No. 24-449

In the Supreme Court of the United States

WARREN PETERSEN *et al.*,

Petitioners,

v.

JANE DOE *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALABAMA, ARKANSAS, AND 22 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE*

The States of Alabama, Arkansas, Alaska, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming respectfully submit this brief as *amici curiae* in support of Petitioners. *Amici* States all have interscholastic and intercollegiate sports leagues and have worked hard to ensure that women and girls have equal access to athletic opportunities.

In sports, equal access means a level playing field. And a level playing field usually means sports teams divided by sex so that girls can compete against other girls. Indeed, providing separate leagues for boys and girls has worked magic, increasing the participation of girls and women in sports by nearly 1,100% over the last half century. *See* Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 83 (2013).

For this reason, *amici* States all have laws or policies like Arizona's that restrict girls' sports teams to biological females. Basing the distinction on biology rather than gender identity makes sense because it is the differences in biology—not gender identity—that call for separate teams in the first place: Whatever their gender identity, biological males are, on average, stronger and faster than biological females. If those

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* *Amici* have provided the parties with ten days' notice of their intent to file this brief. *See* S. Ct. R. 37.2(a).

average physical differences did not matter, there would be no need to segregate sports teams at all.

Yet *amici* States have faced claims similar to those at issue here, in which plaintiffs challenge not the act of the segregation itself (separate sports teams for girls) but the contours of the segregation (using biology rather than gender identity to separate the teams). *Amici* thus have a strong interest in this case. For the reasons explained below, the Court should grant the petition and hold that the Constitution's equal protection guarantee allows States to preserve and further the progress made over the last fifty years in girls' and women's sports.

SUMMARY OF ARGUMENT

The Equal Protection Clause does not prohibit States from offering separate sports teams for men and women, boys and girls. Because "[p]hysical differences between men and women" are "enduring," *United States v. Virginia*, 518 U.S. 515, 534 (1996), segregating sports teams by sex ensures that female athletes have an equal opportunity to compete on a level playing field. And given that it is the physical differences between males and females that warrant separate teams to begin with, the Constitution does not force States to use gender identity in lieu of biological sex to demarcate the teams.

It is important that this Court make that clear. *Amici* States are regularly haled into court and must bring with them an army of biologists, endocrinologists, and physicians just to defend policies that have long been viewed as commonsense ways to protect and promote flourishing for women and girls. Female-only

basketball and swimming teams. Female-only locker rooms and showers. Female-only bathrooms. But as this case demonstrates, courts across the country have splintered over how to apply the Equal Protection Clause to these policies when confronted with allegations that the policies discriminate based on gender identity.

Part of the reason for confusion is that these novel claims are presented in the garb of—and have been misconstrued as—traditional equal protection challenges subject to heightened review. They're not. Female applicants to the Virginia Military Institute did not seek to maintain VMI's sex segregation but assert that they were really men whom VMI unconstitutionally misclassified and rejected. And Oliver Brown did not ask this Court to bless separate-but-equal schooling so long as the Board of Education of Topeka would classify him as white. But the plaintiffs in this case want Arizona to continue to segregate sports teams based on sex. They just want Arizona to segregate a bit more inclusively—to include "gender identity" in its definition of "sex."

Indeed, far from demanding that all sports go coed, the plaintiffs want to take advantage of sex-segregated sports by competing on a team that aligns with their gender identity rather than their biological sex. That makes their claim an underinclusiveness challenge, not a traditional equal protection challenge. And even if separating males and females for the benefit of girls' sports warrants heightened review, using biology rather than gender identity to define the contours of that classification is subject only to rational-basis review—which Arizona's law easily passes.

The Ninth Circuit also held that heightened scrutiny applies because it determined that Arizona's law classifies on the basis of gender identity and that such a classification implicates the quasi-protected class status of individuals who identify as transgender. This Court should also provide clarity in this area. Under Arizona's law, the sole line of demarcation is physical, biological sex—matching the State's interest in providing girls a level playing field based on the physical differences between males and females. To the extent that the sex-based classification disparately impacts individuals who identify as transgender, it does so only incidentally. That is insufficient to raise the level of review even if transgender individuals were a quasi-protected class, which they are not.

