Nos. 24-38, 24-43

IN THE

Supreme Court of the United States

BRADLEY LITTLE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF IDAHO, *et al.*, *Petitioners*,
v.
LINDSAY HECOX, *et al.*, *Respondents.*

THE STATE OF WEST VIRGINIA, *et al.*, *Petitioners*,
v.
B.P.J., BY HER NEXT FRIEND AND MOTHER, HEATHER JACKSON, *Respondent.*

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public-interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in the scope of the Fourteenth Amendment's protections and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The text of the Equal Protection Clause of the Fourteenth Amendment is sweeping and universal: "No State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). Drafted in 1866 and ratified in 1868, the Clause wrote into the Constitution the ideal of equality first laid out in the Declaration of Independence, establishing an expansive guarantee of equality for all persons and demanding "the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996).

In writing the Declaration's principle of equality into the Constitution, the Framers of the Fourteenth Amendment consciously broadened it to create a universal guarantee of equality that would protect

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission.

every individual residing in the United States. Where the Declaration of Independence insisted that "all men are created equal," U.S. Decl. pmbl., the text of the Fourteenth Amendment expressly promises the equal protection of the laws to all "person[s]." The Amendment's universal language settles that "every body—man, woman, and child—without regard to color, should have equal rights before the law," *Speech of Hon. John Sherman at Mozart Hall*, Cincinnati Com., Sept. 29, 1866, at 1, and enshrines into our national charter this "foundation[al] principle" of "absolute equality of all citizens of the United States politically and civilly before their own laws," Cong. Globe, 39th Cong., 1st Sess. 431 (1866) (Rep. Bingham).

One part of the Amendment, however, sanctioned sex-based discrimination. Section 2 imposed a penalty of reduced congressional representation on states that disenfranchised any "male inhabitants," implicitly authorizing sex-based laws that denied women the right to vote. U.S. Const. amend. XIV, § 2. Women's-rights activists celebrated Section 1's universal embrace of equality, but detested the fact that Section 2 had added the word "male" to our national charter. Over the next half-century, women waged a long struggle to write the principle of sex equality explicitly into the Constitution, and that campaign finally succeeded with the ratification of the Nineteenth Amendment in 1920. *See* U.S. Const. amend. XIX. Rejecting stereotypical notions about women's proper roles that had long been used to justify their exclusion from full participation in our democracy, the Nineteenth Amendment deepened our constitutional commitment to equality under the law for all persons regardless of sex. The Amendment, as the debates

reflect, "put women on equal constitutional footing with men." Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 93 (2011).

In a long line of cases, this Court has enforced the constitutional guarantee of equal protection by insisting that laws that classify individuals based on sex must be subjected to heightened judicial scrutiny. *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 57-58 (2017); *Virginia*, 518 U.S. at 531-33; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-26 (1982). Although sex is not a wholly "proscribed classification" given certain "[p]hysical differences between men and women," *Virginia*, 518 U.S. at 533, "demanding" scrutiny must still be applied to sex-based classifications to ensure such distinctions do not impermissibly "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females," *id.* This heightened judicial scrutiny requires the government to establish an "exceedingly persuasive justification" for "official action denying rights or opportunities based on sex," *id.* at 531, to ensure that state laws neither demean "the equal dignity of men and women," *Obergefell v. Hodges*, 576 U.S. 644, 673-74 (2015), nor perpetuate "fixed notions concerning the roles and abilities of males and females," *Hogan*, 458 U.S. at 725. Just last Term, even as this Court held that a Tennessee law did not classify based on sex and so did not trigger "heightened review," it reaffirmed that sex-based classifications are unconstitutional unless they "serve[] important governmental objectives" and their "discriminatory means . . . are substantially related" to achieving those objectives. *United States v.*

Skrmetti, 145 S. Ct. 1816, 1828-29 (2025) (internal quotation marks omitted).

The decisions of the courts below are both consistent with this long line of precedents. Idaho's HB 500 and West Virginia's HB 3293 expressly classify students based on their sex and prohibit all transgender women and girls from joining women's and girls' sports teams across all levels of competition at any public educational institution. *See* Idaho Code § 33-6203(2), (1) (categorizing all "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports" by "biological sex" and providing that those "designated for females, women, or girls shall not be open to students of the male sex"); W. Va. Code § 18-2-25d(c)(2), (1) (same). These statutes also subject cisgender and transgender women and girls—but not *any* men or boys—to invasive procedures to determine their eligibility to join public-school sports teams. *See* Idaho Code § 33-6203(3) (requiring a "health care provider" to "verify the student's biological sex" based on evaluations of "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels"); W. Va. Code § 18-2-25d(b)(1), (c)(1), (c)(2) (mandating the use of a student's "reproductive biology and genetics at birth" to decide eligibility to compete on women's and girls' teams).

