

No. 23-1078

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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

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,
Defendants-Appellees,

and

THE STATE OF WEST VIRGINIA, LAINEY ARMISTEAD
Intervenors-Appellees.

On Appeal from the United States District Court
for the Southern District of West Virginia,
Case No. 2:21-cv-00316 (Goodwin, J.)

**MOTION OF 25 ATHLETIC OFFICIALS AND COACHES OF FEMALE
ATHLETES TO FILE BRIEF OF *AMICI CURIAE*
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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Pursuant to Federal Rule of Appellate Procedure 29(a), 25 athletic officials and coaches of female athletes move for leave to file an *amici curiae* brief in support of Appellees. The proposed brief accompanies this Motion.

Proposed *amici curiae* requested consent from the parties to file their brief of *amici curiae*. Counsel for Plaintiffs-Appellants; Defendants-Appellees West Virginia State Board of Education, Harrison County Board of Education, W. Clayton Burch, and Dora Stutler; and Intervenors-Appellees State of West Virginia and Lainey Armistead consented. Defendant-Appellee West Virginia Secondary School Activities Commission took no position on the filing of the brief. Accordingly, the undersigned file this motion seeking leave from the Court to file their brief of *amici curiae*.

I. Interest of Amici Curiae

Amici curiae consist of over two dozen athletic officials and coaches from nine different sports and 19 different states, writing on behalf of the girls and women they have coached and all female athletes and future athletes, whose futures hang in the balance between objective and subjective notions of “sex.” *Amici* have dedicated significant parts of their lives to the world of sport and ensuring that its safe, fair, and ethical bases are maintained. They represent a wide range of experience and perspectives, and include youth, high school, collegiate, club, professional, and Olympic coaches. They represent different sports, including track, swimming, soccer, gymnastics, archery, weightlifting, rowing, triathlon and tennis. *Amici* include both current and retired coaches from all around the country. What they have in common is that

they recognize the importance of a protected female category so that women and girls can have fairness, safety, and equal opportunities in their sports endeavors. A complete list of the *amici* coaches is included in the addendum attached hereto.

Fundamentally, the job of an athlete's coach—at every level, from youth sports to Olympic competitions—is to help the athlete reach his or her full potential in their chosen athletic endeavors, while keeping them as safe as possible and, ideally, increasing their love for the sport. It is *amici*'s job to oversee the rules of competition, to develop athletes, and to defend athletes against ethical violations. *Amici* have seen and experienced first-hand that competing in and excelling at sports can produce incalculable benefits—physically, mentally, relationally, and socially—and coaches have the unique opportunity and responsibility to facilitate such opportunities.

Ensuring that female athletes are not forced to compete against biological males who self-identify as females is critical to each of those elements of a coach's role. Given the scientifically indisputable and biological differences between males and females, female athletes cannot reach their full competitive and athletic potential if they are required to compete against biological males. In many—perhaps most—sports, it is inherently less safe for female athletes to compete against biological males, and the competitive disadvantage to female athletes forced to compete against biological males has deleterious effect on the joy, self-worth, and confidence that female athletes

derive from their athletic participation. As such, *amici* have an interest in ensuring that the playing field for female athletes is as even as possible.

II. Desirability of a Brief from *Amici Curiae*

The attached brief provides the unique perspective of over two dozen officials and coaches of female athletes. The brief explains why women's officials and coaches have not been more vocal on this issue until now, their unique perspective on why H.B. 3293 is necessary to protect against the rollback of women's rights and their participation in sports to pre-Title IX levels, the significant benefits that athletic participation provides to girls and women that can only be achieved through single-sex sports, and first-hand experiences and observations relating to these issues. *Amici* believe the unique perspectives they offer in the brief may assist the Court in its deliberations by providing first-hand accounts of the stakes involved for women's sports and women's rights more broadly.

Conclusion

For the foregoing reasons, *amici* respectfully ask the Court to grant their motion for leave to file a brief of *amici curiae*.

