No. 24-38; 24-43

IN THE

Supreme Court of the United States

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho, et al.

Petitioners,

v.

LINDSAY HECOX, et al.,

Respondents.

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

B.P.J., BY NEXT FRIEND AND MOTHER, HEATHER JACKSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national civil liberties organization that provides education and legal representation on issues relating to religious liberty, the sanctity of human life, and the family. Liberty Counsel has been substantially involved in the intersection of religious liberty and LGBTQ-related issues, including the precise issues presented in this case. Amicus has an interest in ensuring that the Constitution and laws of the Republic maintain their intended meaning commonly understood at the time and in the context of their adoption, which in this case is a common-sense recognition of the realities of biological sex at birth.[2]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Bostock was never intended to be a one-size-fits-all opinion. This Court made clear it did not "prejudge" or "purport to address bathrooms, locker rooms, or anything else of the kind." *Bostock* v. *Clayton Cnty., Ga.*, 590 U.S. 644, 681 (2020). Even still, jurists and scholars alike were concerned that the Court's

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[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

[2] Amicus would like recognize the contribution and assistance of Stephen J. Nast, and the law students in the Supreme Court and Appellate Clinic at Liberty University School of Law, Nathaniel Brotzman, Rae'Lee Klein, Nikolay E. Michalowskij, and Tristan Minguez, who contributed to the research and development of this brief.

rationale would be used to resolve the issues in the case at bar. See, *e.g.*, *id.* at 727–28 (Alito, J., dissenting) (predicting that the Court's decision would be used in the context of women's sports); Rena M. Lindevaldsen, *Bostock v. Clayton County: A Pirate Ship Sailing Under a Textualist Flag*, 33 Regent U. L. Rev. 39, 69–70 (2020) (concluding that courts would find *Bostock* to be "strong evidence that prohibiting men who identify as women from competing on women's teams constitutes sex discrimination."). And these predictions have become reality. Lower courts have used *Bostock*'s rationale in the context of sex-segregated bathrooms, healthcare programs, and, of course, female sports. See, *e.g.*, *A.C. by M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023) (finding that *Bostock*'s reasoning applies to a Title IX challenge of sex-segregated bathrooms "just as it [does] for Title VII purposes"); *Kadel* v. *Folwell*, 100 F.4th 122 (4th Cir. 2024) (applying *Bostock* to healthcare); *Hecox* v. *Little*, 104 F.4th 1061, 1079–80 (9th Cir. 2024) (using *Bostock* to apply heightened scrutiny in an Equal Protection Clause challenge to a sex-segregated sports policy).

While the Court should, in an appropriate case, revisit its decision in *Bostock*, it is not necessary to resolve these cases. As this Court has previously stated, "Title VII * * * is a vastly different statute from Title IX[.]" *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). The Court needs to look no further than the texts of the two statutes to see how different they are. While this Court held that Title VII contains a but-for causation standard for discrimination, see *Bostock*, 590 U.S. at 656, Title IX's

"on the basis of sex" language requires a stricter purpose for discrimination. See p. 8, *infra*.

But even more than just the language of the statutes, the intention behind Title IX was that athletic opportunities would "substantially expand * * * for *women* to participate and compete at all levels." 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (emphasis added). Accordingly, because the goal is to increase female participation in sports, it is wholly consistent with Title IX to exclude biological males from spaces designated for females. This is not the same as segregating black individuals and females from the workplace. Unlike Title VII, which recognizes there are no inherent differences in the workplace between males and females or people of color, Title IX recognizes that there are inherent physiological differences between males and females that stem from biological differences at birth. See 20 U.S.C. 1681(a); 20 U.S.C. 1686. Just as Title IX recognizes the biological reality of males and females, so too do the Idaho and West Virginia statutes. By codifying Justice Ginsburg's instruction to "celebrat[e]" the "inherent differences between biological males and biological females," *United States* v. *Virginia*, 518 U.S. 515, 533 (1996), Idaho and West Virginia provide a space for biological females to showcase their athletic talents free from biological males who have inherent physiological advantages in competitive sports. W. Va. Code § 18-2-25d; Idaho Code §§ 33-6202–03.

These laws also do not offend the Equal Protection Clause. "This Court has not previously held that transgender individuals are a suspect or quasi-

suspect class." *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1832 (2025). This is because (1) gender identity does not have an obvious, immutable, or distinguishing characteristic; (2) people who identify as transgender have not faced historical *de jure* discrimination; and (3) transgender-identifying individuals do not lack political power. See *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 486–89 (6th Cir. 2023). Thus, the statutes do not face heightened review based on gender identity discrimination and the decisions should be reversed.

ARGUMENT

I. States do not violate Title IX by prohibiting biological males from participating in sports programs limited to biological females.

In *Bostock*, this Court stated that it did not "prejudge" or "purport to address bathrooms, locker rooms, or anything else of the kind." *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 681 (2020). Here, "anything else of the kind" has arrived at the Court. Lower courts have ignored this Court's statement and viewed *Bostock* as the last word on all things gender identity, and applied *Bostock* to seemingly everything else of the kind. The Court must contain *Bostock*'s rationale to its own "ship" that only sails on the Title VII seas. See *id.* at 685 (Alito, J., dissenting).

