Nos. 24-38 and 24-43

In the Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, ET AL., PETITIONERS

v.

LINDSAY HECOX, ET AL.

WEST VIRGINIA, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

D. JOHN SAUER
Solicitor General
Counsel of Record
HARMEET K. DHILLON
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Solicitor General
JESUS A. OSETE
Principal Deputy Assistant Attorney General
MAX E. SCHULMAN
Assistant to the Solicitor General
ANDREW G. BRANIFF
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Title IX of the Education Amendments of 1972 forbids schools from placing trans-identifying athletes on sex-separated sports teams based on their biological sex.

2. Whether the Equal Protection Clause of the Fourteenth Amendment forbids schools from placing trans-identifying athletes on sex-separated sports teams based on their biological sex.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution and statutes: Page

In the Supreme Court of the United States

No. 24-38

BRADLEY LITTLE, GOVERNOR OF IDAHO, ET AL., PETITIONERS

v.

LINDSAY HECOX, ET AL.

No. 24-43

WEST VIRGINIA, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States is responsible for enforcing Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The United States also has authority to enforce the Equal Protection Clause, U.S. Const. Amend. XIV, § 1, in the public-school context, 42 U.S.C. 2000c-6, and may intervene in cases of general importance involving alleged denials of equal protection, 42 U.S.C.

2000h-2. In addition, President Trump has issued an Executive Order declaring that it is "the policy of the United States to oppose male competitive participation in women's sports * * * , as a matter of safety, fairness, dignity, and truth." Exec. Order No. 14,201, § 1, 90 Fed. Reg. 9279, 9279 (Feb. 11, 2025). The United States thus has a substantial interest in whether Title IX or the Equal Protection Clause prohibits schools from placing trans-identifying athletes on sex-separated sports teams based on their biological sex.

INTRODUCTION

The growth of women's sports under Title IX is one of the Nation's huge success stories. In the decades since its enactment, separate sports programs for women and girls have flourished from primary school through college and beyond, yielding great strides in equal athletic opportunity and preserving competitive fairness and safety for all.

Recently, however, those landmark achievements have been undermined by efforts of some male athletes to participate in female sports because they identify as females. The President has determined that the participation of male trans-identifying athletes in female sports "is demeaning, unfair, and dangerous to women and girls, and denies women and girls the equal opportunity to participate and excel in competitive sports." Exec. Order No. 14,201, § 1, 90 Fed. Reg. at 9279. Similarly, 27 States, including West Virginia and Idaho, have adopted laws or regulations providing that men may not participate in women's sports. See Madeline W. Donley et al., Cong. Research Serv., R48448, *Gender and School Sports: Federal Action and Legal Challenges to State Laws*, Tbl. A-1 (updated Aug. 13, 2025).

Federal law does not prohibit these eminently reasonable policies. Both Title IX and the Equal Protection Clause permit the traditional practice of sex-separated sports, which accounts for innate biological differences that make the two sexes not similarly situated for athletic competition. That practice is equally justified for trans-identifying athletes, because the physiological differences between male and female athletes have nothing to do with gender identity and are not eliminated by the puberty blockers or cross-sex hormones taken by some (but not all) of these athletes.

In short, the laws of West Virginia and Idaho place trans-identifying athletes on sports teams on the same valid, biology-based terms as everyone else. That is the definition of equal treatment. It is not gender-identity discrimination at all, much less sex discrimination. See *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1830-1835 (2025). However else Title IX or the Equal Protection Clause may apply to trans-identifying individuals, they certainly do not require granting these men and boys a *preferential exemption* from biology-based rules, let alone when that would come at the expense of competitive fairness and safety for women and girls—the very people Title IX was enacted to protect.

In holding the opposite, the courts below relied on a set of rationales that have no basis in law or fact. And taken to their logical conclusion, those theories would give even non-trans-identifying males a right to play on female sports teams. Neither Title IX nor the Equal Protection Clause supports the perverse result of forcing States to disregard the "[p]hysical differences between men and women" that Justice Ginsburg rightly described as "enduring" and "cause for celebration." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

STATEMENT

A. 1. "West Virginia law and practice have long provided for sex-differentiated sports teams." 24-43 Pet. App. 13a. For decades, state regulations have provided that "[s]chools may sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill." W. Va. Code R. § 127-2-3(3.8) (2025); see 24-43 Pet. App. 14a. These regulations further protect female athletic opportunities by providing that if a school "sponsors a team in a particular sport for members of one sex but sponsors no such team for members of the other sex"—for example, if it sponsors a baseball team only for male students—then "females will be allowed to try out for [that team], but males will not be allowed to try out" for other, female-only teams. W. Va. Code R. § 127-2-3(3.8) (2025).

In 2021, West Virginia's legislature supplemented these longstanding regulations by enacting the Save Women's Sports Act. The Act begins with a series of legislative findings, including that "[t]here are inherent differences between biological males and biological females"; that "[i]n the context of sports involving competitive skill or contact," males and females "are not in fact similarly situated"; and that "[c]lassification of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex." W. Va. Code Ann. § 18-2-25d(a)(1), (3), and (5) (2022). It also includes findings that "gender identity is separate and distinct from biological sex" and that "[c]lassifications based on gender identity serve no legitimate relationship to the State of West Virginia's interest in promoting equal athletic opportunities for the female sex." *Id.* § 18-2-25d(a)(4).

The Act provides that athletic teams sponsored by public secondary schools and colleges "shall be expressly designated as" male, female, or coeducational, "based on biological sex." W. Va. Code Ann. § 18-2-25d(c)(1) (2022). It then provides that female teams "shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 18-2-25d(c)(2). And it instructs that it shall not "be construed to restrict the eligibility of any student to participate in any" male or coeducational teams. *Id.* § 18-2-25d(c)(3).

2. B.P.J. is a biological male teenager attending public high school in West Virginia. See 24-43 Pet. App. 15a. He identifies as female and has taken puberty blockers since age ten. See *id.* at 76a; 24-43 J.A. 550. He seeks to participate in girls' track and cross-country competitions. 24-43 Pet. App. 76a.

In 2021, B.P.J. brought suit in federal district court, claiming that applying West Virginia's law to B.P.J. would violate Title IX and the Equal Protection Clause. 24-43 Pet. App. 79a. He was then 11 years old. 24-43 J.A. 412.

