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.

WEST VIRGINIA, ET AL.,
Petitioners,

v.

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

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits

BRIEF OF *AMICUS CURIAE* CENTER FOR AMERICAN LIBERTY IN SUPPORT OF PETITIONERS

JOSH DIXON
Counsel of Record
COURTNEY CORBELLO
MARK TRAMMELL
CENTER FOR AMERICAN LIBERTY
2145 14th Avenue, Suite 8
Vero Beach, FL 32960
JDixon@libertycenter.org
(703) 687-6200
Counsel for Amicus Curiae

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INTERESTS OF *AMICUS CURIAE*[1]

The Center for American Liberty (CAL) is a 501(c)(3) non-profit law firm dedicated to protecting free speech and civil liberties. CAL has represented litigants across the country, including in this Court, in cases seeking to vindicate individuals' religious freedom, free speech, and parental rights, among other things, against oppressive state action. *See, e.g.*, *Regino v. Staley*, 133 F.4th 951 (9th Cir. 2025); *Antonucci v. Winter*, 767 F. Supp. 3d 122 (D. Vt. 2025), *appeal docketed* No. 25-514 (2d Cir. Mar. 4, 2025); *Doe v. Weiser*, No. 1:24-CV-2185-CNS-SBP, 2025 WL 295015 (D. Colo. Jan. 24, 2025), *appeal docketed* No. 25-1037 (10th Cir. Jan. 31, 2025). CAL has an interest in ensuring that courts apply the correct legal standard in cases involving these rights.

SUMMARY OF THE ARGUMENT

This Court stands at a critical juncture where it can correct a profound misstep by lower courts that conflate biological sex with gender identity. In *B.P.J. by Jackson v. West Virginia State Board of Education*, the Fourth Circuit invalidated West Virginia's Save Women's Sports Act, applying heightened scrutiny under the Equal Protection Clause to strike down a law designed to preserve fairness in interscholastic female athletics by classifying participants based on

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[1] No party or party's counsel has authored this brief either in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief

biological sex. 98 F.4th 542, 555 (4th Cir. 2024). Similarly, in *Hecox v. Little*, the Ninth Circuit affirmed a preliminary injunction against Idaho's Fairness in Women's Sports Act, holding that its categorical ban on biological males in interscholastic female sports likely violates the Equal Protection Clause due to its reliance on distinctions based on biological sex. 104 F.4th 1061, 1076 (9th Cir. 2024), *as amended* (June 14, 2024).

Both decisions rest on a flawed premise: that classifications based on objective, immutable biological traits inherently discriminate against those with a transgender identity, a subjective psychological status. This amicus, committed to upholding the Constitution's original meaning and advocating for the recognition of biological realities, urges this Court to reverse these rulings. The Fourth and Ninth Circuits' approach not only distorts equal protection jurisprudence but also threatens to dismantle state policies safeguarding privacy, safety, and fairness—principles this Court has long held constitute important state ends. This conclusion is particularly true considering that these cases involve minors, given the important parental rights that would be under threat of displacement by the Fourth and Ninth Circuits' rulings. By reversing, this Court will reaffirm that biological sex classifications can serve vital interests, avoid improperly expanding the bounds of the Equal Protection Clause, and uphold important parental rights.

ARGUMENT

I. CLASSIFICATIONS BASED ON SEX AND CLASSIFICATIONS BASED ON GENDER IDENTITY ARE CONSTITUTIONALLY DISTINCT

The Fourth and Ninth Circuits erred in conflating sex-based classifications with gender identity-based classifications. In *B.P.J.*, the Fourth Circuit held the West Virginia Act facially classified "based on gender identity" because it defined a person's sex "only by their 'reproductive biology and genetics at birth.'" 98 F.4th at 555-56 (quoting W. Va. Code Ann. § 18-2-25d). And the Ninth Circuit held that the Idaho Act uses "'biological sex' in place of the word 'transgender,'" which, in turn, meant it is "targeted at excluding transgender[-identifying biological males]." *Hecox*, 104 F.4th at 1077.

