UNITED STATES DISTRICT COURT
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,

ROBERT J. MAY in his official capacity as Chair of the Hanover County School Board, and

MICHAEL B. GILL in his official capacity as Superintendent of Hanover County Public Schools,

Defendants.

Civil Action No. 3:24-cv-00493-MHL

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Janie showed in her opening brief that the School Board's exclusionary Policy—which bars transgender girls like Janie from playing sports in accordance with their gender identity—violates Title IX and the Equal Protection Clause as applied to her. Now, Defendants—having delayed by a month a formal decision on Janie's renewed application to participate on the girls' tennis team at her middle school this Fall—claim principally that it is too early for this Court's intervention. They also contend that Janie has not met her burden for a preliminary injunction. Both arguments are meritless.

Defendants' justiciability argument does not withstand scrutiny. The Policy permits exceptions from its otherwise categorical ban only when "required by law." Defendants have unambiguously told this Court that they believe the law does not require them to let Janie play on the girls' tennis team. Indeed, Defendants argue in their opposition papers that neither Title IX nor the Equal Protection Clause requires that they treat Janie equally. Under Defendants' (erroneous) view of the law, the School Board *cannot* let Janie play tennis. Yet now Defendants assert that they nonetheless *might* just ignore their professed understanding of the law and vote on August 13, 2024, to do precisely what they have told this Court they believe the law forecloses. Notably, girls' tennis tryouts begin just two weeks later—which would leave insufficient time to obtain relief from this Court when the School Board inevitably votes to bar Janie from the team. And any order requiring Defendants to let Janie join the team after tryouts would likely have the effect of outing Janie as transgender—a dangerous and unacceptable consequence of Defendants' actions. The Court should reject Defendants' transparent attempt to manufacture barriers to judicial review until it is too late to safely obtain that review. The

Court's intervention is necessary now to ensure that Janie's rights under Title IX and the Equal Protection Clause are vindicated.

Defendants' arguments on the merits should likewise be rejected. The Fourth Circuit has already held that a materially identical policy prohibiting transgender athletes from playing school sports violated Title IX and likely violated the Equal Protection Clause. *B.P.J. by Jackson v. W. Va. St. Bd. of Educ.*, 98 F.4th 542, 555 (4th Cir. 2024). Defendants contend the School Board's Policy is different because it has a proviso requiring the School Board to comply with the law. But that is no distinction: No local rule can be applied in ways that violate federal law, whether the local rule states as much expressly or not. The question here is whether federal law requires Defendants to treat Janie equally. It does. *B.P.J.* is the law in Hanover County and throughout the Fourth Circuit. And the undisputed facts show that Janie, like the plaintiff in *B.P.J.*, has received puberty-blocking treatment that has prevented her from experiencing elevated testosterone levels and accompanying muscular development.

This case is simple. Applying the Policy to Janie "would treat her worse than people to whom she is similarly situated, deprive her of any meaningful athletic opportunities, and do so on the basis of sex." *B.P.J.*, 98 F.4th at 565. Because Janie has suffered and continues to face irreparable harm, and because the balance of hardships favors injunctive relief, the Court should grant the preliminary injunction.

ARGUMENT

Before diving into the substance, one preliminary procedural issue should be dispensed with. Defendants contend that Janie is seeking a mandatory rather than prohibitory injunction and so her request is subject to heightened scrutiny. That is both incorrect and immaterial.

"[P]rohibitory injunctions 'aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.'" *See League of Women Voters of North Carolina v. North*

Carolina, 769 F.3d 224, 236 (4th Cir. 2014) (quoting *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013))). In the Fourth Circuit, the status quo is defined as "the last uncontested status between the parties which preceded the controversy." *Id.* (quoting *Pashby*, 709 F.3d at 320). "A plaintiff who seeks to enjoin enforcement of a new policy and 'require a party who has recently disturbed the status quo to reverse its actions' seeks a prohibitory injunction, not a mandatory one." *Kadel v. Folwell*, 620 F. Supp. 3d 339, 389 (M.D.N.C. 2022) (citing *League of Women Voters*, 769 F.3d at 236). Before the School Board barred Janie from playing tennis and formalized its discriminatory approach in the Policy, Janie could have played girls' tennis. The injunction Janie seeks would simply require the School Board to reverse its actions upending the status quo. That is the definition of a prohibitory injunction.[1]

