KRISTEN K. WAGGONER,
OR Bar No. 067077
Lead Counsel

RYAN J. TUCKER*
AZ Bar No. 034382
MARK A. LIPPELMANN*
AZ BAR No. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
kwaggoner@ADFlegal.org
rtucker@ADFlegal.org
mlippelmann@ADFlegal.org

DAVID A. CORTMAN*
GA Bar No. 188810
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774
dcortman@ADFlegal.org

**Admitted pro hac vice*

Attorneys for Proposed Intervenor-Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

ELIZABETH HUNTER, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF EDUCATION, et al.,

Defendants,

WESTERN BAPTIST COLLEGE d/b/a CORBAN UNIVERSITY; WILLIAM JESSUP UNIVERSITY; PHOENIX SEMINARY,

[Proposed] Defendant-Intervenors.

Case No. 6:21-cv-00474-AA

REPLY MEMORANDUM IN SUPPORT OF THE RELIGIOUS SCHOOLS' MOTION TO INTERVENE

INTRODUCTION

The Federal Defendants' response—and its revealing amendment less than 24 hours later—confirms that the Religious Schools have a right to intervene. The Federal Defendants concede that the Religious Schools satisfy all the requirements for permissive intervention and all but one of the criteria for intervention of right. Defs.' Am. Resp. in Opp'n to Mots. to Intervene at 5, 10, ECF No. 37 (Defs.' Am. Resp.). The Federal Defendants' limited opposition centers on a mere suggestion—with no commitment—that they will adequately represent the Religious Schools' interests. But none of the factors for adequate representation are satisfied. In fact, the Federal Defendants' response *shows* that they have different and competing interests, will not make all the Religious Schools' arguments, will not develop the same evidence, and will consider settlement on terms that the Religious Schools may not accept.

And the Federal Defendants demonstrated their inadequacy when—facing criticism from Plaintiffs' counsel and the media—they amended their response to abandon or diminish their defense of Title IX's religious exemption by:

- Replacing a suggestion that they will "vigorously" defend the exemption with statement that they can "adequately" defend the case;
- Removing prior statements that the Federal Defendants and the Religious Schools share the same "ultimate objective";
- Replacing the Federal Defendants' prior stated objective "to defend the statutory exemption and its current application" with a limited objective "to defend the constitutionality of the statutory exemption" alone;
- Deleting many statements that the Federal Defendants will defend the Department's current regulation implementing the religious exemption;
- Deleting many statements that the Federal Defendants will defend the Department's current application of the religious exemption; and

- Deleting prior statements that the government has a duty to defend both federal statutes and regulations.

Compare Defs.' Original Resp. in Opp'n to Mots. to Intervene at 7-9, ECF No. 36 (Defs.' Original Resp.) *with* Defs.' Am. Resp. at 7-9. The amended response confirms that the Federal Defendants will not assert all the Religious Schools' arguments and that their interests diverge from those of religious educators. But equally important, the amendment shows that the Federal Defendants will not sustain a vigorous and consistent defense of Title IX's religious exemption in the face of political pressure. The Court should grant the Religious Schools' motion.

ARGUMENT

The Religious Schools have established their entitlement to intervene. Plaintiffs did not file any opposition to the Religious Schools' motion. And the Federal Defendants concede that the Religious Schools satisfy all the requirements for permissive intervention and nearly all the criteria for intervention of right. Defs.' Am. Resp. at 5, 10, ECF No. 37. The Federal Defendants' limited opposition misses the mark, and the Court should grant the Religious Schools' motion.

I. The Religious Schools are entitled to intervention of right.

The Religious Schools are entitled to intervention of right because: (1) their application was timely; (2) they have a significant protectable interest in the action; (3) the disposition of the action may, as a practical matter, impair or impede their ability to protect their interests; and (4) the existing parties may not adequately represent the applicant's interest. *See Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998); *see also* Religious Schools' Mot. to Intervene and Mem. in Supp. at 16-25, ECF No. 8. There is no dispute that the Religious Schools satisfy the first three requirements. *See* Defs.' Am. Resp. at 5, ECF 37. The Federal Defendants only question the fourth factor regarding adequacy of representation, *id.*, but their opposition misses the mark by misstating the relevant standard, ignoring key factors

proving their inadequacy, and overlooking well-established differences between the interests of the Religious Schools and the government.

A. The burden to show inadequate representation is minimal, and no presumption of adequacy arises here.

"In evaluating whether Rule 24(a)(2)s requirements are met, we normally follow 'practical and equitable considerations' and construe the Rule 'broadly in favor of proposed intervenors.'" *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). "We do so because a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Id.* (quotations omitted). "[T]he burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). So the Court should liberally construe the adequate representation requirement in favor of intervention and consider whether the Religious Schools make a minimal showing that the Federal Defendants *may* not adequately represent their interests. The Religious Schools easily meet this burden, as explained in Section I.B. below.

The Federal Defendants point out that, under unique circumstances, a rebuttable presumption of adequate representation may arise when the prospective intervenor and an existing party share the same ultimate objective, or where the government is acting on behalf of a constituency it represents. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). But this presumption does not arise "where the intervenors have 'more narrow, parochial interests' than the existing party, or where 'the applicant asserts a personal interest that does not belong to the general public.'" *E.g.*, *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, No. 1:19-cv-00451-CL, 2019 WL 5788303, at *3 (D. Or. Nov. 6, 2019) (quoting *Forest*

Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 n.8, 1499 (9th Cir. 1995) (*abrogated on other grounds by Wilderness Soc'y*, 630 F.3d 1173); *see also Berg*, 268 F.3d at 823–24; *Cascadia Wildlands v. Kitzhaber*, No. 3:12-cv-00961-AA, 2012 WL 13055400, at *2 (D. Or. Aug. 29, 2012) (Aiken, J.) (holding that the government may not adequately represent a proposed intervenor—although they shared the same ultimate objective—when the government had a broader set of interests). And the presumption doesn't apply when the government is charged with serving "two distinct interests, which are related, but not identical." *Trbovich*, 404 U.S. at 538.

Here, no presumption of adequate representation arises for four reasons. *First*, the Religious Schools' interests in preserving a religious exemption to teach and practice Christian doctrines on gender and sexual morality are personal and parochial interests of private religious educators that do not belong to the government or the general public. *See Pennsylvania v. President United States of Am.*, 888 F.3d 52, 61 (3d Cir. 2018) (finding that the government's general interest in enforcing a law did not adequately represent a religious order's narrower interest in preserving a religious exemption). *Second*, the Federal Defendants do not adequately represent the Religious Schools' interests because the government is charged with two distinct interests that are related but not identical, namely, enforcing Title IX's nondiscrimination provisions and enforcing religious exemptions. *See id.* (finding inadequate representation because the government had two distinct interests of "accommodating the free exercise rights of religious objectors while protecting the broader public interest in access to contraceptive methods and services.").

Third, the Religious Schools' objective involves defending *both* the statutory religious exemption *and* the current implementing regulation, while the Federal Defendants' objective is limited to defending the "statutory exemption" alone. *Compare* Defs.' Original Resp. at 7-8, ECF 36, *with* Defs.' Am. Resp. at 7-8, ECF 37

(removing defense of the regulation and the religious exemption's current application from the Federal Defendants' objective and deleting prior statements that the government must defend the regulation). *Fourth*, the Religious Schools' objective is to show that the religious exemption is not only permitted but *required* to safeguard the constitutional rights of religious educators, which is more particular than the Federal Defendants' general objective "to defend the constitutionality of the statutory exemption." Defs.' Am. Resp. at 7, ECF 37.

Because no presumption of adequate representation arises here, the Religious Schools need only make a minimal showing that the Federal Defendants *may* not adequately represent their interests. And regardless, the Religious Schools would rebut any presumption by their showing below that the *Arakaki* factors for adequate representation are lacking. *See Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 952 (9th Cir. 2009) ("We assess the [intervenor's] rebuttal argument in terms of the three *Arakaki* factors").