These conclusions disregard long-established equal protection jurisprudence, which carefully distinguishes between classifications drawn on objective biological differences in the sexes and classifications that target a group for invidious reasons. Laws that separate athletes by biological sex do not classify based on gender identity, nor do they target transgender-identifying persons. Instead, they classify all individuals according to the same neutral criteria—male or female—and they apply equally within each category. Treating these laws as discriminating on the basis of gender identity not only misinterprets settled law but also destabilizes established equal protection framework.

A. The Equal Protection Clause Permits Sex-Based Classifications Grounded in Biological Reality, Including in Athletics

This Court has never interpreted the Equal Protection Clause to prohibit the government from drawing distinctions that reflect real and enduring biological differences between the sexes. To the contrary, this Court has acknowledged that recognizing such distinctions can serve important governmental objectives, so long as they are not rooted in archaic stereotypes or intended to subordinate one sex to the other. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*") (noting that "[i]nherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity" (cleaned up)).

Nothing in equal protection jurisprudence suggests that sex-based classifications are always invidious. Indeed, as this Court has recognized, sex-based classifications can appropriately reflect the common-sense notion "that the sexes are not similarly situated in certain circumstances" germane to the legislation at issue. *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981).

In *Michael M.*, for example, a California statutory-rape law criminalized rape by males but not females. *Id.* at 467. The Court upheld the law, reasoning that because "virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female," the State could

justifiably impose a penalty on males to offset the biological asymmetry. *Id.* at 473. Similarly, in *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001), this Court upheld a statute that imposed different requirements on children of unwed citizen fathers than on children of unwed citizen mothers. *Id.* at 58–59. In doing so, this Court cautioned that, "fail[ing] to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Id.* at 73. In that spirit, this Court concluded that "[t]he difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender." *Id.*

While sex-based classifications are permissible where grounded in biological realities, legislation along "sex-based lines" has often "reflect[ed] stereotypes or overbroad generalizations about the differences in men and women." *United States v. Skrmetti*, 145 S. Ct. 1816, 1828 (2025). For this reason, sex-based classifications are reviewed under intermediate scrutiny to ensure that the classification actually rests on relevant differences between males and females grounded in biological realities rather than stereotypes or animus. *Id.*

Based on these principles, separating sports teams by sex is permissible under intermediate scrutiny because it preserves athletic opportunities for females. *See Clark, By & Through Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982), *cert. denied* 464 U.S. 818 (1983). Accordingly, it must also be permissible for States to exclude

transgender-identifying biological males from female athletics. After all, transgender-identifying biological males present the same biologically based risks to females' athletic opportunities as non-transgender-identifying biological males. And it cannot be the case that simply recasting sex-based discrimination as discrimination based on gender identity changes this result. *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022) (en banc) (concluding that "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status").

By equating sex-based discrimination with discrimination on the basis of gender identity, *B.P.J.* and *Hecox* imposed a second round of intermediate scrutiny despite the fact that the Acts in question practically engaged in only one type of (permissible) discrimination. That approach is irreconcilable with Equal Protection Clause jurisprudence, which recognizes that sex distinctions grounded in biological fact can serve important governmental objectives.

B. The Fourth and Ninth Circuits Erred in Viewing Sex-Based Classifications in Athletics as a Proxy for Transgender Discrimination

Contrary to the Fourth and Ninth Circuits' holdings, sex-based classifications are not synonymous with discrimination on the basis of gender identity.

For decades, courts have recognized that sex-based distinctions are permissible when made pursuant to relevant and real biological differences. *See, e.g.*,

Nguyen, 533 U.S. 53; *Michael M.*, 450 U.S. 464. Conceptualizing sex-based classifications as a proxy for transgender discrimination turns this precedent on its head. The Fourth Circuit reasoned that the "purpose" of the West Virginia Act, which defined sex by "reproductive biology and genetics at birth," was "to exclude [transgender-identifying biological males] from the definition of 'female' and . . . from participation on girls sports teams." *B.P.J.*, 98 F.4th at 555. Likewise, the Ninth Circuit concluded that the Idaho Act constituted "[i]ntentional discrimination on the basis of gender." *Hecox*, 104 F.4th at 1088.