The district court initially granted B.P.J.'s motion for a preliminary injunction. See 24-43 Pet. App. 79a. Following discovery, however, the court granted summary judgment to defendants. *Id.* at 95a-96a. The court noted that B.P.J. "does not challenge" sex-separated sports generally and had conceded both that "there are benefits associated with" sex-separated athletics and that "the state has an important interest in providing equal athletic opportunities for female students." *Id.* at 83a-84a, 87a-88a. Given B.P.J.'s "telling" concessions and "all of the evidence in the record," the court concluded that West Virginia's law, "which largely mirrors

Title IX, does not violate either that statute or the Equal Protection Clause." *Id.* at 93a, 95a.

3. A divided panel of the Fourth Circuit granted B.P.J.'s motion for an injunction pending appeal, over Judge Agee's dissent. 24-43 J.A. 4347-4348. This Court denied West Virginia's application to vacate that injunction, over the dissent of Justice Alito joined by Justice Thomas. 24-43 Pet. App. 97a-98a.

The same divided Fourth Circuit panel vacated the judgment in part, reversed in part, and remanded. 24-43 Pet. App. 1a-74a. As relevant here, the court held that West Virginia's Act discriminates based on both "sex" and "gender identity." *Id.* at 23a-27a, 38a-40a. But while the court concluded that this determination entitled B.P.J. to summary judgment under Title IX, *id.* at 22a, it remanded the equal-protection claim for further consideration of a factual dispute about whether males who receive puberty blockers nevertheless retain "a meaningful competitive athletic advantage" over females, *id.* at 34a; see *id.* at 43a.

Judge Agee dissented in relevant part. 24-43 Pet. App. 44a-74a. He concluded that no factual dispute precluded holding that "West Virginia may separate its sports teams by biological sex without running afoul of either the Equal Protection Clause or Title IX." *Id.* at 44a; see *id.* at 47a, 53a-54a. He explained that West Virginia's Act did not "treat transgender individuals differently" from anyone else, and nothing in federal law required the State to do so. *Id.* at 51a.

B. 1. Schools in Idaho also sponsor sex-separated sports teams. In 2020, the Idaho legislature passed the Fairness in Women's Sports Act, Idaho Code § 33-6201 *et seq.* (2025). The Act makes legislative findings re-

garding the inherent differences between male and female athletes, including a finding based on research that male athletes' competitive advantage is not eliminated by "use of puberty blockers and cross-sex hormones." *Id.* § 33-6202(11). The Act requires teams sponsored by public schools and colleges to be designated "based on biological sex" as male, female, or coeducational, *id.* § 33-6203(1), and provides that female-designated teams "shall not be open to students of the male sex," *id.* § 33-6203(2). It further provides that disputes regarding a student's sex will be resolved based on an examination by the student's personal healthcare provider. *Id.* § 33-6203(3).

2. Lindsay Hecox is a biological male adult who has attended Boise State University for various periods beginning in 2019. Hecox "ha[s] undergone male puberty" but identifies as female and began taking cross-sex hormones while in college. 24-38 Pet. App. 49a; see 24-38 J.A. 207. He seeks to participate in intercollegiate women's track and cross-country competitions. See 24-38 Pet. App. 20a.

In 2020, Hecox brought suit in federal district court, claiming that Idaho's law violates Title IX and the Equal Protection Clause. See 24-38 Pet. App. 20a, 58a. He was then a 19-year-old college freshman. 24-38 J.A. 205.

Hecox moved for a preliminary injunction solely on equal-protection grounds, which the district court granted. 24-38 Pet. App. 163a-262a. As relevant here, the court determined that "the Act on its face discriminates between cisgender * * * and transgender women athletes" and therefore warranted "heightened" scrutiny. *Id.* at 232a. The court concluded the Act likely

failed that scrutiny because Idaho had "not identified a legitimate interest served by the Act." *Id.* at 253a.

3. The Ninth Circuit affirmed and remanded. 24-38 Pet. App. 1a-61a. As relevant here, the court held that Idaho's Act likely violates the Equal Protection Clause. *Id.* at 24a-55a. The court determined that the Act discriminates based on both "sex" and "transgender status," therefore warranting heightened scrutiny, which the Act likely failed because it was "not substantially related to" the State's interest in "furthering women's equality and promoting fairness in female athletic teams." *Id.* at 25a, 40a.[1]

SUMMARY OF ARGUMENT

I. Title IX permits schools to place trans-identifying athletes on sex-separated sports teams based on their biological sex.

A. Sex-separated athletics are consistent with Title IX's text, history, and purpose. The ordinary meaning of "sex" as used in Title IX refers to the binary biological difference between males and females. And the ordinary meaning of "discrimination" as used in Title IX is treating members of one sex worse than similarly situated members of the other sex.

Athletic competitiveness is one respect in which the sexes are *not* similarly situated. Innate biological differences between the sexes mean that, most notably, males have an advantage over females in strength and speed. These differences emerge before puberty, grow in adulthood, and rest on enduring biological traits.

---

[1] After this Court granted certiorari, Hecox filed a suggestion of mootness, which Idaho will oppose. The United States reserves judgment on that issue until briefing is complete.

Courts have thus long recognized that Title IX allows sex-separated athletics, including before puberty. Because the sexes are not similarly situated with respect to athletic competition given their physical differences, providing separate teams for females and males, where equal opportunities are provided for both, is not sex discrimination prohibited by Title IX.

This conclusion is reinforced by statutory amendments and decades-old regulations expressly contemplating athletic teams separated by biological sex. Moreover, forcing females to compete against males would contravene Title IX's purpose of expanding athletic opportunities for women and girls, threatening to undermine the statute's resounding success.

B. Under Title IX, the rationale that generally justifies sex-separated athletics applies equally to trans-identifying athletes. As gender identity is not itself relevant to athletic ability, a male trans-identifying athlete still would have a competitive advantage against female athletes, just like a male non-trans-identifying athlete.

Title IX does not require a special exemption allowing trans-identifying athletes to compete on teams of the opposite sex. Regardless of whether Title IX prohibits discrimination based on gender identity (it does not), declining to provide an exemption for a male trans-identifying athlete to play on a female sports team is not even gender-identity discrimination, let alone sex discrimination. See *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1830-1835 (2025). It is instead the refusal to provide a gender-identity-based accommodation from a valid sex-based rule. Title IX does not mandate such preferential treatment for male trans-identifying athletes, especially not when it would come at the expense of competitive fairness and safety for women and girls.