The courts below considered whether these laws' sex-based classifications "serve[] important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." *Skrmetti*, 145 S. Ct. at 1828-29 (quoting *Virginia*, 518 U.S. at 533). In concluding that both statutes fall short of this "demanding" burden of justification, *Virginia*, 518 U.S. at 533, those courts acknowledged

the states' interest in promoting competitive fairness in athletics, but rejected the notion that, as applied to Lindsay Hecox and B.P.J., categorical bans on the participation of all transgender women and girls on women's and girls' sports teams substantially furthered that interest. Instead, such sweeping bans deny these students an "equal opportunity to aspire, achieve, participate in and contribute to society based on their *individual* talents and capacities," regardless of their sex. *Id.* at 532 (emphasis added).

This Court has long recognized that sex-based classifications, by their very nature, reduce individuals to their sex and "carry the inherent risk of reinforcing . . . stereotypes," *Orr v. Orr*, 440 U.S. 268, 283 (1979), and "overbroad generalizations about the different talents, capacities, or preferences of males and females," *Virginia*, 518 U.S. at 533. These precedents on sex discrimination help realize the Constitution's guarantee of equal protection under the law, and the courts below correctly applied them in upholding challenges to HB 500 and HB 3293. Their judgments should be affirmed.

ARGUMENT

I. The Text and History of the Fourteenth Amendment Demonstrate the Breadth of Its Guarantee of Equality Under the Law.

The Fourteenth Amendment prohibits a state from denying to "any person" the "equal protection of the laws." U.S. Const. amend. XIV, § 1. As the Amendment's text and history make clear, it establishes a broad guarantee of equality, securing the same rights and protection under the law for all persons, of any race, sex, or class. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions

are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."); *Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.").

As history shows, the guarantee of equal protection "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard), "abolish[ing] all class legislation in the States[,] and do[ing] away with the injustice of subjecting one caste of persons to a code not applicable to another," *id.* It "gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.* The meaning of equal protection, as the debates over the Fourteenth Amendment demonstrate, was that the "law which operates upon one man shall operate *equally* upon all," *id.* at 2459 (Rep. Stevens), thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," *id.* at 2502 (Rep. Raymond).

The Equal Protection Clause guards marginalized people from state-sponsored discrimination at the hands of majorities, "withdraw[ing] from Government the power to degrade or demean," *United States v. Windsor*, 570 U.S. 744, 774 (2013), through the democratic process. *See Civil Rights Cases*, 109 U.S. at 24 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,546) (Field, C.J.) ("[H]ostile and discriminating legislation by a state against persons of any class, sect,

creed or nation, in whatever form . . . is forbidden by the [F]ourteenth [A]mendment."). The constitutional guarantee of equal protection reflected its Framers' conviction that "[a] true republic rests on the absolute equality of rights of the whole people, high and low, rich and poor, white and black." Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom).

The broad wording of the Amendment's promise of equal protection for all persons was no accident. When the 39th Congress drafted the Fourteenth Amendment, it consciously adopted universal language intended to secure equal rights for *all*. Although the Amendment was written and ratified against the backdrop of a bloody Civil War fought over slavery, its drafters deliberately chose broad text that would protect all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 261 n.* (1998). Indeed, the Reconstruction Era Framers specifically considered and rejected constitutional language that would have outlawed racial discrimination and nothing else, s*ee* Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867*, at 46, 50, 83 (1914), preferring instead a universal guarantee of equality that secured equal rights to all persons.

Whether the proposals were broad in scope or drafted narrowly to bar racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected language that would have limited the Amendment's equality guarantee to racial discrimination alone. *See J.E.B.*, 511 U.S. at 151 (Kennedy, J., concurring) ("Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of

race, color or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms."). The Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *id.* at 152, was intended to secure equal rights for all and to enforce "a commitment to the law's neutrality where the rights of persons are at stake," *Romer v. Evans*, 517 U.S. 620, 623 (1996).

The idea that all persons should be guaranteed equal protection of the laws has deep roots in our constitutional heritage. That conception of legal equality was reflected in the seventeenth-century writings of John Locke that profoundly influenced the Founding generation. *See* John Locke, *Second Treatise of Government* § 142, at 75 (C.B. Macpherson ed., Hackett Publishing 1980) (1690) ("They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough."). It formed the centerpiece of the Declaration of Independence, *see* U.S. Decl. pmbl. ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."), and reflected the "self-evident" legal principle that "protection by his Government is the right of every citizen," Cong. Globe, 39th Cong., 1st Sess. 1293 (1866) (Rep. Shellabarger); *see* Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 Duke L.J. 507, 510 (1991) (explaining that "the right to protection in life, liberty, and property became a central principle of American constitutional thought by the time of the Revolution").