But by treating sex-based classifications as if they were classifications based on gender identity, *B.P.J.* and *Hecox* ignore that equal protection analysis demands categorical clarity in defining the classifications at issue. *See Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015) (observing that "the [Supreme] Court has never defined a suspect or quasi-suspect class on anything other than a trait that is definitively ascertainable at the moment of birth"). The recognition that biological sex is determined by objective criteria—such as biological anatomy, and reproductive capacity—has been the bedrock of this Court's sex-discrimination precedents. *See Michael M.*, 450 U.S. at 471 ("Only women may become pregnant"); *Nguyen*, 533 U.S. at 63 ("Fathers and mothers are not similarly situated with regard to the proof of biological parenthood."); *see also Skrmetti*, 145 S. Ct. at 1856 (Alito, J., concurring) (noting that the category of "sex" for equal protection purposes has "always meant . . . the status of having the genes of a male or female").

This understanding of equal protection jurisprudence ensures that the strong medicine of heightened scrutiny is not dispensed in connection with classifications that are based on potentially fluid self-perceptions. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), for example, a plurality of this Court concluded that sex-based classifications warranted heightened scrutiny because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Id*. at 686. This biological anchor for determining which classifications are subject to heightened scrutiny prevents the Equal Protection Clause from invalidating statutes based on impermanent characteristics that may change over time.

The Fourth and Ninth Circuits' reasoning also ignores the clear line this Court has drawn between permissible distinctions that recognize real, biological differences between the sexes and impermissible distinctions that perpetuate sex-based stereotypes. In *Mississippi University for Women v. Hogan*, for example, this Court invalidated a nursing school's women-only admissions policy, concluding that it rested on the stereotype that nursing is "a field for women." 458 U.S. 718, 730 (1982). The problem was not the acknowledgment of differences between the sexes but the reliance on "archaic and stereotypic notions" of gender roles. *Id*. at 725. And in *VMI*, this Court struck down a law excluding women from Virginia's military college. 518 U.S. at 534. In doing so, the Court noted that, while "[p]hysical differences between men and women . . . are enduring," this fact did not justify classifications that "create or

perpetuate the legal, social, and economic inferiority of women." *Id*. at 533.

Unlike *Hogan* and *VMI*, distinctions based on biological sex in the context of athletic competition do not rest on archaic stereotypes. Instead, they simply "take into account actual differences between the sexes, including physical ones," *Clark*, 695 F.2d at 1129, and focus on objective physical characteristics that distinguish male and female athletes, *see Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring) ("[I]t is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male . . . have physiological advantages in many sports."). A biological male is classified as such regardless of whether he embraces a traditionally masculine identity, identifies as female, or rejects gender categories altogether. The classification does not privilege or punish identity—it simply acknowledges biological fact.

Conflating biological sex with gender identity would erase this doctrinal line. And as a result, legitimate sex-based classifications that are based on the biological differences between men and women would all be called into question. For example, state and federal policies that separate the sexes in prison could not survive. States would be required to house male prisoners with their female counterparts—despite the fact males are physically stronger, larger, and can cause females to become pregnant—lest they be discriminated against for their "transgender identity." If the Fourth and Ninth Circuit's rulings are not reversed, there would be no limiting principle to

keep from treating *every* recognition of sex difference as a stereotype, even when the difference is empirically verifiable and legally relevant. That is not what this Court's cases require. *See Nguyen*, 533 U.S. at 73 ("Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.").

Bostock v. Clayton County does not compel a different result. In *Bostock*, this Court determined that taking adverse employment action against employees based on their transgender identity or homosexual status violated Title VII's prohibition against discrimination because of sex. 590 U.S. 644, 683 (2020). The Ninth Circuit relied on *Bostock* in concluding sex-based discrimination constituted discrimination on the basis of gender identity. *Hecox*, 104 F.4th at 1079–80.

