Nos. 24-38, 24-43

IN THE

# Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, *et al.*,

*Petitioners,*

*v.*

LINDSAY HECOX, *et al.*,

*Respondents.*

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WEST VIRGINIA, *et al.*,

*Petitioners,*

*v.*

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

*Respondent.*

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND FOURTH CIRCUITS**

## BRIEF FOR *AMICI CURIAE* OF DR. DANIEL KODSI, MR. JOHN MAIER, PROF. ROBERT GEORGE AND 21 OTHER PHILOSOPHERS IN SUPPORT OF PETITIONERS

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## INTERESTS OF THE *AMICI CURIAE*[1]

*Amici* are Daniel Kodsi (B.A., B.Phil., and D.Phil., University of Oxford); John Maier (B.A., University of Oxford; M.Sc., London School of Economics); Robert P. George (B.A., Swarthmore College; J.D., M.T.S., Harvard University; D.Phil., B.C.L., D.C.L., and D.Litt., University of Oxford); and 21 other philosophers listed in Appendix A.

*Amici* share with the public at large an interest in seeing the law be formulated using clear, precise and principled distinctions, rather than unclear, vague and invidious ones. Consequently, they have an interest in seeing that the laws ensuring fairness in sports be formulated in sex-based terms, which are much clearer, more precise and more principled than any relevant alternatives.

*Amici* have a further interest in familiarizing the Court with a general philosophical distinction, between more and less "natural" categories, which in their professional judgement is highly relevant to problems of categorization in general, including in the natural sciences and mathematics. Recognizing this distinction enables a perspicuous explanation of why it is so costly to abandon sex categories in sports in favor of alternative categories to which *ad hoc* exceptions have been built in.

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[1] No counsel for any party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Witherspoon Institute made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

On their face-value interpretation, the Idaho and West Virginia statutes enable female persons, and only female persons, to participate in certain spaces—namely, in certain sports teams, leagues, events and competitions. To achieve this aim, the Idaho and West Virginia statutes preclude male persons, and only male persons, from participating in those sports teams, leagues, events and competitions. On this face-value interpretation, the statutes propose to organize sports in part around the sex categories: *female (person)* and *male (person)*.[2]

This brief contends that organizing sports around the sex categories is fully justified, given the officially uncontested fact that it is justified to organize sports *approximately* around the sex categories. Its argument leverages a general philosophical distinction between more and less *natural* categories. This distinction will be applied to reinforce the case *for* organizing sports around the sex categories, as well as *against* reorganizing sports around alternative categories to which vividly *ad hoc* exceptions have been built in. Finally, the argument will be extended to the disputed question of the intended function of the Idaho and West Virginia statutes, which it is concluded is,

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[2] On a simple view, which coheres with the argument in this brief, the terms "woman" and "girl," and "man" and "boy," pick out subsets of the sex categories *female* and *male*, respectively. *See* Daniel Kodsi, *Unexceptional Sex*, THE PHILOSOPHERS' MAGAZINE (Sept. 16, 2024), https://philosophersmag.com/unexceptional-sex/. For clarity, rigor, and to minimize the scope for confusion, however, this brief is uniformly written using the explicitly sex-based language of "male" and "female."

indeed, the face-value one: to enable female participation in sports by means of excluding male would-be competitors.

## ARGUMENT

### I. The problem of organizing sports raises questions of a kind to which a general distinction between natural and gerrymandered categories is relevant.

The question of whether it is justified to organize sports around the sex categories is not *sui generis*. That is, considerations that bear on the question of which categories to use in general bear on the question of which categories to use in the specific case of sports. (Indeed, it would be surprising if the organization of sports turned out to give rise to very special problems.) Responding to the general need to make principled discriminations among the many alternative ways there are of categorizing any messy phenomena, philosophers have come to recognize a distinction between more and less *natural* categories. A fruitful feature of this distinction is its high generality: it applies in a similar way across a wide variety of subject matters. Further reflection on the organization of sports reveals that considerations of "naturalness" are not just relevant in principle to the problem of organizing sports but widely relied on by decision-makers in practice, albeit implicitly.

### A. The problem of how to organize sports is an instance of a general problem that admits systematic solutions in other cases.

Is it justified for there to be sporting events in which middle-schoolers (aged 11–14) may compete, but from which all fully-grown adults are excluded?

Presumably. But how come? One simple answer that springs to mind is that adults are faster and stronger than middle schoolers. However, on its own, that consideration does less to explain why sporting events are widely organized around age categories than one might expect.

An initial complication is that not *all* adults are faster and stronger than *all* middle schoolers. Of course, it is true that adults are *on average* faster and stronger than children and young teenagers. However, even divergences in average performance between groups don't correspond to the lines around which sporting events are usually organized in any very straightforward way. That is, it is not always good sports policy to have dedicated sporting events for members of some underperforming group. An obvious counterexample: on average, athletes who never train are weaker and slower than athletes who train many hours a day, but that difference hardly implies that there should be special sporting events set aside for lazy athletes, from which all hard-working athletes are excluded.

As these initial observations already suggest, the question of around which lines to organize sports teams, leagues, events and competitions—call this the

challenge of *organizing sports*—is not always easy to answer. There is no obvious, one-size-fits-all formula available to settle whether to organize sports around the line between people who exemplify a given attribute which correlates with performing well at sports and those who do not.

