Nos. 24-38, 24-43

IN THE

Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, *ET AL.*,
Petitioners,
v.
LINDSAY HECOX, *ET AL.*, *Respondents.*

STATE OF WEST VIRGINIA, *ET AL.*, *Petitioners*,
v.
B.P.J., BY NEXT FRIEND AND MOTHER, HEATHER JACKSON, *Respondent.*

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

Brief *Amici Curiae* of America's Future, Public Advocate of the US, Public Advocate Fdn., Clare Boothe Luce Center for Cons. Women, U.S. Constitutional Rights Legal Def. Fund, One Nation Under God Fdn., and Cons. Legal Def. and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Public Advocate of the United States, Public Advocate Foundation, Clare Boothe Luce Center for Conservative Women, U.S. Constitutional Rights Legal Defense Fund, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* filed *amicus* briefs at the Petition stage in *Little v. Hecox*, Brief *Amicus Curiae* of America's Future, *et al.*, No. 24-38 (Aug. 14, 2024), and *West Virginia v. B.P.J.*, Brief *Amicus Curiae* of America's Future, *et al.*, No. 24-43 (Aug. 15, 2024), as well as in the Fourth Circuit in *B.P.J. v. West Virginia State Board of Education, et al.*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, No. 23-1078 (May 3, 2023).

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

Before this Court are two highly similar cases from the Fourth and Ninth Circuits involving challenges to state laws requiring that school sports teams be separated by biological sex. As it is anticipated these cases will be argued and decided together, these *amici* are filing the same *amicus* brief in both cases.

West Virginia v. B.P.J.

In 2021, the West Virginia legislature enacted the "Save Women's Sports Bill," WV Code § 18-2-25d ("the Act"), to protect women's sports by defining the terms "female," "girl," and "woman" as describing biological females. B.P.J., a biological male, who describes himself as a "transgender girl," seeking to compete on the girls' track and cross country teams, challenged the law under both the Equal Protection Clause and Title IX.

The district court initially granted a temporary injunction against the law in July 2021. *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021). However, after discovery and considering substantial evidence offered by the parties, the district court reversed its position, dissolved its injunction, and granted summary judgment to the State of West Virginia in January 2023. *B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220 (S.D. W. Va. 2023) The district court ruled that "the legislature's chosen definition of 'girl' and 'woman' in [the sports] context is constitutionally permissible." *Id*. at 233, 233.

Thereafter, the Fourth Circuit issued its own injunction against the Act without opinion. *B.P.J. v. W. Va. State Bd. of Educ.*, 2023 U.S. App. LEXIS 8379 (4th Cir. 2023). This Court denied an application to vacate that injunction. *West Virginia v. B.P.J.*, 143 S. Ct. 889 (2023). Joined in dissent by Justice Thomas, Justice Alito wrote, "enforcement of the law at issue should not be forbidden by the federal courts without any explanation.... [I]n the circumstances present here — where a divided panel of a lower court has enjoined a duly enacted state law on an important subject without a word of explanation, notwithstanding that the District Court granted summary judgment to the State based on a fact-intensive record — the State is entitled to relief." *Id.* at 889 (Alito, J., dissenting). While the injunction was in place, Respondent B.P.J. competed in girls' track and field events, defeating a significant number of biological girls in 2023 and 2024, and taking spots from biological girls to compete in conference championships.

Ultimately, the Fourth Circuit overturned the district court's decision, asserting that the district court wrongly decided that West Virginia's Act does not violate the Equal Protection Clause and Title IX. The court ruled that summary judgment should not have been granted against B.P.J. without further factual development of the question whether biological males enjoy a competitive advantage over biological females in sports competitions. *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 561 (4th Cir. 2024) ("*BPJ II*"). It also directed the district court to enter summary judgment against West Virginia on the Title IX claims. *Id.* at 565.

Little v. Hecox

In March 2020, Idaho enacted the "Fairness in Women's Sports Act," Idaho Code § 33-6201-06 (2020). The law provided that only biological females may compete on interscholastic women's and girls' teams in Idaho state schools, allowing biological males to compete in men's and boys' teams as well as designated mixed-sex sports. *Hecox v. Little*, 479 F. Supp. 3d 930, 943-44, 948 (D. Id. 2020) ("*Hecox I*"). The Idaho law was challenged by a biological male wishing to try out for the women's cross country and track teams at Boise State University.