A. *Bostock*'s analysis of Title VII is wholly inapposite to Title IX because, as this Court has stated, Title IX is "vastly different" from Title VII.

"Title VII * * * is a vastly different statute from Title IX[.]" *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Unfortunately, following this Court's decision in *Bostock*, lower courts have not recognized the vast differences between these two statutes, improperly transposing *Bostock*'s ruling into Title IX decisions. See, *e.g.*, *A.C. by M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023) (applying *Bostock* to a sex-segregated bathroom challenge); *Tirrell* v. *Edelblut*, 748 F. Supp. 3d 19, 42–45 (D.N.H. 2024) (applying *Bostock* to Title IX in the context of sex-segregated sports).

One vast difference between Title IX and Title VII is that Title IX does not have a but-for causation standard like this Court found in Title VII. See p. 8, *infra*. Another textual distinction is that unlike Title VII, Title IX contains explicit language permitting different treatments amongst biological sexes. See p. 18-19, *infra*.

It makes sense why Title IX would permit differential treatment between biological males and biological females: one of the primary purposes of Title IX was to increase female participation in sports. See p. 12-13, *infra*. Increasing sports participation for biological women necessarily involves treating them differently from biological males. In fact, Title IX regulations have encouraged increased spending and opportunities in women's sports. See, *e.g.*, 44 Fed.

Reg. 71,413, 71414 (Dec. 11, 1979) ("In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.").

But Title VII does not have a similar history. Title VII does not demand separate spaces for biological males or biological females, nor does it permit distinct offices for whites and blacks. Title VII sought to remove separate spaces from society by recognizing that there were no inherent advantages in the workplace because of a person's skin color, religion, or sex. See 42 U.S.C. 2000e–2(a)(1). Title IX recognized the exact opposite: there *are* inherent advantages between biological males and biological females that support separate sports teams and living arrangements for each sex. See 20 U.S.C. 1681; 20 U.S.C. 1686; 45 C.F.R. 86.41(b).

Title IX and Title VII are—as the Court put it—"vastly different[.]" *Jackson*, 544 U.S. at 175. It is now time for the Court to draw a clear line in the sand restricting *Bostock*'s analysis only to Title VII.

B. Title IX is textually distinct from Title VII, and Congress intended different outcomes with respect to each statute.

To state the obvious, Title IX and Title VII are worded differently. The Court in *Bostock* said it "interpret[ed] [the] statute in accord with the ordinary public meaning of its terms at the time of its enactment." 590 U.S. at 654. Thus, when comparing Title IX and Title VII, it is imperative that this Court note the vast differences in the terms that were used

in each respective statute. "After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Id.*

Bostock relied upon Title VII's phrase "because of sex" to deem that only "the simple and traditional standard of but-for causation" was necessary to find improper discrimination. 590 U.S. at 656 (citation modified). A plaintiff need only show that her "sex was one but-for cause of that decision." *Id.* In other words, the "defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Id.*

The Court has not been shy in the past to state when laws are similar. Justices have stated that Title VI and Title VII have identical meanings. See *Students for Fair Admissions, Inc.*, v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring) (stating Title VI and Title VII have "essentially identical terms"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 416 n.19 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part) (finding that "[b]oth Title VI and Title VII express * * * [the] same principle of individual fairness"). Title VI prevents discrimination "on the ground of race, color, or national origin." 42 U.S.C. 2000d. While "on the ground of" is technically a different phrase than "because of," the phrases have identical dictionary meanings.

Similarly, when the Court believes two laws are different, it says so. See *Jackson*, 544 U.S. at 175 (stating Title VII and Title IX are "vastly different").

Unlike Title VII's "because of" language, and unlike Title VI's "on the ground of" phrase, Congress took a different approach with Title IX. Congress did not need to use qualifying language like "solely," or "primarily" to indicate a narrow discriminatory purpose when using the phrase "on the basis of," because it is already narrow language. *Bostock*, itself, noted this. "From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee *based in part* on sex." *Bostock*, 590 U.S. at 659 (emphasis added). If "on the basis of" or "based on" meant anything but the primary purpose for the action, there would be no need to qualify it with the words "in part."

When drafting Title IX, Congress too could have qualified "on the basis of" to "based in part on sex." But it did not. The Court must continue to "interpret [this] statute in accord with [its] ordinary public meaning" as well. *Bostock*, 590 U.S. at 654. If the Court changes course, it "would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Id.*

C. Requiring States to permit biological males to participate in sports programs limited to biological females would eviscerate the entire purpose of Title IX and undermines its critical work for biological females.