But it hardly matters, as an injunction is appropriate here whether mandatory or prohibitory. The Policy clearly violates Title IX and the Equal Protection Clause and creates significant, ongoing harm to Janie; a preliminary injunction would cause no corresponding harm to the School Board or the public. *C.f. Doe v. Horne*, 683 F. Supp. 3d 950, 970 (D. Ariz. 2023)

[1] The only case Defendants cite in support of their argument that Janie seeks mandatory injunctive relief, *Pierce v. North Carolina State Board of Elections*, is off point. 97 F.4th 194 (4th Cir. 2024). In *Pierce*, the plaintiffs alleged that the boundaries of two state senate districts violated the Voting Rights Act; they sought a preliminary injunction barring the use of two senate districts in upcoming elections and ordering the use of two new districts drawn by the plaintiffs. *Id.* at 202. The Fourth Circuit affirmed the district court's denial of a preliminary injunction. *Id.* Its reasoning highlighted the significant logistical hurdles required by the relief the plaintiffs requested: "The Board of Elections would have to reassign voters. Candidates would have to refile, which could result in contested primaries in the two new [s]enate districts. The Board of Elections would have to generate, proof, and distribute new ballots, schedule any contested primary elections in these districts for May 2024 or later, and, if a runoff were needed, schedule and conduct that special election before August 6, 2024, in order to prepare ballots for the general election. All this would disrupt the orderly election process and sow voter confusion, with the 'consequent incentive to remain away from the polls.'" *Id.* at 228-229 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006)). Here, the Court need only enjoin Defendants from enforcing the Policy as to Janie, thus enabling her to participate in girls' tennis, as she could have done before Defendants' intervention in September 2023.

("For the purpose of issuing a preliminary injunction, the Court's findings that both [plaintiffs] could have played on girls' sports teams last year prior to passage of the Act, cannot play on sports teams consistent with their gender identity now, and want to participate in girls' sports programs at [their middle and high schools] this year, warrant issuance of a mandatory prohibitory injunction to preserve the status quo.").

I. Janie's Claims For Injunctive Relief Are Justiciable

To state the obvious, Janie—an eleven-year-old girl who just wants to play tennis with her friends but cannot because the Defendants have decided she shouldn't—will be injured in the absence of an injunction. Defendants' standing and ripeness arguments fall in the face of this clearly impending injury.

A. Janie Has Standing To Seek A Preliminary Injunction

Everything the School Board has done—from before the Policy was enacted to Defendants' opposition brief in this very case—unambiguously confirms that it will not allow Janie to try out for the girls' tennis team. Defendants purport that the School Board could vote on August 13, that a "reasonable modification" to the Policy is "required by law" for Janie. *See* Opp. 5. The undisputed facts confirm that it will not. The School Board barred Janie from participating on the middle school girls' tennis team during the 2023-2024 season. And far from showing any indication that it intends to depart from that position this year, the School Board has concluded (and argued to this Court) that letting Janie play is *not* "required by law." Defendants cannot evade judicial review by opportunistically asserting incongruous positions—that is, feigning the possibility of a "reasonable modification" while simultaneously arguing that Janie is not entitled to such relief.

A brief review of the history shows that Janie is certain to suffer injury absent an injunction. The School Board barred Janie from participating in girls' sports in September 2023,

invoking a model policy requiring students to participate in single-sex activities in accordance with their "biological sex." On September 5, 2023, after Janie had tried out for and earned a spot on her middle school's girls' tennis team, Robert May wrote to Janie's parents, explaining that the School Board wished to "carefully consider [Janie's] participation on the girls' tennis team" in light of the Virginia Department of Education's Model Policies on Ensuring Privacy, Dignity, and Respect for all Students and Parents in Virginia's Public Schools (the "VDOE Model Policies"). ECF No. 15-1. The VDOE Model Policies state, in relevant part:

> For any athletic program or activity that is separated by sex, the appropriate participation of students shall be determined by sex rather than gender or gender identity. [School Division] shall provide reasonable modifications to this policy only to the extent required by law.