Dated: May 3, 2023

Respectfully submitted,

/s/ Anna St. John

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Attorneys for Amici Curiae

Addendum

Amici Curiae Athletic Officials and Coaches of Female Athletes

| | |
|---|--|
| <p><i>Jack Bauerle</i> Division I Collegiate Swim Coach Lifetime Achievement Award, College Swimming & Diving Coaches Association of America</p> | <p><i>Frank Busch</i> Former National Team Director of USA Swimming (5-time Olympic Coach)</p> |
| <p><i>Brittany Campanello</i> Youth Soccer Coach, Collegiate Athlete</p> | <p><i>Heather Cartwright</i> Former NCAA Division I Rowing Coach</p> |
| <p><i>Tom Coffey</i> AAU women and girls track coach 1969-1972 California interscholastic track coach 1973-2003</p> | <p><i>Catherine Curtis</i> Archery Coach</p> |
| <p><i>Sonni Dyer</i> Division I Collegiate Head Coach & Director of Triathlon</p> | <p><i>Bob Ernst</i> Division I College Rowing Coach, Men's & Women's teams, 50 years US National Team and Olympic Team Coach, 20 years</p> |
| <p><i>Elizabeth Farrington</i> Club and Youth Soccer Coach, Collegiate Scholarship Athlete</p> | <p><i>Kathleen A. Gill</i> Collegiate Scholarship Athlete in Tennis, University of Kentucky Former High School Athletic Director, Former Tennis and Volleyball Coach</p> |
| <p><i>Destani Hobbs</i> Former USA Weightlifting Level 1 Coach Former USA Weightlifting Affiliated Member/Athlete</p> | <p><i>Mary Horan Hollingsworth</i> Coach</p> |

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| <p><i>Vicki Huber-Rudawsky</i> 8x NCAA Champion in Track and Cross-Country 2x Olympian, 4th at World Cross-Country Championships Delaware State High School Champion and Record Holder for 25 years High School Track Coach</p> | <p><i>Patti Hupp</i> USATF Level 2 Certified Track and Field Coach USTFCCA Technical Certified Coach, ALTIS Certified Coach</p> |
| <p><i>Seth Huston</i> NCAA Division I College Swim Coach</p> | <p><i>Jim Livengood</i> Retired Division I Athletic Director - Washington State, University of Arizona, UNLV</p> |
| <p><i>Cynthia Millen</i> Former NCAA Swim Official, Former USA Swimming National Official Former International Paralympic Swim Official</p> | <p><i>Dennis Pursley</i> 5x Olympic Coach American Swimming Coaches Association Hall of Fame</p> |
| <p><i>Lisa Larsen Rainsberger</i> Founder of Kokopelli Kids Racing Team and Head Coach Coronado High School Head Cross Country and Track Coach 1985 Boston Marathon Champion; Former 5 Mile, 15k, 10 Mile, 30k American Record Holder University of Michigan 3 Sport All-American: Track and Field, Swimming and Cross Country</p> | <p><i>Meredith Gordon Remigino</i> Former USATF Certified Level 1 Track & Field Coach and Apprentice Level Official Former Connecticut State Department of Education - Certified Coach NCAA Division I Varsity Women's Cross Country and Track & Field Athlete, Yale University Connecticut High School State Cross Country Champion (1986)</p> |

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| <p><i>Jode Osborn Ritsema</i> Former Division I Soccer Player and Assistant Coach Girls High School Soccer Coach, High School Hall of Fame Athlete</p> | <p><i>Bronwyn Sims</i> Athlete, Girls and Women's Gymnastics Coach</p> |
| <p><i>Dawn Templeton</i> Track Coach, Collegiate Scholarship Athlete</p> | <p><i>Gregg Troy</i> US Olympic Team Head Swim Coach USA Swimming Coach of the Year High School and Division I Collegiate Swim Coach</p> |
| <p><i>Sara Younger-Merrill</i> US Rowing Level II Coach US Rowing Assistant Referee and Masters Athlete</p> | |

Proof of Service

I hereby certify that on May 3, 2023, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing.

Executed on May 3, 2023.

