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.

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,
v.
B.P.J., BY NEXT FRIEND AND MOTHER,
HEATHER JACKSON,
Respondent.

ON WRITS OF CERTIORARI TO THE U.S. COURTS OF APPEALS FOR THE NINTH AND FOURTH CIRCUITS

BRIEF FOR CONCERNED WOMEN FOR AMERICA AND SAMARITAN'S PURSE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with about half a million supporters in all 50 states. CWA advocates for traditional values that are central to America's cultural health and welfare. CWA is made up of people whose voices are often overlooked—average American women whose views are not represented by the powerful or the elite. CWA has a substantial interest in this case. CWA's mission includes ensuring that female athletes can fully participate in sports fairly and safely. Thus, CWA advocates for laws that limit participation in female sports to biological females.

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The ministry operates relief programs for vulnerable women who are victims of war, famine, and disaster. Samaritan's Purse's concern arises when concepts of Biblical and scientific reality are threatened by executive, legislative, or judicial action compelling ideologies that diminish common grace related to safety, fairness, privacy, speech, and religious free exercise.*

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Under the established intermediate scrutiny rule, the Respondents in these cases should lose. Pitting boys against girls in sports is unfair. States have an important objective in ensuring equal athletic opportunities for girls. And these laws are substantially related to that objective because boys generally have an athletic advantage over girls.

This brief makes three points in support of reversal. *First*, the courts below wrongly adopted an unprecedented as-applied intermediate scrutiny theory that focuses on individual circumstances. On that theory, even if a law satisfies intermediate scrutiny, any person can claim an exemption by showing that the State's objective may not fully apply to that person. That theory transforms intermediate scrutiny into the functional equivalent of strict scrutiny by requiring otherwise constitutional laws to perfectly fit the challenger's individual circumstances. Intermediate scrutiny has never demanded a plaintiff-by-plaintiff fit; it limits "discriminatory classifications," not applications. *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). After all, intermediate scrutiny allows some amount of over-inclusiveness "so long as the means chosen are not *substantially* broader than necessary to achieve the government's interest." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218 (1997) (emphasis added). This Court has explained that courts "should look to the likelihood that governmental action premised on a particular classification is valid as a general matter." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Rather than adopt a novel as-applied approach—which even the Biden Administration refused to endorse below—this Court should analyze these laws at most under the accepted intermediate scrutiny standard: laws containing a sex classification are valid if "substantially related" to an "important governmental objective." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (cleaned up). These laws easily meet that standard. The Respondents agreed that providing equal athletic opportunities for females is an important governmental objective. *B.P.J.* Pet. 87a–88a; *Hecox* Pet. 148a–49a. And as the district court in *B.P.J.* found, "sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports." *B.P.J.* Pet. 92a.

Second, by correcting the decisions below, this Court can preserve the path of women's equality that it charted in *Virginia*. Increasingly, litigants and lower courts (including the Ninth Circuit here) are rejecting what this Court recognized: that "[i]nherent differences between men and women" "are cause for celebration." 518 U.S. at 533 (cleaned up). Instead, they frame sex as an indeterminate construct based on personal feelings. That understanding of sex would make intermediate scrutiny unadministrable and incapable of protecting women's equality. Sex-discrimination claims would devolve from the objective and administrable immutable male-female binary into chaos, as men hijack women's sports and private spaces. The Court should reverse the ongoing devolution of intermediate scrutiny rules into class-of-one claims based on innumerable undefined, subjective, ever-changing identities.

Third and alternatively, the Court should recognize that intermediate scrutiny has no textual or historical basis in the first place. That test is especially improper in the context of these challenges, which are not ultimately about differential treatment based on sex but how the government defines male and female. Rather than extend the infirm and manipulable doctrine of intermediate scrutiny—whose rules often appear to be applied differently depending on the underlying constitutional right—the Court should either reject it or at a minimum apply it consistently with historical meaning and other constitutional applications.

ARGUMENT

1. The Fourth Circuit said that B.P.J. "challenges [West Virginia's Act] only as applied to her." *B.P.J.* Pet. 27a. The Ninth Circuit used similar reasoning. *Hecox* Pet. 48a (focusing on the small group of "transgender women" "like Lindsay"). This approach misunderstands intermediate scrutiny. Unlike strict scrutiny, intermediate scrutiny asks whether a law's classification is *sufficiently* tailored to the State's interest. That question focuses on the group classification, and the main question about the individual plaintiff is simply whether they are a member of the group subject to the law's classification. Unlike some applications of strict scrutiny, intermediate scrutiny does not require that the law be the least restrictive means of furthering the State's interest. An as-applied intermediate scrutiny theory collapses this distinction. That theory is unsupported by precedent. And it would upend state regulatory schemes and revolutionize constitutional adjudication.

2. This Court should renew its commitment to upholding sex-based classifications that respect the "enduring" "[p]hysical differences between men and women" for American women's benefit. *Virginia*, 518 U.S. at 533. Sex discrimination was never about an individual's psychological autonomy to impose their present identity on others. It has always concerned an immutable characteristic: biological sex. Departing from that standard leaves physical reality, administrable standards, and precedent behind. This Court should stay the biological sex-discrimination course and corral the below frolics into an unrestrainable subjective-gender-identity standard.

3. Intermediate scrutiny should not apply at all to challenges to a State's biological definition of sex, for that definition does not treat the sexes differently. Extending intermediate scrutiny to this new type of challenge is especially unwarranted given the test's lack of textual or historical grounding, manipulability, and divergent applications across constitutional rights.