ARGUMENT

I. The Question Presented Is Exceptionally Important.

As the Petition explains, courts across the country are hopelessly split on multiple important and recurring questions involving what "sex" means for purposes of Equal Protection Clause jurisprudence, whether plaintiffs' claims are really just underinclusiveness challenges, whether "gender identity" constitutes a "quasi-suspect" classification, and the role of legislative good faith and fact finding in cases involving medical and scientific uncertainties. Pet. 17-31; *see also* Petition for Writ of Certiorari at 9-17, *Hecox v. Little*, No. 24-38 (U.S. Jul. 11, 2024); Petition for Writ of Certiorari at 25-29, *West Virginia v. B.P.J.*,

No. 24-43 (U.S. Jul. 16, 2024). *Amici* will not repeat this discussion.

Instead, *amici* will highlight just some of the costs resulting from the state of confusion. Half the States have laws or policies that use biological sex to offer different sports teams to boys and girls.[1] Are those laws constitutional? At least in some circuits, the answer depends on the "extraordinarily fact-bound test" of "[h]eightened scrutiny analysis." *Hecox v. Little*, 104 F. 4th 1061, 1091 (9th Cir. 2024); App. 38A; *B.P.J. v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 557 (4th Cir. 2024).

As the Court of Appeals recognized, that means a battle of experts. App. 30A; *see B.P.J.*, 98 F.4th 561-62. So schools that refuse to allow a biological male to play on the girls' basketball team are now forced to hire expert biologists and endocrinologists to opine on what should be a straightforward question—what

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[1] *See* Ala. Code §16-1-52; Alaska Admin. Code tit. 4, §06.115; Ariz. Rev. Stat. §15-120.02; Ark. Code Ann. §6-1-107; Fla. Stat. §1006.205; Idaho Code §33-6203; Ind. Code Ann. §20-33-13-4; Iowa Code §261*l*.2; Kan. Stat. Ann. §60-5603; Ky. Rev. Stat. Ann. §§156.070(g), 164.2813; La. Rev. Stat. §4:444; Miss. Code §37-97-1; Mo. Rev. Stat. §163.048; Mont. Code Ann. §20-7-1306; N.C. Gen. Stat. §115C-407.59; N.D. Cent. Code §15.1-41-02; H.B. 396, Gen. Ct. of N.H., Reg. Sess. (N.H. 2024); Ohio Rev. Code §3313.5320; 70 Okla. Stat. Ann. §27-106; S.C. Code Ann. §59-1-500; S.D. Codified Laws §13-67-1; Tenn. Code Ann. §49-7-180; Tex. Educ. Code §33.0834; Utah Code Ann. §53G-6-902; Va. Dep't of Educ., *Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools* (Jul. 18, 2023), https://tinyurl.com/yj2pjyyr; Op. Va. Att'y Gen. No. 23-042, 2023 WL 5535964 (Va. A.G. Aug. 23, 2023); W. Va. Code. Ann. §18-2-25d; Wyo. Stat. §21-25-102.

does "sex" mean? *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 836 (11th Cir. 2022) (en banc) (J. Pryor, J., dissenting) (discussing need for expert testimony about the meaning of "sex" in case about school's sex-based bathroom policy).

Depending on the court's resolution of that question, the expert will then likely need to opine on other questions so that the court can sit in review of other aspects of the school's policy. Can the school restrict all biological males from participating on the girls' basketball team, or only those who have gone through puberty? *Cf.* App. 29A (discounting studies showing "that prepubertal boys may be taller, weigh more, have more muscle mass, have less body fat, or have greater shoulder internal rotator strength than prepubertal girls" based on expert's hypothesis that such physical differences could be the result of "greater societal encouragement of athleticism in boys"); *B.P.J.*, 98 F.4th at 560-61 (reversing grant of summary judgment because of competing expert testimony on whether biological males "enjoy a meaningful competitive athletic advantage" over biological females "[e]ven without undergoing Tanner 2 stage puberty").