/s/ Anna St. John

Anna St. John

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Federal Rule of Appellate Procedure 29 Statement

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Summary of the Argument

H.B. 3293 helps protect the progress that women's and girls' sports have made since the passage of Title IX by ensuring that sex-specific sports teams based on "competitive skill" or "involv[ing] a contact sport" are based on "biological sex." The coaches filing this brief as *amici* understand the immense benefits that girls and women realize from competitive sport, and how both those benefits and the physical safety of female athletes are compromised when biological males are permitted to compete in female athletic events.

If H.B. 3293 is found unconstitutional, it will mark a fundamental shift in American law and policy that strips girls and women of their rights, threatens the physical safety of female athletes, and undercuts means by which women can achieve educational equality. It would not only revoke the very rights and protections that specifically secure women's access to school athletics, but would do so in order to extend those rights and protections to men claiming to be women.

Amici focus on unique issues in this brief, namely their personal experience with the benefits of single-sex sports to women and girls, how those benefits are supported by established law, the harms to women and girls from allowing subjective notions of gender identity to override immutable biological facts, and how strident activists have sought to silence any discussion of the harm to women from basing sports categories on gender identity, instead expecting women to accept being treated as the lesser sex without complaint.

Argument

I. It Is Time for Coaches to Stand Up for Their Women Athletes.

As the debate over biological males competing in women's sports has raged, coaches of female athletes have been largely silent. Many have watched how quickly and carelessly accusations are thrown against those who speak up in support of fairness for female athletes on this emotionally charged issue. By their very nature, coaches share an interest in bringing people together, to encourage a love of sport and to work toward a shared goal. They do not have the time or interest to foment division, engage in unnecessary policy debate, or alienate anyone. And they certainly do not want to be unfairly labeled as bigots who are against the LGBTQ+ community as a whole. Yet all too often, anyone who speaks up on behalf of female athletes is labeled as such by activists using the bully pulpit.

Standing up in today's divisive culture takes courage, and today over two dozen coaches and officials are choosing to speak the truth in support of the individual girls and women they have coached and in support of all women. *Amici* see that the vast majority of coaches among their ranks are adamantly opposed to biological males competing against women. Most of them are afraid to speak up because it would put their job security at risk. Many governing

bodies wish to avoid labels and controversy and thus support participation by men self-identifying as women in women's sports, making it professionally risky and more difficult for coaches to voice a contrary view—as one *amici* can personally attest, having lost her coaching position after publicly voicing such a view.

The stakes are high. If biological males are permitted to compete in women's sports, it will mark a turning point for women's rights. Today, many take for granted single-sex sports and the availability of athletic teams and competitions for women at all levels. *Amici*, some of whom were athletes in the early days of Title IX, do not take the progress in women's rights for granted and are speaking up to avoid the profound loss to women's sports that male competition will cause. Women are being told to give up their rights and accept being relegated once again to treatment as the less-deserving half of the population. We have only just begun to see the devastating effects of this injustice, caused by ignoring objective reality, blind adherence to platitudes of equality, and irrational and oversimplified concepts of inclusion. Unless something is done to stop it, women's sports participation and opportunity will revert back to pre-Title IX levels.

These coaches are proud of their work to bring more people to the sports they love, especially more women. That goal of increasing women's participation in sports—an activity that has incredible life-long benefits—is compromised when the playing field is unfair and women's sports are open to biological males. They see women losing motivation when the playing field includes biological males who have an innate competitive advantage in strength, agility, body size, muscle mass, bone density, body fat percentages, explosive power, etc. Women are being cheated out of honors, recognition, and rewards that these athletes have sacrificed much to achieve and have rightfully earned. This can have a lifelong impact on morale and post-athletic opportunities. Sports provide not only scholarships and other direct opportunities for advancement; they also provide lifelong character and health benefits.

Amici are distressed that after women fought for years to have their own sports, they now risk losing everything they worked for. They cannot silently watch this happen, even at the risk of personal and professional censure.

II. The Wide-Ranging Benefits for Female Athletes Can Only Be Realized if “Sex” Means Biological Sex.

Women’s participation in sports has skyrocketed since Title IX was enacted over fifty years ago. The number of women playing college sports increased from 30,000 in 1981 to over 200,000 in 2017; the number of high school girls participating in sports grew 990% from 1971 to 2003.¹ This increased participation has had enormous benefits for women and girls.