Bostock has no place in equal protection jurisprudence. As an initial matter, the Court specifically cabined its holding to the statutory context of employment discrimination under Title VII. *Bostock*, 590 U.S. at 681–82. Indeed, the Court emphasized that it was not purporting to redefine constitutional equal protection standards, nor was it making larger pronouncements regarding areas like school bathrooms or sports, where biological sex distinctions remain pertinent. *Id.* at 681; *see also Adams*, 57 F.4th at 808 (holding *Bostock* was inapplicable in part because "school is not the workplace."). Moreover, *Bostock* held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex." *Bostock*, 590 U.S. at 669. It did not hold the converse-

—that "discrimination based on biological sex necessarily entails discrimination based on transgender status." *Adams*, 57 F.4th at 809. And as discussed "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." *Id.*

This Court should reaffirm this critical distinction: categorizing individuals based on biological sex does not constitute discrimination on the basis of transgender identity. To conflate the two would not only distort decades of equal protection jurisprudence but also undermine the legitimate governmental interests that biological sex classifications serve, from protecting privacy and safety in intimate spaces to ensuring fairness in athletic competition. Such a move would compel states to abandon rational, biology-based policies in favor of subjective self-identification, with potentially profound and unintended consequences for society at large.

C. The Doctrinal Consequences of Collapsing Sex Into Gender Identity Would be Destabilizing

Treating sex-based classifications as discrimination against those with a transgender identity would upend decades of equal protection jurisprudence. If every recognition of sex differences were deemed discrimination on the basis of gender identity, then virtually all sex-specific policies—from Title IX athletics regulations to medical research protocols—would be at threat.

That result would collapse the careful tiers of scrutiny this Court has developed. This Court has

repeatedly resisted invitations to expand suspect or quasi-suspect classifications without careful analysis. In fact, this Court "has not recognized any new constitutionally protected classes in over [five] decades, and instead has repeatedly declined to do so." *Ondo*, 795 F.3d at 609. Since 1973, the Court has declined to recognize homosexuality, poverty, age, mental disability, and close kinship as suspect or quasi-suspect classifications. *See United States v. Windsor*, 570 U.S. 744, 770 (2013); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (poverty); *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (age); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (mental disability); *see also Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("Close relatives are not a 'suspect' or 'quasi-suspect' class."); *see also Skrmetti*, 145 S. Ct. at 1851 (Barrett, J., concurring) (noting "[t]he test [to determine whether a group is a "suspect class"] is strict, as evidenced by the failure of even vulnerable groups to satisfy it").

Recognizing transgender identity as equivalent to biological sex for purposes of equal protection analysis would create a new suspect class without engaging in the rigorous analysis this Court has required before creating a new protected class. It would also undermine the legitimacy of longstanding precedents that permit sex-specific distinctions grounded in biological realities. *See, e.g.*, *Michael M.*, 450 U.S. at 471; *Nguyen*, 533 U.S. at 63.

To avoid this destabilization in equal protection jurisprudence, resolution of this contentious issue should be left where it belongs: with the legislature.

After all, "policymaking in this area through democracy rather than through federal judges is far more likely to lead to stable settlements than efforts to update the meaning of the Fourteenth Amendment." *Gore v. Lee*, 107 F.4th 548, 566 (6th Cir. 2024). Any other approach would "short-circuit the healthy, if sometimes difficult, legislative debates over these policies" and "impede legislative compromise over the many settings in which these issues appear: sports, bathrooms, pronouns, medical treatments for juveniles, and birth certificates." *Id.* Constitutionalizing questions regarding gender identity serve only to "undermine a democratic consensus." *Id.*

II. THE FOURTH AND NINTH CIRCUITS ERRONEOUSLY TREATED TRANSGENDER STATUS AS A QUASI-SUSPECT CLASS

The Fourth and Ninth Circuits concluded that gender identity was "at least a quasi-suspect class," justifying the application of intermediate scrutiny. *Hecox*, 104 F.4th at 1079 (quotations omitted); *see also B.P.J.*, 98 F.4th at 556 (concluding that "facial classification[s] based on gender identity . . . trigger intermediate scrutiny"). This Court's precedents do not support this conclusion.

