No. 24-449

IN THE
Supreme Court of the United States

WARREN PETERSEN, PRESIDENT OF THE ARIZONA SENATE, *ET AL.*, *Petitioners*,
v.
JANE DOE, BY NEXT FRIENDS AND PARENTS HELEN DOE AND JAMES DOE, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of America's Future, Public Advocate of the United States, Leadership Institute, U.S. Constitutional Rights Legal Def. Fund, Fitzgerald Griffin Foundation, and Conservative 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, Leadership Institute, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin 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. These *amici* previously filed *amicus* briefs in support of petitions for certiorari defending laws in Idaho and West Virginia similar to Arizona's law at issue here. *See Little v. Hecox*, No. 24-38, Brief *Amicus Curiae* of America's Future, *et al.* (Aug. 14, 2024); *West Virginia v. B.P.J.*, No. 24-43, Brief *Amicus Curiae* of America's Future, *et al.* (Aug. 15, 2024).

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; 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

In 2022, Arizona enacted the "Save Women's Sports Act." *See* Ariz. Rev. Stat. § 15.120.02. The law prohibits biological males from competing on interscholastic women's and girls' teams in Arizona schools, restricting biological males to men's and boys' teams and teams in designated mixed sports. *Doe v. Horne*, 2024 U.S. App. LEXIS 22847, *16-17 (9th Cir. 2024) ("*Doe*"). The law was challenged by biological males wishing to participate in girls' sports in Arizona schools. *Id*. at *22.

The district court issued a preliminary injunction against enforcement of the Act against the respondents, holding that they were likely to succeed on their Fourteenth Amendment's equal protection claims and their Title IX claims. *Id*. at *25-26. The Ninth Circuit affirmed the preliminary injunction on the equal protection grounds, determining it was not necessary to reach the Title IX claims. *Id*. at *62-63.

SUMMARY OF ARGUMENT

The Arizona Save Women's Sports Act was enacted to protect women's sports as a logical consequence of the reasonable factual findings of the legislature. The Ninth Circuit rejected any argument that the Act was reasonable and well motivated, preferring to deem it an act of invidious discrimination born of animus. The Ninth Circuit grounded its opinion on the notion that the new concept of transgenderism must completely displace the concept of biological sex. It views all distinctions in law between males and females as

inherently suspect if they are not subordinated to transgender identity.

The Equal Protection Clause of the Fourteenth Amendment was written into the Constitution to ensure that African Americans would have the same rights as white persons — not to overturn age-old distinctions in law based on the most eternal and enduring aspect of humans — biological sex.

The circuit court believed that "heightened scrutiny" was required. There is nothing in the text, history, or relevant ratification era tradition of the Equal Protection Clause that demonstrates that it should govern women's sports. Even where special rights have been granted to homosexuals, that decision was based on the notion that homosexuality is an inherent and immutable characteristic like race. In stark contrast, transgenderism is based on "feelings" and how one currently "identifies" which are the polar opposite of an immutable characteristic.

The district court decision was based on the Standards of Care published by the World Professional Association for Transgender Health ("WPATH"). Despite its noble-sounding name, that organization has been exposed as having been more a political player in the transgender wars than a neutral medical organization focused on actual health issues. If it had a focus on health, it would be concerned about the girls who it believes should be subjected to unfair and dangerous competition. The district court assumed that WPATH's pronouncements were reliable, but a review of its actions demonstrate that WPATH has

tailored its standards to facilitate wins in court, such as in the *BPJ* and *Hecox* cases, as well as this case.