Athletic participation provides significant and comprehensive benefits to female athletes in physical health, mental health, academic achievement, body esteem, social skills, confidence, job performance, and numerous other areas. The potential rewards for achievement are great both within the sport and in the athlete’s broader life during and well after she stops competing. When the recognition and honors—from simply making the team, being a starting player, winning a state or local championship, earning scholarships, and beyond—are unfairly denied, so are the rewards. This is demonstrated by empirical evidence as well as *amici*’s own experience.

¹ Genevieve Carlton, *How Title IX Impacts Women’s Equality in College Athletics*, Best Colleges, Nov. 19, 2021, available at <https://bit.ly/3BFoLuE>.

Academically, girls who play sports have higher grades and score higher on standardized tests than non-athletes.² Participating in sports in high school “may have a positive influence on achievement in science, especially for young women[,]” and positively impacts academic performance generally.³ Girls who participate in sports are more likely to graduate compared to non-athletes with a particularly strong correlation for African American and Latina girls.⁴ At the college level, girls who receive sports scholarships graduate at higher rates.⁵ Female athletes are more likely than female non-athletes to postpone sexual activity and are half as likely to have an unintended pregnancy.⁶ They experience lower rates of depression and substance abuse, have higher self-esteem, and are even less likely to get breast cancer later in life.⁷ And, of

² “Benefits—Why Sports Participation for Girls or Women,” Women’s Sports Foundation (2011), available at <https://bit.ly/3eMMGiF>.

³ See Sandra L. Hanson & Rebecca S. Kraus, *Women, Sports, and Science: Do Female Athletes Have an Advantage?*, 71 *Sociology of Education* 93 (1998); Philip Veliz, & Sohaila Shakib, *Gender, Academics, and Interscholastic Sports Participation at the School Level: A Gender-specific Analysis of the Relationship between Interscholastic Sports Participation and AP Enrollment*, 47 *Sociological Focus* (2014).

⁴ *The Decade of Decline*, Women’s Sports Foundation 54 (Oct. 2012), available at <https://bit.ly/3DnOitw>.

⁵ *Finishing Last: Girls of Color and Schools Sports Opportunities*, Nat’l Women’s Law Ctr. 7 (2015), available at <https://bit.ly/3QBCJSd>.

⁶ *Id.*; *Sport and Teen Pregnancy*, Women’s Sports Foundation 8, 10 (May 1998), available at <https://bit.ly/3BgAQEU>.

⁷ *Benefits—Why Sports Participation for Girls and Women*, Women’s Sports Foundation (2011); *Physical Activity in Adolescence and Young Adulthood and Breast*

course, sports can provide scholarship opportunities, prize money, titles, and other awards which serve as great incentives for girls and women to invest their time and effort into these activities which offer such great public benefit.

Even after the close of an athletic career, sports participation leads to better business and employment opportunities for women.⁸ Women have additional resume items, confidence, encouragement from a network of coaches, teammates, and other supporters, coaching opportunities, and job opportunities. A survey of senior female executives found that 94% of women in the C-suite played sports, including 52% at the university level, and 74% of respondents said that a background in sports can help accelerate a woman's career.⁹ Female executives further reported that their involvement in sports

Cancer Risk: A Quantitative Review, Nat'l Center for Biotech Info. (Feb. 2004), available at <https://www.ncbi.nlm.nih.gov/pubmed/15075782>; see also See Kimberly H. McManama, et al., *Psychological Resilience in Young Female Athletes*, National Library of Medicine (Aug. 17, 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8392459/>.

⁸ See Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, Nat'l Bureau of Economic Research 1, 4 (2010), available at https://www.nber.org/system/files/working_papers/w15728/w15728.pdf.

⁹ *Female Athletes Make Winning Entrepreneurs, According to New EY/ESPNW Report*, ESPN Press Room, May 3, 2017, available at <https://bit.ly/3dfDcMw>.

provided them with early leadership skills, discipline, and the ability to work in a team.¹⁰

The opportunity for women, and not just men, to realize these benefits was cemented into law over five decades ago. The key directive of Title IX of the Education Amendments of 1972 is contained in 37 simple words: “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).

