No. 24-38

In the Supreme Court of the United States

BRADLEY LITTLE, *et al.*,

Petitioners,

v.

LINDSAY HECOX, *et al.*,

Respondents.

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

BRIEF OF ALABAMA, ARKANSAS, 25 OTHER STATES, AND THE U.S. TERRITORY OF GUAM 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, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming and the U.S. Territory of Guam respectfully submit this brief as *amici curiae* in support of Petitioners. *Amici* 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* either already have laws or policies like Idaho's that restrict girls' sports teams to biological females or have engaged in the democratic process to consider similar protections.[1] Basing the

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[1] *See* Ala. Code §16-1-52; Alaska Admin. Code tit. 4, §06.115; Ariz. Rev. Stat. Ann. §15-120.02; Ark. Code Ann. §6-1-107; Fla. Stat. §1006.205; 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.

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. Those average physical differences matter and provide a compelling reason to segregate sports teams.

Yet *amici* 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). And some courts, like the one below, have applied the "extraordinarily fact-bound test" of "[h]eightened scrutiny analysis" to resolve these claims. Pet. App. 61a; *see B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 557 (4th Cir. 2024).

Heightened scrutiny means a battle of experts. *See B.P.J.*, 98 F.4th 561-62. So now schools with girls-only sports teams must hire an army of biologists and endocrinologists to opine on what should be a straightforward question—what does "sex" mean? *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 836 (11th Cir. 2022) (en banc) (J. Pryor, J., dissenting) (discussing purported need for expert

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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; W. Va. Code. Ann. §18-2-25d; Wyo. Stat. §21-25-102.

testimony about the meaning of "sex" in case about school's sex-based bathroom policy).

Other questions also abound. Can a school restrict all biological males from participating on the girls' basketball team, or only those who have gone through puberty? *Cf. B.P.J.*, 98 F.4th at 560-61 (reversing grant of summary judgment due to competing expert testimony on whether biological males "enjoy a meaningful competitive athletic advantage" over biological females "[e]ven without undergoing Tanner 2 stage puberty"). If pubertal development is factored in, what stages of puberty matter? What if a biologically male student has gone through Tanner Stage 3 of puberty but has taken a testosterone suppressant for 6 months—does the Equal Protection Clause mandate that the student be allowed to play on the girls' basketball team? Tanner Stage 4? Would it matter how much the testosterone suppressant hampered the student's jump shot? *Cf.* Pet. App. 42a (noting that "medically prescribed hormone therapy" has "impact[ed]" Hecox's "athletic prowess" and "slowed her racing times by at least 'five to ten percent'"). What if the biological male has gone through puberty and has normal levels of testosterone but is just short and unathletic?

Such scrutiny is not "heightened." It is impossible. Under such review, schools 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 determined by a federal judge turned youth-sports czar), it will face judgment for damages and attorney's fees. *See* 42 U.S.C. §1988(b).

The Constitution does not impose such a Sisyphean task. Under the Equal Protection Clause, schools are free to offer separate sports teams for biological girls because that is how schools can provide them with an equal opportunity to compete. *Amici* have a compelling interest in ensuring that girls in their States retain that opportunity.

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. 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 rather than biological sex to demarcate the teams.

The court of appeals reached the wrong result for two main reasons.

I. First, the lower court viewed the plaintiffs' claims as a traditional equal protection challenge to a sex-based classification. That was wrong. The plaintiffs did not bring a traditional equal protection challenge. They brought an underinclusiveness challenge, which is subject only to rational-basis review.

Consider the canonical equal protection cases. In *United States v. Virginia*, the 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. They wanted VMI's segregation dismantled—for the university to admit men *and* women. Likewise, in *Brown v. Board of Education*, Oliver Brown did not ask this Court to bless separate-but-equal schooling so long as the Topeka Board of Education classified him as white. He wanted the segregated

system de-segregated—for the schools to admit children of *any* race.

Not so for the plaintiffs here. Far from demanding that all boys and girls try out for the same basketball team or line up together for the 100-meter dash, the plaintiffs sought to take advantage of sex-segregated sports by competing on a team that aligns with their gender identity rather than their biological sex. In other words, they generally supported Idaho providing the sex-based benefit of girls' sports; they just wanted Idaho to expand the benefit to include some males with a female gender identity.

That makes their claim an underinclusiveness challenge no different than those brought by business owners who have sought access to race-based affirmative action. And as lower courts have recognized, a challenge to affirmative action triggers heightened scrutiny but arguing that there should be more of it does not. Likewise, 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. Idaho's law easily meets that standard.