B. The Federal Defendants *may* not adequately represent the Religious Schools' interests.

"The most important factor in determining the adequacy of representation is how the [intervenors'] interest compares with the interests of existing parties." *Arakaki*, 324 F.3d at 1086. To compare such interests, courts consider three *Arakaki* factors: "(1) whether the interest of a present party is such that it will *undoubtedly* make *all* of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer *any* necessary elements to the proceeding that other parties would neglect." *Id.* (emphasis added). Each factor shows that the Federal Defendants may not adequately represent the Religious Schools.

1. The Federal Defendants will not *undoubtedly* make *all* the Religious Schools' arguments.

"Adequate representation requires, among other things, that the representative will undoubtedly make all of a proposed intervenor's arguments . . . ." *Exec. Risk Specialty Ins. Co. v. Rutter Hobbs & Davidoff, Inc.*, 564 F. App'x 887, 890 (9th Cir. 2014) (Watford, J., dissenting) (quotations omitted). The Federal Defendants cited this factor in their response memoranda but conspicuously refused to say that they would press and preserve all the Religious Schools' arguments. Indeed, their Amended Response confirms that the Federal Defendants will *not* make several important arguments.

Title IX Applicability. The Religious Schools will argue that the Court should dismiss the First Amended Complaint without reaching the constitutionality of the religious exemption because Title IX's prohibition of "sex" discrimination does not extend to sexual orientation or gender identity. *See* Religious Schools' Proposed Mot. to Dismiss at 37-39, ECF No. 32. It cannot be said that the Federal Defendants will *undoubtedly* make this argument. Just last week, Defendant Goldberg issued a Notice of Interpretation to clarify that "the Department interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity." Suzanne B. Goldberg, *Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of* Bostock v. Clayton County (June 16, 2021), attached as **Exhibit A**, at 4. This act removed any doubt that President Biden's executive orders direct the government's position in this case. *See* Exec. Order No. 13,988, 86 Fed. Reg. 7023, § 1 (Jan. 20, 2021) ("Title IX . . . prohibit[s] discrimination on the basis of gender identity or sexual orientation . . . ."); Exec. Order 14,021, 86 Fed. Reg. 13,803, § 1 (Mar. 8, 2021) ("an educational environment free from discrimination on the basis

of sex . . . including discrimination on the basis of sexual orientation or gender identity . . . is codified, in part, in Title IX . . . .").

And the Federal Defendants are represented by the United States Department of Justice, which declared *its* official position that Title IX's prohibition of "sex" discrimination extends to sexual orientation and gender identity. *See* Pamela S. Karlan, Principal Deputy Assistant General, *Application of* Bostock v. Clayton County *to Title IX of the Education Amendments of 1972* (Mar. 26, 2021), available at https://www.justice.gov/crt/page/file/1383026/download (last visited June 21, 2021). And the Department of Justice is now filing statements of interest in other cases arguing that Title IX extends to sexual orientation and gender identity. Statement of Interest of the United States, *B.P.J. v. West Virginia State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W.Va. June 17, 2021), attached as **Exhibit B**, at 8. Thus, the Court should find that the Federal Defendants will not undoubtedly make this threshold argument.

Defending the Current Regulation. Plaintiffs challenge the validity and constitutionality of 34 C.F.R. § 106.12, the Department's current regulation implementing Title IX's religious exemption. *See* Am. Compl. ¶¶ 674-97, ECF No. 35. The Religious Schools will defend the regulation and will argue that the current application of the religious exemption is required to avoid infringing the Religious Schools' constitutional rights. *See* Religious Schools' Proposed Mot. to Dismiss at 35, 37, ECF No. 32. It cannot be said that the Federal Defendants will *undoubtedly* make this argument.

Less than 24 hours after suggesting that they would "vigorously" defend the statutory exemption and its current application in the Department's implementing regulation, the Federal Defendants amended their response, limiting their objective to "adequately" defending the "statutory exemption" alone, and deleting all prior references to defending the current regulation and application of the religious

exemption. *Compare* Defs.' Original Resp. at 7-9, ECF 36, *with* Defs.' Am. Resp. at 7-9, ECF 37. So the Court should find that the Federal Defendants will not *undoubtedly* defend the current regulation or the Department's current application of the religious exemption.

Asserting Religious Schools' Rights. Besides arguing that the law permits Title IX's religious exemption, the Religious Schools will argue that the statutory exemption and its current application are *required* to safeguard their constitutional rights. *See* Religious Schools' Proposed Mot. to Dismiss at 39-44, ECF 32. Meanwhile, the Federal Defendants limit their objective to defending "the constitutionality of the statutory exemption," and their response memoranda never mention the rights of private religious educators. *See* Defs.' Am. Resp.at 7, ECF 37. The Court should find that the Federal Defendants will not *unquestionably* argue that the statutory exemption and the current regulation are required to safeguard religious educators' constitutional rights.

Because the Federal Defendants will not unquestionably make all of the Religious Schools' arguments, the Religious Schools are not adequately represented by any existing party.

2. The Federal Defendants are not capable and willing to make all the Religious Schools' arguments, and the Religious Schools offer necessary elements that existing parties would neglect.

A proposed intervenor may not be adequately represented if the existing party is not capable and willing to make all the intervenors' arguments, or if the proposed intervenor would offer any necessary element that existing parties may neglect. *Arakaki*, 324 F.3d at 1086. As explained above, the Federal Defendants are not willing to make all the Religious Schools' arguments. But they are also not capable of making such arguments and would neglect necessary elements that the Religious Schools could provide. For one thing, the Federal Defendants and the Department of

Justice have made clear that they will not make and preserve the Religious Schools' argument that Title IX's prohibition against "sex" discrimination does not extend to sexual orientation and gender identity.

And as governmental actors, the Federal Defendants are not situated to make the Religious Schools' arguments that the religious exemption and the current regulation are required to protect the constitutional rights of religious educators. The Court should dismiss this case, but if litigation proceeds to discovery, the Religious Schools will be able to offer different evidence than the Federal Defendants. The Religious Schools could produce testimony and evidence showing, among other things, that the requested relief would infringe on their free exercise of religion in chapel services and religious classrooms, would infringe their free speech on campus and in policy handbooks, and would violate their professors' academic freedom to discuss and teach biological, psychological, and anthropological principles that were uncontroversial just a few years ago. The Federal Defendants are simply not able to present the same evidence that the Religious Schools could offer in defending their constitutional rights.

Because all three *Arakaki* factors are lacking, the Court should find that the Federal Defendants may not adequately represent the Religious Schools' interests.

II. Alternatively, the Court should grant permissive intervention.

Under Rule 24(b)(B), the Court may grant permissive intervention to anyone who "has a claim or defense that shares with the main action a common question of law or fact." There is no dispute that the Religious Schools satisfy all the requirements for permissive intervention. Defs.' Am. Resp. at 10, ECF 37. The Court should grant permissive intervention because Religious Schools' motion is timely, this litigation uniquely impacts the Religious Schools, and intervention will cause no undue delay or prejudice to the original parties.

Still, the Federal Defendants assert three arguments against permissive intervention. *First*, the Federal Defendants argue that the Religious Schools have not rebutted a presumption of adequate representation. Defs.' Am. Resp. at 10, ECF 37. But inadequate representation is not a requirement for permissive intervention. *See* FED. R. CIV. P. 24(b). And as explained in Section I above, no presumption of adequacy applies here, and the Religious Schools show that the Federal Defendants may not adequately represent their interests. *Second*, the Federal Defendants suggest—but do not argue or show—that the Religious Schools lack standing. Defs.' Am. Resp. at 10, ECF 37. But as explained in Section III below, standing is not generally required for intervenor-*defendants*, and in any event, the Religious Schools have standing. *Third*, the Federal Defendants argue that intervention might complicate their defense because the Religious Schools may seek different settlement terms than the government or may file different motions or discovery requests. *Id.* But this just shows why intervention *should be* granted. That the Federal Defendants contemplate settling on terms that the Religious Schools would reject just shows that the government's interests are not identical with those of private educators. Because the Religious Schools' involvement would aid the Court, they should be permitted to intervene.

