

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,*

v.

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,  
DORA STUTLER in her official capacity as  
Harrison County Superintendent, PATRICK  
MORRISEY in his official capacity as Attorney  
General, and THE STATE OF WEST  
VIRGINIA

*Defendants.*

Case No. 2:21-cv-00316

Hon. Joseph R. Goodwin

Oral Argument Requested

**PROPOSED INTERVENOR LAINNEY ARMISTEAD'S  
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

**TABLE OF CONTENTS**

Table of Authorities .....iii

Introduction ..... 1

Facts ..... 1

Argument ..... 3

    I. Armistead satisfies the requirements for intervention as of right because her request is timely, her interests are directly affected by this litigation, and her arguments differ from those of the State..... 4

        A. Armistead’s motion to intervene is timely..... 4

        B. Armistead has a significant, protectible interest in fair and safe competition because she is a female athlete protected by the Sports Act and benefits from the equal opportunities for women safeguarded by the Act..... 6

        C. Armistead’s interest could be impaired by this litigation which threatens to invalidate the Sports Act and to undermine equal opportunity for women. .... 9

        D. The existing parties to the action do not adequately represent Armistead’s interests. .... 10

    II. Alternatively, this Court should grant Armistead permissive intervention because her legal position shares a common question of law and fact with this litigation..... 16

Conclusion..... 17

Certificate of Service..... 19

**Table of Authorities**

**Cases**

*Alt v. U. S. Environmental Protection Agency*,  
758 F.3d 588 (4th Cir. 2014) ..... 4

*Citizens United v. Federal Election Commission*,  
558 U.S. 310 (2010) ..... 9

*City of New Martinsville, West Virginia v. Public Service Commission of West Virginia*,  
2012 WL 6694078 (S.D.W.Va. 2012) ..... 5

*Clark, ex rel. Clark v. Arizona Interscholastic Association*,  
695 F.2d 1126 (9th Cir. 1982) ..... 6

*Cohen v. Brown University*,  
991 F.2d 888 (1st Cir. 1993)..... 6

*D.N. v. Desantis*,  
No. 0:21-cv-61344-RKA (S.D. Fla. filed June 29, 2021)..... 10

*Equity In Athletics, Inc. v. Department of Education*,  
639 F.3d 91 (4th Cir. 2011) ..... 6

*Feller v. Brock*,  
802 F.2d 722 (4th Cir. 1986) ..... 3, 13, 17

*Forest Hills Early Learning Center, Inc. v. Lukhard*,  
728 F.2d 230 (4th Cir. 1984) ..... 7

*Gloucester County School Board v. Grimm*,  
--S. Ct.--, 2021 WL 2637992 (2021) ..... 15

*Grimm v. Gloucester County School Board*,  
972 F.3d 586 (4th Cir. 2020) ..... 15

*Grutter v. Bollinger*,  
88 F.3d 394 (6th Cir. 1999) ..... 7, 8

*Hecox v. Little*,  
479 F.Supp.3d 930 (D. Idaho 2020) ..... 7, 10, 13

*In re Sierra Club v. State of South Carolina*,  
945 F.2d 779 (4th Cir. 1991) ..... 13

*JLS, Inc. v. Public Service Commission of West Virginia*,  
321 F. App'x 286 (4th Cir. 2009) ..... 13

*John Doe No. 1 v. Reed*,  
561 U.S. 186 (2010) ..... 9

*Mayo v. West Virginia Secondary School Activities Commission*,  
672 S.E.2d 224 (W. Va. 2008) ..... 11

*McCormick ex rel. McCormick v. School District of Mamoreneck*,  
370 F.3d 275 (2d Cir. 2004)..... 6, 14

*Michigan State AFL-CIO v. Miller*,  
103 F.3d 1240 (6th Cir. 1997) ..... 11

*Morgantown Energy Associates v. Public Service Commission of West Virginia*,  
2013 WL 140235 (S.D.W.Va. 2013) ..... 5

*North Carolina State Conference of NAACP v. Berger*,  
999 F.3d 915 (4th Cir. 2021) ..... 11, 16

*Northwestern National Life Insurance Co. v. Zimbro*,  
Nos. 89-2838, 89-2858, 1990 WL 86206 (4th Cir. June 14, 1990) ..... 6

*Ohio Valley Environmental Coalition Inc. v. McCarthy*,  
313 F.R.D. 10 (S.D.W.Va. 2015) ..... 5, 6, 9

*Roberts v. Colorado State Board of Agriculture*,  
998 F.2d 824 (10th Cir. 1993) ..... 14

*Soule v. Connecticut Association of Schools, Inc.*,  
2021 WL 1617206 (D.Conn. 2021) ..... 7, 10

*Teague v. Bakker*,  
931 F.2d 259 (4th Cir. 1991) ..... 6

*Trbovich v. United Mine Workers*,  
404 U.S. 528 (1972) ..... 11

*Virginia v. Westinghouse Electric Corporation*,  
542 F.2d 214 (4th Cir. 1976) ..... 11

**Statutes**

W. Va. Code § 18-2-25d..... 8

**Other Authorities**

6 Moore’s Federal Practice § 24.03[4][a] (3d ed. 1997)..... 11

Wright & Miller, 7C *Fed. Pract. & Proc. Civ.* § 1909 (3d ed.) ..... 11

**Rules**

Fed. R. Civ. P. 24(a)(2)..... 4

Fed. R. Civ. P. 24(b) ..... 16

**Regulations**

44 Fed. Reg. 71,417–418..... 14

## **Introduction**

In May of this year, Plaintiff B.P.J. filed this lawsuit challenging West Virginia's recently enacted H.B. 3293 (the "Sports Act"), W. Va. Code § 18-2-25d, which seeks to ensure equal opportunities for women in sports. One of those women is female athlete Lainey Armistead, a college soccer athlete at West Virginia State University. Because this lawsuit seeks to undermine the Sports Act and thereby imperil her interests, Armistead asks to intervene in this litigation under Federal Rule of Civil Procedure 24, either as of right or permissively. This request should be granted for three reasons.

First, Armistead's request is timely. This matter is still in the very early stages. No discovery has occurred, and the Court issued a scheduling order two days before this filing. Second, Armistead has a significant interest in preserving equal athletic opportunities for female athletes. She currently competes in collegiate soccer at a public university and benefits from a system designed to advance athletic opportunities for women. B.P.J.'s request to limit or entirely invalidate the Sports Act directly and personally impairs Armistead's interest in fair and safe competition and puts her at risk of competing head-to-head with male athletes in competition against other teams and for playing time and positions on her own team. And third, the Defendants cannot adequately represent Armistead's interests because she puts forward different litigation goals and different legal arguments. Allowing Armistead to intervene ensures a full-throated defense of the Sports Act. This Court deserves to hear from the very parties most protected by the Sports Act, most affected by attempts to eviscerate its protections, and most motivated to aggressively defend the law.

## **Facts**

Proposed intervenor Lainey Armistead is a West Virginia female athlete for

whom soccer is a passion and life-defining pursuit. *See* Ex. A, Armistead Decl. ¶ 2. Armistead kicked her first soccer ball almost as soon as she could walk, *id.* ¶ 4, and since that time has pursued the joy of athletic training and competition. She now competes in women's soccer on scholarship at West Virginia State University (WVSU) in Charleston. *Id.* ¶ 12. She is committed to ensuring that women's sports are both fair and safe, and therefore enthusiastically supports West Virginia's Sports Act, W. Va. Code § 18-2-25d. *Id.* ¶¶ 34-35.