ARGUMENT

I. THE ARIZONA SAVE WOMEN'S SPORTS ACT IS FIRMLY GROUNDED IN REALITY AS SHOWN BY CLEAR LEGISLATIVE FINDINGS.

The Arizona Save Women's Sports Act, enacted in 2022, was designed to respond to a problem that had arisen across the country. Certain biological males were "identifying" as females and seeking to compete unfairly in girls and women's sports. The Arizona law was predicated on clear legislative findings, including the following:

> 3. "[B]iological differences between males and females are determined genetically during embryonic development";
> 4."Secondary sex characteristics that develop during puberty . . . generate anatomical divergence beyond the reproductive system, leading to adult body types that are measurably different between sexes";
> 5. There are "'[i]nherent differences' between men and women," and that these differences "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." United States v. Virginia, 518 U.S. 515, 533 (1996);
> 6. 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";
> 7. 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";
> 8. Men also have higher natural levels of testosterone, which affects traits such as hemoglobin levels, body fat content, the storage and use of carbohydrates, and the development of Type 2 muscle fibers, all of which result in men being able to generate higher speed and power during physical activity;
> 9. There 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"; and
> 14. Having separate sex-specific teams furthers efforts to promote sex equality by providing opportunities for female athletes to demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain recognition, accolades, college scholarships and the numerous other long-term benefits that flow from success in athletic endeavors. [2022 Ariz. S.B. 1165, Sec. 2 (citations omitted).]

Accordingly, § 15-120.02 first provides that each sports team would be designated either for males, females, or mixed, and then provides:

> B. Athletic teams or sports designated for "females," "women," or "girls" may not be open to students of the male sex.

The simple rule enacted by the legislature is the logical outgrowth and natural consequence of the collective wisdom of the ages, actual science, and the best interests of female athletes. The Ninth Circuit could not see the logic behind the statute, being blinded by the political and religious dogma of "transgenderism."

Since males have an inherent and intractable advantage over females in school sports, it is logical, and indeed essential, that males would be excluded from sports designated for females. This is all that this law does. The Ninth Circuit rushes to revise the law of Equal Protection to protect the Left's newest oppressed class. Thus, the court imputes animus to the Arizona legislature, as that is what is required for the Court to claim for itself power to root out what transgender ideology views as bigotry. The law applies to all males, regardless of their so-called "gender identity." Although there may be some "cisgender" males who would want to play on the girls' teams,[2] the law applies to them as well.

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[2] Rather, in years gone by, most boys and men find competing with girls profoundly unfair and indeed unmanly. "Iowa High School Wrestler Defaults Match So He Wouldn't Face Girl," *AP* (Feb. 17, 2011) ("A standout Iowa high school wrestler refused to compete against a girl at the state tournament ... relinquishing any chance of becoming a champion because he says wrestling a girl would conflict with his religious beliefs.").

Women should be protected from those males who take their place on the podium, knowing full well that their victory is largely due to biology, not ability. The fact that such an act is not considered shameful, rather than constitutionally protected, tells us much of where the Ninth Circuit is ideologically. Consider the fairness of University of Pennsylvania swimmer Lia (formerly William) Thomas, who first competed as a male before switching to compete as a female.

> During the last season Thomas competed as a member of the Penn **men's team**, which was 2018-19, she ranked **554th** in the 200 freestyle, **65th** in the 500 freestyle and **32nd** in the 1650 freestyle. As her career at Penn wrapped, she moved to **fifth**, **first** and **eighth** in those respective events on the **women's deck**. [J. Lohn, "A Look at the Numbers and Times: No Denying the Advantages of Lia Thomas," *Swimming World Magazine* (Apr. 5, 2022) (emphasis added).]

In truth, everyone should be able to understand the reasons that the Arizona legislature acted — except for those whose intellect has been captured by the Cult of Transgenderism,[3] a political and religious

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[3] *See, e.g.,* D. Kennedy, "Anguished parents of trans kids fight back against 'gender cult' trying to silence them," *New York Post* (May 11, 2022); A. Hendershott, "How long can the cult of transgenderism last?" *The Catholic World Report* (Apr. 23, 2022); K. Hayes, "Gender Ideology's True Believers," *Quillette* (May 19, 2022); R. Butterfield, "What is Transgenderism?" *Ligonier.org* (June 24, 2024); J. Cahn, The Return of the Gods (Frontline: 2022).

theory which seeks to completely displace biological reality with subjective and transitory "feelings" about identity.