III. Standing is generally not required for intervenor-defendants, but the Religious Schools nevertheless have standing.

The Federal Defendants suggest that the Religious Schools require Article III standing to intervene. Defs.' Am. Resp. at 5, n. 1, ECF 37. Not so. Intervenor-*defendants* need not establish Article III standing to participate in a case already pending before a trial court. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that the Court need not even consider intervenor-defendants' standing if a case or controversy exists between the original parties). "The Supreme

Court has held that a party must have Article III standing both to initiate an action and to seek review on appeal . . . [b]ut an intervenor who performs neither of those functions and no other function that *invokes* the power of the federal courts need not meet Article III standing requirements." *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014) (emphasis in original). In support of their argument, the Federal Defendants cite *SurvJustice Inc. v. DeVos*, but that non-binding case involved a proposed intervenor-*plaintiff* who sought to invoke the court's jurisdiction even beyond the original plaintiff. No. 18-cv-00535-JSC, 2019 WL 1427447, at *4-5 (N.D. Cal. Mar. 29, 2019). Because the Religious Schools seek to intervene as defendants who will not invoke the Court's jurisdiction, they need not establish standing.

Even so, the Religious Schools *do* have standing because of their personal stake in this litigation. If Plaintiffs prevail in striking down Title IX's religious exemption and the current implementing regulation, the Religious Schools would be forced to either stop speaking and practicing their religious beliefs on gender and sexual morality (infringing their constitutional rights) or suffer a catastrophic reduction in enrollment of students who require financial aid (threatening their very existence). Either outcome presents an existential threat to the Religious Schools: either they cease to be *themselves*, or they cease to *be* altogether. The Federal Defendants suggest that the Religious Schools lack standing simply because none of the named Plaintiffs personally attended the Religious Schools. Defs.' Am. Resp. at 5, n. 1, ECF 37. But Plaintiffs' personal attendance doesn't matter. Plaintiffs seek to represent a class of "more than 100,000" students who *may* attend the Religious Schools. Am. Compl. ¶ 574, ECF 35. And regardless of class certification or personal attendance, Plaintiffs' requested relief would affect the Religious Schools, who rely on Title IX's religious exemption to pursue their educational mission.

CONCLUSION

For the reasons stated above, the Court should grant Religious Schools' motion and allow them to intervene either as of right or permissively.

Respectfully submitted this 22nd day of June, 2021.

/s/ Mark A. Lippelmann

KRISTEN K. WAGGONER,
OR Bar No. 067077
Lead Counsel

RYAN J. TUCKER*
AZ Bar No. 034382
MARK A. LIPPELMANN*
AZ BAR No. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
kwaggoner@ADFlegal.org
rtucker@ADFlegal.org
mlippelmann@ADFlegal.org

DAVID A. CORTMAN*
GA Bar No. 188810
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774
dcortman@ADFlegal.org

**Admitted pro hac vice*

CERTIFICATE OF COMPLIANCE

This memorandum complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), or 54-3(e) because it contains 3,360 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

/s/ Mark A. Lippelmann

MARK A. LIPPELMANN*
AZ BAR NO. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90TH STREET
SCOTTSDALE, AZ 85260
TELEPHONE: (480) 444-0020
mlippelmann@ADFlegal.org

Attorneys for Proposed Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2021, the foregoing was served via CM/ECF on counsel for all parties.

/s/ Mark A. Lippelmann

MARK A. LIPPELMANN*
AZ BAR NO. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90TH STREET
SCOTTSDALE, AZ 85260
TELEPHONE: (480) 444-0020
mlippelmann@ADFlegal.org

Attorneys for Proposed Intervenor-Defendants

EXHIBIT A

Suzanne Goldberg Notice of Interpretation of Title IX

Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*

Notice of Language Assistance

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339) or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: **如果您不懂英語，或者使用英**语有困难，**您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電** 1-800-USA-LEARN (1-800-872-5327) **(聽語障人士專線**：1-800-877-8339), **或電郵**: Ed.Language.Assistance@ed.gov**。**

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức củaBộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkolsa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вампредоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

4000-01-U

DEPARTMENT OF EDUCATION

The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Notice of interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in *Bostock v. Clayton County*. This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.

DATES: This interpretation is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Alejandro Reyes, Director, Program Legal Group, Office for Civil Rights. Telephone: (202) 245-7272. Email: Alejandro.Reyes@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Background: Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of Federal financial assistance. The Department's Office for Civil Rights (OCR) is responsible for the Department's enforcement of Title IX.

OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Notice of Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ___ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*., which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Notice of Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation, as set out below.

Interpretation:

Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity.

Consistent with the Supreme Court's ruling and analysis in *Bostock*, the Department interprets Title IX's prohibition on discrimination "on the basis of sex" to encompass discrimination on the basis of sexual orientation and gender identity. As was the case for the Court's Title VII analysis in *Bostock*, this interpretation flows from the statute's "plain terms." *See Bostock*, 140 S. Ct. at 1743, 1748-50. Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR's responsibility to enforce Title IX's prohibition on sex discrimination.

I. The Supreme Court's Ruling in *Bostock*

The Supreme Court in *Bostock* held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity "requires an employer to intentionally treat individual employees differently because of their sex." 140 S. Ct. at 1742.[1] As the Court also explained, when an employer discriminates against a person for

[1] The Court recognized that the parties in *Bostock* each presented a definition of "sex" dating back to Title VII's enactment, with the employers' definition referring to "reproductive biology" and the employees' definition "capturing more than anatomy[.]" 140 S. Ct. at 1739. The Court did not adopt a definition, instead "assum[ing]" the definition of sex provided by the employers that the employees had accepted "for argument's sake." *Id.* As the Court made clear, it did not need to adopt either definition to conclude that discrimination "because of . . . sex" encompasses discrimination based on sexual orientation and gender identity. *Id.* ("[N]othing in our approach to these cases turns on the outcome of the parties' debate…."). Similar to the Court's interpretation of Title VII, the Department's interpretation of the

being gay or transgender, the employer necessarily discriminates against that person for "traits or actions it would not have questioned in members of a different sex." *Id*. at 1737.

The Court provided numerous examples to illustrate why "it is impossible to discriminate against a person" because of their sexual orientation or gender identity "without discriminating against that individual based on sex." *Id*. at 1741. In one example, when addressing discrimination based on sexual orientation, the Court stated:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

Id.

In another example, the Court showed why singling out a transgender employee for different treatment from a non-transgender (*i.e.,* cisgender) employee is discrimination based on sex:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee

---

scope of discrimination "on the basis of sex" under Title IX does not require the Department to take a position on the definition of sex, nor do we do so here.

identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 1741-42.

II. *Bostock*'s Application to Title IX

For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination "because of . . . sex" encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination "on the basis of sex" under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.

a. *There is textual similarity between Title VII and Title IX.*

Like Title VII, Title IX prohibits discrimination based on sex.

Title IX provides, with certain exceptions: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…." 20 U.S.C. § 1681(a).

Title VII provides, with certain exceptions: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[] . . .; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex[] . . . ." 42 U.S.C. § 2000e-2(a). (Title VII also prohibits discrimination based on race, color, religion, and national origin.)

Both statutes prohibit sex discrimination, with Title IX using the phrase "on the basis of sex" and Title VII using the phrase "because of" sex. The Supreme Court has used these two phrases interchangeably. In *Bostock*, for example, the Court described Title VII in this way: "[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin." 140 S. Ct. at 1737 (emphasis added); *id.* at 1742 ("[I]ntentional discrimination *based on sex* violates Title VII…." (emphasis added)); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("[W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' '*on the basis of* sex,' in violation of Title IX." (second emphasis added)); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) ("[W]hen a supervisor sexually harasses a subordinate *because of* the subordinate's sex, that supervisor 'discriminate[s]' *on the basis of sex*." (emphasis added)).