As one who grew up in a house full of brothers who played soccer and a dad who coached soccer, Armistead is well-acquainted with the physical differences that give males an athletic performance advantage. *Id.* ¶¶ 3-4, 30. She has seen that males typically have greater strength, speed, and size that gives them an undeniable advantage in soccer. *Id.* ¶ 31. Soccer is a rough contact sport: concussion, knee, and ankle injuries are common among female players. *Id.* ¶ 28. Add into the mix a male who races down the field at a faster pace, kicks the ball harder, and slams into other players with a larger physical frame, and the risk of injury to girls and women increases dramatically. *Id.* ¶¶ 31-32.

Armistead also firmly believes that facing a male in a soccer game would change the entire dynamics on the field of play—and not for the better. *Id.* ¶ 38. There are only 11 players per team on the field at any given time. *Id.* ¶ 15. Because of differences in physical strength and speed, female soccer players depend more upon passing and teamwork than male soccer players. *Id.* ¶ 26. Any male on the women's soccer field displaces a deserving woman. *Id.* ¶ 40.

And this is not just hypothetical. A few years ago, Armistead first heard how two male athletes were allowed to compete in Connecticut girls' track and field and dominated the field. *Id.* ¶ 33. From 2017-2019 alone, those two male-bodied individuals won 15 women's state championship titles. *Id.* Similarly, a male athlete who competed on the men's team at the University of Montana began competing

in—and winning—women’s cross-country and track events in the NCAA Division I Big Sky Conference. *Id.* ¶ 34. And these are not isolated examples. Even one girl displaced from the women’s podium, or the field, or the team by a male individual takes away an opportunity from a woman.

Soccer—and striving to win in soccer—taught Armistead so much more than just how to kick a ball. She learned perseverance and how to overcome adversity. *Id.* ¶ 27. She learned leadership skills and good sportsmanship. *Id.* And she developed mental and physical toughness and self-confidence. *Id.* Being an elite soccer athlete required many sacrifices. *Id.* ¶ 22. But those sacrifices were worth it to win—not just for herself, but for her team. *Id.* ¶ 23. Eventually, those sacrifices and hard work paid off with an athletic scholarship, which paved the way for her to attend college at WVSU and join its women’s soccer team. *Id.* ¶¶ 10-12. It also brought her one step closer to her dream of being a lawyer. *Id.* ¶ 12.

To Armistead, allowing a male to displace a woman in a starting position on the field, or for an athletic scholarship, or for another recognition defies the purpose of women’s sports. *Id.* ¶ 42. She fears that too many women feel pressured to keep their real views silent, and she fears that girls might consider not playing sports at all if they feel they cannot win against a physically superior male. *Id.* ¶ 45.

### **Argument**

Federal Rule of Civil Procedure 24 authorizes both intervention as of right and with permission from the court. The Fourth Circuit generally favors liberal intervention to “dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process.” *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (cleaned up). Armistead satisfies the requirements for intervention as of right because her request is timely, her interests are directly affected by this litigation, and her arguments differ from those of other parties. She

also satisfies the requirements for permissive intervention because her legal interests share a common question of law and fact with this case.

**I. Armistead satisfies the requirements for intervention as of right because her request is timely, her interests are directly affected by this litigation, and her arguments differ from those of the State.**

Under Fed. R. Civ. P. 24(a)(2), a person can intervene as of right when (1) her motion is timely; (2) the intervenor claims an interest relating to the property or transaction that is the subject of the action; (3) the intervenor is “so situated that disposing of the action may as a practical matter impair or impede” the intervenor’s ability to protect her interest; and (4) no other party in the action can adequately protect the intervenor’s interests. *Alt v. U.S. Env’t Prot. Agency*, 758 F.3d 588, 591 (4th Cir. 2014). Armistead satisfies each factor.

**A. Armistead’s motion to intervene is timely.**

Armistead’s motion to intervene is timely because this lawsuit is in its infancy. Courts evaluate the timeliness of intervention to “prevent a tardy intervenor from derailing a lawsuit within sight of the terminal.” *Alt*, 758 F.3d at 591 (citation omitted). To make this determination, courts consider (1) how far the suit has progressed prior to the motion; (2) the prejudice which delay might cause other parties; and (3) the reason for any tardiness in moving to intervene. *Id.*

Armistead clears the timeliness hurdle because this lawsuit began just three months ago. It is nowhere near “sight of the terminal.” *Id.* The original complaint was filed on May 26, 2021, and an amended complaint on July 16, 2021. A preliminary injunction was briefed and issued without oral argument. The State Board of Education and County Defendants have filed motions to dismiss the amended complaint, which have not yet been decided. The parties have not exchanged discovery, and the Court issued a scheduling order just two days ago, on September 8, 2021. Intervention at this early juncture would not stall the lawsuit.

Indeed, courts regularly grant intervention requests made in the same timeframe or even later than Armistead's request. *See Ohio Valley Env't Coal. Inc. v. McCarthy*, 313 F.R.D. 10, 17–18 (S.D.W.Va. 2015) (intervention timely when filed approximately four months after the complaint); *City of New Martinsville, W. Va. v. Pub. Serv. Comm'n of W. Va.*, 2012 WL 6694078, at \*3 (S.D.W.Va. 2012) (intervention timely when motion filed two days after court entered scheduling order and no discovery had occurred); *Morgantown Energy Assocs. v. Pub. Serv. Comm'n of W. Va.*, 2013 WL 140235, at \*4 (S.D.W.Va. 2013) (intervention timely when motion filed prior to court's entry of scheduling order and no discovery had occurred).

Nor has Armistead delayed in moving for intervention. Choosing to intervene in a case like this is a weighty decision. Armistead only became aware that this lawsuit endangered her rights when she learned of it. Armistead Decl. ¶ 36. And that harm only became likely after the plaintiff won a preliminary-injunction motion and this Court decided that it may facially enjoin the Sports Act in the future. *See*, Order at 2, 4, ECF 67. So, Armistead sought counsel and weighed her options carefully before deciding she should intervene and only intervened when absolutely necessary. Armistead Decl. ¶ 37. Once she decided to intervene, she moved forward quickly.

Because Armistead did not delay and moved to intervene so early in this case, no party suffers from her intervention request. Armistead has filed a proposed answer to the amended complaint concurrently with this motion (Ex. B) and will comply with the scheduling deadlines established by this Court's September 8, 2021, order. Her motion is therefore timely.

**B. Armistead has a significant, protectible interest in fair and safe competition because she is a female athlete protected by the Sports Act and benefits from the equal opportunities for women safeguarded by the Act.**

The intervenor's interest must be "significantly protectable." *Nw. Nat'l Life Ins. Co. v. Zimbro*, Nos. 89-2838, 89-2858, 1990 WL 86206, at \*2 (4th Cir. June 14, 1990) (per curiam) (citation omitted). Though the Fourth Circuit has not articulated a single test for defining significantly protectable interests, an interest typically qualifies if the intervenor "stands to gain or lose by the direct legal operation of a judgment in that action." *Ohio Valley Env't Coal.*, 313 F.R.D. at 18 (quoting *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991)) (internal brackets and quotation marks omitted).