C. The Fourth Circuit's contrary holding rests on three key errors. First, the court claimed that West Virginia's law discriminates based on gender identity, when it treats trans-identifying students the same as everyone else—it assigns them to teams based on their biological sex. Second, the court objected that the law adheres to a common practice of allowing female athletes to try out for certain male teams but not vice versa. That practice is not discriminatory, as such female athletes lack the competitive advantage in strength and speed that male athletes would have. And the court's objection proves too much, as it suggests even *non-trans-identifying* males must be allowed to play on female teams. Third, the court stated that the law operates categorically and thus ignores whether individual males who use puberty blockers, like B.P.J., are similarly situated to females. Regardless of those particular circumstances, the biological differences between the sexes still endow any male athlete with a competitive advantage in strength and speed over a female athlete who is similarly situated in all respects other than sex.

II. The Equal Protection Clause likewise permits schools to place trans-identifying athletes on sex-separated sports teams based on their biological sex.

A. This Court's precedent has long upheld classifications that treat men and women differently where the two sexes "are not similarly situated," after "tak[ing] into account a biological difference between" them. *Nguyen* v. *INS*, 533 U.S. 53, 63-64 (2001). Physical fitness is an obvious circumstance where the sexes are not similarly situated, as the Court recognized in *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996). History and tradition, plus lower-court precedent, also support the constitutionality of sex-separated sports teams.

B. The Equal Protection Clause does not require special exemptions for trans-identifying athletes any more than Title IX does. To the contrary, it is even more obvious that the *Equal* Protection Clause does not mandate such *preferential* treatment.

C. The Fourth Circuit's equal-protection ruling rested on the same errors as its Title IX ruling. And the Ninth Circuit's ruling was largely the same, with one additional error: it deemed the state law's sex classification a "proxy" for gender-identity discrimination, contrary to this Court's decision in *Skrmetti* that rejected an analogous argument.

ARGUMENT

After vigorous debate, more than half the States have adopted laws preventing male athletes from competing on female sports teams. Neither Title IX nor the Equal Protection Clause prohibits States from enforcing that sensible policy. When placing students on sex-separated sports teams engaged in athletic competition, what matters is biology, not gender identity.

I. TITLE IX PERMITS SCHOOLS TO PLACE TRANS-IDENTIFYING ATHLETES ON SEX-SEPARATED SPORTS TEAMS BASED ON THEIR BIOLOGICAL SEX

A. Title IX Generally Permits Sports Teams To Be Separated By Sex

Allowing women and girls to compete on separate sports teams from men and boys does not violate Title IX's prohibition against "discrimination" "on the basis of sex" in federally funded education. 20 U.S.C. 1681(a).

1. a. Because Title IX does not define "sex," courts "look to the ordinary meaning of the word when it was enacted in 1972." *Adams* v. *School Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc).

"[T]he overwhelming majority of dictionaries" from "the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Ibid.*; accord 24-43 Pet. App. 61a, 71a-72a (Agee, J., dissenting in relevant part). Indeed, just one year after Title IX was enacted, a plurality of this Court explained that sex "is an immutable characteristic determined solely by * * * birth" that distinguishes "male and female" individuals. *Frontiero* v. *Richardson*, 411 U.S. 677, 681, 686 (1973). And Title IX itself makes clear that Congress shared this understanding of the term, as the statute repeatedly uses "sex" to refer to the binary difference between males and females. *E.g.*, 20 U.S.C. 1681(a)(8) ("students of one sex" and "of the other sex"); 20 U.S.C. 1681(a)(2) ("students of both sexes").

Title IX also carries "the 'normal definition of discrimination.'" *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005). The "ordinary meaning of the word discrimination" is treating individuals or groups that "are similarly situated differently without sufficient justification for the difference in treatment." *Alabama Dep't of Revenue* v. *CSX Transp., Inc.*, 575 U.S. 21, 26 (2015) (quotation marks omitted); see, *e.g.*, *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 19 (1980) ("An employer 'discriminates' against an employee only when he treats that employee less favorably than he treats others similarly situated.").

Putting those two definitions together leads to a straightforward interpretation: Title IX prohibits practices that subject members of one biological sex to "'less favorable' treatment" than similarly situated members of the other sex. *Jackson*, 544 U.S. at 174.

b. Importantly, this does not mean that *all* sex-based classifications are prohibited discrimination. Given that the difference between males and females is grounded in biology, there are of course some physiological ways in which "the sexes are not similarly situated." *Bauer* v. *Lynch*, 812 F.3d 340, 351 (4th Cir. 2016) (quoting *Michael M.* v. *Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion)), cert. denied, 580 U.S. 959 (2016).

"It is beyond dispute that, barring rare genetic mutations not at issue here, a person either has male sex chromosomes or female sex chromosomes," and this biological trait "determines many of the physical characteristics relevant to athletic performance." 24-43 Pet. App. 90a. On average, males differ from females with respect to attributes like height, weight, bone structure, muscle mass, and heart and lung capacity. See Idaho Br. 8-9. This results in males being stronger and faster than females, all else being equal—*i.e.*, if they have had similar environmental experiences and possess similar genetic traits other than the different sex chromosome.

For example, in *Bauer*, the Fourth Circuit recognized that "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs." 812 F.3d at 350. "[T]o account for the[se] innate physiological differences," the FBI has adopted sex-normed physical-fitness standards for special agents: *e.g.*, men must do 30 push-ups and run 1.5 miles in 12 minutes and 24 seconds, whereas women need only do 14 push-ups and run 1.5 miles in 13 minutes and 59 seconds. See *id.* at 343-344; U.S. Fed. Bureau of Investigation, U.S. Dep't of Justice, *Special Agent Physical Requirements*, https://fbijobs.gov/special-agents/physical-

requirements; see also Idaho Br. 7-8. The Fourth Circuit held that those sex-based standards are not discrimination because of sex under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a). *Bauer*, 812 F.3d at 351.

Congress itself has recognized that "physiological differences between male and female individuals" warrant sex-based differences in physical-fitness admissions standards at military academies. Pub. L. No. 94-106, Tit. VIII, § 803(a), Oct. 7, 1975, 89 Stat. 537-538 (10 U.S.C. 7442 note). And in Title IX in particular, Congress confirmed that accounting for real differences between the sexes is not prohibited discrimination, codifying the "[i]nterpretation" that "nothing" in the statute "shall be construed to prohibit" sex-separated living facilities. 20 U.S.C. 1686.