The Framers of the Fourteenth Amendment incorporated this broad guarantee of equality for all persons to bring the Constitution back into line with these fundamental principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald v. City of Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). As the Amendment's Framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence," Cong. Globe, 39th Cong., 1st Sess. 2961 (1866) (Sen. Poland), and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it." *Id.* at 2539 (Rep. Farnsworth).

The Amendment's Framers acted from experience as well. They had seen firsthand that states could not be trusted to respect fundamental liberties or basic notions of equality under the law for all persons—nor to protect their citizens from mistreatment and violence inflicted by private actors. A pattern of state-sponsored discrimination and state neglect fueled by racial prejudice and antipathy toward those responsible for the Union's success in the Civil War made it essential to guarantee the equal protection of the laws to all persons. *See Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. at xvii (1866) (detailing findings that, in the aftermath of the war, many people in the South refused "to place

the colored race . . . upon terms even of civil equality" or "tolerat[e] . . . any class of people friendly to the Union, be they white or black"). In demanding constitutional changes "to secure the civil rights of all citizens of the republic," *id.* at xviii, the Joint Committee that drafted and proposed the Amendment highlighted state failures to protect Black Americans, describing the dire reality that "deep-seated prejudice against color . . . leads to acts of cruelty, oppression and murder, which the local authorities are at no pains to prevent or punish," *id.* at xvii; *see also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1847 (2010) ("[T]he Joint Committee's Report focused particularly on the lack of legal protection for blacks in the South. The majority of the injustices reported were examples of private violence and the failure of states to protect blacks and white unionists from this violence."); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1354 & nn.12-14 (1964) (observing that the Joint Committee's report documented "a pervasive pattern of private wrongs, motivated by popular prejudice and hostility"). Both equality and protection were critical to the promise of freedom.

Across the South, Black Americans convening in the wake of the Civil War demanded their rights and fought to eradicate the racial prejudice, white-supremacist violence, and discrimination they faced. These Black Conventions described how white Southerners "have returned to their homes with all their old pride and contempt for the negro transformed into a bitter hate for the new-made freeman, who aspires to the exercise of his new-found rights, and who has been fighting for the suppression of their rebellion." *Address from the Colored Citizens of*

Norfolk, Va. to the People of the United States 3 (1865). Linking their suffering to the promises of the Declaration of Independence, they decried how "the strong wall of prejudice, on the part of the dominant race, has obstructed our pursuit of happiness." *Proceedings of the Colored People's Convention of the State of South Carolina* 27 (1865). These powerful Black aspirations for freedom and equality helped convince congressional Republicans of their duty "to protect these freedmen against the public sentiment and the oppression that will undoubtedly be thrown upon them by the people of the southern States." Cong. Globe, 39th Cong., 1st Sess. 744 (1866). The idea of protection under the law included in the Fourteenth Amendment was thus understood to encompass government-based protections from the pervasive private violence and discrimination that Black Americans and their allies experienced. *See* Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 Geo L.J. 1, 51-52 (2021) (discussing how "the lawless conditions in Southern states exposed Black people and their white allies, if not to enslavement, then to conditions of analogous vulnerability to domination"); David H. Gans, *Equality and Protection: The Forgotten Meaning of the Fourteenth Amendment*, 102 Denv. L. Rev. 897, 931 (2025) (explaining that "the Fourteenth Amendment was deeply concerned with public and private manifestations of prejudice and how they enabled a racialized power structure that subjugated and subordinated Black Americans").

In order to prevent these sorts of documented abuses, the Fourteenth Amendment "put in the fundamental law the declaration that all citizens were entitled to equal rights in this Republic," Chi. Trib., Aug. 2, 1866, at 2, placing all people "throughout the

land upon the same footing of equality before the law, in order to prevent unequal legislation," Cincinnati Com., Aug. 20, 1866, at 2. "With this section engrafted upon the Constitution, it will be impossible for any Legislature to enact special codes for one class of its citizens." Cincinnati Com., June 21, 1866, at 4. As Representative John Bingham argued, the guarantee of equal protection was a "sublime example of a great and powerful people" writing into their foundational charter the principle that "the humblest human being anywhere within their limits shall have the same protection under the law as the President himself." *Mr. Bingham's Speech*, Wheeling Daily Intelligencer, Sept. 5, 1866.

In short, the Fourteenth Amendment established equality under the law and equality of rights for all persons as a constitutional mandate. Under the Amendment's plain text and original meaning, this sweeping, universal guarantee of equality applies to all, and states may not engage in invidious class-based discrimination that denies individuals access to school activities, including sports, based on their sex.

II. The Nineteenth Amendment Buttressed the Fourteenth Amendment's Promise of Equality.

Section 1 of the Fourteenth Amendment guarantees the equal protection of the laws to all persons, regardless of sex. *See Virginia*, 518 U.S. at 540 (observing that a state college's males-only admission policy, which "serves the Commonwealth's sons" but "makes no provision for her daughters," is "not *equal* protection").

