No. _____

In the
Supreme Court of the United States

WARREN PETERSEN, Senator, President of the Arizona State Senate; BEN TOMA, Representative, Speaker of the Arizona House of Representatives; and THOMAS C. HORNE, in his official capacity as State Superintendent of Public Instruction,

Petitioners,

v.

JANE DOE, by next friends and parents HELEN DOE and JAMES DOE, MEGAN ROE, by next friends and parents KATE ROE and ROBERT ROE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 17, 2024

QUESTION PRESENTED

The question whether biologically male athletes who identify as female should be allowed to compete in women's sports is the focus of recent, active, and rapidly evolving public debate. This debate extends to the States, which "are currently engaged in serious, thoughtful examinations," *Washington* v. *Glucksberg*, 521 U.S. 702, 719 (1997), of the participation of biologically male athletes in girls' and women's sports. In just the past few years, twenty-six States have reaffirmed the traditional practice of reserving women's sports teams and competitions for biological females—including twenty-five by statute. The Fourth and Ninth Circuits, however, have constitutionalized this debate by recognizing a novel constitutional right of biological males who identify as female to participate in girls' and women's sports. Most recently, the Ninth Circuit upheld an equal-protection challenge to Arizona's statute preserving the traditional separation of sports teams by biological sex. The question presented is:

Whether Arizona's Save Women's Sports Act ("SWSA"), which preserves the traditional practice of excluding biological males from girls' and women's sports teams and competitions, violates the Equal Protection Clause.

PARTIES TO THE PROCEEDING

Petitioners are Warren Petersen, President of the Arizona State Senate; Ben Toma, Speaker of the Arizona House of Representatives (collectively, intervenor-defendants in the district court and intervenor-defendants-appellants in the court of appeals); and Thomas C. Horne, in his official capacity as State Superintendent of Public Instruction (defendant in the district court and defendant-appellant in the court of appeals).

Respondents are Jane Doe, by next friends and parents Helen Doe and James Doe; and Megan Roe, by next friends and parents Kate Roe and Robert Roe (collectively, plaintiffs in the district court and appellees in the court of appeals); Laura Toenjes, in her official capacity as Superintendent of the Kyrene School District; Kyrene School District; The Gregory School; and the Arizona Interscholastic Association, Inc. (collectively, defendants in the district court).

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the District of Arizona:

- *Doe* v. *Horne*, No. 4:23-cv-00185 (order granting a preliminary injunction issued July 20, 2023).
- *Doe* v. *Horne*, No. 4:23-cv-00185 (order denying stay pending appeal issued July 31, 2023).

United States Court of Appeals for the Ninth Circuit:

- *In re Horne*, No. 23-70111 (order denying mandamus relief sought by Horne relating to order denying transfer of venue issued June 29, 2023).
- *Doe* v. *Horne*, No. 23-16026 c/w No. 23-16030 (order denying stay pending appeal issued August 14, 2023).
- *Doe* v. *Horne*, No. 23-16026 c/w No. 23-16030 (order denying initial en banc hearing issued January 4, 2024).
- *Doe* v. *Horne*, No. 23-16026 c/w No. 23-16030 (order affirming grant of preliminary injunction issued September 9, 2024).
- *Doe* v. *USA Women of Action*, No. 23-3188 (order affirming denial of intervention to USA Women of Action d/b/a Arizona Women of Action, Anna Van Hoeck, Lisa Fink, and Amber Zenczak issued September 9, 2024).
- *In re Petersen*, No. 24-4335 (order denying writ of mandamus issued August 8, 2024).
- *Doe* v. *Horne*, No. 24-4749 (order denying *pro se* non-party's interlocutory appeal issued August 29, 2024).

United States Supreme Court:

- *In re Warren Petersen, et al.*, No. 24-219 (petition for writ of mandamus filed August 20, 2024).
- *In re Warren Petersen, et al.*, No. 24A218 (order denying application for a stay pending disposition of petition for writ of mandamus issued September 3, 2024).

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The district court's order denying a stay pending appeal is available at 2023 WL 5017231 and reprinted at App.109A–121A. The Ninth Circuit's order denying a stay pending appeal is not available in an official or unofficial report but is reprinted at App.57A–58A.

The Ninth Circuit's order denying initial en banc consideration is not available in an official or unofficial report but is reprinted at App.59A–60A.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment and opinion on September 9, 2024. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1334. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1292(a)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause provides, in relevant part, that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. It is also reprinted at App.119A.

The Save Women's Sports Act is codified at chapter 106 of the Arizona Session laws, *see also* 2022 Ariz. Legis. Serv. ch. 106 (S.B. 1165) (West), and section 1 is codified at ARIZ. REV. STAT. § 15-120.02. The Act is reprinted at App.119A.

INTRODUCTION

The participation of biologically male, transgender athletes in girls' and women's sports is the focus of novel, active, and rapidly evolving public debate. High-profile examples of biological males dominating women's athletic competitions have raised questions of basic fairness about the practice.[1] Elite female athletes have expressed concerns about fairness, the loss of opportunity for women, and the privacy and safety of female athletes.[2] National and international governing bodies for sports are actively reexamining their positions, with a strong trend toward policies that restrict the participation of biological males in

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[1] *See, e.g.,* Ryan Gaydos, *Cece Telfer, Transgender Athlete Who Won NCAA Title, Vows to 'Take All the Records' in Indoor Competitions*, FOX NEWS (June 24, 2024), https://tinyurl.com/4du5nbzp; Melissa Koenig, *Transgender Cyclists Once Again Take Gold and Silver at Major Female Competition*, N.Y. POST (Dec. 5, 2023), https://tinyurl.com/3wk3tymp; Ian Casselberry, *Carli Lloyd Confirms USWNT Once Lost to Team of 15-Year-Old Boys*, SPORTS ILLUSTRATED (Nov. 10, 2023), https://tinyurl.com/5n7hkyra; Shyam Kamal, *Williams Sisters vs Karsten Braasch: When World No. 203 Destroyed Serena Williams and Venus Williams in Battle of the Sexes*, SPORTSKEEDA (Oct. 2, 2022), https://tinyurl.com/42h6ky68; Eric Levenson, *Transgender Swimmer Lia Thomas Sets Ivy League Record in 200-Yard Freestyle at Ivy Championships*, CNN (Feb. 18, 2022), https://tinyurl.com/nch3dhc4.