Accordingly, "it is generally accepted" that "males outperform females athletically because of inherent physical differences between the sexes." 24-43 Pet. App. 90a-91a; see *id.* at 33a ("strength and speed" are "attributes relevant to most competitive sports"). To be sure, the physical differences between the sexes do not always lead to a competitive advantage for males. They sometimes may benefit females, as in sports that favor light weight or flexibility, see *Sex Segregation in Youth Rodeo Events Under Title IX Regulations*, __ O.L.C. __ (2021) (slip op. at 9), https://www.justice.gov/olc/opinion/sex-segregation-youth-rodeo-events-under-title-ix-regulations, and there may be other sports where the differences are not sufficiently material to affect competitive outcomes. But no matter the sport, the physical differences between the sexes persist, and thus it is not discrimination to separate males and females to ensure a fair and safe competitive playing field.

Although the sexes' divergence in athletic performance grows in adulthood, it rests on innate biological differences that exist at birth and manifest during childhood. Sex chromosomes give rise to "pre-puberty physical differences that affect athletic performance." *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring); see 24-43 Pet. App. 48a-49a (Agee, J., dissenting in relevant part). As explained in expert reports submitted in B.P.J.'s case, "much data and multiple studies show that significant physiological differences, and significant male athletic performance advantages in certain areas, exist before significant developmental changes associated with male puberty have occurred." 24-43 J.A. 2155; see *id.* at 2155-2173, 2467-2486.

These advantages are seen, among other places, in the results of the Presidential Fitness Test widely used in American schools, in which "boys outperform girls" at ages as young as six. 24-43 J.A. 2158; see *id.* at 2217-2219. As the Arizona legislature found in enacting a law similar to those challenged here, "in studies of large cohorts of children from six years old, boys typically scored higher than girls on cardiovascular endurance, muscular strength, muscular endurance, and speed/agility, but lower on flexibility." *Doe* v. *Horne*, 115 F.4th 1083, 1095 (9th Cir. 2024) (quoting 2022 Ariz. Legis. Serv. ch. 106, § 2, ¶ 6) (brackets and quotation marks omitted), petition for cert. pending, No. 24-449 (filed Oct. 17, 2024); see *id.* at 1100 (acknowledging studies indicating that even before puberty, boys are generally "taller, weigh more, have more muscle mass, have less body fat, [and] have greater shoulder internal rotator strength" than same-age girls). Studies also indicate that these differences in performance persist between "similarly trained" athletes. 24-43 J.A. 2162.

And studies aside, the relevant physical differences between the sexes are "easily corroborated by common experience." *Roe* v. *Critchfield*, 137 F.4th 912, 925 (9th Cir. 2025) (denying relief in challenge to sex-separated bathrooms, locker rooms, and showers).

In sum, because males and females are not similarly situated physically with respect to athletic competition, separating sports teams by sex is not "discrimination" prohibited under Title IX when such separation does not treat members of either sex worse than the other. Consistent with this straightforward interpretation, courts have recognized for decades that "the Title IX regime permits institutions to maintain gender-segregated teams." *Cohen* v. *Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996) (emphasis omitted), cert. denied, 520 U.S. 1186 (1997); see also, *e.g.*, *Kelley* v. *Board of Trs.*, 35 F.3d 265, 270-271 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *Williams* v. *School Dist. of Bethlehem*, 998 F.2d 168, 172 (3d Cir. 1993), cert. denied, 510 U.S. 1043 (1994). And the same goes for young students. For example, in *O'Connor* v. *Board of Education of School District Number 23*, Justice Stevens and the Seventh Circuit both denied relief to an 11-year-old challenging exclusion from opposite-sex middle-school basketball teams. 449 U.S. 1301, 1307 (1980) (declining to vacate stay of injunction); 645 F.2d 578, 582 (1981) (reversing injunction), cert. denied, 454 U.S. 1084 (1981).

2. Title IX's plain meaning is reinforced by subsequent statutory amendments and implementing regulations that specifically address sex-separated sports.

Shortly after Title IX's enactment, Congress in 1974 directed the Department of Health, Education, and

Welfare (HEW) to promulgate regulations "implementing the provisions of Title IX," including "reasonable provisions considering" how Title IX applies to athletics given "the nature of particular sports." Pub. L. No. 93-380, § 844, 88 Stat. 612.

HEW implemented Congress's directive by adopting regulations permitting certain forms of sex separation, including in athletics. 40 Fed. Reg. 24,128 (June 4, 1975). These regulations "permit[] separate teams for members of each sex where selection for the team is based on competitive skill or the activity involved is a contact sport." *Id.* at 24,134. They thus contemplate that schools may "operate[] or sponsor[] separate teams" for "members of each sex," so long as they provide "equality of opportunity for members of each sex." *Id.* at 24,143.

Congress declined to disapprove these regulations, see *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531-535 (1982), and the original provision permitting sex-separated athletics has remained in effect for 50 years, 34 C.F.R. 106.41(b) and (c); see 65 Fed. Reg. 52,858, 52,872 (Aug. 30, 2000) (common rule by 21 agencies adopting this provision). Because these agency "interpretations issued contemporaneously with the statute" and "have remained consistent over time," they are "especially useful in determining the statute's meaning." *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 394 (2024). Indeed, this Court has repeatedly "recognized the probative value of Title IX's unique postenactment history" in construing the statute. *Grove City Coll.* v. *Bell*, 465 U.S. 555, 567-568 (1984) (citing *North Haven*). That history strongly supports interpreting Title IX to permit sex-separated athletics.

3. Preserving sex-separated sports also honors the purposes behind Title IX and the statute's enormously successful effects over five decades.

Title IX was manifestly enacted for the purpose of promoting "girls' and women's rights." *Adams*, 57 F.4th at 817 (Lagoa, J., specially concurring); see *McCormick* v. *School Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) ("Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities."). And it has achieved substantial success in that regard, especially in the realm of sports. "[O]ne need not look further than the neighborhood park or local college campus to see the remarkable impact Title IX has had on girls and women in sports." *Adams*, 57 F.4th at 818. "In 1971, before Congress enacted the statute, approximately 300,000 girls and 3.67 million boys played competitive high school sports nationwide." *McCormick*, 370 F.3d at 286. Today, Title IX "has had stellar results," *Louisiana* v. *U.S. Dep't of Educ.*, 737 F. Supp. 3d 377, 390 (W.D. La. 2024), such that nearly half of college athletes are women, up from 16% before Title IX, see National Women's Law Center, *Quick Facts about Title IX and Athletics* (June 21, 2022), https://bit.ly/41eUaxC.