ECF No. 34-1 at 18. The VDOE Model Policies define "sex" as "biological sex." *Id.* at 7. May's letter requested that Janie's parents fill out an "Application for Transgender Appeal" and provide "information in furtherance of [Janie's] consistent expression as female." ECF No. 15-1. It also stated that Janie would "not be permitted to participate in practices or matches until a decision is rendered by the School Board." *Id.* After Janie's parents submitted the requested information, they received a second letter from May on September 14, 2023, informing them that "the School Board voted unanimously against permitting [Janie] to participate on the middle school girls' tennis team in effort to ensure fairness in competition for all participants." ECF No. 15-2. The School Board provided no further explanation. And nothing in the September 14 letter suggested that the School Board's decision to bar Janie from playing on the girls' tennis team was limited to the 2023-2024 season. *See* ECF No. 15-2.

Two months later, on November 14, 2023, the School Board adopted a substantively identical version of the policy invoked in the September 5 letter, stating:

> For 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.… Reasonable modifications to this policy will be permitted only to the extent required by law.

ECF No. 15-3 at 1. On June 21, 2024, in the wake of the Fourth Circuit's decision in *B.P.J.*, Janie's parents submitted a renewed application for Janie's participation on the girls' tennis team for the 2024-2025 season. ECF No. 34-3. The School Board discussed Janie's renewed application at its July 9, 2024 meeting but chose to "defer[] a decision to its next meeting on August 13, 2024." Opp. 4.

The School Board's assessment of Janie's September 2023 application suffices to show that it will subject her to the same discriminatory bar and deny her present application. The Policy in place today is substantively identical to the VDOE Model Policies the School Board considered last year. *Compare* ECF No. 34-1 at 18 *with* ECF No. 15-3 at 1. The facts are likewise unchanged. The renewed application that Janie's parents submitted on June 21, referred the School Board to the documentation they provided in September 2023, adding a letter from Janie's pediatric endocrinologist reaffirming Janie's gender dysphoria diagnosis and attesting to Janie's continuing care. ECF Nos. 34-3, 34-4. Applying the same standard to the same facts, the School Board will inevitably come to the same unlawful conclusion and bar Janie's participation in girls' tennis for the 2024-2025 season.

The only material development between the last application and this one is the Fourth Circuit's decision in *B.P.J.* The School Board has known about that decision since at least June 21, ECF No. 34-3, but has shown no sign of accepting that it is the law. Precisely the opposite. Rather than vote in accordance with *B.P.J.*'s clear mandate at its July 9 meeting, the School Board chose to shelve its decision on Janie's renewed application until at least

August 13—a move that would fabricate Defendants' standing arguments. Meanwhile, on the substance, Defendants' submission to this Court argues at length that the law does not require them to let Janie play, rendering hollow their suggestion that the School Board might grant Janie a reasonable modification that is permitted only when "required by law." Opp. 4-13.

B. Janie's Claims Are Ripe For Judicial Review

For essentially the same reasons, Janie's claims are ripe. Ripeness doctrine "prevents judicial consideration of issues until a controversy is presented in 'clean-cut and concrete form.'" *Miller v. Brown*, 462 F.3d 312, 318-319 (4th Cir. 2006) (quoting *Rescue Army v. Mun. Court*, 331 U.S. 549, 584, (1947)). In evaluating ripeness, courts "balance the fitness of the issues for judicial decision [with] the hardship to the parties of withholding court consideration." *Id.* at 319 (quoting *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002)). Both factors weigh in Janie's favor.