II. THE NINTH CIRCUIT OPINION IS FOUNDED ON UNEXAMINED PRESUPPOSITIONS.

The operative text of the Arizona law makes a distinction based on one of, if not the most, well-established classifications existing in the natural world — the difference between men and women. Perhaps for that reason, the statute's text received little attention from the court. Although the operative provisions of the statute made no reference to so-called transgenderism, that was the only focus of the Ninth Circuit. The Ninth Circuit gave the legislative findings no deference, but rather assumed the role of a super-legislature, dismissing facts that supported the statute. Actually, the legislative findings are significant irrespective of whether the Ninth Circuit agreed with them, because they clearly demonstrated a laudable objective for the statute — and completely undermined the unsupported claims made by the court of invidious discrimination. *See Doe* at *43.

Even though the operative provisions of the law were based on the legislative findings, the court found nothing but malice because:

> Arizona's trangender ban discriminates on its face based on transgender status. This conclusion is consistent not only with common sense — there is simply no denying that a

> transgender sports ban discriminates based on transgender status — but also with the decision of other courts, which have held that transgender sports bans ... discriminate on their face against transgender women and girls. [*Id*. at *45-46.]

Until a few years ago, before the Ninth Circuit got "woke" on Transgenderism, the court likely would have described the Act quite differently: "the purpose of the Act was to categorically **ban men** from public sports teams designated for **females**." Naturally, the Ninth Circuit could not phrase the issue in that way because of its fashionable political presuppositions, which reject science and the common understanding of all humankind since the Garden of Eden.[4] This is the way that it always has been, and still is, until the Cult of Transgenderism arrives on the scene. The fact that this Cult is spreading is not a reason to indulge its destructive political agenda and those suffering from the mental condition of "gender dysphoria," for if it is allowed to spread, it threatens to completely destroy women's sports.

To be sure, the Arizona law distinguishes between males and females, but that does not violate the Equal Protection Clause, and the fact some people have gender dysphoria does not change this rule. Males and females are different in ways highly relevant to sports. The law says nothing about whether the males barred from the female teams are transgender or cisgender or

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[4] *See Genesis* 1:27, 2:20-23.

otherwise. If there is a problem to be found in the Arizona law, it is in the eye of the beholder — not the Arizona legislature.

In states where it is permitted, they can unfairly compete against females and take home the trophies and college scholarships based largely on their inherent biological advantages, rather than their hard work and achievements. And they can do damage to women participating in sports.

Real danger to women athletes exists at the high school level. Payton McNabb was spiked in the face by a male competing with the women. Her testimony before the North Carolina legislature illustrates the harm the Arizona law was designed to prevent.

> McNabb indicated that, to this day, she is still recovering from her injuries, and continues to face other health struggles as a result of what happened, such as impaired vision, partial paralysis on the right side of her body, constant headaches, anxiety and depression. [5]

Thus, to rule against Arizona, the Ninth Circuit took a straightforward law designed to accomplish a straightforward objective of protecting women in sports, and twisted it to impute malice and animus to the Arizona state legislature. The Ninth Circuit obviously cares more about political correctness than

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[5] A. Schemmel, "Injured volleyball player speaks out after alleged transgender opponent spiked ball at her," *ABC 13 News* (Apr. 21, 2023).

women athletes, but there is no constitutional authority for that court to negate the actions of the Arizona legislature.

Finally, other sports governing bodies have seen the damage that male athletes can unfairly do to female athletes and are beginning to adopt rule changes to protect them.[6] Will this Court be less sensitive to the protection of women than the North American Grappling Association?

III. THE CIRCUIT COURT EXTENDED THE EQUAL PROTECTION CLAUSE TO PROTECT "TRANSGENDER RIGHTS" WITHOUT ANY CONSIDERATION OF ITS TEXT, HISTORY, OR TRADITION.