The undisputed purpose of Title IX was to provide women more resources and opportunities in education. See 44 Fed. Reg. 71,413. Congressional records also show the well-known purpose of Title IX was to promote opportunities in sports for biological women. For example, Senator Chafee said that Title IX "put an end" to "practices of the past where women and girls were not afforded equal opportunity to * * * develop their athletic talents through programs equal in quality to those provided for male students." 130 Cong. Rec. 28,289–90 (1984) (statement of Sen. Chafee). Representative Coleman described the importance of preserving "the tremendous gains that we have made for women and girls" through Title IX, and that "[o]ne of the best examples of women gaining equal access in education thanks to title IX has been in the area of athletics." 130 Cong. Rec. 18,524 (1984) (statement of Rep. Coleman). And Representative Snowe noted that "[b]efore title IX was enacted, it was both legal and common for women to be excluded from * * * and denied opportunities for athletic competition and scholarship. Since 1972, title IX has been the primary legal preventive against such discrimination, and it has dramatically expanded the opportunities for women and girls[.]" 130 Cong. Rec. 18,536 (1984) (statement of Rep. Snowe).

By all accounts, Title IX has been a smashing success in increasing athletic opportunities, scholarships, and spending for female sports. *The State of Women in College Sports*, NCAA (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf. There has also been a direct correlation between women who participated in sports and those who rise to executive level positions, with some reports suggesting "94 percent of women who hold C-suite level positions are athletes." Rebecca Hinds, *The 1 Trait 94 Percent of C-Suite Women Share (And How to Get It)*, Inc. (Feb. 8, 2018), www.inc.com/rebecca-hinds/the-1-trait-94-percent-of-c-suite-women-share-and-how-to-get-it.html. Ultimately, the gains that women and girls have had because of Title IX have been invaluable.

Title IX's purpose is to provide more opportunities to females, women, and girls. It defies logic to ignore 50 years of progress in the advancement of women's sports to placate the gender-based "make-believe" of biological males wanting to play in women's sports.

The main thrust of the argument the men claiming to be women in these cases make is that there is no evidence that biological females are being displaced by inclusion of males wanting to play "dress up" in women's sports. See B.P.J. C.A. Br. at 4; Hecox C.A. Br. at 13–14. These biological males claiming to be female athletes attempt to persuade the Court that there is nothing to worry about because this never happens. That is demonstrably false. There are two biological males seeking to displace female athletes in this consolidated case alone. There are others who

played volleyball for San Jose State University and swam for the University of Pennsylvania. See pp. 16-18, *infra*. More biological males just this past year competed against, broke records of, and shared locker rooms with biological females in high schools in California, Maine, Minnesota, Oregon, New Hampshire, Washington, Pennsylvania, and New York. Jackson Thompson, *Tracking the trans athlete high school sports controversies shaking the nation over the last year*, Fox News (June 4, 2025), www.foxnews.com/sports/tracking-trans-athlete-high-school-sports-controversies-shaking-nation-over-last-year.

B.P.J. (a biological male) claims to be no threat to biological females because B.P.J. is "not fast enough" and "regularly finishes near the back of the pack," B.P.J. C.A. Br. at 11, [and] reports indicate that B.P.J. made the West Virginia state championship and "finished in third place in the discus event and eighth in the shot put competition[.]" Thompson, p. 11 *supra*. But, even if B.P.J.'s skills were lackluster and he finished last in every event against every female in every competition, it would still be irrelevant. The point is Title IX was drafted to enhance *opportunities* for female sports, and the presence of even one biological male in that competition eliminates the opportunity for a biological female to compete. Sports participation is a zero-sum game. There are only so many spots available, there is only so much playing time, and there is certainly only one winner. One biological male who takes a spot away from a biological female takes another scholarship away, another trophy away, and possibly another C-suite

executive position away. Title IX was created to end these practices. Prohibiting biological males from participating in sports programs limited to biological females is wholly consistent with the text of Title IX.

D. All biological males are treated identically under the States' programs.

Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. 1681(a). This Court defined discrimination in *Bostock* as "treating that individual worse than others who are similarly situated." 590 U.S. at 657. Thus, the simple rule under Title IX is that similarly situated persons must be treated equally.

For present purposes, the question thus becomes just who is it that is similarly situated in female sports. Contrary to the respondents' contentions, biological males are not similarly situated to biological females. Justice Ginsburg noted, "inherent differences between men and women, we have come to appreciate, remain cause for celebration[.]" *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (citation modified). These "inherent differences" include "[p]hysical differences" which "are enduring[.]" *Id.* Physical differences between males and females have been proven to be "enduring" even at an early age before puberty.

For example, amongst "prepubescent boys and girls, boys performed better in tests of aerobic fitness, strength, speed, and agility[.] * * * Other studies indicate that boys have an advantage over girls in running, jumping, and aerobic capacity even before

the age of 10." Indep. Women's F. & Indep. Women's L. Ctr., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports* 26 (2d ed. 2023), www.iwf.org/wp-content/uploads/2023/06/IWLC_CompetitionReport_2ndEdition.pdf. Studies have also shown that "transgender women in the US Air Force * * * maintained a performance advantage of 12% over cisgender women[,]" and biological males identifying as females "are typically stronger than cisgender women *even 14 [years]* after initiation of [gender affirming hormone therapy]." Sandra K. Hunter, et al., *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine*, 8(4) Translational J. of the Am. Coll. of Sports Med. 1, 19 (Sept. 29, 2023), pubmed.ncbi.nlm.nih.gov/37772882/ (emphasis added).