[2] *See, e.g., Riley Gaines Among More Than a Dozen College Athletes Suing NCAA over Transgender Policies*, CBS NEWS (Mar. 15, 2024), https://tinyurl.com/yx93sdyw; *Martina Navratilova on Why She Keeps Talking About Trans Women in Sports*, N.Y. MAG. (Nov. 30, 2023), https://tinyurl.com/y9wd6crn; Taylor Penley, *NCAA Volleyball Player Refuses to Stay Silent as Trans Athletes Put Women's Opportunities 'At Risk'*, FOX BUSINESS (Dec. 19, 2023), https://tinyurl.com/2p6nbuw9.

female competitions.[3] Public opinion in the United States increasingly favors the traditional practice of reserving women's sports for biological females.[4]

This active debate extends to the States, which "are currently engaged in serious, thoughtful examinations," *Washington* v. *Glucksberg*, 521 U.S. 702, 719 (1997), of the participation of biologically male athletes in female sports. At the time of this petition, twenty-five States have enacted laws reaffirming the traditional practice of reserving

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[3] *See, e.g.,* Beth Hands, *Many Sports Are Tightening Their Transgender Policies – Can Inclusion Co-Exist with Fairness, Physical Safety and Integrity?*, THE CONVERSATION (June 18, 2024), https://tinyurl.com/8nda9fk3; Thomas McKenna, *Lia Thomas Loses Challenge to International Swimming Rule Banning Males from Female Events*, NAT'L REV. (June 12, 2024), https://tinyurl.com/2rnkk3f5; Dennis Dodd, *NAIA, Small Colleges Association, Bans Transgender Athletes from Women's Sports Competitions*, CBS SPORTS (Apr. 8, 2024), https://tinyurl.com/3pvexekp; Valerie Richardson, *Women's Pro Golf Tour Bans Transgender Golfer Hailey Davidson with Female-Only Rule*, WASH. TIMES (Mar. 8, 2024), https://tinyurl.com/bd2n7aj; Amanda Davies, *World Athletics' Policy Limiting Trans Women Participation Is 'Here to Stay,' Says President Sebastian Coe*, CNN (Mar. 7, 2024), https://tinyurl.com/mthf8n97; Mike Hytner, *Rugby League Joins Swimming in Barring Transgender Women from Female International Competition*, THE GUARDIAN (June 20, 2022), https://tinyurl.com/5n7kfk2p.

[4] *See, e.g.,* Elizabeth T. Mitchell, *Poll: Majority of Voters Against Allowing Men in Women's Sports*, THE LION (Aug. 5, 2024), https://tinyurl.com/yhz82572; Chris Nesi, *66% of US Adults Oppose Transgender Girls Competing on Female Sports Teams, New Survey Reveals*, N.Y. POST (June 7, 2024), https://tinyurl.com/2rh63jk5; Jeffrey M. Jones, *More Say Birth Gender Should Dictate Sports Participation*, GALLUP (June 12, 2023), https://tinyurl.com/ycy7k78p.

women's sports for biological females, and another has done so by regulation.[5]

This debate, however, is dramatically curtailed in the Fourth and Ninth Circuits, which contain 14 States and almost 30 percent of the Nation's population. In three recent decisions, those Circuits have recognized a novel, unprecedented constitutional right of biologically male, transgender athletes to compete in women's sports. *See* App.1A–56A; *Hecox* v. *Little (Hecox II)*, 104 F.4th 1061, 1068 (9th Cir. 2024), *petition for cert. filed* (U.S. July 11, 2024) (No. 24-38); *B.P.J. ex rel. Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542, 550 (4th Cir. 2024), *petitions for cert. filed* (U.S. July 16, 2024) (Nos. 24-43, 24-44). These decisions uphold challenges to state statutes, like Arizona's, that preserve the traditional practice of separating sports teams by biological sex, and they cast doubt on other States' ability to enforce similar statutes or policies in those circuits.

This petition seeks review of the most recent of those three decisions—the Ninth Circuit's decision holding that Arizona's statute reserving female sports teams for biological women and girls violates the Equal Protection Clause. App.1A–56A. That decision satisfies this Court's criteria for granting review, *see* Sup. Ct. R. 10, because it decided an important question of federal law in a manner that conflicts with this Court's precedents and creates or deepens multiple splits of authority with other federal Circuits. This case presents an ideal vehicle to address these questions of fundamental importance.

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[5] *See Equality Maps: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT 3 (2024), https://tinyurl.com/yhuny8xk.

First, the Ninth Circuit's decision conflicts with this Court's precedent and splits with many circuits on the question whether to defer to state legislative factfinding in cases involving "medical and scientific uncertainties." *Marshall* v. *United States*, 414 U.S. 417, 427 (1974). Following this Court's precedent, other circuits routinely hold that such deference applies where, as here, the state legislature has made specific findings in disputed scientific matters on which experts disagree. The Ninth Circuit disagreed with these precedents, holding that such deference applies only in cases involving rational-basis scrutiny. This attempted distinction—for which the Ninth Circuit cited no authority—conflicts with many decisions from other circuits applying such deference in cases involving intermediate scrutiny and similar levels of enhanced scrutiny.

Second, the Ninth Circuit's opinion deepens a well-established, multi-faceted circuit split on what level of scrutiny applies to equal-protection claims based on transgender status. This split of authority includes inter-circuit disagreement on (1) whether disparate treatment of transgender plaintiffs necessarily constitutes sex discrimination triggering intermediate scrutiny; (2) what role, if any, *Bostock* v. *Clayton County*, 590 U.S. 644, 660 (2020), should play in such equal-protection analysis; and (3) whether transgender persons constitute a quasi-suspect class.

Third, the Ninth Circuit's decision conflicts with the Second Circuit on the question whether an Equal Protection challenge based on underinclusiveness triggers rational-basis scrutiny. Where, as here, the plaintiff does not challenge the underlying suspect classification but instead seeks to expand the contours of that classification, the claim is subject to rational-basis scrutiny. *Jana-Rock Constr., Inc.* v. *New York*

State Dep't of Econ. Dev., 438 F.3d 195, 207 (2d Cir. 2006).

Fourth, the Ninth Circuit's finding that Arizona's statute was based on intentional discrimination, in the absence of any credible evidence of animus, splits with other circuits that correctly hold that the challenged law must be "inexplicable by anything but animus." *L.W. ex rel. Williams* v. *Skrmetti (L.W. II)*, 83 F.4th 460, 487 (6th Cir. 2023), *cert. granted sub nom. United States* v. *Skrmetti*, 144 S. Ct. 2679 (2024) (No. 23-477) (quoting *Trump* v. *Hawaii*, 585 U.S. 667, 706 (2018)). Here, where Arizona's statute preserves the traditional practice of separating sports by biological sex and advances compelling state interests in fairness, safety, privacy, and equality of opportunity for female athletes, no such showing is possible.