A. The Circuit Court Erroneously Believed It Was Required to Use Heightened Scrutiny.

The Ninth Circuit asserted as an unquestionable truth that the Arizona Act "discriminates on its face based on transgender status." *Doe* at *45. Had the court stated the issue correctly — "the Act discriminates against all men by excluding them from female designated sports" — it would have had an insurmountable problem striking it down, as it is unlikely it would find that the Arizona legislature exhibited invidious discrimination against "all men."

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[6] *See also*, M. Koenig, "Martial arts competition changes rules after female fighters pull out over safety fears after facing trans grapplers," *New York Post* (Oct. 31, 2023).

Further, "all men" is not, and is never likely to be deemed, a suspect class such as race, national origin, and religion, triggering strict scrutiny. Neither would "all men" ever be designated as a quasi-suspect class, triggering intermediate scrutiny.

The court below cited *United States v. Virginia*, 518 U.S. 515, 555 (1969) ("*VMI*") in its application of "heightened scrutiny." *Doe* at *49-50. Even if one believes heightened scrutiny was properly applied to help women's education by integrating male-only VMI, it certainly does not fit here where its use would harm women by allowing men to compete unfairly against them in women's sports.

In one of his classic dissenting opinions, Justice Scalia exposed the completely arbitrary nature of the Court's use of the "equal protection clause":

> [O]ur current equal protection jurisprudence ... regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely **up to us which test will be applied** in each case. [*VMI* at 567 (Scalia, J., dissenting) (emphasis added).]

Justice Scalia asserted that the *VMI* court was writing its educational preferences "into the Constitution ... by application of custom-built 'tests.'

This is not interpretation of a Constitution, but the creation of one." *VMI* at 570. Justice Scalia explained that this Court not only was trying to re-shape the nation according to the Justices' political views, but changing tests it applies on the fly. For most of our history, no one dreamed that single-sex education was a problem:

> The tradition of having government-funded **military schools for men** is as well **rooted in the traditions** of this country as ... sending only men into military combat. The people may decide to change one tradition ... but the assertion that either tradition has been unconstitutional through the centuries is **not law, but politics-smuggled-into-law**. [*Id.* at 569 (emphasis added).]

Along the way, the Court settled on intermediate scrutiny to decide such challenges. In *Clark v. Jeter*, 486 U.S. 456, 461 (1988), Justice O'Connor stated for a unanimous Court, that we evaluate a statutory classification based on sex under a standard "[b]etween the extremes of rational basis review and strict scrutiny." *Id.* Yet in *VMI*, even intermediate scrutiny was deep-sixed in favor of "heightened scrutiny."

Now, after *VMI*, the Ninth Circuit believes this Court requires it to use "heightened scrutiny." This progression demonstrates that when judges analyze "equal protection," they do not conduct a search for

authorial intent of the clause,[7] but rather some see a grant of unlimited authority to courts to decide public policy questions. Yesterday, intermediate scrutiny; today, heightened scrutiny; tomorrow, who knows?

In truth, the Equal Protection Clause provides no guidance at all on the issue of men participating in women's sports. In finding that it does, however, the Ninth Circuit exercised raw and arbitrary federal power the Framers of our Constitution sought to end. This is not the rule of law, but of men, and it is causing the judiciary to lose the confidence of the people.

B. The "Tiers of Scrutiny" Approach Leads to Constitutionally Unfaithful Results.

The Ninth Circuit's use of tiers of scrutiny in this Equal Protection challenge is exactly what this Court has termed a **"judge-empowering interest-balancing inquiry**." *See District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). Under heightened scrutiny, the balancing test includes considering whether the State has presented an "'**exceedingly persuasive' justification**" for its classification. *Doe* at *50 (emphasis added). Is the desire to protect women in women's sports "exceedingly persuasive?" Is the fact that the law prevents some men who suffer from gender dysphoria from unfairly competing against women "exceedingly persuasive?" These are political, not legal questions, unrelated to any meaningful interpretation of constitutional text.