The Idaho district court enjoined the Act, declaring that it violated the Fourteenth Amendment's equal protection guarantee. *Id.* at 988-89. The injunction barred enforcement of any portion of the Act against any person. In August 2023, the injunction was upheld by the Ninth Circuit. *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023). Following this Court's ruling in *Labrador v. Poe*, 144 S. Ct. 921 (2024), relating to the Idaho Vulnerable Child Protection Act, the Ninth Circuit issued an amended opinion (*Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024) ("*Hecox II*")). That amended opinion remanded the case and stating that "the scope of the injunction is not clear.... On remand, the district court should tailor the injunction to provide ... specificity." *Hecox II* at 1089. The Ninth Circuit then denied petitions for rehearing *en banc* as moot. *Hecox v. Little*, 2024 U.S. App. LEXIS 14077 (9th Cir. 2024).

SUMMARY OF ARGUMENT

Our nation has been gripped by what could be termed transgender mania for more than a decade. Although every effort has been made by psychiatrists to alter their technical diagnoses to please the transgender advocates (*e.g.*, "gender dysphoria" replacing "Gender Identity Disorder" replacing "gender identity disturbance"), transgenderism remains a disorder of dissatisfaction with the reality of one's sex. For many years, plaintiffs asserting transgender status have demanded the government bend to their ever-increasing demands, even at the expense of all others. All too often, these plaintiffs have been treated by courts as if they were members of a protected class. The medical community has demanded the right to disfigure the bodies of such minors, and in response, several states have acted to protect minors from elements of the medical establishment eager to profit from such horrific acts. Fortunately, this Court acted to protect minors in *Skrmetti*.

Now, in response to a different, yet serious, threat to women, states such as West Virginia and Idaho have acted to prevent certain boys and men from invading girls' and women's sports. In the two cases now before the Court, certain male students, some with a mental or spiritual disorder, and some possibly because they have not had success competing against other men, have declared themselves transgender to gain eligibility to use their natural, physical advantages in a profoundly unfair manner. The courts below have yielded to this demand.

The phrase "on the basis of sex" in Title IX cannot be read to mean anything but males and females. To yield to the demand of the transgender plaintiffs requires that the purpose of Title IX be not only ignored, but upended. The Equal Protection Clause was not designed to protect transgenderism, which in no way can be considered a protected class. Fortunately, this case is coming before this Court toward the end of the period of transgender mania, allowing clear thinking to prevail. The decisions below should be reversed.

ARGUMENT

I. THE FOURTH CIRCUIT ERRED IN RULING THAT THE WEST VIRGINIA LAW PROTECTING WOMEN IN SPORTS VIOLATED TITLE IX.

The Fourth Circuit directed the district court to enter summary judgment against West Virginia on the Title IX claims. *BPJ II* at 565. No doubt, Respondents will argue in this Court, as below, that five words contained in Title IX dictate the result of this case: "No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). And, no doubt, again, the strongest argument that Respondents will have available is this Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), addressing the words "because of ... sex" where they are used in Title VII of the Civil Rights Act of

1964. These *amici* continue to believe that *Bostock* was wrongly decided,[2] but fortunately, there is no need to revisit *Bostock* to decide this case. First, this Court expressly disclaimed any intention to apply *Bostock* beyond Title VII:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; **we have not had the benefit of adversarial testing about the meaning of their terms**, and **we do not prejudge any such question today**. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. [*Bostock* at 681 (emphasis added).]

Moreover, as Petitioners argue (W.V. Pet. Br. at 17, 29-31), this Court's holding in *Bostock* does not control here, and indeed is inapplicable to Title IX. And even if the Court found once sufficient ambiguity to shoehorn a policy choice never entertained or desired by Congress into the phrase "because of ... sex" in Title VII, similar language employed in Title IX cannot be so read. "Sex" in Title IX expressly refers to

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[2] *See* Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, *Bostock v. Clayton County, Georgia* & *Altitude Express v. Zarda*, U.S. Supreme Court Nos. 17-1618 and 17-1623 (Aug. 23, 2019).

two biological sexes, male and female. Indeed, the express purpose of Title IX was to protect females from imbalances in education — including in the context of sports — that favored biological males over biological females. To jam the square peg of *Bostock* into the round hole of Title IX would effectively overturn Title IX, hopelessly vitiating the purpose for which the law was enacted.