This case presents an ideal vehicle to address these important issues. It involves a well-developed factual record, including extensive expert evidence from both sides, and lengthy, detailed opinions from both the Ninth Circuit and the district court. Further percolation would not serve to elucidate the issues, and delay would inflict irreparable injury on Arizona and other States in the Fourth and Ninth Circuits that seek to exercise their sovereign authority regarding this disputed question on which the Constitution is silent. The question presented is one of exceptional importance "that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

STATEMENT OF THE CASE

I. The Traditional Practice of Separating Sports Teams by Biological Sex Advances Compelling State Interests.

"Physical differences between men and women … are enduring: The two sexes are not fungible." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (quotations and alteration omitted). "'Inherent differences' between men and women … remain cause for celebration," but "not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* (citation omitted).

One way to celebrate those differences is to provide women with a fair and equal opportunity at athletics through sex-separated athletic competition. "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" against women. *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n (Clark I)*, 695 F.2d 1126, 1131 (9th Cir. 1982).

Title IX demonstrates the benefits of that policy. By encouraging the creation of separate sports teams for women, Title IX "'precipitated a virtual revolution for girls and women in sports'" and "'paved the way for significant increases in athletic participation for girls and women at all levels of education.'" *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818 (11th Cir. 2022) (en banc) (Lagoa, J., specially concurring) (quoting Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 15 (2000)). "Girls who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs. They are also more likely to lead." *Id.* at 820.

Allowing biological males to compete in women's sports threatens that progress and raises persistent concerns about fairness, safety, privacy, and equality of opportunity for female athletes. Respondents and the lower courts here effectively concede the validity of these concerns. For example, as the district court acknowledged, all experts in this case "agree that" post-pubertal males have physiological and competitive advantages over females. App.112A. Likewise, the Ninth Circuit recognized that "the NCAA and International Olympic Committee have tightened their transgender eligibility policies." App.49A.

In this area of rapidly "evolving" "standards," *id.*, Arizona passed the Save Women's Sports Act ("SWSA").

II. The Save Women's Sports Act Promotes Fairness, Safety, Privacy, and Equal Opportunity for Female Athletes.

Before the SWSA, non-governmental entities decided who could play on Arizona sports teams designated for women and girls, and their policies applied only to high-school sports—leaving elementary-school and college sports unaddressed. The Arizona Interscholastic Association ("AIA"), a nonprofit association, regulates interscholastic athletic competitions only for member schools, and only for sports teams in grades 9-12. App.72A–73A. Its rules permitted transgender students to "play on teams consistent with their gender identity" after a review to determine whether the request was "consistent with AIA … policy" or was "motivated by an improper purpose." App.73A.

In 2022, Arizona enacted the SWSA. In passing the Act, the Arizona legislature made explicit

legislative findings, including that there are two biological sexes; that there are physiological differences between them; and that those differences give male athletes, on average, an athletic advantage that is not eliminated by puberty blockers or similar treatments. App.121A–124A.

In particular, Arizona found that pre-pubescent males possess physical advantages over pre-pubescent females: "In studies of large cohorts of children from six years old, '[b]oys typically scored higher than girls on cardiovascular endurance, muscular strength, muscular endurance, and speed/agility, but lower on flexibility.'" App.123A (quoting Konstantinos Tambalis et al., *Physical Fitness Normative Values for 6–18–Year–Old Greek Boys and Girls, Using the Empirical Distribution and the Lambda, Mu, and Sigma Statistical Method*, 16 EUR. J. SPORT SCI. 736 (2016)). Arizona found that these physical differences lead to male competitive advantages in sports: "Physiological differences between males and females relevant to sports performance 'include a larger body size with more skeletal-muscle mass, a lower percentage of body fat, and greater maximal delivery of anaerobic and aerobic energy.'" App.123A (quoting Øyvind Sandbakk et al., *Sex Differences in World–Record Performance: The Influence of Sport Discipline and Competition Duration*, 13 INT'L J. SPORTS PHYSIOLOGY & PERFORMANCE 2 (2018)).

Thus, both before and after puberty, Arizona found, "[t]here is a sports performance gap between males and females, such that 'the physiological advantages conferred by biological sex appear, on assessment of performance data, insurmountable.'" App.124A (citation omitted). These "inherent, physiological differences between males and females

result in different athletic capabilities." App.124A. Testosterone suppression, Arizona found, does "not diminish[]" that natural advantage. App.125A.

Separating sports teams by biological sex, Arizona concluded, addresses the "obvious concerns about fair and safe competition" that arise when biological males compete against females. App.125A (quotations omitted). Moreover, "[h]aving separate sex-specific teams furthers efforts to promote sex equality ... ." App.125A. Female-only teams increase the "opportunities" for female athletes "to obtain recognition, accolades, college scholarships and the numerous other long-term benefits that flow from success in athletic endeavors." App.125A–126A.

Arizona thus directed that sports teams for public schools, or private schools that compete against a public school, be designated "based on the biological sex of the students who participate on the team or the sport." App.119A–120A. "Athletic teams or sports designated for 'females', 'women' or 'girls' may not be open to students of the male sex." App.120A.

III. Petitioners Present Extensive Evidence of Male Competitive Advantage Before and After Puberty.

Respondents are biological males who identify as female and who were 11 and 15 years old at the time this lawsuit was filed. App.68A, 70A. Both claim that they are taking, or plan to take, medications to block the effects of male puberty. App.69A, 71A. Both assert that they wish to play sports on girls' teams but, because they are biologically male, the SWSA prohibits them from doing so. App.68A, 70A, 72A.

Respondents brought this lawsuit via their parents on April 17, 2023, alleging that the SWSA violates the Equal Protection Clause. D.Ct. Doc. 1 ¶¶ 68–73. They

moved for a preliminary injunction on that basis. D.Ct. Doc. 3, at 10–12.[6]

Respondents do not challenge Arizona's decision to provide sex-separated, female-only sports teams—in fact, they openly concede that Arizona may do so. Instead, they challenge Arizona's decision to define "females," "women," and "girls" by reference to "biological sex" alone, instead of biological sex *and* gender identity. *See, e.g.*, App.35A n.8. Thus, they do not challenge Arizona's sex-based classification but seek to *expand* the classification to include themselves within the definition of the protected class. *See* App.35A n.8.

As authorized by Arizona law, Petitioners President of the Arizona State Senate Warren Petersen and Speaker of the Arizona House of Representatives Ben Toma intervened to defend the SWSA. D.Ct. Docs. 79, 142. In response to Respondents' motion for a preliminary injunction, Petitioners presented extensive expert evidence reinforcing Arizona's legislative findings that there are significant differences in athletic performance between boys and girls, including before puberty, and that those differences are not eliminated by the administration of puberty blockers.

