories: private spaces such as restrooms and dormitories, and athletic competitions. When Congress mandated equal treatment for women and men in education, for instance, it was careful to specify that schools still may "maintain[] separate living facilities

for the different sexes." 20 U.S.C. 1686. And when the Department of Education promulgated regulations to implement that nondiscrimination mandate, it specified that schools generally "may operate or sponsor separate [athletic] teams for members of each sex." 34 C.F.R. 106.41(b).

II. The Consensus In Favor Of Women's Sports Has Always Been Premised On Biology—But That Is Now In Question.

Sports programs often fall into both of these categories warranting separate opportunities reserved for women. In addition to involving athletic competition, they often require athletes to change clothes or shower in shared locker rooms, or to share overnight accommodations when traveling. All of these reasons, it has been understood, justify reserving separate sports programs for women.

The emergence of this social and legal consensus for women's sports in the past several decades has done tremendous good for millions of American girls and women, offering them opportunities for growth, leadership, and excellence that likely would not have existed otherwise. Since the 1970s, the number of high-school girls participating in athletics has increased nearly thirty-fold.[3] Recent years have seen an even greater groundswell in girls' sports participation at the local level, which is now

[3] Nat'l Fed. Of State High School Ass'ns, *High School Athletics Participation Survey* at 56, Athletics Participation Survey Totals, https://www.nfhs.org/media/7212351/2022-23_participation_survey.pdf

approaching the same level as boys'.[4] *Amica* A.C. is one of the millions of girls who have benefited from these developments.

Until recently, the consensus in favor of women's sports has been premised on the biological distinction between women and men. Even as this Court has developed stronger protections for women's rights, a cornerstone of its jurisprudence has remained the recognition that "[p]hysical differences between men and women … are enduring". *United States v. Virginia*, 518 U.S. 515, 533 (1996). This basic reality is reflected in our national understanding that, with respect to private spaces and athletic competitions, equal opportunity for women means separate opportunities reserved for women. This, it has been understood, is necessary to account for the relevant physical differences between women and men. As a result, the biological distinction between women and men has always been the premise for women's sports.

In the last decade or two, however, some have voiced strong objections to this basic understanding. There has been an increasing awareness of a concept of "gender identity," reflecting that some people's interior sense of being a woman or man does not correspond with their biological sex, as determined by genetics and reproductive organs present at birth.

In many areas of public life, where sex distinctions are properly regarded as immaterial, there is no direct conflict between protecting rights of women

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[4] Project Play, Aspen Institute, *State of Play 2023: Participation Trends* at § 2, https://projectplay.org/state-of-play-2023/participation

(defined by biology) and protecting rights of transgender people (defined by gender identity). For instance, a transgender person's right to vote on the same terms as any other citizen—or to own property, or to make contracts, or to exercise various other rights—normally presents no direct conflict with any biological woman's right to do the same.

A conflict arises only in the few important areas where society still recognizes the need to reserve separate spaces and programs for women. In these areas, those advocating for transgender rights have increasingly argued that gender identity should *replace* biological sex as the eligibility criterion. Women's restrooms, or dormitories, or sports teams, it is said, should be open to anyone who identifies as a woman, even if the person's biological characteristics are mostly or wholly male. In other words, the argument goes, those spaces and programs are *not* to be reserved for biological females anymore. They must also be open to people with biologically male characteristics who identify as female.

This presents what is likely the most significant inflection point that women's sports has ever faced. It raises a host of important and hotly-debated questions. Having established an extensive and successful sporting infrastructure reserved for women, can we fairly, prudently, and feasibly abandon the physical criteria by which we have defined who is eligible to participate? If we can, what replacement criteria could or should we use? And if we do, how might it affect the revolutionary success of women's sports over the past half century? It is no exaggeration to say that the future of women's sports may hinge on the answers.

III. There Are Extraordinarily Powerful Reasons To Continue Determining Eligibility For Women's Sports Based On Physical, Biological Criteria.

Faced with those questions, a near-majority of the States have enacted statutes that retain or establish physical, biological criteria for determining who may participate in women's sports.[5] There are exceedingly strong reasons for this approach. Put simply, it makes sense to define eligibility for women's sports by the biological differences between women and men, because the very existence of women's sports is justified by the biological differences between women and men.

In this regard, it is important to be specific about how women and men are physically different from each other in ways that recommend separate athletic opportunities. Boys and men tend to be significantly stronger and faster, physically, than girls and women. Biological men tend to be taller and heavier than biological women; their muscles and bones tend to be bigger and stronger; their lungs tend to take in more oxygen, and their hearts to pump more blood. For that reason, if sports programs were simply opened to all

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[5] Ala. Code 16-1-52; Ariz. Code 15-120.02; Ark. Code 6-1-107; Fla. Stat. 1006.205; Idaho Code 33-6201–6206; Ind. Code 20-33-13-4, Iowa Code Ch. 261I; Kan. Stat. 60-5601–5606; Ky. Stat. 164.2813; La. Stat. 4:444; Miss. Code 37-97-1, Mo. Stat. 163.048; Mont. Code 20-7-1306–1307; N.C. Gen. Stat. 116-400–403; N.D. Cent. Code Ch. 15.1-41-01; Ohio Code 3313.5320; 70 Okla. Stat. 27-106, S.C. Code 59-1-500; S.D. Code 13-67-1; Tenn. Code 49-7-180; Tex. Educ. Code 51.980; Utah Code 53G-6-901–904; W. Va. Code 18-2-25d; Wyo. Stat. 21-25-101–102.

comers regardless of sex and women were forced to compete against men, women's opportunities to excel and win would be sharply curtailed, and in many cases eliminated.

