No. 24-43

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,

Petitioners,

v.

B.P.J., BY NEXT FRIEND AND MOTHER, HEATHER JACKSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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The State of West Virginia and 26 other States have confronted a serious social debate and concluded that biological boys should not compete on girls' athletics teams. But the Fourth Circuit found West Virginia's legislative effort lacking, citing Title IX and the Equal Protection Clause. *United States* v. *Skrmetti*, No. 23-477, slip op. (S. Ct. June 18, 2025), disclaims any guidance on the Title IX question presented here, and the decision's equal-protection analysis does not address critical questions unique to athletics. The Court should thus grant plenary review.

First, *Skrmetti* did not shed light on the Fourth Circuit's Title IX holding. Respondents predicted *Skrmetti* would clarify whether the Court's "reasoning" in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), "applies only to Title VII." Opp.33 (cleaned up). But the Court did not reach that issue. *Skrmetti*, slip op. at 19 ("We need not do so here.").

Granting this petition would allow the Court to confront the unique question of whether *Bostock*'s Title VII analysis applies to Title IX (a statute with a different text and enactment history). See *Skrmetti*, slip op. at 2-5 (Thomas, J., concurring). As Judge Agee explained in his dissent below, Pet.App.62a-73a, the Fourth Circuit's decision here relied in part on circuit precedent from outside the athletics context that mistakenly invoked *Bostock* to justify an onerous standard under Title IX. See 972 F.3d 586, 616-20 (4th Cir. 2020). The decision below has since been used to justify the same misguided approach elsewhere. E.g., Compl. ¶ 111, *California* v. *DOJ*, No. 3:25-cv-04863-CRB (N.D. Cal. filed June 9, 2025), ECF No. 1 (lawsuit challenging the Administration's Title IX views, relying on the Fourth Circuit's holding here for the proposition that not allowing a male who identifies as female to

play on a women's sports team "is tantamount to exclusion"). This Court's review is needed to restore Title IX to its intended purpose.

Second, *Skrmetti*'s equal-protection analysis does not address the unique statutory classifications at issue here. West Virginia's statute turns on sex. Tennessee's statute did not. *Skrmetti*, slip op. at 9-16. So it is doubtful *Skrmetti* would lead the court below to reconsider its equal-protection holding. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

Third, *Skrmetti* leaves open a further question affecting the equal-protection analysis here: whether "transgender persons constitute a quasi-suspect class so that "heightened scrutiny applies whenever some separation is thought to implicate them." Pet.26. "That important question has divided the Courts of Appeals … and [the Court] will almost certainly be required to [confront it] very soon." *Skrmetti*, slip op. at 10 (Alito, J., concurring). But because the *Skrmetti* majority held that "SB1 does not classify on the basis of transgender status," the Court did not resolve that question. *Skrmetti*, slip. op. at 16; see also *id.* at 1-11 (Barrett, J., concurring) (noting the Court did "not resolve whether transgender status constitutes a suspect class" and "explain[ing] why, in [Justice Barrett's] view, it does not").

The petition presents two splits on that point. The Fourth Circuit below first joined the Ninth Circuit in holding that any statute that treats "all 'biological males' … the same" is a "facial classification based on gender identity." Pet.27 (quoting Pet.App.24a-25a and discussing *Hecox* v. *Little*, 79 F.4th 1009, 1024 (9th Cir. 2023)). Conversely, the Eleventh Circuit has held that "discrimination based on biological sex" "does not" "necessarily entail[ ]

discrimination based on transgender status," and the Second and D.C. Circuit appear to agree. Pet.27 (quoting *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022) (en banc), and citing concurrences from *Soule* v. *Conn. Assoc. of Schs. Inc.*, 90 F.4th 34, 62 (2d Cir. 2023), and *Doe 2* v. *Shanahan*, 917 F.3d 694, 733 (D.C. Cir. 2019)).

