No. 24-38

IN THE

Supreme Court of the United States

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

Petitioners,

v.

LINDSAY HECOX, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* EQUAL PROTECTION PROJECT IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Equal Protection Project (EPP), a project of the non-profit Legal Insurrection Foundation, is dedicated to the fair treatment of all persons without regard to race, ethnicity, or sex. EPP's guiding principle is that there is no "good" form of unlawful discrimination. The remedy for unlawful discrimination is never more unlawful discrimination.

Since its creation, EPP has filed civil rights complaints against more than one hundred twenty governmental or federally funded entities that have engaged in alleged discriminatory conduct in more than five hundred fifty discriminatory programs. EPP has also previously filed briefs *amicus curiae* before this Court. *See, e.g.*, *First Choice Women's Res. Centers, Inc. v. Platkin*, No. 24-781, 2025 WL 1678987, at *1 (June 16, 2025); *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2025 WL 815221 (Mar. 10, 2025); *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 2022 WL 2919681 (May 9, 2022). EPP's participation will focus on providing the Court with additional information regarding the academic origins of trans-ideology and reasons science should trump subjective feelings as a basis for Equal Protection Clause analysis.

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1. No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The dispute in this case is about who qualifies as a female for purposes of participating in school sports. The lower courts concluded that Idaho violated the Plaintiff-Respondent's right to equal protection by basing its determination about who qualifies as "woman or girl" on objective biological facts. Instead of well-established science showing physiological difference between the sexes, the lower courts held that the state must accept a definition of female based on a person's psychological feeling and "sense of self," regardless of biology.

But equal protection jurisprudence has always recognized that classifications must be determinable and anchored in reality rather than fluid and opaque. In other words, differential treatment must be based on meaningful differences. Thus, in the past whenever this Court examined whether a law distinguishes between "men" and "women," it presupposes that these are objective, knowable categories. This Court should reverse the order below for the following three reasons additional to those discussed by the Petitioner-Defendants.

First, in deciding who constitutes a woman for purposes of school athletics, the Ninth Circuit relied on a disputed and controversial transgender ideology based on recent academic notions of human sexuality. Second, the lower courts erred in disregarding the host of philosophical, political, cultural, and theological issues bearing on the nature of a human person as it is expressed in a person's sex, and none of which is open to resolution by judicial fiat. Last, if the lower court's ruling allowing

subjective feelings to trump biological realities is accepted by this Court, it will have far-reaching implications for other areas of law, all of which will harm women.

For these and the reasons discussed by the Petitioner-Defendants, this Court should reverse the Ninth Circuit and protect women's rights.

ARGUMENT

I. Academic theories regarding "gender" are a poor substitute for objective sex categories.

The Ninth Circuit invalidated Idaho's Fairness in Women's Sports Act by treating as constitutional fact a disputed academic theory. Namely, that sex for purposes of sports is determined by an internal "gender identity" rather than by objective biological traits. The intellectual foundation for the Ninth Circuit's approach is recent and sharply contested.

The use of "gender" to distinguish between femininity and masculinity—as aspects of personality and behavior—gained currency only in the 1960s with works such as Robert Stoller's *Sex and Gender*. *See* Alex Byrne, *Trouble with Gender* 36, 48 (2024). Stoller, a UCLA psychiatrist, described gender as "the amount of masculinity or femininity found in a person," observing that the "normal male has a preponderance of masculinity and the normal female a preponderance of femininity." *Sex and Gender* 9–10, quoted in Byrne, *Trouble* at 36.

From there, some academics reconceived sex as "gender identity" or "the sense of knowing to which sex

one belongs, that is, the awareness 'I am a male' or 'I am a female.'" Byrne, *Trouble* at 42. By 2004, Judith Butler and other theorists carried this idea into the "politics and theory of transgenderism and transsexuality." *Id.* at 43. Disputes about "sex," "gender," and "gender identity" have since become intensely contentious, with scholars and advocates urging diametrically opposite conclusions. *See id.* at 57–123. Fluid subjective perceptions of "gender" have thus replaced concrete biological categories in many academic and medical quarters.