And if schools factor pubertal development into the line drawing required by the Constitution, at what stage of puberty can the school draw the line? What if a biologically male student went through some aspects of pubertal development before starting puberty blockers—must the school allow that student to play on the girls' basketball team? *Cf.* App. 33A-34A (discussing testosterone exposure in adolescents who "started puberty blockers at an average age of 14.5

years" versus "from around 13 years of age" versus "at age 11"). What if the student proceeded through Tanner Stage 2 of puberty but not Stage 3? *Cf. B.P.J.*, 98 F.4th at 560 (noting that "different physical processes" "manifest at what medical professionals call the 'Tanner 2' stage"). Would it matter how much the testosterone suppressant hampered the student's jump shot? *Cf. Hecox*, 104 F.4th at 1082 (noting that the "medically prescribed hormone therapy" has "impact[ed]" the plaintiff's "athletic prowess" and "slowed her racing times by at least 'five to ten percent'"). What if the male completed puberty but is just short and unathletic?

If these are the questions courts must care about, schools are faced with an impossible task. They must create sport-specific policies that protect girls' sports *just enough* from unfair or unsafe competition but that don't exclude all biological males from the girls' teams. Then they must attempt to administer those policies, which, if the judgment below is any indication, will require some sort of testosterone and/or Tanner-stage monitoring and other invasive medical testing to determine whether a student is eligible to play on the girls' team for a specific sport. And if a school guesses wrong in striking just the right balance for any individual student (at least as judged by a federal court), it will face judgment for damages and attorney's fees and have to start all over. *See* 42 U.S.C. §1988(b).

If these are in fact the questions to which the Equal Protection Clause requires answers, the Court should say so now so that schools and States can determine how best to attempt their impossible navigation—or get out of the business of trying. And if these

are *not* the questions to which the Equal Protection Clause requires answers, the Court should say *that* now so that schools and States can be free to protect the strides made in girls' and women's sports in any rational manner they choose—including by restricting girls' sports teams to biological females. Either way, it is important for the Court to resolve these issues and provide the guidance everyone so desperately needs.

II. The Equal Protection Clause Does Not Compel States To Define "Sex" as "Gender Identity."

Fortunately, the Constitution does not require that federal judges assume the mantle of sports commissioner and become intimately familiar with how pubertal development and specific levels of testosterone can affect strength or athletic ability for students playing different sports. While the underlying questions for state legislatures, school boards, and sports commissioners may be delicate and complicated, the legal questions are straightforward.

Here, even assuming that Arizona's decision to offer separate sports teams for boys and girls is a sex-based classification warranting heightened scrutiny review under the Equal Protection Clause, no one disputes that it survives such scrutiny. App. 35A n.8. As a result, the primary questions are (1) whether an underinclusiveness challenge to the contours of the sex-based classification warrants heightened review, (2) whether Arizona's law classifies based on "gender identity," and (3) if it does, whether such a classification warrants heightened review. The answers are "no," "no," and "no."

A. Plaintiffs' Sex-Discrimination Claim Is an Underinclusiveness Challenge Subject to Rational-Basis Review.

1. Arizona's Save Women's Sports Act seeks to "promote sex equality by providing opportunities for female athletes to demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain recognition, accolades, college scholarships and the numerous other long-term benefits that flow from success in athletic endeavors." App. 125A. To do that, the Act provides for "separate sex-specific" sports teams. *Id.*

The Arizona Legislature found that separate, sex-based teams are necessary because males "have higher natural levels of testosterone, which affects traits such as hemoglobin levels, body fact content, the storage and use of carbohydrates, and the development of Type 2 muscle fibers, all of which result in men being able to generate higher speed and power during physical activity." App. 123A. Even "[i]n studies of large cohorts of children from six years old," the Legislature found, "boys typically scored higher than girls on cardiovascular endurance, muscular strength, muscular endurance, and speed/agility." *Id.* (cleaned up). According to the Legislature, "[t]he benefits that natural testosterone provides to male athletes is not diminished through the use of testosterone suppression." App. 125A.