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[7] *See* E.D. Hirsch, Validity in Interpretation at vii, 1, 5, 212-23 (Yale Univ. Press: 1973).

In *Heller*, and again in 2022, this Court declared a method to achieve constitutionally faithful resolution for challenges under the Second Amendment right to keep and bear arms. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*. 597 U.S. 1 (2022). If conduct being restricted comes within the Amendment's plain text, courts must strike down the regulation of that conduct unless the government demonstrates it comports with the history of gun regulations that existed around the time of the Amendment's adoption. In these Second Amendment cases, this Court expressly "relied on text and history," and "did not invoke any means-end test such as strict or intermediate scrutiny." *Bruen* at 22.

Unfortunately, this Court's Equal Protection jurisprudence has been largely oblivious to the Amendment's text and history. This Court's manufactured "tiers of scrutiny" allows it to create out of whole cloth new "rights" never envisioned by the Framers of the Fourteenth Amendment. During oral argument in *District of Columbia v. Heller*, Chief Justice Roberts quite properly noted, "these standards ... just kind of developed over the years as sort of baggage that the First Amendment picked up."[8] In *Heller*, their use was ended for Second Amendment challenges. They should also be ended for Equal Protection challenges.

Tiers of scrutiny enable judges to obscure the arbitrariness of decisions with a patina of judicial

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[8] Statement of Roberts, C.J., Tr. of Oral Arg. at 44, *Dist. of Columbia v. Heller*, 554 U.S. 570 (U.S. Supreme Court No. 07-290).

rhetoric, and determine the scope of a particular constitutional right based on little more than each "judges' assessments of its usefulness." *Heller* at 634. As Professor Richard H. Fallon, Jr. has correctly noted, "The words 'strict judicial scrutiny' appear nowhere in the U.S. Constitution. Neither is there ... any foundation in the Constitution's original understanding, for the modern test under which legislation will be upheld ... only if ... 'narrowly tailored' to promote a 'compelling' governmental interest."[9]

As then-Judge Kavanaugh once noted, "Strict and intermediate scrutiny tests are not employed in the Court's ... application of many other individual rights provisions of the Constitution." *Heller v. District of Columbia*, 670 F.3d 1244, 1283 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). He laid out a long list of rights regarding which this Court has never applied "balancing," including rights to jury trial and against self-incrimination and cruel and unusual punishment. *Id.* In the Equal Protection context, courts have used tiers of scrutiny to divine "rights" that the Framers of the Fourteenth Amendment would never have dreamed about. This Court should take this opportunity to follow the example of *Heller* and *Bruen* to interpret the Equal Protection Clause based on text, context, history, and tradition.

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[9] R. Fallon, "Strict Judicial Scrutiny," 54 UCLA L. REV. 1267 (2006-2007).

C. The Text and History of the Equal Protection Clause Leave No Room for Imposing "Transgender Care" Requirements on States.

As this Court recognized 150 years ago, the Fourteenth Amendment (including its Equal Protection Clause) was designed to ensure equal treatment for African Americans *vis a vis* white citizens. The Court found it "necessary to look to the purpose which we have said was the pervading spirit of them all, **the evil which they were designed to remedy**...." *Slaughter-House Cases*, 83 U.S. 36, 72 (1873) (emphasis added). Addressing specifically the Equal Protection Clause, this Court noted:

> In the light of the history of these amendments, and the pervading purpose of them, ... it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was **the evil to be remedied** by this clause.... [*Id*. at 81 (emphasis added).]

A review of the debates over the Fourteenth Amendment, and its immediate predecessor the Civil Rights Act of 1866, makes clear that preventing unequal treatment by race was the purpose of its Framers. Radical Republican leader Rep. Thaddeus Stevens stated for history the Amendment's purpose:

"Whatever law protects the white man shall afford 'equal' protection to the black man."[10]

D. "Transgender" Advocates Seek to Adopt the Strategy Employed by Homosexuals to Achieve Constitutional Protections.

Legal protections designed especially for homosexuals logically do not apply to transgender persons. For years, the dominant narrative has been that homosexuals possess an immutable trait — that homosexuality is inherent in a person, like race. Homosexuals are "born that way,"[11] and no persons should be discriminated against because of their immutable nature. Assuming, *arguendo*, that homosexuality is inherent and unchangeable, that claim has helped justify special rights being bestowed upon homosexuals.