For example, as the district court acknowledged, Petitioners presented evidence drawn from "school-based fitness testing" for "girl and boy students ages 6 through 11" demonstrating superior performances

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[6] Respondents also brought claims under Title IX and the ADA and Rehabilitation Act. D.Ct. Doc. 1 ¶¶ 74–85. They also sought preliminary relief under Title IX. D.Ct. Doc. 3, at 8–10. The Ninth Circuit affirmed only on Equal Protection grounds. App.52A–53A.

by boys in the shuttle run, flexed arm hang, standing broad jump, and throwing speed and distance. App.83A. These include significant disparities in running and throwing capabilities before puberty, as "9-year-old boys … exceed[] girls' running times by … percentages ranging from 11.1-15.2%," and "[b]oys exceed girls in throwing velocity by 1.5 standard deviation units as early as 4 to 7 years of age" and in "throwing distance by 1.5 standard deviation units as early as 2 to 4 years of age." App.83A.

Petitioners submitted additional evidence of pre-puberty physical differences between boys and girls that cause those athletic-performance disparities. *See, e.g.,* D.Ct. Doc. 92-8 ¶ 4.4 ("Males are consistently 1-2 cm taller than females between 0-10 years old."); D.Ct. Doc. 87-1 ¶ 25(b) (citing a study from Spain that demonstrated "pre-pubertal boys had more muscle mass, less fat mass, and performed better than girls on tests of countermovement jump, handgrip strength, and 20 m shuttle run"); D.Ct. Doc. 87-1 ¶ 25(f) (citing a study of preschool children from Chile "showing that boys were heavier and taller than[] girls, with boys performing better on handgrip strength test, standing long jump, and 20 m sprint"); D.Ct. Doc. 82-1 ¶ 79 ("Starting at birth, girls have more body fat and less fat-free mass than boys.").

Petitioners also submitted extensive evidence showing that these physical differences translate into athletic advantages. *See, e.g.,* D.Ct. Doc. 82-2 ¶ 151 ("Although the differences increase upon puberty, biological males already show even before puberty a 2–5% advantage in swimming, running, jumping, and a range of strength tests.") (citing studies from Australia, Germany, Norway, Spain, and Latvia); D.Ct. Doc. 82-2 ¶ 152 ("In track and field athletics, the effects of age on running performance showed that the

prepubertal differences of 3.0% increased to a plateau of 10.1%" after puberty and that a "*prepubertal difference of 5.8%*" in jumping increased after puberty.) (emphasis in original) (quotations omitted); D.Ct. Doc. 82-1 ¶¶ 109–110 (compiling national and Arizona-specific data showing, with rare exceptions, middle school boys (*e.g.*, 6th graders) outperform middle school girls in track and field); D.Ct. Doc. 87-3 ¶ 21 (citing data showing that record holders in 33 out of 34 track and field events for children 12 and under are boys); D.Ct. Doc. 82-1 ¶¶ 85–110, 113 (citing data and studies from the United States, United Kingdom, Australia, Europe, Denmark, and Colombia); D.Ct. Doc. 92-8 ¶¶ 7.5–7.14 (reviewing international track and field records for ages 5-16 and finding a "clear" "male advantage"); D.Ct. Doc. 87-3 ¶ 19 (discussing a study involving "throwing in children" that "found similar consistent findings across all cultures," specifically that "'[a]t all ages, males throw faster, on average, than females'"). Thus, while male competitive advantages increase after puberty, Petitioners' evidence demonstrated significant, outcome-determinative competitive advantages for boys before puberty as well.

Petitioners also presented evidence that puberty blockers do not eliminate these athletic advantages. Doc. 82-1 ¶ 125 (summarizing two studies showing that male height advantages are "not eliminated, or even meaningfully affected, by an ordinary course of puberty suppression or puberty suppression followed by cross-sex hormone therapy"); Doc. 92-8 ¶ 11.3 ("In two studies where male puberty was partially-blocked, lean body mass in young adulthood remains higher than in reference females and grip strength remains higher than in a matched cohort of transgender boys.") (footnotes omitted). In addition,

Petitioners' evidence showed that even small differences in performance translate into vastly different outcomes in athletic competitions. D.Ct. Doc. 82-1 ¶ 111 ("As serious runners will recognize, differences of 3%, 5%, or 8% are not easily overcome. During track competition the difference between first and second place, or second and third place, or third and fourth place (and so on) is often 0.5-0.7%, with some contests being determined by as little as 0.01%.").

IV. The District Court and the Ninth Circuit Hold That Arizona's Save Women's Sports Act Violates the Equal Protection Clause.

On July 20, 2023, the district court granted Respondents' request for a preliminary injunction and found that the SWSA likely violated the Equal Protection Clause as applied to Respondents. App.93A–103A. The district court applied intermediate scrutiny because it found that the SWSA discriminates against "transgender girls"—which it held was a form of sex-discrimination and discrimination against a quasi-suspect class in the Ninth Circuit. App.95A–96A.

The district court did not dispute that the SWSA's purposes of promoting fairness, safety, and equality in women's sports and of remedying past discrimination constitute "legitimate and important governmental interests." App.97A. But it found that the SWSA is not sufficiently tailored because it supposedly does not achieve its purposes as applied to transgender, biologically male athletes who take puberty blockers to avoid experiencing male puberty. *See* App.97A–101A.

Notwithstanding extensive evidence to the contrary, including Arizona's specific legislative

findings, the district court found that, "[b]efore puberty, *there are no significant differences in athletic performance between boys and girls*." App.88A (emphasis added). Yet, at virtually the same time, the district court acknowledged that there *are* performance-based differences between boys and girls before puberty. App.83A. The district court dismissed these well-established disparities, however, as "small differences," and claimed that such "minor" differences should be disregarded because they *might* be attributable to other causes, such as "greater societal encouragement of athleticism in boys" or "greater opportunities for boys to play sports." App.85A. In so holding, the district court ignored extensive evidence showing that these differences are *not* merely the result of social factors because the differences do not vary across cultures with widely varying attitudes toward female sports. *See, e.g.*, D.Ct. Doc. 82-1 ¶¶ 85–110, 113 (citing data and studies from the United States, United Kingdom, Australia, Europe, Denmark, and Colombia); D.Ct. Doc. 82-2 ¶ 151 (citing studies showing pre-pubescent male advantages from Australia, Germany, Norway, Spain, and Latvia); D.Ct. Doc. 87-3 ¶ 19 (noting that a study "found similar consistent findings across all cultures," including cultures with differing attitudes toward girls' athletics).

Petitioners appealed. Their requests for stays pending appeal were denied. App.58A, 118A. Petitioners sought initial en banc hearing, which the Ninth Circuit denied on January 4, 2024. App.60A.