This becomes especially clear when one attends to the dizzying array of distinctions—transient and permanent, biological and environmental, social and economic—that to one degree or another correlate with differences in athletic performance. For instance, being taller correlates to some extent with being better at basketball. Should basketball competitions therefore be re-organized around heights categories? If not, why not?

When first presented with the full range of variation relevant to performance in sports, some pessimists may be tempted to declare an early defeat and conclude that any ways of organizing sports "are on a par": no way is any better than any other. Exactly what practical implications this subversive verdict is supposed to have for the real-world organization of sports is unclear. Regardless, it is clear that it should be rejected. Though their ways of doing so may be far from perfect, local, national and international sports regulators have in fact found reasonable, non-arbitrary ways of organizing sports competitions the world over.

A more general reason to expect there to be more and less principled ways of organizing sports is that the problem of how to organize sports is similar to other problems of categorization. Such problems often

seem intractable at first yet turn out to admit systematic solutions.

Here is an example. Consider the long-standing scientific challenge of how to organize the animal kingdom into principled general groupings. Animals differ from each other in indefinitely many ways. Some animals can swim, while others can fly; some animals have four legs, while others have six; some animals have fur, while others have feathers; some animals have a relatively recent ancestor in common, while others have only a distant ancestor in common. Prioritizing one, rather than another, basis for classification will lead to radically different taxonomies of the animal kingdom. For instance, is the dolphin more similar to the shark, given that both live in the water, or to the hippopotamus, given that both have lungs? How are scientists to decide which basis for categorization to rely on in their thinking?

As before, when first presented with the full range of variation between animal species, some pessimists may be tempted to declare an early defeat and conclude that any ways of organizing the animal kingdom are "on a par": no way is any better than any other. But the development of principled zoological taxonomies within the broader scientific research program of evolutionary biology demonstrates that such pessimism is ill-conceived. In the end, a systematic approach, based in cladistics, to organizing the animal kingdom into classes (species, genera, families, orders, …) turned out to be feasible.

Of course, this analogy leaves open how much systematicity we can hope to achieve when it comes to the

challenge of organizing sports. Equally, however, there is no reason to imagine the problem of organizing sports to be a locus of special obstacles. Further, reflecting on what sorts of categories are best to use in general is, the rest of this section argues, helpful for getting some traction on the problem.

### B. There is a widely applicable and projectible distinction between natural and gerrymandered categories.

In Plato's *Phaedrus*, Socrates proposes an ideal to govern clear and consistent discourse: "of dividing things again by classes, where the natural joints are, and not trying to break any part, after the manner of a bad carver" (264–6). Though the intervening centuries have brought many twists and turns in philosophical thought, Plato's contention that good reasoning "carves nature at the joints" commands broad support among many contemporary theoretical philosophers. In terminology used to advert to Plato's ideal, philosophers today commonly recognize a general distinction between more and less *natural* categories. Facts about which categories are the more natural are supposed to have implications for which are most relevant to thought and action across a variety of domains.

The intended sense of "natural" is best introduced by examples. Consider the following contrasting pairs of categories:

| | |
|---|---|
| *Gold* | *Gold or iron pyrite*[3] |
| *Water* | *Water located in Lake Erie* |
| *Oak (tree)* | *Tree that looks like an oak from 10 feet away* |
| *Odd (number)* | *Number that is odd or less than 94* |
| *Car* | *Car owned by Bill Clinton* |
| *Fact* | *Thing that Paul McCartney believes is a fact* |
| *American* | *American born in either 1979 or 2003* |
| *Mammal* | *Mammal discovered before 1830* |

Although the categories on this list all differ in various ways from each other—they run the gamut from natural-scientific categories (gold, water, mammal) to abstract categories (odd number, fact) to social categories (car, American)—there seems to be a general difference between each category on the left-hand-side and the neighboring category on its right-hand-side. Moreover, as philosophers sometimes say, the exhibited contrast is *projectible*: having been introduced to it on the basis of a few examples, it is easy to intelligently apply it to new cases. Readers of this brief will probably be able to tell on which side of the list to put the category *iced coffee made with beans from Colombia* and which to put the category *beverage*, or on

[3] Iron pyrite is also known as *fool's gold*.

which to put the category *electron* and which to put the category *electron that is part of the Eiffel Tower*.

In contemporary philosophy, the terminology of "naturalness" has become influential as a means to describe this general difference between some categories and others.[4] *Natural* categories contrast with what are known as *gerrymandered* categories: categories which have weird, jagged or otherwise arbitrarily delineated boundaries.[5] In general, it is quite hard to make a once-and-for-all determination as to exactly *how* natural a category is, when judged in isolation. But problems of categorization—such as those that arise in sports and zoology—typically involve making *comparisons* between different potentially relevant categories. And in many cases, such as those listed above, it is possible to reach robust verdicts as to *relative* naturalness: that is, as to which of two categories is more natural than the other.

