



Written by [Elad Hakim](#) on March 15, 2023

## The Supreme Court Has a Chance to Help Protect Biological Female Student Athletes

Should a biological male who identifies as a female be permitted to compete against a biological female in public-school sports? The State of West Virginia has asked the Supreme Court to [vacate](#) an injunction entered by the U.S. Court of Appeals for the Fourth Circuit in an important case involving transgender participation in women's sports in public schools.

The case revolves around a West Virginia law, known as the Sports Act, which was passed to "ensure equal opportunities and fair play for all student athletes." In essence, the [Act](#) requires public schools to designate sports teams "based on biological sex" "at birth," and ensures that biological males cannot compete against biological females in contact or competitive sports "designated for females, women, or girls."



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In response to the Sports Act, B.P.J., a 12-year-old biological male who identifies as a female, filed a lawsuit seeking to enjoin enforcement of the law. The trial [court](#) initially entered a preliminary injunction in the case. Approximately seven months later, the court entered summary judgment in favor of the State of West Virginia and the other defendants, [holding](#) that "biological males have physiological advantages over biological females" and that such "inherent" advantages make "biological males ... not similarly situated to biological females." The court rejected B.P.J.'s argument that sports designations should be based on gender identity, not biology, and that such determination should be made on a case-by-case basis. In doing so, the trial [court](#) found the Sports Act constitutional and dissolved its previous injunction.

Despite the court's specific and detailed ruling, B.P.J. appealed the court's decision to the Fourth Circuit, and asked the appellate court to stay the district court's decision. A divided panel of the appellate court granted B.P.J.'s request without explanation and, in essence, entered an injunction prohibiting enforcement of the Sports Act against B.P.J. As a result, the State of West Virginia asked the Supreme Court to vacate the injunction, though not to rule on the merits of the case.

If the Supreme Court accepts the case, its eventual ruling could have far-reaching implications. Many states around the country have implemented similar laws to protect biological female student athletes from possible harm/injuries associated with having to compete against biological men. Such laws also aim to ensure fairness for biological female student athletes, who oftentimes lose opportunities when they are forced to compete against biological men who identify as women and/or are transitioning.

Some of the confusion stemmed, in part, from the Supreme Court's ruling in [Bostock v. Clayton County](#).



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As reported in [The National Law Review](#), the Supreme Court in *Bostock* held that “Title VII’s prohibition against ‘sex discrimination’ includes a prohibition against discrimination based on sexual orientation and gender identity.” This broad definition of “sex” led Joe Biden to issue an [executive order](#) in 2021 in which he threatened to “take federal education funds away from any state that refuses to allow transgender athletes to compete in whatever category they feel like choosing.” It also led to claims that gender identity was protected under [Title IX](#) and efforts to revise this law to this effect.

While the State of West Virginia is not seeking a ruling on the merits, a ruling in this case by the nation’s highest court could still provide some possible insight as to how the Supreme Court might approach the broader question on the merits. All student athletes deserve the same opportunities and fair play, including biological female student athletes. There are too many instances where biological women are losing opportunities because they are forced to compete against biological males. If gender identity, rather than biology, determines whether a biological male may compete against a biological female in the public-school context, biological female student athletes will continue to feel demoralized, put themselves at risk for serious injury, face unfair competition, and lose opportunities that would otherwise be available to them.



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