II. Second, the Ninth Circuit also erred by applying heightened scrutiny based on its determination that transgender status is a quasi-protected class under the Equal Protection Clause.

A. For one, Idaho's law does not segregate based on transgender status or gender identity; it segregates based on sex. That's the entire reason the plaintiffs sued—because Idaho *refused* to use gender identity to

determine eligibility for sports teams. So it makes no difference whether transgender status is a quasi-protected class because Idaho's law treats people the same no matter what their gender identity is—all biological females, transgender or not, can compete to play on sports teams reserved for biological females, and no biological males, transgender or not, may do so.

B. For another, transgender status is not a quasi-protected class under the Fourteenth Amendment. Among other reasons, that is because transgender status is not immutable and there are no consistent characteristics that define individuals who identify as transgender as a discrete group. The World Professional Association for Transgender Health (WPATH) assures that there are a "huge variety" of gender identities falling under the "transgender" umbrella, "includ[ing] people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of other genders (e.g., polygender, demiboy, demigirl), and/or who have a gender that changes over time (e.g., genderfluid)."[2] If true—if "genderfluid" individuals can be part of the "transgender" umbrella one moment but not the next depending on whether they identify with their biological sex—then it makes little to sense to think that the

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[2] E. Coleman et al., *Standards of Care for the Health of Transgender & Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S15, S80 (2022), https://perma.cc/Y9G6-TP3M ("SOC-8").

Equal Protection Clause affords special protections to such an amorphous group.

C. Last, even if transgender status were a quasi-protected class, Idaho's law *still* would not be subject to heightened review because any disparate impact the law has on individuals who identify as transgender is merely incidental. The Ninth Circuit found intentional discrimination nonetheless by concluding that the Idaho Legislature must have enacted its law because of animus, but that ignores the presumption of legislative good faith. More likely is the reason the Legislature gave: "to promote sex equality … by providing opportunities for female athletes." Idaho Code §33-6202(12).

The Court should reverse.

ARGUMENT

Whatever the complexities of the underlying policy questions in this case, the good news for this Court is that it need not answer them. The Constitution charges state legislatures and school boards with that unenviable task. So while policymakers may wish to dive into the intricacies of how pubertal development and testosterone can affect strength and athletic ability, the question for this Court is simply whether the Equal Protection Clause forbids Idaho's decision to reserve certain sports teams for biological females. It does not.

The answers to three subsidiary questions show why. Even assuming Idaho's decision to offer girls-only sports teams is a sex-based classification warranting heightened scrutiny, no one disputes that it survives such scrutiny. No one argues that all males

and females must compete against each other. As a result, the remaining questions are (1) whether an underinclusiveness challenge to the contours of the sex-based classification warrants heightened review, (2) whether Idaho'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."

I. Plaintiffs' Underinclusiveness Challenge Is Subject To Rational-Basis Review.

1. Idaho's Fairness in Women's Sports Act seeks to "further[] efforts to promote sex equality" by ensuring "separate sex-specific" sports teams. Idaho Code §33-6202(12). The Idaho Legislature found that separate teams are necessary because "[m]en generally have denser, stronger bones, tendons, and ligaments," "larger hearts, greater lung volume per body mass, a higher red blood cell count," and "higher natural levels of testosterone." *Id.* §33-6202(3), (4) (cleaned up). The higher levels of testosterone, in turn, "affect[] traits such as hemoglobin levels, body fat contents," "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." *Id.* §33-6202(4) (cleaned up).

Because of these physical differences between males and females, the Legislature determined that sports teams offered by public schools should be designated for either "[m]ales, men, or boys," "[f]emales, women, or girls," or "[c]oed or mixed." *Id.* §33-6203(1)(a)-(c). 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 shall not be open to students of the male sex." *Id.* §33-6203(2). "Sex" here means "biological sex," which is determined purely by physical characteristics—"the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.* §33-6203(3).

When challenging Idaho's law, the plaintiffs below did not argue that the State's decision to segregate sports teams on the basis of sex violates the Equal Protection Clause. *See* Pet. App. 45a. Just the opposite. The relief they sought was for Idaho 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.

That request should give the Court pause. Asking a federal court to compel segregation based on self-professed identity is unusual. Doing so under the Equal Protection Clause is especially bizarre. Under that provision, plaintiffs normally try to end the segregation, not continue it along new lines. 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 some 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 *how* the Board had separated students into different schools based on racial categories; the problem was that the Board had separated the students because of their race—*period*. In canonical equal protection cases, segregation provides the cause of action. But here, according to the plaintiffs below, 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, the lead plaintiff, Lindsay Hecox, a biological male who identifies as a woman, sought to "try out for the women's cross-country team." Dkt. 1 ¶33. The plaintiffs' grievance is that by defining "[f]emales, women, or girls" by "biological sex," Idaho Code §33-6203(1), (3), the class benefiting from Idaho's classification ("females, women, or girls") is underinclusive because it does not include "transgender girls"—biological males whose gender identity "does not align with the sex they are assigned at birth." Dkt. 1 ¶100.