Still other research indicates brain activity, bone structure, and cardiorespiratory systems in males are permanently affected by early-life (pre-puberty) testosterone exposure. See Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19(15) Int'l J. of Environmental Rsch. & Pub. Health 9103, at 3–4, pmc.ncbi.nlm.nih.gov/articles/PMC9331831/. "[M]ale physiology cannot be reformatted to female physiology simply by gender-affirming estradiol therapy in a [man claiming to be a woman] training at a high-performance level." *Id.* at 5. Thus, biological males "will enter the female division with an inherent advantage because of their prior male physiology. *Id.* at 8.

Therefore, regardless of hormone suppressants or testosterone levels, "when it comes to competitive sports," gender identity "is actually irrelevant[.]" *B.P.J. by Jackson* v. *W. Va. St. Bd. of Educ.*, 98 F.4th 542, 568 (4th Cir. 2024) (Agee, J., concurring in part and dissenting in part). "Gender identity, simply put, has nothing to do with sports. It does not change a person's biology or physical characteristics. It does not affect how fast someone can run or how far they can throw a ball. *Biology does*." *Id.* (emphasis added). What would people think if a state created separate athletic divisions for Christians, Muslims, and Jews? Most (if not all) would find this distinction to be ludicrous. Why? Because a person's 40-yard dash time is not dependent on that individual's religious identity. So too for gender identity. In competitive sports, the comparators that matter are the individual's capacity to run, lift, jump, throw, hit, punch, or whatever conduct the sport permits. An individual's perception of their biological and chromosomal reality has no bearing on this and should not impact Title IX analysis in any way. *Biology should*.

Recognition of the biological and physiological differences between males and females is further spelled out in Title IX, federal regulations, Department of Education guidance, and Executive Orders. In Title IX, Congress permits schools to "maintain separate living facilities for the different sexes." 20 U.S.C. 1686. Accompanying federal regulations explicitly provide for "operat[ing] or sponsor[ing] separate teams for members of each sex[.]" 45 C.F.R. 86.41(b). Additionally, in response to

this Court's opinion in *Bostock*, the Department of Education stated that it is "clear": schools "must separate [athletic] teams solely on the basis of biological sex, male or female, and not on the basis of transgender status or sexual orientation[.]" Memorandum from the United States Department of Education, Office of the General Counsel on *Bostock* v. *Clayton Cnty.* (Jan. 8, 2021), www.ed.gov/sites/ed/files/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf. And since retaking office, President Trump has signed multiple Executive Orders distinguishing "sex" from "gender identity," and "Keeping Men Out of Women's Sports." See Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025); Exec. Order No. 14,201, 90 Fed. Reg. 9279 (Feb. 5, 2025).

These studies, reports, and interpretations all point towards one conclusion: biological males are not similarly situated to biological females. Because discrimination only compares the treatment of similarly situated persons, it is entirely consistent with Title IX to treat biological males and biological females differently. The only people that a biological male is similarly situated to in the context of sports are other biological males. All that is left for the Court to do now is compare how biological males are treated in comparison to one another. This is a simple task because both statutes treat biological males identically. That should be the end of the inquiry.

E. Permitting biological males to participate in sports programs limited to biological females would have significant impacts far beyond the athletic field and intrude into locker rooms, bathrooms, and living arrangements in a way Title IX explicitly exempted.

Participating in sports and athletic teams goes far beyond the arena in which one competes. Often when inclusion of biological males in female sports is discussed, the focus is on the playing field. However, when an athlete is permitted to share the field with others, those athletes also share locker rooms, bathrooms, and living arrangements. To require a biological female to share these private spaces with biological males invades the privacy of these girls and women and defies Title IX's express language.

It is not hypothetical that under policies permitting biological males into female sports, girls have been forced to share locker rooms and living arrangements with biological males. Riley Gaines, perhaps the most vocal advocate against the inclusion of biological males in female sports, detailed her interaction with Lia Thomas—a biological male—in a locker room: "A 6-foot-4 man was allowed to undress, fully expose himself. He was full naked and, of course, full intact inches away from where we, 18-, 19-, 20-year-old girls, were fully undressed." Isabel Baldwin, *Riley Gaines recalls 'humiliating' experience of sharing locker room with 'fully naked' trans athlete*, Daily Mail (March 7, 2025), www.dailymail.co.uk/sport/othersports/article-14474563/Riley-Gaines-reca

lls-humiliating-experience-sharing-locker-room-fully-naked-trans-athlete.html.

Riley Gaines is not the only female athlete who has been forced into intentionally private places with biological males. Brooke Slusser, co-captain of the 2024 San Jose State University women's volleyball team, shared that "she was frequently assigned to share a room with her transgender teammate on road trips." Rachel Nostrant & Kate Selig, *San Jose State Women's Volleyball Team Finds Itself at Center of Transgender Debate*, N.Y. Times (Nov. 4, 2024), www.nytimes.com/2024/10/29/us/san-jose-womens-volleyball-transgender-ncaa.html. While her coaches were aware that the player was not a biological female, they never informed Slusser that the individual she "slept in the same room with and undressed in front of" was a biological male. Jackson Thompson, *SJSU transgender volleyball scandal: Timeline of allegations, political impact and a raging culture movement*, Fox News (Nov. 27, 2024), www.foxnews.com/sports/sjsu-transgender-volleyball-scandal-timeline-allegations-political-impact-counterculture-movement.