In addition, both statutes specifically protect *individuals* against discrimination. In *Bostock*, 140 S. Ct. at 1740-41, the Court observed that Title VII "tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals." The Court made a similar observation about Title IX, which uses the term *person*, in *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), stating that "Congress wanted to avoid the use of federal resources to support discriminatory practices [and] to provide *individual* citizens effective protection against those practices." *Id.* (emphasis added).

Further, the text of both statutes contains no exception for sex discrimination that is associated with an individual's sexual orientation or gender identity. As the Court stated in *Bostock*, "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." 140 S. Ct. at 1747. The Court has made a similar point regarding Title IX: "[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (citations and internal alterations omitted). It also bears noting that, in interpreting the scope of Title IX's prohibition on sex discrimination the Supreme Court and lower Federal courts have often relied on the Supreme Court's interpretations of Title VII. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001).

Moreover, the Court in *Bostock* found that "no ambiguity exists about how Title VII's terms apply to the facts before [it]"—i.e., allegations of discrimination in employment against several individuals based on sexual orientation or gender identity. 140 S. Ct. at 1749. After reviewing the text of Title IX and Federal courts' interpretation of Title IX, the Department has concluded that the same clarity exists for Title IX. That is, Title IX prohibits recipients of Federal financial assistance from discriminating based on sexual orientation and gender identity in their education programs and activities. The Department also has concluded for the reasons described in this Notice that, to the extent other interpretations may exist, this is the best interpretation of the statute.

In short, the Department finds no persuasive or well-founded basis for declining to apply *Bostock*'s reasoning — discrimination "because of . . . sex" under Title VII encompasses discrimination based on sexual orientation and gender identity — to Title IX's parallel prohibition on sex discrimination in federally funded education programs and activities.

b. Additional case law recognizes that the reasoning of Bostock *applies to Title IX and that differential treatment of students based on gender identity or sexual orientation may cause harm.*

Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert filed*, No. 20-1163 (Feb. 24, 2021); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending*, No. 18-13592 (Aug. 28, 2020); *Koenke v. Saint Joseph's Univ.*, No. CV 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe v. Univ. of Scranton*, No. 3:19-CV-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

The Department also concludes that the interpretation set forth in this Notice is most consistent with the purpose of Title IX, which is to ensure equal opportunity and to protect individuals from the harms of sex discrimination. As numerous courts have recognized, a school's policy or actions that treat gay, lesbian, or transgender students differently from other students may cause harm. *See, e.g.*, *Grimm*, 972 F.3d at 617-18 (describing injuries to a transgender boy's physical and emotional health as a result of denial of equal treatment); *Adams*, 968 F.3d at 1306-07 (describing "emotional damage, stigmatization and shame" experienced by a transgender boy as

a result of being subjected to differential treatment); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044-46, 1049-50 (7th Cir. 2017) (describing physical and emotional harm to a transgender boy who was denied equal treatment); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016) (describing "substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old" transgender girl from denial of equal treatment); *Doe*, 2020 WL 5993766, at **1-3 (describing harassment and physical targeting of a gay college student that interfered with the student's educational opportunity); *Harrington ex rel. Harrington v. City of Attleboro*, No. 15-CV-12769-DJC, 2018 WL 475000, at **6-7 (D. Mass. Jan. 17, 2018) (describing "'wide-spread peer harassment' and physical assault [of a lesbian high school student] because of stereotyping animus focused on [the student's] sex, appearance, and perceived or actual sexual orientation").

c. *The U.S. Department of Justice's Civil Rights Division has concluded that* Bostock*'s analysis applies to Title IX.*

The U.S. Department of Justice's Civil Rights Division issued a Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download.

The memorandum stated that, after careful consideration, including a review of case law, "the Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation." Indeed, "the Division ultimately found nothing persuasive in the statutory text,

legislative history, or caselaw to justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly."

III. Implementing this Interpretation

Consistent with the analysis above, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. As with all other Title IX complaints that OCR receives, any complaint alleging discrimination based on sexual orientation or gender identity also must meet jurisdictional requirements as defined in Title IX and the Department's Title IX regulations, other applicable legal requirements, as well as the standards set forth in OCR's Case Processing Manual, www.ed.gov/ocr/docs/ocrcpm.pdf.[2]

Where a complaint meets applicable requirements and standards as just described, OCR will open an investigation of allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities. This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity. OCR carefully reviews allegations from anyone who files a complaint, including students who

[2] Educational institutions that are controlled by a religious organization are exempt from Title IX to the extent that compliance would not be consistent with the organization's religious tenets. *See* 20 U.S.C. § 1681(a)(3).

identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways.

While this interpretation will guide the Department in processing complaints and conducting investigations, it does not determine the outcome in any particular case or set of facts. Where OCR's investigation reveals that one or more individuals has been discriminated against because of their sexual orientation or gender identity, the resolution of such a complaint will address the specific compliance concerns or violations identified in the course of the investigation.

This interpretation supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation and gender identity. This interpretation does not reinstate any previously rescinded guidance documents.

Accessible Format: On request to the contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated:

_____

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights

EXHIBIT B

Statement of Interest of the United States in *B.P.J v. West Virginia State Board of Education*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

B.P.J., by her next friend and mother, HEATHER JACKSON, *Plaintiff*,	)	
vs.	)	Case No. 2:21-cv-00316
WEST VIRGINIA STATE BOARD OF EDUCATION, HARRISON COUNTY BOARD OF EDUCATION, WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION, W. CLAYTON BURCH in his official capacity as State Superintendent, and DORA STUTLER in her official capacity as Harrison County Superintendent, *Defendants*.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, under 28 U.S.C. § 517,[1] to advise the Court of its view that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment do not permit West Virginia to categorically exclude transgender girls[2] from participating in single-sex sports restricted to girls.

[1] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

[2] The term "transgender" describes a person whose gender identity differs from the person's sex assigned at birth. For example, a transgender girl is a person who identifies as a girl but whose sex assigned at birth was male. The term "cisgender" describes a person whose gender identity is the same as the person's sex assigned at birth. Given Plaintiff's age, the United States refers only to "girls" and "boys," but the analysis applies equally to women and men.

The United States has a significant interest in ensuring that all students, including students who are transgender, can participate in an educational environment free of unlawful discrimination and that the proper legal standards are applied to claims under Title IX and the Equal Protection Clause. The U.S. Department of Justice ("DOJ") and U.S. Department of Education enforce Title IX to protect students from sex discrimination in federally funded education programs and activities. This includes ensuring that recipients offer equal athletic opportunities to students regardless of their sex. DOJ is further charged with coordinating federal agencies' implementation and enforcement of Title IX. 28 C.F.R. Pt. 54; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. 0.51. DOJ also has authority to investigate and resolve complaints that a school board is depriving students of equal protection based on sex (and other bases). 42 U.S.C. § 2000c-6.

Under the law challenged here, West Virginia (or the "State") prohibits girls who are transgender from participating on female "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education." W. Va. Code §§ 18-2-25d(c)(1)-(2) ("H.B. 3293"). The State claims that H.B. 3293 will protect athletic opportunities for girls. Neither the facts nor the law supports that assertion. To be sure, there remain significant barriers to providing full equity in athletics for female students.[3] But permitting participation by transgender girls, who make up "approximately one half of one percent" of the United States' population, is not one of them. *See Hecox v. Little,* 479 F. Supp. 3d 930, 977 (D. Idaho 2020), *appeals docketed*, Nos. 20-35813, 20-35815 (9th Cir.

[3] Indeed, on the day Plaintiff filed this lawsuit, the United States filed an *amicus* brief in the Sixth Circuit to clarify the standards for assessing whether a school equitably meets its students' athletic interests and abilities, regardless of sex. *See* U.S. Br. as Amicus Curiae, *Balow v. Michigan State Univ.*, No. 21-1183 (6th Cir. May 26, 2021).

Sep. 17, 2020). The United States submits this Statement of Interest to provide its view that Plaintiff's Title IX and Equal Protection Clause challenges are likely to succeed on the merits.

