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Supreme Court declines to intervene to enforce West Virginia transgender athlete ban

BY ZACH SCHONFELD AND BROOKE MIGDON - 04/06/23 2:42 PM ET



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The Supreme Court has ruled that transgender athletes in West Virginia can compete on female school sports teams in response to a challenge by the state to allow it to enforce a law that prohibits such athletes from doing so.

In a brief, unsigned order, the justices denied the state’s emergency request to lift an appeals court’s injunction, which enabled a transgender girl to compete on her middle school’s female teams until the three-judge panel reaches a final decision.

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The appeals panel is now set to hear the student athlete’s appeal in full, and the case could ultimately return to the high court.

Justice [Samuel Alito](#) in a statement joined by Justice [Clarence Thomas](#) dissenting from the decision said the case “concerns an important issue that this Court is likely to be required to address in the near future.”

West Virginia in 2021 became the seventh state in the nation — and the sixth that year — to enact a law prohibiting transgender women and girls from competing on female sports teams. The measure, officially titled the “Save Women’s Sports Act,” bars transgender female athletes from participating in sports consistent with their gender identity in public elementary schools, high schools and universities.

West Virginia Gov. [Jim Justice](#) (R) could not cite a specific example of a transgender athlete with an unfair competitive advantage in his state when asked [during an interview](#) following his approval of the bill, but he said his experience as a girls’ basketball coach led him to believe the legislation is fair.

West Virginia Gov. Jim Justice speaks in the House Chambers at the state capitol in Charleston, W.Va., on Jan. 11, 2023. (AP Photo/Chris Jackson, File)

A lawsuit filed the following month by civil rights organizations including the American Civil Liberties Union (ACLU) and Lambda Legal on behalf of Becky Pepper-Jackson, a now-12-year-old transgender girl, alleges the law is unconstitutional because it discriminates based on sex and transgender status.

Becky, who entered middle school in the fall of 2021, had been planning to try out for her school's cross country team when the law took effect.

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A federal district judge had handed Becky a preliminary victory — allowing her for months to compete on her school’s female sports teams — before reversing course in his final ruling in January.

The state’s transgender athlete restrictions are “constitutionally permissible,” District Court Judge Joseph Goodwin wrote in the January ruling, because the state legislature’s definition of “woman” and “girl” are “substantially related to the important government interest of providing equal athletic opportunities for females.”

For the purposes of school sports, West Virginia law defines both “woman” and “girl” as an individual who is “biologically female,” or was assigned female at birth.

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Becky appealed, and a divided three-judge panel on the 4th U.S. Circuit Court of Appeals in a February ruling [blocked the ban's enforcement](#) until the panel could consider the dispute in full.

West Virginia Attorney General [Patrick Morrisey](#) (R) then [filed an emergency appeal](#) with the Supreme Court, asking the justices to take the unusual step of intervening in the case immediately without oral argument or extensive briefing. [Twenty-one Republican attorneys general backed Morrisey](#) before the high court.

“I would grant the State’s application. Among other things, enforcement of the law at issue should not be forbidden by the federal courts without any explanation,” Alito wrote, taking aim at the lower court for ordering the injunction in a brief decision.

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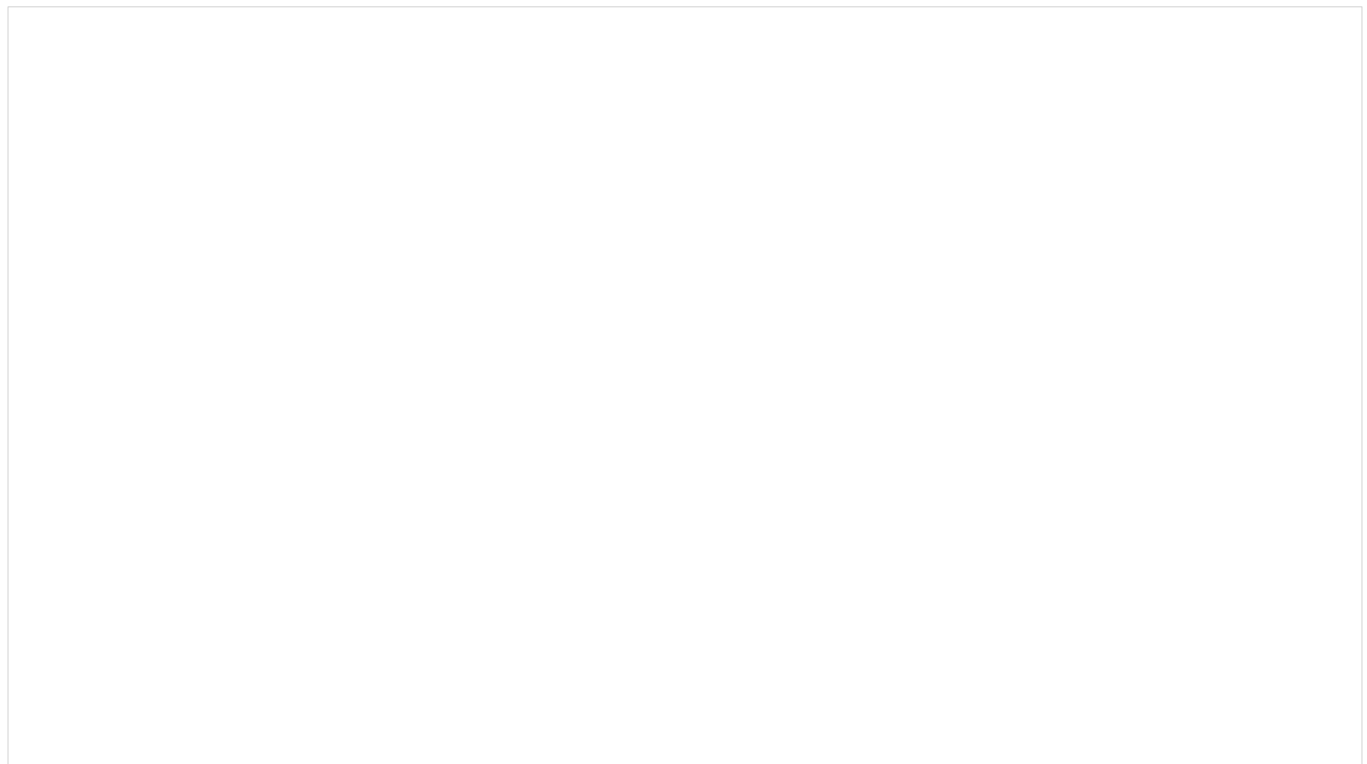
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Morrisey called the high court's decision a "procedural setback."