As shown by the female athletes who were (and are) exposed to biological males in private spaces, this issue is a safety concern. "We did not give our consent, they did not ask for our consent, but in that locker room we turned around, and there's a 6'4" biological man dropping his pants and watching us undress, and we were exposed to male genitalia." Yael Halon, *Lia Thomas exposed 'male genitalia' in women's locker room after meet, Riley Gaines says: Dropped 'his pants'*, Fox News (Feb. 9, 2023), www.foxnews.com/

media/lia-thomas-exposed-male-genitalia-womens-locker-room-after-meet-riley-gaines-dropped-pants.

Females, women, and girls should not be forced into private spaces where they are exposed to male genitalia. Exposure is the safety concern. And the solution cannot be to force the girls who oppose exposure to use a different locker room. One lower court found this to be the appropriate solution in a bathroom case because it "d[id] not view the level of stress that cisgender students may experience because of [the School District's] bathroom and locker room policy as comparable to the plight of transgender students who are not allowed to use facilities consistent with their gender identity." *Doe* v. *Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3d Cir. 2018). It is sickening to label the victim as the problem. If the Court permits biological males to participate in female sports, it will have a devastating effect in locker rooms, bathrooms, and living spaces—all things this Court said it was not addressing in *Bostock* and all things Title IX was explicitly intended to prevent.

F. The interscholastic and intercollegiate sports context is wholly different than the employment context, so *Bostock*'s rationale has no application here.

Not only are Title VII and Title IX textually distinct, but the two are also "vastly different" statutes because of their respective contexts.

1. Prohibiting biological males from participating in sports programs limited to biological females leaves those biological males with identical opportunities to participate in male sports.

The first main difference between the employment and sports contexts is the result if the person claiming to be a sex different than their biological reality is not permitted to participate. Contrary to what may be true in employment, in the sports context, all biological males are left with ample opportunities to participate in sports. All biological males can still try-out for and participate in male sports. Certainly, the competition for a spot on the men's team is more robust. For instance, Lia Thomas was ranked 554th in the country in men's swimming but then became one of the highest ranked swimmers in the female division once ignoring biological reality and claiming to be female. See John Lohn, *A Look At the Numbers and Times: No Denying the Advantages of Lia Thomas*, Swimming World (Apr. 5, 2022) www.swimmingworldmagazine.com/news/a-look-at-the-numbers-and-times-n o-denying-the-advantages-of-lia-thomas/. Hence the entire point of Title IX. A biological male inescapably skews the opportunities for women if permitted to participate in women's sports. The Fourth Circuit said "the government has no interest in protecting one girl's ranking in any competition." *B.P.J.*, 98 F.4th at 560. True enough, but neither does the government have an interest in allowing a biological male who has lackluster rankings to "take his ball and go home" to the

women's team where he has unfair advantages and can raise his ranking.

2. Permitting biological males to participate in sports programs limited to biological females has a profound impact on female sports in a way not present in the employment context.

A different impact is observed in the workplace when a person claiming to be a sex different than their biological and chromosomal reality is hired compared to when a biological male plays on the female sports team. In the employment context, it is uncommon to work with only males or only females. Unless a biological female is forced to share a bathroom with a biological male claiming to a woman, to require that adults work with persons of the opposite sex does not cause the average workplace harm. But the same cannot be said when young girls are required to share a sports field with biological males.

Contrary to the employment context, where physical differences rarely impact one's ability to perform the tasks at hand,[3] competitive sports is necessarily predicated on physical advantages. As Judge Agee noted, "biological sex is relevant to sports." *B.P.J.*, 98 F.4th at 567 (Agee, J., concurring in part, dissenting in part). The reason is simple: "biological boys have a competitive advantage over

[3] Notably, just as Title IX does for female sports, where biological differences are, in fact, relevant in the employment context, Title VII likewise exempts such decisions based on biologically sex from employment discrimination claims where it is a bona fide occupational qualification. 42 U.S.C. §2000e-2(e)(1).

biological girls *even before puberty*." *Id.* That ends the inquiry for purposes of Title IX, because that biological advantage necessarily limits (if not wholly eliminates) biological females' opportunities in sports. The person who has inherent physiological advantages based on biology (biological males) will nearly always be the player who is selected for the team over biological females.

On a very similar token, the various stages of "transitioning" are much different in the workplace than in the sports context. According to the World Professional Association for Transgender Health (WPATH), among the various "treatments" a child can receive for his or her gender dysphoria include social transitioning (e.g., changing pronouns, name, clothes, etc.), hormone therapy, and surgical interventions. See generally, WPATH, Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, 23 Int'l J. of Transgender Health S1 (2022), www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644.