A. Title IX Was Designed to Level the Playing Field in School Athletics between Biological Males and Biological Females.

Any argument that *Bostock* could have any application to Title IX requires a complete disregard for the reason Title IX was enacted. Title IX Senate sponsor Birch Bayh (D-IN) introduced the legislation, stating that its object was to ensure that females have the same educational opportunities available to males. Senator Bayh attacked "corrosive and unjustified discrimination against women." 118 *Cong. Rec.* 5803. He stressed that the bill was designed to address preferential treatment for biological males over females. He denounced stereotypes of females as "pretty things who go to college to find a husband … and finally marry, have children and never work again." 118 *Cong. Rec.* 5804.

Senator Bayh repeatedly lamented disparate opportunities in education and employment between "men" and "women." "I am concerned that in 1970 the percentage of the female population enrolled in college was markedly lower than the percentage of the male population…." 118 *Cong. Rec.* 5805. He further

added, "[i]t is of little comfort for women to know that they are encouraged to further their schooling but that … they will be earning far less than male colleagues for the rest of their lives." 118 *Cong. Rec.* 5807. However, Senator Bayh noted that Title IX's language dealt expressly with differentiations on the basis of "sex." "Central to my amendment are sections 1001-1005 which would prohibit discrimination on the basis of sex in federally funded education programs." 118 *Cong. Rec.* 5807. Section 1007 of Title IX required the Commissioner of Education to "investigate sex discrimination at all levels of education ... and report ... recommendations for action to guarantee equality of opportunity in education between the sexes." 118 *Cong Rec.* 5808.

B. Title IX Allowed Biological Sex Segregation to Protect Women in School Sports from Male Intrusion.

In his remarks, Senator Bayh made clear that Title IX would prohibit one of the results of allowing men identifying as women to compete — "differential treatment by sex" "in sports facilities or other instances where **personal privacy must be preserved**." 118 *Cong. Rec.* 5807 (emphasis added). Nothing in the language of Title IX even contemplates allowing biological males to invade the locker rooms and bathrooms used by biological female students engaged in school sports.

Dr. Bernice Sandler, a pioneer instrumental in the enactment of Title IX, recognized what advocates of transgender ideology and too many courts fail to

recognize. That is, in sports, "some sex segregation is necessary. If all teams were integrated by sex, few women would have access to sports." B. Sandler, "Title IX: How We Got It and What a Difference It Made," 55 CLEV. ST. L. REV. 473, 482 (2007). That is precisely the evil Title IX sought to remedy.

Allowing men identifying as women to compete in women's sports threatens the success of Title IX. Until Title IX's passage, Sandler wrote, "discrimination against women in collegiate athletics was pervasive and substantial." *Id.* at 480. Reflecting back on 35 years of Title IX in 2007, Sandler wrote that "college women are now approximately forty percent of varsity athletes. Despite these increases, we still have a very long way to go to reach equity in athletics. Of all the areas that Title IX covers, sports and athletics is the area where most ... schools at all levels are still out of compliance." *Id.* at 487. Now "transgender" participation threatens to ruin Title IX's dream of scholastic athletic equity forever.

C. The Text of Title IX Makes Clear It Was Designed to Level the Playing Field in School Athletics between Biological Males and Females.

The text of Title IX embodies Senator Bayh's plan to promote women in sports, not men identifying as women. There was no concept of "gender identity" contemplated or incorporated in either the statute's intent or its text. As one court recently noted:

> Title IX carves out exceptions for a number of traditional male-only or female-only activities, as long as similar opportunities provided for "one sex" are provided for "the other sex." See 20 U.S.C. §1681(a)(1)-(8).... Senator Bayh, one of the proposal's architects, stressed that Title IX "provide[d] equal access for women and men students to the educational process," but did not "desegregate" spaces and activities that have long been sex-separated. 117 Cong. Rec. 30407 (1971). [*Tennessee v. Cardona*, 737 F. Supp. 3d 510, 524 (E.D. Ky. 2024) ("*Cardona I*").]