As to the first factor, there is no "need to await any further factual developments." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 199 (4th Cir. 2013). The Fourth Circuit routinely holds that civil rights claims are ripe after a discriminatory decision issues. For example, "[a]n issue becomes ripe for adjudication under the [Fair Housing Act] when a disabled resident *first* is denied a reasonable and necessary modification or accommodation." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013) (emphasis added). While government actors "must be afforded an opportunity to make a final decision, the issue is sufficiently concrete for judicial resolution once an accommodation is denied." *Bryant Woods Inn, Inc. v. Howard Cnty., Md.*, 124 F.3d 597, 602

(4th Cir. 1997). This suit has thus been ripe since September 2023, when the School Board first denied Janie's request to play girls' sports.[2]

Even if that past decision were insufficient to make her claim fit for this Court's intervention, Janie need not wait for the School Board to reach its inevitable decision before seeking judicial review. The School Board has been perfectly clear that it believes no modification to the Policy is "required by law" in this case. Indeed, Defendants go on at length in their brief to explain why they believe Janie is not entitled to relief under Title IX or the Equal Protection Clause.[3] And if no modification to the Policy is "required by law," then the Policy permits no modification. Defendants' "argument amounts to little more than a formalistic contrivance." *Lansdowne*, 713 F.3d at 199. "The case is not ripe, [they] complain[], because [they] may at some point in the future gratuitously renounce" the position they vigorously defend in this litigation. *Id.* "The law does not require [a] [p]laintiff to avail [her]self of a hopeless administrative process before looking to the courts for relief." *Hamilton v. Pallozzi*, 165 F. Supp. 3d 315, 321 (D. Md. 2016), *aff'd*, 848 F.3d 614 (4th Cir. 2017); *see also Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 643 (3d Cir. 1995) ("Litigants are not required to make … futile gestures to establish ripeness."). The result of the School Board's deliberations is

[2] Neither Title IX nor the Equal Protection Clause has an exhaustion requirement. *See Peltier v. Charter Day Sch., Inc.*, Case No. 7:16-cv-30-H, 2017 WL 1194460, at *3 (E.D.N.C. Mar. 30, 2017) ("Title IX has no administrative exhaustion requirement.") (internal citation omitted); *Talbot v. Lucy Corr Nursing Home*, 118 F.3d 215, 218 (4th Cir. 1997) ("[A]s a general rule, a plaintiff filing suit pursuant to 42 U.S.C. § 1983 does not have to exhaust state administrative remedies before filing suit in federal court").

[3] Where the Fourth Circuit has found that a claim is not ripe, it is frequently because a plaintiff "ha[d] not taken any of the steps necessary" to achieve her desired result. *Doe v. Va. Dep't of St. Police*, 713 F.3d 745, 754 (4th Cir. 2013). Here, Janie submitted a request to the School Board in September 2023 after she was initially blocked from participating in girls' tennis, and later resubmitted a nearly identical request at Defendants' suggestion.

inevitable, waiting for the School Board to accept its obligation to follow the law will be futile, and Janie's claims are ripe for this Court's review.

The only purported ripeness problem with this case is squarely and solely a result of the Defendants' transparent attempt to manufacture a justiciability challenge where none exists. At its July 9 meeting, the School Board could have taken a principled stance and teed up the issue for this Court's decision. It did not. Instead, it kicked the can down the road to its August 13 meeting in the hopes this Court would stay its hand. This Court should grant no harbor to this patent attempt to evade intervention. Indeed, the School Board offers no guarantee that it will make a decision on August 13, let alone decide that Janie is allowed to participate on the girls' tennis team. While the School Board tarries, a young girl's mental and social health, and her happiness, hang in the balance. *See* ECF No. 16 ¶¶ 12, 15, 16, 19-21; ECF No. 17 ¶¶ 20, 22; ECF No. 18 ¶¶ 21-22; ECF No. 15-10 (American Psychiatry Association noting family and societal rejection of gender identity are some of the strongest predictors of mental health difficulties among people who are transgender and that transgender children and adolescents are often victims of bullying and discrimination at school, contributing to serious adverse mental health outcomes).

As to the second factor, Janie will experience significant hardship if she is unable to participate in girls' tennis for another season. *See* § III, *infra*; Pl's Br. 24-26. "The hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiff]." *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-209 (4th Cir.1992). According to Defendants, it is "likely"—only *likely*—that the School Board "will determine whether a reasonable modification to the Policy is required by law such that Plaintiff is permitted to try out for the girls' tennis team" on August 13. Opp. 5. Team tryouts begin only thirteen

days later. Janie will not have sufficient time to seek judicial relief after the August 13 meeting and before tryouts. Defendants of course know this. Any order requiring Defendants to comply with the law that comes down after tryouts begin risks outing Janie as transgender to her classmates and community. This lawsuit has received significant media attention, and there are only four middle schools in Janie's school district. The puzzle pieces will be easy to put together. Outing Janie as transgender is dangerous and unacceptable for the reasons laid out in her Motion to File Under Pseudonym. *See* ECF No. 23. Accepting Defendants' argument that the case is not ripe until after the August 13 meeting will effectively require Janie to out herself as transgender to the nation if she is to enjoy the protections of Title IX and the Equal Protection Clause to which she is entitled. The Court should give no countenance to Defendants' contorted efforts to prevent this eleven-year-old girl from safely playing tennis with her friends.

