No. 24-38

IN THE

Supreme Court of the United States

BRADLEY LITTLE, in his official capacity as governor of the state of Idaho; MADISON KENYON; MARY MARSHALL, ET AL.,
Petitioners,

v.

LINDSAY HECOX,
Respondent.

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

Brief for *Amici Curiae* American Principles Project, Paula Scanlan, and Brooke Blom in support of Petitioners

CRAIG L. PARSHALL
Senior Counsel for Civil Liberties & Legal Policy
American Principles Project
2800 Shirlington Rd., Suite 901
Arlington, VA 22206

NOAH HEINZ
Counsel of Record
ALBERT PAK
Pak Heinz PLLC
20 F Street NW 7th Fl.
Washington, DC 20001
(202) 505-6354
noah.heinz@pakheinz.com

Counsel for Amici Curiae

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Interest of *Amici Curiae*[1]

American Principles Project (APP) is a national non-profit organization engaging in research, public education, and advocacy on behalf of the institution of the family and the welfare of American youth. It also files *amicus* briefs in related cases, including for the prevailing parties in *Free Speech Coalition v. Paxton*, and *United States v. Skrmetti*. APP has been at the vanguard of advocacy for fairness in women's sports.

Paula Scanlan and Brooke Blom are women who swam competitively at the University of Pennsylvania

[1] No counsel for a party authored any part of this brief. No entity or person other than *amici* or their counsel made any monetary contribution intended to fund its preparation or submission.

(U. Penn.). While they were student-athletes, a transgender swimmer on the men's team was allowed onto the women's team and later won an NCAA championship in the women's category. Both women faced extreme privacy violations of the sort that advocates of inclusion too often ignore. They also experienced first-hand the unbalanced and unfair effect of including transgender athletes in women's competitive swimming.

Summary of the Argument

Amici Scanlan and Blom began seriously training in swimming by ages 8 and 5 respectively. Before joining the University of Pennsylvania team, Scanlan had set the New England Independent School League Record in the 400-yard freestyle relay, and Blom had been a high school state swimming champion. Participating in women's competitive swimming at the university level meant so much to both of them.

Transgender swimmer Lia Thomas made a mockery of women's swimming at U. Penn. Thomas, standing six-foot-four, swam on the men's team at first. But U. Penn. allowed Thomas—despite remaining anatomically male—to join the women's swimming team with Scanlan, Blom, and other women. Thomas changed in their locker room and watched them as they dressed and undressed, deeply violating their privacy. Having Thomas compete violated the fairness of women's swimming. In the words of *Sports Illustrated*, Thomas was dominant after joining the women's team and "throttled" the female swimmers. Thomas's participation diminished the ambitions of U. Penn. female swimmers to a race for second place and knocked some of the women out of tournament slots they had earned.

Idaho Code §§ 33-6202 – 33-6203 (Idaho Act, or the Act), neither targets transgender athletes for discrimination nor has a discriminatory purpose. Rather, it seeks to protect privacy and opportunities for female athletes from the youngest ages in school through college. Dozens of other states have pursued the same legitimate public policy. Idaho's choice to protect competitive fairness and privacy in women's sports, instead of prioritizing transgender athletes over those values, is in sync with trends in the NCAA and the World Athletic Council, as well as Title IX, which successfully opened opportunities for women and girls. Nothing in the Constitution bars this common-sense law.

The Act does not classify based on sex or transgender status in any invidious way. Respondent does not challenge the *existence* of separate women's sports. That foundational sex classification is not at issue. Rather, they challenge only the exclusion of transgender athletes, which does not draw any sex classification because changing an athlete's transgender status *but not biological sex* would not change his or her eligibility for competing in women's sports. The Act may disproportionately restrict transgender athletes seeking to join female teams, but that alone does not prove hostile or discriminatory intent. Like the state law upheld in *United States v. Skrmetti*, Idaho's law, as the Ninth Circuit explicitly recognized, was passed in the context of disputed and evolving science on a policy-related issue. In such circumstances, courts should presume the legislature was pursuing legitimate interests on one side of the disputed science, rather than infer discriminatory animus as the Ninth Circuit did.