There is, unsurprisingly, much underlying disagreement among philosophers about what *makes* one category more natural than other. But a popular idea is that the more natural a category, the more its members are *similar* to each other and *dissimilar* to nonmembers. Conversely, the more unnatural a category,

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[4] *See* Cian Dorr, *Natural properties*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 13, 2019), https://plato.stanford.edu/entries/natural-properties/; Alexander Bird, *Natural kinds*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 28, 2022), https://plato.stanford.edu/entries/natural-kinds/.

[5] Of course, such a metaphorical use of "gerrymandered" is intended without prejudice to the actual electoral practice of gerrymandering.

the more its members are *dissimilar* to each other but *similar* to non-members.

Given this understanding of what makes for naturalness, a simple test for the unnaturalness of a category is how *random* or *arbitrary* its membership is. Could membership in the category very easily have been different? Is its membership liable to change in unpredictable ways over time? The answers to these questions support the verdicts that categories like *mammal* and *water* are more natural than categories like *mammal discovered before 1830* and *water located in Lake Erie*, respectively. The very same species of mammal could have been discovered before the year 1830 or after it, as a function of mere historical contingency, changing very little else about the species itself. The same molecule of water could be located in Lake Erie or not located in Lake Erie, again changing very little else about it. In fact, specific water molecules do move about the earth in a more or less unpredictable way.

A second test for the unnaturalness of a category is whether it encodes sensitivity to the value of some easy-to-vary "parameter." For example, consider the category *number that is odd or less than 94*. Membership in this category is not contingent, but necessary: whether a certain number is either odd or less than 94 can't change. But the category is just one of infinitely many alternatives which could be specified using similar disjunctive formulations: *odd or less than 90*, *odd or greater than 103*, and so on. Unless there is some reason to think that *all* of these categories are natural, a safe conclusion is that none of them is especially natural.

A third important test for the naturalness of a category is simply: what happens when one attempts to reason with the category in practice? This pragmatic test is motivated by the fact that actions sensitive to natural categories will tend to go better than actions sensitive to gerrymandered ones. As a simple illustration of the connection, suppose a team of engineers were to decide to organize its work around the category *gold or iron pyrite*, rather than the more natural category *gold*. In particular, suppose that when constructing connectors intended for military use, these engineers use gold and iron pyrite interchangeably, given that both materials belong to the category *gold or iron pyrite*. The expected result would be connectors that are unfit for the important purposes they are supposed to serve. The moral is that the disunity of the category *gold or iron pyrite* is not merely of theoretical interest. Insufficient sensitivity to its unnaturalness would have real, and perhaps disastrous, practical consequences. Relatedly, it is no mere accident that modern-day scientists and engineers do not lump iron pyrite together with gold, despite the two minerals' superficial visual similarities.

Even taken together, the three tests just outlined do not provide a perfectly reliable recipe for determining whether a category is natural or gerrymandered. This fact—and the relatively abstract level at which one has to conduct any general discussion about the character of natural categories—notwithstanding, the idea of naturalness is tractable enough to be of use, and in particular to be of use for adjudicating between rival ways of organizing sports.

### C. The distinction between natural and gerrymandered categories is relevant to the problem of how to organize sports.

For all that has been said so far, doubts may remain about the relevance of the distinction between natural and gerrymandered categories to the problem of organizing sports. But these doubts are misplaced, as will now be argued. Reflection on where lines are in fact drawn—and, just as significantly, *not* drawn—in sports reveals that, far from being irrelevant to the challenge of organizing sports, the distinction between natural and gerrymandered categories is implicitly relied on by sports regulators *virtually all the time*. Appreciating that this is the case will also make clear why the prioritization of natural categories over gerrymandered ones is no optional extra, but rather a necessary constraint on the organization of sports, as it is in other human activities.

The key point is simple. Here is an example to help illustrate it. In tennis, like in other sports, there are many junior competitions, participation in which is limited to those aged 18 or younger. Suppose that it were to be proposed that the line for inclusion in junior tennis be redrawn. In particular, suppose it were proposed that the criterion for participation in junior tennis should be weakened to make an exception for non-juniors from Switzerland. That is, rather than at the boundary between the categories *junior* and *non-junior*, the line for participation in junior tennis is to be redrawn at the boundary between the categories *junior or from Switzerland* and *neither a junior nor from Switzerland*. Clearly, such a proposal is to be rejected. But what is wrong with it?

An initially tempting answer might be: Enacting the proposed change to junior tennis would have bad and unfair results, because Swiss non-juniors would start to win junior tennis tournaments. And that claim may well be true. But how do we *know* what the results of such a change to the condition for eligibility to compete in junior tennis would be? (After all, who knows how many Swiss non-juniors would want to compete in junior tennis if given the chance?) What's more, there is nothing unfair about the fact that certain subsets of the category *junior* tend to win tournaments against other juniors. So why would it be unfair if the Swiss subset of the category *Swiss or junior* tended to win junior-or-Swiss tournaments?

In principle, one could attempt to respond to such questions without invoking the difference in naturalness between the categories *junior* and *junior or Swiss*, perhaps by thinking up some specific considerations, tailored to the example in hand, that distinguish the two categories. But that would be a trap. The reason it would be a trap is that proposals to organize sports around gerrymandered categories can be multiplied without limit. As a simple practical matter it would be infeasible to have to provide, in the case of each candidate proposal, specific evidence pertaining to the likely effects of drawing the line in a given sport in the mooted place as a means to rule out making the proposed change. As a theoretical matter, the commitment to evaluating arbitrarily many *ad hoc* proposals on their specific merits concedes too much to the unmotivated assumption that there are no general grounds on which some proposed ways of organizing sports can be appropriately rejected.

