NO. _____

IN THE

Supreme Court of the United States

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; MADISON KENYON; MARY MARSHALL, et al.,

Petitioners,

v.

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Women and girls have overcome decades of discrimination to achieve a more equal playing field in many arenas of American life—including sports. Yet in some competitions, female athletes have become bystanders in their own sports as male athletes who identify as female have taken the place of their female competitors—on the field and on the winners' podium.

The Idaho Legislature addressed that injustice by enacting the Fairness in Women's Sports Act, which ensures that women and girls do not have to compete against men and boys no matter how those men and boys identify. The Act—one of 25 such state laws around the country—is consistent with longstanding government policies preserving women's and girls' sports due to the "average real differences" between the sexes. *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

Breaking with this Court's precedents, its own caselaw, other circuit decisions, and biological reality, the Ninth Circuit panel here upheld an injunction against the Act because it prevents "transgender women and girls"—meaning males who identify as women and girls—from competing in "women's student athletics." App.4a–5a.

The question presented is:

Whether laws that seek to protect women's and girls' sports by limiting participation to women and girls based on sex violate the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

State Petitioners Bradley Little; Debbie Critchfield (formerly Sherri Ybarra); Individual Members of the State Board of Education; Boise State University; Marlene Tromp; Independent School District of Boise City, #1; Lisa Roberts (formerly Coby Dennis); Individual Members of the Board of Trustees of the Independent School District of Boise City, #1; and Individual Members of the Idaho Code Commission were Defendants in the district court and Appellants in the Ninth Circuit. Intervenor Petitioners Madison Kenyon and Mary Marshall were Intervenors in the district court and Appellants in the Ninth Circuit. Petitioners are all individuals or public entities that have no stock, and no parent or publicly held companies have any ownership interests in them.

Respondents Lindsay Hecox and Jane Doe, with her next friends Jean Doe and John Doe, are natural persons who were Plaintiffs in the district court and Appellees in the Ninth Circuit.

LIST OF ALL PROCEEDINGS

1. United States Court of Appeals for the Ninth Circuit, Nos. 20-35813 and 20-35815, *Hecox* v. *Little*, amended opinion issued June 14, 2024.
2. United States Court of Appeals for the Ninth Circuit, Nos. 20-35813 and 20-35815, *Hecox* v. *Little*, order denying prior petition for rehearing en banc dated June 10, 2024.
3. United States Court of Appeals for the Ninth Circuit, Nos. 20-35813 and 20-35815, *Hecox* v. *Little*, order withdrawing August 17, 2023 opinion dated April 29, 2024.
4. United States Court of Appeals for the Ninth Circuit, Nos. 20-35813 and 20-35815, *Hecox* v. *Little*, opinion issued August 17, 2023.
5. United States District Court for the District of Idaho, No. 1:20-cv-00184, *Hecox* v. *Little*, memorandum decision and order granting preliminary injunction, granting intervention, and denying motion to dismiss issued August 17, 2020.

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STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on June 14, 2024, nearly four years after the district court enjoined Idaho's Fairness in Women's Sports Act. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISION AND STATUTES

The Equal Protection Clause states, in relevant part: "No State shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws."

Relevant provisions of Title IX, Title IX regulations, and the Idaho Fairness in Women's Sports Act are reprinted in the Appendix at 268a, 273a, and 263a–67a, respectively.

INTRODUCTION

Women and girls have fought for decades to achieve an equal playing field. Nowhere has that been more evident than in sports. Through persistent advocacy, women have come to occupy an area once dominated by men. And they've done so by carving out their own space, allowing them to showcase their unique skills and abilities.

These spaces are now vanishing. The last decade has exhibited a growing trend of males identifying as females competing against—and beating—females in women's sports across the country. Countless female student-athletes—including Olympic swimmers at the NCAA championships, high-school sprinters in Connecticut, and Ivy League swimmers—have been shoved aside by male athletes benefiting from obvious physiological advantages.

In response to this growing trend, the Idaho Legislature enacted the Fairness in Women's Sports Act. The Fairness Act ensures that women and girls are not forced to compete against men and boys who benefit from the "enduring" "physical differences between men and women." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (cleaned up). And it does so by drawing an across-the-board distinction based on sex, as this Court's intermediate-scrutiny standard has long allowed.

In the decision below, the Ninth Circuit upheld an injunction against the Fairness Act, holding that the Equal Protection Clause prohibits Idaho from drawing that sex-based distinction. In so doing, the Ninth Circuit denied Idaho's sovereign interests in protecting spaces reserved exclusively for tens of

millions of female athletes. And its decision places the Ninth Circuit firmly on the wrong side of two entrenched circuit splits: whether sex is objectively defined in Equal Protection jurisprudence, and whether transgender identity is a quasi-suspect class.

This Court's review is urgently needed to resolve these splits and preserve the equal playing field women have fought to secure. And it is even more important because *United States* v. *Skrmetti*, No. 23-477, will not resolve the issues presented here—how to define sex, how much deference the states receive when they protect women's sports, how weighty their interest is in preserving female athletics, and whether assigning athletic teams based on sex is a legitimate way to advance that interest.

To ensure that both the Equal Protection and Title IX objections to laws protecting women's sports are addressed in a single opinion, the Court should also grant the concurrently filed petition in *State of West Virginia* v. *B.P.J.*, No. 23-___, and hear arguments in the two cases the same day. Granting certiorari only in one of these two cases would prevent the Court from resolving important questions that warrant this Court's review.