The Ninth Circuit reached the opposite conclusion only by crafting a stunningly novel, nigh-insurmountable equal protection test. To pass constitutional muster under the lower court's view, a law must be supported by proof that *all* transgender athletes have a relevant performance advantage over all biological females. That standard would eviscerate women's sports entirely and has no grounding in this Court's precedent. The Ninth Circuit also failed to identify a proper comparator. Transgender women are not similarly situated to biological women. Biological women (under Idaho law) are defined by biology and genetics outside the individual's control; transgender women are defined by self-reported mental identity which can change over time or be fluid. This Court's equal protection precedents do not require conflating these different categories.

Under the Ninth Circuit's approach, female athletes like *amici* Scanlan and Blom will continue to face a coercive, unconstitutional choice: either compete against transgender athletes with unfair advantages and change alongside them in female locker rooms or else quit the sport. As U. Penn. recently recognized, and as more athletic organizations are recognizing at long last, the costs of including transgender athletes are too profound. Courts should not impose by edict what experience has discredited.

Argument

I. *Amici* Paula Scanlan and Brooke Blom's experience illustrates the real-world privacy and fairness harms of including transgender athletes.

The laws at issue in this case protect privacy and fairness. The costs of failing to protect those interests

are well illustrated by the experience of *amici* Paula Scanlan and Brooke Blom, who were university swimmers. Allowing a transgender athlete into women's swimming violated their privacy and robbed them of a fair swimming competition.

A. Allowing transgender athletes on women's teams invades women's privacy.

In September 2019, in an abrupt meeting that lasted only a few minutes, the Women's Swimming and Diving Team at the University of Pennsylvania was informed that Will Thomas, a member of the men's swimming team, would be transitioning to Lia Thomas, and planned to compete on the women's team. The female athletes had no input, there was no open discussion, and no questions were allowed. The decision had already been made, and nothing they could say would change it.

By the 2021–2022 season, Thomas was officially competing on the women's roster. As a member of the women's team, Thomas used the women's locker room where the team dressed and undressed 18 times per week, before and after practice. Even though Thomas had transitioned to the women's team, there was no *surgical* transition—in the dressing room, Thomas was anatomically male.

For Paula, this new reality was not just uncomfortable but deeply distressing. As she explained in her testimony before the House Judiciary Subcommittee on the Constitution and Limited Government, she had previously been sexually

assaulted in a bathroom.[2] Many other women have similar experiences. The locker room had previously been a space of routine and trust, where teammates could relax and prepare together. Suddenly, it became a place of tension and unease. She would hurry to change as quickly as possible, keeping her back turned or hiding in a bathroom stall. Many teammates did the same. Some resorted to using a family restroom down the hall.

Brooke, then a freshman, was assigned a space in the locker room directly adjacent to Thomas. She too experienced distress at being forced to change next to a biological male. She felt on edge in the locker room and unable to let her guard down.

When some of the swimmers voiced concerns, the university treated the swimmers' distress at this privacy violation as a sign they needed psychological help. U. Penn. referred them to psychological services for re-education.

Profound physical privacy violation is inherent in allowing transgender athletes in women's sports, and suffering harm from these violations is normal, not a psychological problem. That is why men and women have sex-separated locker rooms for athletes. Federal standards for educational athletics envision "each sex" with "separate teams;" and "both sexes" with their own

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[2] *The Dangers and Due Process Violations of "Gender-Affirming Care" for Children*, Hearing Before the Subcommittee on the Constitution and Limited Government of the House Committee on the Judiciary, 118th Cong. (July 27, 2023) (statement of Paula Scanlan) at 2, https://docs.house.gov/meetings/JU/JU10/20230727/116284/HHRG-118-JU10-Wstate-ScanlanP-20230727.pdf (hereinafter Scanlan Testimony).

appropriate physical facilities, including "locker rooms." 45 C.F.R. § 86.41 (2024).

The Ninth Circuit gave no genuine weight to these privacy considerations. The Eleventh Circuit upheld a school bathroom policy based on biological sex based on privacy concerns, *Adams ex rel. Kasper v. School Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc), which the Ninth Circuit's withdrawn opinion distinguished on the dubious ground that "bathrooms by their very nature implicate important privacy interests and are not the equivalent of athletic teams." Pet. App. 102a–103a. It is hard to square that with *Amici's* experience in locker rooms, but, either way, the Amended Opinion omitted that line of reasoning. *See* Pet. App. 33a–34a.