Boxing commissioners, for example, are under no obligation to take seriously potential proposals to weaken the criterion on inclusion in the welterweight category to make an exception for any or all of (i) boxers with exactly shoulder-length hair, (ii) boxers from Laos or (iii) boxers who weigh exactly 156 pounds. Redrawing the relevant line in boxing in any of those ways would in effect be to partly re-organize boxing matches around a vividly gerrymandered category: something that should not be done.

Their conspicuous absence from any mainstream sporting competitions reveals how criteria of naturalness often operate in the background to circumscribe the number of options for inclusion or exclusion under consideration by decision-makers in sports in the first place. The fact that naturalness is prioritized by *default* helps explain why the role of naturalness in structuring sports competitions has often gone unrecognized. Many of the categories currently used in sports are clearly far from perfectly natural (especially as compared to the naturalness of categories relied on in, say, fundamental physics). Nevertheless, the absence from mainstream sporting competitions of vividly gerrymandered categories like *junior or from Switzerland* testifies to the fact that naturalness *is* prioritized in the organization of sports, whether sports regulators think in those terms or not.

Considerations of naturalness can also be brought to bear in a more positive way, to encourage organizing sports competitions around certain categories (not just to rule out organizing them around extremely gerrymandered ones). Most notably from a naturalness-prioritizing perspective, one category that it is clearly

justified to organize sports around is the *open* category: that is, the category in which *anyone* can compete. For a sports category that is subject to no special restrictions is in effect as natural as the species category *human* itself. Given the assumption that sports competitions should as far as possible be organized around natural categories, it is unsurprising that many competitions do in fact avail themselves of an open category. In all sorts of casual and amateur sporting events, anyone who wants to participate is free to. For instance, more or less anyone can join a pick-up basketball game. Admittedly, *professional* sports tend not to explicitly incorporate an open category. The reason for this omission is in effect the subject of the remainder of this brief.

## II. It is justified to organize sports around sex categories.

All parties in the cases before the Court officially recognize that it is justified to organize sports *approximately* around the sex categories *male (person)* and *female (person)*. This section argues that, given this officially uncontested assumption, the naturalness of the sex categories makes it justified to organize sports around them exactly. This conclusion gains further support from the failure of the respondents explicitly to identify any alternative categories to do the job instead. Worse, the most reasonable interpretation of the respondents' arguments seems to require reorganizing sports around the vividly unnatural boundary between *males who do not identify as female* and *females or persons who identify as female*.

### A. It is justified for lawmakers to organize sports *approximately* around sex categories.

We begin by noting a *prima facie* tension between the two legal doctrines most relevant to the cases before the Court: equal protection law and Title IX law. In general, equal protection law requires that "similarly situated" individuals be treated equally. One of the main implications of equal protection law is that, by default, it is unjustified for the law to treat male people and female people differently. Indeed, part of the purpose of the Court's recognition of sex as a quasi-suspect class is to ensure that laws which, taken at face value, do treat male and female people differently are subjected to proper scrutiny.

Title IX, meanwhile, is a paradigm of a law that classifies on the basis of sex. Indeed, as applied to sport, one reasonable understanding of Title IX provisions is as saying decision-makers may treat males and females differently in sporting contexts. In particular, Title IX enables decision-makers to create and foster the existence of spaces which exclude males and only males: namely, female sports teams, leagues, events and competitions. This raises an obvious question: why isn't Title IX in violation of equal protection law?

When it comes to sports specifically, this obvious question has a familiar answer: because the distinction between males and females systematically correlates with differences in performance in sports. To a good first approximation, any kind of sporting event in which males *can compete* is a sporting event that

males *will win*. In all the most popular sports, many non-professional male athletes can outperform even the best professional female athletes. A representative data point: in 2016, every teenage male finalist in the NBNO track-and-field meet for high school athletes had a faster time than every female finalist in the Olympics across all of the 100-, 200-, 400- and 800-meters.[6] Such examples are readily multiplied.

Such observations help explain the provisions Title IX makes for female sports. Having sports categories reserved for female athletes, and from which male athletes are excluded, ensures that female people have a chance to compete in and win sporting events. Correspondingly, so far from constituting illicit sex-based discrimination, Title IX *enables* fair competition. The background moral point is familiar. Although unfairness often consists in treating similar individuals differently, it can also sometimes consist in refusing to treat *different* individuals differently. Refusing to make special provisions for female sports plausibly exemplifies the second half of this maxim.

The foregoing considerations will not be news to most readers of this brief. Sports provide a paradigm case in which treating the sexes differently—specifically by *separating* them—serves the interests of both, while prejudicing the interests of neither. Nor, recall, is the principle that it is justified for sports to be organized around categories with *approximately* the same membership as the sex categories in dispute in the cases before the Court. No party to these disputes goes so far as to argue that there shouldn't be protections

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[6] *See* 'Boys vs Women', https://boysvswomen.com/#/.

made for female athletes at all. The Fourth Circuit majority, for instance, begins with the disclaimer: "To state the obvious, the Act did not originate the concept of sex-based sports teams." W. Va. Pet.App.14a.