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" warrants 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.

a. Here, it's doubtful that heightened scrutiny applies to Idaho's initial decision to segregate sports teams based on the physical differences between males and females. The plaintiffs did 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 Court "has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny." *United States v. Skrmetti*, 145 S. Ct. 1816, 1829 (2025). Thus, "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. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023).

For instance, this Court has recognized that "a State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination." *Skrmetti*, 145 S. Ct. at 1833 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)). And subjecting "medical treatments and procedures" that "are uniquely bound up in sex" to heightened scrutiny would be "especially

inappropriate," the Court noted, since such distinctions simply reflect "biological differences between men and women" rather than invidious sex-based discrimination. *Id.* at 1829 (quotation omitted); *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).

b. But even if heightened scrutiny were triggered by the State's policy offering separate teams for males and females, plaintiffs do not challenge the decision to provide females the benefit of girls' sports. Instead, they seek to preserve and extend that benefit to some males as well. But "[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 Idaho 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, Idaho Code §33-6202(13), 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 address all interests "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. Again: 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 Idaho'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 the 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 *Jana-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 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.

Or consider 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). This was big news for a man who "grew up thinking of himself as Caucasian." *Id.* Once Taylor "realized he had Black ancestry, he 'embraced his Black culture.'" *Id.* He "joined the NAACP," "subscribed to Ebony magazine," and began to "take[] great interest in Black social causes." *Id.* at *3. And believing his new identity might bestow economic rewards, Taylor classified himself as "Black" and applied for special benefits under state and federal affirmative-action programs. *Id.* at *2-3.

The programs' managers rejected Taylor's proposed racial classification and denied his application. So Taylor brought suit alleging, among other things, that the state and federal governments' restrictive definition of "Black" violated his constitutional and statutory rights. *Id.* at *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, explaining that "construing the narrower definition as broadly as [Taylor] advocates would strip the provision of all exclusionary meaning." *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.

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 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. Idaho's answer is perfectly rational. Restricting access to girls' sports teams to biological females makes sense because the physical differences between males and females are what justify separate teams in the first instance. Other States are trying out different solutions, as are the governing bodies of different athletic associations. *See* Pet. App. 48a n.14 (discussing "IOC and NCAA policies [that] evaluate eligibility for transgender participation in athletics on a sport-by-sport basis"). But Idaho can wait to see how those experiments turn out. It is not required to experiment now at the expense of girls who are subjected to unfair competition and deprived of equal opportunities. And federal courts are in no better position than the Idaho Legislature or local school boards to arrive at an appropriate balance. As in *Skrmetti*, this Court should apply rational-basis review and "leave questions regarding" the policies themselves "to the people, their elected representatives, and the democratic process." 145 S. Ct. at 1837.

II. The Ninth Circuit Erred By Subjecting Idaho's Law To Heightened Review Based On Gender Identity.

Rather than apply rational-basis review, the Ninth Circuit applied heightened scrutiny based on the Act's purported discrimination "on the basis of transgender status," which the court viewed as "at least a 'quasi-suspect class.'" Pet. App. 36a. (quoting *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019)). But Idaho's law does not so discriminate, and even if it did, heightened scrutiny would still not apply because (1) transgender status is not a quasi-suspect class, and (2) even if it were, the plaintiffs failed to show intentional discrimination.

A. Idaho's Law Classifies Based On Sex, Not Gender Identity.

At the outset, the Ninth Circuit's theory that "[t]he Act discriminates based on transgender status," Pet. App. 25a, makes little sense because the Act turns entirely on biological sex—*not* gender identity. Indeed, that is precisely why the plaintiffs sued—to force Idaho to use gender identity *rather than sex* to segregate its sports teams. As this case demonstrates, the State cannot use both definitions; one must control. Idaho chose biological sex.

The upshot is that an athlete's gender identity plays *no role whatsoever* in determining which sports team he or she is allowed to play on. The logic of *Bostock v. Clayton County*, 590 U.S. 644 (2020), confirms

this.[3] There, the question was whether an employer who discriminates "against employees for being homosexual or transgender" necessarily discriminates "because of" or "based on" sex. *Id.* at 661-62. Here, the question is the inverse—whether sex-segregated sports leagues necessarily classify "because of" or "based on" gender identity.