In sports, the type of "treatment" the person decides to undergo can make a difference in the person's athletic capabilities. Undoubtedly, even before testosterone levels are affected by puberty, biological males have an athletic advantage in "aerobic fitness, strength, speed, and agility[.]" Indep. Women's F. & Indep. Women's L. Ctr., *supra* at 26. Thus, even before considering the stage of "transition," there is a physiological advantage for males over females. However, once puberty occurs, biological males "can jump 25% higher[,]" "throw 25% further[,]" "run 11% faster[,]" "accelerate 20%

faster[,]" "punch 30–162% harder[,]" "and are around 30% stronger than females of equivalent stature and mass." *Id.* at 28. Accordingly, the stage of "transition" could greatly affect the gameplay, and ultimately the safety, of female sports.

With rare exceptions not relevant here, an individual's ability to perform in the workplace is not contingent on their ability to jump, throw, run, accelerate, punch, or the like. Thus, the inherent difference between biological males and biological females is largely irrelevant in the workplace. But, in sports, where the entire point is to run, jump, throw, and accelerate, these biological differences are dispositive of performance ability and therefore, opportunity for biological females.

II. States do not violate the Equal Protection Clause by prohibiting biological males from participating in sports programs limited to biological females.

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The original purpose of the Equal Protection Clause was to "stop states from discriminating against blacks." Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause Common Interpretation*, Nat'l Const. Ctr., constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 (last visited Aug. 29, 2025). Yet, the Court finds itself once again with a case involving individuals who seek refuge under the Equal Protection Clause for gender dysphoria. The Court should find as it did in

Skrmetti that gender identity does not receive heightened scrutiny, see *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1832–33 (2025), and that States may prevent biological males from playing in female sports without running afoul of the Fourteenth Amendment.

A. *Skrmetti* explicitly refused to classify individuals claiming to be transgender as a suspect or quasi-suspect class because they are not.

For a class to receive heightened review, this Court must recognize it as a suspect or quasi-suspect class. Lower courts have attempted to work around this requirement by finding that if the policy cannot be stated without reference to sex (e.g., sex-segregated bathrooms and sports teams), then "[o]n that ground alone, heightened scrutiny should apply." *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020); see also *Hecox* v. *Little*, 104 F.4th 1061, 1079 (9th Cir. 2024) ("[D]iscrimination on the basis of transgender status is a form of sex-based discrimination."); *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 (11th Cir. 2022) ("[T]he policy Adams challenges classifies on the basis of biological sex[.]"). But "this Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny." *Skrmetti*, 145 S. Ct. at 1829; see also *Tuan Anh Nguyen* v. *I.N.S.*, 533 U.S. 53, 64 (2001) ("The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction."). Some courts have ignored altogether the fact that "[t]his Court has not previously held that

transgender individuals are a suspect or quasi-suspect class." *Skrmetti*, 145 S. Ct. at 1832. Contra *Hecox*, 104 F.4th at 1079 ("[The Ninth Circuit has] previously held that heightened scrutiny applies to laws that discriminate on the basis of transgender status, reasoning that gender identity is at least a quasi-suspect class.") (citation modified). Thus, it is imperative to instruct lower courts that gender identity is not a suspect or quasi-suspect class and that the work around is not permissible.

This Court determines a suspect or quasi-suspect class by requiring the class to have: (1) an obvious, immutable, or distinguishing characteristic; (2) a history of unequal treatment; *and* (3) a history of a lack of access to political power. See *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986). This is a strict test under which the Court has "*never* embraced a new suspect class[.]" *Skrmetti*, 145 S. Ct. at 1851 (Barrett, J., concurring).

Biological males who reject their biological and chromosomal reality to claim identity as female falter out of the starting gate and therefore fail the *Carolene Products* test. First, claiming to be a sex different than one's biological and chromosomal reality is not obvious, immutable, or distinguishing. In the *Skrmetti* oral argument, Justice Alito gave Chase Strangio, attorney for the ACLU, ample opportunity to explain why transgender status is immutable, asking the advocate four times whether such a status satisfies this first element. See Tr. of Oral Argument at 89, 96, 98–99, *United States* v. *Skrmetti*, 145 S. Ct. 1816 (2025) (No. 23-477). But unlike race where the

immutable characteristic is skin color, and unlike sex where the immutable characteristic is the person's chromosomal makeup, Strangio's response was that "[t]ransgender people are characterized by having a gender identity that differs from their birth sex." *Id.* at 89. Strangio even admitted that there are "individuals who are born male, assigned male at birth, who at one point identify as female but then later come to identify as male," and vice versa. See *id.* at 97 ("There are such people. I agree with that, Justice Alito.").

Indeed, for many children, "[g]ender dysphoria during childhood does not inevitably continue into adulthood[,]" with studies showing that "the dysphoria persisted into adulthood for only 6-23% of children." WPATH, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, Version 7 (2011), at 11, gendergp.s3.eu-west-2.amazonaws.com/media/Standards-of-Care-V7-2011-WPATH.pdf. According to WPATH's own research (which it deleted but did not update in the most recent version), between 77–94% of children who report gender dysphoria as a minor "detransition" upon reaching adulthood. In other words, rejecting one's biological reality is *not immutable*. That failure is *alone* sufficient to find that biological males claiming to be females are not a suspect class. *Skrmetti*, 145 S. Ct. at 1853 (Barrett, J., concurring) ("The conclusion that transgender individuals do not share the obvious, immutable, or distinguishing characteristics of a discrete group is enough to demonstrate that transgender status does not define a suspect class."). The upshot of all this? Respondents

are not part of and cannot satisfy the test for suspect class and there is no violation of equal protection.