Equal protection doctrine recognizes only a limited set of suspect and quasi-suspect classifications—subject to heightened scrutiny—and this Court has consistently exercised caution before expanding the list. By concluding gender identity is a "quasi-suspect class," the Fourth and Ninth Circuits misapplied the law and undermined equal protection jurisprudence.

A. This Court Carefully Limits the Use of Heightened Scrutiny

This Court has applied heightened scrutiny in only a narrow set of classifications: classifications based on race and national origin (strict scrutiny), and sex and illegitimacy (intermediate scrutiny). *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (discussing recognized classes and applicable levels of scrutiny). As noted, the Court has rejected more recent efforts to expand this list beyond its original mooring. *See Windsor*, 570 U.S. at 770; *Rodriguez*, 411 U.S. at 28–29; *Murgia*, 427 U.S. at 313–14; *Cleburne*, 473 U.S. at 442; *Lyng*, 477 U.S. at 638.

And rightfully so. Proliferating categories that receive heightened scrutiny would encroach on States' ability to meet the legislative challenges before them. *See Cleburne*, 473 U.S. at 440 (explaining the "general rule" is that, "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." (cleaned up)); *see also Skrmetti*, 145 S. Ct. at 1851 (Barrett, J., concurring) (same). Moreover, assessing putative "suspectness" and applying means-end scrutiny mandate a "judge-empowering interest-balancing inquiry" that is beyond the judicial ken. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 22 (2022) (quotations omitted). Thus, this Court's caution is not based on mere stinginess; instead, it reflects the structural role the Equal Protection Clause plays in balancing judicial review and democratic governance. For that reason, this Court has expanded suspect

classifications only where history and doctrine overwhelmingly support doing so.

B. Transgender-Identifying Individuals do not Form a Quasi-Suspect Class

Heightened scrutiny does not apply here because transgender-identifying individuals are not a quasi-suspect class. In considering whether to identify a new suspect or quasi-suspect class, this Court has identified several criteria that should be considered: a history of widespread and conspicuous discrimination, political powerlessness, and an immutable characteristic that tends to serve as an obvious badge of membership in a clearly defined and readily identifiable group. *See, e.g., Lyng*, 477 U.S. at 638. These criteria are difficult to meet, and having a transgender-identity does not satisfy them.

As to a history of discrimination, there is no "long and tragic history" of purposeful, invidious discrimination against transgender-identifying individuals that justifies creation of a new suspect class. *Bowen v. Gilliard*, 483 U.S. 587, 598 (1987). While it is true that "[t]ransgender persons have undoubtedly experienced discrimination" in the past, that is not enough. *Skrmetti*, 145 S.Ct. at 1866 (Alito, J., concurring). Heightened scrutiny is not justified simply because a group shows "some degree of prejudice from at least part of the public at large." *Cleburne*, 473 U. S. at 445. Rather, there must be "widespread and conspicuous" bias akin to that against racial minorities or women. *Murgia*, 427 U.S. at 313. Discrimination against persons with a transgender identity lacks the systemic, de jure

oppression of Jim Crow or coverture laws. *See Skrmetti*, 145 S.Ct. at 1853 (Barrett, J., concurring) (concluding that only de jure discrimination is relevant in determining whether to create a new suspect class). Moreover, even to the extent more recent legislative distinctions between transgender-identifying persons and non-transgender-identifying persons could be considered evidence of invidious discrimination—as opposed to permissible line-drawing—those distinctions are of far too recent vintage to give rise to a protected class.