Then, after concluding that assigning athletic teams by sex is a facial classification based on gender identity, the Fourth Circuit followed its own precedent—aligned with that of the Seventh, Eighth, and Ninth Circuits—and applied heightened scrutiny because "transgender persons constitute a quasi-suspect class." Pet.26 (quoting *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020) and citing *A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), *Brandt ex rel. Brandt* v. *Rutledge*, 47 F.4th 661, 670 n.4 (9th Cir. 2022), and *Hecox*, 79 F.4th at 1026). The Tenth and en banc Eleventh Circuits refuse to apply heightened or intermediate scrutiny in similar circumstances. Pet.26-27 (discussing *Adams* and *Druley* v. *Patton*, 601 F. App'x 632, 635 (10th Cir. 2015)).

The Court should grant the petition and explain that such classifications do not "classify on the basis of transgender status" or hold that transgender-based classifications do not affect a suspect class. *E.g.*, *Bridge on behalf of Bridge* v. *Okla. State Dep't of Educ.*, 711 F. Supp. 3d 1289, 1299 n.11 (W.D. Okla. 2024) ("[T]he Court rejects the view that gender identity is synonymous with biological sex or that biological sex is a stereotype."). After all, applying heightened scrutiny "implicates … several areas of legitimate regulatory policy"—including "eligibility for boys' and girls' sports teams." *Skrmetti*, slip. op. at 6 (Barrett, J., concurring).

A remand will *not* resolve these circuit conflicts. Assume the unlikely scenario where the Fourth Circuit changes course on remand and holds that a law assigning athletic teams by sex does not differentiate based on transgender status or, alternatively, holds that transgender status does not constitute a suspect class. Both circuit splits would remain: the first would move from 2–3 to 1–4, and the second from 4–2 to 3–3. The Court should thus review now.

Fourth, Judge Agee, in his dissent below, expressed his "hope" that the Court would "take the opportunity with all deliberate speed to resolve these questions of national importance." Pet.App.74a (Agee, J., dissenting). These questions are even more pressing now than when Judge Agee penned those words some 14 months ago. Girls deserve a safe, fair playing field today—not years from now—and the ruling's present harm to women and girls is stark. When biological males compete on women's teams, female athletes lose championships, opportunities, and scholarships and suffer serious harms and safety risks. *E.g.*, Br. of 102 Female Athletes, pp. 9-23; Br. of 35 Athletic Officials and Coaches of Female Athletes, pp. 12-18; Cyd Zeigler, *These 28 trans athletes have won state, national or international titles in women's sports*, OUTSPORTS (Dec. 6, 2024), http://bit.ly/4eb9iDV. Here, the Fourth Circuit's injunction will likely cause continuing harm to young women in the form of lost events, lost opportunities, lost privacy, and more. Br. of A.C., pp. 1-3; accord Pet.11.

What's more, the NCAA amended its participation policies this past February to declare that biological male athletes "may not compete for an NCAA women's team," no matter how they identify. NCAA, *NCAA announces transgender student-athlete participation policy change*

(Feb. 6, 2025), https://perma.cc/6842-5LHS. But if States or public universities in the Fourth Circuit—and the Ninth Circuit, for that matter—try to comply with the NCAA's policy, then courts would declare those efforts unconstitutional under the ruling here (and in *Hecox*).

Equally concerning, the President recently declared that it is "the policy of the United States to oppose male competitive participation in women's sports … as a matter of safety, fairness, dignity, and truth." Exec. Order 14201, 90 Fed. Reg. 9279, 9279 (Feb. 5, 2025). Educational programs that do not respect this policy can lose "all" their federal funding. *Ibid.* That declaration leaves public schools in the Fourth Circuit (and the Ninth, too) between a rock and a hard place. Should they follow an executive order that threatens all their funding—even funding unrelated to athletics? Or should they follow a court order that has not yet been applied to them? The years of delay that would follow were the Court to grant, vacate, and remand here would not help, especially when *Skrmetti* did not purport to address the legal questions that drive this case. And this dilemma is no hypothetical: when Petitioner Harrison County Board of Education asked the district court here how to reconcile the President's executive order with the district court's injunction, the court provided no guidance and summarily turned it away. See Order, *B.P.J.* v. *W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. Feb. 28, 2025), ECF No. 556.

In sum, the Court should take up this petition and resolve this "important issue" once and for all. Pet.App.97a (Alito, J., dissenting from denial of application to vacate injunction).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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