What's more, the Fourth Circuit and other circuit courts have found that women have a legitimate and important interest in ensuring they receive equal athletic opportunities. See *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 104 (4th Cir. 2011) (noting that "[t]here is no doubt" that promoting equal athletic opportunities for the female sex is an important interest); see also *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) ("[t]here is no question" that redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is a legitimate and important government interest); *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) ("Equal opportunity to participate lies at the core of Title IX's purpose"); *McCormick ex rel. McCormick v. Sch. Dist. of Mamoreneck*, 370 F.3d 275, 286-95 (2d Cir. 2004) (Title IX's purpose is ensuring women have "[e]qual opportunity" to participate in educational programs and activities).

Given this consensus, federal courts have unanimously granted intervention requests in situations like this case. For example, in *Hecox v. Little*, a male-bodied athlete challenged a substantially similar sports-equity law in Idaho. 479 F.Supp.3d

930, 952 (D. Idaho 2020). Two Idaho collegiate athletes moved to intervene to defend the law, and the court granted their motions both permissively and as of right. *Id.* at 955, 958. In doing so, the court noted that the proposed female athlete intervenors undoubtedly have a protectable interest in equal athletic opportunity. *Id.* at 952. In fact, to find otherwise would mean that no one—the transgender plaintiff included—had a protectable interest in the litigation’s subject matter. *Id.*

Similarly, three female athletes challenged a Connecticut athletic association policy that allowed males to compete in the female category, thereby depriving female athletes of honors, recognitions, advancement opportunities, and championship titles. *See Soule v. Connecticut Association of Schools, Inc.*, 2021 WL 1617206 (D. Conn. 2021). The court found that the two male-bodied athletes had a legally protectible interest in the litigation and granted their intervention. Order Granting Motion to Intervene, *Soule v. Connecticut Association of Schools, Inc.*, 2021 WL 1617206 (D. Conn. 2021), ECF No. 93.

As these cases show, courts recognize that athletes have an interest in intervening to defend government policies that affect their ability to compete. And that fits the liberal intervention principles in the Fourth Circuit. When a policy greatly affects or benefits a particular group, the Fourth Circuit counts that in favor of intervention. *See Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 245-46 (4th Cir. 1984) (remanding to provide opportunity for religiously affiliated childcare center to intervene in defense of law that provided religious groups a regulatory exemption).

This logic applies with particular force when a law ensures equal opportunities. For example, in *Grutter v. Bollinger*, the Sixth Circuit allowed minority students and one minority coalition to intervene in lawsuits challenging race-conscious admission policies at the University of Michigan. 188 F.3d 394, 396 (6th Cir. 1999). The Sixth Circuit did so because the case would affect qualified minority students’

access to public higher education. Accordingly, it gave those minority students a “substantial legal interest in educational opportunity” which includes preventing a decline in enrollment of minority students. *Id.* at 398. In short, the minority students were beneficiaries of the equal-access law and therefore had a protectable interest in defending it.

Like those minority students in *Grutter*, Armistead has a substantial legal interest in ensuring her equal opportunity to compete in collegiate athletics. Armistead is a competitive soccer athlete with a direct and experiential interest in the operation of West Virginia’s Sports Act. As the State has repeatedly said, the Sports Law exists to protect athletes like her. *See, e.g.*, State Defs.’ Opp. to MPI 1, ECF 49. And as a female athlete who competes on a women’s athletic team at a public university that is a member of the NCAA, Armistead and women like her are the Act’s primary beneficiaries. *See* W. Va. Code § 18-2-25d; *see also* Armistead Decl. ¶¶ 11-14. She wishes to maintain female-only competition and a competitive environment shielded from physiologically advantaged male participants who could compromise both the fairness and safety of her sport. *See id.* ¶ 41-42. Her desire to protect her own personal legal interest in equal athletic opportunities is unquestionably a significant and protectible interest.

And like the intervenors in *Grutter*, Armistead also has a legally protectible interest in preserving fair competition for female athletes generally in West Virginia. In *Grutter*, the intervenors not only had an interest in personally attending certain schools but also in ensuring that the entire educational system was fair and equitable and promoted equal access and diversity in general. So too, Armistead has an interest in ensuring fair and equitable participation and athletic opportunity for athletes like her.

**C. Armistead’s interest could be impaired by this litigation which threatens to invalidate the Sports Act and to undermine equal opportunity for women.**

The “significantly protectible interest” requirement is closely linked with the third requirement for intervention of right—that the litigation may impair the intervenor’s interest. Once a court determines that an intervenor has a protectible interest in the litigation, it should have little difficulty concluding that the litigation may impair that interest. *See, e.g. Ohio Valley Env’t Coal.*, 313 F.R.D. at 18 (“An applicant has a significantly protectible interest in an action if it ‘stand[s] to gain or lose by the direct legal operation’ of a judgment in that action.”) (citation omitted).

That general principle holds here. This litigation could eviscerate Armistead’s ability to compete fairly and safely and to participate in a system designed to protect women. B.J.P. has challenged the law on constitutional and Title IX grounds. Though couched as an as-applied claim, “[t]he label is not what matters.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). After all, “the distinction between facial and as-applied challenges is not so well defined.” *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 331 (2010). So this Court could provide broader facial or semi-facial relief no matter what labels B.P.J. used to describe the claims brought—just as the Supreme Court did in *Citizens United*. *Id.* at 330 (expressing skepticism whether, on appeal, “a party could somehow waive a facial challenge while preserving an as-applied challenge”).

To make matters clearer, B.P.J has already made broad facial arguments for invalidating the Sports Act throughout the complaint. *See, e.g.* First Am. Compl. ¶¶ 4, 39-42, 85-87, 97-98, 104-108, ECF 64. And this Court has already confirmed that whether the Sports Act is *facially* unconstitutional “is an issue raised in the Complaint and *will* be resolved at a later stage of litigation.” Order 4, ECF 67 (emphasis added); *see also id.* at 10 (noting that arguments about testosterone suppression “may be relevant to a facial challenge of the statute.”).

Were the Sports Act facially invalidated, Armistead would be stripped of her legal protections under the Act. She would likely face the Hobson's choice of competing for a place on her team against a male athlete, competing against a team with a male athlete, or not competing at all. Armistead Decl. ¶ 39. This risk is not hypothetical, as evidenced by males competing in women's sports in Connecticut, Idaho, Florida, and even here in West Virginia. Order Finding as Moot Pl.'s Motion for Prelim. Inj., *Soule v. Connecticut Association of Schools, Inc.*, 2021 WL 1617206 (D. Conn. 2021), ECF No. 176 (Connecticut); Mem. Decision and Order, *Hecox v. Little*, 479 F.Supp.3d 930, 952 (D. Idaho 2020), ECF No. 63 (Idaho); Compl. for Declaratory and Injunctive Relief, ECF No. 1, *D.N. v. Desantis*, No. 0:21-cv-61344-RKA (S.D. Fla. filed June 29, 2021) (Florida); First Am. Compl., ECF 64 (West Virginia). And if Armistead is not permitted to intervene, she would have few options to challenge a permanent injunction imposed by this Court against the Sports Act. She therefore has significant, protectible interests that are at risk of being impaired by this litigation.

Even if the Court grants only as-applied relief, Armistead's interests are still imperiled. The rationale proposed by B.P.J. to invalidate the Sports Act—if successful—could be used by any male athlete seeking to compete in the female category in West Virginia. These arguments are not unique to this plaintiff and also imperil Armistead's interests protected by the Sports Act. *See, e.g. Hecox*, 479 F.Supp.3d at 988-89 (facially enjoining a similar Sports Act based on equal protection arguments).