Consequently, a judicial pronouncement at this late date that Title IX requires "commingling both biological sexes in the realm of female athletics" would have "vast societal consequences" and "threaten[] to undermine one of [Title IX's] major achievements, giving young women an equal opportunity to participate in sports." *Adams*, 57 F.4th at 818, 821 (Lagoa, J., specially concurring) (brackets in original); see *Clark* v. *Arizona Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th

Cir. 1989) (*Clark II*) ("If males are permitted to displace females on the school volleyball team even to the extent of one player * * * , the goal of equal participation by females in interscholastic athletics is set back, not advanced."). These considerations further bolster the conclusion that Title IX does not forbid female-only sports. See *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (construing statute based on "context, structure, history, and purpose") (quotation marks omitted).

B. Title IX Does Not Require A Special Exemption Allowing Trans-Identifying Students To Compete On Opposite-Sex Teams

The rationale that justifies sex-separated athletics under Title IX applies equally to athletes whose asserted "gender identity does not align with their biological sex." *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1824 (2025). Regardless of whether trans-identifying athletes *identify* with the opposite sex, they possess the *biology* of their own sex. A school thus may bar males who are trans-identifying from competing on female sports teams for the same reason that it may bar non-trans-identifying males from doing so: They have a competitive advantage in strength and speed over females due to their physiological differences.

That rule obviously does not involve "discrimination" "on the basis of sex" under Title IX. When it comes to competitive athletics, males "are not similarly situated" to females given their "physiological differences," *Bauer*, 812 F.3d at 351, whether or not the man or boy at issue identifies as a woman or girl. As the teams are permissibly separated based on biological sex, it does not somehow become prohibited sex discrimination to neutrally apply that valid criterion to trans-identifying students. Their subjective gender identity "has nothing

to do with" the objective biological differences justifying sex-separated teams. 24-43 Pet. App. 49a (Agee, J., dissenting in relevant part); see 24-43 J.A. 1742-1743 (B.P.J.'s expert conceding that "gender identity itself is not a useful indicator of athletic performance").

Accordingly, barring a male trans-identifying athlete from competing on female teams is not providing "'less favorable' treatment" than females receive. *Jackson*, 544 U.S. at 174. Rather, it ensures *equal* treatment for both sexes. See 24-43 Pet. App. 51a-52a (Agee, J., dissenting in relevant part).

Put differently, respondents are not seeking to prevent discrimination based on sex, but rather demanding a preferential "accommodation" based on gender identity. See *Doe 2* v. *Shanahan*, 917 F.3d 694, 707 (D.C. Cir. 2019) (Williams, J., concurring) (rejecting challenge to sex-separated military facilities and standards). While other males are validly excluded from competing against females, respondents insist that they must be allowed to do so, merely because they subjectively identify as females, despite the objective physiological advantages they have as males.

That would turn Title IX on its head. However else the statute may apply in the context of trans-identifying students, it certainly does not require schools to create a special exemption that *discriminates in their favor*. Cf. *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (*SFFA*) ("Eliminating * * * discrimination means eliminating all of it."). Title IX "[p]rohibit[s]" "discrimination" "on the basis of sex," 20 U.S.C. 1681(a), which cannot conceivably be construed to *mandate preferential treatment* for male trans-identifying athletes, let alone when that would come at the expense of competitive

fairness and safety for women and girls, cf. *SFFA*, 600 U.S. at 287 (Gorsuch, J., concurring) (interpreting Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, to bar preferential treatment for racial minorities).[2]

C. The Fourth Circuit's Contrary Reasoning Is Flawed

Although the Fourth Circuit rejected the argument that the United States is advancing here, the court agreed with the argument's key premises. To begin, the court acknowledged that, because "discrimination means treating an individual *worse than* others who are similarly situated," "not every act of sex-based classification is enough to show legally relevant discrimination for purposes of Title IX." 24-43 Pet. App. 38a (brackets and quotation marks omitted). Moreover, the court "d[id] not hold" that States are categorically "forbidden from creating separate sports teams for boys and girls," recognizing that Title IX's regulations generally authorize such teams. *Id.* at 43a; see *id.* at 41a-42a. Yet the court then reached the conclusion that West Virginia's law violates Title IX as applied to B.P.J. *Id.* at 43a. That conclusion rested on three key errors.

1. The Fourth Circuit primarily reasoned that West Virginia's law "discriminates based on gender identity." 24-43 Pet. App. 39a; see *id.* at 24a ("If B.P.J. were a cisgender girl, she could play on her school's girls teams. Because she is a transgender girl, she may not."). The court thus found a Title IX violation under circuit precedent that held, relying on *Bostock* v. *Clayton County*,

[2] Whether Title IX *prohibits* schools from allowing males who identify as females to compete on female sports teams raises distinct issues not presented here. This Court should make clear that its opinion in these cases does not address that question.

590 U.S. 644 (2020), that "discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX." 24-43 Pet. App. 39a.

Bostock's reasoning, however, does not extend beyond Title VII to Title IX, given significant differences between the statutes. See *Tennessee* v. *Cardona*, No. 24-5588, 2024 WL 3453880, at *2-3 (6th Cir. July 17, 2024) (Sutton, C.J.). Moreover, like *Skrmetti*, this case does not require the Court to "consider[] whether *Bostock*'s reasoning reaches beyond the Title VII context," because West Virginia's law "does not classify [or otherwise discriminate] on the basis of transgender status." 145 S. Ct. at 1833-1834; cf. *Bostock*, 590 U.S. at 681 (reserving judgment on "sex-segregated bathrooms").

In particular, while West Virginia's law "explicitly treats biological boys and biological girls differently, it does not expressly treat transgender individuals differently." 24-43 Pet. App. 51a (Agee, J., dissenting in relevant part). It does not, for example, provide that trans-identifying students cannot play on *any* sports teams, akin to the employer in *Bostock* who fired an employee "allegedly for no reason other than the employee's * * * transgender status," a characteristic this Court deemed "not relevant to employment decisions." 590 U.S. at 653, 660. Indeed, the law disavows "[c]lassifications based on gender identity." W. Va. Code Ann. § 18-2-25d(a)(4) (2022). As Judge Agee's dissent explained, trans-identifying athletes fare "no differently than any other athlete" when schools applying the law place "athletes on the team corresponding with their biological sex." 24-43 Pet. App. 52a; cf. *Adams*, 57 F.4th at 808 (same for sex-separated bathrooms).