While such theories of gender identity may be debated in the culture at large, they are a poor basis for constitutional law. Ideological fashions are fleeting, and nothing ensures that the current transgender paradigm will long remain dominant. If subjective feelings can override biological fact, courts could next be asked to recognize "transracial" or age-identity claims, with no principled stopping point. See *Washington v. Glucksberg*, 521 U.S. 702, 720 n.7 (1997) (warning against constitutional rights "whose contours are so fluid that they cannot be fairly applied").

For the purposes of this case, the biological definition of "woman," rather than the subjective psychological experiences of the Plaintiff-Appellee, lies at the center of the conflict. If "women" and "girls" are defined by biological attributes, as Idaho's Act requires, then "transgender women" are not women—a view Idaho and many states share, along with numerous gender-critical feminists and scientists. Trans-activists proclaim the opposite. Sometimes the debate turns on edge cases such as intersex conditions or disorders of sex development, but more often it is overtly political. All of this, at best, is contested territory.

The Ninth Circuit nevertheless plunged into these contested waters, adopting the terminology, "sex assigned at birth," and "cisgender," that originated as esoteric academic theory and remains highly controversial.[2] But that reasoning cannot be reconciled with this Court's equal protection jurisprudence, which requires that "classifications must be substantially related to the achievement of important governmental objectives," *Michael M. v. Sonoma Cnty. Superior Ct.*, 450 U.S. 464, 468–69 (1981), and has long recognized that biological sex is a real and relevant distinction, *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (acknowledging "the undeniable differences between the sexes"); *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (upholding exclusion of boys from girls' volleyball because males would "displace females to a substantial extent").

As Justice Thomas cautioned, "[i]n politically contentious debates over matters shrouded in scientific uncertainty, courts should not assume that self-described experts are correct." *Skrmetti v. United States*, 145 S. Ct. 1838, 1849 (2025) (Thomas, J., concurring). By embracing a theory that equates "transgender women" with biological women—full stop, no qualifications—the Ninth Circuit effectively rewrote the Equal Protection

2. For example, the most recent authoritative statement of the views of the Catholic Church, as issued by the Holy See's Dicastery for the Doctrine of the Faith, is ***Dignitas Infinita*** ("Infinite Dignity"), released on 8 April 2024. *Dignitas Infinita* was issued by and approved with a signature by Pope Francis. The declaration argues gender theory is "extremely dangerous since it cancels differences in its claim to make everyone equal," and thus "all attempts to obscure reference to the ineliminable sexual difference between man and woman" are "to be rejected."

Clause. Constitutional adjudication requires neutral legal principles and demonstrable facts, not the adoption of fashionable academic theories.

The Ninth Circuit should be reversed and women's rights protected.

II. The Equal Protection Clause does not require subjective feelings supplant legitimate state legislation.

Nothing in constitutional text, history, or logic justifies a court in holding that a person's gender embarrassment, hurt feelings, or subjective feelings of distress should warrant invalidating a proper exercise of a State's legislative prerogatives.

In assessing whether Idaho's definition of females, women, and girls based on biological sex violated the Equal Protection Clause, the Ninth Circuit began by asserting that "such seemingly familiar terms as 'sex' and 'gender' can be misleading." App. 12a. "Gender identity," said the court, is subjective: "the term used to describe a person's sense of being male, female, neither, or some combination of both." *Id.* In contrast, a person's "sex" is "typically assigned at birth based on an infant's external genitalia," though the court added that "assignment" does "not always align with other sex-related characteristics." App. 13a. For a transgender person, "the individual's gender identity does not correspond to their sex assigned at birth." *Id.*

The very terms the Ninth Circuit used to frame this case effectively imported a highly controversial, ideological understanding of sex into the Constitution

and dictated the outcome. From that beginning—with its pseudo-biology lesson and glossary of terms—the court went on to equate "transgender women," meaning biological males who later identify as women, with "biological women," meaning persons born female who identify as women. But the language used by the Ninth Circuit to define "sex" would have been incomprehensible to the Framers of the Fourteenth Amendment. In fact, until very recently no speaker of standard English would have deemed the terms "sex" or "gender" as "misleading" or difficult to use correctly or understand.