**D. The existing parties to the action do not adequately represent Armistead's interests.**

Finally, the Defendants' representation is inadequate to represent Armistead's interests. The "burden of showing an inadequacy of representation" is generally minimal and is satisfied if the applicants show that the representation of their

interests *may* be inadequate. *Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976); *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). A proposed intervenor “should be treated as the best judge of whether the existing parties adequately represent his or her interests, and ... any doubt regarding adequacy of representation should be resolved in [movant’s] favor.” 6 Moore’s Federal Practice § 24.03[4][a] (3d ed. 1997); *see also* Wright & Miller, 7C *Fed. Pract. & Proc. Civ.* § 1909 (3d ed.) (“Since [Rule 24(a)] is satisfied if there is serious possibility that the representation may be inadequate, all reasonable doubts should be resolved in favor of allowing [intervention] so that [the absentee] may be heard in his own behalf.”)

It “may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenors’ arguments.” *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). To be sure, a heightened presumption of adequacy applies when the proposed intervenor seeks to intervene on the side of a governmental defendant. *See North Carolina State Conference of NAACP v. Berger*, 999 F.3d 915, 934 (4th Cir. 2021). But an intervenor can rebut that presumption by identifying adverse interests with the government party, collusion, or nonfeasance. *Id.* at 930.

Of the seven named defendants, two are Harrison County officials or entities (County Board of Education and Superintendent Stutler). And Armistead is not a resident of Harrison County. She resides in Kanawha County, *see* Armistead Decl. ¶ 1. These County Defendants do not represent her interests. A third defendant, the West Virginia Secondary School Activities Commission (WVSSAC), is a quasi-public agency that is not a state agency under state law. *See Mayo v. W. Va. Secondary Sch. Activities Comm’n*, 672 S.E.2d 224, 233 (W. Va. 2008). These three defendants have narrower interests in this litigation than Armistead, they do not purport to

represent her interests, and therefore Armistead's burden of showing inadequacy of representation for all three of these defendants is minimal.

The remaining four defendants are state officials (Attorney General Morrissey and Superintendent Bursch), a state agency (the State Board of Education, or "BOE"), and the State of West Virginia. Though a heightened presumption of adequacy applies when the state government is a party, Armistead has different litigation interests and different litigation arguments from these State Defendants that make her interests adverse to the State. And any doubts about the adequacy of representation should be resolved in Armistead's favor.

**1. Armistead has different litigation interests.**

First, Armistead has different litigation interests from Defendants. The County Defendants represent the interests of Harrison County residents, not Kanawha County residents (like Armistead). And the WVSSAC is a quasi-public agency and does not represent female athletes like Armistead.

Meanwhile, Defendants State BOE and State Superintendent have tried to distance themselves from the introduction and enactment of the Sports Act, casting doubt on their willingness to vigorously defend it in litigation. *See* BOE Defs.' Opp. to MPI 3, ECF 48; BOE Defs.' Mem. of Law in Supp. of MTD 2, ECF 75. In fact, they have repeatedly stated that they have not "*and will not* enforce [the law] in the future as to Plaintiff." BOE Defs.' Mem. of Law in Supp. of MTD 11-12, ECF 75 (emphasis added).<sup>1</sup> These Defendants essentially argue that the Sports Act is not their problem. If a narrowing construction is presented or if a settlement offer comes, they will likely choose an exit strategy over vigorously defending the law.

---

<sup>1</sup> These Defendants further claim they have no enforcement power. BOE Defs.' Mem. of Law in Supp. of MTD 11-12, ECF 75. Plaintiff disagrees. *See* Pl.'s Consolidated Mem. in Opp. to MTD 9, 15, ECF 80.

Armistead, by contrast, seeks the broadest possible interpretation of the law. She has a personal, competitive interest in putting forth the best possible arguments, to ensure the broadest interpretation and application of the Sports Act so that it protects not only her but future female athletes in West Virginia. The Fourth Circuit has allowed intervention when a government agency may not litigate an action with sufficient vigor to protect the intervenor's competitive interests. *See JLS, Inc. v. Pub. Serv. Comm'n of W. Va.*, 321 F. App'x 286, 290 (4th Cir. 2009) (transportation companies were allowed to intervene in a lawsuit alongside a government agency to protect their own competitive interests). The same logic applies here.

Moreover, the State Defendants' litigation interests are not co-extensive with Armistead's. The "government's position is defined by the public interest, [not simply] the interests of a particular [] citizen[]" (like Armistead). *Feller*, 802 F.2d at 730; *see In re Sierra Club v. State of S.C.*, 945 F.2d 779, 780 (4th Cir. 1991). Defendants could settle this case in a manner that could harm Armistead's interests or offer a narrowing construction of the law. *See, e.g. JLS, Inc. v. Pub. Serv. Comm'n of W. Va.*, 321 F. App'x 286, 290 (4th Cir. 2009) (movants noted that if their intervention is denied, government entity could settle the case in a way that harmed their interests); *see also Hecox*, 479 F.Supp.3d at 955 (movants allowed to intervene because state defendants offered a narrowing construction and movants did not). Armistead is the only potential party with an undivided interest in protecting her right to equal treatment.

In sum, the Defendants and Armistead do not share unity on all litigation objectives and therefore no current parties to the litigation will adequately represent Armistead's interests.

## 2. Armistead will advance contrary litigation arguments.

Armistead will also advance litigation arguments different from and contrary to the State Defendants' arguments. For example, the State of West Virginia Defendants argue that Title IX *permits*—but does not require—separate sports teams based on biological sex to promote the interests of fairness and safety for women and girls. *See, e.g.*, State's Def.'s Opp. to Mot. for Prelim. Injun. 2, ECF 49 (noting that the law "*further*s the goals of Title IX"); *see also id.* at 13-14 (arguing that Title IX "authorizes" separate teams for each sex).

Armistead, however, will argue that Title IX not only permits—but *requires*—separate sports teams for women and girls in contests of strength or speed. Her position is that "[t]reating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX's mandate of equal opportunity for both sexes." *McCormick ex rel. McCormick*, 370 F.3d at 295. After all, in many sports, Title IX's mandate of non-discrimination could not be achieved with sex-blind programs. Failure to provide members of the female sex with equal quality of competition that effectively accommodates their interests and abilities violates Title IX. *See* 44 Fed. Reg. 71,417–18; *see also Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir.1993).

Armistead will also put forward equal-protection arguments that differ from the State Defendants. First, Armistead will argue that even if the Sports Act discriminates based on gender identity, the Act should be upheld because gender identity is not a protected class. The State Defendants acknowledge that the Fourth Circuit has held that gender-identity discrimination triggers heightened scrutiny. State Def.'s Opp. to MPI 5, ECF 49. But the State did not argue that the Fourth Circuit got it wrong and misapplied Supreme Court precedent.<sup>2</sup>

---

<sup>2</sup> Neither Defendant State Board of Education nor Superintendent Burch argued that the Fourth Circuit wrongly elevated gender identity as a protected class. *See*

Second, even if gender identity is a protected class, Armistead will argue that the State's interest in providing equal athletic opportunities for women justifies that differential treatment. The State Defendants have raised no such argument.

Third, the State made a passing reference in its preliminary-injunction response to the fact that B.P.J.'s requested relief requires this Court to affirmatively discriminate based on gender identity. ECF 49 at 2. But the State did not press that point. Armistead though will press that point and even argue that this discrimination violates the 4th Circuit's decision in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) (holding that school board policy separating school restrooms based on biological sex discriminated based on transgender status). Specifically, the requested relief will necessitate discrimination by requiring sports teams to allow males who identify as women to join girls' teams yet prohibiting men who identify as men from also joining the girls' team. Which, of course, demonstrates the radical and ultimately unworkable nature of the relief Plaintiff requests.