I. The novel as-applied theory eliminates the distinction between intermediate and strict scrutiny.

"The general rule is that legislation is presumed to be valid," and a law "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. But courts are more suspicious of certain classifications. Thus, laws that "classif[y] by race, alienage, or national origin" "are subjected to strict scrutiny." *Ibid.* Such "classifications are simply too pernicious to permit any but the most exact

connection between justification and classification," and the government "must demonstrate that the use of individual racial classifications . . . is narrowly tailored to achieve a compelling government interest." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (cleaned up). In some contexts, strict scrutiny requires the government to "show that it has adopted the least restrictive means of achieving [its] interest," "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997).

Sex-based classifications receive lesser scrutiny. As this Court has recognized, "[t]he two sexes are not fungible," and there are "inherent differences" between the sexes. *Virginia*, 518 U.S. at 533 (cleaned up). These differences "remain cause for celebration, but not for denigration of the members of either sex." *Ibid.* Thus, sex classifications have received intermediate scrutiny, which requires that the classification "serve[] important governmental objectives" with means that "are substantially related to the achievement of those objectives." *Ibid.* (cleaned up).

Courts also apply intermediate scrutiny outside of Fourteenth Amendment equal protection claims. For instance, courts apply intermediate scrutiny for sex discrimination claims against the federal government under the Fifth Amendment's Due Process Clause. See *Frontiero* v. *Richardson*, 411 U.S. 677, 690–91 (1973). Courts apply intermediate scrutiny to content-neutral time, place, or manner restrictions. In these cases too, "a regulation need not be the least []restrictive means," but it cannot "burden

substantially more speech than is necessary to further" the government's legitimate interests. *TikTok Inc.* v. *Garland*, 604 U.S. 56, 76–77 (2025) (first quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994); then quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989)).

In sum, this Court's precedents teach that intermediate scrutiny has two main requirements: (1) the government must have an important interest, and (2) the law must closely—but not precisely—further that interest.

The novel as-applied intermediate scrutiny theory is flawed for three reasons. First, it requires perfect fit of the sort only required, if ever, by strict scrutiny. Second, it is contradicted by precedent. Third, it would upend state regulatory schemes and constitutional adjudication in many areas of law. And the only apparent defense of this theory lacks merit.

A. The as-applied intermediate scrutiny theory requires perfect fit.

The as-applied theory collapses the distinction between strict and intermediate scrutiny, requiring a perfect fit between an otherwise lawful classification and a specific plaintiff's circumstances. When applying strict scrutiny, at least in some contexts, courts examine whether "application of the [legal] burden *to the person* represents the least restrictive means of advancing a compelling interest." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (emphasis added) (cleaned up). That approach may make sense when the least restrictive means test applies. If even one burdensome

application of a law subject to strict scrutiny is unnecessary to achieve the government's objective, then arguably the law is not the least restrictive means. That would mean it flunks strict scrutiny, and the plaintiff subjected to the unnecessary burden wins. Again, strict scrutiny is not always applied this way, but it is at least logically possible to consider such an "as-applied" strict scrutiny argument.

As-applied intermediate scrutiny, by contrast, is incoherent. Intermediate scrutiny is "a less rigorous analysis" than strict scrutiny. *Turner Broad.*, 520 U.S. at 213. By definition, intermediate scrutiny's fit is looser than the "narrow[] tailor[ing]" or "least restrictive means" required by strict scrutiny. *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). Thus, intermediate scrutiny tolerates over-inclusivity that strict scrutiny would not: a statute can pass intermediate scrutiny even if the states' interest is not achieved every time. *Turner Broad.*, 520 U.S. at 216.

Certainly, intermediate scrutiny does not tolerate too much over-inclusivity. See, *e.g., Craig* v. *Boren*, 429 U.S. 190, 202 (1976) ("[A] correlation of 2%" between sex and the relevant behavior "must be considered an unduly tenuous 'fit.'"). But it tolerates laws with *some* unnecessary applications. While a 2% correlation might be too little, 100% is far too much. See *id.* at 204 (calling for merely "a legitimate, accurate proxy"); *Turner Broad.*, 520 U.S. at 216–17 (acknowledging that a law is not overbroad even when the government's interest is not implicated in every application). Otherwise, intermediate scrutiny is no different from strict scrutiny.

Contrary to the Fourth Circuit's theory, it is incoherent to ask whether the law's application to a single plaintiff is permissibly overinclusive. That inquiry has no meaning. And the Ninth Circuit's effort to focus on a very small group of people likewise misses the mark. See *Adams* v. *Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1323–24 (CA11 2021) (Pryor, C.J., dissenting).

Rather, the over-inclusivity question focuses on the overall group classification. In other words, the over-inclusivity question is exactly what the traditional intermediate scrutiny standard says: is the law's group-wide classification sufficiently tailored to an important interest? That connection is assessed by group-wide characteristics. The longstanding "two remedial alternatives" confirms this group focus: "withdrawal of benefits from the favored class" or "extension of benefits to the excluded class." *Sessions* v. *Morales-Santana*, 582 U.S. 47, 72–73 (2017). Under intermediate scrutiny, the law cannot be "overbroad[]" simply because its application to a single plaintiff is unnecessarily burdensome. *Id.* at 63 n.13. That is nonsensical.