Because of these physical differences between males and females, the Legislature determined that sports teams offered by public schools should be designated for "[m]ales, men or boys," "[f]emales, women

or girls," or "[c]oed or mixed." App. 120A. Athletic teams designated as coed or for males are open to all, but the Act provides that "teams or sports designated for 'females,' 'women,' or 'girls' may not be open to students of the male sex." *Id.* And "sex" means "biological sex," which is "determined at fertilization and revealed at birth, or, increasingly, *in utero*." App. 122A (cleaned up).

When challenging Arizona's law, the plaintiffs did "not challenge the State's decision to require that schools maintain separate teams for girls and boys." App. 35A n.8. Just the opposite. The relief plaintiffs' sought was for Arizona to *continue* segregating sports teams by sex, but for the State's definition of "sex" to change from a historical, physical-based definition to a new "gender identity"-based definition that would allow some biological males to play on teams currently reserved for biological females.

This should give the Court pause. Asking a federal court to compel segregation along protected characteristics is unusual. Doing so under the Equal Protection Clause is bizarre. When the United States sued on behalf of high-school girls seeking admission to VMI, the government argued that the institution's "exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment," *Virginia*, 518 U.S. at 523, not that female applicants were in fact males who should be able to avail themselves of an otherwise salutary sex-segregated admissions process. And Oliver Brown was not trying to take advantage of separate-but-equal schooling on the theory that the Board of Education of Topeka should have classified him as white. *Brown v. Bd. of Educ.*, 347

U.S. 483 (1954). When black students were "denied admission to schools attended by white children under laws requiring or permitting segregation according to race," *id.* at 487-88, the problem was not that the Board had separated Topeka's races too finely; the problem was that the Board had separated races at all. In canonical Equal Protection cases, segregation provides the cause of action. But here, according to the plaintiffs, segregation provides the remedy.

That distinction reveals the truth about the nature of the claim at issue. If the plaintiffs wanted to challenge sex segregation, the relief would involve coed teams. They don't want that. Instead, they want to "try out for and play on the school sports' team consistent with their gender identity" rather than their biological sex. Dkt. 1 at 20. Despite being biologically male, plaintiff Jane Doe wants to "try out for the girls' soccer and basketball teams," while plaintiff Megan Roe wants to "try out for the girls' volleyball team." App. 69A, 71A. Their grievance is that by defining "'[f]emales,' 'women' or 'girls'" by "biological sex," App. 120A, the class benefiting from the State's classification (females, women, and girls) is underinclusive because it does not include "transgender girls"—biological males whose gender identity does not match their "assigned sex." App. 11A.

In other words, the plaintiffs' claim is a textbook underinclusiveness challenge.

2. The Equal Protection Clause of the Fourteenth Amendment prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Court has

explained that "giv[ing] a mandatory preference to members of either sex over members of the other" warrant heightened scrutiny. *Reed v. Reed*, 404 U.S. 71, 76 (1971). Likewise, when litigants seek to *eliminate* "official action that closes a door or denies opportunity to women (or to men)," heightened scrutiny applies. *Virginia*, 518 U.S. at 532-33.

Here, it's doubtful that heightened scrutiny applies to the State's initial decision to segregate sports teams based on the physical differences between males and females. The plaintiffs do not allege that one sex was given a "mandatory preference" over the other or that the law treats members of one sex worse than the other. This is important because "the necessity of heightened review[] will not be present every time that sex factors into a government decision," but only when the government "use[s] sex classifications to bestow unequal treatment on men and women." *L.W. by & through Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir.), cert. granted sub nom. *United States v. Skrmetti*, No. 23-477, 2024 WL 3089532 (U.S. June 24, 2024). So, for instance, this Court has recognized that heightened scrutiny does not apply when reviewing "[t]he regulation of a medical procedure that only one sex can undergo … unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022) (alteration in original) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)); *see also*, *e.g.*, *Women Prisoners of D.C. Dep't of Corrs v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996) (heightened review not triggered by government policy

housing male and female inmates separately but otherwise treating them the same).