The notion of immutability does not relate to "transgender persons." After all, the essence of "trans" is that it is based on "gender identity" which can change. It is based on feelings and self-perception of "identity." A Harvard Medical School publication makes a desperate attempt to explain terms that never existed before and which most find impenetrable: "Gender fluidity refers to change over time in a

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[10] A. Kelly, "The Fourteenth Amendment Reconsidered, The Segregation Question," 54 MICH. L. REV. 1049, 1078 (1955-1956).

[11] *See generally* Joanna Wuest, Born This Way: Science, Citizenship, and Inequality in the American LGBTQ+ Movement (Univ. Chicago Press: 2023).

person's gender expression or gender identity, or both. That change might be in expression, but not identity, or in identity, but not expression. Or both expression and identity might change together."[12]

With homosexuality, we are told it is all about biology. With transgenderism, we are told biology is irrelevant. Those are very different concepts. One thing that is certain: transgender status is not an immutable characteristic justifying suspect class treatment such as race.[13]

Another suspect classification is being a class of persons politically powerless to protect themselves — thereby giving the group victim status.[14] The trans movement is attempting to follow the victimhood strategy set out 35 years ago by two leaders of the homosexual movement, which has been adopted by the transgender movement. Theologian Albert Mohler explains: "Authors Marshall Kirk and Hunter Madsen combined psychiatric and public relations expertise in devising their strategy. Kirk, a researcher in neuropsychiatry, and Madsen, a public relations consultant, argued that homosexuals must change their presentation to the heterosexual community if

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[12] S. Katz-Wise, "Gender fluidity: What it means and why support matters," *Harvard Health Publishing* (Dec. 3. 2020).

[13] *See, e.g.*, "4 out of 5 kids who question gender 'grow out of it': Transgender expert," *New York Post* (Feb. 22, 2023).

[14] *See United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938) ("discrete and insular minorities").

real success was to be made."[15] Mohler explains the strategy:

> **Portraying homosexuals as victims** was essential to their strategy. Offering several principles for tactical advance in their cause, the authors called upon homosexuals to "portray gays as victims of circumstance and depression, not as aggressive challengers." This would be necessary, they argued, because "gays must be portrayed as victims in need of protection so that straights will be inclined by reflex to adopt the role of protector." [*Id*.]

The authors of that strategy were candid that they sought to take advantage of the plague of AIDS:

> As cynical as it may seem, AIDS gives us a chance, however brief, to **establish ourselves as a victimized minority legitimately deserving of America's special protection and care**.
>
> The campaign we outline in this book, though complex, depends centrally upon a program of **unabashed propaganda**, firmly grounded in long-established principles of **psychology and advertising**. [Marshall Kirk & Hunter Madsen, After the Ball: How America Will Conquer Its Fear & Hatred of Gays in the 1990's (Doubleday: 1989) at xxv-xxvi (emphasis added).]

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[15] A. Mohler, "After the Ball - Why the Homosexual Movement Has Won," *Albert Mohler.com* (undated).

Today, many homosexuals are among the most wealthy and politically powerful members of the society, but the benefits of the early victimhood strategy remain.[16] As that manipulative strategy once worked for homosexuals, it is being trotted out once again.