Concepts of privacy are inevitably framed by personal expectations and "general social norms." *Robbins v. California*, 453 U.S. 420, 428 (1981) (plurality opinion) *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982). Such norms include bodily privacy. The Ninth Circuit decision is only supportable if women like Brooke Blom and Paula Scanlan are entitled to *no expectation of privacy* in a locker room occupied by a transgender athlete who is anatomically male. This Court should reject that absurd position.

B. Allowing transgender athletes on women's teams harms competitive fairness.

Men's and women's physical bodies are different, which is why athletic competitions in virtually every sport and context have separate men's and women's divisions. The U. Penn. story shows why, but the principles extend to much younger ages.

1. Allowing Thomas to compete on the women's college team crushed competitive women's swimming.

Encouraged by her father, *Amicus* Brooke Blom began swimming at 5 years old. For years afterwards, she spent countless hard hours in the pool. By seventh grade her talent was so obvious that she had visions of competing at a major university. By eighth grade she qualified for the YMCA national swimming competition. Her continuing hard work and excellence drove her to a West Virginia high school state championship in the 100-yard butterfly event.[3] She began swimming at the University of Pennsylvania in the 2021–2022 season. In 2022–2023, she came in fifth place in the ECAC championships in the 100-yard butterfly event, competing against other biological women. As was typical in competitive swimming, seconds and fractions of seconds counted. She was only .08 of a second behind the fourth-place swimmer, 0.52 of a second from third, 1.84 from second, and less than two seconds from first place.

In the 2023–2024 season at U. Penn., Brooke Blom was part of the of 400 free relay team that not only won the ECAC title and a gold medal but also a silver medal in the 200 medley relay.[4] In the next season, she was the women's team captain, an ECAC Championships qualifier, winner of a pair of bronze medals in the 50 freestyle and the 100 free with a personal-best time, and winning three bronze medals

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[3] Brooke Blom – Women's Swimming and Diving, Univ. of Pa. Athletics https://pennathletics.com/sports/womens-swimming-and-diving/roster/brooke-blom/24152.

[4] *Id.*

in the 200 medley relay, 200 free relay, and 400 medley relay, and a silver medal in the 400 free relay.[5]

Amicus Paula Scanlan described her early motivation to swim competitively:

> I started swimming at a very young age, by age 8 I was swimming competitively, and by late middle school I was devoting at least 20 hours per week to swimming. I gave up countless Christmas holidays, weekends, and social events to work towards my goal of swimming Division 1. A dream that came true when I began swimming for the University of Pennsylvania.[6]

She held the New England Independent School League Record in the 400-yard freestyle relay before coming to the University of Pennsylvania. She set that record in March of 2017, and it was still the record as of her 2023 congressional testimony. [7] Both *amici* dedicated incalculable effort to shaving off fractions of a second, year-after-year, to compete.

Including Thomas made a mockery of competition in women's swimming at U. Penn. Thomas stands six-foot-four. Thomas's personal best times in every freestyle event were *faster than the women's world records*. It is no surprise that after joining the women's team, Thomas became U. Penn's first women's swimming NCAA champion in program history.[8]

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[5] *Id.*
[6] Scanlan Testimony, 1.
[7] *Id.*
[8] *Id.*

A Sports Illustrated article sums up Thomas's dominance:

> In her first year swimming for the Penn women's team after three seasons competing against men, Thomas throttled her competition. She set pool, school and Ivy League records en route to becoming the nation's most powerful female collegiate swimmer. Photos of Thomas resting at a pool wall and waiting for the rest of the field to finish have become a popular visual shorthand of her dominance.[9]

Did Thomas simply work much harder than any of the others on the women's team to achieve these results? Perhaps it was better nutrition, or cutting-edge coaching techniques? Obviously not. Before competing on the women's team, Thomas had been ranked in the mid-500s (554th in the 200 freestyle, all divisions)[10]. On the women's side, Thomas became an NCAA Division I champion, winning the 500-yard freestyle in 2022 and defeating Olympic female medalists. Days before Thomas's NCAA victory, Swimming World magazine published the position of more than 5,446 athletes, parents, coaches, and sports officials, including nearly 300 Olympians and Paralympians who opposed transgender inclusion in

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[9] Robert Sanchez, *"I Am Lia": The Trans Swimmer Dividing America Tells Her Story*, Sports Illustrated (Mar. 3, 2022). https://www.si.com/college/2022/03/03/lia-thomas-penn-swimmer-transgender-woman-daily-cover.