But even if heightened scrutiny were triggered by the State's policy offering separate teams for males and females, "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). Thus, "[a] statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen v. Ward*, 279 U.S. 337, 339 (1929), because "reform may take one step at a time," *Williamson*, 348 U.S. at 489. "The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Id.*; *accord, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 656-57 (1966) (applying rational-basis review where Congress extended benefit to citizens educated in "American-flag schools" in Puerto Rico but did "not extend[] the relief … to those educated in non-American-flag schools"); *cf. Peightal v. Metro. Dade Cnty.*, 940 F.2d 1394, 1409 (11th Cir. 1991) ("The Equal Protection Clause does not require a state actor to grant preference to all ethnic groups solely because it grants preference to one or more groups.").

So even assuming the Arizona Legislature could have crafted a statute that permitted biological males who identify as girls to play on girls' sports teams while simultaneously ensuring "opportunities for female athletes to demonstrate their skill, strength and athletic abilities" on a level playing field, App. 125A, that would not make the choice the Legislature made constitutionally suspect. Because "[t]he state was not bound to deal alike with all these classes, or to strike

at all evils at the same time or in the same way," *Semler v. Ore. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935), it does not matter as a constitutional matter that biological males might *also* seek the benefit of playing on teams reserved for girls. Even if the State's decision to segregate sports teams by sex in the first instance warrants heightened scrutiny, the sex classification that informs how far Arizona's law "extend[s] … relief," *Katzenbach*, 384 U.S. at 656-57, does not.

An example might help. Underinclusiveness claims like the plaintiffs' have often been raised in the racial-affirmative-action context, and their dispositions underscore why challenges to classification—rather than to the discrimination itself—warrant only rational-basis review. When asked "to examine the parameters of the beneficiary class" but *not* "to pass on the constitutionality of [an affirmative-action] program or of the racial preference itself," courts engage in "a traditional 'rational basis' inquiry as applied to social welfare legislation." *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986). So where, as here, plaintiffs seek to avail themselves of a sex-segregated program by broadening the "parameters of the beneficiary class," *id.*, the government's decision not to calibrate the class to the plaintiffs' preferences does not warrant heightened scrutiny. *See id.* at 1160-61 (rejecting Equal Protection claim because government's "definition of 'Hawaiian' … ha[d] a rational basis").

The Second Circuit explicated this principle in J*ana-Rock Construction, Inc. v. New York Department of Economic Development*. 438 F.3d 195 (2d Cir. 2006). The case involved "New York's 'affirmative action' statute for minority-owned businesses," which

extended to "Hispanics" but did "not include in its definition of 'Hispanic' people of Spanish or Portuguese descent." *Id.* Plaintiff Rocco Luiere owned a construction company and was "the son of a Spanish mother whose parents were born in Spain," but he was not considered Hispanic for purposes of the New York program. *Id.* at 199. (This despite Luiere's sworn affidavit stating, "I am a Hispanic from Spain." *Id.* at 203.) Luiere did not "challenge the constitutional propriety of New York's race-based affirmative action program," but only the State's decision not to classify him as Hispanic for purposes of the program. *Id.* at 200, 205.

On its way to rejecting Luiere's claim, the Second Circuit confirmed that "[t]he purpose of [heightened scrutiny] is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* at 210. Because "[i]t [was] uncontested by the parties" that New York's affirmative-action program satisfied strict scrutiny—just as it is uncontested here that sex-segregated sports would satisfy heightened scrutiny—a heightened level of review retained "little utility in supervising the government's definition of its chosen categories." *Id.* The Second Circuit thus "evaluate[d] the plaintiff's underinclusiveness claim using rational basis review." *Id.* at 212.

