IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JANIE DOE, by her next friends and parents, JILL DOE and JOHN DOE,

Plaintiff,

v.

HANOVER COUNTY SCHOOL BOARD, *et al.*,

Defendants.

Case No. 3:24-cv-00493

[PROPOSED] BRIEF OF THE COMMONWEALTH OF VIRGINIA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

Over the next few weeks, millions of American children will watch athletes from all over the world compete in the Olympics. For more than a century, girls have been able to watch women compete in the Olympics and imagine that one day, they too may represent their country on a world stage. Unfortunately, many of those girls have found their dreams hindered when they are forced to compete against biological males playing women's and girls' sports. The Commonwealth of Virginia, represented by its Attorney General, has a compelling interest in providing a well-rounded education to the Commonwealth's youth, including fair and safe access to school sports. The Commonwealth and many of its school divisions have thus acted to protect women's sports. As relevant here, the Hanover County School Board issued a policy that reaffirmed that, for sports separated by sex, student participation would generally be determined by sex, subject to reasonable modifications on an individual basis.

This reasonable policy does not violate the Equal Protection Clause or Title IX. See 2023 Op. Va. Atty. Gen. 64, 64–78. And yet Doe (a transgender biological male who wants to play on the girls' tennis team at a Hanover County public school) contends that a preliminary injunction is "clearly warranted in light of recent Fourth Circuit precedent," Doe Br. 3—namely *B.P.J. by Jackson v. West Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024). But *B.P.J.* did "not hold that government officials are forbidden from creating separate sports teams for boys and girls or that they lack power to police the line drawn between those teams," nor did it hold "that Title IX requires schools to allow every transgender girl to play on girls teams." *Id.* at 565.

Doe is unlikely to succeed on the merits and is thus not entitled to a preliminary injunction. *B.P.J.* explicitly held that there were genuine disputes of material fact about whether a sex-separation policy substantially relates to the government's concededly important interest in maintaining competitive fairness in sports. Further, *B.P.J.* did not grapple with the Supreme

Court's plain requirement that Congress speak clearly when conditioning Title IX funds—something that Congress did not do here, as courts around the country have held. And, in any event, the Hanover County School Board has not even yet determined whether Doe is eligible to try out for the girls' team as a "reasonable modification." The motion should be denied.

BACKGROUND

This case arises from a preemptive challenge to an "expected" decision from the Hanover County School Board, see Doe Br. 11, about whether a biological male student—Janie Doe—can play on the girls' tennis team.

Doe is an eleven-year-old biological male who identifies as a transgender girl. Compl. ¶¶ 1–2. In 2023, Doe tried out for and made the girls' tennis team at a Hanover County middle school. *Id.* ¶¶ 58–59. A few days later, however, the Hanover County School Board (Board) asked Doe's parents to provide information about Doe's "consistent expression as female, including any medical documentation or verification that may exist." *Id.* ¶ 60. Doe's parents provided information to the Board, which it considered in a closed hearing on September 12, 2023. *Id.* ¶¶ 67–68, 70. After reviewing the information, the Board concluded that Doe would not be allowed to participate on the girls' team "in effort to ensure fairness in competition for all participants." *Id.* ¶ 70.

Shortly afterwards, the Board updated its policies on participation in school programs, including sports. The revised policy provides that generally "[f]or any school programs, events, or activities (including extracurricular activities) that are separated by biological sex, the appropriate participation of students will be determined by biological sex rather than gender or gender identity." Compl. ¶ 74. The policy provided for "[r]easonable modifications" on an individual basis "to the extent required by law." *Ibid.* This policy was modeled after the Virginia Department of Education's Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and

Parents in Virginia's Public Schools. See *id.* ¶ 78.

Last month, the Board informed Doe's parents that it would consider a renewed request for Doe to participate on the girls' tennis team in the upcoming season, telling Doe's parents "to submit a formal request with supporting documentation" that it could consider in a closed session. Compl. ¶ 85. On June 21, 2024, Doe's parents submitted the request for Doe to participate on the girls' team in the upcoming school year. *Id.* ¶ 86. Because Doe's parents "expect[]" that the renewed request will be denied by the Board, Doe Br. 11, Doe filed suit and sought a preliminary injunction before the Board had a chance to decide on the request.