Prior to Title IX, girls and women largely lacked teams of their own, and they did not have opportunities comparable to men to participate in sports at any level. Title IX changed this imbalance by disallowing recipients of federal funds—like schools—from discriminating on the basis of sex. It treats sex as limited to the binary categories of male and female, both objective and fixed. *See Adams v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 2022 WL 18003879, at *15 (11th Cir. Dec. 30, 2022) (*en banc*) (“[R]eading in ambiguity to the term ‘sex’ ignores the overall statutory scheme and purpose of Title IX, along with

¹⁰ *New Nationwide Research Finds: Successful Women Business Executives Don't Just Talk a Good Game... They Play(ed) One*, MassMut. Fin. Group, Feb. 2022, available at www.massmutual.com/mmfg/pdf/boardroom.pdf.

the vast majority of dictionaries defining ‘sex’ based on biology and reproductive function.”); *see also Neese v. Becerra*, No. 2:21-cv-163-z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) (“Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each ‘sex.’”); *see also* 20 U.S.C. § 1681(a)(2) (“[T]his section shall not apply . . . in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes[.]” (emphasis added)); *see also* 20 U.S.C. § 1681(a)(8) (“[T]his section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex[.]” (emphasis added)).

For athletic participation to continue to provide these and other benefits to female athletes, however, the meaning of “sex” under Title IX cannot be desecrated. Without sports dedicated exclusively to participation by women and girls, women and girls would be wholly excluded from the benefits of athletic participation. Sex-separated sports exist because of biological and physiological sex differences that are highly relevant to athletics. All sports have eligibility criteria, with only the highest performing athletes selected to

join a team, compete in a particular event, qualify for the next level of competition, or receive scholarship funds. This is usually a zero-sum environment, such that there are a designated number of slots, and if one person is selected for an opportunity, another person necessarily misses out. When female athletes are forced to compete in de facto coed teams, they are deprived of titles, records, medals, scholarships, and opportunities to win, or even participate at all fairly and safely, not to mention all of the ancillary benefits that sports participation provides.

These results have been demonstrated time after time in recent years. In 2019, two male track runners blew away female competitors in Connecticut's state track championship and smashed 17 meet records previously held by female competitors. Overall, physiological sex differences are so large that the U.S. Women's National Team was beaten in a soccer scrimmage by the FC Dallas under-15 boys' team in 2017.¹¹ And recent headlines have reported on collegiate swimmer Lia Thomas's success in women's competitions. As recently as 2020, Thomas was competing as a member of the University of Pennsylvania's men's swimming team. In 2021,

¹¹ *FC Dallas under-15 boys squad beat the U.S. Women's National Team in a scrimmage*, CBS Sports (2017), available at <https://bit.ly/3qyE6qj>.

just a year later, the University allowed Thomas to join the women's team after self-identifying as a woman, taking a spot on the team and thus depriving aspiring young women athletes of a fair and level playing field in competition on the team and against other schools. But Thomas is still anatomically a male, bearing all the biological advantages of male developmental physique and making teammates uncomfortable in the locker room with no recourse when they raised concerns with the coaching staff.¹²

In other sports the biological differences between the sexes is reflected in different standards of competition. Because of the strength difference, and other immutable biological differences, the rules and structure of competition differ for men and women within individual sports. In gymnastics, male and female gymnasts compete on very different apparatus to account for these differences. In archery men shoot at 90 meters while women shoot at 70 meters. To handle a nearly 50-pound bow, women must spend significant time strengthening their upper bodies, as accuracy is compromised by slower flight as windage takes its toll, and having an arc arrow flight to reach the target involves a greater degree of skill.

¹² See Letter to Hon. Catherine E. Lhamon from Concerned Women for America (Mar. 17, 2022), available at <https://bit.ly/3QOYOx2>.