[10] John Lohn, *A Look at the Numbers and Times: No Denying the Advantages of Lia Thomas*, Swimming World Magazine (Apr. 5, 2022) https://www.swimmingworldmagazine.com/news/a-look-at-the-numbers-and-times-no-denying-the-advantages-of-lia-thomas/.

women's swimming events, contending it was fundamentally unfair.[11]

Facing this unfair competition, Blom, Scanlan, and many others on the women's team felt they were downgraded to a race for second place. Having Thomas on the team changed the U. Penn. coaching strategy and displaced female swimmers, bumping them out of events and positions. In swimming, a coach needs to predict what placements in events will allow the team to capture the most points. Since Thomas could win any freestyle event, the whole chain of placement was disrupted. For example, only three swimmers were able to score points at dual meets. If Thomas swam the 100 freestyle, that knocked out the third-best 100 freestyler. In freestyle and medley relays, Thomas's inclusion took a spot away from a woman in the A relay, shifting every female down one spot and forcing the best female freestyler to swim in the B relay instead. Thomas's inclusion also took a spot away from a woman to be on the Ivy League Conference team, a dream for many of the female swimmers on the team.

Recognizing the biological differences between men's and women's bodies in sports is exactly why previous challenges to separate women's sports has survived legal challenge. *See Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (ban on biological males playing on female teams constitutional because "due to average physiological

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[11] *See* Dan D'Addona, *Champion Women, WSPWG Release Results of Petitions Asking Congress, Sports to Prioritize Fairness for Biological Women*, Swimming World Magazine (Mar. 15, 2022) https://www.swimmingworldmagazine.com/news/champion-women-wspwg-release-results-of-petitions-asking-congress-sports-to-prioritize-fairness-for-biological-women/.

differences, *males would displace females* to a substantial extent if they were allowed to compete for positions on the [female] volleyball team") (emphasis added).

The U. Penn. story has a bittersweet coda. Earlier this year, the school struck Thomas's women's swimming records and apologized to each member of the women's swimming team.[12] Athletic organizations have made that same choice. As Petitioners pointed out in their pre-petition-grant Supplemental Brief, "NCAA's recently amended policy prohibit[s] males from participating in women's sports, including males who identify as women." Pet. Supp. Br. 9 (citing NCAA, *NCAA announces transgender student-athlete participation policy change*, (Feb. 6, 2025), perma.cc/6842-5LHS). The record also shows that the World Athletic "Council decided to prioritize fairness and integrity of the female competition in athletics" over inclusion of transgender athletes. *See* Pet. App. 291a (World Athletic Council press release).

West Virginia and Idaho do not need to make the mistake U. Penn. did. There is nothing unconstitutional about ensuring women like Scanlan and Blom can compete fairly against other women on the basis of grit, natural ability, and training.

2. The same fairness principles apply to pre-college sports.

The Ninth Circuit faulted the Idaho Act for applying a "categorical ban [which] includes transgender students who are young girls in

[12] Matt Moret, *Penn Revokes Lia Thomas' Records, Bans Trans Athletes Under Trump Administration Deal*, N.Y. Times (July 1, 2025) https://www.nytimes.com/athletic/6467404/2025/07/01/trump-lia-thomas-transgender-athletes-penn/.

elementary school or even kindergarten." Pet. App. 48a. Though the competitive dynamics are not identical at younger ages, the same principles still apply, and the court erred in holding otherwise.

Amici here did not show up at U. Penn. and decide they wanted to learn to swim—rather, both had been swimming competitively for a decade or more. Scanlan's competitive entry at age 8 is in line with the overall average starting age for highly competitive child swimmers. According to one expert from San Diego State University: "The average age to begin the Stage of Basic Training is 9–10 years for girls."[13] Serious female swimmers start their training in the elementary grade and can begin showing elite capability by middle-school, by the age of 14 according to one global study.[14] Taking *women's* sports seriously requires taking *girls'* sports seriously.

Besides the competitive aspects, the privacy concerns apply just as strongly for children, who also need physical privacy in their locker rooms.