BACKGROUND

The Governor of West Virginia signed H.B. 3293 into law on April 28, 2021, and it is set to go into effect on July 8, 2021. The law mandates that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education . . . shall be expressly designated as [male, female, or coed] based on biological sex." W. Va. Code § 18-2-25d(c)(1). The law defines "biological sex" as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." *Id.* § 18-2-25d(b)(1). It further defines "female" to mean "an individual whose biological sex determined at birth is female," with a corresponding definition for "male."[4] *Id.* §§ 18-2-25d(b)(2)-(3). The law prohibits girls who are transgender from participating on girls' sports teams, stating that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex"—where "male sex" is determined by sex assigned at birth—"where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 18-2-25d(c)(2). There is no parallel provision for participation on boys' sports teams. The law also creates a private cause of action for "[a]ny student aggrieved" by a violation, allowing for injunctive relief, damages, fees, and costs against a county board of education or state institution of higher education. *Id.* § 18-2-25d(d)(1). The Legislature's proffered justification is that "[c]lassification of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex." *Id.* § 18-2-25d(a)(5). Specifically, "[b]iological males would displace females to a substantial extent if permitted to compete on teams

[4] The United States does not concede the accuracy of these definitions.

designated for biological females." *Id.* § 18-2-25d(a)(3).

Plaintiff B.P.J is an 11-year-old girl who is transgender. She argues that Defendants' compliance with H.B. 3293 will bar her from participating in school athletics in violation of Title IX and the Equal Protection Clause. No. 1 at 2.[5] B.P.J. participated on an all-girls cheerleading team while in elementary school, and she wants to participate in girls' athletics as she enters middle school in the 2021-22 school year. No. 2-1 at 21-22. Specifically, B.P.J. wants to try out for Bridgeport Middle School's girls' cross-country and track teams. The middle school principal informed B.P.J.'s mother that her daughter may not participate on the girls' cross-country or track teams because of H.B. 3293. No. 2-1 at 23. B.P.J. does not seek to join the boys' cross-country and track teams because she is a girl and such participation would "devastate" B.P.J., "completely erase who she is," and undermine her social transition. No. 1 at 17; No. 2-1 at 23. Even if B.P.J. wanted to participate on the boys' team, the principal said it would be "confusing" for her to join the boys' teams because she looks like and presents as a girl. No. 2-1 at 23. In reality, then, H.B. 3293 will exclude B.P.J. entirely from the cross-country and track programs at her middle school. B.P.J. has moved for a preliminary injunction, arguing that Defendants' compliance with H.B. 3293 violates Title IX and the Equal Protection Clause. She requests this Court to enjoin West Virginia from enforcing H.B. 3293 and "any other law, custom, or policy that precludes B.P.J.'s participation on girls' school sports teams in West Virginia" and allow B.P.J. to participate on girls' sports teams consistent with her gender identity. No. 19 at 8.

ARGUMENT

On a motion for a preliminary injunction, the court reviews: (1) the movant's likelihood

[5] "No.__ at __" refers to the docket entry number and page number of documents filed in this case, using the Court's CM/ECF pagination.

of success on the merits; (2) the threat of irreparable harm to the movant absent an injunction; (3) the balance of hardships; and (4) the public interest. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citation omitted). The United States believes that Plaintiff will likely succeed on the merits of her Title IX and equal protection claims and does not address the other factors.

A state law that limits or denies a particular class of people's ability to participate in public, federally funded educational programs and activities solely because their gender identity does not match their sex assigned at birth violates both Title IX and the Equal Protection Clause. H.B. 3293 does exactly this. H.B. 3293's prohibition applies to all transgender girls in public secondary and postsecondary education—regardless of a student's specific circumstances—and to no one else.[6]

H.B. 3293 violates Title IX by effectively prohibiting, solely on the basis of sex, a certain subset of students—girls who are transgender—from participating in athletic programs offered by recipients of federal financial assistance ("recipients"). On its face, H.B. 3293 restricts girls who are transgender from participating on girls' teams. But because forcing transgender girls to participate on boys' teams also causes discriminatory harm, H.B. 3293 affords them no opportunity to participate on single-sex sports teams at all.

H.B. 3293 also violates the Equal Protection Clause. Discriminatory treatment against transgender people is subject to heightened scrutiny because it constitutes both discrimination based on sex and discrimination against a quasi-suspect class. H.B. 3293 fails heightened scrutiny

[6] To be sure, West Virginia may not remedy the violation by extending its categorical ban to boys who are transgender. The Supreme Court has explained that federal nondiscrimination mandates protect individuals. By extending its discriminatory ban to boys, West Virginia would not avoid liability, but rather would double it. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("Nor is it a defense for an employer to say it discriminates against both men and women because of sex. . . . Instead of avoiding Title VII exposure, this employer doubles it.").

analysis because West Virginia cannot demonstrate that prohibiting a handful of transgender student athletes from playing on athletic teams consistent with their gender identity is substantially related to any important government interest. Thus, this Court should find a likelihood that Plaintiff will succeed on the merits of both her Title IX and Equal Protection Clause claims.

I. B.P.J. Is Likely To Prevail On Her Title IX Claim

B.P.J. is likely to prevail on her Title IX claim against Defendants. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's implementing regulations mandate that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient." 34 C.F.R. § 106.41(a); 28 C.F.R. § 54.450(a). Although the regulations allow recipients to operate or sponsor separate teams based on sex, the regulations do not define "sex" or address how students who are transgender should be assigned to such teams. 34 C.F.R. § 106.41(b); 28 C.F.R. § 54.450(b). The regulations do not require, or even suggest, that recipients assign students who are transgender to teams based on their sex assigned at birth, as H.B. 3293 requires.

This Court should reject any attempt by the State to argue that *the regulations* do not prohibit the assignment of students to teams based on sex assigned at birth, regardless of whether such a classification harms transgender students. When assigning students to single-sex sports teams, a recipient must still comply with the *statutory* prohibition against discrimination based on sex in Title IX itself. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) ("[T]he implementing regulation cannot override the statutory prohibition against

discrimination on the basis of sex."), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, No. 20-1163 (Feb. 19, 2021). And the Supreme Court has recently clarified that discrimination against a person for being transgender *is* discrimination based on sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746-47 (2020); *see also Grimm*, 972 F.3d at 619. Therefore, any interpretation of Title IX's regulations that requires gender identity discrimination would violate the statute's nondiscrimination mandate. Because H.B. 3293 requires the Defendants to engage in precisely this type of sex discrimination that causes harm to B.P.J, the law violates Title IX. A discriminatory state law is no defense to a Title IX violation.

A. H.B. 3293 Requires Recipients To Discriminate In Violation Of Title IX

B.P.J. prevails on her Title IX claim by showing: (1) she was excluded from an education program or activity on the basis of sex; (2) the educational institution in question is a recipient of federal financial assistance; and (3) the improper discrimination caused her harm. *See Grimm*, 972 F.3d at 616 (citation omitted). The United States believes she is likely to make this showing.

There is no question that the school district that B.P.J. attends is a recipient of federal funds. Nor can there be any doubt that B.P.J. will be excluded from a recipient's education program or activity: Bridgeport Middle School's principal told B.P.J.'s mother that B.P.J. is ineligible for the girls' cross-country and track program. *See* No. 2-1 at 23. That is precisely the effect of H.B. 3293. It excludes all girls who are transgender from participating in girls' athletics in public secondary and postsecondary schools.

Any argument that B.P.J. has not been excluded because she could join the boys' team is untenable. B.P.J. is a girl, not a boy. She describes herself as a girl. No. 2-1 at 31. She lives and identifies as a girl in her daily life. No. 2-1 at 20. Her middle school principal acknowledged it would be "confusing" for B.P.J. to join the boys' teams given that she neither looks like, nor

presents herself as a boy. No. 2-1 at 23. As the Fourth Circuit has explained, for purposes of a discrimination analysis, B.P.J. is similarly situated to other girls. *See Grimm*, 972 F.3d at 610, 618 ("Grimm was similarly situated to other boys, but was excluded from using the boys['] restroom facilities based on his sex-assigned-at-birth."). Requiring her to join a boys' team would harm B.P.J. for the reasons discussed below. In practice, Harrison County Schools' compliance with H.B. 3293 will exclude B.P.J. from all of her school's single-sex sports teams.

