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Legal

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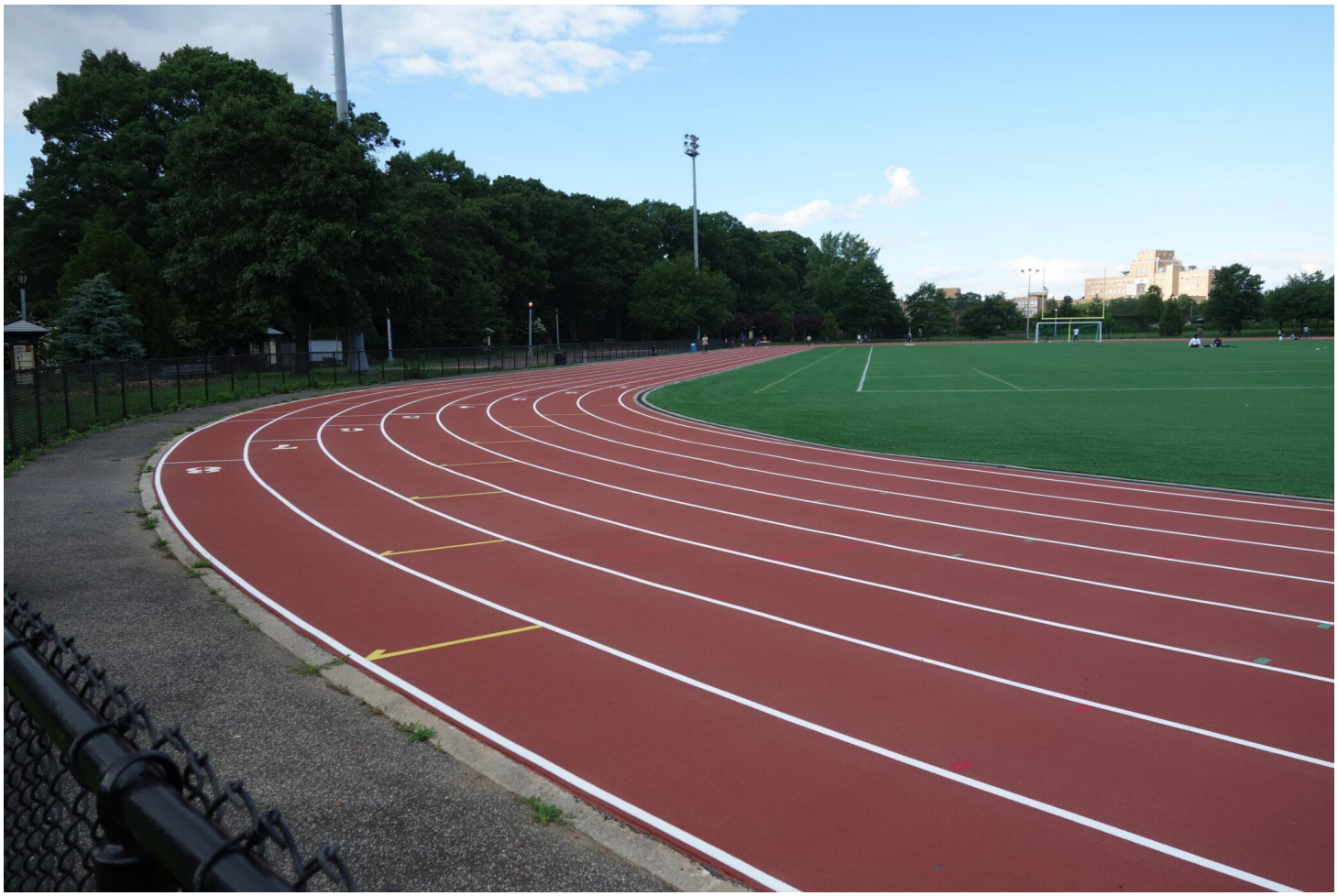

A transgender track and field athlete in West Virginia is at the center of a court case involving Alliance Defending Freedom, an anti-LGBTQ litigation group.

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Alliance Defending Freedom, the conservative religious litigation group, representing as intervening defendant a cisgender girl who claims it is unfair to require her to compete in track and field against a transgender girl, applied to the Supreme Court to reverse an order by a three-judge panel of the Fourth Circuit Court of Appeals allowing B.P.J., a transgender girl, to continue competing while the court of appeals considers her appeal of an adverse ruling by the federal district court.

The actual defendants in the case are the State of West Virginia, its State Board of Education, the West Virginia Secondary School Activities Commission, and the state Education Superintendent. ADF's application, addressed to Chief Justice John G. Roberts, Jr., who receives such

applications arising from courts within the Fourth Circuit, was docketed on March 13. Chief Justice Roberts ordered B.P.J. to respond by noon on March 20.

The application was accompanied by two amicus briefs, from "67 Female Athletes, Coaches, Sports Officials, and Parents of Female Athletes" and from "Alabama, Arkansas, and 19 Other States." ADF apparently acted quickly to round up support.

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The Fourth Circuit's February 22 Order, issued by a 2-1 vote of the panel, provided no explanation for its decision to reject District Judge Joseph Goodwin's refusal to stay the order that he had issued early in January, when he had concluded that B.P.J. was not likely to prevail on her claim that West Virginia's Sports Act violated her federal constitutional and statutory rights. Goodwin issued an opinion on February 7 reiterating his refusal to stay his ruling, which prompted B.P.J. to seek quick relief from the Fourth Circuit before the spring track and field season commenced.