II. Idaho's law promotes privacy and fairness consistent with the Constitution.

States have strong interests in protecting privacy and fairness, and the Constitution does not stand in their way. The Idaho Act should be upheld regardless

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[13] Brent S. Rushall, *Basic Training Principles for Pre-Pubertal Swimmers*, 23 Swimming Science Bulletin, (Apr. 3, 1998) (public symposium), available at https://coachsci.sdsu.edu/swim/bullets/greece23.htm.

[14] Aylin K. Post et al., *Multigenerational Performance Development of Male and Female Top-Elite Swimmers – A Global Study of The 100m Freestyle Event*, 30 Scand. J. Med. Sci. Sports 564 (Dec. 8, 2019), https://pmc.ncbi.nlm.nih.gov/articles/PMC7028091.

of whether the Court employs the rational basis level of scrutiny or heightened scrutiny, because it satisfies both. However, rational basis is more appropriate. As the Court recently explained, "where a law's classifications are neither covertly nor overtly based on sex," courts "do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose." *United States v. Skrmetti*, 145 S. Ct. 1816, 1832 (2025).

A. The Idaho Act's classifications are not based on sex or transgender status in any relevant respect.

Respondent here does not challenge the *existence* of separate team sports for men and women. Rather, they challenge the way the states classify between biological women and transgender women. That distinction is simply not a sex classification at all. To state the obvious, women as a class are not excluded from women's sports.

The Act also does not discriminate based on transgender status. Under Idaho law, transgender *men* may compete on women's teams (because they are biologically female under the law). Transgender *women* may not compete on a women's team, but that is not due to their transgender status. Using a but-for test, if one changed *just* their transgender status, but kept biological sex the same, Idaho law would treat them the same. That is, a biological man, whether transgender or not, cannot compete on the women's team.

The Act does refer to gender identification, but only in the context of protecting equal and fair competition and opportunities for women in sports:

> A recent study on the impact of such treatments found that even "after 12 months of hormonal therapy," a man who identifies as a woman *and is taking cross sex hormones* "had an absolute advantage" over female athletes and "will still likely have performance benefits" over women.

Pet. App. 265a, Idaho Code § 33-6202(11), Legislative findings and purpose, (emphasis added) (citation omitted). In any event, this Court has never held that transgender status is suspect or quasi-suspect, and transgender status does not surmount the high standard for becoming suspect or quasi-suspect.

The law may have a disparate impact on transgender women, but that is not the same thing as drawing a classification, which requires an "identity" between the decision criterion and the trait. *Skrmetti*, 145 S. Ct. at 1833 (quoting *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

Respondent (and the decisions below) bypass this analysis by subsuming *all sex* under the flawed rubric of "gender identity":

> [T]he [Idaho] Act on its face discriminates between cisgender [biological female] athletes, who may compete on athletic teams consistent with *their gender identity*, and transgender women athletes, who may not compete on athletic teams consistent with *their gender identity*.

Pet. App. 232a–33a (emphasis added). The lower courts deemed the Act's dissimilar treatment of transgender women and "cisgender" (biological)

women in sports as sex (or transgender status) discrimination. This analogy fails because the two are not similarly situated.

The Act creates three competitive sports categories, consisting of only two sexes: "(a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed." Pet. App. 267a, Idaho Code § 33-6203 (1)(a) – (c). Those categories are to be "based on biological sex." *Id.* It also provides that "Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." *Id.* This last provision lies at the core of this case.

Respondent and the lower courts attempt to equate two different categories of athletes, but the Constitution does not require this. Biological women have a female sex that is established not by an "identity" or by mental ideation but by genetic factors beyond their control. The immutability of sex is one of the reasons it is protected by the Equal Protection Clause. By contrast, men-to-women transgender athletes argue that they qualify as women for purposes of athletic competition not based on genetic factors beyond their control, but on "gender identity," which can be fluid or even within one's control. The second group is not similarly situated to the first.

Respondent's approach is out of step with this court's Equal Protection Clause jurisprudence. For instance, this Court has held that a difference in *the degree to which one group has control but another lacks control* can ground differential treatment consistent with the Equal Protection Clause. In *Tigner v. Texas*, 310 U.S. 141 (1940), the Court held that a Texas law that exempted agricultural commerce from antitrust restrictions, but not other commercial enterprises, did

not violate equal protection. Its reasoning substantially hinged on the fact that unlike many other commercial enterprises, farmers' "economic fate was in large measure dependent upon contingencies *beyond their control*." *Id.* at 145 (emphasis added). After all, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* at 147.