The Fourth Circuit did not try explaining how its theory would not collapse intermediate and strict scrutiny, other than noting the irrelevant fact that "winning an as-applied challenge does not impact the state's ability to apply its law to other parties." *B.P.J.* Pet. 30a. But that confuses a remedial question with whether the law violates equal protection at all. The Fourth Circuit's explanation is also difficult to credit practically when it comes to unobservable and

subjective criteria like gender identity, a topic addressed below.

The Fourth Circuit also reasoned that "a defendant may prevail by showing that its refusal to make an exception for the plaintiff's individual circumstances itself satisfies the relevant level of constitutional scrutiny." *B.P.J.* Pet. 30a. But this does not distinguish as-applied intermediate scrutiny from strict scrutiny. Certainly, the Fourth Circuit's suggestion might be true in strict scrutiny cases like the free exercise case it relied on. See *ibid.* (discussing *United States* v. *Lee*, 455 U.S. 252 (1982)); see also *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 734 (2014) (explaining "the fundamental point" of *Lee* as "there simply is no less restrictive alternative to the categorical requirement to pay taxes"). But that showing should never be required under intermediate scrutiny, where individual circumstances are irrelevant.

The United States's prior position provides a helpful contrast, as it refused to press the Fourth Circuit's version of as-applied intermediate scrutiny as *amicus* below. The Biden Administration argued that "the State's categorical exclusion of all transgender girls—including those who, like B.P.J., have no sex-based competitive advantage over other girls—from competing . . . is not substantially related to achieving the State's asserted interest." Brief for the United States as *Amicus Curiae* 18–19, 2023 WL 2859726, *B.P.J.* v. *W. Virginia State Bd. of Educ.*, 98 F.4th 542 (CA4 2024); see also *Hecox* Pet. 48a–49a (adopting a similar position).

Focusing on this very small group of individuals is wrong, as explained above. But the Fourth Circuit's theory was even more extreme. The Biden Administration argued that the law is overbroad as applied to the group of "all transgender girls," merely using the plaintiff as an example to show that supposed over-inclusivity. But B.P.J. argued that the law is invalid as applied *just* because the State's asserted interests supposedly do not apply to B.P.J. Under this theory—adopted by the Fourth Circuit—B.P.J. would win here even if every other transgender girl dominated in girls' sports. As the Biden Administration's refusal to sign on to this novel theory suggests, this theory bears no relation to intermediate scrutiny. To maintain the distinction between strict and intermediate scrutiny, the Court should reject novel as-applied theories.

B. Precedent contradicts an as-applied theory.

The weight of precedent is also against the as-applied theory. Time and again, this Court has said that individual characteristics have no bearing on a law's constitutionality under intermediate scrutiny.

Take *Ward* v. *Rock Against Racism*, where the respondent argued that a city's requirement that it use the city's sound equipment and technician for its performance failed intermediate scrutiny. 491 U.S. at 787–90. The city said its regulation would "eliminate[] the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers." *Id.* at 801. This Court noted that "this concern [was] not applicable to respondent's concerts, which apparently were characterized by more-than-

adequate sound amplification." *Ibid.* But this "fact [was] beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ibid.* The Court continued: "the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline." *Ibid.*

Likewise, the Court in *United States* v. *Edge Broadcasting Co.* refused to sanction an as-applied challenge to a federal prohibition on broadcasting of lottery advertising by broadcasters licensed in States that banned lotteries. 509 U.S. 418 (1993). Applying intermediate scrutiny, the Court rejected an as-applied challenge from a broadcaster licensed in North Carolina (where lotteries were prohibited) but whose viewers were primarily in Virginia (where lotteries were permitted). See *id.* at 423–25; see also *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 73 (2022) (describing the commercial speech test as "intermediate scrutiny"). The Court said that whether the "regulation directly advances the governmental interest asserted" "cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity." *Edge*, 509 U.S. at 427. The Court said that was "the wrong question": "[e]ven if there were no advancement as applied," "there would remain the matter of the regulation's general

application to others." *Ibid.* Thus, the regulation could "directly advance[] the governmental interest" "even if, as applied to Edge, there were only marginal advancement of that interest." *Id.* at 429–30. "[T]he validity of the restriction" is "judge[d]" "by the relation it bears to the general problem," "not by the extent to which it furthers the Government's interest in an individual case." *Id.* at 430–31.

In an equal protection case, *Nguyen* v. *INS*, this Court applied intermediate scrutiny to a law providing different citizenship rules for children born abroad and out of wedlock depending on whether the citizen parent was the mother or the father. 533 U.S. 53, 61 (2001). The plaintiffs argued that there was no "guarantee" that the law would always advance the government's asserted interests. *Id.* at 69. This Court held that "[t]his line of argument misconceives" "the manner in which we examine statutes alleged to violate equal protection." *Ibid.* "None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Id.* at 70. Instead, it is enough that "the means adopted by Congress are in substantial furtherance of important governmental objectives." *Ibid.*

Many other cases are in accord. See *Rostker* v. *Goldberg*, 453 U.S. 57, 81 (1981) (upholding the exclusion of women from selective-service registration even though "a small number of women could be drafted for noncombat roles"); *Califano* v. *Webster*, 430 U.S. 313, 318 n.5 (1977) (per curiam) (upholding a statute providing higher Social Security benefits for

women than for men because "women *on the average* received lower retirement benefits than men." (emphasis added)); *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977) ("[B]road legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples.").