Single-sex teams not only level the playing field competitively; they also protect women from the increased injury that arises from competing against males who are naturally larger, faster, and stronger. Unsurprisingly, women are at an increased risk of injury when playing contact sports with men. Girls and women not only are disadvantaged in size, speed, and strength; they have the additional physiological challenge of being far more prone to severe injury and to a condition called Female Athlete Triad, which causes osteoporosis, increases in fractures, and psychological issues such as depression, anxiety, body dysmorphia, and eating disorders.¹³

III. *Amici*'s Experience Demonstrates the Importance of Maintaining Single-Sex Sports for Women.

In the decades that *amici* have spent supporting women's sports as coaches, officials, and athletes themselves, they have seen first-hand the importance of protecting single-sex sports for women.

First and foremost are issues of safety. One *amici* described “dramatic injuries sustained in mixed sex competitions,” saying that she “can’t believe any sporting organization would countenance mixed sex in contact sports”—a

¹³ Committee on Adolescent Health Care, *Female Athlete Triad*, American College of Obstetricians and Gynecologists, Committee Opinion No. 702 (June 2017), <https://pubmed.ncbi.nlm.nih.gov/28538496/>.

scenario that the West Virginia law at issue specifically seeks to prevent. As a matter of basic biology, and supported by these coaches' personal experience, men even of the same height usually weigh significantly more than women as their bones and muscle mass are significantly denser. Biological differences due to sex are encoded permanently during the earliest stages of the human development process. These advantages are clearly demonstrated by childhood assessments and, of course, validated by the differences between male and female records at every level of high school, collegiate, Olympic and professional sport.¹⁴ “It’s only a matter of time before someone”—almost certainly a woman, by a man—“is killed, paralyzed, or left with permanent brain damage” when biologically male athletes are permitted to compete against women.

Beyond the immediate threat of injury during competition, personal safety concerns are yet another reason that single-sex sports are essential to women realizing the benefits of athletic competition. Training often involves long periods of time alone in a training facility, whether that be a gym, a track,

¹⁴ See Ashe Schow, *Even The New York Times Admits Biological Men Have a Huge Advantage Over Women In Sports*, Daily Wire (May 31, 2022), available at <https://www.dailywire.com/news/even-the-new-york-times-admits-biological-men-have-a-huge-advantage-over-women-in-sports>.

a range, or elsewhere. When women do not have separate, dedicated spaces, they will often reduce the hours they spend in those spaces. *Amici* have observed that women generally shy away from certain sports where training facilities are located in remote spaces and are usually all- or heavily-male environments. Training opportunities are reduced if athletes require the regular company of family, friends, or coaches. Some of *amici* themselves have been personally threatened by men in athletic spaces. If women athletes do not have secure facilities, it will be more difficult for them to put in the training required to achieve their highest and best performance.

Second, the unfairness inherent in allowing biological males to compete with women will decimate women's sports and deny women the benefits that athletic participation offers. The rules for sporting competition come in many forms, all with a goal of ensuring fairness. As the very foundation upon which sports are built, rules are indispensable to the long-term growth and health of the sport. The playing field is a smaller version of life, where rules exist in every realm, from board games to driving, to paying taxes to maintain order, safety, and fairness. Sports requires rules for the same purposes.

Playing on an unfair field demeans the sport and the athletes competing in it. For example, athletes are frequently subjected to drug tests to ensure

they are not unfairly enhancing their strength and power beyond natural levels. The purpose of the tests is to keep the competition as fair as possible. One *amici*, a professional runner and former Olympian who competed against athletes she knew were taking illegal performance-enhancing drugs, experienced how demoralizing and frustrating it is to lose to athletes who have an unfair advantage. While she followed the rules and took frequent drug tests demonstrating this fact, other athletes were enhancing their strength and power beyond natural levels for women.

A similar phenomenon occurs when men self-identifying as women compete in women's sporting events. Indeed, *amici* coaches have seen that girls wishing to transition to males typically wait until they are no longer competing athletically. As a matter of basic biology, if biological women want to be competitive in their chosen sport, they must compete as women. "Beginning in the womb, men are bathed in testosterone and puberty accelerates that. Men on average have broader shoulders, bigger hands and longer torsos, and greater lung and heart capacity. Muscles are denser[.] . . . [R]ecords for elite adult male swimmers are on average 10 percent to 12 percent faster than the records of elite female swimmers, an advantage that

has held for decades.”¹⁵ A male athlete, regardless of gender identity or hormone treatments, retains biological and genetic advantages conferred by sex. The fact is, “testosterone reduction or suppression does not negate all the physiological advantages of having developed testosterone driven strength, stamina and physique.”¹⁶ This explains the foundational reason for having different sports for men and women. No matter how dedicated a women is, how hard or smartly she trains, men and women are biologically different in ways that matter in sports competitions.¹⁷ These differences—*i.e.*, physical advantages for men—are not mitigated by hormone therapy or other medical procedures that males identifying as females may undergo.