Amici Scanlan and Blom do not "identify" as female; rather, they *are* female, not by identification, but by immutable biological and genetic facts that exist beyond their control. By contrast, Respondent was treated as female in the courts below by a different metric entirely: namely, not genetics but by mental "identity." States need not equate the two.

One sex classification the Act does draw is in allowing women (whether trans or not) to compete in men's sports, but barring men (whether trans or not) from women's sports. But this distinction is barely challenged by Respondent, is of little consequence, and is easy to explain. This Court has recognized that some laws protecting only women are warranted where women "suffer disproportionately" absent appropriate legislation to protect them. *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981) (plurality opinion). There, the Court upheld a criminal statute barring rape by men but not by women. The Court rested that distinction on a common-sense notion: "We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Id.* at 471.

Though Idaho could have written its law either way, there is little question that women "suffer disproportionately" from joint sports leagues, because men have a substantial physiological advantage in many sports. There are no stories of transgender men dominating the competition after joining the men's team. Idaho's distinction is constitutionally permissible.

B. The Act was not motivated by an invidious discriminatory purpose.

The Idaho Act promotes women's fairness and privacy, which is worlds away from any invidious purpose. *Skrmetti* controls here. There, Tennessee's transgender procedure ban affected transgender youth disproportionately, but the Court held that "sex stereotyping" did not occur because the state statute had a legitimate and substantial interest in protecting youth from, among other things, "emotional harm." 145 S. Ct. at 1832. The Court applied rational basis. Simply put, disproportionate impact alone does not prove discriminatory intent that triggers heightened scrutiny under the Equal Protection Clause. *See also Washington v. Davis*, 426 U.S. 229, 242 (1976).

The purposes of the Idaho Act are to "promote sex equality" through "[s]ex-specific teams" and equal "opportunities" for women and girls in sports. Pet. App. 266a. Those "opportunities" include "obtain[ing] recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." *Id.* These benefits are plainly bona fide rather than mere hypotheticals, as *amici's* experience shows.

The federal government protects the same interests. Federal regulations promulgated under

Title IX underscore the logic of Idaho's approach. They envision two sexes, male and female, with equal opportunities and separate locker rooms for each:

> (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section [prohibiting discrimination "on the basis of sex" in athletics], a recipient may operate or sponsor *separate teams* for members of *each sex* …"
>
> ***
>
> (c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of *both sexes*."

Pet. App. 273a, 45 C.F.R. § 86.41(b)–(c) (emphasis added). Under these regulations, "members of *both sexes*" are entitled to "equal opportunity" in the "[p]rovision of *locker rooms*, practice and competitive facilities." *Id.* at 274a (emphasis added). Colleges and athletic organizations are coming around to the same view.

The Idaho legislature has the health-and-safety prerogative to protect its college athletes by prioritizing fairness and general athlete well-being over transgender inclusion.

III. The Ninth Circuit's contrary decision is revolutionary and unsupported.

A. The Ninth Circuit's legal test would end women's sports if applied consistently.

In contrast to the simple resolution Petitioners propose, to affirm the Ninth Circuit this Court would need to endorse extreme legal and factual

propositions. The Ninth Circuit held that Idaho could avoid an equal protection violation only if it could produce data that "ineluctably" demonstrates not just that *many* or *most* "transgender women," but "*all* transgender women, including those … who receive hormone therapy, have a physiological advantage over cisgender women." Pet. App. 48a (emphasis added).

This extraordinary new doctrine—which requires Idaho to prove total dominance by "all transgender women" athletes before it can legislate in the field—obliterates settled law. Even under heightened scrutiny, the Idaho Act may apply different rules based on sex where "[t]he biological differences" between men and women "provide a relevant basis for *differing rules* …." *Miller v. Albright*, 523 U.S. 420, 445 (1998) (emphasis added) (differing rules between women and men for conferring citizenship on their children born in foreign lands held constitutional). Before now, no court had suggested that the "biological differences" must be true for *all* men and *all* women.

This test is so extreme that it would bar women's sports entirely. After all, there are surely at least a few *men*—even without hormone therapy—with no physiological advantage over women. There is no principled reason to apply a higher standard to excluding transgender athletes than the test used to allow separate women's sports in the first place.

B. The Ninth Circuit's holding uses the Constitution to decide questions of policy on which the democratic process should govern.