Likewise, the second element cannot be met. When considering whether a group has been subjected to a history of unequal treatment, the historical discrimination must be *de jure* discrimination—or legal discrimination by public actors. *Skrmetti*, 145 S. Ct. at 1853 (Barrett, J., concurring). In other words, "the relevant question is whether the group has been subject to a longstanding pattern of discrimination *in the law*." *Id.* Not surprisingly, neither the Fourth nor Ninth Circuits even attempted to show satisfaction of this requirement. The reason is simple: there is no such history.

Finally, biological males claiming to be female are not a politically powerless group. Some courts have focused this inquiry on whether "the group has drawn the support of powerful interest groups" or obtained "statutory protection from discrimination in the private sector." *Id.* at 1855. In the most recent national election, the rights of so-called "transgenders" were a main point of the Democrat party's platform. Even the ACLU stated that the "Biden-Harris administration [was] a bulwark against anti-LGBTQ attacks[.]" ACLU, *Harris on LGBTQ Rights* (Aug. 13, 2024), https://www.aclu.org/harris-on-lgbtq-rights. A group that is supported by one of the two major political parties in this country, supported by nearly all the major medical organizations, and protected by Title VII, is not one that lacks political power. See *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023). Indeed, for a group that makes up 1.0% of the

United States population aged 13 and older, individuals who identify as transgender have *extraordinary* political power. *See* Jody L. Herman & Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Inst. (August 2025), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/. One with the support of a major political party is hardly powerless.

Therefore, the Court was right to refuse to classify gender identity as a suspect or quasi-suspect class, because (1) it does not have an obvious, immutable, or distinguishing characteristic; (2) people who identify as transgender have not faced historical *de jure* discrimination; and (3) it is not a class that lacks political power. That ends the equal protection inquiry.

B. Biological males are not "materially identical" to biological females, so they are not similarly situated.

For a person to maintain an actionable claim under the Equal Protection Clause, the person must be "materially identical" to others who are "receiv[ing] different treatment." *B.P.J.*, 98 F.4th at 567 (Agee, J., concurring in part and dissenting in part). Persons are materially identical if they "are in *all* relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). Put simply, "all persons similarly situated should be treated alike." *City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "The similarly situated analysis is the same under Title IX as it is under the Equal Protection Clause[,]" *B.P.J.*, 98 F.4th at 572 (Agee, J.,

concurring in part and dissenting in part), so there is no need to rehash all the reasons why biological males are not similarly situated to biological females. See pp 12–16, *supra*. But to emphasize one point, it is important to note what the Court looks to under the Equal Protection Clause.

This Court stated in *Reed* v. *Reed* that to determine similarly situated groups under the Equal Protection Clause, it looks to the object of the statute. 404 U.S. 71, 76 (1971). Both in Title IX and these States' statutes, the objective is to provide more opportunities for biological *females* and protect *female* safety so that the "inherent differences" between biological males and females can be celebrated. See *Virginia*, 518 U.S. at 533. These differences are not "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* Even the respondents have admitted that there is a "performance advantage typical of men over women in sport[.]" Hecox C.A. Br. at 19; see also B.P.J. C.A. Br. at 14 (admitting there is a "medical consensus" of a "biological cause of average differences in athletic performance" between biological males and females). So, too, did the lower courts.

When these differences are challenged, it is not uncommon for girls to get hurt. In the most recent Olympics, an Italian boxer forfeited her match against a boxer who "fail[ed] gender eligibility tests." Sean Ingle, *Angela Carini abandons Olympic fight after 46 seconds against Imane Khelif*, The Guardian (Aug. 1, 2024), www.theguardian.com/sport/article/2024/aug/01/angela-carini-abandons-fight-after-46-seconds-against-imane-khelif. The female boxer sobbed

after being punched at the start of the match and stated that she had "never felt a punch like this." *Id.* Another example is Payton McNabb who suffered severe head and neck injuries after a biological male identifying as a female spiked a ball in her face during a high school volleyball match. See Valerie Richardson, *North Carolina on verge of transgender athlete ban after hearing from injured female athlete*, The Wash. Times (Apr. 21, 2023), www.washingtontimes.com/news/2023/apr/21/north-carolina-verge-transgender-sports-ban-after-/. Or in Boston, a biological male playing on a female field hockey team sent a girl on the opposing team to the hospital after his shot hit her in the mouth, causing "significant facial and dental injuries[.]" CBS News, *Massachusetts school calls for change after female field hockey player hurt by boy's shot* (Nov. 6, 2023), www.cbsnews.com/boston/news/massachusettm-field-hockey-male-female-injury-swampscott-dighton-rehoboth/.

In the context of objectives that prioritize female opportunities and safety, biological males are not similarly situated nor materially identical to biological females. Simply put, women are biologically different from males—and that "remain[s] cause for celebration[,]" *Virginia*, 518 U.S. at 533, not an equal protection violation.