The ADF application is likely to draw the Supreme Court into one of the most hotly disputed issues in transgender law: whether federal law requires that transgender girls be treated as girls for purposes of athletic competition. According to ADF's application, 17 states have adopted these bans, and similar proposals are pending in more state legislatures.

The Second Circuit Court of Appeals recently announced that it was taking up the same question by the full bench of that court (13 active judges) in relation to Connecticut's policy of letting transgender girls compete, thus vacating a three-judge panel decision that had upheld the dismissal of a challenge to that state's policy that was brought by three cisgender girls who had been beaten in competition by transgender girls. The plaintiffs in that case argued that the state's policy violated their Equal Protection and Title IX rights.

When Judge Goodwin first encountered B.P.J.'s lawsuit, filed by Lambda Legal and the ACLU, in the context of a pretrial motion for a preliminary injunction, he granted the preliminary injunction early in 2021, allowing B.P.J. to fulfill her wish upon beginning middle school to be able to participate in spring girls' track and field events based on her gender identity rather than what the state would refer to as her "biological sex," which it defines as "reproductive biology and genetics at birth." She had identified as a girl since early childhood, but was told she would not be able to compete as a girl due to the recently enacted state law.

Judge Goodwin, Senior District Judge who was appointed by President Bill Clinton, narrowed his preliminary injunction to B.P.J. as an individual, reserving for later decision the question

whether the state law is unlawful on its face. After refusing to dismiss B.P.J.'s complaint, and reviewing the voluminous record compiled through discovery, Judge Goodwin changed his mind and decided that for purposes of athletic competition transgender girls are not similarly situated with cisgender girls, and thus it was not unlawfully discriminatory for the state to exclude them from girls' athletic competition. In that January 2023 ruling, he ordered the preliminary injunction dissolved and subsequently refused to "stay" that dissolution while B.P.J. appealed to the Fourth Circuit.

It is quite unusual for a court of appeals panel to issue an order without explanation to revive a preliminary injunction that had been ordered dissolved in a lengthy decision by the district court, and ADF played up this lack of explanation in its application, suggesting that there was something suspect about it, as it was not accompanied by a detailed explanation of why two of the three panel judges disagreed with Judge Goodwin.

In order to issue a preliminary injunction against the application of a state law, a court has to find that the plaintiff's challenge to the law is likely to succeed and to explain why, to justify upsetting the legal status quo established by the law. If the Fourth Circuit panel had added to their order that they agreed with and incorporated by reference Judge Goodwin's earlier explanation why a preliminary injunction was merited, ADF would not be in a position to make an argument that may be persuasive to the Supreme Court as providing a way to dispose of this application without stating its own view on the merits of the case.

The Fourth Circuit has proved friendly in the past to the argument that excluding transgender students from equal access to all school programs and facilities violates their rights, most notably in its 2020 decision in Grimm v. Gloucester County School Board, in which it held that the Equal Protection Clause and Title IX of the Education Amendments of 1972 required a public high school to allow a transgender boy to use the boys' restroom facilities. Ultimately, however, Judge Goodwin concluded that sports competition presented distinctly different issues, and that biological sex was relevant in this context because, he was convinced, allowing a transgender girl to compete in girls' sports presented unfair competition to cisgender girls.

ADF drove these points home in its application, asserting that every time B.P.J. competed, she was depriving a cisgender girl of an opportunity to compete, and every time she beat cisgender girls in competition, she was depriving them of the victories they deserved. ADF pointed to the legislative history of Title IX, which at the time was described as an effort by Congress to provide more opportunities for girls to participate in sports, arguing that letting transgender women compete was undermining the original goal of the statute.

ADF sharply contested the argument that the Supreme Court's Bostock ruling from 2020, which interpreted Title VII of the Civil Rights Act of 1964 to make it unlawful for an employer to discharge an employee because of their transgender status, could be translated to Title IX without modification. ADF argued that a rule relevant to employee hiring and discharge was not appropriately applied to the issues in this case, especially noting that regulations under Title IX clearly allow for separate teams and competitions for boys and girls, based on a view that allowing "boys" to compete on girls' teams would deprive girls of equal opportunity to engage in athletic competition.

B.P.J.'s argument is that a categorical exclusion is inappropriate, that each transgender student should be evaluated on an individual basis depending on the nature of their transition. ADF argued that this was an unworkable approach that would mire school districts and courts in difficult and time-consuming determinations about whether a particular transgender girl should be allowed to compete. They also posed the disingenuous suggestion that any boy could just declare himself a girl to play on a girls' team, a distortion of B.P.J.'s arguments.

In recent years, the court has been increasingly deciding significant issues of law and policy in the so-called "shadow docket," responding to motions and applications for relief from lower court decisions. These rulings are made without the full trappings of a plenary review, which would include full briefing and oral arguments that accompanies a grant of certiorari and stretches out the process over a significant period of time. The "shadow-docket" rulings come quickly, and frequently without extensive written explanation.

ADF's application also couches its concerns in the language of federalism, urging the court to defer to the state legislature's judgment in an area — regulation of public education — that is traditionally a state rather than a federal function. "This case implicates a question fraught with emotions and differing perspectives," ADF writes. "The decision was the West Virginia Legislature's to make. The end of this litigation will confirm that it made a valid one. In the meantime, the court should set aside the Fourth Circuit's unreasoned injunction and allow the state's validly enacted law to go back into effect."