This Court's decision in *Skrmetti* is directly on point. There, the challenged law, "[o]n its face," classified

"based on age" and "based on medical use," not "on the basis of transgender status." 145 S. Ct. at 1829-1833. Similarly here, West Virginia's law does not classify based on gender identity, but rather based on sex, albeit in a manner that is not "discrimination" because it accounts for real physical differences between males and females that are relevant to athletic competition.

To be sure, the neutral application of this law may impose burdens on males who socially present as females, especially if they undergo procedures to further that appearance. 24-43 Pet. App. 40a-41a. But as this Court held in *Skrmetti*, facially neutral laws do not discriminate based on gender identity even if they disproportionately burden trans-identifying individuals, such as by banning use of a medical procedure for a condition that "only transgender individuals" would seek to remedy through the procedure. 145 S. Ct. at 1833. As noted above, West Virginia's refusal to accommodate those burdens on male trans-identifying athletes by granting them a special exemption, which would allow only such males to compete against females despite their physiological advantages, is not "discrimination" on the basis of gender identity, let alone discrimination "on the basis of sex." 20 U.S.C. 1681(a).[3]

2. The Fourth Circuit further reasoned that West Virginia's law "also discriminates based on sex" because it "forbid[s] transgender girls—but not transgender boys—from participating in teams consistent with their gender identity." 24-43 Pet. App. 39a; see *id.* at

[3] For the same reason, the Fourth Circuit erred in suggesting that West Virginia's law "effectively 'exclud[es]' [B.P.J.] from 'participation in' all non-coed sports." 24-43 Pet. App. 41a. The State permits B.P.J. to participate on boys' sports teams (and any choice by B.P.J. to refrain from doing so is not based on sex).

25a-26a. But this is sophistry. Translated into ordinary English, the court merely observed that, while the State's law bars *boys* (trans-identifying or not) from competing on girls' teams, it does not bar *girls* (trans-identifying or not) from competing on boys' teams. W. Va. Code Ann. § 18-2-25d(c)(3) (2022). Title IX has long been read to permit this asymmetrical treatment in certain circumstances given the physiological differences between boys and girls, and the Fourth Circuit's contrary conclusion would lead to radical results.

Consistent with its text, history, and purpose, Title IX permits schools to allow girls to participate in boys' sports in certain circumstances, where doing so is consistent with safety and privacy and would not afford girls the competitive advantage that boys would gain if allowed to participate in girls' sports. For example, longstanding Title IX regulations expressly require that girls be allowed to try out for boys' teams in some circumstances. 34 C.F.R. 106.41(b); see 40 Fed. Reg. at 24,134. As the Fourth Circuit admitted, West Virginia has a similar regulation "long predating" the law challenged here. 24-43 Pet. App. 26a n.1.

This limited asymmetry is not sex-based "discrimination" under Title IX. Because biological girls generally "have no physiological advantage over biological boys, their inclusion in boys' sports does not hinder biological boys' competition," but "[t]he converse is not true." 24-43 Pet. App. 51a n.3 (Agee, J., dissenting in relevant part). Thus, allowing girls to compete on boys' teams, but not vice versa, ordinarily does not treat "similarly situated" athletes differently, *Bauer*, 812 F.3d at

351, and does not subject any athlete to "'less favorable' treatment" based on sex, *Jackson*, 544 U.S. at 174.[4]

Moreover, the Fourth Circuit's reasoning cannot be cabined to trans-identifying students, because the differential treatment the court identified is based on sex alone. Thus, under the court's logic, if a State allows a gifted female athlete to compete on the boys' team, it must then allow any and all male athletes to compete on the girls' team. Title IX does not compel that absurd and self-defeating result.

3. The Fourth Circuit finally reasoned that West Virginia's law "treat[s] students differently even when they are similarly situated" because it separates teams by sex "on a categorical basis, regardless of whether any given" male trans-identifying athlete "possesses any inherent athletic advantages" over girls. 24-43 Pet. App. 39a-40a. But while Title IX asks whether a "person" has been subjected to sex-based discrimination, 20 U.S.C. 1681(a), the court fundamentally erred in suggesting that either B.P.J. or any other individual boy is "similarly situated" to any individual girl in the context of athletic competition.

There are "innate physiological differences" between every male and every female, which is why "equally fit" males and females have "different performance outcomes." *Bauer*, 812 F.3d at 348; see pp. 13-14, *supra*.

---

[4] The analysis could be different if a State allowed females to compete on male teams even where their inclusion provided females with a competitive advantage. See p. 14, *supra*. But no such claim has been raised here; and besides, the proper remedy if that were deemed sex discrimination would be to bar females from competing on male teams for that small subset of sports, *not* to allow males to compete on female teams for the much broader range of sports where they have a competitive advantage. See *Sessions* v. *Morales-Santana*, 582 U.S. 47, 72-76 (2017).

To be sure, there is a range of athletic ability for both males and females, and so "some females may be able to outperform some males." 24-43 Pet. App. 90a. But for a boy and a girl who have otherwise similar genetic traits and environmental experiences, the "inherent physical differences" due to their sex chromosomes, *id.* at 91a, mean that they are not comparable for athletic competition. These "inherent differences between those born male and those born female"—which are "irrelevant" to gender identity and apply equally to trans-identifying individuals—justify categorical sex separation in sports. *Id.* at 48a-49a (Agee, J., dissenting in relevant part) (quotation marks omitted).

The Fourth Circuit suggested that boys may not have "a meaningful competitive athletic advantage" over girls "[b]efore puberty." 24-43 Pet. App. 34a. That is both wrong and immaterial. "[T]here is evidence that biological boys have a competitive advantage over biological girls *even before puberty*." *Id.* at 48a-49a (Agee, J., dissenting in relevant part). Although increased testosterone from male puberty is one "driver" of "significant sex-based differences in athletic performance," *id.* at 33a (majority opinion), puberty only "magnifie[s]" the fact that even "prepubertal male children[] can run faster, output more muscular power, jump higher, and possess greater muscular endurance than * * * prepubertal female children," 24-43 J.A. 2124; see pp. 15-16, *supra*. And regardless, boys and girls are not similarly situated for elementary and middle-school teams if they will soon need to be separated for high-school and college teams. It is not sex discrimination for schools to maintain consistent eligibility criteria so that students can build teams and play with the same comrades from childhood through graduation.