Consider also the case of Ralph Taylor. In 2010, Taylor "received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African." *Orion Ins. Grp. v. Wash. State Off. of Minority & Women's Bus. Enters.*, No. 16-5582-RJB, 2017 WL 3387344, at

*2 (W.D. Wash. Aug. 7, 2017), *aff'd sub nom. Orion Ins. Grp. v. Wash.'s Off. of Minority & Women's Bus. Enters.*, 754 F. App'x 556 (9th Cir. 2018). He took these results to mean that "he had Black ancestry." *Id.* Taylor then classified himself as "Black" and applied for special benefits under state and federal affirmative-action programs—and then filed suit when his applications were denied, arguing that the state and federal governments' restrictive definition of "Black" violated his constitutional and statutory rights. *Id.* at *2-4. He advocated an expansive definition of "Black," asserting that he fit into the category because "Black Americans are defined to include persons with 'origins' in the Black racial groups in Africa," and his genetic testing revealed he had African ancestry. *Id.* at *11.

The court summarily dispatched with Taylor's claim. *Id.* Rather than apply heightened scrutiny and force the State to justify its definition of "Black," the court applied rational-basis review and rejected Taylor's claim accordingly. *Id.* at *13 ("Both the State and Federal Defendants offered rational explanations for the denial of the application.").

By challenging the lawfulness of a classification's definitional contours rather than the lawfulness of the classification itself, plaintiffs in cases like this one follow the same path as Rocco Luiere and Ralph Taylor. They endorse sex-segregated sports teams and challenge only States' decision to base their definition of female on biological sex rather than gender identity. But because the "purpose" of heightened scrutiny "is to ensure that the government's choice to use [protected] classifications is justified," not to police the

classifications' "contours," *Jana-Rock*, 438 F.3d at 210, the "contours" attendant to States' sex-segregated sports teams warrant only rational basis review. *Cf. Hoohuli*, 631 F. Supp. at 1159 n.23 ("The mere mention of the term 'race' does not automatically invoke the 'strict scrutiny' standard."); *accord Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1326 (11th Cir. 2021) (*Adams II*) (W. Pryor, C.J., dissenting) (noting that while "[s]eparating bathrooms by sex treats people differently on the basis of sex," by contrast "the mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex"), *rev'd en banc*, 57 F.4th 791.[2]

3. Viewing the plaintiffs' claim as an underinclusiveness challenge subject to rational-basis review makes short work of the legal claim while allowing elected officials room to wrestle with the tough policy questions of how best to ensure a level playing field for women and girls while respecting the dignity of individuals who identify as transgender. Even if Arizona's answer has its critics, it is perfectly rational. Restricting access to girls' sports teams to biological females makes sense because it is the physical

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[2] The Court of Appeals sought to distinguish the *Katzenbach* and *Jana-Rock* line of cases by giving short shrift to the presumption of legislative good faith and declaring, without citation or reasoning, that a different rule applies where a challenged provision is "adopted for the purpose of excluding transgender girls from playing on girls' sports teams." App. 43A. The court's error in trying to distinguish that which cannot be distinguished—and doing so based on a shortcut to finding intentional discrimination by a state legislature, *see infra* 20-21—simply compounds the need for this Court's review. *See* Pet. 30.

differences between males and females that demand separate teams to begin with. Other States are trying out different solutions, as are the governing bodies of different athletic associations. As the Court of Appeals itself recognized, "the research in this field is ongoing," and "[i]n the last few years alone, both the NCAA and International Olympic Committee have tightened their transgender eligibility policies." App. 49A. Arizona can wait to see how those experiments turn out and then decide whether it wants to change course. But the Constitution does not mandate one approach over the other, and federal courts are in no better position than the Arizona Legislature or local school boards to figure out the appropriate balance. The Court should grant the petition, make clear that rational-basis review applies, and reverse.

B. The Court Below Erred By Subjecting Arizona's Law To Heightened Review Based On Gender Identity.

The Ninth Circuit also erred by applying heightened scrutiny based on the Act's purported discrimination "based on transgender status." App. 35A (citing *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019)).