Every day the Ninth Circuit's decision stands, female athletes suffer injustice. The petition should be granted without delay.

STATEMENT OF THE CASE

Madison Kenyon and Mary Marshall ran on the women's track and cross-country teams at Idaho State University. Both worked hard to achieve the best times and win. Yet in 2019, they both lost—by a significant margin—to June Eastwood, a male athlete who identified as female. App.21a. That surprised no one; Eastwood competed on the men's team the year before and recorded times that would have broken national women's records. Kenyon felt "frustrated and defeated"; Marshall felt her hard work did "not matter." Exs. A & B to Mem. in Supp. of Mot. to Intervene, *Hecox* v. *Little*, No. 1:20-cv-0018 (D. Idaho).

Madison and Mary are the tip of the iceberg. From 2017 through 2019, two Connecticut male high-school athletes who identify as female broke 17 track records, took 13 girls' state-championship titles, and deprived girls of more than 68 opportunities to advance to higher-level competitions—opportunities that otherwise would have gone to females. Appl. to Vacate Inj. at 5, *West Virginia* v. *B.P.J.*, No. 22A800 (Mar. 9, 2023). Accord App.117a. A couple of years ago, a male swimmer who identifies as a woman, Lia Thomas, won the NCAA Division I Championships in the women's 500-yard freestyle—beating two female, former Olympians. Greg Johnson, *Thomas Concludes Spectacular Season with National Title*, Penn Today (Mar. 20, 2022), perma.cc/EC6R-72SZ. Meanwhile, a male swimmer at Ramapo College has been setting school records after switching to the women's team. Amanda Wallace, *Transgender Swimmer at Ramapo College Faces More Criticism After Breaking School Record*, NorthJersey.com (Feb. 20, 2024), perma.cc/758A-B4TU. The list goes on.

Injustice like this motivated Idaho to enact the Fairness in Women's Sports Act. Under the Act, student sports are designated "based on biological sex." Idaho Code § 33-6203(1). And sports "designated for females, women, or girls shall not be open to students of the male sex." *Id.* § 33-6203(2). This distinction applies to all males; the Act says nothing about gender identity. If a dispute arises, schools are to request "a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex." *Id.* § 33-6203(3). And such statements can be based on a routine sports physical. *Ibid.*

In adopting the Act, Idaho found extensive legislative facts based on the "inherent differences between men and women," "rang[ing] from chromosomal and hormonal differences to physiological differences." *Id.* § 33-6202(1)–(2) (quoting *Virginia*, 518 U.S. at 533). As the Legislature found, men "have higher natural levels of testosterone, which affects traits such as hemoglobin levels, body fat 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." *Id.* § 33-6202(4) (quoting Doriane Coleman, *Sex in Sport*, 80 L. and Contemporary Problems 63, 74 (2017)). "[I]n every sport except sailing, shooting, and riding, there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science." *Id.* § 33-6202(10) (quoting Doriane Coleman, Martina Navratilova, et al., *Pass the Equality Act, But Don't Abandon Title IX*, Washington Post (Apr. 29, 2019)).

Soon after the Act's passage, though, Respondents Lindsey Hecox and Jane Doe sued, claiming the Fairness Act violates the Fourteenth Amendment's Equal Protection Clause and Title IX. Hecox is a male who identifies as female and wished to compete on the Boise State University women's track and cross-country teams. App.20a. Doe was a female high-school athlete who challenged the Act's sex-verification provision.[1] *Ibid.* The Idaho Attorney General's Office defended the Fairness Act on behalf of the State Petitioners; Madison Kenyon and Mary Marshall intervened to defend the law. App.21a.

The district court preliminarily enjoined the Fairness Act so Hecox could try out for BSU's women's cross-country and track teams. The court said the Fairness Act "on its face discriminates between cis-gender athletes, who may compete on athletic teams consistent with their gender identity, and trans-gender women athletes, who may not compete on athletic teams consistent with their gender identity." App.232a–33a. For the court, "the physiological differences" between males and females "do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status." App.233a. And the court thought that the Act failed heightened scrutiny because no male athletes had yet won women's events *in Idaho* and sports equality "is not jeopardized" by letting men who suppress their testosterone compete against women. App.239a–41a.

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[1] Doe's claim is now moot, App.121a n.17, but the Ninth Circuit held that Hecox's challenge to the Fairness Act as a whole encompasses the challenge to the Act's sex-verification provision, App.52a n.16.

The Ninth Circuit affirmed the injunction. App.61a. Agreeing with the district court but parting ways with the en banc Eleventh Circuit, the panel adopted a subjective definition of sex based on gender identity and held that laws drawing sex-based distinctions in schools function as "proxy discrimination" against transgender athletes. App.33a (cleaned up). The panel also split with numerous circuits by holding that transgender status is at least a quasi-suspect class. App.36a. After subjecting the Fairness Act to heightened scrutiny, the court concluded that Idaho lacked a valid interest in ensuring separate athletic teams and spaces for women and girls—again splitting from other circuits and even from previous Ninth Circuit decisions. App.40a–45a (attempting to distinguish *Clark I*). As a result, the court held all the Act's provisions were unconstitutional. App.55a.