The laws at issue operate within those bounds. They prohibit biological boys from competing in girls' sports, without exception. That is the policy choice that citizens made, consistent with intermediate scrutiny. But if the Court lets a vision of as-applied intermediate scrutiny control, that would create a significant, judicially imposed exception to these laws via a perfect fit requirement—something this Court has never required, and the citizens' representatives never voted for.

To salvage its novel as-applied theory, the Fourth Circuit pointed to *Lehr* v. *Robertson*, 463 U.S. 248 (1983), and *Cleburne*, 473 U.S. at 440. But neither is about sex, and neither applied intermediate scrutiny.

In *Lehr*, this Court upheld a law that "guarantee[d] to certain people the right to veto an adoption." 463 U.S. at 266. Under the challenged law, "[t]he mother of an illegitimate child is always within that favored class, but only certain putative fathers are included." *Ibid.* Because the father in *Lehr* "never established a substantial relationship with his daughter," the government could constitutionally distinguish between him and others like him and fathers who "are in fact similarly situated [to the mother] with regard to their relationship with the child." *Id.* at 267.

Lehr did not apply intermediate scrutiny at all. Instead, it found no equal protection violation because the plaintiffs were not "similarly situated" to those in the supposedly favored group. *Ibid.*; see *Morales-Santana*, 582 U.S. at 64 n.12 ("The 'similarly situated' condition was not satisfied in *Lehr*."). In other words, the Court held that the regulation discriminated between parents with "a substantial relationship" with their child and parents without that relationship, not based on sex. *Lehr*, 463 U.S. at 266–67.

Cleburne does not support the as-applied approach, either. There, this Court considered whether denying a conditional use zoning permit to a group home violated equal protection. 473 U.S. at 435. Rather than create a new suspect class, the Court asked if the zoning "rational[ly]" met "a legitimate end." *Id.* at 442. In that inquiry, courts "should look" to whether the "classification is valid *as a general matter*." *Id.* at 446 (emphasis added).

The Fourth Circuit emphasized that *Cleburne* "held that 'the ordinance [was] invalid *as applied in this case*.'" *B.P.J.* Pet. 28a (quoting 473 U.S. at 448). "But applying rational-basis review in a *'case'* is not the same as applying it to the unique circumstances of a specific plaintiff." *Jones* v. *Governor of Fla.*, 975 F.3d 1016, 1036 (CA11 2020) (Pryor, C.J.). "After the passage cited by the [Fourth Circuit]," *Cleburne* "evaluated whether the city's proffered reasons for requiring a permit for a group home of people with intellectual disabilities but not for comparable facilities rationally reflected relevant differences between 'the mentally retarded *as a group*' and

others." *Ibid.* (citing *Cleburne*, 473 U.S. at 448–50). "The Court did not focus on factors unique to the particular disabled people involved," *ibid.*, and its application as a remedial matter was appropriately limited to the zoning permit before it. *Cleburne*'s analysis—rational basis for a zoning application by one party—is not some hidden sea change in constitutional jurisprudence.

In sum, the as-applied intermediate scrutiny approach finds no basis in this Court's precedents, which reject that theory.

C. The consequences of the as-applied theory would be significant.

Beyond disregarding precedent, the novel as-applied theory would have significant negative consequences. It would permit a plaintiff to demand perfect tailoring to his situation, forcing the government to abandon the law's enforcement writ large to avoid plaintiffs with often undetectable unique circumstances. This intermediate scrutiny reformulation would also alter vast swaths of law, including equal protection, Fifth Amendment due process, and speech—or else inexplicably result in different flavors of intermediate scrutiny. Decades of precedent would be disturbed, and intermediate scrutiny would essentially morph into strict scrutiny, which is supposed to be reserved for the most inherently suspect laws.

First, the practical consequences of as-applied intermediate scrutiny would be severe. Laws that are facially valid—and further important government interests like protecting girls and women from

harm—would no longer be enforced. That is because States will be unable to predict when some plaintiff with unique (and, as here, unapparent) circumstances might come along and suffer a supposed as-applied violation. And any state-run single-sex homeless shelter, prison, or restroom could create an equal protection violation for gender identity—as applied to an individual. Rather than face "high-cost, high-risk lawsuit[s]," *Virginia*, 518 U.S. at 597 (Scalia, J., dissenting), States and local governments will simply not enforce these laws or programs, even if they are valid as against every other person in the world.

The as-applied approach would reach beyond gender identity and seemingly spell the end of sex-separated sports. The decisions below suggest that "meaningful competitive athletic advantage" is the only permissible dividing line. *B.P.J.* Pet. 34a; see *Hecox* Pet. 42a. So consider a boy (who identifies as male) with a disability or low hormone levels, leading to reduced physical ability.[1] Or consider a boy who is simply smaller or slower than average.[2] These conditions are far more common than transgender identification, which the Ninth Circuit estimated was between 0.6 and 1.8% of Americans. *Hecox* Pet. 13a–14a. If courts were required to do a case-by-case analysis for every person (or small group) in every

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[1] For instance, around 5% of males experience delayed puberty and thus reduced physical ability. *Delayed Puberty in Boys: Information for Parents*, Am. Acad. of Pediatrics (June 9, 2015), https://perma.cc/29M3-DSDB.