Legislatures are not governed by the rule of experts. As Justice Thomas noted in his concurrence in *Skrmetti*, "so-called experts have no license to

countermand the 'wisdom, fairness, or logic of legislative choices.'" 145 S. Ct. at 1840 (Thomas, J., concurring (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). The Ninth Circuit's conclusion ignores this wisdom, arrogating legislative power to itself to force unwilling women, states, and schools to allow transgender athletes to compete with women.

This would be bad enough if there were an expert consensus in favor of the Ninth Circuit's policy outcome, but here there is none. The Ninth Circuit conceded that "the scientific understanding of transgender women's potential physiological advantage is fast-evolving and somewhat inconclusive." Pet. App. 48a.[15] The Fourth Circuit's decision also recognized the unsettled scientific debate. It referenced West Virginia's "expert report contradicting the assertions by B.P.J.'s experts and saying that, even apart from increased circulating testosterone levels associated with puberty, there are 'significant physiological differences, and significant male athletic performance advantages in certain areas.'" *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 561–62 (4th Cir. 2024). The majority opinion recognized that the issue was a "disputed

[15] To nonetheless rule against Idaho, the Ninth Circuit was forced to cherry-pick the evidence and give short shrift to competing harms. It cited the policies of the International Olympic Committee (IOC) only once; there, to illustrate the supposed defects in the Idaho Act. Pet. App. 11a. Yet, the IOC's policies make clear that the "psychological and mental well-being" of all female athletes was its priority. Pet. App. 284a, 319a. Similarly, the court focused on transgender male-to-female athletes and their privacy interests, Pet. App. 11a, but ignored the counterbalancing privacy interests of biological females in locker rooms who face transgender athletes with male anatomy.

evidentiary issue," and "the very thing the experts disagree about." *Id*.

Skrmetti teaches the proper course when reviewing laws on medical questions with "inconclusive" and "fast-evolving" science. There, the conflicting and evolving science on transgender medical procedures undermined any inference of animus or sex-based stereotyping because the Tennessee legislature had "found that the prohibited medical treatments are experimental." 145 S. Ct. at 1832. The Court relied on the principle that "States [have] 'wide discretion to pass legislation in areas where there is medical and scientific uncertainty.'" *Id.* at 1836 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

The Ninth Circuit flipped this rule on its head. It demanded proof that "*all* transgender women … who receive hormone therapy, have a physiological advantage over cisgender women." Pet. App. 48a (emphasis added.). This Court's precedents teach the opposite—where the facts are unsettled, legislatures get *more* deference. This principle is particularly applicable here where the lower court considered the relevant science to be shifting sand.

Under rational basis analysis, Idaho's legislature was entitled to legislate by making its own policy choice in this unsettled field if it rests on any conceivable and reasonable basis and its classifications neither discriminate against a suspect class, nor violate fundamental constitutional rights. More to the point, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. Because this Court has never determined transgender

status to be a suspect or quasi-suspect class, the logic of *Beach Communications* applies.

IV. Properly read, Title IX also promotes fairness and privacy for women.

The Idaho Act's purpose is to protect the integrity, fairness, and welfare of women's sports. The leveling of the playing field for women has been a long road since 1972 when Title IX was passed by Congress. *See* Title IX, Education Amendments of 1972, 86 Stat. 373, 20 U.S.C. § 1681 *et seq*. As a result, the disproportionate lack of opportunities for women athletes has receded:

> In 1972, there were just over 300,000 women and girls playing college and high school sports in the United States. Female athletes received 2 percent of college athletic budgets, while athletic scholarships for women were virtually nonexistent.
>
> By 2012, the 40th anniversary of Title IX's passage, the number of girls participating in high school sports nationwide had risen tenfold, to more than 3 million. More than 190,000 women were competing in intercollegiate sports—six times as many as in 1972.[16]

While this Idaho case does not directly implicate Title IX, there is some overlap with that issue in the West Virginia case, where Title IX and the Equal Protection Clause are both at issue. *See B.P.J. by Jackson*, 98 F.4th at 563. The Fourth Circuit's majority recognized

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[16] Sarah Pruitt, *How Title IX Transformed Women's Sports*, History.com (Mar. 2, 2025) https://www.history.com/articles/title-nine-womens-sports.

that, "Although Title IX and equal protection claims are similar, they are 'not ... wholly congruent." *Id.* (quoting *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009)). Each requires a separate analysis, remembering, as Justice Thomas has suggested, "An abstract similarity between the purposes of the Constitution and a statute is not a license to import the statute's interpretation into the Constitution, much less to ignore the Constitution's text." *Skrmetti*, 145 S. Ct. at 1838 n.2 (Thomas, J., concurring) (addressing the difference in textual language between the Equal Protection Clause and Title VII).