C. State programs prohibiting *all* biological males from participating in sports programs limited to biological females treat all similarly situated biological males alike.

As in Title IX, so too in the Equal Protection Clause: the laws at issue do not treat biological males different from one another. Both statutes provide that biological males are prohibited from participating in "[a]thletic teams or sports designated for females, women, or girls[.]" Idaho Code § 33-6203(2); W. Va. Code § 18-2-25d(c)(2). There are no carveouts for any person who is a biological male, nor are there any special prohibitions. All biological males may play sports with other biological males, and they can also play on coed or mixed teams. But they may not take an opportunity from, nor may they cause harm to, a biological female in the female sports category. All biological males are treated the same under these Statutes.

D. Permitting biological females to participate in sports programs available to biological males furthers the States' interest in advancing otherwise unavailable athletic opportunities for biological females.

Another feature of these Statutes is that the prohibition is a one-way street: biological males are prohibited from participating in sports designated for females, but biological females are *not* prohibited from participating in sports designated for males. This does not offend the Equal Protection Clause.

Importantly, the one-way street is actually required under Federal regulations. Federal law mandates that where a school offers a sports team for males but not females, the school "must" allow females to "try-out for the team offered unless the sport involved is a contact sport." 45 C.F.R. 86.41(b). Thus, it would be impermissible under federal law if the one-way street was not included in these statutes.

Additionally, it should be noted that both states have regulations that prevent biological females from participating in boys' sports if a sport is offered for both boys and girls. W. Va. Code R. § 127-2-3(3.8); Idaho High School Athletic Association, *Rules & Regulations*, at 11-1-1 https://idhsaa.org/asset/Rules%20&%20Regs/Rules%20and%20Regs%2025-26.pdf. The stated purpose for this one-way street in the West Virginia regulation (which mirrors Title IX regulations) is "because overall athletic opportunities for females have previously been limited[.]" W. Va. Code R. § 127-2-3(3.8). Thus, this one-way street provides further opportunities to shine a spotlight on the great female athletes in this country.

E. To hold that State programs limiting female sports programs to biological females violates the Equal Protection Clause would require the Court to hold Title IX itself is unconstitutional.

As this Court previously stated, "neutral terms can mask discrimination that is unlawful[.]" *Tuan Anh Nguyen*, 533 U.S. at 64. Title IX uses neutral terms, but its purpose and effect has been anything but neutral. Accordingly, if the States' programs in

these cases are unlawfully discriminatory, then so is Title IX, which is a contention that has been rejected for decades.

Title IX's language prevents any person from being excluded from participation in sports on the basis of sex. See 20 U.S.C. 1681(a). Not just males or females, but anyone. However, in 1972, males were under no threat of discrimination in sports. Before Title IX, females comprised "less than 16 percent of all college athletes." Nat'l Women's L. Ctr., *Quick Facts About Title IX And Athletics* (June 21, 2022), nwlc.org/resource/quick-facts-about-title-ix-and-athletics. Title IX, contemplating a history of unequal treatment of one sex, explicitly permits "preferential or disparate treatment to members of one sex on account of an imbalance * * * with respect to the total number or percentage of persons of that sex participating in [sports.]" 20 U.S.C. 1681(b). Subsequent policy interpretations acknowledged it was biological women who faced this "imbalance." See 44 Fed. Reg. at 71414 ("In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels."); *id.* at 71419 ("Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men.").

Additionally, courts have recognized for decades that one of the main purposes for Title IX was to increase opportunities for female athletes. The First Circuit detailed "Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities." *Cohen* v.

Brown Univ., 101 F.3d 155, 179 (1st Cir. 1996). The Ninth Circuit similarly noted that Title IX "envisions continuing progress toward the goal of equal opportunity for all athletes[,]" and "Title IX is at least partially responsible for th[e] trend of increased participation by women." *Neal* v. *Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 769 (9th Cir. 1999). This same purpose—ensuring opportunities for female athletes—is the purpose for the Idaho and West Virginia laws. See Idaho Code § 33-6202(12) ("Having separate sex-specific teams furthers efforts to promote sex equality. Sex-specific teams * * * provid[e] opportunities for female athletes[.]"); W. Va. Code § 18-2-25d(a)(5) ("Classification of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex.").

The statutes in these cases share language and purpose with Title IX. So, it is quite simple: If these states violate the Equal Protection Clause by restricting biological males from competing in sports for biological females, then Title IX, itself, would violate the Fourteenth Amendment. Such is not the law.

CONCLUSION

We are at a crossroads in this country, and it looks a lot like 1972. Women's sports are at risk of becoming non-existent once again. Regardless of identity, biological males have an inherent physiological advantage in competitive sports. As Judge Agee aptly explained, "when it comes to competitive sports," gender identity "is actually irrelevant[.]" *B.P.J.*, 98 F.4th at 568 (Agee, J., concurring in part and

dissenting in part). Idaho, West Virginia, and twenty-five other states have stood up to protect females, women, and girls. It is incumbent upon the Court to do the same.

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