There is a massive structural difference between Title VII and Title IX, in that Title IX explicitly carves out areas where specific federally funded programs are textually entitled to make distinctions on the basis of the biological realities of sex. Title VII does not. In an on-point ruling upheld by this Court, the Sixth Circuit recently noted:

> As many jurists have explained, Title VII's definition of discrimination, together with the employment-specific defenses that come with it, do not neatly map onto other areas of discrimination.... Title VII's definition of sex discrimination under Bostock simply does not mean the same thing for other anti-discrimination mandates, whether under the Equal Protection Clause, Title VII, or Title IX. [*Tennessee v. Cardona*, 2024 U.S. App. LEXIS 17600 at *8 (6th Cir. 2024) ("*Cardona II*").]

While Title VII makes no textual "carveouts" for when sex differences may be considered in the employment context, Title IX expressly does so in the educational context, and those carveouts are expressly based on the inherent biological differences between males and females.

One of these carveouts is that Title IX expressly allows schools to maintain "separate living facilities" by biological sex. "Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. It is incomprehensible that the text of Title IX permits sex-segregated college cafeterias or laundry rooms, but not sex-segregated sports teams, where the biological advantages of males are manifest.

D. The Regulatory History of Title IX Makes Clear Its Intent to Level the Playing Field in School Athletics between Biological Males and Females.

The Eleventh Circuit is in accord, noting that the implementing regulations for Title IX expressly allow for "'separate toilet, locker room, and shower facilities on the basis of sex,' so long as the facilities 'provided for students of one sex [are] comparable to such facilities provided for students of the other sex.'" *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (quoting 34 C.F.R. § 106.33) (emphasis added).

Notably, the DOE's implementing regulations for Title IX themselves envision the actual binary world of two biological sexes. The way the DOE Office of Civil Rights ("OCR") interpreted Title IX at the time of its passage is instructive. OCR promulgated regulations in 1975 to initially implement Title IX. The implementing regulations clearly envisioned two — and only two — distinct sexes, and were intended to close the gap between biological males and females in school athletics:

> The Department's intent ... is to require institutions to take the interests of **both sexes** into account in determining what sports to offer. As long as there is no discrimination against members of either sex, the institution may offer whatever sports it desires.... In so doing, an institution should consider by a reasonable method it deems appropriate, the interests of **both sexes**. [40 *Fed. Reg*. 24134 (1975) (emphasis added).

The regulations, in these earliest days of Title IX, also **"permit[ted] separate teams for members of each sex where selection for the team is based on competitive skill or the activity involved is a contact sport.**" *Id.* (emphasis added). Clearly, the text recognizes and expressly accounts for inherent biological differences between men and women.

It is a blatant departure from the intent and text of Title IX to socially construct gender contrary to simple biology. In the intervening half-century, Congress has never redefined the word "sex" relative

to Title IX in a manner so patently contrary to the legislation's text or intent. Indeed, "'Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities....' [U]ndercutting that purpose ... creates myriad inconsistencies with Title IX's text and its longstanding regulations." *Cardona I* at 535-36. "This is an impermissible result." *Id.* at 535.

When Congress enacted Title IX in 1972, the only commonly understood meaning of "sex" was biological sex. In that same year, 1972, the United States explained to the Supreme Court that "sex, like race and national origin, is a visible and immutable biological characteristic." U.S. Br. at *15, *Frontiero v. Laird*, No. 71-1694, 1972 WL 137566 (U.S. Dec. 27, 1972). The Supreme Court determined that "sex" is "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

All popular dictionaries at that time defined "sex" as referring to the physiological distinctions between males and females. The dictionaries defined only two sexes and did so with reference to the reproductive functions of the two. Webster's Third New International Dictionary defined "sex" as "one of the two divisions of organic esp. human beings respectively designated male or female," or "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental

reproduction."[3] Other contemporaneous dictionaries defined "sex" similarly. The Random House College Dictionary at 1206 (1973) defined sex as "1. either the male or female division of a species esp. as differentiated with reference to the reproductive functions. 2. The sum of the structural and functional differences by which male and females are distinguished." The American College Dictionary at 1109-10 (1970) defined "sex" as "1. The character of being either male or female ... 2. The sum of the anatomical and physiological differences with reference to which the male and female are distinguished or the phenomena depending on these differences." The American Heritage Dictionary of the English Language at 1187 (1st ed. 1969) defined "sex" as "1. a. The property or quality by which organisms are classified according to their reproductive functions. b. Either of two divisions, designated male and female, of this classification."