Finally, Armistead will argue that B.P.J. is asking the Court to replace biological sex with gender identity in the Sports Act. This treats biological sex as a sex stereotype that will revolutionize sex-based protections in law, to the detriment of women and girls. No other party has raised this argument, but this Court should consider this argument as it highlights, again, the extensive repercussions of B.P.J.'s arguments.

---

Def's Opp. to Mot. for Prelim. Injun. 8, ECF 48. These Defendants argued only that rational basis is the proper standard of review "for the purposes of preserving the record" given that *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) was—at the time these Defendants opposed the preliminary injunction—pending *certiorari* before the Supreme Court. That *certiorari* petition was later denied. *Gloucester Cnty. Sch. Bd. v. Grimm*, --S. Ct.--, 2021 WL 2637992 (2021). It is unclear whether Defendants will press this argument further.

In this early stage of litigation, Armistead cannot state with certainty every strategy and argument Defendants will advance. But the caselaw does not require such certainty. It requires only what the available evidence reveals—an adequate basis to conclude that Defendants *may* not adequately represent Armistead’s interest. While the government may share the general goal of defending the Sports Act, Armistead’s and the government defendants’ interests are still distinct. By allowing Armistead to intervene as of right, the Court will ensure it will receive the most robust arguments to reach a just, equitable, and efficient resolution of the issues.

**II. Alternatively, this Court should grant Armistead permissive intervention because her legal position shares a common question of law and fact with this litigation.**

Besides satisfying the requirements for intervention of right, Armistead also qualifies for permissive intervention. Fed. R. Civ. P. 24(b)(1) provides that “[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” In making this determination a court must also consider “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3); *see also North Carolina State Conference of NAACP*, 999 F.3d at 927.

As discussed above, Armistead’s motion is timely filed, and her participation will cause no undue delay or prejudice to the original parties. Armistead has tendered a responsive pleading (Ex. B) and her participation advances efficient litigation by ensuring a full airing of the issues in this case. Her legal position “shares with the main action a common question of law or fact,” Fed. R. Civ. P. 24(b)(1), as her interests situate and compel her to defend West Virginia’s Sports Act.

Finally, Armistead —unlike the named defendants—has a personal, experiential perspective to share. As an intervenor, Armistead would provide this Court with a perspective otherwise out of view, thereby aiding in the disposition of the case. This would allow the Court to “dispose of as much of a controversy” as is possible, compatible with efficiency and due process. *Feller*, 802 F.2d at 729. She therefore satisfies the conditions for permissive intervention.

### **Conclusion**

This case raises important legal issues for countless citizens in West Virginia and particularly for the athletes that will be affected by whatever this Court decides. This Court should therefore hear from these voices—the voices most affected and protected by the West Virginia’s Sports Act. For these reasons, Armistead respectfully requests this Court issue an order authorizing her to intervene, either as of right or permissively.

Respectfully submitted this 10th day of September, 2021.

*/s/ Brandon S. Steele*

---

Brandon Steele, WVBar No. 12423  
The Law Offices of Brandon S. Steele  
3049 Robert C. Byrd Drive, Suite 100  
Beckley, WV 25801  
(304) 253-1230  
(304) 255-1520 Fax  
bstelelawoffice@gmail.com

Jonathan Scruggs, AZ Bar No. 030505\*  
Alliance Defending Freedom  
15100 N. 90th Street  
Scottsdale, AZ 85260  
(480) 444-0020  
(480) 444-0028 Fax  
jscruggs@adflegal.org

Christiana Holcomb, DC Bar No. 176922\*  
Alliance Defending Freedom  
440 First Street NW, Suite 600  
Washington, DC 20001  
(202) 393-8690  
(202) 347-3622 Fax  
cholcomb@adflegal.org

Timothy D. Ducar, AZ Bar No. 015307\*  
Law Offices of Timothy D. Ducar, PLC  
7430 E. Butherus Drive, Suite E  
Scottsdale, AZ 85260  
(480) 502-2119  
(480) 452-0900 Fax  
tducar@azlawyers.com

*\*Statement of Visiting Attorneys  
forthcoming*

*Attorneys for Proposed Intervenor*

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,*

v.

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,  
DORA STUTLER in her official capacity as  
Harrison County Superintendent, PATRICK  
MORRISEY in his official capacity as Attorney  
General, and THE STATE OF WEST  
VIRGINIA

*Defendants.*

Case No. 2:21-cv-00316

Hon. Joseph R. Goodwin

**Certificate of Service**

I, Brandon Steele, hereby certify that on September 10, 2021, I electronically filed a true and exact copy of ***Proposed Intervenor Lainey Armistead's Memorandum in Support of Motion to Intervene*** with the Clerk of Court and all parties using the CM/ECF system.

*/s/ Brandon S. Steele*

---

Brandon Steele, WV Bar No. 12423  
The Law Offices of Brandon S. Steele  
3049 Robert C. Byrd Drive, Suite 100  
Beckley, WV 25801  
(304) 253-1230  
(304) 255-1520 Fax  
bsteelelawoffice@gmail.com

*Attorney for Proposed Intervenor*

# Exhibit A

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

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,*

v.

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,  
DORA STUTLER in her official capacity as  
Harrison County Superintendent, PATRICK  
MORRISEY in his official capacity as Attorney  
General, and THE STATE OF WEST  
VIRGINIA

*Defendants.*

Case No. 2:21-cv-00316

Hon. Joseph R. Goodwin

**LAINHEY ARMISTEAD'S DECLARATION  
IN SUPPORT OF MOTION TO INTERVENE**

I, Lainey I. Armistead, under penalty of perjury, declare as follows:

1. I am a twenty-one-year-old resident of Charleston, West Virginia, in Kanawha County, and have personal knowledge of the information below.
2. I am a junior and female athlete at West Virginia State University (WVSU) in Charleston, West Virginia, where I compete on the women's soccer team. Soccer is my passion and life-defining pursuit.

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

***Athletics Background***

3. I come from a family of talented athletes. My dad was a multi-sport athlete in high school and an All-American soccer player in college. He later coached club soccer. My mom was a high school and collegiate cheerleader. Two of my brothers went on to play soccer in college.

4. Soccer was like the air I breathed growing up. I first kicked a soccer ball at three years old—almost as soon as I could walk. I grew up playing pick-up soccer games with my brothers, being coached by my dad on technique, and cheering at soccer matches alongside my family.

5. I started playing on club soccer teams in my home state of Kentucky at age seven and continued competing on club teams through the end of my high school career.

6. I was excited to enjoy success on those club soccer teams. When I was just nine years old, my club soccer team won the indoor U.S. Youth Futsall National Championships—which is the largest and most prestigious indoor youth soccer competition in the country. It was an unforgettable experience.

7. I later went on to help my club soccer team win state championships during my freshman and sophomore years of high school. Those wins pushed me to try even harder.

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

8. Also during my sophomore year of high school, I had the honor of being selected from my club soccer team (Kentucky Fire) as one of only 20 girls in the nation to be invited to compete in a showcase soccer event in Las Vegas.

9. In addition to club soccer, I also competed on my school's middle school and high school soccer teams. One of my favorite memories from that time was helping my high school soccer team win the state championship during my freshman year of high school.