The question only remains, then, whether it is justified for states and other decision-makers to enable female people, and only female people, to participate in certain sports teams, leagues, events and competitions, by the means of excluding male people, and only male people, from those sports teams, leagues, events and competitions. That is, the question is whether it is justified for sports to be organized *exactly* around the sex categories. We submit that it is.

### B. It is justified for lawmakers to organize sports *exactly* around sex categories.

The distinction between males and females has all the hallmarks of being a natural distinction. In particular, the distinction between males and females is one of the most explanatory distinctions between higher organisms in the theory of evolution by natural selection, itself one of the most successful scientific research programs ever conceived. It is not the aim of this brief to adduce all the relevant evidence for that broad claim. Suffice it to say that if any distinction between types of humans is natural, then the distinction between female humans and male humans is.

It bears pointing out that the term "natural" is still being used here in its somewhat technical philosophical sense. The categories *male* and *female* are clearly also natural in another more familiar sense, in virtue of being biological categories. But that should not

obscure the fact that they are natural too in the more abstract sense that has been brought under focus in this brief. The distinction between males and females is not gerrymandered.

It is also worth emphasizing that the claim that the categories *male* and *female* are natural does not imply that it is always or even usually justified to treat males and females differently. After all, though there are various ways in which male humans differ from female humans, there are indefinitely many other ways in which the sexes are *alike*. Recognizing the reality of differences between the sexes is fully compatible with recognizing the reality of similarities between the sexes, much as recognizing the physically important distinction between gold and iron is compatible with recognizing the many physically important properties that gold and iron have in common.

That qualification out of the way, we are in a position to state the main claim of this section of this brief: that, since this is a case in which it is recognized that some line needs to be drawn *approximately* along the boundary between males and females, lawmakers are justified in drawing the line *exactly* at the boundary between males and females, given that it is the most natural line in the vicinity. More specifically, lawmakers are justified in protecting the interests of female athletes by means of excluding male athletes from various sports teams, leagues, events and competitions.

At a minimum, opponents of organizing sports exactly around the sex categories face the burden of proof. They must provide positive reasons *not* to

embrace the simple approach of having female-only sports categories.

Typically, efforts to motivate alternatives to the division of sports into male and female categories pursue what could be broadly characterized as "reductionist" styles of argument. This strategy often involves a mixture of casting doubt on the scientific good standing of the sex binary, while attempting to shore up the standing of some alternative non-sex-based approach to organizing sports.

There is, of course, a large cluster of specific biological distinctions which correlate at least to some degree both with being male (and hence with sex differences) and with superior performance in sports. Doriane Coleman, cited in Idaho's state law, lists several examples: among the many traits that correlate both with being male and with performance in sport are levels of testosterone, hemoglobin levels, body fat content, the storage and use of carbohydrates, and the development of type 2 muscle fibers. Idaho Code § 33-6202(4) (quoting Doriane Coleman, *Sex in Sport*, 80 L. & CONTEMPORARY PROBLEMS 63, 74 (2017)).

Indeed, a great many other physical traits, such as the ability to grow a beard or tendency to be red-green color blind, will also correlate with superior performance at sport. In these latter cases, the traits' obvious causal irrelevance to sporting prowess more readily reveals that the correlation observed is explained by the fact that *being male* is correlated both with the target physical trait and with superior performance at sport.

Relatedly, the fact that there is an extremely large cluster of more and less specific biological distinctions which roughly map onto the difference between males and females has sometimes been invoked to *problematize* the simplicity—or in the present terms, naturalness—of sex categories. But this is just a confusion. The fruitful application of the sex-based categories both in science and everyday life testifies to their comparative naturalness, as contrasted with these proposed alternatives. Proponents of alternative bases for categorization often selectively overlook the way in which their own objections to the sex distinction—accusations of arbitrariness, vagueness, or the existence of unclear cases—redound even more damagingly in the case of their own preferred criterion.

All of the various fine-tuned biological distinctions in the vicinity of the distinction between males and females provide less natural alternatives to it. They are also less relevant to understanding performance in sports than the distinction between males and females itself. Within theoretical science, it is a mistake to assume that the distinction between male and female is to be understood in terms of some one element of the many basic distinctions typically associated with it: in terms of chromosomes, testosterone levels, the possession of certain body parts, or whatever. Scientists have not eliminated sexed-terms from their theoretic vocabulary; on the contrary, they continue to find them conveniently general terms in which to frame their thinking. The lesson is that attempted physical reduction does not always register that an increase in theoretical depth has been achieved.

For similar reasons, there are no grounds to expect it to be helpful to eliminate the terms "male" and "female" from reasoning about sports categories. There too, we should feel a strong pull towards anti-reductionism. Alighting on any one more fine-grained biological feature signals a diminution, rather than increase, in our ability to think in a clear and readily-generalizable way about the problems of fair competition we are interested in.