To answer that question under *Bostock*'s logic, we must "change one thing at a time and see if the outcomes changes." *Id.* In *Bostock*, the Court changed the employee's sex to determine whether sex was a but-for cause of the employer's action. *Id.* at 660. So here, we change the player's gender identity to determine whether gender identity serves as a basis for Idaho's law.

The result is not surprising. Changing an athlete's gender identity[4] changes nothing about the law's application. Whether one identifies as male, female,

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[3] This Court has "not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context," and it "need not do so here." *Skrmetti*, 145 U.S. at 1834. And the Court *should not* apply *Bostock* to the Equal Protection Clause because of their different wording and histories and this Court's "entirely different methodology" for interpreting the provisions. *Id.* at 1859 (Alito, J., concurring in part). But to the extent *Bostock*'s logic helps to identify what an action is "based on," it confirms that Idaho's law is based on sex—not gender identity.

[4] WPATH defines "gender identity" as a "person's deeply felt, internal, intrinsic sense of their own gender." SOC-8, *supra* note 2, at S252.

transgender,[5] non-binary,[6] or one of the other countless gender identities,[7] it does not matter. Biological sex, not gender identity, determines what sports teams an athlete may play on:

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[5] The Court in *Skrmetti* defined "transgender" as meaning that a person's "gender identity does not align with [his or her] biological sex." 145 S. Ct. at 1824.

[6] According to WPATH, "[t]he term nonbinary includes people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of other genders (e.g., polygender, demiboy, demigirl), and/or who have a gender that changes over time (e.g., genderfluid)." SOC-8, *supra* note 2, at S80; *see also infra* pp. 24-26. WPATH also says that "[n]onbinary" can "function[] as a gender identity in its own right." *Id.*

[7] According to WPATH, there are "a huge variety of gender identities," SOC-8, *supra* note 2, at S15, including transsexual, trans, gender queer, gender diverse, nonbinary, two-spirit, gender fluid, agender, and eunuch, *see id.* at S18-19, S88, S137.

Sex	Gender Identity	Identify as transgender?	Able to compete on girls' sports team?
Male	Male	No (typically)	No
Male	Female	Yes (typically)	No
Male	Non-binary	Maybe	No
Male	Other	Maybe	No
Female	Male	Yes (typically)	Yes
Female	Female	No (typically)	Yes
Female	Non-binary	Maybe	Yes
Female	Other	Maybe	Yes

This result makes sense. As the bathroom cases show, "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. Such is the case here. Because transgender status plays no role in determining whether an individual may compete on a girls' sports team, the Ninth Circuit erred by holding that Idaho's law discriminates based on transgender status.

B. Even If Idaho's Law Classified Based On Gender Identity, It Would Not Trigger Heightened Review.

Even if Idaho's law somehow turned on gender identity rather than sex, it would not matter because

transgender persons do not constitute a suspect or quasi-suspect class.

The general rule is that "laws are presumed to be constitutionally valid, and a legislative classification will be upheld 'so long as it bears a rational relation to some end.'" *Skrmetti*, 145 S. Ct. at 1850 (Barrett, J., concurring) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)). "There are only a few exceptions to this rule: classifications based on race, sex, and alienage." *Id.*

Though it is theoretically possible for more classifications to join the group, this Court "has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so." *Id.* (quoting *Ondo v. Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015)). In fact, even though it has set forth a test for determining whether a group constitutes a "suspect class"—considering "whether members of the group in question 'exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group,' whether the group has, '[a]s a historical matter, ... been subjected to discrimination,' and whether the group is 'a minority or politically powerless'"—it appears that the Court has "*never* embraced a new suspect class under this test." *Id.* at 1851 (alterations in original) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

All this Justice Barrett pointed out in her *Skrmetti* concurrence, and her opinion and Justice Alito's aptly explain why transgender status is not a suspect or quasi-suspect class under the Fourteenth Amendment. *See id.* at 1849-55 (Barrett, J., concurring); *id.*

at 1860-67 (Alito, J., concurring in part). *Amici* will not repeat the discussion.

Instead, one point bears emphasizing. Unlike classes this Court has recognized as "suspect," individuals who identify as transgender do not "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quotation omitted). Transgender status is not obvious, it is not immutable, and there are no consistent characteristics that define transgender individuals as a discrete group.

As discussed briefly above (*see supra* notes 4-7), the World Professional Association for Transgender Health recognizes that there are "a huge variety of gender identities." SOC-8, *supra* note 2, at S15. "In English speaking countries," WPATH notes, "[transgender and gender diverse] people variously identify as *transsexual*, *trans*, *gender nonconforming*, *gender queer or diverse*, *nonbinary*, or indeed *transgender and/or gender diverse*, as well as by other identities; including (for many identifying inside the gender binary) *male* or *female*." *Id.* at S18-19. There are also "eunuchs," for whom WPATH uses an "identity-based definition" to mean "individuals" who are "assigned male at birth and wish to eliminate masculine physical features, masculine genitals, or genital functioning." *Id.* at S88.