II. Janie Is Likely To Succeed On The Merits

A. Janie Is Likely To Succeed On Her Title IX Claim

Binding, factually indistinguishable Fourth Circuit precedent makes clear that prohibiting Janie from playing girls' sports violates Title IX. *B.P.J.*, 98 F.4th at 565. Defendants cannot escape that clearly settled law.

Defendants contend that Janie has not shown that she is "similarly situated to other students who will try out for the girls' tennis team." Opp. 10. That is wrong under settled law. Under Title IX, "discrimination 'mean[s] treating that individual worse than others who are similarly situated.'" *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) (alteration in original) (citing *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 657 (2020)). The Fourth Circuit has clearly held that "discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX." *B.P.J.*, 98 F.4th at 563 (citing *Grimm*, 972 F.3d at 616). In *Grimm*, the Fourth Circuit held that a transgender boy was treated worse than

others who are similarly situated simply because he "consistently and persistently identified as male," but "[u]nlike other boys, he had to use either the girls restroom or a single-stall option." 972 F.3d at 618-619. In *B.P.J.*, the Fourth Circuit held that a West Virginia law treated similarly situated students differently merely by categorically forbidding transgender students from participating in sports teams "corresponding with [their] gender." 98 F.4th at 563 (alteration in original) (citing *Grimm*, 972 F.3d at 618). Simply put, Janie is a girl, but unlike other girls at her middle school, she is barred from participating in girls' tennis because she is transgender. For purposes of Title IX, that suffices to show discrimination on the basis of gender identity, and it suffices to show that Janie is likely to succeed on the merits of her Title IX claim.

Defendants try to brush all that aside, contending that Janie has not shown that "she has not undergone the Tanner 2 stage of puberty or experienced physical changes, such as increased muscle mass." Opp. 10. As discussed below, that is dead wrong, refuted by unrebutted factual submissions before the Court. *See* § II.B, *infra*. But it also is irrelevant to Janie's Title IX claim, as the Fourth Circuit made clear in *B.P.J.* What matters for purposes of the Title IX claim is whether the policy "discriminates based on gender identity." It does. Again, by the plain terms of the policy, "the appropriate participation of students shall be determined by biological sex rather than gender or gender identity." ECF No. 15-3 at 1. That means that non-transgender girls can participate in girls' sports but transgender girls cannot, with no opportunity for individualized inquiry whatsoever. *B.P.J.*, 98 F.4th at 563 ("[T]he Act requires treating students differently even when they are similarly situated.… And it does so on a categorical basis, regardless of whether any given girl possesses any inherent athletic advantages based on being transgender."). That is discrimination in violation of Title IX, as the Fourth Circuit made clear in *B.P.J.* Nothing more is required to carry Janie's burden at this preliminary-injunction stage.

Defendants also argue that the Policy's savings clause, allowing modifications only when "required by law," distinguishes it from the West Virginia policy at issue in *B.P.J.* That argument is tautological and wrong. A policy that says "no women can be firefighters unless required by the law" violates Title VII just as much as a bare prohibition on women being firefighters. Both discriminate against women, relegate them to second-class employment opportunities, and burden them with the obligation to seek court intervention to establish their entitlement to a particular job.