On September 9, 2024, the Ninth Circuit affirmed the district court. App.52A–53A. Citing circuit precedent, including its opinion in *Hecox II*, 104 F.4th 1061, the Ninth Circuit held "that heightened scrutiny applies to laws that discriminate based on

transgender status." App.34A–35A. The court found that the SWSA purposefully discriminates against transgender individuals because the SWSA "turns entirely on a student's transgender or cisgender *status*, and not at all on factors—such as levels of circulating testosterone—that the district court found bear a genuine relationship to athletic performance and competitive advantage," App. 17A (emphasis in original), and because of the SWSA's supposed disparate impact on transgender athletes, *see* App.37A–38A. The Ninth Circuit also concluded that Arizona's decision to separate sports based on biological sex constitutes "proxy discrimination." App.39A–41A (quotations and alteration omitted). The Ninth Circuit rejected Petitioners' argument that Respondents' underinclusiveness challenge to the SWSA should be subject to rational-basis scrutiny by noting its earlier finding that the SWSA's purpose was supposedly discriminatory. *See* App. 41A–43A.

Petitioners argued that the SWSA would satisfy intermediate scrutiny, even if it applied, because it advances Arizona's interest at least 99.996 percent of the time even under Respondents' theory, since it advances Arizona's substantial interests as to every other student-athlete except transgender athletes like Respondents. App.50A. The Ninth Circuit rejected this argument by concluding that the SWSA does not affect biological boys who identify as boys because it "merely codifies preexisting rules" issued by non-governmental entities like the AIA and NCAA "barring" them from women's sports teams. App.37A n.9, 50A.

The Ninth Circuit recognized that Arizona's "interests in ensuring competitive fairness, student safety, and equal athletic opportunities for women and girls are important governmental objectives."

App.43A–44A. However, it concluded that the SWSA is not "substantially related to the achievement of those objectives." App.44A. To reach this conclusion, the court found that the SWSA "does not afford transgender women and girls equal athletic opportunities" because they cannot "play male sports," App.44A–45A; that biologically male, transgender athletes would not displace biological girls "to a substantial extent," App.46A; and "a student's transgender status," unlike biological sex, "is *not* an accurate proxy for average athletic ability or competitive advantage," App.46A–47A.

Central to this holding, the Ninth Circuit affirmed the district court's implausible finding that "[b]efore puberty, there are no significant differences in athletic performance between boys and girls." App.47A; *see also* App.47A–48A. As a result, the Ninth Circuit held that the SWSA failed intermediate scrutiny. App.48A. The Ninth Circuit acknowledged that its application of heightened scrutiny diverged from the Sixth Circuit's analysis in *L.W. ex rel. Williams* v. *Skrmetti (L.W. II)*, 83 F.4th 460 (6th Cir. 2023), *cert. granted sub nom. United States* v. *Skrmetti*, 144 S. Ct. 2679 (2024) (No. 23-477). App. 49A. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Decided an Important Question of Federal Law in an Opinion That Contradicts This Court's Precedent and Splits with Other Circuits on Multiple Issues.

The Ninth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court," and has done so "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Ninth Circuit has also "entered

a decision in conflict with the decision[s]" of other "United States court[s] of appeals on the same important matter." Sup. Ct. R. 10(a).

A. The Ninth Circuit's decision conflicts with this Court and splits with other circuits on the question whether to defer to state legislative factfinding in cases of medical or scientific uncertainty.

Under a longstanding rule, this Court "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales* v. *Carhart*, 550 U.S. 124, 163 (2007); *see also, e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195–96 (1997) (holding that "courts must accord substantial deference to the predictive judgments of Congress," and that courts "owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power"). "When Congress," or a state legislature, "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation … ." *Marshall*, 414 U.S. at 427. To be sure, this deference is not absolute, and the courts "retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake." *Carhart*, 550 U.S. at 165. But this deference to legislative factfinding is significant and "must be especially broad" in cases like this one, where "[state] officials 'undertake to act in areas fraught with medical and scientific uncertainties.'" *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting *Marshall*, 414 U.S. at 427)).

For decades, federal circuits have followed this instruction and deferred to state legislative factfinding in cases that involve significant medical or scientific uncertainty. *See, e.g.*, *Navratil* v. *City of Racine*, 101 F.4th 511, 520 (7th Cir. 2024) (rejecting a time/place/manner First Amendment challenge to COVID lockdown orders because when state "officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad'") (cleaned up); *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Cuomo*, 804 F.3d 242, 261–62 (2d Cir. 2015) (affording "substantial deference to the predictive judgments of the legislature" in applying intermediate scrutiny to firearms regulations) (quotations omitted); *Planned Parenthood Minn., N.D., S.D.* v. *Rounds*, 686 F.3d 889, 899–900 (8th Cir. 2012) (en banc) ("[T]he Supreme Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty") (quotation omitted); *Abigail All. for Better Access to Developmental Drugs* v. *von Eschenbach*, 495 F.3d 695, 713 (D.C. Cir. 2007) (rejecting a claim of terminally ill patients to access experimental drugs because "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty"); *Waterman* v. *Farmer*, 183 F.3d 208, 216 n.8 (3d Cir. 1999) (citing *Marshall* and deferring to New Jersey's state legislative factfinding regarding sex-offender rehabilitation); *United States* v. *Middleton*, 690 F.2d 820, 823 (11th Cir. 1982) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad … .").

In contrast to these decisions, the Ninth Circuit refused to defer to Arizona's explicit legislative

findings, which directly contradict the Ninth Circuit's analysis. App.47A–48A. As noted above, Arizona's legislature expressly found—consistent with common human experience—that pre-pubescent boys possess athletic advantages over pre-pubescent girls, which advantages are not attributable to pubertal increases in male testosterone. As Arizona found, "[i]n studies of large cohorts of children from six years old, '[b]oys typically scored higher than girls on cardiovascular endurance, muscular strength, muscular endurance, and speed/agility, but lower on flexibility.'" App.123A (citation omitted). Arizona further found that increased male testosterone after puberty is *not* the sole cause of athletic-performance disparities between male and female athletes: "Physiological differences between males and females relevant to sports performance 'include a larger body size with more skeletal-muscle mass, a lower percentage of body fat, and greater maximal delivery of anaerobic and aerobic energy.'" App.123A (citation omitted); *see also id.* (finding that "[m]en *also* have higher natural levels of testosterone") (emphasis added). Arizona found that "[t]he benefits that natural testosterone provides to male athletes is not diminished through the use of testosterone suppression." App.125A.