[2] See, *e.g.*, L. Sharma et al., *Short Stature*, Nat'l Insts. of Health (2025), https://perma.cc/JKL8-42TU (3% of children suffer from short stature); see generally *B.P.J.* Pet. 92a–93a.

sport as a matter of equal protection, many more males with physical abilities on par with females would presumably have to be let into girls' sports.

Yet policies separating sports by sex protect important state interests. Individuals protected by those laws—here, young girls—will suffer. In places where biological men who identify as women have competed against biological women, these harms are real. Young girls have lost not just individual competitions, but the chance to compete on a fair playing field against their peers.[3] Certainly, this is not the "celebration" of women's physical capabilities that intermediate scrutiny is supposed to preserve. *Virginia*, 518 U.S. at 533. Instead, the as-applied theory would allow biological men to "denigrat[e]" women's "[p]hysical differences" by infiltrating women's sports and ultimately excluding women from the highest levels of athletic achievement. *Ibid.*

The as-applied theory will also unsettle precedent. Under that theory, many cases from this Court discussed above would have been decided differently. For example, this Court in *Nguyen* would likely have found that the "ultimate objective" of the statute at

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[3] See, *e.g.*, R. Pollina, *High School Track Star Appears to Give 'Thumbs-Down' After She's Pushed out of State Champs by Transgender Competitor: 'Cheated'*, N.Y. Post (May 22, 2023), https://perma.cc/XJH4-ZD95; W. Martin & M. Cash, S*wimmer Lia Thomas Beat 2 Olympic Medalists Amid Protests to Make History as the First Trans Athlete to Win an NCAA Title*, Business Insider (Mar. 18, 2022), https://perma.cc/XZG2-MXTH; E. Lips, *Bearded MA 'Trans' HS Athlete Injures Multiple Girls; Now Story Part of NH Debate*, NH Journal (Apr. 4, 2024), https://perma.cc/SDR8-BGNB.

issue was not furthered by enforcing it against Nguyen, and thus the statute would have been held unconstitutional. See 533 U.S. at 70. As discussed, *Nguyen* considered a statute providing different steps for immigrants to attain citizenship depending on whether the unwed father or unwed mother was a citizen. *Id.* at 62. The government's asserted interests in parent-child relationships were not implicated by the facts in *Nguyen*, as the petitioner's relation to his citizen father was shown through a DNA test, and the petitioner lived with his father in the United States from ages five to 22. *Id.* at 57. Though *Nguyen* held that the statute need not "be capable of achieving its ultimate objective in every instance," *id.* at 70, the as-applied theory would require the opposite.

Further, if this Court accepts the as-applied theory and permits a challenger to demand a perfect fit between a law and that challenger's unique circumstances, the Court would be sanctioning formerly meritless claims. As the Supreme Court has warned, if a plaintiff can change the substantive law by labeling a claim "as-applied," the courts will be plagued with "pleading games." *Bucklew* v. *Precythe*, 587 U.S. 119, 139 (2019). While the "line between facial and as-applied challenges can sometimes prove amorphous," "the label is not what matters." *Ibid.* (cleaned up). "To hold now, for the first time, that choosing a label changes the meaning of the Constitution would only guarantee a good deal of litigation over labels, with lawyers on each side seeking to classify cases to maximize their tactical advantage. Unless increasing the delay and cost . . . is the point of the exercise, it's hard to see the benefit in placing so much weight on what can be an abstruse

exercise." *Ibid.* Rather than deny that reality, the Fourth Circuit embraced it, explaining that "an as-applied challenge" "'affects the extent to which the invalidity of the challenged law must be demonstrated.'" *B.P.J.* Pet. 29a.

Finally, what's sauce for intermediate scrutiny is sauce for rational basis review. As suggested by the Fourth Circuit's reliance on *Cleburne*, the as-applied theory would revolutionize rational basis review. It would mean that courts must consider whether the government's regulation of a *particular person* is rationally related to a legitimate government interest. That has never been the test. Under rational basis, this Court has long held that "a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour* v. *City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012) (cleaned up). "[S]tate classifications" that are subject to rational basis review "cannot be determined on a person-by-person basis." *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 85–86 (2000). "Our Constitution permits States to draw lines [for non-suspect classes] when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Id.* at 86; see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 473 (1991) (upholding mandatory retirement for judges while acknowledging that "[i]t is probably not true that most" judges suffer deterioration in old age, and "[i]t may not be true at all"); *Mass. Bd. of Retirement* v.

Murgia, 427 U.S. 307, 311, 314–17 (1976) (holding that mandatory retirement for police officers passed rational basis review even though the challenger was in "excellent physical and mental health" and was still "capable of performing the duties of a uniformed officer").

To be sure, closer scrutiny is warranted under intermediate scrutiny. But the question is whether the relevant equal protection scrutiny level in an as-applied case is adjudicated by reference to the plaintiff's own circumstances. If intermediate scrutiny requires that the government's interests be borne out in the individual case, rational basis scrutiny logically would as well. That is true even if a lesser interest suffices under rational basis review. And "[n]early any statute which classifies people may be irrational as applied in particular cases." *Jones*, 975 F.3d at 1036 (quoting *Beller* v. *Middendorf*, 632 F.2d 788, 808 n.20 (CA9 1980) (Kennedy, J.)). Once again, the as-applied theory would upend constitutional law.

The courts below did not address these consequences. The as-applied theory is logically incoherent and incompatible with precedent. Its consequences would be severe. The Court should reject it.