And this argument is particularly unpersuasive given the Defendants' simultaneous contention that the law does not require a modification in this case. As Defendants read and apply the Policy here, Janie is not entitled to a modification and cannot play on the girls' tennis team because she is transgender. That is discrimination. *See, e.g.*, *Hecox v. Little*, 104 F.4th 1061, 1080-1081 (9th Cir. 2024) (Idaho law that bases participation in school athletics on "biological sex" and prohibits "students of the male sex" from participating in girls' athletics "categorically ban[s] transgender women and girls from all female athletic teams"); *Horne*, 683 F. Supp. at 962 (same with respect to an Arizona law). The savings clause on which Defendants rely does not erase the Policy's central discriminatory features as a general matter—and certainly not in this case, where the School Board believes its Policy requires barring Janie from the girls' tennis team. The Policy as applied to Janie violates Title IX, just as a materially identical policy as applied to B.P.J. violated Title IX.[4]

[4] The Commonwealth of Virginia, as amicus, asserts that the application of Title IX here would run afoul of the Spending Clause of the United States Constitution, because Congress has failed to "provide potential recipients of federal education funding with unambiguous notice of the conditions they are assuming when they accept it." *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 637 (1999) (internal quotations omitted). "Because this argument was not raised by the parties," this Court should decline to consider it. *FTC v.*

B. Janie Is Likely To Succeed On Her Equal Protection Claim

Defendants' Equal Protection argument is unpersuasive for many of the same reasons. Defendants agree that intermediate scrutiny applies when the government makes classifications based on gender identity. Opp. 11. The Policy, which prohibits transgender girls from playing on girls' sports teams unless "required by law," subjects Janie to differential treatment that is not "substantially related to an important government interest." *B.P.J.*, 98 F.4th at 556, 559. The Policy makes the operative distinction based wholly on "biological sex," with no assessment of an individual's levels of testosterone, muscle development, or athletic ability. *Id*. at 560 (rejecting the notion "that all cisgender girls are entitled to be protected from competition from all transgender girls" and demanding a more individualized inquiry). It is accordingly overbroad and fails heightened review.

Defendants again try to differentiate the Policy from the West Virginia law at issue in *B.P.J.* based on the Policy's savings clause permitting exceptions "only to the extent required by law." But as discussed above, the exception is meaningless. Every government policy—whether explicitly or implicitly—allows for exceptions "required by law," because applying a policy

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Phoebe Putney Health System, Inc., 568 U.S. 216, 226 n.4 (2013); *Tafas v. Dudas*, 511 F. Supp. 2d 652, 660 (E.D. Va. 2007) (courts "may not consider legal issues or arguments not raised by the parties" but raised by amicus).

In any case, the Fourth Circuit squarely foreclosed this line of thinking in *Grimm*, holding that funding recipients were on notice of the potential application of Title IX to categorizations based on biological sex that exclude transgender individuals. 972 F.3d 586, 619 n.18 (4th Cir. 2020). *Grimm* noted that the Supreme Court has resolved any ambiguity about Title IX's application to discrimination against transgender individuals and that, in any case, Title IX, like Title VII, "has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them." *Id.* (quoting *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 680 (2020)). The Commonwealth instead relies on several out-of-circuit district court opinions and the dissenting opinion in *B.P.J.* 98 F.4th at 573 (Agee, J., dissenting) (noting that the majority opinion "runs afoul of the Constitution's Spending Clause"). Dissenting opinions and out-of-circuit district court opinions cannot overcome the clear Fourth Circuit holding in a majority opinion.

when the law requires otherwise is necessarily unlawful. The savings clause thus does nothing more than state the obvious. What the savings clause does *not* do is make the Policy dependent on something other than a student's gender identity. The savings clause does not say that all students—regardless of their "biological sex"—can participate on athletics teams consistent with their levels of circulating testosterone, muscle development, or athletic ability. It does not say that all students—regardless of their "biological sex"—are subject to individualized inquiry as to whether they can play on the girls' or boys' teams. It instead singles transgender kids out for distinctly adverse treatment and then attempts to provide legal shelter for the School Board to say it will follow the law when a court tells it to do so. That's not even true—the School Board resists following *B.P.J.* here. But it also does not make the Policy any less discriminatory for equal protection purposes.