Contrary to the Fourth Circuit's suggestion, 24-43 Pet. App. 34a, it is likewise irrelevant whether a boy is taking puberty blockers or cross-sex hormones. For starters, not all boys who are trans-identifying will undergo such interventions. And even for those who do, evidence shows, and several state legislatures have found, that "the use of puberty blockers and cross-sex hormones" does not eliminate male athletes' "advantage" over female athletes in strength and speed. Idaho Code § 33-6202(11) (2025); see *Horne*, 115 F.4th at 1095 (acknowledging the Arizona legislature's finding that studies indicate the innate advantages of male athletes persist despite "the use of testosterone suppression").

This case illustrates the point: As a younger athlete, B.P.J. "regularly finished near the back of the pack." 23-43 J.A. 4416 (brackets and quotation marks omitted). But as a biological male teenager, despite taking puberty blockers, B.P.J. has performed strongly in girls' competitions—"consistently plac[ing] in the top fifteen participants at track-and-field events," and also "earn[ing] a spot at the conference championship in both shot put and discus." 24-43 Pet. App. 46a (Agee, J., dissenting in relevant part).

The Fourth Circuit's contrary reasoning suggests that Title IX would require allowing even *non-trans-identifying* boys to compete against girls if they "receiv[e] puberty blocking treatment." 24-43 Pet. App. 34a. In other words, mediocre athletes in men's sports could make themselves standout athletes in women's sports by using a medical procedure that does not eliminate their natural competitive advantage. Or, as the district court suggested, non-trans-identifying "boys [who] run slower than the average girl" could seek to

participate on girls' teams, rather than running near the back of the pack on boys' teams. *Id.* at 92a. None of that is the law.

Finally, even on its own terms, the Fourth Circuit's reasoning was internally inconsistent. Despite denying summary judgment on the equal-protection claim, given a purported factual dispute about whether puberty blockers eliminate male athletes' competitive advantage, the court directed summary judgment for B.P.J. on the Title IX claim. 24-43 Pet. App. 34a-37a. As Judge Agee observed, this means the majority concluded, indefensibly, that B.P.J. was "similarly situated to biological girls" under Title IX "*regardless of the competitive advantage* [B.P.J.] may have." *Id.* at 49a.

II. THE EQUAL PROTECTION CLAUSE PERMITS SCHOOLS TO PLACE TRANS-IDENTIFYING ATHLETES ON SEX-SEPARATED SPORTS TEAMS BASED ON THEIR BIOLOGICAL SEX

A. The Equal Protection Clause Generally Permits Sports Teams To Be Separated By Sex

Allowing women and girls to compete on separate sports teams from men and boys does not violate the Constitution's prohibition against denial of "the equal protection of the laws." U.S. Const. Amend. XIV, § 1. This conclusion is, if anything, even more straightforward than the Title IX analysis above.

This Court's precedent instructs that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Nguyen* v. *INS*, 533 U.S. 53, 63 (2001). The Clause is therefore not violated by classifications that treat men and women differently where the two sexes "are not similarly situ-

ated," such as measures that "take[] into account a biological difference." *Id.* at 63-64. "[B]ecause the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons[,] or require things which are different in fact . . . to be treated in law as though they were the same, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.*, 450 U.S. at 469 (plurality opinion) (citation and quotation marks omitted).

For example, in *Nguyen*, this Court upheld a statute that imposed additional requirements for fathers to convey citizenship to children born abroad, due to the "basic biological difference[] * * * that a mother must be present at birth but the father need not be." 533 U.S. at 73; see *id.* at 56-57. Likewise, *Michael M.* upheld a statutory-rape law that punished males for having sexual intercourse with under-age girls, but not vice versa, given that "the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male." 450 U.S. at 466, 476 (plurality opinion).

Sex-separated athletics are constitutionally permissible because they "realistically reflect[] the fact that the sexes are not similarly situated" with respect to athletic competition, as a matter of "immutable physiological fact." *Michael M.*, 450 U.S. at 467, 469 (plurality opinion). Thus, even while holding that the Equal Protection Clause required the integration of the Virginia Military Institute in *United States* v. *Virginia*, 518 U.S. 515 (1996), the Court recognized that the school "undoubtedly" would have to "adjust aspects of the physical training programs" in light of "physiological differences between male and female individuals." *Id.* at 550 n.19.

The same logic justifies separate sports teams for women and girls, illustrating the principle that "[p]hysical differences between men and women * * * are enduring" and "remain cause for celebration." *Id.* at 533. Indeed, this conclusion follows *a fortiori* from *Nguyen* and *Michael M.* Those cases upheld *added burdens* placed on males due to biological differences, whereas the state laws here merely separate males from female teams to protect competitive fairness and safety.

"[C]onstitutional history" supports the same conclusion. *SFFA*, 600 U.S. at 231. There is no viable argument that the Equal Protection Clause was originally understood to forbid sex-separated athletics. See *Adams*, 57 F.4th at 801 ("There has been a long tradition in this country of separating sexes in some, but not all, circumstances."); *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ.* v. *Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 670 (6th Cir. 1981) (appendix to opinion of Jones, J., concurring in part and dissenting in part) (detailing history of women's sports "begin[ning] in the mid-19th century").

Lower courts thus have recognized for decades that "the distinct differences in physical characteristics and capabilities between the sexes" permit sex-separated athletics under the Equal Protection Clause. *Cape* v. *Tennessee Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam). That includes the Ninth Circuit, which saw "no question" that sex-separated athletics properly accommodate "real differences between the sexes." *Clark* v. *Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (1982) (*Clark I*) (citing *Michael M.*), cert. denied, 464 U.S. 818 (1983). As with Title IX, moreover, courts have upheld sex-separated athletics under the Equal Protection Clause even for

younger athletes, consistent with the innate biological differences between the sexes that manifest pre-puberty. *E.g.*, *O'Connor*, 645 F.2d at 583 (11-year-old); *Cape*, 563 F.2d at 795 ("junior and senior high schools").