After the panel affirmed the entirety of the district court's injunction—which prevented Idaho from enforcing its Act against *anyone,* not just Hecox, App.127a–30a—it later amended its opinion following this Court's decision in *Labrador* v. *Poe*, 144 S. Ct. 921 (2024), and directed the district court to determine the injunction's proper scope on remand, App.61a. Even so, the panel hinted that a universal injunction might still be proper: "We do not agree with the Intervenors, however, that the preliminary injunction would necessarily be overbroad as a matter of law if it extends to nonparties despite the district court's dismissal of [Hecox]'s facial challenge." App.58a.

Because the interests at stake here are so great, and because this case already has taken years to wind its way through the lower courts, Petitioners seek this Court's immediate review.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's decision deepens and widens two circuit splits, each of which warrants this Court's review.

The Ninth Circuit's decision exacerbates two separate circuit splits over the Equal Protection Clause's application to sex-based distinctions. Each split independently warrants this Court's review; together, they compel it.

These splits span eleven different cases in the courts of appeals, many with multiple opinions. The splits have presented in a variety of different factual contexts involving gender identity: sports, bathrooms, medical procedures, birth certificates, and military service. The splits are wide, well-developed, and openly acknowledged, with the circuits having fully ventilated the issues in opinions citing, following, disagreeing with, and distinguishing the others.

These splits are also intractable. Some circuits have committed en banc to positions that other circuits have conclusively rejected en banc. Meanwhile, other circuits have dug more deeply into settled positions. Nor will this Court's decision in *United States* v. *Skrmetti*, No. 23-477, obviate the need for review; only one of the two splits here is presented in *Skrmetti*, and *Skrmetti*'s analysis of whether states can prohibit experimental and dangerous drugs for minors will not control the outcome here. This case presents an ideal opportunity to resolve the circuit conflicts this case implicates and to decide whether the Constitution prohibits the people's elected representatives in half the states from relying on sex-based distinctions to save women's sports.

A. The Ninth Circuit widened the split over whether sex is a subjective term in equal-protection classifications.

By applying different definitions of "sex" under the Equal Protection Clause, the circuits have split over whether a law that classifies based on sex discriminates against people who identify as transgender.

This Court's equal-protection cases have uniformly treated sex as an objective concept that is binary, inherent, and biological: there are "two sexes," *Virginia*, 518 U.S. at 533; they are "immutable," *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973); and they are defined by "our most basic biological differences," *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 73 (2001).

The en banc Eleventh Circuit applied that objective, biological understanding of sex to hold that a policy that distinguished between "biological boys" and "biological girls" is a "sex-based classification." *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022). But the Fourth, Seventh, and Ninth Circuits have all held that such laws discriminate against those who identify as transgender. While those three circuits followed different rationales, they all treated sex as subjective. The split on this threshold question—foundational to all equal-protection cases alleging sex discrimination—desperately needs resolution.

1. In *Grimm*, the Fourth Circuit held that a school policy that assigned restrooms based on sex violated the Equal Protection Clause by treating students who identified as transgender differently because they "fail[d] to conform to [a] sex stereotype." *Grimm* v.

Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020). The proper question was whether the plaintiff—a biological girl who identified as a boy—"was similarly situated to *other boys*." *Id.* at 610 (emphasis added). But in answering that question, the Fourth Circuit relied on a subjective definition of sex based on gender identity. Specifically, the court rejected the school district's position that basic biology meant the plaintiff was not similarly situated to biological boys. *Ibid.* According to the Fourth Circuit, the school's view reflected its "own bias" by privileging "sex-assigned-at-birth over … medically confirmed, persistent and consistent gender identity" to the contrary. *Ibid.* Having thus redefined what it means to be a "boy," the court concluded over Judge Niemeyer's dissent that the challenged policy violated the Equal Protection Clause. *Id.* at 608–10, 613–16.

The Fourth Circuit recently applied the same reasoning to a challenge to a law that, like Idaho's Fairness Act, designates participation in women's sports based on sex. *B.P.J. ex rel. Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542, 556 (4th Cir. 2024). And the Fourth Circuit's decision to overturn a final judgment for the State likewise turned on a subjective definition of sex. The sole reason to define a person's sex "only by their reproductive biology and genetics at birth," the court said, was "to exclude transgender girls from the definition of 'female' and thus to exclude them from participation on girls sports teams." *Id.* at 556 (cleaned up). And that meant treating "transgender girls"—a term that itself rejects the biological understanding of sex—"differently from cisgender girls." *Ibid.* That, the court held, was "the definition of gender identity discrimination." *Ibid.*

Dissenting from that part of the opinion, Judge Agee embraced a biological definition of sex. He explained that the proper analysis required comparing the plaintiff, "a biological boy who identifie[d] as a girl" to other "biological boy[s]." *Id.* at 566–67 (Agee, J., concurring and dissenting in part).