Moreover, the uncontested facts show that Janie, whose circumstances are nearly identical to the plaintiff's in *B.P.J.*, does not have a competitive advantage warranting her exclusion from girls' tennis.[5] The undisputed record shows that as a result of Janie's medical treatment, she has not experienced the levels of testosterone or muscular development that might give her a competitive advantage in athletics, making her similarly-situated to other girls her age. In August 2021, following a yearlong evaluation, Janie's psychologist diagnosed her with gender dysphoria. ECF No. 16 ¶¶ 6-8; ECF No. 17 ¶ 7; ECF No. 18 ¶ 7. Gender dysphoria is the clinically significant distress that results from "a marked incongruence between one's experienced/expressed gender and their assigned gender" at birth. ECF 15-10 at 2. The diagnosis included a recommendation that Janie begin the use of puberty blockers when she

[5] None of this actually matters, of course. Nothing about the Policy suggests that it is "applied on a case-by-case basis." Opp. 12. The Policy is, in fact, a categorical ban.

reached the appropriate stage of puberty. ECF No. 17 ¶ 7; ECF No. 18 ¶ 7; *see also* ECF 15-10 at 3 (American Psychiatric Association advises that "[m]edical affirmation may include pubertal suppression for adolescents with gender dysphoria"; "[m]edical affirmation is not recommended for prepubertal children"). In September 2022, at the age of nine, Janie received a histrelin transplant, which suppresses her endogenous hormones and prevents further development of puberty associated with testosterone. ECF No. 16 ¶ 10; ECF No. 17 ¶ 10; ECF No. 18 ¶ 10. This is the earliest such a course of treatment is recommended for transgender youths, and it is in line with the standard of care. *See* ECF No. 15-6 at 50 (Standards of Care published by the World Professional Association for Transgender Health recommend that "[t]he adolescent has reached Tanner stage 2 of puberty for pubertal suppression to be initiated"); ECF No. 15-8 at 2 (Endocrine Society's Clinical Practice Guidelines "recommend treating gender-dysphoric/gender-incongruent adolescents who have entered puberty at Tanner Stage G2/B2 by suppression"). As a result of Janie's course of treatment, she did not "progress[] through the Tanner 2 stage and as a result … has never experienced elevated levels of testosterone." *B.P.J.*, 98 F.4th 560-561; *see also* ECF No. 16 ¶ 10; ECF No. 17 ¶ 10; ECF No. 18 ¶ 10; ECF No. 15-8 at 12-13 ("[A]t the beginning of puberty, estradiol and testosterone levels are still low"; "[A] reason to start blocking pubertal hormones early in puberty is that the physical outcome is improved compared with initiating physical transition after puberty has been completed…. We therefore advise starting suppression in early puberty to prevent the irreversible development of undesirable secondary sex characteristics.").

Given this clear violation of the Equal Protection Clause, Janie is entitled to a preliminary injunction. *See e.g.*, *Hecox*, 104 F.4th at 1068 (affirming the district court's grant of preliminary injunctive relief on equal protection grounds); *Horne*, 683 F. Supp. 3d at 976 (granting motion

for preliminary injunction on equal protection and Title IX grounds); *B.P.J. by Jackson v. W. Va. St. Bd. of Educ.*, 550 F. Supp. 3d 347, 350-351 (S.D. W. Va. 2021) (granting motion for preliminary injunction on equal protection and Title IX grounds).

III. Janie Will Suffer Irreparable Harm In The Absence Of Injunctive Relief

As explained in her opening brief—largely without rebuttal—Janie has been irreparably harmed by, and faces ongoing and future irreparable harm from, the deprivation of her ability to participate in girls' sports. Defendants restate their flawed justiciability arguments to assert that Janie has not been irreparably harmed and does not face the threat of further irreparable harm from their continued denial of her participation in girls' tennis. But as demonstrated in her declaration and the declarations of her parents, Janie is already suffering significant harm because of Defendants' decision to bar her from the girls' tennis team in September 2023. *See* ECF No. 16 ¶¶ 13, 16-17, 20-21; ECF No. 17 ¶¶ 18, 20, 22, 25-26; ECF No. 18 ¶¶ 17, 19, 21, 25-26. And absent judicial intervention, Janie will be subjected to these harms yet again—soon. Tryouts for the 2024-2025 season begin in less than a month, and absent a preliminary injunction Janie will be unable to participate. And though the School Board states it may take up the issue at its August 13 meeting, if it does—and inevitably bars Janie from participating—she will be left with insufficient time to seek a new injunction.