First, the law's classification based on biological sex is not a classification based on gender identity. To the contrary, "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." *Adams*, 57 F.4th at 809. That is the case here because transgender status plays no role in determining whether an individual may compete on a girls' sports team. That depends

solely on biological sex. Males may not try out for a girls' sports team (*regardless* of whether they identify as transgender) and females may try out for a girls' sports team (again, *regardless* of whether they identify as transgender).

Second, contrary to the lower court's decision (and earlier Ninth Circuit precedent), transgender persons do not constitute a quasi-suspect class. This Court has "rarely deemed a group a quasi-suspect class," *Adams*, 57 F.4th at 803 n.5, and has not done so "in over four decades," *L. W. by & through Williams*, 83 F.4th at 486. And in stark contrast to recognized suspect classifications, transgender individuals do not share an immutable characteristic, do not constitute a discreet group, and unlike groups suffering long discrimination are far from politically powerless. *Id.* at 487.

Third, even if transgender persons were a suspect class, a sex-based law that has a disparate impact on them would still not trigger heightened scrutiny. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979) (recognizing that "a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact"). "[P]urposeful discrimination"—not disparate impact alone—"is the condition that offends the Constitution." *Id.* at 274 (cleaned up). "Purposeful discrimination" means "more than" "intent as awareness of consequences" and "implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

The lower court provided two reasons for finding that the Arizona legislature acted with the express purpose to discriminate against individuals identifying as transgender. First, it concluded that the Act could not have been passed to "ensure competitive fairness" because "the Act bars students from female athletics based entirely on *transgender status*." App. 36A. But that is the exact opposite of what the Act does. Under the Act, biology—*not* transgender status—is what matters. That is why the plaintiffs brought suit, after all. Restricting girls' sports to biological females may *effect* boys who identify as girls, but the classification is not "based" on gender identity.

That "effect" is the second reason the Court of Appeals gave: "The Act's burdens … fall *exclusively* on transgender women and girls." App. 37A. But even if that were true, it is hardly evidence of purposeful discrimination because the Legislature provided a nondiscriminatory reason for the path it chose: because "[h]aving separate sex-specific teams furthers efforts to promote sex equality by providing opportunities for female athletes to demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain recognition, accolades, college scholarships and the numerous other long-term benefits that flow from success in athletic endeavors." App. 126A. And the Legislature was explicit in why it drew the line at biological sex rather than gender identity: because "the inherent, physiological differences between males and females result in different athletic capabilities." App. 124A.

Under any fair reading of the Act, then, the Legislature acted to promote women's and girls' sports by

excluding biological males from girls'-only sports teams. That is a rational reason, and one courts have long upheld. *E.g.*, *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131-32 (9th Cir. 1982).

In nevertheless presuming discrimination, the Court of Appeals paid but lip service to the presumption of legislative good faith. App. 36A. "[W]hen a court assesses whether a duly enacted statute is tainted by discriminatory intent, 'the good faith of the state legislature must be presumed.'" *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (per curiam) (quoting *Abbott v. Perez*, 585 U.S. 579, 603 (2018)). The presumption applies at every "stage[] of litigation," *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995), and "directs district courts to draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions," *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1235-36 (2024).

Thus, even if the Ninth Circuit's reading of the statutory language was plausible, it was not the only reading—and the other (even more plausible) reading is one that does *not* unfairly impute animus as the legislative intent. "In light of the presumption of legislative good faith, that possibility is dispositive." *Id.* at 1241.

* * *

The Ninth Circuit erred when it held that Arizona's Save Women's Sports Act likely violates the Equal Protection Clause of the Fourteenth

Amendment. The Constitution does not require States to redefine "sex" to mean or include "gender identity." The difference between men and women in athletics "is a real one, and the principle of equal protection does not forbid" States from "address[ing] the problem at hand in a manner specific to each gender." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). Indeed, "[t]o fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it." *Id.* And "[t]he distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class." *Id.* Instead, it seeks to accomplish just what the Act's title suggests: to save women's sports from unfair competition and provide meaningful athletic opportunities for girls and women. The Court should reverse the judgment below and make clear that the Constitution does not prohibit States from doing just that.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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