***Competing in Women's Collegiate Athletics***

10. It was my dream to play soccer in college. And I hoped my hard work would pay off with a college scholarship. I know, however, that athletic scholarships are limited and competitive.

11. After visiting approximately ten different colleges, I decided to visit West Virginia State University (WVSU), a public state university. I immediately knew this was where I wanted to attend college and I committed the same day.

12. WVSU offered me a soccer scholarship to compete on its women's soccer team. That scholarship helps pay for my education and brings me one step closer to my dream of being a lawyer someday.

13. Without a scholarship, I likely would have attended a college in my hometown and been saddled with school loans. My athletic scholarship opened the door for me to attend the school of my choice.

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

14. WVSU is an NCAA Division II soccer team and competes in the NCAA Mountain East Conference.

15. There are 11 players per team (22 players total) on the soccer field at any given time, though teams may have two or three times that many players total. Those 11 starting positions are highly coveted and competitive.

16. Team players are grouped into four general categories:

- a. the front, or attacking positions, which are called strikers;
- b. the midfielder positions;
- c. the defender positions;
- d. and the goalie.

17. I play starting left wingback on the soccer field, which is a defender position. But I “attack” a lot, which means I run up and down the field much of the game.

18. I also have the privilege of serving as team captain. This is a leadership position that is voted on by both players and coach, and has responsibilities that include organizing the team, determining what jerseys to wear, serving as liaison between the players and coaches, and also serving as liaison between the players and referee.

19. In 2020, I received the Stinger Award for “Female Teammate of the Year” in WVSU women’s soccer.

20. Due to COVID, I will still have two additional years of NCAA eligibility after I graduate with my BA from WVSU.

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

21. My teammates and I train hard to win. We do running drills, weightlifting, and watch replay videos of our prior games to evaluate how we can improve.

22. But it is not always easy. I have made many sacrifices over the course of my athletic career to play the sport that I love. I have missed school dances and spring breaks; family events; and friends' birthdays. I have given up my weekends and free time. I stay at school late for practice and get up early to train.

23. But I make these sacrifices because I want to be the best that I can be. I want to win—not just for myself, but also for my teammates. And it is that love of winning that helps me press through when the going gets tough.

24. I love my sport. It's exhilarating to see all the training and hard work that we put in at practice pay off on the field.

25. Soccer is called the “beautiful sport”—and for good reason. It is the most played sport in the world. Like music, soccer transcends culture. You can play a pick-up game of soccer with anyone regardless of language or background.

26. But soccer is also beautiful because it takes incredible teamwork to achieve a win. Soccer is a 90-minute game. It is much more difficult for women to run nonstop for a full 90-minutes than it is for men. As a result, women's soccer games are different than men's. We have to be more cohesive. We pass the ball more, communicate more, and rely on our teammates more. But rather than a downside, I see teamwork as a thing of beauty. I love accomplishing things as a group. And when I step on the field with those ten other women, I know they have

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

my back and I have theirs. We play hard for each other. As a result, my teammates have become some of my closest friends.

27. Soccer also taught me life skills like mental and physical toughness, perseverance, and good sportsmanship. It taught me that hard work and discipline pay off. It taught me the value of teamwork. It provided leadership opportunities that will benefit my future career. It opened new financial opportunities, such as benefitting from my image and likeness. And it has given me something to strive for.

***Safety Concerns in Soccer***

28. Soccer is a rough contact sport, and injuries are common among female athletes.

29. From my own observations, concussions, knee injuries, and ankle injuries are the most common injuries incurred by soccer players. In the first couple games of the WVSU 2021 soccer season alone, members of my team suffered all three of these injuries.

30. Playing a rough contact sport with other girls is one thing. But having played pick-up soccer games with my brothers and street soccer with men, I have realized that playing a rough contact sport with men is entirely different.

31. Males have advantages of strength, speed, and size in soccer. They compete at a faster pace. They kick the ball harder. Their physical frames are generally larger.

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

32. Thankfully, I can enjoy a casual pick-up game of soccer with men because they take it easier on me. They do not go “all-in” because they know they could hurt me. But if a male was seriously competing and making full use of his strength, speed, and size in a soccer match against me, based on my long experience playing competitive team soccer, I would be more worried about being injured by that male than if I were competing against another female.

***Fairness in Women’s Sports***

33. A couple years ago, I heard about female track athletes in Connecticut who lost to biological males competing in their races. I learned that these two males won 15 women’s state championship titles in girls’ high school track and field. I was appalled and heartbroken for those girls. It felt so unfair. But I was thankful that those athletes had the courage to stand up.

34. I also heard that a male who competed on the University of Montana men’s team track and cross-country team began competing in women’s cross-country and track events and displaced collegiate female athletes.

35. So when I heard that West Virginia’s legislature passed the Save Women’s Sports Act to protect the integrity of women’s sports, I enthusiastically supported it.

36. I never dreamed this would be an issue in West Virginia. And I never thought this issue could personally impact my competition till I learned a lawsuit had been filed against the new West Virginia law to protect women’s sports.

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

37. Getting involved in this lawsuit was a weighty decision. I sought a lot of counsel and considered my options carefully before deciding to become involved in a case of this public importance and controversy.

38. And I know from my own experience in friendly competitions against men that facing a male in a soccer game would change the entire dynamics on the field and pose not just fairness but safety concerns, as well.

39. If forced to compete against a male athlete, I would have to face the hard decision of competing on an unfair playing field with heightened safety risks, or not competing at all.

40. A single male on my team could displace me or one of my teammates from a starting position—or a position on the field at all.

41. Even if the male athlete was on my team—arguably giving my team an advantage—I would treat that individual with respect and kindness, but it would still be unfair to displace a female athlete from her place on the field or from that position. And it also would not be fair to the female players on the opposing team.

42. Allowing males into women's athletics allows a person with a male body to take opportunities away from female athletes—whether that is a spot on the team, a starting position on the field, an athletic scholarship, the opportunity to benefit from her likeness, or recognition and awards—and is contrary to the entire purpose of women's sports.

43. Women's sports exist to give girls like me a chance to compete in sports on a level playing field.

EXHIBIT A  
Declaration of Lainey Armistead  
In Support of Motion to Intervene

44. Women have worked so hard to be taken seriously on the athletic level.

45. I fear that too many women feel pressured to remain silent about their beliefs.

46. I want other little girls in the future, or my own daughters, to not have to worry about competing against males. I also fear that girls in the future might consider not playing at all if they feel they cannot win against a physically superior male. Winning is the motivation for a lot of us who played sports for years.

47. I believe that protecting fairness in women's sports is a women's rights issue. This isn't just about fair play for me: it's about protecting fairness and safety for female athletes across West Virginia. It's about ensuring that future generations of female athletes are not discriminated against but have access to the same equal athletic opportunities that shaped my life.

48. Being an athlete in college has made me even more passionate about the sport that I play. I want fairness and equality in sports. And I want to ensure those standards are protected for other girls, too.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Lainey I. Armistead  
Dated: September 9, 2021

# Exhibit B

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,*

v.

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,  
DORA STUTLER in her official capacity as  
Harrison County Superintendent, PATRICK  
MORRISEY in his official capacity as Attorney  
General, and THE STATE OF WEST  
VIRGINIA

*Defendants.*

Case No. 2:21-cv-00316

Hon. Joseph R. Goodwin

Jury Trial Demanded

**INTERVENOR'S PROPOSED ANSWER TO FIRST AMENDED COMPLAINT**

Under Federal Rule of Civil Procedure 24(c), Intervenor-Defendant submits the following answer and affirmative defenses to Plaintiff's First Amended Complaint. Intervenor denies any allegation that is not expressly admitted below.