ARGUMENT

"A preliminary injunction is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). To be entitled to such relief, a plaintiff must show "that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest." *Metropolitan Reg'l Info. Sys., Inc. v. American Home Realty Network, Inc.*, 722 F.3d 591, 595 (4th Cir. 2013); see also *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). "Although no single factor is dispositive, the first *Winter* factor is most important." *Northern Va. Hemp & Agric. LLC v. Virginia*, __ F. Supp. 3d __, 2023 WL 7130853, at *4 (E.D. Va. Oct. 30, 2023); see also *Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 201 (4th Cir. 2019) ("Because a preliminary injunction affords temporary relief *before trial* of the type that can be granted permanently *after trial*, it is an 'extraordinary remedy' and may be granted only 'upon a clear showing that the plaintiff is entitled to such relief.'" (quoting *Winter*, 555 U.S. at 22)). Doe is not likely to succeed on either claim in the Complaint.

I. Doe is not likely to succeed on the Equal Protection Clause claim

Doe is not likely to succeed on the merits of the Equal Protection Clause claim "under *B.P.J.*" Doe Br. 12. As an initial matter, as the Board argues, Doe's claim is premature because the Board has not even made a decision as to whether Doe is eligible to try out for the girls' team as a "reasonable modification." See Hanover Br. 4–7. Further, the plaintiff in *B.P.J.* did not succeed on the merits of an Equal Protection Clause claim; rather, the Fourth Circuit declined to enter summary judgment in the student's favor due to genuine disputes of material fact about the application of intermediate scrutiny. See *B.P.J.*, 98 F.4th at 561. And, as Judge Agee noted, the government action would be "struck down only if the state fails to meet the requisite level of scrutiny—which is unlikely in a case like this." *Id.* at 572 (Agee, J., dissenting). Relying solely on *B.P.J.* for support, Doe is therefore unlikely to succeed on the merits of the equal protection claim.

The parties do not dispute that under Fourth Circuit precedent, policies like the one at issue here trigger intermediate scrutiny. See Doe Br. 19–21; Hanover Br. 11; see also *B.P.J.*, 98 F.4th at 555 ("The defendants acknowledge that creating separate teams for boys and girls is a sex-based distinction, which triggers intermediate scrutiny under the Equal Protection Clause."). [1] A regulation satisfies intermediate scrutiny if it "'serves important governmental objectives'" and the "'means employed are substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). A perfect fit is not required, only a substantial one. *Nguyen v. INS*, 533 U.S. 53, 70 (2001). The "alternative chosen" may "represent trade-offs between equality and

[1] The United States Supreme Court recently granted certiorari in a case that involved an equal protection challenge brought by transgender individuals against a state action. See *L.W. by and through Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023); *United States v. Skrmetti*, No. 23-477, 2024 WL 3089532 (June 24, 2024). The outcome of that case could, of course, affect the outcome of this case.

practicality" and "even the existence of wiser alternatives than the one chosen does not serve to invalidate" a policy that "is substantially related to the goal." *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131–32 (9th Cir. 1982). "[I]ntermediate scrutiny requires less of a showing than does 'the most exacting' strict scrutiny standard of review." *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010) (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

In *B.P.J.*, the plaintiff did not dispute that "competitive fairness" is an important government interest. 98 F.4th at 559. Nor does Doe appear to. See Doe Br. 21 ("Even conceding fairness is an important governmental interest . . ."). Thus, if Doe's request to play on the team is ultimately denied by the Board, the "merits question" in this case will be whether any eventual decision to exclude Doe from the girls' tennis team "substantially relate[s]" to the important government interest of maintaining competitive fairness in sports. *B.P.J.*, 98 F.4th at 559, 561. This is the exact question on which the Fourth Circuit held that there was a genuine dispute of material fact and, consequently, "decline[d] to direct the district court to enter summary judgment in B.P.J.'s favor." *Id.* at 561. The "merits questions at issue here" are thus *not* "clearly decided by *B.P.J.*," as Doe argues. Doe Br. 12.