2. The Seventh Circuit has likewise defined sex subjectively when resolving Equal Protection challenges brought by transgender plaintiffs. That court first staked out that position in a case challenging a school district's policy of assigning bathrooms based on the sex listed on the student's birth certificate. *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). In holding that the policy violated the Equal Protection Clause, the Seventh Circuit rejected the argument that the policy treated "all boys and girls the same." *Ibid.* That was "untrue," the court held, because the policy classified students and imposed "sex-based stereotypes" based on their "assigned sex at birth." *Ibid.* And that meant denying students who identified differently from their "assigned sex at birth" the choice "to use a bathroom that conform[ed] to their gender identity." *Ibid.*

That view is entrenched in the Seventh Circuit, and it will stay that way until this Court intervenes. Last year in a case raising similar issues, the court wrote that "[l]itigation over transgender" issues "is occurring all over the country," and the court assumed "at some point" this Court would "step in with more guidance than it has furnished so far." *A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 764 (7th Cir. 2023). "Until then," though, the court would "stay the course and follow *Whitaker*." *Ibid.*

3. Unlike the Fourth and Seventh Circuits, the Eleventh Circuit's en banc decision in *Adams* refused to redefine sex, 57 F.4th at 801, 807–08, which led the court to uphold a school district's policy separating restrooms based on biological sex, *id.* at 808–11. As the seven-judge majority explained, that "policy facially classifie[d] based on biological sex—not transgender status or gender identity," both of which were "wholly absent from the bathroom policy's classification." *Id.* at 808. Such laws do not "single[] out transgender students" because "both sides of the classification—biological males and biological females—include transgender students." *Ibid.* And "biological sex … is not a stereotype." *Id.* at 809. This Court "has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences." *Ibid.* So to say that a policy "relies on impermissible stereotypes because it is based on the biological differences between males and females is incorrect." *Id.* at 810. And as Judge Lagoa's concurrence explained, that reasoning applies equally to sports policies like the Fairness Act. *Id.* at 817–21 (Lagoa, J., specially concurring).

Though dissenting opinions urged the majority to adopt the Fourth and Seventh Circuits' approaches, *id.* at 821–24 (Wilson, J., dissenting); *id.* at 824–30 (Jordan, J., dissenting); *id.* at 830–32 (Rosenbaum, J., dissenting); *id.* at 832–60 (J. Pryor, J., dissenting), the majority expressly rejected them, *id.* at 807–08. "[C]ontrary to the dissent's claims," this was "a case about the constitutionality and legality of separating bathrooms by biological sex." *Id.* at 808. It was *not* a case about "gender identity." *Ibid.*

4. The Ninth Circuit's decision here exacerbated this pre-existing circuit split by joining the Fourth and the Seventh Circuits in subjectively defining sex to include notions of gender identity.

Indeed, the Ninth Circuit's decision was the most full-throated opinion yet rejecting the traditional definition of sex. It stated that the biological and objective understanding of sex embodied in the Fairness Act "is likely an oversimplification of the complicated biological reality of sex and gender," a reality that it found depends on "secondary sex characteristics[] *and* gender identity." App.99a (cleaned up, emphasis added). "[T]he ratifiers of the Fourteenth Amendment," the panel reasoned, would "not have understood the Fairness Act's definition of 'biological sex'" or "how 'genetic makeup' influences sex." App.29a n.9. Today, the Ninth Circuit said, biological sex is not "a neutral and well-established medical and legal concept." App.29a. So it concluded the Fairness Act's definition of sex must have been artificially "designed" "to exclude transgender and intersex people." App.29a.

The Ninth Circuit held that the Fairness Act thus classifies based on both sex *and* transgender status, and that "the law is directed at excluding women and girls who are transgender," meaning males who *identify* as women and girls, "rather than on promoting sex equality and opportunities for women." App.26a (cleaned up). And by referring to males who identify as female using the phrase "women and girls who are transgender," the Ninth Circuit left no doubt that it rejected the traditional definition of sex in favor of an identity-based construct.

* * *

This split on a basic definitional question of equal-protection jurisprudence warrants this Court's review. And it warrants this Court's review now. As the Seventh Circuit observed in *A.C.*, "[m]uch of what is needed to resolve this conflict is present in the majority opinion and four dissents offered by the Eleventh Circuit in *Adams*." 75 F.4th at 771. And the Ninth Circuit's decision below and the Fourth Circuit's decision in *B.P.J.*—including Judge Agee's thoughtful dissent—offer additional insights.

Granting review here matters not just to cases like this one involving women's sports, but to any law that contains a classification by sex. Since sex is one of just two quasi-suspect classes this Court has recognized, how that class is defined—and in particular, whether it is fixed and objective—has great bearing on how this Court and the lower courts apply intermediate scrutiny in Equal Protection cases. Circuit conflict over the meaning of a fundamental term that courts must apply every day cannot wait for review.

Finally, *Skrmetti* does not implicate and will not resolve this split. That case asks whether a statute that regulates medical procedures and refers to sex necessarily classifies based on sex or transgender status. Pet. for Writ of Cert. at i, 18, 24, *United States* v. *Skrmetti*, No. 23-477 (Nov. 6, 2023). In contrast, this case implicates a more fundamental question: what does sex mean for purposes of the Equal Protection Clause? *Skrmetti* does not directly present that question, yet that issue warrants immediate review.

B. The Ninth Circuit also deepened the split over whether transgender identity is a quasi-suspect class.

The circuits are also split over whether gender identity or transgender identity are quasi-suspect classifications that trigger intermediate scrutiny.

The Fourth Circuit has held that those who identify as transgender "constitute at least a quasi-suspect class." *Grimm*, 972 F.3d at 607. And that court has doubled down on that decision in two subsequent rulings, including one en banc. *B.P.J.*, 98 F.4th at 555–56; *Kadel* v. *Folwell*, 100 F.4th 122, 143 (4th Cir. 2024) (en banc). Likewise the Ninth Circuit, after first hinting that transgender identity requires elevated scrutiny five years ago, *Karnoski* v. *Trump*, 926 F.3d 1180 (9th Cir. 2019) (per curiam), expressly held here "that heightened scrutiny applies to laws that discriminate on the basis of transgender status" because "gender identity is at least a 'quasi-suspect class.'" App.36a (cleaned up).