This is not a new observation. As Justice Stevens put it, "[w]ithout a gender–based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor v. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers). Or, as the Ninth Circuit put it in the precedent that governed until this case, "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" against each other, and "[t]hus, athletic opportunities for women would be diminished." *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

To be sure, this distinction is based on *averages*. No one thinks that every man or boy is stronger or faster than every woman or girl. And with respect to certain other athletic characteristics—such as eye-hand coordination or flexibility—men likely do not have an overall advantage. But the average differences in speed and strength are large enough and important enough that, in almost every sport, equal competitive opportunities for women can be meaningfully achieved only through separate women's events. We will not belabor this point with a multitude of examples—although it could be done—but track-and-field records provide a vivid illustration. The holders of women's world records in track and field are superb

athletes and exemplars of human excellence. Society's ability to celebrate these athletes—as it should—depends on the existence of separate women's competitions. If those world-record-holders were forced to compete against men, the record books show that the top U.S. high-school boys would regularly exceed them in every event. *See* Coleman & Shreve, *Comparing Athletic Performance: The Best Elite Women to Boys and Men*, https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf. Something similar is true in virtually every sport, at virtually every level of competition: proper recognition of women's athleticism and athletic achievements is made possible only by separate women's events.

Crucially, this distinction between women and men is also based on *biology*. Sports are inherently physical. There is no serious debate that excellence in sports depends heavily on the physical characteristics of one's body. Although training and mental preparation play major roles, raw physical ability also remains an indispensable ingredient in athletic success. Simply put, a person's athletic prowess depends, in significant part, on his or her native size, strength, speed, stamina, and numerous other physical factors. In these respects, the differences between women and men are matters of biology. They derive from the significant average physical differences between biological women's and biological men's muscles, bones, lungs, hearts, and other body parts. And as the discussion above shows, although these characteristics are not *perfectly* correlated with biological sex (as determined by reproductive organs and chromosomes), the correlation is so close and so strong that no other non-sex-based classification criteria have ever been

developed that can adequately ensure both fair competition and equal opportunity for women.

Of course, every sporting event will always have winners and losers. Learning to be gracious in either well-earned victory or hard-fought defeat is an important lesson that many people gain from athletics, and one that applies in many other circumstances throughout life. But if it were to become the norm that both sexes compete against each other in athletic competitions, then there can be no serious dispute that women's victories would become few and far between. That would teach an entirely different lesson, and one that our society is rightly reluctant to endorse. On top of that, if sports programs are to involve biological males and females changing clothes or showering in common spaces, privacy concerns may deter a number of athletes from participating at all—and there is significant risk that a disproportionate number of those deterred will be girls and women.

IV. The Court Should Grant Review To Affirm Biological Eligibility Criteria For Women's Sports.

"[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). That is exactly the situation here. Our nationwide support for women's sports is predicated on our consensus that, with respect to athletic competitions, women and men "are not similarly situated." Moreover, the relevant difference undeniably turns on

biology, not on an individual's interior sense of gender. Therefore, there can be nothing invidious or untoward about defining eligibility for women's sports based on the former rather than the latter.

This Court's decision in *Bostock v. Clayton County* is frequently invoked against that conclusion. That is incorrect. In *Bostock* the Court observed that "homosexuality and transgender status are inextricably bound up with [biological] sex," because "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." 590 U.S. 644, 651-652, 660-661 (2020). Thus, the Court held that a statutory prohibition on sex discrimination also prohibits discrimination based on a person's transgender status.

Athletics, restrooms, and dormitories present an obvious and dispositive difference from the employment discrimination at issue in *Bostock*. In these areas, the law *does not prohibit* sex-based distinctions—instead, it encourages and sometimes requires separate opportunities reserved for women. Where the logic of *Bostock* applies, it establishes that discrimination based on sexual orientation or transgender status is discrimination based on sex. But that is inapposite in areas where, as here, the law specifically *permits* sex-based distinctions.

A.C.'s experience illustrates. She does not object to competing against or sharing a locker room with B.P.J. because of B.P.J.'s gender identity. Rather, she objects to competing against or sharing locker rooms with persons of the male sex, defined biologically. West Virginia's relevant statute draws the same

distinction: it specifies that all biological males—of any gender identity—are to participate on boys' or men's teams, not girls' or women's teams. This is the precise sex distinction that is permitted by federal law.

What the plaintiffs in this and other similar cases are advocating, then, is a transformation of the logical underpinnings of transgender-rights claims that finds no footing in *Bostock*'s textual analysis. *Bostock* held that, in at least some statutory contexts, gender-identity distinctions are a logical subset of sex distinctions. By contrast, in this and similar cases, the plaintiffs argue that gender-identity distinctions should *replace* sex distinctions, in contexts where sex distinctions are lawful. Nothing in any statute or any precedent of this Court suggests that this outcome is required by any federal law.

The plaintiff and the Fourth Circuit in this case, of course, are not the only ones who wish to replace biological criteria for women's sports with internal gender-identity criteria. A vigorous public debate on that topic is underway. But this Court should recognize two important principles as common ground. First, this debate presents an inescapable choice: whether to reserve women's sports for biological women or instead to reserve them for those who identify as women. Because those two groups are not the same, it is logically impossible to do both. And second, it is entirely within legislative competence to make that choice by defining eligibility for physical competitions with reference to competitors' physical criteria as biological women.

The decision below, and others nationwide, are increasingly calling those plain realities into question. The Court should grant review to correct matters.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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