From 1972 until 2021, the Department of Education always defined "sex" as referring to two biologically exclusive sexes. There is no basis in the text or history of Title IX to expand *Bostock* beyond Title VII. As Justice Ginsburg famously wrote for this Court, "Physical differences between men and women, however, are enduring: 'The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *United States v. Virginia,* 518 U.S. 515, 533 (1996) (*quoting Ballard v. United States*, 329 U.S. 187, 193

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[3] Webster's Third New International Dictionary at 2081 (1966).

(1946)). Indeed. And a sports team including males is inherently different from one including only females — and has a built-in biological competitive advantage.

Last year, this Court quite properly signaled that it would respect the understanding of the drafters, and not attempt to impose *Bostock* onto Title IX. The Sixth Circuit, in *Cardona II*, and the Fifth Circuit, in *Louisiana v. United States Dep't of Educ.*, 2024 U.S. App. LEXIS 17886 (5th Cir. 2024), rejected an effort by the Biden administration's Department of Education ("DOE") to "defin[e] 'discrimination on the basis of sex' in Title IX to extend to discrimination on the basis of 'gender identity,' among other categories." *Cardona II* at *7-8. As the Sixth Circuit noted, "the Department mainly relied on *Bostock v. Clayton County*" as somehow offering support for the DOE's redefinition of "sex" in Title IX. *Id.* at *8. The Sixth Circuit rejected the claim expressly, while the Fifth Circuit did so implicitly, but both circuits opted to enjoin the redefinition as atextual and without statutory authority.

Notably, this Court upheld both injunctions, finding that the plaintiffs were likely to prevail on the merits: "Importantly, all Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity." *Dep't of Educ. v. Louisiana*, 603 U.S. 866, 867 (2024).

Given the legislative history of Title IX, this Court in *Louisiana* reached the only coherent outcome. It should do so again, finding that *Bostock* is simply inapplicable outside the Title VII context, and particularly in the Title IX context.

II. THE NINTH CIRCUIT ERRED IN RULING THAT THE IDAHO LAW PROTECTING WOMEN IN SPORTS VIOLATED THE EQUAL PROTECTION CLAUSE.

A. The Reality of Sex Differences.

This Court's recent opinion in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) provides some context to the battle by some to crush biological distinctions between the sexes. *Skrmetti's* holding turned on this Court's determination that a Tennessee statute banning chemical castration and genital and other surgeries for minors differentiated on the basis of age, not sex, and thus, rational basis scrutiny applied. But *Skrmetti* stands for a broader principle than just the type of balancing test which should be applied. In *Skrmetti*, this Court quite properly signaled that statutes that affect "transgender" individuals do not automatically discriminate "on the basis of sex," and Justice Barrett's concurrence cements this conclusion. *Skrmetti* at 1855 (Barrett, J., concurring). This Court's equal protection analysis is clear that not all sex-based classifications, including those involving transgender persons, are inherently invidious.

There has been a trend of courts sanctioning disparate treatment of biological men and women, that

should have application to those imagining themselves to be of a different sex. In *Parham v. Hughes*, 441 U.S. 347 (1979), this Court upheld a Georgia statute which permitted the mother of an illegitimate child to file wrongful death actions if the child died, but forbade a father to do so unless he first "legitimated" the child. The Court reasoned that while the mother of an illegitimate child would generally be known, proving the identity of the father is sometimes more difficult, and thus men and women are not similarly situated. The Equal Protection Clause is not offended by requiring the father to prove paternity before being able to file a wrongful death action.

Two years later, in *Michael M. v. Superior Court*, 450 U.S. 464 (1981), this Court upheld a statute criminally punishing males for sexual intercourse with minors, while imposing no such punishment against females. This Court stated, "[w]e need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Id.* at 471. Accordingly, as in *Parham,* the sex-based classification was not invidious, and the legislature's rational basis of preventing teen pregnancy was sufficient to justify the classification.