In contrast, the Tenth Circuit has held that transgender identity is *not* a quasi-suspect classification. *Brown* v. *Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995). See also *Fowler* v. *Stitt*, 104 F.4th 770, 794 (10th Cir. 2024). And Chief Judge Sutton's opinion for the Sixth Circuit in *Skrmetti* also held that transgender identity is not quasi-suspect. *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023). Meanwhile, the en banc Eleventh Circuit in *Adams* expressed "grave 'doubt' that transgender persons constitute a quasi-suspect class." 57 F.4th at 803 n.5; accord *Eknes-Tucker* v. *Governor of Ala.*, 80 F.4th 1205, 1230 (11th Cir. 2023).

This split also warrants review. *Skrmetti* may not resolve this question—indeed, other circuits have both upheld and rejected state laws like the one in *Skrmetti* without making any determination about a quasi-suspect class. Compare *Eknes-Tucker*, 80 F.4th at 1230 (finding it unnecessary to resolve that issue), with *Brandt* v. *Rutledge*, 47 F.4th 661, 670 n.4 (8th Cir. 2022) (discerning "no clear error in the district court's factual findings underlying [its] legal conclusion" that a law discriminating against "transgender people" deserves heightened scrutiny). This case presents a clean vehicle for this Court to resolve the split and provide much-needed clarity to the lower courts on this recurring question.

II. The Ninth Circuit's decision was egregiously wrong and conflicts with this Court's precedents.

This Court should also grant review because the decision below is egregiously wrong on a constitutional issue of deep importance: whether states can preserve fairness in women's sports. In deciding that question, the Ninth Circuit's opinion conflicts with this Court's caselaw at every turn.

A. This Court's cases establish that sex is binary, biological, and immutable.

The Ninth Circuit rejected the objective, biological definition of sex as "an oversimplification," App.30a, treating sex instead as a flexible construct that varies according to "a person's sense of being male, female, neither, or some combination of both," App.13a. That holding contradicts this Court's equal-protection cases on sex discrimination.

Those cases universally regard sex as an "immutable characteristic," *Frontiero*, 411 U.S. at 686, defined by "our most basic biological differences," *Nguyen*, 533 U.S. at 73. "The difference between men and women … is a real one," *ibid.*, and should be a "cause for celebration," *Virginia*, 518 U.S. at 533. And it is precisely *because* sex is fixed that this Court subjects sex classifications to intermediate scrutiny. *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988); *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982). Making sex subjective negates the rationale for giving it that higher scrutiny.

This objective understanding of sex is controlling for equal-protection claims. It dooms any equal-protection analysis founded on the modern construct of gender identity, which was not even considered when the Equal Protection Clause was ratified in 1868. Carl R. Trueman, *The Rise and Triumph of the Modern Self* 350–57 (2020) (the concept of gender identity did not emerge in an academic setting until the late 20th century, and in popular understanding, only within the last decade).

Yet the Ninth Circuit brushed aside this settled understanding, suggesting that the law has been superseded by science. "[T]he drafters of the Fourteenth Amendment," it theorized, "would have had no concept of what 'endogenously produced testosterone levels' meant in 1868." App.29a n.9. But that only proves the point as to the controlling definition of sex: when the Equal Protection Clause was adopted, sex was understood to be fixed and immutable, a biological reality determined by reproductive roles. *Male*, WEBSTER'S DICTIONARY (1828) (defining male as "[p]ertaining to the sex that

procreates young"); *Female*, WEBSTER'S DICTIONARY (1828) (defining female as "one of that sex which conceives and brings forth young"). Allowing the Ninth Circuit's decision to stand would revolutionize constitutional jurisprudence by inviting courts to invoke "scientific" expert opinion to subvert and displace existing constitutional bedrock.

What's more, the Ninth Circuit's analysis is scientifically faulty. Even the medical organizations that support transgender causes recognize the traditional definition of sex as the "biological indication of male and female (understood in the context of reproductive capacity), such as sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia." Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 829 (5th ed. 2013). While "gender dysphoria" is a real mental-health issue, a person's subjective feelings do not change their sex, and there is no scientific basis to believe that men who identify as women are really women. J. Michael Bailey & Kiira Triea, *What Many Transgender Activists Don't Want You to Know: And Why You Should Know it Anyway*, 50 Perspectives in Biology and Medicine 521–34 (Fall 2007).

The Ninth Circuit wrongly supposed that a law using the traditional definition of sex imposes a sex-based stereotype. But such laws do "not depend in any way on how students act or identify," but rather classify "based on biological sex, which is not a stereotype." *Adams*, 57 F.4th at 809. Contra App.37a.

Nor is there merit to the Ninth Circuit's holding that the Fairness Act's use of the traditional understanding of sex "functions as a form of proxy discrimination." App.33a (cleaned up). Proxy discrimination occurs if a law discriminates based on a characteristic that is coextensive with a suspect class—as with "[a] tax on wearing yarmulkes." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Accord *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 275 (1979). In contrast, the Fairness Act's sex criteria apply to activities—sports—that are not "engaged in exclusively or predominantly by" the "class" of individuals who identify as transgender. *Bray*, 506 U.S. at 270. The Act sets sports participation based on sex, and transgender identity is a "distinct concept[] from sex." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 669 (2020).