As for political powerlessness, transgender-identifying individuals have unique political power despite their relatively small numbers. Transgender-identifying individuals have influenced change in policies, practices and laws at every level of government. President Biden made "Preventing and Combating Discrimination on the Basis of Gender Identity" a key focus while in office, Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021), and placed transgender-identifying appointees at the highest levels of the federal government.[2] In addition, many state laws prohibit discrimination against transgender-identifying individuals. *See e.g.,* N.Y. Exec. Law § 296; NJ Rev Stat § 10:5-4; Cal. Educ. Code § 221.5(f); Va. Code Ann. § 38.2-3449.1; Wash. Rev. Code Ann. § 28A.642; Colo. Rev. Stat. Ann. §§ 22-32-109, 24-34-402, 24-34-502; Haw. Rev. Stat. § 489-

[2] Rachel Levine and Shawn Skelly, both transgender-identifying individuals, were the Assistant Secretary for Health and Assistant Secretary of Defense for Readiness, respectively. *See* Brett Samuels, *Here are the history-making LGBTQ officials in the Biden administration*, The Hill (June 2, 2023) http://bit.ly/4n5pmuQ.

3; 775 Ill. Comp. Stat. 5/1-102; Iowa Code Ann. § 216.1 *et seq*.; Md. Code. Ann. Educ. § 7-424(a); Me. Rev. Stat. Ann. tit. 5, §§ 4552, 4602(4); Minn. Stat. Ann. § 363A.02; N.M. Stat. Ann. § 28-1-7; N.C. Gen. Stat. § 115C-407.15; Or. Rev. Stat. § 240.306, 659A.030, 659A.403; D.C. Code § 2-1402.11. Put simply, "transgender individuals do not occupy 'a position of political powerlessness' that requires 'extraordinary protection from the majoritarian political process.'" *Gore*, 107 F.4th at 559 (quoting *Rodriguez*, 411 U.S. at 28).

Finally, transgender-identifying persons do not have "obvious, immutable, or distinguishing characteristics that define them as a discrete group" and cannot be altered through choice or circumstance. *Lyng*, 477 U.S. at 638. Having a transgender identity is not fixed; it may evolve over time, with individuals moving in or out of the category based on personal, psychological, or social factors unique to them. *See Skrmetti*, 145 S. Ct. at 1866 (Alito, J., concurring) (explaining that "a person's gender identity may 'shift,' and a person who is transgender now may not be transgender later"). Even the primary medical associations that promote so-called "gender-affirming care" acknowledge this fact. *See Eknes-Tucker v. Governor of Alabama*, 114 F.4th 1241, 1265 (11th Cir. 2024) (Lagoa, J., concurring) (explaining WPATH and the American Psychological Association view gender identity as a "wide spectrum"). Moreover, minors' gender identities are even more fluid than adults'. *See* Zucker, Ken J., *The myth of persistence: Response to "A Critical Commentary on Follow-Up Studies and Desistance Theories about Transgender and Gender Non-Conforming Children" by Temple Newhook et al.*,

19 International Journal of Transgenderism (2018), at 232-33 (detailing rates of persistence between transgender-identifying adults and children), available at http://bit.ly/3IflPe2; *see also The Cass Review*: *Independent review of gender identity services for children and young people*, United Kingdom National Health Service (April 10, 2024) ("*The Cass Review*") at 163, available at https://perma.cc/U684-54XM.

Where a proposed class is this "diverse" and "amorphous," *Rodriguez*, 411 U.S. at 28, heightened scrutiny is inappropriate. This is so because "it is hard to pin down whether [those in the proposed class] share the relevant characteristics that make closer scrutiny warranted," *Skrmetti*, 145 S. Ct. at 1867 (Alito, J., concurring). And a diverse and amorphous class makes it "difficult for . . . courts . . . to identify the outer bounds of such groups." *Id.*; *see also Eknes-Tucker*, 114 F.4th at 1265 (Lagoa, J., concurring) (noting that there are "no practical limits" on who could be part of a transgender-identifying class at any given time).

Thus, the Fourth and Ninth Circuits erred in concluding transgender individuals constitute a quasi-suspect class. Judicial restraint in this burgeoning area of law is crucial, and new suspect classes should not be created lightly lest courts supplant legislatures. *See Cleburne*, 473 U.S. at 442–43 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."). The

Fourth and Ninth Circuits' rulings ignore this danger, enjoining laws amid scientific and legislative debate on transgender-identifying athlete participation. Reversing will confine equal protection to its moorings, while honoring doctrinal fidelity and safeguarding democratic governance.