B. The Biology of Sex Differences.

In *Skrmetti*, this Court again recognized that some differences between men and women are simply

biological and immutable, and laws that recognize and accommodate for these differences are not inherently invidious:

> This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny.... Such an approach, moreover, would be especially inappropriate in the medical context. Some medical treatments and procedures are uniquely bound up in sex. The Food and Drug Administration itself recognizes that "[r]esearch has shown that biological differences between men and women (differences due to sex chromosome or sex hormones) may contribute to variations seen in the safety and efficacy of drugs, biologics, and medical devices." [*Skrmetti* at 1829-30.]

Finding a mere reference to sex to be invidious would be just as inappropriate in the sports context — for the same medical reasons. Whatever the prevailing political opinion, the science is unyielding — biological males on average possess physiological advantages that tilt the playing field against biological females. The addition of the label "transgender" does nothing to subtract that advantage. It's not politics; it's biology, especially testosterone.

> The predominant influence affecting male versus female athletic performance is hormonal.... The sex hormone testosterone plays an important role in regulating bone mass, fat distribution, muscle mass and strength, and the production of red blood cells

> leading to higher circulating hemoglobin. After puberty, male circulating testosterone concentrations are 15 times greater than those of females at any age. The result is a clear male advantage in regard to muscle mass, strength and circulating hemoglobin levels even after adjusting for sex differences in height and weight. On average, females have 50-60% of male's upper arm muscle cross-sectional area and 65-70% of male's thigh muscle cross-sectional area with a comparable reduction in strength. Young males have on average a skeletal muscle mass over 12kg greater than age-matched females at any given body weight.... Taken together, these discrepancies render females, on average, unable to compete effectively against males in power-based or endurance-based sports.[4]

Dr. Carole Hooven, the co-director of undergraduate studies in human evolutionary biology at Harvard, states the obvious: "There is a large performance gap between healthy normal populations of males and females, and that is driven by testosterone."[5] Dr. Hooven notes, "In 2019, about 2,500 men, almost one-third of the total number of

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[4] M. Artigues & M. Cretella, "Sex is a Biological Trait of Medical Significance," *American College of Pediatricians* (Mar. 2021).

[5] S. Warren, "Doctors Verify the 'Scientific Evidence' Proves Trans Swimmer Lia Thomas' Unfair Advantage Over Females," *CBN News* (May 31, 2022).

men competing worldwide in the [International Amateur Athletic Federation] 100-meter event, beat the fastest women's time. Without segregation, it's not just that men would win — women would never even qualify for the competitions in the first place."[6]

C. The Immutability of Sex Differences.

All the medical efforts to erase this advantage in the name of politics have proven unsuccessful. The application of puberty blockers in males cannot erase the biological imbalance between the sexes, as the differences are apparent even before puberty. "[A]mong the best prepubescent athletes in the United States, the male-female performance gap is ~ 3%–5% in track and field running events ... and ~ 5%–10% in jumping events."[7] Suppressing testosterone in males does not close the gap. "[T]estosterone suppression is associated with modest reductions in both muscle mass and muscle strength, but a large sex-based difference in muscle mass and strength is retained." *Id.* at 278. Nor will testosterone supplementation in females close the gap. "[T]estosterone supplementation in female athletes is unlikely to erase the puberty-driven male advantage in sports performance." *Id.* at 279.

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[6] E. Spitznagel, "Trans women athletes have unfair advantage over those born female: testosterone," *New York Post* (July 10, 2021).

[7] M. Joyner, S. Hunter & J. Senefeld, "Evidence on sex differences in sports performance," J. APPL. PHYSIOL. 138, 274, 275, *American Physiological Society* (Dec. 24, 2024).

Olympic sprinter Allyson Felix "is a six-time Olympic gold medalist and holds numerous World Championship titles. Yet in 2018, 275 high school boys ran faster times than Felix's lifetime best."[8] Felix is "the most decorated woman in Olympic track and field history."[9] But she would have been only 276th best among U.S. male high school athletes in 2018. Biology, that is, science, is undeterred by political labels, and the legislative classifications created by West Virginia and Idaho simply recognize the scientific reality. They are not invidious.

