U.S. Supreme Court upholds state bans on transgender athletes while striking down campaign finance regulation

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30 June 2026

On Tuesday, the final day of its term, the U.S. Supreme Court handed down two 6-3 decisions, both written by Justice Brett Kavanaugh, that further undermine democratic rights and enhance the domination of the corporate oligarchy over the political system. In the first, the court upheld state bans excluding transgender girls from school sports. In the second, it lifted limits on political campaign contributions, making it even easier for the wealthy to dictate public policy.

The five other right-wing justices endorsed Kavanaugh's opinion while the three moderates—Elena Kagan, Sonya Sotomayor and Ketanji Brown Jackson—joined in dissent.

The court ruled that public schools may bar transgender girls from girls' and women's sports teams. The decision in *West Virginia v. B. P. J.*, argued together with the Idaho case *Little v. Hecox*, upholds laws now on the books in 27 states and hands the Republican right another victory in its campaign to ostracize a small and vulnerable segment of the population.

The state bans at issue are solutions in search of a problem. In the B.P.J. case, West Virginia passed the Save Women's Sports Act before there was a record of *any* transgender person participating in school sports in the state, much less a wave of transgender students taking the places of female athletes or making them unsafe. In the entire five-year history of the ban, B. P. J. is the only transgender girl publicly identified in the state as seeking to play women's sports.

B. J. P. was born male and began to identify as female at a young age. At age nine, she was diagnosed with gender dysphoria. She underwent gender-affirming care, including puberty blockers and hormone treatment. Her medical expert—an endocrinologist practicing at Mount Sinai Hospital—filed a report with the trial court stating that B. P. J. had never experienced male puberty and explaining that it would be impossible for her to have any athletic performance advantages associated with her birth gender because these were the product of testosterone. West Virginia's trial expert was not even a medical doctor.

The record showed that B. P. J. participated on her middle school's girl's track and cross-country teams without issue before the Save Women's Sports Act took effect. As far as "taking the place" of female-born athletes, every student who tried out was admitted to the teams.

When her school stopped allowing her to participate, B. P. J.'s mother sued, alleging that the law violated Title IX of the Civil Rights Act and the Equal Protection Clause of the 14th Amendment.

Justice Sonya Sotomayor summarized B. P. J.'s position in her dissent, saying:

> As the majority stresses and no one disputes, when it comes to sex identified at birth, males generally have an inherent athletic advantage over females in playing sports. B. P. J., however, contends that this generalization does not hold true for a discrete, easily identifiable group: transgender girls who have never experienced an endogenous male puberty, who receive gender-affirming treatment, and who are, she says, thus similarly situated to cisgender girls. For that group, she argues, neither of West Virginia's interests is furthered by excluding them from girls' and women's sports.

Sotomayor read her dissent from the bench to underscore her opposition to the majority ruling.

Justice Kavanaugh's opinion stands out most for its distortion of the facts. In a typical passage, he wrote:

> Sports are generally zero sum. Every biological male who makes the team takes a roster spot from a female athlete. Every biological male who earns playing time reduces the playing time of a female athlete... Every biological male who wins a race takes the gold medal away from a female athlete. And so on.

This reality, he argued, drove state legislatures to enact laws protecting women's sports from being overrun or made unsafe by biological males. The science attesting to the fact that testosterone accounted for male athletic advantage was "in dispute," he said, and even if B. P. J. could prove her case scientifically, the US Constitution did not require states to be perfectly precise in devising laws with some discriminatory impact.

Justice Clarence Thomas wrote a three-paragraph concurrence that pandered to backwardness and prejudice. Arguing that those enduring gender dysphoria deserved the lowest level of legal protection in Equal Protection Clause jurisprudence, he frothed:

> Because "gender dysphoria" is a mutable mental state that is the object of psychiatric treatment, it does not resemble the immutable characteristics on the basis of which our precedents have applied heightened scrutiny—race, sex, or national origin. Instead, gender dysphoria resembles other characteristics on the basis of which legislatures may classify with a merely rational basis… Legislatures have many obvious rational bases to keep men who believe that they are women out of teams and private spaces reserved for women.

The fostering of fear and hatred toward this numerically minuscule portion of society has only one purpose: scapegoating. The existence of centi-billionaires and even trillionaires—who are the real cause of scarcity and social misery—must be obscured and camouflaged by religious and moralistic appeals.

The same six-justice majority used the final day of the term to gut what remains of the country's campaign finance laws. In *National Republican Senatorial Committee v. Federal Election Commission*, the court struck down the Federal Election Campaign Act's limits on how much a political party may spend in coordination with its own candidates, and overruled its 2001 precedent, *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*), which had upheld those limits. Justice Kagan dissented, joined by Justices Sotomayor and Jackson.

The decision follows the logical course of cases such as *Citizens United v. FEC* (2010) and *McCutcheon v. FEC* (2014)—the methodical demolition of every legal barrier to the direct domination of the financial oligarchy over political life. Where *Citizens United* unleashed unlimited "independent" corporate spending and *McCutcheon* removed the aggregate cap on what a single donor can give, this ruling allows donations to a party to serve as de facto donations to a given candidate.

According to prior election regulations, an individual could donate a maximum of $7,000 to a candidate for public office, but that same individual could give hundreds of thousands of dollars to that candidate's political party every election cycle, funneled through various state committees. If the party can give any or all of that money to the same candidate, there is no significance to the $7,000 limit. A candidate can now use his party as his checkbook, and behind him stands wealthy donors holding the strings.

In her dissent, Justice Kagan traced the election rules being scuttled to the Watergate era, specifically to an episode in which Richard Nixon raised a subsidy on milk in direct exchange for a $2 million campaign contribution from the dairy industry. Decrying the majority's overruling of *Colorado II* without consideration for the legal doctrine of *stare decisis*, she wrote that "for those who would prefer even more money to be pumped even more easily into politics despite the danger of corruption—this overruling is for you."