B. The Equal Protection Clause Does Not Require A Special Exemption Allowing Trans-Identifying Students To Compete On Opposite-Sex Teams

As with Title IX, the rationale that generally justifies sex-separated athletics under the Equal Protection Clause applies the same to trans-identifying athletes. Regardless of their gender identity, male athletes have a competitive advantage in strength and speed over females. Requiring male athletes to play on male sports teams thus simply accounts for real biological differences that render them not similarly situated to female athletes for competitive sports. Declining to provide male trans-identifying athletes a preferential accommodation from a valid biology-based rule, at the expense of women and girls, is not the denial of equal protection. See pp. 19-21, *supra*.

This conclusion is, if anything, even clearer under the Equal Protection Clause than under Title IX. To start, instead of a specific prohibition against discrimination on the basis of sex, the Fourteenth Amendment only imposes a general duty to ensure "the equal protection of the laws." U.S. Const. Amend. XIV, § 1. While this Court has held that the Clause invalidates sex-based classifications that do not satisfy intermediate scrutiny, see *Nguyen*, 533 U.S. at 60-61, it cannot possibly be construed—especially under the provision's original understanding—to require *preferential* treatment for male trans-identifying athletes that places females at a *disadvantage* in competitive fairness and safety. To the contrary, this Court has held that the

Clause does not require preferential treatment for racial minorities, even during the pre-*SFFA* period when the Court held that the Clause sometimes tolerated such treatment. See *Schuette* v. *BAMN*, 572 U.S. 291, 310 (2014) (plurality opinion); *id.* at 316-317 (Scalia, J., concurring in the judgment). So also here, applying the same biology-based rules to trans-identifying athletes as everyone else is not invidious discrimination, but rather the absence thereof.

C. The Contrary Reasoning Of The Fourth And Ninth Circuits Is Flawed

The equal-protection reasoning of the Fourth and Ninth Circuits was almost entirely duplicative of the Fourth Circuit's Title IX reasoning, and that reasoning is even more flawed in the equal-protection context.

First, the courts of appeals deemed the States' laws to discriminate based on gender identity and then treated that as discrimination based on sex. See 24-43 Pet. App. 26a; 24-38 Pet. App. 25a. But the premise that the States are engaged in gender-identity discrimination is wrong for the reasons already discussed. See pp. 21-23, *supra*. And *Skrmetti* squarely holds that laws imposing even greater incidental burdens on trans-identifying individuals do not discriminate based on gender identity for equal-protection purposes. 145 S. Ct. at 1832-1834.

Moreover, while the Court could again avoid deciding whether gender-identity discrimination qualifies as sex discrimination under the Equal Protection Clause, *Skrmetti*, 145 S. Ct. at 1832, it plainly does not. The Clause has no language even arguably equivalent to the "'because of' * * * sex" language on which *Bostock* relied to reach gender-identity discrimination under Title VII. See *id.* at 1834; *Lange* v. *Houston Cnty.*, No.

22-13626, 2025 WL 2602633, at *7 (11th Cir. Sept. 9, 2025) (en banc) (Newsom, J., concurring). In addition, regardless of the public meaning of Title VII in 1964, there is no serious argument that the original public meaning of the Equal Protection Clause in 1868 would subject classifications based on gender identity to any sort of heightened scrutiny. Instead, trans-identifying individuals are not a suspect class, and laws classifying on that basis are subject only to rational-basis review. See *Skrmetti*, 145 S. Ct. at 1849-1855 (Barrett, J., concurring); *id.* at 1860-1867 (Alito, J., concurring in part and in the judgment); Idaho Br. 36-40.

Second, the courts of appeals deemed the States' laws to discriminate based on sex because they do not additionally bar females who identify as males from trying out for male teams. See 24-43 Pet. App. 25a-26a; 24-38 Pet. App. 31a-32a; see also 24-38 Pet. App. 38a-40a, 43a, 52a-55a (similarly faulting Idaho's sex-verification procedures for women's teams but not men's teams). But like Title IX, the Constitution permits this asymmetrical treatment due to males' biological advantage in strength and speed; and again, this objection proves too much because it would logically allow non-trans-identifying males to also compete on female teams. See pp. 23-25, *supra*. Courts have long rejected such equal-protection challenges and held that "preclud[ing] boys from playing on girls' teams, even though girls are permitted to participate on boys' athletic teams," is "a legitimate means of providing athletic opportunities for girls." *Clark I*, 695 F.3d at 1127, 1130.

Third, the courts of appeals suggested that males who identify as transgender are similarly situated to females if they have taken puberty blockers or cross-sex hormones. See 24-43 Pet. App. 30a-37a; 24-38 Pet. App.

42a, 46a-48a. This is both empirically false and legally insufficient. Males retain an inherent competitive advantage in strength and speed based on biological differences from birth, even for those like B.P.J. who take puberty-blocking interventions as adolescents. See pp. 25-28, *supra*. And regardless, the "basic biological differences" between the classes of male athletes and female athletes *in general* are more than enough for the challenged laws to satisfy intermediate scrutiny, which requires only that the laws be "substantially related" to achieving the government's important interests, regardless of what science shows about the effect of medical interventions on the *tiny subclass* of male athletes that comprises male trans-identifying athletes who take puberty blockers. See *Nguyen*, 533 U.S. at 70, 73; Idaho Br. 50-52 (citing cases). In all events, Hecox is an adult male who went through puberty, resulting in indisputably significant physical advantages before the use of cross-sex hormones. See 24-38 Pet. App. 49a.

Finally, the Ninth Circuit, unlike the Fourth Circuit, also posited that separating athletes based on biological sex was a "proxy" for gender-identity discrimination. 24-38 Pet. App. 33a (brackets omitted). That conclusion is unsound. This Court has suggested that proxy discrimination occurs where the state targets a trait that is possessed "exclusively or predominantly" by a protected group *and* that would be "irrational" to target except because it was possessed by the group. *E.g.*, *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). By contrast, the States here ban male athletes from competing on female teams, which prevents both trans-identifying and non-trans-identifying males from

gaining a competitive advantage against females. Indeed, in *Skrmetti*, this Court rejected a claim of proxy discrimination even though the challenged law adversely affected *only* trans-identifying children. See 145 S. Ct. at 1829-1830. That decision forecloses the Ninth Circuit's proxy-discrimination holding.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
HARMEET K. DHILLON
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Solicitor General
JESUS A. OSETE
Principal Deputy Assistant Attorney General
MAX E. SCHULMAN
Assistant to the Solicitor General
ANDREW G. BRANIFF
CHRISTOPHER C. WANG
Attorneys

SEPTEMBER 2025