National Association of Women Judges Webinar

The Supreme Court & Transgender Rights:

What Just Happened, What's Next

Suzanne B. Goldberg
Herbert and Doris Wechsler Clinical Professor of Law
Columbia Law School
sgoldberg@columbia.edu

Oct. 6, 2026

Overview

- Setting the stage: LGBT rights litigation in the U.S. Supreme Court, 2025-26
  - Background, Key rulings
    - Bostock, Skrmetti, Mahmoud, Chiles
    - Emergency docket
- West Virginia v. B.P.J. and Little v. Hecox (2026)
- Cert grants
- Legal scapegoating

Key resources for background on transgender people:

https://www.transhealthhub.org/

https://transequality.org/trans-101

Setting the stage: Recent LGBT rights litigation in the U.S. Supreme Court, 2025-26

Backdrop in 2020: Bostock v. Clayton Cty.

6-3 (Gorsuch, J., joined by Roberts, Ginsburg, Breyer, Sotomayor, Kagan).

Title VII's prohibition on discrimination "because of sex" covers discrimination against gay and transgender employees because the **employer penalizes traits or actions it would accept in an employee of a different sex. This makes sex a but-for cause of the decision.**

Left open restrooms, locker rooms, religious liberty defenses.

Alito dissent, joined by Thomas:

Congress understood "sex" to mean biological sex and did not include sexual orientation or gender identity

Kavanaugh dissent: Firing someone because of their sexual orientation (or by extension, gender identity) may involve sex in a "very literal" sense, but courts must follow a **statute's ordinary meaning**, under which sexual orientation discrimination is different from sex discrimination. It is **up to Congress, not the Court, to amend Title VII.**

United States v. Skrmetti (2025):

6-3 ruling (Roberts, C.J.) Upholding Tennessee's ban on puberty blockers, hormone treatment and surgery for treating transgender youth. Among the State's rationales: To "protec[t] minors from physical and emotional harm" by "encouraging minors to appreciate," rather than "become disdainful of," their sex.

Majority:

Although this ban exclusively affected transgender minors, the **state's line-drawing was based on age and medical use, not sex.**

Rational basis review applied and the **state's concerns about the treatment were sufficient.**

Concurrences from Justices Thomas, Barrett, and Alito

- **Thomas:** *Bostock*'s reasoning should not carry over from Title VII to the Equal Protection Clause, and **courts should defer to legislatures rather than "self-described experts"** when the science is uncertain and the issue is politically contested.
- **Barrett** (joined by Thomas): **Transgender status is not a suspect classification** because it lacks the "obvious, immutable, or distinguishing characteristics" of race or sex and has no comparable history of de jure discrimination, so rational basis review applies.
- **Alito** (joined majority in part): Agrees that the law does not classify by sex and that *Bostock* does not apply; would assume arguendo that the law classifies based on transgender status and uphold it under rational basis review. **"Transgender people make up a 'diverse' and 'amorphous class.'"**

Dissents from Justice Sotomayor (joined by Jackson and Kagan (mostly)) and Kagan

- **Sotomayor**: The Tenn. law classifies by sex and by transgender status on its face since "sex determines access to the covered medication," so **intermediate scrutiny is required. The majority "abandons transgender children and their families to political whims."**
- Kagan: Agrees that heightened scrutiny applies but **would remand because unresolved factual disputes remain.**

Mahmoud v. Taylor (2025):

6-3 ruling (Alito, J.). School board's refusal to give parents notice or let them opt out prior to teachers reading "LGBTQ+-inclusive" story books warrants strict scrutiny. The school policy interferes substantially with parents' free exercise right to control their children's religious upbringing. Thomas concurred.

Sotomayor, dissenting (with Kagan and Jackson):

The Free Exercise Clause bars government coercion, not simply exposing children to ideas that conflict with their faith.

The majority's rule has no limiting principle and will cause "chaos" in public schools by giving parents religion-based veto power over curricular decisions that belong to educators and school boards.

Chiles v. Salazar (2026)

The Court held (8-1) that Colorado's ban on licensed counselor’s efforts to change a minor’s sexual orientation or gender identity conversion therapy ban, as applied to talk therapy, regulates speech based on viewpoint and must satisfy strict scrutiny.

Justice Kagan concurred (joined by Sotomayor), adding that a content-based but viewpoint-neutral law regulating therapeutic speech would raise a "different and more difficult question," which the Court left open.