1. To the extent Plaintiff asserts that B.P.J. is a biological female, Intervenor denies this allegation. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 1, so they are denied.

2. Intervenor admits that West Virginia's legislature passed H.B. 3293 in April 2021 and is codified at W. Va. Code § 18-2-25d. To the extent Plaintiff characterizes H.B. 3293, Intervenor states that the law speaks for itself. Intervenor denies the remaining allegations in paragraph 2.

3. Intervenor denies the allegations in paragraph 3.

4. Intervenor denies the allegations in paragraph 4.

5. Intervenor admits that B.P.J. seeks declaratory and injunctive relief from this Court. Intervenor denies the remaining allegations in paragraph 5.

6. To the extent Plaintiff asserts that B.P.J. is a biological female, Intervenor denies this allegation. Intervenor admits that B.P.J. purports to bring this suit by and through Heather Jackson. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 6, so they are denied.

7. Plaintiff cites statutes and case law that speak for themselves. Intervenor lacks sufficient knowledge and information to admit or deny the allegations in paragraph 7, so they are denied.

8. Plaintiff cites statutes and case law that speak for themselves. Intervenor lacks sufficient knowledge and information to admit or deny the allegations in paragraph 8, so they are denied.

9. Plaintiff cites statutes that speak for themselves. Intervenor lacks sufficient knowledge or information to admit or deny that the Harrison County Board of Education has delegated control of Bridgeport Middle School's athletics to the School Activities Commission, so this allegation is denied. Intervenor admits the remaining allegations in paragraph 9.

10. Plaintiff cites a statute that speaks for itself. Intervenor lacks sufficient knowledge or information to admit or deny that Clayton Burch "executes his official duties in Wood County," so this allegation is denied. Intervenor admits the remaining allegations in paragraph 10.

11. Plaintiff cites a statute that speaks for itself. Intervenor lacks sufficient knowledge or information to admit or deny that Dora Stutler's responsibilities include "interscholastic athletics," so this allegation is denied. Intervenor admits the remaining allegations in paragraph 11.

12. Plaintiff cites a statute that speaks for itself. Intervenor lacks sufficient knowledge or information to admit or deny that the Attorney General is charged

with enforcing H.B. 3293, so this allegation is denied. Intervenor admits the remaining allegations in paragraph 12.

13. Plaintiff cites a statute that speaks for itself. Intervenor lacks sufficient knowledge or information to admit or deny that “West Virginia oversees and operates the West Virginia State Board of Education,” so this allegation is denied. Intervenor admits the remaining allegations in paragraph 13.

14. Intervenor admits the allegations in paragraph 14.

15. Intervenor denies the allegations in paragraph 15.

16. Intervenor admits that the Southern District of West Virginia, Charleston Division, is a proper venue for this case because the State Board of Education resides in this District and Division. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 16, so they are denied.

17. Intervenor admits that this Court has general authority to enter declaratory judgments and to provide injunctive relief but denies that such relief is proper in this case.

18. Intervenor denies that Plaintiff’s rights under the United States Constitution and laws of the United States have been denied and admits the remaining allegations in paragraph 18.

19. Intervenor admits that a person’s sex is manifest in “distinct biological characteristics” such as genetics, reproductive organs, hormones, and secondary sex characteristics. Intervenor denies that gender identity is a biological attribute and denies any remaining allegations in paragraph 19.

20. Intervenor denies the allegations in paragraph 20.

21. Intervenor denies the allegations in paragraph 21.

22. Intervenor admits that a person is born male or female and that sex is often recognized at birth in part based on a visual assessment of genitalia.

Intervenor lacks sufficient knowledge or information to admit or deny “[m]ost people are cisgender,” so this allegation is denied.

23. Intervenor denies the allegations in paragraph 23.

24. Intervenor denies that paragraph 24 accurately states the contents of the DSM-V.

25. Intervenor denies the allegations in paragraph 25.

26. Intervenor denies the allegations in paragraph 26.

27. Intervenor denies the allegations in paragraph 27.

28. Intervenor admits that puberty-blocking drugs can interfere with puberty and can limit the influence of endogenous hormones on the body. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 28, so they are denied.

29. Intervenor admits that puberty-blocking drugs can interfere with puberty and can delay or inhibit physical development that would otherwise occur. Intervenor denies that puberty blockers help mitigate gender dysphoria and denies any remaining allegations in paragraph 29.

30. To the extent Plaintiff asserts that B.P.J. is a biological female, Intervenor denies this allegation. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 30, so they are denied.

31. To the extent Plaintiff asserts that B.P.J. is a biological female, Intervenor denies this allegation. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 31, so they are denied.

32. To the extent Plaintiff asserts that B.P.J. is a biological female, Intervenor denies this allegation. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 32, so they are denied.

33. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 33, so they are denied.

34. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 34, so they are denied.

35. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 35, so they are denied.

36. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 36, so they are denied.

37. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 37, so they are denied.

38. Intervenor admits that athletics provide benefits to children and young adults. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 38, so they are denied.

39. Intervenor denies the allegations in paragraph 39.

40. Intervenor admits that circulating testosterone levels in boys and girls can diverge significantly starting at puberty. Intervenor denies the remaining allegations in paragraph 40.

41. Intervenor denies the allegations in paragraph 41.

42. Intervenor admits that the NCAA, World Athletics, and the International Olympics Committee permit biological males to compete in women's sport events in certain circumstances. Intervenor denies the remaining allegations in paragraph 42.

43. Plaintiff cites to portions of the West Virginia administrative code that speak for themselves. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 43, so they are denied.

44. Intervenor denies the allegations in paragraph 44.

45. Intervenor admits that Delegate Caleb Hanna helped sponsor H.B. 3293 in the West Virginia House of Delegates. Intervenor denies the remaining allegations in Paragraph 45.

46. Intervenor denies the allegations in paragraph 46.

47. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 47, so they are denied.

48. Plaintiff cites an earlier version of H.B. 3293 that speaks for itself. Paragraph 48 calls for a legal conclusion to which no response is required.

49. Plaintiff cites an earlier version of H.B. 3293 that speaks for itself. Paragraph 49 calls for a legal conclusion to which no response is required.

50. Plaintiff cites an earlier version of H.B. 3293 that speaks for itself. Paragraph 50 calls for a legal conclusion to which no response is required.

51. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 51, so they are denied.

52. Intervenor admits that on March 18, 2021, the Education Committee held a hearing on H.B. 3293. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 52, so they are denied.

53. Intervenor admits that on March 18, 2021, the Education Committee passed H.B. 3292 to the Judiciary Committee. The public record speaks for itself. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 53, so they are denied.

54. Intervenor admits that H.B. 3293 passed out of the Judiciary Committee, as amended, on March 18, 2021. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 54, so they are denied.

55. Intervenor admits that the West Virginia Delegates debated H.B. 3293 on March 23, 2021. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 55, so they are denied.

56. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 56, so they are denied.

57. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 57, so they are denied.

58. Intervenor admits the allegations in Paragraph 58.

59. Intervenor admits that on April 1, 2021, the Education Committee considered H.B. 3293. Intervenor admits that the Committee later passed an amended version of H.B. 3293. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 59, so they are denied.

60. Intervenor admits that on April 8, 2021, the Senate debated H.B. 3293. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 58, so they are denied.

61. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 61, so they are denied.