In this Nov. 1, 2018, file photo, Patrick Morrisey speaks to reporters after a debate in Morgantown,

W.Va. (AP Photo/Raymond Thompson, File)

“This is a procedural setback, but we remain confident that when this case is ultimately determined on the merits, we will prevail,” Morrissey said in a statement. “We maintain our stance that this is a common sense law—we have a very strong case. It’s just basic fairness and common sense to not have biological males play in women’s sports.”

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Becky has asserted the West Virginia law violates the 14th Amendment’s Equal Protection Clause and Title IX, the federal civil rights law that prohibits sex-based discrimination in schools. As a minor, Becky is formally represented by her mother, Heather Jackson, and is identified by her initials in court filings.

“Applicants’ emergency motion fails at every requisite step, including by failing to identify any harm that warrants this Court’s intervention to block B.P.J. from continuing what she has been doing for more than a year and a half. This Court’s intervention should be reserved for true emergencies. This is not one,” attorneys for Becky wrote in their brief.

West Virginia contended the injunction lacked any reasoning and would upset the status quo. The law “easily” meets the Supreme Court’s standard for allowing sex-based distinctions, Morrissey’s office wrote in their brief.

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“Biological differences between males and females matter in sports. Both Title IX and the Fourteenth Amendment allow that judgment,” the state wrote.

At least 20 states since 2020 have enacted laws that bar transgender athletes from competing on sports teams consistent with their gender identity.

Updated 2:55 p.m.

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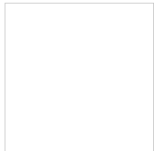
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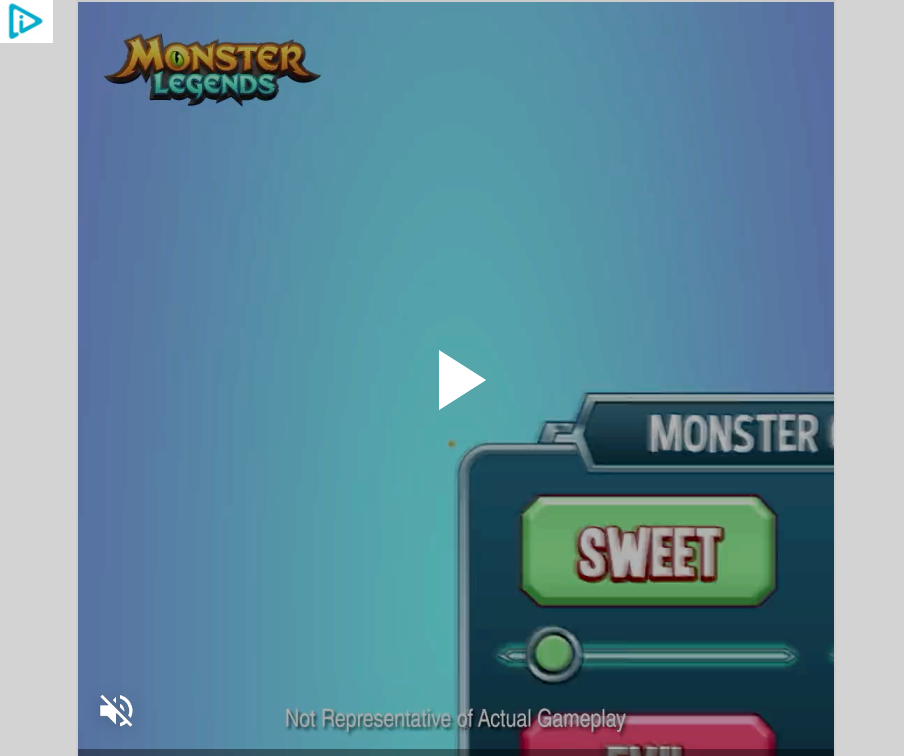
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