D. Defenses of the as-applied theory lack merit.

A recent academic article purports to defend an as-applied intermediate scrutiny theory of equal protection, but what it actually defends is nothing of the sort. See K. Eyer, *As-Applied Equal Protection*, 59

Harv. C.R.-C.L. L. Rev. 49 (2024). According to this article, some precedents involving unwed fathers suggest that plaintiffs may bring as-applied intermediate scrutiny challenges. The article argues that this Court has permitted "differential treatment of non-marital fathers . . . but only insofar as the law affords such fathers an opportunity to show that they are similarly situated with respect to their children." *Id.* at 55–56. These cases supposedly suggest that "the availability of an individualized method to show one's similarity to a favored group [is] a key feature of what will allow a discriminatory scheme to satisfy intermediate review." *Id.* at 51.

This argument falls short in several respects. Most of all, the line of precedents it cites *opposes* an as-applied theory of intermediate scrutiny. No doubt, the Court has looked at the absence of individualized statutory inquiry to assess the tailoring of the statute to the asserted government interest. See, *e.g., Caban* v. *Mohammed*, 441 U.S. 380, 394 (1979) (striking down a categorical distinction between unwed mothers and fathers as too broad). But that is not the same as as-applied intermediate scrutiny, which would ask as a matter of constitutional inquiry whether the statute's operation against the particular plaintiff is substantially related to the government's interest. In this (senseless) inquiry, it would make no difference how many other plaintiffs might be affected or how broad the classification is otherwise. The Biden Administration's argument discussed above is an example of invoking the categorical nature of a law to contend that it fails intermediate scrutiny, though it improperly focuses on a very small group; an as-

applied application of intermediate scrutiny to *a person* is something different, and even worse.

Again, "[n]one of [this Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. A State is "entitled to protect its interest by applying a prophylactic rule to" "circumstances generally," and need not "prove that the state interests supporting the rule actually were advanced by applying the rule in [the] particular case." *Edge*, 509 U.S. at 431.

The article's own cases show the divergence between the "as-applied" statutory mechanisms it relies on and a constitutional "as-applied" inquiry. As the article concedes, in some cases the availability of individualized statutory inquiry did not save the statute, while in other cases even a statute without an individualized inquiry was upheld. See Eyer, *supra*, at 59 nn.46–47; see also, *e.g., Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 151–52 (1980) (striking down a death-benefits law that automatically granted benefits to widows but not widowers, even though widowers had the individualized opportunity to show dependency and receive benefits); *Michael M.* v. *Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 470, 475–76 (1981) (plurality opinion) (upholding California's statutory rape law that categorically exempted women from prosecution). In the latter set of cases, an as-applied intermediate scrutiny theory would have at least led to a different analysis, if not a different result. And though the article relies on *Cleburne*, Eyer, *supra*, at 64–66, that case did not involve

intermediate scrutiny and does not support the as-applied theory here for the reasons explained above—reasons that the article does not address. See *supra* pp. 15–16 (citing *Jones*, 975 F.3d at 1036).

Indeed, the article fails to address any of the points above. It does not explain how its theory would not collapse intermediate and strict scrutiny. It does not explain why its theory would apply only to intermediate scrutiny and not rational basis review. It does not explain how courts would assess whether a regulation is permissibly overbroad with respect to one plaintiff. It does not explain why equal protection intermediate scrutiny—the only type of intermediate scrutiny it addresses—would be different from other applications of intermediate scrutiny, where this Court has rejected an as-applied analysis. And it identifies no precedent of this Court squarely supporting its theory, instead relying on broad statements by the author accompanied by string-cited footnotes that offer dubious support for those statements. Compare Eyer, *supra*, at 54–59, with L. Worrick, *Rules for Thee . . . and Also for Me: Why Courts Should Reject As-Applied Intermediate Scrutiny*, 37 Regent U. L. Rev. 131, 141–47 & n.98 (2024).

For all these reasons, the Court should reject an as-applied theory of intermediate scrutiny.

II. Under equal protection, "sex" is not a subjective category divorced from physical, biological reality.

A through-line in this Court's equal protection cases is that the government cannot discriminate

based on certain immutable characteristics. See *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race" is "odious in all aspects."); *Virginia*, 518 U.S. at 532 (denouncing any "law or official policy [that] denies to women, simply because they are women," "equal opportunity to aspire, achieve, participate in and contribute to society"). Each time this Court has recognized a protected class, it has understood that whether the individual is part of the class is an objective fact. See *Engquist* v. *Oregon Dep't of Agr.*, 553 U.S. 591, 601 (2008) ("The basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes." (cleaned up)). Sex is no different. But the decisions below try to break this link between sex and biology. The Biden Administration also asserted that what was formerly understood as sex is *not* immutable, but a matter of changing preferences and identities. Adopting this theory would erode the foundation of heightened scrutiny and undermine the quest for equal rights for women.

Echoing "today's faddish social theories," litigants and courts have started to "embrace" the idea that sex is a mutable, undefinable construct. *Parents Involved*, 551 U.S. at 780 (Thomas, J., concurring). The Ninth Circuit, for instance, quoted a strident proponent of gender transitioning procedures to declare that "[t]he phrase 'biological sex' is" "imprecise," because "[a] person's sex encompasses the sum of several biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, and gender identity," each of which may not "align[]."