Extensive expert evidence supports these legislative findings. *See supra*, Statement of Facts. At the very least, the question whether biological boys have competitive advantages over girls before puberty that are not eliminated by puberty blockers is an issue of "medical and scientific uncertainty." *Carhart*, 550 U.S. at 163. Indeed, the Ninth Circuit repeatedly admitted as much. App.49A (recognizing that "the research in this field is ongoing and that standards governing transgender participation in sports are evolving," and that "[i]n the last few years alone, both

the NCAA and International Olympic Committee have tightened their transgender eligibility policies"); App.50A (acknowledging that "future cases may have different outcomes if the evolving science supports different findings").

Notwithstanding its recognition of "evolving" scientific uncertainty, *id.*, the Ninth Circuit's opinion directly contradicted Arizona's legislative findings. Even while recognizing that "studies show[] that prepubertal boys outperform prepubertal girls on school physical fitness tests," App.24A, the Ninth Circuit upheld and repeatedly relied on the district court's implausible finding that "[b]efore puberty, there are no significant differences in athletic performance between boys and girls" as "not clearly erroneous." App.28A; *see also* App.24A, App.47A.

In particular, the Ninth Circuit upheld and relied on the district court's erroneous findings (1) that biological boys "who receive puberty-blocking medication do not have an athletic advantage over other girls because they do not undergo male puberty and do not experience the [associated] physiological changes," App.47A; (2) that each athlete's "levels of circulating testosterone," not biological sex, are what "bear a genuine relationship to athletic performance and competitive advantage," App.17A; and (3) that "the biological driver of average group differences in athletic performance between adolescent boys and girls is the difference in their respective levels of testosterone, which only begin to diverge significantly after the onset of puberty," App.24A.

In doing so, the Ninth Circuit recognized Arizona's legislative findings to the contrary, App.19A (quoting them), but explicitly disregarded them in favor of the district court's weighing of competing expert evidence. App.28A–32A, 46A–47A. By disregarding those

legislative findings, the Ninth Circuit was not exercising its "independent constitutional duty to review factual findings where constitutional rights are at stake." App.27A (quoting *Carhart*, 550 U.S. at 165). Instead, the Ninth Circuit sided with "part of the medical community … disinclined to follow the proscription," which is "too exacting a standard to impose on the legislative power." *Carhart*, 550 U.S. at 166.

As noted above, the Ninth Circuit acknowledged that this is an area of scientific and medical uncertainty. App.49A, 50A. The Ninth Circuit also acknowledged this Court's instruction in *Carhart* that "[l]egislatures are not prohibited from acting 'in the face of medical uncertainty.'" App.49A (quoting *Carhart*, 550 U.S. at 166). But the Ninth Circuit held that deference to legislative factfinding in cases of scientific and medical uncertainty applies only in cases involving *rational-basis* scrutiny, not intermediate scrutiny: "[N]either *Carhart* nor *Skrmetti* applied heightened scrutiny, as we are obliged to do, and that standard requires the State to demonstrate an 'exceedingly persuasive justification' for a discriminatory classification … ." App.49A (quoting *Virginia*, 518 U.S. at 531, 533); *see also id.* App.49A n.15 (noting that *Carhart* and *Skrmetti* applied rational-basis scrutiny, not intermediate scrutiny, as the justification for declining to defer to Arizona's findings).

This holding was in error, and it conflicts with the decisions of this Court and the other circuits cited above. The Ninth Circuit's attempt to distinguish these cases is meritless and does not cure the conflict. Other federal circuits have applied this Court's traditional deference to legislative factfinding on issues of medical and scientific uncertainty in cases

involving not just rational-basis scrutiny, but higher levels of scrutiny, including intermediate scrutiny. *See, e.g.*, *Navratil*, 101 F.4th at 519–20 (deferring to legislative factfinding in a case involving intermediate First Amendment scrutiny of time, place, and manner restrictions, which must be "narrowly tailored to serve a significant governmental interest"); *Cuomo*, 804 F.3d at 261–62 (deferring to legislative findings in applying intermediate scrutiny to firearms regulations); *Rounds*, 686 F.3d at 899 (deferring to legislative factfinding in pre-*Dobbs* undue-burden scrutiny of abortion restrictions); *Golan* v. *Holder*, 609 F.3d 1076, 1083-85 (10th Cir. 2010) (according "substantial deference to the predictive judgments of Congress" in a case applying "intermediate scrutiny" under the First Amendment); *Mercado-Boneta* v. *Administracion del Fondo de Compensacion al Paciete ex rel. Ins. Comm'r of P.R.*, 125 F.3d 9, 13 (1st Cir. 1997) (acknowledging deference to legislative factfinding in a Contract Clause case that applied enhanced scrutiny that is "more searching that rational basis review"); *Supre* v. *Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (deferring to legislative factfinding in Eighth Amendment deliberate-indifference review); *see also Kadel* v. *Folwell*, 100 F.4th 122, 196 (4th Cir. 2024) (en banc) (Wilkinson, J., dissenting) (in a case applying intermediate scrutiny, faulting the majority for disregarding the rule that "States have wide discretion to pass legislation in areas where there is medical and scientific uncertainty") (quotations omitted). This Court's case law strongly indicates that this majority view, not the Ninth Circuit's novel view, is correct. *See Carhart*, 550 U.S. at 163 (noting that "[t]his traditional rule is consistent with *Casey*," which adopted undue-burden review instead of rational-basis scrutiny).

Thus, the Ninth Circuit's attempt to distinguish case law from *Marshall* to *Carhart* as applying deference to legislative findings only in cases involving rational-basis review conflicts with this Court's precedent and fails to cure the circuit split.

Under a proper application of this Court's precedent, the fact that Respondents' experts disagreed with Petitioners' experts should have led the Ninth Circuit to *uphold* Arizona's legislative findings, not reject them. "[I]t is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes." *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997). "[C]ourts are bound to give the legislature greater deference—not less—where the latter has undertaken to act in an area where experts disagree." *Waterman*, 183 F.3d at 216 n.8 (cleaned up). This is especially true where, as here, "[c]ommon sense tells us," *id.* at 217, that the district court's and Ninth Circuit's factual "findings" are plainly incorrect. Pre-pubescent boys and girls are *not* identical with respect to athletic competitiveness—as reflected in the near-universal practice of separating pre-pubescent boys and girls by sex in competitive sports.

B. The Ninth Circuit's opinion deepens a circuit split on the standard used to evaluate laws that allegedly classify based on gender identity.

The Ninth Circuit's decision also deepens a multi-faceted circuit split on an important question of federal law—whether gender-identity classifications trigger intermediate, or heightened, scrutiny. Indeed, the Ninth Circuit acknowledged its departure from the Sixth Circuit on this point. *See* App.49A. The split rests on three aspects of the circuits' conflicting

reasoning on whether gender-identity classifications do, or do not, trigger intermediate scrutiny.