The issue of transgender participation in single-sex sports thus almost exclusively burdens female athletes, who, consistent with gender stereotypes, are expected to graciously accept such new competitors, no matter the blatant unfairness. As much as the undersigned *amici* coaches preach about character

¹⁵ *See id.*

¹⁶ Mary Margaret Olohan, *Biologically male athletes have unfair advantage over women, major review finds*, Alpha News (Oct. 2, 2021) (internal quotation and citation omitted), available at <https://alphanews.org/biologically-male-athletes-have-unfair-advantage-over-women-major-review-finds/>.

¹⁷ Importantly, female sports are not merely lesser competitions of the male versions. Female athletes and sports represent a class of athletes and competitions that test the range of physical achievement that is possible with the female human body.

development and internal satisfaction, the fact remains that tangible rewards and recognition, or at least a fair and reasonable opportunity to achieve them, are the primary motivating factors for most athletes. In their absence, most athletes would be unlikely to even participate much less make the level of commitment required in the pursuit of excellence. Even the perception (or, in this case, the reality) that there is not a “level playing field” or that the “deck is unfairly stacked against them,” will have a negative impact on women’s morale and performance in the short term, and will likely eventually lead to abandoning their athletic pursuits altogether. As women are socialized to hide disappointment and to be more “sportsmanlike,” *amici* coaches observe how female athletes often pretend to be fine with unfair competition from biological males, but then watch their performance degrade when they know they have no chance at winning.

In that vein, activists have made it hugely detrimental to one’s career to speak out against the gross unfairness of having biological males compete in female sports. One *amici*—a highly educated and successful athlete, widely respected coach, and lifelong Democrat from a family with a long history of athletic accomplishments, including multiple Olympic gold medals—directly experienced this unfortunate reality. After publicly speaking before a

legislative body in support of protecting hard-won female-only athletic programs, an elite university dismissed her from her coaching job as “not the right fit” after her comments made “someone” “uncomfortable.” This experience shows that ideologues have sought to shut down any discussion whatsoever around this issue, with profoundly negative consequences for women. Female athletes will now be denied the opportunity to learn from this accomplished woman, and a university supposedly committed to free speech and rigorous debate has sought to silence the voices of women with unique and important perspectives on how best to protect against the erosion of women’s sports back to pre-Title IX days.

Finally, female-only sports are necessary to ensure that women perform their best. In co-ed sports and P.E. classes, *amici* have seen that boys are often centered and prioritized, with girls losing enthusiasm and interest and suffering as a result. One *amici*, an archer, previously found herself deliberately performing worse so as not to annoy the men in the same competitive space. To correct this issue, she began shooting only at times when the range would be empty so that she could perform up to her potential. Although some may see archery—a traditionally male-dominated sport—as a niche endeavor, it offers huge benefits to women: It can be enjoyed later in life

and, in fact, is the only Olympic sport without an upper age limit. It increases upper body strength, which helps women to maintain their posture as they go through menopause. It builds strength and confidence, can be enjoyed alone or in groups, competitively or recreationally, and supports calmness and wellness. Such social, emotional, and health-related benefits take different forms in different sports, but a commonality is that sports offer huge benefits to women, and the opportunity for women to achieve these benefits must be protected against encroachment by men. West Virginia has sought to do so with H.B. 3293, and *amici* ask this Court to allow that law to stand.

Conclusion

For the foregoing reasons, *amici* ask this Court to affirm the district court's decision and allow West Virginia to continue protecting its athletes.