Hecox Pet. 99a. (Note the inclusion of gender identity as a supposed component of sex.) The trendy view is that, "[i]n the truest scientific sense, gender and sex are multidimensional concepts with complex expressions that are related—and distinct from each other—in ways that modern science is still exploring."[4] See also *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (CA4 2020) (referring to "so-called 'biological sex'").

Adopting this theory, the United States under the previous administration took it another step. "[A]ssert[ing] that a person's sex 'cannot be changed,'" the Biden Administration argued, is so obviously false that it betrays "animus."[5] In this topsy-turvy world, sex is mutable, gender identity immutable—"and the two simultaneously equivalent to each other."[6]

This new word-salad paradigm of sex would detonate intermediate scrutiny and subordinate women to biological men. Under this new paradigm, sex discrimination is not about whether a person was treated differently as biological man or women, this Court's longstanding dividing line. Rather, this paradigm misappropriates and redefines sex to mean (at least in part) an individual's internal sense of

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[4] M. McNamara et al., *An Evidence-Based Critique of "The Cass Review" on Gender-affirming Care for Adolescent Gender Dysphoria* 24-25 (July 1, 2024), https://perma.cc/9D5Q-D6JC.
[5] U.S. Resp. in Opp. to Mot. for Summ. J. 66, *Boe* v. *Marshall*, No. 22-cv-184, Doc. 627 (M.D. Ala. July 1, 2024).
[6] Defs' Reply in Support of Mot. for Summ. J. 116–17, *Boe*, Doc. 700-1 (M.D. Ala. Aug. 5, 2024), https://perma.cc/9CCC-D4PC.

self—their gender identity—and unknown other criteria.

But courts cannot apply intermediate scrutiny based on some undefinable, unascertainable characteristic that varies in each individual and may not align with other characteristics—and could vary day-by-day. That standard would create as many "class[es]-of-one" as there are people on the planet—and thus be wholly administrable. Cf. *Engquist*, 553 U.S. at 608–09. It is unclear how courts could even identify policies that facially discriminate based on sex if sex is a "multidimensional concept with complex expressions." Who's to say that VMI's students used to be "male"? How do we know that? How are courts supposed to decide which "components" of "complex expressions" represent sex, such that a classification by those components (but not others) gives rise to heightened scrutiny? How should courts decide the appropriate comparators? What happens if a litigant's "sex" changes? Would these answers change as "modern science" continues to "explore"?

The proponents of redefinition have no answers. And their standard is incompatible with this Court's sex discrimination precedents that acknowledge the "enduring" "[p]hysical differences" between "men and women." *Virginia*, 518 U.S. at 533; see, *e.g.*, *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1833 (2025) ("only biological women can become pregnant"). Rather than reimagine what sex means, this Court should stick with the sex discrimination paradigm from *Virginia*. In *Virginia*, this Court evaluated VMI's single-sex admissions program under intermediate scrutiny. 518 U.S. at 520, 523–24. This program ultimately failed

intermediate scrutiny because there was no "substantial[ly] equa[l]" single-sex educational alternative available to women. *Id.* at 554.

The core problem, then, with VMI's policy was that it categorically excluded biological women from an opportunity afforded to men. Seemingly nothing in VMI's policy would have prevented a qualified biological man who had a female gender identity from enrolling.[7] Likewise, that policy would not have let a biological woman enroll even if the woman identified as a man. Those identities are irrelevant to the constitutional understanding of sex. When addressing how intermediate scrutiny would apply to sex-based classifications going forward, the Court tied its analysis to the physical differences between men and women. See *Virginia*, 518 U.S. at 533. As Justice Ginsburg explained, "[p]hysical differences between men and women" "are enduring" and "the two sexes are not fungible." *Ibid.* (This view is now labeled "animus" in many quarters, including by the previous administration.[8]) A "community made up exclusively of one sex"—like girls' sports teams—"is different from a community composed of both" sexes. *Ibid.* (cleaned up). This is "cause for celebration" (*ibid.*)—just as women's sports are for so many girls and women.

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[7] VMI did not consider asking prospective students about their gender identity in the admissions process until as late as October 2023. Editorial, *VMI's Transgender Policy*, The Cadet (Nov. 17, 2023), https://perma.cc/258X-VL6M.

[8] See *supra* note 5.

The sex as complex construct theory, however, ignores biological reality and upends this Court's analysis. It would shred women's athletic equality by making women's sports co-ed—the opposite of the Court's vision in *Virginia*. It would allow biological men who say they are women to hijack women's athletic competitions, even when those men possess inherently different athletic capabilities. The result would be fewer opportunities for girls and women; less privacy in personal spaces; and physical dangers in many spheres.[9] Rather than adopt the radical position offered below, this Court should stay on its intermediate scrutiny path, which respects the biological differences between the sexes and promotes women's equality.

III. The lower courts' divergent applications of intermediate scrutiny suggest a return to text and history.

The lower courts' view that intermediate scrutiny guarantees males the right to invade women's sports and private spaces calls into doubt the test itself. Even if intermediate scrutiny could somehow apply to a State's definition of sex—rather than any differential treatment—the test's lack of historical grounding and susceptibility to manipulation cautions against this

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[9] See, *e.g.*, J. Tasch, *Team Forfeits After Girls Basketball Player Allegedly Hurt in Play with Male who Identifies as Female*, N.Y. Post (Feb. 20, 2024), https://perma.cc/HAQ6-54V9; O. Land, *Male Rikers Island Inmate who was 'Instructed to Claim He was Transgender' Raped Female Prisoner: Lawsuit*, N.Y. Post (Jan. 24, 2024), https://perma.cc/ZX4W-KNQG.

extension. That lower courts appear to apply intermediate scrutiny differently depending on the underlying constitutional right suggests that the test covers for policy rather than providing a neutral principle of adjudication.