First, the circuits are split on whether sex-based classifications trigger heightened scrutiny on the theory that "discrimination on the basis of transgender status is a form of sex-based discrimination." *Hecox II*, 104 F.4th at 1079. Where, as here, the underlying law contains an unchallenged sex-based classification, this is a split on "the character of the classification in question." *Dunn* v. *Blumstein*, 405 U.S. 330, 335 (1972).

To illustrate, the SWSA requires that sports teams be designated as male, female, or co-ed and prevents biological males from playing on female teams. App.120A. That sex-based classification, however, is not directly at issue, because all agree that it is constitutional. Respondents' claim, and the Ninth Circuit's position, is that a classification premised on biological sex involves a *second* classification premised on gender identity, which in turn constitutes a second sex-based classification subject to a second round of intermediate scrutiny.

This position erroneously conflates gender identity with biological sex. According to the Ninth Circuit, the "specific classification of 'biological sex'" in laws like the SWSA "has … been carefully drawn to target transgender women and girls, even if it does not use the word 'transgender' in the definition." *Hecox II*, 104 F.4th at 1078. By then concluding that a sex-based classification encompasses a separate classification on gender identity, the Ninth Circuit found a second sex-based classification by reasoning that "'it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex.'" *Id.* at 1079–80 (quoting *Bostock*, 590 U.S. at 660). On this front, the

Ninth Circuit is aligned with the Fourth Circuit. *See Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020). The Seventh Circuit has also cited this rationale in subjecting laws creating sex-separated bathrooms to heightened scrutiny, *see A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023), though it has "express[ed] no opinion" on whether its reasoning extends to "sports teams." *Id.* at 773.

The Eleventh Circuit disagrees. Laws like the SWSA "facially classif[y] based on biological sex—not transgender status or gender identity." *Adams*, 57 F.4th at 808. The relevant classification is biological sex, not transgender status. Thus, "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." *Id.* at 809. In a different context, the Sixth Circuit has expressed its agreement, noting that "a law does not 'classify based on sex' whenever it uses sex-related language." *L.W. II*, 83 F.4th at 482 (quotations and alterations omitted).

Second, there is a closely related split on the relevance of *Bostock* to the Equal Protection analysis. The panel here relied on *Hecox II*, *see* App. 34A–35A, which in turn relied on *Bostock* in holding that "discrimination on the basis of transgender status is a form of sex-based discrimination." 104 F.4th at 1079–80. Likewise, the Fourth Circuit applied *Bostock* to an Equal Protection challenge brought by transgender plaintiffs. *See Kadel*, 100 F.4th at 153. The Tenth Circuit has also "applied *Bostock*'s reasoning to equal protection claims." *Fowler* v. *Stitt*, 104 F.4th 770, 793 (10th Cir. 2024).

By contrast, the Sixth and Eleventh Circuits have held that "*Bostock* . . . concerned a different law (with materially different language) and a different factual

context, [so] it bears minimal relevance to the instant case." *Eknes-Tucker* v. *Gov. of Ala.*, 80 F.4th 1205, 1229 (11th Cir. 2023); *see L.W. II*, 83 F.4th at 484 (discussing why *Bostock* does not apply to an Equal Protection analysis).

Third, the circuits are split on whether transgender persons constitute a quasi-suspect class. The Ninth Circuit and the Fourth Circuit have held that they are. *See, e.g.*, App.34A–35A; *Hecox II*, 104 F.4th at 1079 (quoting *Karnoski* v. *Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019)); *Grimm*, 972 F.3d at 613. The Eighth Circuit has reserved the question, but it has suggested agreement with this view. *See Brandt ex rel. Brandt* v. *Rutledge*, 47 F.4th 661, 670 n.4 (8th Cir. 2022).

The Sixth Circuit, however, has disagreed, noting that "[t]he bar for recognizing a new suspect class is a high one." *L.W. II*, 83 F.4th at 486. Likewise, the Eleventh Circuit has twice expressed "'grave doubt that transgender persons constitute a quasi-suspect class.'" *Eknes-Tucker*, 80 F.4th at 1230 (second quotations omitted) (quoting *Adams*, 57 F.4th at 803 n.5). And the Tenth Circuit has indicated that transgender status is not a quasi-suspect class. *See Brown* v. *Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995).

C. The Ninth Circuit's decision contradicts the Second Circuit on the standard for an underinclusiveness challenge under the Equal Protection Clause.

Respondents' Equal Protection challenge in this case differs critically from a typical equal protection challenge. Arizona's statute facially discriminates on the basis of biological sex—a classification that is admittedly subject to intermediate scrutiny—yet Respondents do not challenge that classification.

App.35A n.8. Instead, Respondents argue that Arizona's creation of this facially discriminatory classification does not go far enough because Arizona (according to Respondents) was required to include *more* people in the suspect classification by including biological boys who identify as girls in its definitions of "women" and "girls." Thus, Respondents do not object to Arizona's creation of female-only sports teams. Instead, they claim that they should be included in the definition of the protected class so that they too can participate on female-only sports teams.

This is a textbook underinclusiveness challenge. Rather than challenging the existence of the suspect classification and seeking to abolish it, Respondents argue that the suspect classification should be *expanded* to include them.

Katzenbach v. *Morgan* instructs that such underinclusiveness challenges should be subject to rational-basis scrutiny, not more exacting scrutiny. 384 U.S. 641, 657 (1966). Where a plaintiff challenges only the "limitation on … relief" granted by a statutory scheme, "the closest scrutiny of distinctions in laws denying fundamental rights … is inapplicable." *Id.* "Rather," such cases "are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' that a legislature need not 'strike at all evils at the same time,' and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.* (citations omitted).

The Second Circuit followed *Katzenbach*'s logic in *Jana-Rock*, 438 F.3d at 207. Jana-Rock claimed that a race-based affirmative-action program was fatally underinclusive because it included set-asides for Hispanics of Latin American descent, but not for

Spanish-born Hispanics. *Id.* at 200–02. As here, the plaintiff did not dispute the validity of the racially discriminatory program, but instead contended that the program's definition of "Hispanic" must be expanded to include Spanish-born Hispanics. *Id.* at 206.

The Second Circuit held that the law's definition of "Hispanic" was subject to rational-basis scrutiny, not strict scrutiny. *Id.* at 209–11. The court reasoned that a challenge to the scope of a race-based program's coverage—rather than a challenge to the racial classification itself—is not subject to heightened scrutiny: "Once it has been established that the government is justified in resorting to the 'highly suspect tool' of racial or national origin classifications, strict scrutiny has little utility in supervising the government's definition of its chosen categories." *Id.* at 210 (citation omitted). "The purpose of the test is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.*; *see also, e.g.*, *Peightal* v. *Metro. Dade Cnty.*, 940 F.2d 1394, 1409 (11th Cir. 1991) (Brown, J., dissenting) ("The Equal Protection Clause does not require a state actor to grant preference to all ethnic groups solely because it grants preference to one or more groups.").