Justice Jackson dissented: Colorado was regulating a harmful medical treatment within its traditional police power over the professions. Any limit on Chiles's speech was incidental and did not trigger heightened scrutiny. The majority ruling weakens states' ability to enforce standards of care delivered through speech.

Shadow/emergency docket

Military service:

- United States v. Shilling (stay granted May 2025): Supreme Court stayed an injunction against Trump's transgender military service ban, unsigned, with Sotomayor, Kagan, and Jackson noting they would have denied the stay. Ban remains in effect; Shilling trial is set for November 3, 2026.
- **Talbott v. U.S. (cert petition pending).** The district court enjoined the same transgender military service ban after rejecting the government's military readiness argument and ruling that the ban was "soaked in animus and dripping with pretext." The D.C. Circuit heavily weighed this finding and blocked the government from discharging the active-duty plaintiffs. Order has been stayed.

Passports: Trump v. Orr (stay granted Nov. 2025): Supreme Court stayed a district court injunction, allowing the State Department to resume issuing passports reflecting sex at birth only (no "X" marker). The policy remains in effect while litigation continues in the district court.

Parental notification: Mirabelli v. Bonta (March 2026): Supreme Court reinstated a permanent injunction for parent plaintiffs challenging California school policies that permitted schools to withhold information about a student's in-school gender transition from parents. Barrett concurred; Kagan dissented (joined by Jackson) objected to resolving novel questions on the emergency docket; Sotomayor noted she would have denied the application in full. Litigation continues.

West Virginia v. B.P.J. (June 2026) (6-3) at a glance

The Court upheld two state laws imposing a total ban on transgender girls and women participating on girls and women's sports teams in their schools, concluding that Title IX and the Equal Protection Clause allow states to limit women's and girls' teams to "biological females."

- *B.P.J.:* At the time she filed suit, *Becky PJ* was about to enter sixth grade. She is now an 11th grader in a WV public high school. She and her lawyers told the court that Becky has known she is a girl for as long as she can remember and by third grade, she was recognized as a girl at home and at school.
- The majority opinion in B.P.J. calls Becky a "biological male who identifies as female"; the dissent calls her a transgender girl who wants to live her life consistent with her gender identity.
- *Lindsay Hecox i*s a transgender woman and a college student at Boise State in Idaho – majority also called a biological male who identifies as female. She didn't make the NCAA track or cross-country teams at her school but had competed in club soccer.

Opinions:

- Majority: Kavanaugh, joined by Roberts, Thomas, Alito, Gorsuch, Barrett.
- Concurrences: Thomas; Gorsuch (each also joined the majority in full).
- Concurring in the judgment in part and dissenting in part: Sotomayor (with Kagan and Jackson); Jackson.

The laws

West Virginia, “Save Women's Sports” Act (2021)

- Every team from middle school through college must be designated male, female, or coed by "biological sex," defined as "reproductive biology and genetics at birth."
- Female teams are closed to males in skill-based or contact sports; male teams have no comparable restriction.
- It replaced a 2016 policy that allowed case-by-case eligibility, with an appeal process.

Idaho, “Fairness in Women's Sports” Act (2020)

- It bars male students from female teams and defines sex by biology.
- The legislature found that the benefit of natural testosterone "is not diminished through the use of puberty blockers and cross-sex hormones."

Title IX

All justices agreed that that the athletics-participation ban was based on sex; for various reasons, all agreed that B.P.J's Title IX claim failed.

- B.P.J. did not dispute for purposes of the litigation that "sex" in Title IX meant "biological sex." (*Note: Many biologists would disagree.*)

Majority: "Sex" in Title IX (1972), the 1974 Javits Amendment, and the 1975 Title IX regulations "cannot plausibly be interpreted to refer to anything other than biological sex."

  - Nothing in the text "say[s] (or even hint[s])" that an exception is required for transgender girls on puberty blockers or hormones.
  - A biological line is "reasonable" under Javits: it promotes safety and fair competition, and sports are "generally zero sum."

- *Bostock* is "not relevant": Title VII generally requires sex-blind treatment, whereas Title IX authorizes sex-separate teams, and *Bostock* expressly reserved such questions.

Title IX (Justice Jackson concurrence/dissent)

> “The majority is wrong to suggest that the term ‘sex’ in Title IX ‘cannot plausibly be interpreted to refer to anything other than biological sex.’”