D. Recognition of Sex Differences Is Not Invidious.

In her *Skrmetti* concurrence, Justice Barrett noted that this Court has never recognized "transgender" status as a protected class for Equal Protection purposes, and described how that status utterly fails to meet this Court's test. "Indeed, this Court 'has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so.'" *Skrmetti* at 1850 (Barrett, J., concurring).

> To determine whether a group constitutes a "suspect class" akin to the canonical examples of race and sex, we apply a test derived from

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[8] C. Holcomb, "Biden preaches science while ignoring it on high school sports," *N.Y. Daily News* (Feb. 5, 2021).

[9] A. Barnes, "American sprinter becomes most decorated woman in Olympic track history," *The Hill* (Aug. 6, 2021).

the famous footnote 4 in *United States v. Carolene Products Co.*... We consider 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.... The test is strict, as evidenced by the failure of even vulnerable groups to satisfy it: We have held that the mentally disabled, the elderly, and the poor are not suspect classes.... In fact, as far as I can tell, we have *never* embraced a new suspect class under this test. [*Id.* at 1851 (Barrett, J., concurring) (internal quotations omitted).]

"To begin," Justice Barrett points out:

transgender status is not marked by the same sort of obvious, immutable, or distinguishing characteristics as race or sex.... In particular, it is not defined by a trait that is definitively ascertainable at the moment of birth. The plaintiffs here, for instance, began to experience gender dysphoria at varying ages.... Meanwhile, the plaintiffs acknowledge that some transgender individuals "detransition" later in life.... Accordingly, transgender status does not turn on an immutable ... characteristi[c]. [*Id.* (internal quotations omitted).]

"Nor is the transgender population a 'discrete group,' as our cases require. Instead, like classes we have declined to recognize as suspect, the category of transgender individuals is large, diverse, and amorphous.... The ... term 'transgender' can describe 'a huge variety of gender identities and expressions.'" *Id.* at 1852 (internal quotations omitted).

Finally, Justice Barrett added, "holding that transgender people constitute a suspect class would require courts to oversee all manner of policy choices normally committed to legislative discretion." *Id.* Among these permissible legislative choices, Justice Barrett noted, is the historical ability of a state, unchallenged from the adoption of the Fourteenth Amendment until a few years ago, to keep male athletes from competing on girls' sports teams:

> [T]ransgender status implicates several other areas of legitimate regulatory policy — ranging from access to restrooms to eligibility for boys' and girls' sports teams. If laws that classify based on transgender status necessarily trigger heightened scrutiny, then the courts will inevitably be in the business of "closely scrutiniz[ing] legislative choices" in all these domains.... [L]egislatures have many valid reasons to make policy in these areas, and **so long as a statute is a rational means of pursuing a legitimate end, the Equal Protection Clause is satisfied**. [*Id.* at 1852-53 (Barrett, J., concurring) (emphasis added).]

E. Failure to Recognize Sex Differences Is Irrational.

The states in these cases have easily posited a rational basis for their policy choices — indeed, the very basis for which Title IX was created by its framers, to end longstanding unequal treatment of biological women and girls in education, including educational sports programs. As Brazil's Olympian volleyball athlete Ana Paula Henkel wrote in an open letter to the International Olympic Committee, the "heedless decision to include biological men, born and built with testosterone, with their height, their strength and aerobic capacity of men, is beyond the sphere of tolerance. It represses, embarrasses, humiliates and excludes women."[10] As Petitioner West Virginia notes, "[b]ecause of these [biological and physiological] differences, males would displace females to a substantial extent if they were allowed to compete together. With sex-specific sports, women have a chance to compete fairly while not risking their safety against physiologically distinct competitors." W.V. Pet. Br. at 4 (internal quotation omitted). This is an eminently rational basis for the challenged laws. And thus, as this Court suggests in *Skrmetti* and Justice Barrett demonstrates, the Equal Protection Clause is not offended.

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[10] A. Henkel, "Open letter to the International Olympic Committee by Ana Paula Henkel," *FairPlayforWomen.com* (Dec. 13, 2018).

CONCLUSION

For the foregoing reasons, the decisions of the Fourth and Ninth Circuits should be reversed.

Respectfully submitted,

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