To begin, applying intermediate scrutiny here makes little sense, given that the Respondents do not challenge separation of sports by sex. See *B.P.J.* Pet. 42a; *Hecox* Pet. 45a. Rather, their challenge is to the States' definitions of sex, as they seek to be classified as girls even though they are biologically boys. But the States' *definitions* do not treat individuals differently based on sex, so the Respondents' challenge should be analyzed (at most) under rational basis review. See *Jana-Rock Const., Inc.* v. *New York State Dep't of Econ. Dev.,* 438 F.3d 195, 212 (CA2 2006) (evaluating a similar underinclusiveness claim under rational basis review).

Extending intermediate scrutiny to this context is especially unwarranted for two other reasons. First, intermediate scrutiny was a highly dubious innovation of the 1970s, now used in counterintuitive fashion "to protect *men* from supposed discrimination"—including "men who identify as women and seek to co-opt their lived experiences, take their place on sports teams, and invade their private spaces." Brief for Concerned Women for America and Samaritan's Purse as *Amici Curiae* in Support of State Respondents 30–31, 2024 WL 4594899, *United States* v. *Skrmetti*, No. 23-477 (Oct. 15, 2024) ("*Amici* Brief"). Intermediate scrutiny "c[ame] out of thin air," *Craig*, 429 U.S. at 220 (Rehnquist, J., dissenting), and "ha[s] no basis in the text or original meaning of the

Constitution," *United States* v. *Rahimi*, 602 U.S. 680, 731 (2024) (Kavanaugh, J., concurring) (quoting J. Alicea & J. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, National Affairs 72, 73 (2019)); see generally *Amici* Brief 26–32 (explaining that "the doctrine itself has no foundation in the Constitution").

Second, "[i]t is no secret that intermediate scrutiny is a 'judge-empowering interest-balancing inquiry.'" *Amici* Brief 19 (quoting *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 22 (2022)). Though *amici* have recently explained the point in detail, see *id.* at 19–26, the decisions below highlight just how manipulable intermediate scrutiny is. "Some judges will apply heightened scrutiny with a presumption in favor of deference to the legislature," while others "will apply heightened scrutiny with a presumption in favor of the individual right in question." *Rahimi*, 602 U.S. at 733 (Kavanaugh, J., concurring).

Below, the Fourth and Ninth Circuits applied intermediate scrutiny in a way that looks like strict scrutiny, even beyond the "as-applied" error discussed above. See, *e.g.*, *B.P.J.* Pet. 35a n.2 ("the Act's categorical rule" is not "narrowly focused"); *Hecox* Pet. 39a–55a. But when the Fourth and Ninth Circuits applied purportedly the same test in the Second Amendment context, they were highly deferential to the government. See, *e.g.*, *Kolbe* v. *Hogan*, 849 F.3d 114, 140 (CA4 2017) ("The judgment made by the General Assembly of Maryland in enacting the [firearm ban] is precisely the type of judgment that legislatures are allowed to make without second-guessing by a court."); *Duncan* v. *Bonta*, 19 F.4th

1087, 1165, 1167 n.8 (CA9 2021) (VanDyke, J., dissenting) (noting the Ninth Circuit's "super-pliable test" and "undefeated, 50–0 record against the Second Amendment"); see also *Bruen*, 597 U.S. at 26 ("[F]ederal courts" reviewing "firearm regulations under the banner of 'intermediate scrutiny' often defer[red] to the determinations of legislatures.").

Likewise, though this Court has warned in the First Amendment context that courts applying intermediate scrutiny should not "sift[] through all the available or imagined alternative means of regulati[on]," *Ward*, 491 U.S. at 797, the courts below did just that. See *Hecox* Pet. 48a–50a & n.14, 54a–55a; *B.P.J.* Pet. 14a, 35a n.2. And as noted above, First Amendment intermediate scrutiny is not "as-applied," see *Edge*, 509 U.S. at 427; *Ward* 491 U.S. at 801, while the courts below created a novel "as-applied" intermediate scrutiny that collapses the distinction between strict and intermediate scrutiny. See *B.P.J.* Pet. 27a–30a.

All this underscores that intermediate scrutiny "is policy by another name." *Rahimi*, 602 U.S. at 731 (Kavanaugh, J., concurring). This "open-ended balancing test[]" is both "[v]ague" and "manipulable." *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004). That courts seem to apply different flavors of intermediate scrutiny with divergent tailoring requirements suggests that the foundation of the doctrine is policy judgment, not constitutional text and history.

The results are contrary to the rule of law. Some rights are more protected than others, without any textual justification for the difference. As with any "grand balancing test in which unweighted factors

mysteriously are weighed," "'equality of treatment . . . is impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.'" *June Med. Servs. LLC* v. *Russo*, 591 U.S. 299, 348 (2020) (Roberts, C.J., concurring in judgment) (cleaned up) (quoting A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)). This Court should reverse the lower courts' extension of this "unanalyzed exercise of judicial will" (*id.* at 349) to the new context of males challenging States' biologically and historically correct definition of sex.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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