No one in 1866 spoke of a person's sex being "assigned at birth," as if it were a matter about which there could be some doubt. No one imagined that properly classifying a person as a woman or a girl turned on her level of circulating testosterone, particularly given that the hormone testosterone was not identified and isolated until the 1930s.[3] No one spoke of men "transitioning" to become women, and then perhaps "transitioning" back to become men again, as if one's sex were merely a social or cultural costume. Nor did anyone use the term "gender" to describe "a person's sense of being male, female, neither, or some combination of both." App. 13a. Instead, "gender" was simply another term for a person's biological sex, either male or female, but in either case fixed and permanent. *See, e.g.*, Alex Byrne, *Trouble with Gender* (Polity Press: Cambridge, UK and Hoboken, NJ 2024) (hereinafter cited as "Byrne, Trouble") at p. 47.

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3. *See* Freeman ER, Bloom DA, McGuire EJ (February 2001). "A brief history of testosterone". The Journal of Urology. **165** (2): 371–73. *available at:10.1097/00005392-200102000-00004*.

The Idaho legislature grounded its policy in the understanding of differences between the sexes recognized across the globe for time immemorial (before ten to fifteen years ago). As the statute explains, "due to the average physiological differences between men and women," restricting women's sports to biological females "substantially advances the important state interest of promoting sex equality . . . by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities [and] opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." Idaho Code § 33-6202(12); App. 18c.

Below, the Ninth Circuit did not identify *any* context in which this Court has held that a person's subjective feelings are sufficient, standing alone, to sustain a constitutional challenge to a fact-based distinction drawn in a legislative enactment. To the contrary, this Court has repeatedly warned against elevating new social theories above enduring constitutional principles. See *Washington v. Glucksberg*, 521 U.S. 702, 720 n.7 (1997) (cautioning against constitutional rights "whose contours are so fluid that they cannot be fairly applied"); *Skrmetti v. United States*, 145 S. Ct. 1838, 1849 (2025) (Thomas, J., concurring) ("In politically contentious debates over matters shrouded in scientific uncertainty, courts should not assume that self-described experts are correct."). Yet that is precisely what happened here.

Equal protection analysis must turn on neutral principles, not on manifestly non-neutral terminology or the lens of an ideological movement. To eschew ideology and return to law requires recognizing that among the

many issues the Constitution does not address—and which a federal court lacks institutional competence to decide—is whether biological men who later subjectively identify as women are "real" women for all, some, or no purposes. To see the logical flaw in embracing the opposite approach it is only necessary to substitute the phrase "a male who has a 'sense of self' as a female" for every instance in which the court used "transgender girls and women." The question then becomes whether such males may, consistent with equal protection, be excluded from girls' and women's sports. Posed in this way, the question readily answers itself under this Court's precedents.

The Ninth Circuit should be reversed and women's rights protected.

III. The Idaho Legislature democratically defined sex in accordance with real physiological differences between men and women.

The lower courts did not question that separate teams for men and women are constitutionally proper. Of course, for decades state statutes providing for separate sports teams for men and women are based on the undisputed proposition that, on average, men have significant physical advantages over women in sports competitions such that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Skrmetti,* 145 S. Ct. at 1828-29 (*quoting United States v. Virginia*, 518 U. S., 515, 533 (1996)).

Instead, the lower courts disagreed with Idaho's considered judgment to define males and females by

reference to objective biological facts. In doing so, the lower courts conflated individualized therapeutic concerns with basic fairness in athletic competition.