Indeed, this Court would have to wrestle with similar questions to those that remain open on remand in *B.P.J.* As a threshold matter, the Court would have to determine whether Doe had reached "Tanner 2 stage puberty," see *B.P.J.*, 98 F.4th at 560–61 (noting that, in that case, the "undisputed evidence shows B.P.J. has never gone through the Tanner 2 stage")—a question on which Doe has failed to provide any evidence in support of the preliminary injunction motion, see Hanover Br. 10. Next, if Doe has not reached that stage of puberty, the Court would have to determine whether, "[e]ven without undergoing Tanner 2 stage puberty, . . . people whose sex is assigned as male at birth enjoy a meaningful competitive athletic advantage over cisgender girls."

B.P.J., 98 F.4th at 561. At this stage of the litigation, Doe has not made the "clear showing" required for a preliminary injunction on this question. *Winter*, 555 U.S. at 22. In elite sports competition, biological males possess "advantages that are so large no female could reasonably hope to succeed without sex segregation in most sporting competitions." Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in The Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Medicine 204 (2021). That disparity is even worse for non-elite, teen athletes, as "a review of age-group performance data confirms what policymakers understood already in the 1970s: if sport were not sex segregated, most school-aged females would be eliminated from competition in the earliest rounds." Doriane Lambelet Coleman et. al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. Gender L. & Pol'y 69, 90 (2020). That advantage is not limited to post-pubescent athletics: biological males possess physical advantages over biological females in sports before puberty, although the difference is smaller. See Hilton & Lundberg, *supra* at 200 (noting faster sprint speeds, higher jump heights, and greater upper body strength for boys as young as 6 years old). Indeed, as the Fourth Circuit noted in *B.P.J.*, an expert report submitted by the *B.P.J.* defendants explained "that, even apart from increased circulating testosterone levels associated with puberty, there are 'significant physiological differences, and significant male athletic performance advantages in certain areas.'" 98 F.4th at 561–62.

A "plaintiff seeking a preliminary injunction generally cannot rely on mere allegations in the complaint but must come forward with some evidence showing a likelihood of success on the merits." *Mahmoud v. McKnight*, 102 F.4th 191, 203 (4th Cir. 2024). But Doe relies only on an unsubstantiated statement that "there is ample evidence that transgender girls—particularly those like Janie who have not undergone the 'Tanner 2' stage of puberty—do not have an inherent

competitive athletic advantage over cisgender girls." Doe Br. 22. Doe does not come forward with evidence to support that assertion—nor even evidence as to whether Doe has reached the "Tanner 2" stage of puberty. See Hanover Br. 10. Relying only on unsupported allegations falls well short of the mark at this stage of the litigation.

II. Doe is not likely to succeed on the Title IX claim

Doe is also not likely to succeed on a Title IX claim. Again, as the Board argues, the Board has not even made a decision as to whether Doe is eligible to try out for the team, and thus Doe's claim is premature. See Hanover Br. 4–7. In addition, a conclusion that the Board violated Title IX would run afoul of the Constitution's Spending Clause. Because legislation enacted pursuant to the Spending Clause is much in the nature of a contract—where a State agrees to comply with federally imposed conditions in return for federal funds—Congress must impose a condition unambiguously. But Congress did not unambiguously provide that a policy that generally separates sports by biological sex and does not explicitly treat transgender individuals differently than their peers violates Title IX.

Congress enacted Title IX under its Spending Clause powers. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005). Those powers give Congress the authority to "set the terms on which it disburses federal funds." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022). A statute enacted under the Spending Clause "'is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'" *Ibid.* (quoting *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). To comply with the Spending Clause's limitations, Congress must provide the States "with unambiguous notice of the conditions they are assuming when they accept" funding. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 637 (1999) (cleaned up); see also *Adams by & through Kasper v. School Bd. of St. Johns Cnty.*, 57 F.4th 791, 815 (11th Cir. 2022) (stating that the Spending

Clause mandates that Congress give "a clear statement when imposing a[ny] condition[s] on federal funding"); *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *3 (6th Cir. July 17, 2024) ("Congress enacted Title IX as an exercise of its Spending Clause power, which means that Congress must speak with a clear voice before it imposes new mandates on the States.").