C. The Fourth and Ninth Circuits Improperly Discounted the State's Important Interests Under an Improperly Elevated Standard

Even if reviewed under intermediate scrutiny, the Acts at issue are constitutional. The States advanced important objectives—preserving fairness and safety in women's sports and protecting equal athletic opportunities for female athletes. Those interests are "exceedingly persuasive." *VMI*, 518 U.S. at 531. They are grounded in biological reality, supported by empirical data, and consistent with decades of precedent.

Intermediate scrutiny requires only a substantial relation to important objectives—not the least restrictive means. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Acts in question easily pass muster. Biological differences in speed, size, strength, and endurance between males and females are "real" and "undeniable." *Nguyen*, 533 U.S. at 68, 73. And in light of these realities, preserving female athletic opportunities is not speculative; indeed, it is the very purpose for which Title IX has long permitted sex-based separation. *See, e.g., McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) (noting that Title IX was

enacted to combat the "pervasive discrimination" against women in regard to their access to educational and athletic opportunities). The States' choice to classify by sex was not arbitrary but directly tied to the important governmental objective of ensuring fairness and equality for women in sports.

The Fourth and Ninth Circuits failed to apply intermediate scrutiny appropriately, which led them to discount interests that this Court has repeatedly recognized as important. Their judgments cannot stand.

III. DETERMINING WHETHER TRANSGENDER-IDENTIFYING MINORS ARE A PROTECTED CLASS INVOLVES UNIQUE CONSIDERATIONS VIS-À-VIS THEIR PARENTS

Families occupy a unique place in our constitutional design. As this Court first held over a century ago, parents possess the fundamental right under the substantive component of the Due Process Clause to direct the upbringing of their children. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). This right is foundational to the continuation of our republic: "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Holding that the Equal Protection Clause requires heightened scrutiny of classifications based on a minor's alleged transgender identity threatens to collide head-on with the parents' right to decide how best to raise their children, at least in cases where

parents do not consent to the social transition of their children. Such a holding would threaten to displace parental authority, empower the State to substitute its judgment for that of parents in matters relating to their children's gender identity and psychological care, and accelerate minors toward risky and potentially irreversible medical interventions.

A. Parents, Not the State, Possess the Constitutional Authority Over Their Children's Care, Custody, and Control

For over a century, this Court has recognized that the Constitution guards parents' authority over their children against State encroachment. In *Meyer*, the Court struck down a ban on foreign-language instruction because it interfered with "the natural duty of the parent to give his children education suitable to their station in life." 262 U.S. at 400. In *Pierce v. Society of Sisters*, the Court invalidated an Oregon law requiring all children to attend public school. 268 U.S. 510, 535 (1925). In *Parham v. J.R.*, the Court recognized that the "natural bonds of affection lead parents to act in the best interests of their children," and it concluded that the State may not supplant parental judgment regarding their children's healthcare absent some showing of abuse or neglect. 442 U.S. 584, 602 (1979). And in *Troxel v. Granville*, the Court concluded that the state must give special deference to parents' decisions regarding third-party visitation with their children in the absence of a showing of parental unfitness. 530 U.S. 57, 70 (2000) (plurality op.); *see also id.* at 77–78 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring).

The through-line of these precedents establishes that parents—not the State, and not the child—have the prima facie right to direct and control their children's upbringing, a right that can only be overcome by a showing of something more than a "simple disagreement" between the State and parents. *Id.* at 72. Any equal protection ruling that would force the State to recognize or enforce a minor's asserted gender identity over parental objection would undermine this fundamental liberty.

B. Extending Heightened Scrutiny to Claims Involving a Minor's Asserted Transgender Identity Threatens to Undermine Parental Rights

The Equal Protection Clause must be harmonized with other constitutional guarantees, not read to nullify them. A holding that transgender identity is a quasi-suspect class would threaten to pit children's equal protection rights against parents' substantive due process rights. If minors have an equal protection right to have their alleged transgender identity recognized by the State regardless of their parents' wishes, then parents' due process rights are at risk.