The Ninth Circuit's re-imagining of the meaning of sex under the Equal Protection Clause defies this Court's precedents, history, science, and logic. That mistaken view is ripe for review here, and this Court should correct it.

B. The Ninth Circuit flouted this Court's intermediate-scrutiny jurisprudence.

The Fairness Act uses a straightforward, biologically based sex distinction to assign school sports teams. The Ninth Circuit previously considered such a distinction and readily upheld it under intermediate scrutiny. *Clark I*, 695 F.2d at 1129–32. But it missed the mark this time because its application of intermediate scrutiny was seriously flawed and again in conflict with this Court's precedents.

Intermediate scrutiny requires that laws serve "important governmental objectives" and employ means "substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (cleaned up). The Fairness Act does both.

Idaho has not just an important interest in providing equal athletic opportunities for women and girls—it has a compelling one. See *B.P.J.*, 98 F.4th at 570 (Agee, J., concurring and dissenting in part). As the Idaho Legislature explained, separating sports teams based on sex furthers the State's interest in promoting "equality" for women "by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities" and "to obtain recognition and accolades, college scholarships, and … other long-term benefits." Idaho Code § 33-6202(12). No one has disputed the importance of this interest. App.40a.

Idaho's preservation of a separate space for females to compete is also substantially related to its goals. "Given how biological differences affect typical outcomes in sports, ensuring equal opportunities for biological girls in sports requires that they not have to compete against biological boys." *B.P.J.*, 98 F.4th at 571 (Agee, J., concurring and dissenting in part). As Justice Stevens recognized decades ago, without this protection, boys will "dominate the girls' programs and deny them the equal opportunity to compete in interscholastic events." *O'Connor* v. *Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers).

Given the importance biology plays in sports, sex is a reasonable classification. As Judge Lagoa explained in *Adams,* "it is neither myth nor outdated stereotype that there are inherent differences" between males and females and that "those born male … have physiological advantages in many sports." *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring). Multiple studies confirm that irreversible physiological differences exist between biological males and females that give male athletes significant advantages over their female competitors. *Id.* at 819–20 (citing studies). As a result, allowing "a biological male," regardless of how that individual identifies, "to try out for and compete on a [women's] sports team" "significantly undermine[s] the benefits afforded to female student athletes." *Id.* at 819. Idaho therefore has more than a reasonable interest in using sex as a classification here.

Rather than apply the intermediate-scrutiny standard that this Court has developed, the Ninth Circuit subjected the Fairness Act to something more akin to strict scrutiny.

Start with the state's interest. Though claiming to accept as legitimate Idaho's interest in promoting women's athletics, the court treated that interest as a cover for discrimination. App.33a. The court also faulted Idaho for having no *in-state* "record of transgender women and girls participating in competitive women's sports." App.16a, 51a, 85a. But Idaho legislators were reasonably concerned that what had happened in other states could just as easily happen in Idaho. And Intervenors—female college athletes in Idaho—were forced to compete against a man at an out-of-state meet. App.21a.

More important, intermediate scrutiny does not require manifest harm before a state can regulate. Rather, intermediate scrutiny gives states like Idaho the breathing room to act prophylactically based on "predictive judgment." *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

In addition to getting Idaho's interest wrong, the Ninth Circuit erroneously imposed a narrow-tailoring requirement, faulting Idaho for classifying by sex, not circulating testosterone levels. App.97a–98a. Under intermediate scrutiny, though, a classification need not achieve the state's "ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Instead, it need only use a "fit" that, while not necessarily "perfect," is "reasonable." *Bd. of Trs. of State Uni*v. *of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989) (cleaned up).

Put simply, intermediate scrutiny does not require the State to adopt the alternatives the Ninth Circuit proposed. Intermediate scrutiny does not require a "reasonable decisionmaker" to select "the most appropriate method for promoting significant government interests." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218 (1997) (cleaned up). So while the Ninth Circuit may find testosterone-based classifications to be "more inclusive," "it is not for the court to impose such a requirement." *B.P.J.* v. *W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220, 232 (S.D. W. Va. 2023). Accord *Clark I*, 695 F.2d at 1131 ("We recognize that specific athletic opportunities could be equalized more fully in a number of ways.… The existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal. It does not mean that the required substantial relationship does not exist.").

Intermediate scrutiny gives the state breathing room to choose "trade-offs between equality and practicality." *Id.* at 1131–32. So the State need not "maximize equality" in its line-drawing. *Ibid.* In any event, the panel's preferred policy alternatives, such as dividing sports based on circulating testosterone levels, would *not* ensure fair competition. Excerpts of Record at 427, Expert Declaration of Gregory Brown, Ph.D., *Hecox* v. *Little*, __ F.4th __ (2024) (Record Nos. 20-35813, 20-35815).

For similar reasons, the panel wrongly focused on the effect of allowing Hecox alone to compete in women's sports. "[T]he validity of the [Fairness Act] depends on the relation it bears to the *overall* problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989) (emphasis added).