There is substantial parity between the Idaho law and the regulations under Title IX regarding separate male-female facilities and locker rooms, and the well-being and privacy interests of female athletes implicated by that. The congruence is not perfect, but reversing the Ninth Circuit's Equal Protection holding would avoid rolling back the gains that female athletes have achieved over the decades under Title IX.

A recent Title IX case underscores this point. In *Department of Education v. Louisiana*, 603 U.S. 866 (2024) (per curiam) the Court denied an application to stay the preliminary injunctions imposed by lower courts against a new rule from the Department of Education redefining the reach of Title IX. "The rule newly defined sex discrimination to 'includ[e] discrimination on the basis of … sexual orientation, and gender identity.' 89 Fed. Reg. 33886 (2024)." *Id*. at 867. All members of the Court agreed that the district court's preliminary injunction *barring* that new definitional language from being inserted into Title IX regulations should remain in effect. *Id.*

The Equal Protection Clause as properly understood, and Title IX when properly interpreted, are, in the end, complementary. The approaches advocated by Respondent in both this and the companion case would damage women's sports, distort both equal protection and Title IX, and would leave a trail littered with bad constitutional law accompanied by a statutory construction precedent that ignores the plain language of Congressional text.

A correct resolution here will reaffirm an equal protection doctrine that objectively defines sex and avoids disproportionate harm to female sports. Otherwise, a new equal protection era ushered in by the Ninth Circuit's stunning logic will arise, one that ignores real biological differences in favor of mental identities, and that would end women's sports if applied consistently.

V. The Court should resolve the equal protection issue now.

After litigating for multiple years, Respondent now suggests that the case is moot. Suggestion of Mootness, 1–3. Mootness is not an insurmountable obstacle where a plaintiff "abandoned her case in an effort to evade our review." *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023). In *Acheson Hotels* the plaintiff's case was mooted by her voluntary dismissal only after an independent extrinsic event—the lower court's suspension of her attorney's license to practice law. *Id.* at 3–4. It was uncertain whether that was evasion, depending, as it did, on events outside her control.

This case is quintessential evasion. The supposed mootness here amounts to little more than a change of mind—Respondent no longer wants to be on a women's

team. Suggestion of Mootness at 3. This eleventh-hour dismissal could have occurred during the year between the filing of the Petition and the granting of the Petition. Instead, Respondent had this change of mind only *after Skrmetti* was decided—no doubt advised by sophisticated attorneys who, like Belshazzar, saw the writing on the wall.

Finding mootness here would waste judicial resources. "[O]nce this Court has undertaken a consideration of a case," an exception to usual mootness principles is "warranted" to avoid substantial wasting of judicial resources. *Honig v. Doe*, 484 U.S. 305, 331–32 (1988) (Rehnquist, C.J., concurring).

This Idaho case presents the equal protection issue cleanly, and briefing is well underway. Review of the issue may be stymied if the dismissal were accepted. Though the West Virginia case presents the Title IX issue, the equal protection issues were not as squarely decided in that case. It may not be strictly necessary for this Court to rule on the Fourth Circuit's mistaken equal protection reasoning if it reversed the Title IX reasoning. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947) ("this Court has followed a policy of strict necessity in disposing of constitutional issues"). The Court has discretion to reject Respondent's suggestion of mootness and should exercise that discretion here to ensure the issue does not evade review and waste judicial resources.

Conclusion

The Court should reverse both the Fourth and Ninth Circuit decisions below.

Respectfully submitted,

NOAH HEINZ
Counsel of Record
ALBERT PAK
Pak Heinz PLLC
20 F Street NW 7th Fl.
Washington, DC 20001
(202) 505-6354
noah.heinz@pakheinz.com

Counsel for Amici Curiae

CRAIG L. PARSHALL
Senior Counsel for Civil Liberties & Legal Policy
American Principles Project
2800 Shirlington Rd., Suite 901
Arlington, VA 22206

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