It is also clear that this exclusion is based on sex. H.B. 3293 targets girls who are transgender. In *Bostock*, the Supreme Court explained that "discrimination based on . . . transgender status necessarily entails discrimination based on sex." *See* 140 S. Ct. at 1746-47. Following *Bostock*, the Fourth Circuit held that Title IX prohibits discrimination against students because they are transgender. *Grimm*, 972 F.3d at 616-17; *see also Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending*, No. 18-13592 (11th Cir. Aug. 28, 2020). In *Grimm*, the Fourth Circuit found that a school board policy violated Title IX because the school board:

> could not exclude Grimm from the boys['] bathrooms without referencing his 'biological gender' under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions.

972 F.3d at 616. So too here. H.B. 3293 separates students onto athletic teams by their "sex determined at birth," W. Va. Code § 18-2-25d (b)(2)-(3), and it is impossible to enforce H.B. 3293 against B.P.J. without referencing her sex assigned at birth.

Finally, H.B. 3293 causes B.P.J. discriminatory harm. To comply with H.B. 3293, B.P.J.'s school district must exclude her from girls' sports entirely, all the way through high school. *See Gregor v. W. Va. Secondary Sch. Activities Comm'n*, 2020 WL 6292813, at *4 (S.D. W. Va. Oct.

27, 2020) (citations omitted) (acknowledging a person may be irreparably harmed if they cannot participate in a sport at all); No. 2-1 at 60 ("[I]t can be extremely harmful for transgender youth to be excluded from the team consistent with their gender identity.").[7] B.P.J., unlike her cisgender peers, would miss the many benefits of interscholastic athletics, including skill-building, exercise, motivation, social ties, and increased confidence. No. 2-1 at 46-47. As many courts have recognized, this type of exclusion would cause a student like B.P.J. to experience stigma, isolation, and dignitary harm. *See Grimm*, 972 F.3d at 597-601, 617-18 (bathroom policy made plaintiff feel "alienat[ed]" and "humiliate[ed]"); *Adams*, 968 F.3d at 1307 (bathroom policy made plaintiff feel "sorely 'alienated' and 'different' from other students because he is transgender"); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045-47 (7th Cir. 2017) (exclusion from boys' restroom "stigmatized" transgender boy, causing him "significant psychological distress" including "depression and anxiety"), *cert. dismissed*, 138 S. Ct. 1260 (2018); *Dodds v. Dep't of Educ.,* 845 F.3d 217, 221-222 (6th Cir. 2016) (finding that exclusion from the girls' restrooms "had substantial and immediate adverse effects" on plaintiff's "daily life," "health," and "well-being").[8]

Requiring that B.P.J. participate on a boys' team would likewise cause her real and lasting harm. Joining the boys' team would contravene B.P.J.'s medically-supervised social transition. No. 2-1 at 20-21, 60. It would "erase who she is" and "devastate her," causing mental and

[7] If she attends a public college in West Virginia, B.P.J. also will be banned from women's intercollegiate sports.

[8] Conversely, the mere presence of transgender students in sex-segregated spaces that align with their gender identity does not violate cisgender students' Title IX rights. *See Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018) (restrooms and locker rooms), *cert. denied*, 139 S. Ct. 2636 (2019); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020) (restrooms, locker rooms, and showers).

emotional distress. No. 2-1 at 23, 32-33. Forcing her to run on the boys' team would "constitute harm under Title IX, as it 'invites more scrutiny and attention' from other students, 'very publicly branding all transgender students with a scarlet 'T'.'" *Grimm*, 972 F.3d at 617-18 (quoting *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) (brackets omitted), *cert. denied*, 139 S. Ct. 2636 (2019)). Being on a boys' team would make B.P.J. vulnerable to invasive questions, gossip, and ridicule for participating on the "wrong" team. This "emotional and dignitary" harm is "legally cognizable under Title IX." *See id.* at 618 (citing *Adams*, 968 F.3d at 1306-07, 1310-11). On these facts, the United States believes B.P.J. is likely to prevail on the merits of her Title IX claim.

B. Title IX Itself Provides Sufficient Protection Against H.B. 3293's Concern That Boys Will Displace Girls In Athletics

In addition to requiring recipients to discriminate based on sex, the West Virginia Legislature's justification for H.B. 3293 ignores Title IX's existing protections in the athletics context. The State seeks to justify the law on the theory that "[i]n the context of sports involving competitive skill or contact, biological males and biological females are not in fact similarly situated. Biological males would displace females to a substantial extent if permitted to compete on teams designated for biological females." W. Va. Code § 18-2-25d(a)(3).[9] As an initial matter, there are no facts to suggest that, in this case, allowing B.P.J. to participate in girls' sports will substantially displace other girls, or that any cisgender boy seeks a spot on a girls' team. An overview of Title IX's regulations, which can be credited with creating hundreds of thousands of athletic opportunities for girls, demonstrates why H.B. 3293 is unnecessary.

[9] H.B. 3293's definition of "biological males" wrongly conflates two distinct groups, cisgender boys and transgender girls. The legislature's conflation of these groups is inappropriate given the Fourth Circuit's analysis of similarly situated students in *Grimm*. 972 F.3d at 610, 618 (finding that the plaintiff, a transgender boy, was "similarly situated to other boys").

Since 1975, Title IX's implementing regulations have required recipients to provide equal athletic opportunities for their students regardless of sex. 45 C.F.R. § 86.41(c) (subsequently codified at 34 C.F.R. § 106.41(a) and 28 C.F.R. § 54.450(a)). The regulations recognized that in order to expand opportunities for girls, as the underrepresented sex, recipients could offer sex-segregated sports teams. 45 C.F.R. § 86.41(b) (subsequently codified at 34 C.F.R. § 106.41(b); 28 C.F.R. § 540(b). B.P.J. does not challenge her school's ability to offer separate boys' and girls' sports teams. She simply challenges how her school and her state intend to assign her, as a transgender girl, to a single-sex team.

The regulations further require that a recipient's "selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c); 28 C.F.R. § 54.450(c). The regulation ensures that recipients provide athletic participation opportunities that effectively accommodate the interests and abilities of each sex, and protects against boys usurping girls' athletic participation opportunities. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856-57 (9th Cir. 2014). It does not preclude recipients from treating transgender students consistent with their gender identity. Nor can it. *See Grimm*, 972 F.3d at 618 ("[T]he implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex."). And as a factual matter, there is no discernible risk that transgender girls will somehow "displace" cisgender girls "to a substantial extent." W. Va. Code § 18-2-25d(a)(3); *see also Hecox*, 479 F. Supp. 3d at 977 ("It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women.").

Moreover, under Title IX, recipients may both permit transgender girls to participate on girls' athletic teams *and* exclude cisgender boys from the girls' teams. B.P.J. is a girl. She has participated on an all-girls community cheerleading team for the last two years. No. 2-1 at 21. Her middle school principal acknowledged that it would be confusing to identify her any other way. No. 2-1 at 23. Consistent with Fourth Circuit precedent, B.P.J. is similarly situated to other girls. *See Grimm*, 972 F.3d at 610. An analogous claim by a cisgender boy to play on a girls' team rather than the corresponding boys' team would fail because: (1) he lives and presents as a boy and therefore is not similarly situated to girls for purposes of permissibly sex-segregated activities; and (2) he experiences no cognizable "emotional and dignitary harm" from being excluded from the girls' team. *Id.* at 618 (citing *Adams*, 968 F.3d at 1306-07, 1310-11).