Consider, as a somewhat different example, laws defining the legal voting age. In most democracies, adults can vote and children cannot. In most democracies there is also a broad informal consensus that there are many, more fine-grained, traits, including competencies and interests, relevant to an individual's entitlement to vote. Most of these traits tend to come online roughly at the age of majority, typically around 18, though some individuals will develop them precociously and others belatedly. It is virtually never the case that a given individual comes to possess these traits for the first time on the day they reach the legal voting age. Yet, it is completely appropriate for the law to use the non-reductionist attribute of exact age to sharply distinguish those who are legally entitled to vote from those who are not. If pressed to explain or justify the choice of a particular voting age, say 18, people may well begin to advert, in reductionist style, to some one or other of the underlying traits both correlated with age and with the entitlement to vote. But it would be a mistake to think, for that reason, that voting laws were in some sense *really* about these other traits rather than age. That would be a misinterpretation of the rule in question: one that is about

the age of individuals in the most straightforward sense.

Attempts to motivate reductionist alternatives to natural distinctions often conceal grave theoretical and practical problems. Typically there is a reason the reduced categories were not the ones identified to begin with: they tend to be less natural, more arbitrary, challenging to measure or detect, less well integrated into neighboring domains of inquiry, and to conceal hidden difficulties behind their false promise of greater precision. And it would certainly be a mistake to assume that the properties referred to in the law are somehow mere "proxies" for such ill-specified reductionist alternatives. A far better assumption is that lawmakers *intend* to pick out the categories that they actually, explicitly, literally pick out. This is clear enough in the case of age in related to voting laws. It is even clearer in the case of sex in relation to sports

### C. The respondents fail to identify any remotely natural alternative boundary for lawmakers to use in organizing sports.

The conclusion that the boundary between males and females is the most natural place at which to draw a line for the purpose of ensuring fairness in sports gains significant support from a striking fact about the decisions of the Fourth Circuit majority and the Ninth Circuit: that the decisions *fail to explicitly identify* any specific alternative boundary at which to draw the line.

For example, both Circuits appeal to the role of differences in "circulating testosterone levels" in

underpinning differences in performance between male and female athletes. W.Va.Pet.App. 33a–34a, 36a, 41a, 43a; Little.Pet.App. 28a, 42a, 46a–47a, 51a. The implication—although neither Circuit is at all explicit on this point—seems to be that it would be fairer, and more justified, for states to classify using some finely-tailored biological criterion like "has such-and-such a level of circulating testosterone" than to use the criterion of sex itself. But no specific positive proposal is made as to exactly what this criterion should be.

This is a serious omission from the lower courts' judgments. Without an explicit alternative to the joint between males and females being put on the table, it is impossible to compare both for their relative naturalness. Those who criticize reliance on one distinction, while refraining from offering an explicit alternative to said distinction themselves, may be suspected of implicitly recognizing that any alternative they could offer would readily fall prey to versions of their original criticism, thereby revealing those criticisms to be less discriminating and hence less damaging than they first appear.

That dynamic is exemplified in the case of sport. Take the criterion, mentioned by the courts, of circulating levels of testosterone. It will fail to achieve the desired result in the special case of males with complete androgen insensitivity syndrome (CAIS). Males with this rare genetic condition are insensitive to testosterone and other androgens from birth onward, so develop female-typical secondary sex characteristics. They often appear indistinguishable from females. If one's goal is to fine-tune the criterion for organizing

sports so as to generate intuitive verdicts about atypical problem cases, CAIS males provide a paradigm case of those who should be accommodated. Yet the criterion of circulating levels of testosterone notably fails to accommodate this case in the desired way, because CAIS males have male-typical levels of circulating testosterone; it is just that their bodies do not respond to it.

The potential for there to be unexpected obstacles to identifying a criterion for inclusion that makes room even for males as developmentally similar to females as CAIS males to participate in female sports speaks to the wisdom of the Court's precedent, emphasized by the petitioners, in *Nguyen*, of not requiring a classification to achieve perfect "fit." Little Pet.23; W.Va.Pet.17, 30–31. Indulging complications so as to accommodate even a single special case or exception can often result in a surprisingly large decrease in naturalness, without even guaranteeing that the accommodation will cover the cases one intends. In being made more fine-grained, a categorization often just becomes *worse*.

The fact that the respondents argue that the statutes discriminate against transgender individuals despite only excluding *male* transgender individuals strongly suggests that the only place they would not object to drawing the line is at a location whereby all transgender individuals are included in the protected category.

It is therefore worth briefly illustrating how dysfunctional, because unnatural, a direct implementation of this approach would be. That is, let us directly

consider a proposal to re-organize sports around the boundary between *males who do not identify as female* and the disjunctive grouping *females or person who identifies as female.*[7]

Now, compare the sex categories with these proposed alternative categories for their relative naturalness:

| | |
|---|---|
| *Male (person)* | *Male person who does not identify as female* |
| *Female (person)* | *Female or person who identifies as female* |

The resemblance between these contrasts and those examples tabled in section 1.B above should be clear. In both cases here, a relatively natural, well-unified group is replaced by an artificial, gerrymandered one.