When a child asserts that he or she has a transgender identity, parents generally have two options. On the one hand, parents can choose to "affirm" that identity through a social transition. A social transition occurs when the child undergoes social changes that allow the child to live as a different gender, like a change in the child's name and pronouns. *The Cass Review* at 31 (explaining social transition). On the other hand, parents can choose to

continue to treat the child in conformity with the gender associated with his or her birth sex and help the child cope with any psychological distress the child may be experiencing in ways other than through a social transition. *See, e.g.*, *id.* at 158–64.

The decision whether to socially transition a child is a monumental one in the child's life. Most children who experience a transgender identity ultimately desist—that is, lose their transgender identity—before adulthood. *Id.* at 163, 223; Zucker, *supra*, at 232–33. When social transitioning is introduced, however, the desistence rates plummet. *The Cass Review* at 162; Zucker, *supra*, at 237. Thus, socially transitioning a child makes it more likely that the child's transgender identity will persist into adulthood. *The Cass Review* at 164 (noting that "sex of rearing seems to have some influence on eventual gender outcome").

Moreover, minors who undergo a social transition will likely go on to undergo graduated "affirmative" care in the form of a medical transition—*i.e.*, puberty blockers, cross-sex hormones, and, for some, "affirming" surgeries. *Id.* at 31, 162, 176. The risks from these medical treatments are significant, and include bone weakness, deficiencies in neurocognitive development, sexual dysfunction, and infertility/sterility. *Id.* at 32, 174, 178, 196.

Minors lack the "maturity, experience, and capacity for judgment" necessary to make the decision—on their own—whether to undergo a social transition. *Parham*, 442 U.S. at 603; *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that

children are "vulnerable . . . to negative influences and outside pressures" and often make "impetuous and ill-considered . . . decisions"). Accordingly, the decision must "reside first" in parents. *Troxel*, 530 U.S. at 65; *see also Mirabelli v. Olson*, 761 F. Supp. 3d 1317, 1332–33 (S.D. Cal. 2025) (holding that parents have the right to decide whether their child undergoes a social transition at school).

If the Court were to apply heightened scrutiny to classifications based on minors' asserted transgender identity—even in the absence of parental consent to "affirm" that identity— such a holding would threaten to supersede their parents' rights. In other words, because parents have the prima facie right to determine whether to "affirm" their children's alleged transgender identity through a social transition, the Court must take care to ensure that it does not impliedly transfer that decisionmaking authority to children through an equal protection holding placing them in a protected class. Indeed, schools across the country are currently trampling parents' rights by allowing children to decide for themselves whether to undergo a social transition at school without parental consent. *See, e.g., Regino v. Staley*, 133 F.4th 951 (9th Cir. 2025); *Littlejohn v. Sch. Bd. of Leon Cnty., Fla.*, 132 F.4th 1232 (11th Cir. 2025); *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336 (1st Cir. 2025); *Doe v. Weiser*, No. 1:24-CV-2185-CNS-SBP, 2025 WL 295015 (D. Colo. Jan. 24, 2025), *appeal docketed* No. 25-1037 (10th Cir. Jan. 31, 2025).

While the plaintiffs' parents in the cases before the Court have consented to their children's social transition, caution is still warranted to avoid issuing

a ruling that unwittingly supersedes parents' rights in cases where parents do not consent. In areas where the risks are grave and knowledge is unsettled, the Constitution places decision-making authority with parents, not the State, and certainly not with children acting alone. The Equal Protection Clause must be interpreted in harmony with that principle.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

JOSH DIXON
Counsel of Record
MARK TRAMMELL
COURTNEY CORBELLO
CENTER FOR AMERICAN LIBERTY
2145 14th Avenue, Suite 8
Vero Beach, FL 32960
JDixon@libertycenter.org
(703) 687-6200

Attorneys for Amicus Curiae

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