Under intermediate scrutiny, this Court has "consistently upheld statutes where the gender classification [was] not invidious, but rather realistically reflect[ed] the fact that the sexes are not similarly situated in certain circumstances." *Clark I*, 695 F.2d at 1129 (quoting *Michael M.* v. *Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981)). To hold otherwise here, the Ninth Circuit accepted arguments that were previously thought "ludicrous" while ratcheting intermediate scrutiny up to levels impossible to satisfy. *Michael M.*, 450 U.S. at 475. In so doing, the court called into question the constitutionality of similar laws in 24 other states. This Court should grant review and reverse the Ninth Circuit's improper application of intermediate scrutiny.

The Ninth Circuit's intermediate-scrutiny analysis also failed to consider relevant history and tradition. "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 730 (1988) (quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922)). Women's sports teams have existed since the late 19th century to give "female athletes" space "to flourish." Maria Cramer, *How Women's Sports Teams Got Their Start*, N.Y. Times (Apr. 28, 2022). Because the Fairness Act is consistent with these longstanding practices, *United States* v. *Rahimi*, No. 22-915, 2024 WL 3074728, at *10 (U.S. June 21, 2024), only an exceptionally compelling case can override the statute under intermediate scrutiny, *e.g.*, *Adams*, 57 F.4th at 796 (deferring to tradition and historical practice in rejecting a challenge to the "unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex"). The Ninth Circuit did not come close to making such a case. Its decision warrants immediate review.

C. The Ninth Circuit wrongly focused on transgender identity and misapplied this Court's precedents by treating it as a quasi-suspect class.

The Ninth Circuit did not analyze the Fairness Act as a straightforward sex-based distinction. Instead, it analyzed the law as if it discriminated based on transgender identity. It could do so only by ignoring this Court's precedents.

Only two paths would have allowed the Ninth Circuit to conduct its equal-protection analysis based on transgender identity. The first requires a law that facially discriminates based on that classification. See *Califano* v. *Boles*, 443 U.S. 282, 293–94 (1979) ("The proper classification for purposes of equal protection analysis … begin[s] with the statutory classification itself."). But the only facial distinction that the Fairness Act draws is based on sex.

The second path requires a legislature acting with an "invidious" purpose to discriminate based on transgender identity. *Feeney*, 442 U.S. at 274. Accord *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) ("A purpose to discriminate must be present." (cleaned up)). But no such purpose is present here. The Fairness Act's purpose is "to promote … equality" for females "by providing opportunities for [them] to demonstrate their skill, strength, and athletic abilities" and "to obtain recognition and accolades." Idaho Code § 33-6202(12).

At the same time, the Act *allows* many athletes who identify as transgender—namely, biological females who identify as males—to play women's sports. It strains credulity to conclude that such a law has the purpose of discriminating against people who identify as transgender. The Ninth Circuit thus violated this Court's directives by analyzing the Fairness Act as if it discriminated based on transgender identity.

Regardless, the Ninth Circuit was wrong to treat transgender identity as a new quasi-suspect class. This Court has not recognized a new quasi-suspect class in over 40 years, and it has been "reluctant" to do so "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985). Yet without acknowledging *Cleburne*'s caution or even applying the test for a quasi-suspect class, the Ninth Circuit simply declared it to be so. *Karnoski*, 926 F.3d at 1200; App.36a. That unreasoned pronouncement on such a consequential point of law requires review.

The Sixth Circuit's *Skrmetti* decision shows why transgender identity cannot satisfy the relevant test. Chief Judge Sutton began with the premise that "[t]he bar for recognizing a new suspect class is a high one." 83 F.4th at 486. And that "hesitancy makes sense" considering the many "line-drawing dilemmas" associated with transgender identity. *Ibid.* Those dilemmas implicate various factual contexts, including "[b]athrooms and locker rooms," "[s]ports teams and sports competitions," and others that are "sure to follow." *Ibid.* "Removing these trying policy choices from fifty state legislatures … runs the risk of making them harder to solve." *Id.* at 486–87.

Transgender identity also lacks the characteristics of a quasi-suspect class. For one, it is *not* an "obvious, immutable, or distinguishing characteristic[] that define[s] … a discrete group." *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987). "Unlike existing suspect classes, [it] is not definitively ascertainable at the moment of birth." *Skrmetti*, 83 F.4th at 487 (cleaned up). Nor is

it "immutable" because, as "detransitioners" attest, many people leave the group, *ibid.*, often with irreversible damage and grave regret. And far from being a "discrete group," *Bowen*, 483 U.S. at 602, transgenderism describes "a huge variety of gender identities and expressions," *Skrmetti*, 83 F.4th at 487 (cleaned up).

Nor does a transgender identity mark a group lacking "political power[]." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973). The federal government, many states, and major medical organizations all support people who identify as transgender. *Skrmetti*, 83 F.4th at 487. For these reasons, the Sixth Circuit correctly held that transgender identity is not a quasi-suspect classification. *Id.* at 486. The Ninth Circuit erred in holding otherwise here.

The Ninth Circuit's only reasoning was its prior caselaw applying elevated scrutiny to "'government attempts to intrude upon the personal and private lives of homosexuals.'" *Karnoski*, 926 F.3d at 1200 (quoting *Witt* v. *Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008)). But whatever the merits of those prior decisions, any such standard is irrelevant to the issues of participation in sports presented by this case. This Court should grant review and reverse.