Here, Respondents' challenge is indistinguishable from the one rejected in *Jana-Rock*. By arguing that Arizona's definition of "women" and "girls" is too narrow, they do not challenge Arizona's use of the "suspect tool" of sex-based classifications, but instead challenge "the contours of the specific [sex-based] classification that the government chooses to use." 438 F.3d at 210.

The Ninth Circuit acknowledged this conflict with *Katzenbach* and *Jana-Rock*, but it sought to distinguish those cases on the ground that Arizona's statute supposedly involves purposeful, invidious discrimination. App.43A. The Ninth Circuit reasoned that this "argument rests on the flawed premise that the [SWSA] qualifies as remedial legislation," whereas the district court "found that 'the Act was adopted for the purpose of excluding transgender girls from playing on girls' sports teams.'" App.43A. "Thus," the Ninth Circuit held, "the Act is not remedial, and *Morgan* and *Jana-Rock* do not control." App.43A.

No basis for this distinction exists in the text or reasoning of *Katzenbach* or *Jana-Rock*, so the Ninth Circuit's cursory reasoning on this point does not cure the conflict of authority. Even worse, the Ninth Circuit's impermissibly lax standards for finding intentional discrimination by a state legislature create *another* split of authority and conflict with this Court's precedents. *See infra*, Part I.D.

D. The Ninth Circuit's decision contradicts decisions of this Court and other circuits on the standard for finding intentional discrimination by a state legislature.

The Ninth Circuit's decision contradicts decisions of this Court and other circuits on the standard for attributing intentional, invidious discrimination to a state legislature. This Court's cases have long emphasized that such a finding must be supported by a truly compelling showing of animus. *See, e.g., Miller* v. *Johnson*, 515 U.S. 900, 915 (1995) ("[T]he good faith of a state legislature must be presumed"); *Personnel Adm'r of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' … implies more than intent as volition or intent as awareness of

consequences."). Accordingly, other circuits have correctly held that a finding of intentional discrimination by a state legislature is permissible only when the challenged law is "inexplicable by anything but animus." *L.W. II*, 83 F.4th at 487 ("Instead of asking judges to read the hearts and minds of legislators, the inquiry asks whether the law at issue is 'inexplicable by anything but animus.'") (quoting *Trump*, 585 U.S. at 706); *Adams*, 57 F.4th at 810 (similar). Arizona's law, which reflects traditional practice and promotes fairness, safety, privacy, and equality for female athletes, is not "inexplicable by anything but animus." *Trump*, 585 U.S. at 706 (quotations omitted).

II. This Case Presents an Ideal Vehicle to Address These Important Questions.

This case presents an ideal vehicle to address these important questions of federal law, and it carries no significant vehicle problems. Further percolation is unnecessary to address these issues that have been thoroughly discussed in the courts of appeals.

This Court recently granted certiorari in *L.W.* v. *Skrmetti*, 144 S. Ct. 2679 (2024), which implicates some—but not all—of the splits of authority discussed above. *Supra*, Part I.B. At the very least, the Court should hold this petition for *Skrmetti*. For several reasons, however, the Court should grant this petition outright and address the merits without further delay.

First, this case involves a question of federal law that is crucially important in its own right—the constitutionality of the longstanding, traditional practice of separating sports teams by biological sex. This is "an important issue that this Court is likely to be required to address in the near future." *W. Va.* v.

B. P. J. ex rel. Jackson, 143 S. Ct. 889 (2023) (Alito, J., dissenting from denial of application to vacate injunction). The Ninth Circuit's novel, unprecedented constitutional right of biologically male, transgender athletes to participate on female sports' teams does not exist. The fact that two circuits have now recognized such a right presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Second, the Ninth Circuit's opinion implicates multiple conflicts of authority not presented in *Skrmetti*, including whether to defer to state legislative factfinding in cases not involving rational-basis scrutiny, whether to apply rational-basis scrutiny to Equal Protection underinclusiveness challenges, and what standard determines whether a state legislature engaged in intentional discrimination. *See supra*, Parts I.A, I.C, I.D. This case presents a clean opportunity to resolve these splits of authority.

Third, this Court's decision of *Skrmetti* may not resolve the ultimate question at stake in this case. For example, after the Sixth Circuit's decision in *L.W.* v. *Skrmetti*, a district court in the Sixth Circuit held that separating sports by biological sex violates the Equal Protection Clause. *L.E. ex rel. Esquivel* v. *Lee*, 2024 WL 1349031, at *14–*20 (M.D. Tenn. Mar. 29, 2024). That district court cited the Ninth Circuit's decision in *Hecox I* to conclude that limiting participation in sports to biological sex "'is, constructively, facial discrimination against'" transgender people. *Id.* at *15 (quoting *Hecox* v. *Little (Hecox I)*, 79 F.4th 1009, 1024 (9th Cir. 2023)). This case, therefore, presents disputes that show strong indications of continuing regardless of the outcome of *Skrmetti*.

Fourth, further percolation is not necessary to decide these questions. The Fourth and Ninth Circuits have issued lengthy opinions on the question, and the Second, Sixth, Seventh, and Eleventh Circuits have issued detailed opinions on related disputes. The underlying circuit splits discussed above, *supra* Part I.A-D, are well-developed and do not require additional percolation to flesh out the issues.

Fifth, this case presents no significant vehicle problems. On the contrary, it involves a particularly well-developed, focused factual record, including extensive expert evidence on both sides, and lengthy, detailed opinions by both the district court and the Ninth Circuit.

Sixth, delay in deciding these issues will inflict ongoing injury on the States in the Fourth and Ninth Circuits, and it will wrongfully tilt the playing field of public debate on a vexing question of social policy. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Further, leaving the Ninth Circuit's decision in place grants a significant, unwarranted advantage to advocates on one side of the ongoing, rapidly evolving debate. The Ninth Circuit "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 392 (1992).

Seventh, review now will eliminate uncertainty by ensuring that state policymakers know whether they may separate sports by biological sex. Laws like Title IX have provided a "beneficial legacy for girls and

women in sports." *Adams*, 57 F.4th at 821 (Lagoa, J., specially concurring). "[R]emoving distinctions based on biological sex from sports, particularly for girls in middle school and high school, harms not only girls' and women's prospects in sports, but also hinders their development and opportunities beyond the realm of sports—a significant harm to society as a whole." *Id.*

CONCLUSION

This petition for a writ of certiorari should be granted.

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Respectfully submitted,

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