Without this Court's intervention, Janie will suffer numerous irreparable harms. Janie will "suffer severe and irreparable mental, physical, and emotional harm … because [she] cannot play on [girls'] sports teams." *Horne*, 683 F. Supp. 3d at 975. Not only will she be deprived of the ability to compete, but of the "benefits of shared community, teamwork, leadership, and discipline." *Hecox*, 104 F.4th at 1090. Janie will also suffer "[d]ignitary wounds [that] cannot always be healed with the stroke of a pen." *Obergefell v. Hodges*, 576 U.S. 644, 678 (2015); *see*

also Hecox v. Little, 479 F. Supp. 3d 930, 987 (D. Idaho 2020) (finding that such dignitary wounds constitute irreparable harm), *aff'd in relevant part*, 104 F.4th 1061 (9th Cir. 2024).

The factual record provides substantial research illustrating the benefits to students' physical and mental health, as well as academic performance, that are borne from participation in school sports—especially for transgender youth. *See* Pl's Br. at 13 n.19, 20. The only way for Janie to experience the benefits of playing school sports is to play on the girls' team. ECF No. 16 ¶¶ 19-20; ECF No. 17 ¶¶ 25-26; ECF No. 18 ¶¶ 25-26; ECF No. 15-6 at 53-54 (acceptance and affirmation of transgender identity associated with fewer negative mental health and behavioral symptoms and more positive mental health and behavioral functioning). Accordingly, without this Court's intervention, Janie will lose out on another season of sport and fellowship, losing opportunities to build camaraderie and team-building skills at a critical point in her adolescent development. "These are all specific harm[s] for which there is no adequate legal remedy in the absence of an injunction." *Hecox*, 104 F.4th at 1088 (internal quotations omitted, alteration in original).

Janie has further been subjected to, and absent judicial relief will continue to experience, such dignitary harms. When Janie was barred from the girls' tennis team in September 2023, she felt "singled out," "excluded," and "embarrassed." ECF No. 16 ¶ 16; *see also* ECF No. 15-7 at 2 ("invalidation and rejection of transgender … identities … by others (e.g., families, therapists, school personnel) are forms of discrimination, stigma, and victimization, which result in psychological distress"). Janie was so hurt by her initial exclusion from the team that she cried—it was the "worst moment" of her mother's life. ECF No. 16 ¶ 13; ECF No. 17 ¶ 18; ECF No. 18 ¶ 17. Absent a preliminary injunction, Janie will face these dignitary harms yet again.

Defendants' only additional argument on irreparable harm is that constitutional injury cannot form the basis of Janie's irreparable harm because there is no constitutional injury. To be clear, the profound, concrete harms detailed above suffice to carry Janie's burden. In any event, as explained above, Janie is likely to succeed on her equal protection claim, and that violation constitutes irreparable harm. *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right … constitutes irreparable harm for purposes of equitable jurisdiction."). Defendants do not refute the fact that Title IX violations also constitute irreparable harm. *See Doe v. Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d 771, 777 (S.D. W. Va. 2012) (collecting cases).

IV. The Balance Of Hardships And Public Interest Favor Injunctive Relief

Defendants again rely on their flawed assertion that Janie has not been injured to support their contention that the balance of equities favors maintaining the status quo. As has been explained at length above, Janie, deprived of the opportunity to play sports with her friends on her middle school team because of her gender identity, "faces deeply personal, irreparable harms without injunctive relief." *Hecox*, 104 F.4th at 1089. Injunctive relief, meanwhile will not "inflict any comparable harm" on the School Board or the public it serves. *Id.* In 2023, Janie tried out for, and was selected for, her middle school's girls' tennis team. Absent Defendants' intervention to block her ability to participate and subsequent adoption of an unlawful Policy, she would be able to play.

CONCLUSION

Janie has met her burden, and Defendants have not provided any law or facts suggesting otherwise. The Court should grant Janie's motion, enjoining Defendants from enforcing the Policy as to Janie, and enabling her to participate in the 2024-2025 tennis season just like other girls in Hanover County.

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Respectfully submitted,

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