III. This case is an ideal vehicle for resolving important equal-protection issues and entrenched circuit splits.

This case cleanly presents the issue whether designating sports teams based on biological sex violates the Equal Protection Clause because that was the sole ground that the district court and the Ninth Circuit relied on for their decisions. There are no disputes of material fact. And the Ninth Circuit issued a comprehensive analysis that took sides in multiple circuit splits. No amount of further percolation is necessary. And the case was brought by a private plaintiff, so there is no possibility that a subsequent change in the federal government's approach to regulating high-school and college athletic teams will moot the question presented.

Moreover, this petition presents an even better vehicle when paired with the request for review in West Virginia's women's sports case, *State of West Virginia* v. *B.P.J.*, No. 23-___. That petition presents the Court an opportunity to resolve a private-party Title IX challenge to state laws that designate women's sports teams based on sex.

It makes eminent sense to resolve the equal-protection and Title IX challenges to laws like Idaho's and West Virginia's in one fell swoop rather than addressing those issues in separate cases heard in separate terms. That is the approach this Court took when deciding whether college affirmative-action programs violate either equal protection or Title VI. See *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023). It should do the same here.

Hecox's complaint also included a Title IX claim. Compl. at 50–52, *Hecox* v. *Little*, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-00184). So while neither the district court nor the Ninth Circuit have yet addressed that Title IX claim in this case, the issue will have to be resolved eventually if this Court holds that Hecox's equal-protection claim is unlikely to succeed. After all, the two can't stand in conflict. And by granting both this petition and the petition in *B.P.J.*, the Court can ensure that it fully resolves both the equal-protection and Title IX questions raised by state laws protecting women's sports—along with the many circuit conflicts discussed in both petitions.

Similarly, granting certiorari only in *B.P.J.* might prevent the Court from resolving the constitutionality of applying these women's sports laws in a broad range of common factual contexts. According to the Fourth Circuit, the middle-school athlete who challenged West Virginia's law "has never felt the effects of increased levels of circulating testosterone" that puberty produces. *B.P.J.*, 98 F.4th at 561.

By contrast, Hecox is a college athlete who *has* gone through male puberty. App.49a. And this Court should have the opportunity to resolve a challenge brought by a male athlete who has gone through puberty and enjoys the resulting physiological advantages like increased bone size, heart size, and lung volume that hormone therapy cannot reverse. Excerpts of Record at 427, Expert Declaration of Gregory Brown, Ph.D., *Hecox* v. *Little*, __ F.4th __ (2024) (Record Nos. 20-35813, 20-35815).

The substantial overlap between the equal-protection and Title IX issues provides yet another reason to decide this case and *B.P.J.* together. Consistent with the Equal Protection framework outlined above, Title IX leveled the playing field for women and girls; it did not force them to the sidelines as men who identify as women take their place. Yet the Ninth Circuit's equal-protection reasoning is analogous to the Fourth Circuit's Title IX analysis in *B.P.J.* Both cases should be considered together.

Finally, the Court should grant the petition here and in *B.P.J.* notwithstanding the recent grant in *Skrmetti* for at least four reasons.

First, *Skrmetti* will not answer the question presented by the first circuit split in this case: how to define sex under the Equal Protection Clause. The United States' petition in *Skrmetti* does not ask this Court to adopt the amorphous definition of "sex" the Ninth Circuit adopted below. Instead, that petition argues heightened scrutiny applies to a law prohibiting experimental and dangerous treatments for minors because the law (1) relies on sex-based classifications, or (2) discriminates against a quasi-suspect class. Pet. for Writ of Cert. at 18–23, 24–25 *United States* v. *Skrmetti*, No. 23-477. So *Skrmetti* will not resolve what sex means under the Equal Protection Clause.

Second, *Skrmetti* will not say how much deference the states receive when they protect women's sports. As explained above, the Ninth Circuit gave no such deference here, instead reimagining how athletic teams can be assigned based on circulating testosterone levels. *Skrmetti* does not touch these issues.

Third, even if this Court were to apply heightened scrutiny in *Skrmetti*—despite lower courts deciding the validity of laws like Tennessee's Senate Bill 1 *without* deciding that heightened scrutiny applies—the resulting analysis would shed little light on how heightened scrutiny should be applied to women's sports laws. The strength of the government's interest in safeguarding minors from experimental and dangerous procedures is necessarily different than its interest in providing a safe and level playing field in sports. And whether laws like Tennessee's Senate Bill 1 and Idaho's Fairness in Women's Sports Act are narrowly tailored to advance those respective interests requires an independent analysis.

Fourth, this case and *B.P.J.* include Title IX claims, providing yet another reason to grant these petitions in addition to *Skrmetti*, which does not. The Court should grant review here to ensure it can address the important Title IX issues currently roiling the lower courts, female athletes and students, and every level of government.

* * *

Both this case and *B.P.J.* present critically important questions. Female athletes deserve to compete on a level playing field. Allowing males who identify as females to compete in women's and girls' sports destroys fair competition, safety, and women's athletic opportunities. Female athletes are losing medals, podium spots, public recognition, and opportunities to compete due to males who insist on participating in women's sports. So much of what women and girls have achieved for themselves over the course of several decades is being stolen from them—all under the guise of "equality."

In recent years, half the states have taken important steps to correct these injustices. But unless and until this Court acts, those efforts will continue to be thwarted by courts that insist on redefining sex, treating transgender identity as a quasi-suspect class, and misapplying this Court's intermediate-scrutiny test. The Court should not wait any longer to correct these mistakes and to return the issue of protecting women's sports to the people's elected representatives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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