IV. THE DISTRICT COURT'S FINDINGS OF FACT RELIED ON THE FABRICATED VIEWS OF WPATH.

A. The District Court's Decision Was Based on WPATH Standards of Care.

It is important to examine the foundational source of these counter-intuitive, transgender notions of how gender supplants sex. The Circuit Court noted that "[t]he generally accepted medical practice is to treat people who suffer from gender dysphoria with 'necessary, safe, and effective' gender-affirming medical care," citing the district court's findings. *See Doe* at *52 n.13. The district court explained that:

> 10. The major associations of medical and mental health providers in the United States, including the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, and the

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[16] *See, e.g.*, B. Glassman, "Same-Sex Married Couples Have Higher Income Than Opposite-Sex Married Couples," *Census.gov* (Sept. 17, 2020); T. Ring, "Get to Know Biden's Many LGBTQ+ Appointed Officials," *The Advocate* (June 10, 2021).

> Pediatric Endocrine Society, have endorsed medical standards of care for treating gender dysphoria in adolescents, which were **developed by the World Professional Association for Transgender Health ("WPATH")** and the Endocrine Society. [*Doe v. Horne*, 683 F. Supp. 3d 950, 957-58 (D. Ariz. 2023) (emphasis added).]

WPATH's views have been accepted as authoritative — even unquestionable — by numerous courts. WPATH, according to its website, creates "internationally accepted Standards of Care (SOC) ... to promote the health and welfare of transgender, transsexual and gender variant persons...."[17] The prior revision of the SOC guidelines, SOC-7, was released by WPATH in 2012, and was updated with SOC-8 in 2022.[18] It is these SOC which the courts below, along with the Fourth Circuit and a number of other courts, viewed as the authoritative scientific standard.

Having accepted the authority of WPATH, the district court repeated the mistake this Court made in *Roe v. Wade,* 410 U.S. 113 (1973), which made a legal ruling based on politicized "experts." When *Roe* was overturned in 2022, this Court properly criticized its previous decision for relying on the "expertise" of activists devoted to skewing the debate. "**Relying on**

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[17] WPATH, "Mission and Vision," *WPATH.org*.

[18] M. Cooper, "The WPATH guidelines for treatment of adolescents with gender dysphoria have changed," *MDEdge.com* (Oct. 17, 2022).

two discredited articles by an **abortion advocate**, the Court erroneously suggested — contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority — that the common law had probably never really treated post-quickening abortion as a crime." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 272 (2022) (emphasis added).

B. WPATH Subordinates Medicine and Science to Politics and Litigation Priorities.

WPATH is not a neutral scientific organization. It is an active combatant in the culture wars. WPATH has been concisely described as "a hybrid professional and activist organization, where activists have become voting members."[19] As James Esses of the British "Thoughtful Therapists Network" puts it:

> [t]here have long been concerns that the organisation acts more as a partisan lobby group underpinned by gender ideology, instead of a body driven by medical evidence. Many of the senior members of WPATH identify as "trans" or "non-binary" themselves or are gender activists.[20]

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[19] L. MacRichards, "Bias, not evidence dominates WPATH transgender standard of care," *Canadian Gender Report* (Oct. 1, 2019).

[20] J. Esses, "What's wrong with WPATH version 8?" *Sex-Matters.org* (Sept. 20, 2022).

The WPATH committee that produced the current SOC-8 guidelines is dominated by those with obvious conflicts of interest:

> All of them either receive income based on recommendations in the guidelines, work at clinics or universities who receive funds from advocacy groups, foundations, or pharmaceutical companies who heavily favour a certain treatment paradigm, or have received grants and published papers or research in transgender care.[21]

C. Discovery Elsewhere Has Revealed WPATH'S Politicization and Conflicts of Interest.

Ongoing litigation in federal court in Alabama has uncovered evidence that WPATH is far more driven by politics and profits than science. A report provided by Dr. James Cantor, Ph.D., exposes internal WPATH communications admitting that WPATH **changed the recommendations** in SOC-8, under pressure from the Biden administration, and **at the urging of attorneys hoping to use the SOC in courts** against states like Alabama that seek to protect children from irreversible and damaging surgeries and puberty blocker "treatments."

WPATH presents to the public the appearance of scholarly unanimity, while at least some WPATH

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[21] L. MacRichards, *supra*.

stakeholders harbor grave doubts about the safety and efficacy of irreversible surgical and puberty blocker treatments, and whether young children can even give informed consent.