One obvious contrast is that only the categories on the right-hand side encode sensitivity to the relation of *identifying as*. Despite its widespread social adoption, this relation remains obscure. Perhaps identification should be thought of as a form of belief or desire, with "transgender" individuals being those who

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[7] A subtly different proposal is to cut at the line between *male-identified people* and *female-identified people*. However, as well as facing variants of the objections below, from the relative unnaturalness of the specified alternative categories, such a proposal faces an objection from the unfairness of excluding female people who do not identify as female but are otherwise completely sex-typical from female sports. (Note that some such female athletes may not identify as male either, perhaps because they identify as "non-binary.")

believe or desire that they are the opposite sex. Alternatively, perhaps it should be thought of as a *sui generis* mental state. Either way, the envisaged proposal for reorganizing sports incurs significant costs in naturalness.

The category *female or person who identifies as female* does not stand up well to the general tests, sketched above, for a category's relative naturalness.

First, unlike the category *female,* its second disjunct encodes sensitivity to how individuals happen to identify. Unlike *female,* its composition thus varies over time and space in ways that are difficult to predict.

Second, the disjunctive categorization can evidently be varied in a manner that would produce indefinitely many no-less-natural exceptions, which clearly provide no basis for special treatment. Some examples are *female or person who believes it is fair for them to compete against females* and *female or person who wants to compete against females.* As already mentioned, there is no general obligation to diagnose specific problems with a given proposal for reorganizing sports around a vividly gerrymandered category: that is a skeptical requirement which mistakes where the burden of proof lies.

Third, to reason on the basis of the category *female or person who identifies as female* would lead one into analogous trouble as that invited by the category *junior or from Switzerland.* In a tennis tournament that pits transgender-identified males against biological females, reasoning with the disjunctive category

*female or person who identifies as female* will be of no help in explaining or predicting why the former group is likely to win: for that, one needs the more natural categories *male* and *female*.

Finally, and more generally, to account for the typical male advantage in sport by adverting to the fact that a person is a *male who does not identify as female* creates the undesirable implication that the way the individual identifies is causally implicated in his advantage. It is akin to explaining someone's sudden death by adverting, not to the fact that they were run over by a bus, but to the fact that they were run over by a bus that wasn't painted red.

We conclude that the contrast between *female* and *female or person who identifies as female* vividly and systematically exemplifies the comparative unnaturalness of the latter. It is a poor alternative to organizing sports exactly around the joint between males and females. On the face of it, it would be as unjustified and arbitrary to carve an exception into protections for female sports in order to benefit males who identify as female as it would be to do so in order to benefit any other kind of male.

We also wish to note that the factors which disqualify categories whose membership is sensitive to facts about the sex individuals "identify as" from being natural categories are similar to some of those which bear on whether a group should be treated as a quasi-suspect class. In particular, just as the fact that a category (of any kind) is heterogenous and its membership mutable counts against regarding the category as natural, the fact that a social category is heterogenous

and its membership mutable counts against treating the group as a quasi-suspect class. *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987). The Court has previously been discouraged from instituting transgender identity as a quasi-suspect class in part for that reason. *Skrmetti*. The unnaturalness of the relevant categories adds yet another, closely related reason to refrain from doing so.

## III. The respondents' interpretation of the intended function of the Idaho and West Virginia statutes is mistaken.

The decisions of the Ninth and Fourth Circuit Courts and briefs filed by the plaintiffs all foreground the question of whether the Idaho and West Virginia statutes discriminate on the basis of transgender identity. Relatedly, they seek—in some cases at length—to establish an interpretation of the statutes on which the intended function of the statutes is to exclude "transgender girls" from playing on girls' sports teams.

By contrast, both of the petitions for certiorari filed by the appellants foreground the established interest of girls and women in having their own sports teams, leagues and competitions. Relatedly, they argue that the intended function of the Idaho and West Virginia statutes is to reinforce protections for female sports.

The conclusion that it is justified for Idaho and West Virginia to exclude all males from female sports helps support the petitioners' interpretation of the Idaho and West Virginia statutes. In particular, given

the option of interpreting the Idaho and West Virginia statutes as motivated by the justified aim of excluding all males from female sports, it is quite invidious to interpret them as instead motivated by the unjustified aim of excluding males who identify as female in particular.

Consider a simple analogy. Imagine that we are back in Medieval Europe. Gold is the currency of the land. Consequently, many merchants prefer to accept gold and only gold as payment. However, a new movement is afoot, whose members are known as the *alchemists*. The alchemists purport to have found a way of turning iron pyrite (fool's gold) into gold. Some people are convinced by the claims of the alchemists, though many others are not. This difference in attitudes starts to lead to time-wasting interactions in which an alchemist or fellow traveler tries to purchase a good using iron pyrite from a merchant who, unmoved by well-publicized insistence on the part of the alchemists that only irrational prejudice could lie behind lingering doubts about the possibility of converting iron pyrite into gold, continues to insist on only accepting gold as payment. One such merchant, whose unofficial working policy has hitherto been to accept only gold as payment, decides to make his policy official by putting up a sign on his store saying, "Only gold accepted (no iron pyrite!)."

What is the best way to interpret the merchant's newly-explicit policy? Given that his longstanding practice has been to accept only payment in gold, and that his sign literally articulates a general policy of accepting only gold as payment, should we interpret the merchant as acting on a policy of accepting only

gold as payment? Or alternatively, given the parenthetical mention of "iron pyrite" in his sign, should we interpret the merchant as primarily acting on a more narrowly-tailored policy of not accepting iron pyrite as payment?