Dated: May 3, 2023

Respectfully submitted,

/s/ Anna St. John

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Attorneys for Amici

Addendum

Amici Curiae Athletic Officials and Coaches of Female Athletes

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|---|--|
| <p><i>Jack Bauerle</i> Division I Collegiate Swim Coach Lifetime Achievement Award, College Swimming & Diving Coaches Association of America</p> | <p><i>Frank Busch</i> Former National Team Director of USA Swimming (5-time Olympic Coach)</p> |
| <p><i>Brittany Campanello</i> Youth Soccer Coach, Collegiate Athlete</p> | <p><i>Heather Cartwright</i> Former NCAA Division I Rowing Coach</p> |
| <p><i>Tom Coffey</i> AAU women and girls track coach 1969-1972 California interscholastic track coach 1973-2003</p> | <p><i>Catherine Curtis</i> Archery Coach</p> |
| <p><i>Sonni Dyer</i> Division I Collegiate Head Coach & Director of Triathlon</p> | <p><i>Bob Ernst</i> Division I College Rowing Coach, Men's & Women's teams, 50 years US National Team and Olympic Team Coach, 20 years</p> |
| <p><i>Elizabeth Farrington</i> Club and Youth Soccer Coach, Collegiate Scholarship Athlete</p> | <p><i>Kathleen A. Gill</i> Collegiate Scholarship Athlete in Tennis, University of Kentucky Former High School Athletic Director, Former Tennis and Volleyball Coach</p> |
| <p><i>Destani Hobbs</i> Former USA Weightlifting Level 1 Coach Former USA Weightlifting Affiliated Member/Athlete</p> | <p><i>Mary Horan Hollingsworth</i> Coach</p> |

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|---|--|
| <p><i>Vicki Huber-Rudawsky</i> 8x NCAA Champion in Track and Cross-Country 2x Olympian, 4th at World Cross-Country Championships Delaware State High School Champion and Record Holder for 25 years High School Track Coach</p> | <p><i>Patti Hupp</i> USATF Level 2 Certified Track and Field Coach USTFCCA Technical Certified Coach, ALTIS Certified Coach</p> |
| <p><i>Seth Huston</i> NCAA Division I College Swim Coach</p> | <p><i>Jim Livengood</i> Retired Division I Athletic Director - Washington State, University of Arizona, UNLV</p> |
| <p><i>Cynthia Millen</i> Former NCAA Swim Official, Former USA Swimming National Official Former International Paralympic Swim Official</p> | <p><i>Dennis Pursley</i> 5x Olympic Coach American Swimming Coaches Association Hall of Fame</p> |
| <p><i>Lisa Larsen Rainsberger</i> Founder of Kokopelli Kids Racing Team and Head Coach Coronado High School Head Cross Country and Track Coach 1985 Boston Marathon Champion; Former 5 Mile, 15k, 10 Mile, 30k American Record Holder University of Michigan 3 Sport All-American: Track and Field, Swimming and Cross Country</p> | <p><i>Meredith Gordon Remigino</i> Former USATF Certified Level 1 Track & Field Coach and Apprentice Level Official Former Connecticut State Department of Education - Certified Coach NCAA Division I Varsity Women's Cross Country and Track & Field Athlete, Yale University Connecticut High School State Cross Country Champion (1986)</p> |

| | |
|---|---|
| <p><i>Jode Osborn Ritsema</i> Former Division I Soccer Player and Assistant Coach Girls High School Soccer Coach, High School Hall of Fame Athlete</p> | <p><i>Bronwyn Sims</i> Athlete, Girls and Women's Gymnastics Coach</p> |
| <p><i>Dawn Templeton</i> Track Coach, Collegiate Scholarship Athlete</p> | <p><i>Gregg Troy</i> US Olympic Team Head Swim Coach USA Swimming Coach of the Year High School and Division I Collegiate Swim Coach</p> |
| <p><i>Sara Younger-Merrill</i> US Rowing Level II Coach US Rowing Assistant Referee and Masters Athlete</p> | |

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point CenturyExpd BT font.

Executed on May 3, 2023.

/s/ Anna St. John

Anna St. John

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I hereby certify that on May 3, 2023, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing.

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/s/ Anna St. John
Anna St. John

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as the

(party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

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