At its core, Title IX is about ensuring equal educational opportunities to all students regardless of their sex. Despite its claim of "promot[ing] equal athletic opportunities" for girls, W. Va. Code § 18-2-25d(a)(5), H.B. 3293 does the opposite. It targets a vulnerable and historically marginalized subset of girls and prohibits them from participating in athletics. It bars girls who are transgender from teams that are consistent with their gender identity—and effectively bars them from all single-sex sports teams at the secondary and postsecondary levels—without regard to any individual's specific circumstances and without any facts to suggest that there is a "problem" that requires solving in the first place. H.B. 3293 does so despite the fact that Title IX already protects equal athletic opportunities for all students and H.B. 3293 does so in violation of Title IX's mandate to offer educational opportunities free of sex discrimination.

II. H.B. 3293 Cannot Survive Heightened Scrutiny Under The Equal Protection Clause

B.P.J. is also likely to succeed on the merits of her equal protection claim because H.B. 3293 discriminates based on sex and transgender status. The Equal Protection Clause

prevents states from discriminating against individuals on the basis of sex and against people who are transgender absent an "exceedingly persuasive" justification. *Grimm*, 972 F.3d at 610-13. The State cannot demonstrate such a justification.

A. H.B. 3293 Is Subject To Heightened Scrutiny

To determine whether a statute or policy warrants heightened scrutiny under the Equal Protection Clause, a court asks whether the classification at issue jeopardizes the exercise of a fundamental right or categorizes based on an inherently suspect characteristic. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citations omitted). Heightened scrutiny applies here for two separate reasons: H.B. 3293 discriminates based on sex and H.B. 3293 discriminates based on transgender status.

The Supreme Court has long held that classifications based on sex warrant heightened scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (*VMI*) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982)). H.B. 3293 singles out girls who are transgender, including B.P.J., for different treatment based on the sex they were assigned at birth. W. Va. Code § 18-2-25d(b)(1). The Fourth Circuit's controlling precedent holds that excluding transgender students from sex-segregated spaces that align with their gender identity is discrimination based on sex under the Equal Protection Clause. *Grimm*, 972 F.3d at 607-10. Other circuits agree. *See Adams*, 968 F.3d at 1296; *Whitaker By Whitaker*, 858 F.3d at 1051. Just as in *Grimm*, H.B. 3293 discriminates on the basis of sex: it treats B.P.J. differently from all other students with the same gender identity based solely on her sex assigned at birth. 972 F.3d at 608 (school district policy limiting bathroom access to "corresponding biological genders" or sex listed on birth certificate "creates sex-based classifications").

Fourth Circuit precedent also requires heightened scrutiny here because people who are

transgender are a quasi-suspect class. *Grimm,* 972 F.3d at 611–13. The Fourth Circuit observed, "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment." *Id.* at 610-11 (citation omitted). It does not matter that H.B. 3293 categorizes teams without explicitly referencing "transgender students": by categorizing teams based on that law's definition of "biological sex," girls who are transgender are the only group who cannot compete on sports teams that align with their gender identity. W. Va. Code § 18-2-25d(b). Because H.B. 3293 discriminates against a quasi-suspect class—girls who are transgender—this Court must apply heightened scrutiny. *Grimm,* 972 F.3d at 610.

B. H.B. 3293 Is Not Substantially Related To Achieving The State's Articulated Governmental Interest

H.B. 3293 cannot survive the rigorous analysis that heightened scrutiny demands. To survive heightened scrutiny, the state must show the law "serves important governmental objectives" and the "discriminatory means employed are substantially related to the achievement of those objectives." *See VMI*, 518 U.S. at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724) (internal quotation marks omitted). "The burden of justification is demanding" and the justification must be "'exceedingly persuasive.'" *Id.* (quoting *Miss. Univ. for Women,* 458 U.S. at 724). The inquiry provides enhanced protection in circumstances where there is a greater danger that the legal classification results from either impermissible prejudice or stereotypes, *see, e.g.*, *Grimm*, 972 F.3d at 614–15, or "a bare . . . desire to harm a politically unpopular group," *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Moreover, when evaluating an articulated governmental interest, the "justification must be genuine, not hypothesized" and "must not rely on overbroad generalizations." *VMI*, 518 U.S. at 533; *see also Grimm*, 972 F.3d at 615 (holding that policy restricting access to restroom by

"biological sex" is "marked by misconception and prejudice" against transgender plaintiff) (citation omitted); *Adams*, 968 F.3d at 1297 (finding no substantial relationship between defendants' articulated justification and restroom policy where the concerns were hypothesized and treated transgender plaintiff unfavorably "simply because he defies gender stereotypes"). A classification does not withstand heightened scrutiny when "the alleged objective" differs from the "actual purpose" underlying the classification. *Miss. Univ. for Women,* 458 U.S. at 730.

The State proffers "promoting equal athletic opportunities for the female sex" as its governmental interest. W. Va. Code § 18-2-25d(a)(4). There is no doubt that promoting equal athletic opportunities is an important governmental interest. *See Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 104 (4th Cir. 2011) (citing *Kelley v. Bd. of Tr., Univ. of Ill.*, 35 F.3d 265, 272 (7th Cir. 1994)). The State contends this law is necessary to "promote equal athletic opportunities for the female sex" because "[i]n the context of sports involving competitive skill or contact, biological males and biological females are not . . . similarly situated" and "[b]iological males would displace females to a substantial extent if permitted to compete on teams designated for biological females." W. Va. Code § 18-2-25d(a)(3)-(5). But as explained above, Title IX already ensures that cisgender boys will not "displace [girls] to a substantial extent" and the State does not claim that cisgender boys have sought to do so. The truth is H.B. 3293 targets transgender girls. This Court should reject the State's proffered explanation as factually inaccurate, based on biases, and employing overbroad generalizations about transgender girls. Further casting doubt on the State's justification, H.B. 3293 hinders equal athletic opportunities for girls by creating an additional hurdle for participation.

First, the State's justification lacks a factual basis. H.B. 3293's text and legislative record make clear that the law was calculated to exclude girls who are transgender from girls' athletic

teams. The State already allows schools to have "separate teams for members of each sex," and under existing state law, cisgender boys cannot join a girls' team except in limited circumstances. W. Va. Code R. § 127-2-3.8.[10] When asked how H.B. 3293 would change this status quo, counsel for the bill explained that it "would affect those that changed their sex after birth." No. 1-1 at 14. Other delegates, including bill sponsors, also made clear that the bill's focus was on transgender girls. No. 1-1 at 21, 25. So, when the State says, "biological males would displace females" in athletics, W. Va. Code § 18-2-25d(a)(3), and defines students by their sex assigned at birth, *id.* § 18-2-25d(b)(1), the State's objective is clear: to define transgender girls as "boys" and then to prevent them from participating on girls' athletics teams. *See VMI*, 518 U.S. at 535-36 ("[B]enign justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." (internal quotation marks and citation omitted)).

Recently, an Idaho District Court found a similar law unconstitutional. *See Hecox*, 479 F. Supp. 3d at 979. The *Hecox* court rejected Idaho's claim that barring girls who are transgender from girls' athletic teams had any relationship to ensuring equality and opportunities for girls' athletics. As was the case in *Hecox*, H.B. 3293's legislative record "reveals no history of transgender athletes ever competing in sports" in West Virginia and no evidence that female athletes have been displaced by transgender athletes in West Virginia. *Id.* at 978. The West

[10] H.B. 3293's reliance on *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), does not support the law's discriminatory means. W. Va. Code § 18-2-25d(a)(3). *Clark* did not address the participation of transgender athletes. Instead, *Clark* upheld a school district's policy that cisgender boys could not play on a girls' volleyball team where "boys' overall opportunity is not inferior to girls'." 695 F.2d at 1131. At issue here is a transgender girl who seeks to play on a girls' team. *Clark* thus provides no support for the State's discriminatory purpose because, simply, transgender women "have not and could not 'displace' cisgender women in athletics 'to a substantial extent.'" *Hecox*, 479 F. Supp. 3d. at 977 (quoting *Clark*, 695 F.3d at 1131).