The answer is obvious. The sign expresses the merchant's general policy of only accepting gold as payment. The parenthetical "no iron pyrite" is included on the sign only to clarify that the merchant's general policy extends to the form of non-gold that is in practice likeliest to be proposed to him as payment in lieu of gold. In fact, of course, no alchemical technology is (or, we now know, ever will be) available for converting iron pyrite into gold. The merchant's refusal to make a special exception to his general policy of only accepting gold as payment for the allegedly special case of iron pyrite is easily explained by his justified disbelief in claims by the alchemists to possess one.

Of course, there are differences between state laws which exclude all males from female sports and the merchant's sign stating that he accepts only gold as payment. Nevertheless, the latter case is an example of how clarifications of policy which happen to be prompted by a specific historical-social movement which mistakenly assimilates some non-instances of a natural category to instances of that category need reflect no special animus.

A more general point is worth making, too. Inevitably, general principles need to be *applied* in specific cases. For example, the merchant's principle "only gold as payment" needs to be applied multiple times a day to proposed payments. It is always possible for

those who object to the application of a general principle in a specific case to accuse those who are applying the principle as motivated not by the principle but instead by a pre-conceived verdict about that case. ("You are only rejecting this payment because you dislike this very coin!") If people with principles had to respond to each such claim of being unfairly singled out on its individual merits, the result would be a systematic obstacle to bring principles to bear in practice.

All of this, of course, carries over to laws, which similarly need to be applied every day in specific cases and to specific individuals. In that sense, *every* application of the law to a specific case may provoke the challenge, "Does this law only exist to discriminate in this very case?," If the justice system were under an obligation to answer each such potential challenge on its individual merits, it would grind to a halt. Clearly, it is under no such obligation.

## CONCLUSION

Like scientific theorists and other decision-makers, lawmakers do better to rely on natural, rather than gerrymandered, categories whenever possible. Statutes which exclude all males from female sports are justified in part because they respect this general constraint on good practical and theoretical reasoning. Potential alternative regimes which carve *ad hoc* exceptions into established protections for female sports are unjustified in part because they flagrantly violate it.

Respectfully submitted,

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# APPENDIX

## APPENDIX TABLE OF CONTENTS

## APPENDIX A – List of Individual *Amici*[8]

The individual *amici* are as follows, including relevant experience:

1. **Tomás Bogardus**
   Professor of Philosophy, Pepperdine University

2. **Peter Carruthers**
   Distinguished University Professor, University of Maryland

3. **Adam Caulton**
   Associate Professor of Philosophy of Physics, University of Oxford

4. **Cora Diamond**
   University Professor and Kenan Professor of Philosophy Emerita, University of Virginia

5. **Rona Dinur**
   Ph.D. in Philosophy (Hebrew University), LL.M. (Harvard University)

6. **Paul Elbourne**
   Professor of the Philosophy of Language, University of Oxford

7. **Gary Francione**
   Board of Governors Distinguished Professor of

[8] Institutions of individual *Amici Curiae* are listed for identification purposes only. The opinions expressed are those of the individual *amici,* and not necessarily of their affiliated institutions.

Law and Nicholas deB. Katzenbach Scholar of Law and Philosophy, Rutgers University

8. **Molly Gardner**
   Assistant Professor of Philosophy, University of Florida

9. **Robert P. George**
   McCormick Professor of Jurisprudence and Director of James Madison Program in American Ideals and Institutions, Princeton University

10. **Moti Gorin**
    Associate Professor of Philosophy, Colorado State University

11. **Joel David Hamkins**
    John Cardinal O'Hara Professor of Logic, University of Notre Dame

12. **Daniel Kodsi**
    D.Phil. in Philosophy (University of Oxford)
    Editor-in-Chief, *The Philosophers' Magazine*

13. **Holly Lawford-Smith**
    Associate Professor of Political Philosophy, University of Melbourne

14. **Mary Leng**
    Professor of Philosophy, University of York

15. **John Maier**
    Emerging Scholar, Mercatus Center at George Mason University

16. **Jeff McMahan**
    Emeritus Sekyra and White's Professor of Moral Philosophy, University of Oxford

17. **Kate Phelan**
    Lecturer, RMIT University

18. **Jon Pike**
    Professor of Philosophy, The Open University

19. **John Schwenkler**
    Professor of Philosophy and Director of Graduate Studies, University of Illinois Urbana-Champaign

20. **Bradford Skow**
    Laurance S. Rockefeller Professor of Philosophy, Massachusetts Institute of Technology

21. **Scott Soames**
    Distinguished Professor of Philosophy, University of Southern California

22. **Roger Teichmann**
    Lecturer in Philosophy, St Hilda's College, University of Oxford

23. **Timothy Williamson**
    Senior Research and Teaching Fellow and Emeritus Wykeham Professor of Logic, University of Oxford, and A. Whitney Griswold Visiting Professor, Yale University

24. **Crispin Wright**
    Global Distinguished Professor of Philosophy, New York University, and Professor of Philosophical Research, University of Stirling