WPATH likewise states that "[e]lsewhere, identities include but are not limited to *travesti* (across much of Latin America), *hijra* (across much of South Asia), *khwaja sira* (in Pakistan), *achout* (in Myanmar), *maknyah, paknyah* (in Malaysia), *waria*

(Indonesia) *kathoey, phuying kham phet, sao praphet song* (Thailand), *bakla, transpinay, transpinoy* (Philippines), *fa'afafine* (Samoa), *mahu* (French Polynesia, Hawai'i), *leiti* (Tonga), *fakafifine* (Niue), *pinapinaaine* (Tuvalu and Kiribati), *vakasalewalewa* (Fiji), *palopa* (Papua Niugini), *brotherboys and sistergirls* (Aboriginal and Torres Strait Islander people in Australia), and *akava'ine* (Cook Islands)." *Id.* at S19 (citations omitted). WPATH claims "[t]here are also a large number of *two spirit* identities across North America (e.g., *nadleehi* in Navajo (Diné) culture)." *Id.* at S19 (citations omitted). Notably, according to WPATH, these words and phrases describe complex, culturally contingent identities that vary from one culture to another; they are not simply untranslated phrases that all mean the same thing. *See id.*

The term "nonbinary" itself has also been understood to encompass a number of gender identities, "includ[ing] people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of other genders (e.g., polygender, demiboy, demigirl), and/or who have a gender that changes over time (e.g., genderfluid)." *Id.* at S80. WPATH claims that "[n]onbinary people may identify to varying degrees with binary-associated genders, e.g., nonbinary man/ woman, or with multiple gender terms, e.g., nonbinary and genderfluid." *Id.*

This great diversity makes it difficult to use "transgender" status or "gender identity" or any of the many manifestations described by WPATH to

characterize a group that is, in fact, "amorphous." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). (Indeed, it is worth noting that the plaintiffs have not explained what sports team someone who identifies as agender, polygender, or gender fluid should be allowed to play on—or whether Idaho would need to create new teams for each of the various gender identities.[8]) And if individuals can be part of the group one day but not another—as when "genderfluid" individuals identify with their natal sex on Saturday but not Sunday, or when those who once identified as transgender no longer do because of a "change in identity," SOC-8, *supra* note 2, at S41—then that group obviously cannot be defined by an immutable characteristic.

The Constitution provides protection to all Americans, no matter their gender identity. But it does not carve out gender identity or transgender status for special protection. The Ninth Circuit's holding otherwise should be reversed.

C. Disparate Impact Does Not Trigger Heightened Review In Any Event.

Last, 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

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[8] This is not an idle question if recent studies regarding the increasing numbers of youth who identify as nonbinary are true. *See* SOC-8, *supra* note 2, at S80 ("Recent studies suggest nonbinary people comprise roughly 25% to over 50% of the larger transgender population, with samples of youth reporting highest percentage of nonbinary people.")

(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 Ninth Circuit inexplicably concluded that Idaho's law was passed with just such a discriminatory purpose. Pet. App. 26a. To do so, it looked at the effect the Act would have on students identifying as transgender—who, like everyone else, would be classified by their biological sex rather than their gender identity when it came to participating in sports—and recounted the "legislative debate" that "centered around two transgender women [*i.e.*, biological male] athletes running track in Connecticut high schools, as well as one running college track in Montana, and the potential 'threat' those athletes presented to female athletes in Idaho." *Id.* at 26a-27a. Based on these sketches, the court determined that the Legislature passed the Act "because of" its animus against transgender individuals. *Id.*

Among other problems with the court's conclusion, perhaps most egregious is that it completely ignores the presumption of legislative good faith. The Idaho Legislature was explicit in why it passed the Fairness in Women's Sports Act: 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 and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." Idaho Code §33-6202(12). The Legislature was also 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." *Id.* §33-6202(8).

Under any fair reading of the Act, 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). Yet the court of appeals looked at these same legislative findings and found animus as "its animating purpose." Pet. App. 26a.

That was error. "[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. For this reason too, the Court should reverse.

* * *

The Ninth Circuit erred when it held that Idaho's Fairness in 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: promote fairness in women's sports. The Court should reverse the judgment below.

CONCLUSION

For the foregoing reasons, the Court should reverse.

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SEPTEMBER 19, 2025

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