Virginia Department of Education's Executive Director of Policy and Government Relations testified that the agency has received no complaints about transgender athletes. No. 1-1 at 14-15. One of the bill's sponsors, Delegate Ellington, stated that he knew of no complaints regarding transgender athletes in West Virginia, *see* No. 1-1 at 9, 19, much less that transgender girls are so numerous and skilled that they could "displace" other women and girls in sports.[11] Instead, he pointed to "two transgender girls" who "were allowed to compete in state track and field meets in Connecticut." No. 1-1 at 21. The existence of two runners in another state fails to provide an "exceedingly persuasive justification" for H.B. 3293's categorical bar. *See Hecox*, 479 F. Supp. 3d. at 979 (citing *VMI*, 518 U.S. at 533). As in Idaho, the record here contains "no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote 'sex equality' or to 'protect athletic opportunities for females'" in West Virginia. *Id.* at 978-79 (citation omitted). The State can point to no valid evidence to justify H.B. 3293.

On the contrary, the State disregarded evidence that giving girls who are transgender the same athletic opportunities that all other girls enjoy has not displaced cisgender girls. The West Virginia Legislature had before it evidence that sixteen states successfully allow transgender students to participate in sports consistent with their gender identity. No. 25 at 38-39, 75. The National Collegiate Athletic Association ("NCAA") has allowed transgender students who meet certain conditions to participate in intercollegiate sports consistent with their gender identity for over ten years. *Id.*; *see also* NCAA, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf. Yet, girls and young women who are transgender have not displaced cisgender girls in those states or in college

[11] The bill's co-sponsors and the Governor of West Virginia also stated that they did not know of any girls who are transgender in West Virginia who competed on girls' teams, much less who dominated or displaced cisgender girls. No. 1 at 2, 14.

athletics. The lack of "empirical evidence that transgender inclusion will hinder sex equality in sports or athletic opportunities" for girls shows that H.B. 3293's exclusion of transgender girls "has no relationship" to the law's objective. *Hecox*, 479 F. Supp. 3d. at 979, 982.

Second, statements by H.B. 3293's sponsors show that a misunderstanding or fear of transgender girls, and in certain instances, outright anti-transgender bias, rather than an interest in promoting women's athletic opportunities, motivated this bill. For example, Delegate Mazzochi said that she did not "want all this mixing and matching" of transgender and cisgender children in "locker rooms." No. 1 at 12. Delegate Bridges announced on Facebook he was co-sponsoring H.B. 3293, then "liked" comments to his post that advocated for physical violence against girls who are transgender, compared them to pigs, and called them by a pejorative term ("tranny"). Jordan Bridges, "Update: The bill passed out of committee." Facebook (Mar. 16, 2021), https://perma.cc/HA5C-VJ4N.[12] He also made other anti-transgender comments, saying that "this country is going down hill [sic] fast" in response to a news article discussing transgender-inclusive business practices. Jordan Bridges, "I swear my hand." Facebook (Oct. 23, 2019), https://perma.cc/8BHK-7V5Z. The biases and moral disapproval articulated by the bill's sponsors are not justifiable reasons to legislate. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (holding moral disapproval of same-sex sexual conduct was impermissible basis for legislation); *see also Palmore v. Sidoti,* 466 U.S. 429, 433 (1984) (finding in a race discrimination suit that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").[13]

[12] The archived and live Facebook pages are available via the permalink. DOJ has retained permanent copies of these Facebook pages in the event that they are modified or deleted.

[13] Intermediate scrutiny is the appropriate level of review in this case. But even under rational basis review, H.B. 3293 would fail because bare dislike of an unpopular social group is never a

Third, even if this Court were to credit the State's purported objective of wanting to protect girls' athletic opportunities, H.B. 3293's categorical exclusion of transgender girls is not "substantially related" to that objective, as the equal protection caselaw requires. *See VMI*, 518 U.S. at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724) (internal quotation marks omitted). H.B. 3293's assumption that transgender girls, as a group, enjoy some inherent competitive advantage over their cisgender classmates ignores the facts of this case. Excluding B.P.J., who has not gone through puberty and is receiving puberty-delaying treatment, No. 2-1 at 21, 32, contributes nothing to ensuring competitive fairness. *See* No. 2-1 at 6-8. By sweeping so broadly, the State proved itself "less concerned with ensuring equality in athletics than [] with ensuring exclusion of transgender women athletes." *Hecox*, 479 F. Supp. 3d at 984.

Finally, H.B. 3293 may hinder rather than promote athletic opportunities for all girls. Though the law purports to bar only transgender girls from joining the girls' team, the practical effect is that *every* girl in West Virginia may be subject to having her eligibility for a single-sex team challenged merely because some other student claims the girl in question is not a "real" girl. This is likely to affect girls who do not adhere to sex stereotypes and who present as less stereotypically feminine. While intended to expose transgender girls, the consequences would be harmful for gender non-conforming cisgender girls as well. Indeed, two doctors testified that being the subject of such a challenge would be "psychologically devastating," "embarrassing, humiliating," "lead to the . . . person being ostracized," and increase her suicide risk. No. 25 at 97-98, 101. Thus, rather than protecting opportunities for girls, the law could reasonably chill

---

legitimate legislative motive. *See Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446-47 (1985)*; Moreno*, 413 U.S. at 534. The State's prohibition of transgender girls from girls' teams is not rationally related to its stated interest of protecting girls' athletic opportunities. *See Cleburne,* 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

athletic participation by all girls who do not conform to sex stereotypes.

H.B. 3293 cannot survive heightened scrutiny. The State cannot point to any valid evidence that allowing transgender girls to participate on girls' sports teams endangers girls' athletic opportunities. Instead, the State legislated based on misconceptions and overbroad assumptions about transgender girls. It is illogical for the State to believe it can protect girls' athletic opportunities by barring girls from playing sports. The harm to B.P.J. is real and it will be lasting. The United States believes B.P.J. will succeed on the merits of her equal protection claim.

CONCLUSION

Title IX and the U.S. Constitution bar Defendants from implementing the policy commanded by H.B. 3293. That policy does nothing to further the State's purported goal of protecting athletic opportunities for girls. At the same time, it violates the nondiscrimination mandates of Title IX and the Equal Protection Clause.

Respectfully submitted, this 17th day of June, 2021.

LISA G. JOHNSTON
Acting United States Attorney
Southern District of West Virginia

FRED B. WESTFALL, JR.
W. Va. State Bar No. 3992
Assistant United States Attorney, Civil Chief
JENNIFER M. MANKINS
W. Va. State Bar No. 9959
Assistant United State Attorney
300 Virginia Street East, Room 4000
Charleston, WV 25301
Telephone: (304) 345-2200
Fax: (304) 347-5104
Fred.Westfall@usdoj.gov
Jennifer.Mankins@usdoj.gov

/s/ Emma Leheny
EMMA LEHENY
Principal Deputy General Counsel

VANESSA SANTOS
JESSICA WOLLAND
Attorneys
Office of the General Counsel
United States Department of Education

KRISTEN CLARKE
Assistant Attorney General

PAMELA S. KARLAN
Principal Deputy Assistant Attorney General
Civil Rights Division

SHAHEENA A. SIMONS
Acting Deputy Assistant Attorney General
Civil Rights Division

WHITNEY M. PELLEGRINO
Acting Chief
ARIA S. VAUGHAN
MICHELLE L. TUCKER
AMANDA K. DALLO
Trial Attorneys
United States Department of Justice
Civil Rights Division
Educational Opportunities Section
950 Pennsylvania Ave., NW
4CON, 10th Floor
Washington, DC 20530
Telephone: (202) 598-9629
Aria.Vaughan@usdoj.gov
NY Bar No. 5044748

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

Respectfully submitted,

ARIA S. VAUGHAN
Trial Attorney
Civil Rights Division
Educational Opportunities Section
950 Pennsylvania Ave., NW
4CON, 10th Floor
Washington, DC 20530
Telephone: (202) 598-9629
Aria.Vaughan@usdoj.gov
NY Bar No. 5044748