The development of "gender identity" as a way of describing transgender individuals and developing therapeutic treatments for persons suffering from gender dysphoria arose in the clinical context of addressing the distress of individuals who believe that their biological sex does not match their internal sense of their "real" sex. In that therapeutic setting, objectively verifiable biological evidence is, by definition, of limited relevance: blood tests, CAT scans, and other diagnostic tools that guide treatment of physical illness do little to resolve a patient's psychological distress.

This case presents an entirely different context. It concerns drawing clear, fair lines for participation on competitive sports teams designated for women, in order to protect equal opportunities for female athletes. The biological definition of sex is objective and measurable. Peer-reviewed athletic and medical research shows persistent performance gaps between males and females—differences in muscle mass, lung capacity, bone density, hemoglobin concentration, and VO_2 max that endure even after hormone suppression. See, e.g., Hilton & Lundberg, *Transgender Women in Female Sports Categories*, Sports Med. 2021; Handelsman et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, Endocrine Rev. 2018.

While academic theorists and activists are free to indulge the notion that a person's sex is a social construct amenable to alteration or the ebbs and flows of personal

preferences, nothing in the Constitution precludes Idaho from preferring objective facts over subjective feelings.

Because the legislative purpose here is fairness in women's sports, it was misguided for the lower courts to reduce the equal protection question to a narrow dispute over circulating testosterone. Measuring hormones cannot capture how forcing female athletes to accept competitors who are biologically male affects their ability to obtain from other women "the benefits of shared community, teamwork, leadership, and discipline." App. 61a. Of course, some boys or men—whether "cisgender" or "transgender"—cannot outperform highly trained female athletes, while other boys and men—again whether "cisgender" or "transgender"—could dominate female athletes completely.

Yet no court has ever held that sex-segregated teams are unconstitutional because they exclude all males from women's sports regardless of individual ability. To the contrary, even the Ninth Circuit itself once upheld such exclusions. See *Clark ex rel. Clark v. Arizona Interscholastic Ass'n* (Clark I), 695 F.2d 1126, 1131–32 (9th Cir. 1982) (holding that excluding boys from a girls' volleyball team was permissible to redress past discrimination against female athletes and to promote equal opportunity for women); and *Clark ex rel. Clark v. Arizona Interscholastic Ass'n* (Clark II), 886 F.2d 1191 (9th Cir. 1989).

Justice Thomas recently emphasized that courts must resist the temptation to elevate transient claims of "expert consensus" over democratic judgment. *Skrmetti v. United States*, 145 S. Ct. 1838, 1840, 1848 (2025)

(Thomas, J., concurring) ("so-called experts have no license to countermand the wisdom, fairness, or logic of legislative choices" and courts may not "sit as a super-legislature to weigh the wisdom of legislation"). When this Court has departed from that principle—as when it lent constitutional prestige to eugenics in *Buck v. Bell*, 274 U.S. 200 (1927)—the results have proved harmful and enduringly regrettable.

Nothing in the Fourteenth Amendment requires repeating such mistakes. By defining eligibility for women's sports according to objective, biological criteria, Idaho acted well within its constitutional authority and in harmony with the premise that sex-segregated athletics can be necessary to secure equal opportunity. The Ninth Circuit's contrary ruling undermines the very protections for women and girls that federal law and the Constitution were meant to guarantee.

The Ninth Circuit should be reversed and women's rights protected.

CONCLUSION

Courts should not sacrifice women's opportunities to an ideological agenda rooted in feelings rather than facts. This is especially true where the athletic advantages enjoyed on average by males over females—advantages that can determine victory or defeat by inches or fractions of a second—are well documented and undisputed. Nor is there any constitutional basis for privileging the psychological discomfort of transgender "girls" at having to "play on a sports team that does not match their gender identity," over the embarrassment and privacy concerns of biological girls required to compete with boys who remain physiologically male.

For these and the reasons discussed by the Petitioner-Defendants, this Court should reverse the Ninth Circuit and protect women's rights.

Respectfully submitted,

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