> Sex stereotyping: “Title IX makes room for individuals to live in the gender they choose; it cares not just about sex assigned at birth but also about individuals' ability to match (or not) their gender presentation to their gender identity.”

> West Virginia’s law, by forcing B.P.J. “to live — in this case, to play — as a boy though she is a girl,” may violate Title IX as properly construed.

Majority, Equal Protection

- The laws classify by sex, and intermediate scrutiny applies.
  - No majority ruling on heightened scrutiny for transgender status classifications.
- Safety and competitive fairness are important interests, and limiting girls' teams to “biological females” is substantially related to those interests.
- The test looks to “the overall problem,” not each individual case.
  - Equal protection does not require an individualized assessment of whether the law’s rationale (retained male-puberty advantages) actually applies to a subclass of transgender girls who take female hormones and have not undergone male puberty.
- Just as states may exclude males whose abilities fall within the female range, they may “treat all biological males the same.”

More from the majority

Many states. Court repeatedly notes that 25 other states have similar bans.

Science. Whether treated transgender girls retain an advantage is “the subject of ongoing medical and scientific debate,” which calls for deference to legislatures rather than demanding “athlete-by-athlete” proof.

Mootness. Hecox's case is not moot despite a post-certiorari declaration that Hecox would stop playing.

Concurrences

Thomas

- Transgender status is not a suspect classification; **gender dysphoria is "a mutable mental state," so only rational-basis review applies.**
- "A man does not have a legal right to compete against women just because he believes that he is a woman."

Gorsuch

- Spending Clause: "Nothing in Title IX clearly and unambiguously alerts funding recipients" that they cannot restrict teams to "biological women or girls."
- *Bostock* "supports, not undermines" the result. *Bostock* "took as given" that firing is discrimination and that "sex" means "biological sex."
- **Here the question is whether single-sex teams are discrimination at all**. "It is a mistake to assume" that what violates Title VII also violates Title IX.

Sotomayor (with Kagan and Jackson), concurring in part and dissenting in part

- **Title IX.** The claim fails, but "on a narrower basis" that B.P.J. did not dispute that "sex" in Title IX meant "biological sex." *Does not read the majority to allow schools to bar transgender students from classes or activities or to expel them.*

- **Equal protection.** Case should have been remanded for fact-finding on whether transgender girls who never went through male puberty and receive female hormones have any sex-based advantage.

  – **The majority's approach disregards settled sex-discrimination precedent** (e.g. U.S. v. Virginia) **that examines whether the classification's stated rationale actually fits the subclass being excluded** – here, transgender girls who have not undergone endogenous male puberty.

- Court's opinion "unencumbered by fact or law."

Sotomayor dissent, continued

> “The majority's opinion ends by reciting the many wonderful ways in which playing sports can be valuable to young people. ***
>
> Because of the Court's decision today, West Virginia, and any other state actor, can deny B. P. J. and others like her these experiences simply because it thinks they have an inherent athletic advantage, even if the facts show that they do not.
>
> In the end, to the Court, the facts do not matter, even though the consequences are serious. The ban is absolute, so B. P. J. cannot practice on girls’ teams, even if she would not take anyone's spot in an eventual competition, even if everyone who tries out for the team makes it, and even if having the chance to participate could aid immensely in treating B. P. J.’s gender dysphoria.”

“Sports, of course, are often zero sum, but the law need not and should not be.”

Cert grants on LGBT and Title IX issues

International Partners for Ethical Care, Inc. (IPEC) v. Ferguson: Whether parents have standing to challenge Washington's runaway-youth law, which offers alternative reunification procedures rather than standard parental notification when a minor seeks gender-affirming care; Ninth Circuit found no standing. Argument: Dec. 7, 2026.

St. Mary Catholic Parish v. Roy: Catholic parishes challenge Colorado's preschool-funding nondiscrimination condition (covering sexual orientation/gender identity) as violating free exercise; Tenth Circuit upheld it as neutral and generally applicable under Employment Division v. Smith. Cert granted on two Free Exercise Clause questions. Argument: Nov. 3, 2026.

Crowther v. Board of Regents of the University System of Georgia: Whether Title IX gives employees (not just students) a private right of action for sex discrimination in education-institution employment; Eleventh Circuit said no; other circuits have said yes. Argument: Nov. 30, 2026.

Legal scapegoating of transgender people

Forthcoming article: Legal Scapegoating of Transgender People, Democratic Vulnerability, and the Problem of Judicial Blinders