62. Intervenor admits the allegations in paragraph 62.

63. Intervenor admits the allegations in paragraph 63.

64. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 64, so they are denied.

65. Intervenor admits the allegations in paragraph 65.

66. Intervenor denies the allegations in paragraph 66.

67. Intervenor admits that paragraph 67 accurately reproduces language in part from West Virginia Code § 18-2-25d(a)(4). Intervenor denies the remaining allegations in paragraph 67.

68. Intervenor denies that paragraph 68 accurately states the content of West Virginia Code § 18-2-25d(c).

69. Intervenor admits the allegations in paragraph 69.

70. Intervenor admits that paragraph 70 accurately states the definition of biological sex contained in H.B. 3293. Intervenor admits that biological males cannot show that they are girls whether they identify as male or female.

71. Intervenor admits the allegations in paragraph 71 accurately quote in part from H.B. 3293.

72. Intervenor admits that H.B. 3293 “delegates authority to other bodies to establish rules and regulations.” Intervenor denies the remaining allegations in paragraph 72.

73. Intervenor lacks sufficient knowledge or information to admit or deny what the School Activities Commission requires students to disclose, so these allegations are denied. Intervenor denies the remaining allegations in paragraph 73.

74. Intervenor denies the allegations in paragraph 74.

75. Intervenor denies the allegations in paragraph 75.

76. Intervenor denies the allegations in paragraph 76.

77. Intervenor states that Paragraph 77 calls for a legal conclusion and the statute speaks for itself.

78. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 78, so they are denied.

79. Intervenor denies the allegations in paragraph 79.

80. Intervenor admits that track and cross-country involve “competitive skill.” Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 80, so they are denied.

81. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 81, so they are denied.

82. To the extent Plaintiff asserts that B.P.J. is a biological female, Intervenor denies this allegation. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 82, so they are denied.

83. Intervenor denies that H.B. 3293 bars B.P.J. from participating in sports. Intervenor lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 83, so they are denied.

84. Intervenor denies the allegations in paragraph 84.

85. Intervenor denies the allegations in paragraph 85.

86. Intervenor denies the allegations in paragraph 86.

87. Intervenor denies the allegations in paragraph 87.

88. Paragraph 88 merely incorporates allegations to which Intervenor has already responded, so it does not require a response here.

89. Intervenor admits the allegations in paragraph 89.

90. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 90, so they are denied.

91. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 91 and they are therefore denied.

92. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 92 and they are therefore denied.

93. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 93 and they are therefore denied.

94. Intervenor denies the allegations in paragraph 94.

95. Intervenor admits the first sentence in paragraph 95 and denies the second sentence because in some circumstances compliance with Title IX may require the separation of sports teams by sex.

96. Intervenor denies the allegations in paragraph 96.

97. Intervenor denies the allegations in paragraph 97.

98. Intervenor denies the allegations in paragraph 98.

99. Intervenor denies the allegations in paragraph 99.

100. The first sentence of paragraph 100 merely incorporates Plaintiff's allegations to which Intervenor has already responded, so it does not require a response here.

101. Intervenor admits the allegations in paragraph 101.

102. Intervenor lacks sufficient knowledge or information to admit or deny the allegations in paragraph 102, so they are denied.

103. Intervenor denies the allegations in paragraph 103.

104. Intervenor denies the allegations in paragraph 104.

105. Intervenor denies the allegations in paragraph 105.

106. Intervenor denies the allegations in paragraph 106.

107. Intervenor denies the allegations in paragraph 107.

108. Intervenor denies the allegations in paragraph 108.

109. Intervenor denies the allegations in paragraph 109.

110. Intervenor denies the allegations in paragraph 110.

#### **ANSWER TO PLAINTIFF'S PRAYER FOR RELIEF**

Intervenor denies that H.B. 3293 violates any of Plaintiff's rights. Intervenor also denies that Plaintiff is entitled to any relief.

#### **AFFIRMATIVE DEFENSES**

1. Plaintiff lacks standing to bring the asserted claims.
2. Plaintiff lacks standing to seek relief beyond Plaintiff.
3. Plaintiff has failed to join indispensable parties.
4. Plaintiff's claims are unripe.
5. No government action occurred in relation to Plaintiff's claims against W. Va. Code § 18-2-25d.
6. Plaintiff fails to state a claim upon which relief can be granted.
7. Plaintiff is not entitled to attorney fees and/or costs under 42 U.S.C. § 1988.

8. Plaintiff fails to state any cause of action for which attorney fees and costs are recoverable.

9. The First Amended Complaint is barred, in whole or part, because the relief sought exceeds that authorized by law.

10. Plaintiff's claims are barred to the extent the First Amended Complaint seeks damages in excess of the caps on damages under applicable law.

11. The requested relief would violate Intervenor's rights under Title IX, 20 U.S.C. § 1681, et seq. and its interpreting regulations.

12. Intervenor is entitled to all defenses available under federal and state constitutional, statutory, and decisional law including but not limited to any and all affirmative defenses listed in Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure.

13. Intervenor reserves the right to identify additional affirmative defenses based on information obtained during discovery.

#### **PRAYER FOR RELIEF**

Wherefore, Defendant-Intervenor ask this Court to dismiss the Complaint with prejudice.

#### **JURY DEMAND**

Defendant-Intervenor demands trial by jury on all issues triable by jury.

Respectfully submitted this 10th day of September, 2021.

*/s/ Brandon S. Steele*

---

Brandon Steele, WVBar No. 12423  
The Law Offices of Brandon S. Steele  
3049 Robert C. Byrd Drive, Suite 100  
Beckley, WV 25801  
(304) 253-1230  
(304) 255-1520 Fax  
bsteelelawoffice@gmail.com

Jonathan Scruggs, AZ Bar No. 030505\*  
Alliance Defending Freedom  
15100 N. 90th Street  
Scottsdale, AZ 85260  
(480) 444-0020  
(480) 444-0028 Fax  
jscruggs@adflegal.org

Christiana Holcomb, DC Bar No. 176922\*  
Alliance Defending Freedom  
440 First Street NW, Suite 600  
Washington, DC 20001  
(202) 393-8690  
(202) 347-3622 Fax  
cholcomb@adflegal.org

Timothy D. Ducar, AZ Bar No. 015307\*  
Law Offices of Timothy D. Ducar, PLC  
7430 E. Butherus Drive, Suite E  
Scottsdale, AZ 85260  
(480) 502-2119  
(480) 452-0900 Fax  
tducar@azlawyers.com

*\*Statement of Visiting Attorneys  
forthcoming*

*Attorneys for Proposed Intervenor*

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,*

v.

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,  
DORA STUTLER in her official capacity as  
Harrison County Superintendent, PATRICK  
MORRISEY in his official capacity as Attorney  
General, and THE STATE OF WEST  
VIRGINIA

*Defendants.*

Case No. 2:21-cv-00316

Hon. Joseph R. Goodwin

CERTIFICATE OF SERVICE

I, Brandon Steele, hereby certify that on September 10, 2021, I electronically filed a true and exact copy of *Intervenor's Proposed Answer to First Amended Complaint* with the Clerk of Court and all parties using the CM/ECF system.

*/s/ Brandon S. Steele*

Brandon Steele, WV Bar No. 12423  
The Law Offices of Brandon S. Steele  
3049 Robert C. Byrd Drive, Suite 100  
Beckley, WV 25801  
(304) 253-1230  
(304) 255-1520 Fax  
bsteelelawoffice@gmail.com

*Attorney for Proposed Intervenor*