Dr. Cantor states that "[m]embers of the Guideline Development Group acknowledged that there is no consensus among treatment providers regarding the use of puberty blockers."[22] One wrote, "I think *there is no agreement on this within pediatric endocrinologists*, what is **significant risk** especially balanced against the benefits of e.g. **thinking time which can be very important for a 14 year old.**" *Id.* (bold added).

Other members "of the WPATH Guideline Development Group repeatedly and explicitly lobbied to **tailor language of the guidelines for the purposes of influencing courts** and legislatures, and to strengthen their own testimony as expert witnesses." *Id.* at vi (emphasis added). Although names were redacted from the communications, one SOC guideline developer stated:

> *I am concerned about language such as '**insufficient evidence**,' 'limited data,' etc… I say this from the perspective of current **legal challenges** in the US.* Groups in the US are trying to claim that gender-affirming interventions are experimental and should only be performed under research protocols

[22] Appendix A to supplemental expert report of James Cantor, Ph.D., *Boe v. Marshall*, Case No. 2:22-cv-00184, Dkt. 591-24, p. ii (M.D. Ala. 2024).

> (*this is based on two recent federal cases in which I am an expert witness*). In addition, these groups already assert that research in this field is low quality (ie [sic] small series, retrospective, no controls, etc.…). My specific concern is that this type of language (insufficient evidence, limited data, etc...) will empower these groups.... [*Id.* (bold added).]

Another member wrote, "I think we need a more detailed defense that we can use that can respond to academic critics and that *can be used in the many court cases that will be coming up*." *Id.* And yet another wrote, "Here are a number of my thoughts which may be *helpful for Chase and the legal team*." *Id.* (Chase Strangio is Deputy Director for Transgender Justice with the ACLU's LGBT & HIV Project). Another wrote, "*There are* ***important lawsuits happening*** *right now in the US, one or more of which* ***could go to the Supreme Court****, on whether trans care is medically necessary vs experimental or cosmetic. I cannot overstate the importance of SOC 8 getting this right at this important time*." *Id.* at vii (bold added).

Dr. Cantor notes, "Members of the WPATH Guideline Development Group went so far as to explicitly advocate that SOC 8 be written to maximize impact on litigation and policy *even at the expense of scientific accuracy*." *Id.* One wrote, "*My hope with these SoC is that they land in such a way as to have serious effect in the law and policy settings* that have affected us so much recently; *even if the wording isn't quite correct* for people who have the background you and I have." *Id.*

D. The Federal Government Has Pressured WPATH.

The internal communications reveal that WPATH was intensely pressured by Biden administration officials to change its SOC-8 recommendations to suit the administration's policy preferences. One WPATH contributor wrote, "I have just spoken to Admiral Levine today, who — as always is extremely supportive of the SOC 8, but also very eager for its release — so to ensure integration in the US health policies of the Biden government." *Id.* at viii.[23]

Another wrote, "I am meeting with Rachel Levine[24] and her team next week, as the US Department of Health is very keen to bring the trans health agenda forward." *Id.* Another stated, "[T]his should be taken as a charge from the United States government to do what is required to complete the project immediately." *Id.*

Now that WPATH's SOC have been debunked, both the district court's and the circuit court's opinions are revealed to be based on a house of cards.

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[23] Levine is an Admiral in the U.S. Public Health Service Commissioned Corps, not in the armed services.

[24] Admiral Rachel Levine, born Richard Levine and the father of two grown children, "transitioned" in 2011, and then divorced his wife Martha Levine in 2013.

CONCLUSION

The Ninth Circuit has incorrectly decided an important question of federal law because it erroneously believed the issue had been resolved by this Court. The same issue has arisen in the Fourth Circuit and other circuits. Granting certiorari in this case as well as in *Little v. Hecox* and *B.P.J. v. West Virginia* would allow the issue of state laws protecting girls' and women's school sports to be settled by this Court.

Respectfully submitted,

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