Congress must speak with a clear voice because "there can, of course, be no knowing acceptance of the terms of the putative contract if a State is unaware of the conditions imposed by the legislation or is unable to ascertain what is expected of it." *Davis*, 526 U.S. at 640 (cleaned up). Recipients are not capable of "knowingly accept[ing]" funds unless they would "'clearly understand . . . the obligations' that would come along with doing so." *Cummings*, 596 U.S. at 219 (quoting *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006)); see also *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (providing that Congress must state the conditions of receipt of federal funds "unambiguously" so that the States may "exercise their choice knowingly, cognizant of the consequences of their participation").

Title IX contains no "clear statement" prohibiting States or school boards from implementing policies like the one at issue here. To the contrary, a federal Department of Education implementing regulation clarifies that a school may "sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b); see also *id.* § 106.41(c) (referring to the "separate teams" as "male and female teams"). Indeed, since 1975 the governing regulations have treated "sex" as a binary: like the statute, those regulations refer multiple times to "one sex" (especially versus "the other sex"), use the phrase "both sexes," and reference "boys and girls" and "male and female teams." See, *e.g.*, 34 C.F.R. §§ 106.33, 106.34(a)(3), 106.36(c), 106.37(a)(3), 106.41, 106.51(a)(4), 106.58(a), 106.60(b), 106.61. And when "Congress prohibited

discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Adams*, 57 F.4th at 812.

It should thus come as no surprise that courts around the country have concluded that the Spending Clause prevents conditioning of Title IX funds on prohibiting discrimination based on "gender identity" as opposed to biological sex. See, *e.g.*, *Texas v. Cardona*, __ F. Supp. 3d __, 2024 WL 2947022, at *41 (N.D. Tex. June 11, 2024) (States did not knowingly and voluntarily agree to ignore "the differences between biological sex and gender identity" or "abolish sex-specific bathrooms, locker rooms, room assignments, and sports in exchange for Title IX's funds"); see also *Tennessee v. Cardona*, __ F. Supp. 3d __, 2024 WL 3019146, at *15 (E.D. Ky. June 17, 2024) ("Title IX's language provides no indication that an institution's receipt of federal funds is conditioned on any sort of mandate concerning gender identity."); *Louisiana v. U.S. Dep't of Educ.*, No. 3:24-cv-563, 2024 WL 2978786, at *15–16 (W.D. La. June 13, 2024) (similar); *Kansas v. U.S. Dep't of Educ.*, __ F. Supp. 3d __, 2024 WL 3273285, at *12–13 (D. Kan. July 2, 2024) (similar).

The Fourth Circuit has not ruled to the contrary. As the *B.P.J.* majority noted, the defendants in that case "never made" a Spending Clause argument. 98 F.4th at 565 n.3. Judge Agee explained, however, that a Spending Clause argument would be successful under similar facts, were one to be raised. *Id.* at 573–74 (Agee, J., dissenting). Although *Grimm v. Gloucester County School Board* rejected a Spending Clause argument in a footnote, see 972 F.3d 586, 619 n.18 (4th Cir. 2020) ("*Bostock* forecloses [the argument] that [the phrase] 'on the basis of sex' is ambiguous as to discrimination against transgender persons."), the *Grimm* footnote would not apply here "because *Bostock* clearly does not answer the question before the Court today—whether a [government policy] that separates sports by biological sex and does not explicitly treat

transgender individuals differently than their peers violates Title IX," *B.P.J.*, 98 F.4th at 574 n.9 (Agee, J., dissenting). "Thus, *Grimm*'s discussion of the Spending Clause has no bearing here." *Ibid.*

Title IX recipients like Hanover County Public Schools accepted federal funds knowing that the regulations expressly allow sex-separated sports for "separate" "male and female teams." 34 C.F.R. § 106.41(c). There can be no "clear statement" imposing conditions that recipients allow participation based on gender identity when the regulations explicitly allow for separate teams based on sex.

CONCLUSION

For the foregoing reasons, this Court should deny the motion for preliminary injunction.

Dated: July 25, 2024

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on July 25, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

/s/ Kevin M. Gallagher
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