Another part of the Fourteenth Amendment's text, however, seemed to permit sex discrimination. Section 2 of the Amendment imposed a penalty of reduced

congressional representation on states that denied or abridged the right to vote of any of the state's "male inhabitants," U.S. Const. amend. XIV, § 2, implicitly sanctioning the disenfranchisement of women. Section 2 reflected the view that voting was a privilege that could be given to men and denied to women, who were deemed to be ruled and represented virtually by men. *See* Cong. Globe, 39th Cong., 2nd Sess. 40 (1866) (arguing that extending the right to vote to women would "subvert the fundamental principles of family government in which the husband is, by all usage and law, human and divine, the representative head" and "assign[] her duties revolting to her nature and constitution, and wholly incompatible with those which spring from womanhood") (Sen. Morrill).

Women's-rights activists celebrated the Fourteenth Amendment's universal embrace of equality. They well understood that "there is . . . but one safe principle of government—equal rights to all. And any and every discrimination against any class . . . can but imbitter and disaffect that class and thereby endanger the safety of the whole people." Susan B. Anthony, *Constitutional Argument*, *in The Elizabeth Cady Stanton-Susan B. Anthony Reader* 161 (Ellen C. Dubois ed., 1981) (1872). But they vociferously rejected the idea that our foundational promises of democracy, freedom, and equality were realized if half the population was excluded from voting based on sex. Demanding fundamental constitutional change, women engaged in "fifty-two years of pauseless campaign" to "get the word male . . . out of the constitution," Carrie Chapman Catt & Nettie Rogers Shuler, *Woman Suffrage and Politics* 107 (1923), and they finally succeeded with the ratification of the Nineteenth Amendment in 1920, U.S. Const. amend. XIX.

The Nineteenth Amendment deepened the Fourteenth Amendment's promise of equality, effectively striking the word "male" from the Constitution and guaranteeing equal citizenship to all regardless of sex. *See* Calabresi & Rickert, *supra*, at 2, 66-67 ("The Nineteenth Amendment struck out the Constitution's only explicit privileging of the male sex . . . [and] made it implausible to read the Fourteenth Amendment's equality guarantee as inapplicable to women, because a guarantee of political rights implicitly guarantees full civil rights."); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 948, 1045 (2002) ("The Nineteenth Amendment grew out of struggles over the Fourteenth Amendment and was a long-resisted, fully-deliberated, collective commitment to include women as equal members of the constitutional community.").

The ratification of the Nineteenth Amendment did more than revolutionize American democracy: it decisively rejected state-sponsored discrimination that was rooted in sex-based stereotypes "about the way men and women are," *Morales-Santana*, 582 U.S. at 57, and that denied individuals "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities," *Virginia*, 518 U.S. at 532; *see* Calabresi & Rickert, *supra*, at 67 ("Outdated assumptions about gender were rejected by the Nineteenth Amendment's supporters, and its detractors objected to the Amendment precisely because it emancipated women."). The Nineteenth Amendment recognized definitively that sex-based prejudices have no place in our fundamental law.

The Nineteenth Amendment guaranteed equal citizenship to all regardless of sex, including at the

polls, rejecting the narrow conceptions about women's roles and bodies that had rendered them second-class citizens. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."); *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (holding that women's "physical structure and a proper discharge of her maternal functions" justify sex-based labor laws). Put simply, the Nineteenth Amendment rejected the notion that sex is destiny. Such outmoded and discriminatory views about the proper roles and behavior appropriate for men and women are, due to the Amendment, now part of "the history that the Constitution left behind," *United States v. Rahimi*, 144 S. Ct. 1889, 1915 (2024) (Kavanaugh, J., concurring).

As the debates over the Nineteenth Amendment demonstrate, the American people rejected "[t]he old conception of the place of woman," proclaiming that a woman was no longer to be "ruled by a male head" and have "her place in the world . . . determined by the place held by this head." 56 Cong. Rec. 788 (1918) (Rep. Lehlbach). Congress urged passage of the Nineteenth Amendment to ensure that women would be "accorded the same opportunity to take part in life that men have always had." 58 Cong. Rec. 80 (1919) (Rep. Little). To the Framers of the Nineteenth Amendment, "it [was] a gross injustice amounting to nothing less than an outrage to deny them the right of suffrage, or any other right that man may be entitled to or permitted to enjoy." 56 Cong. Rec. 8345 (1918) (Sen. Thompson).

With the Nineteenth Amendment's ratification, "our Constitution finally guaranteed that a person's sex will not determine his or her rights." Calabresi & Rickert, *supra*, at 99.

III. Idaho's HB 500 and West Virginia's HB 3293 Classify Based on Sex and Cannot Survive Heightened Judicial Scrutiny.

Consistent with the text and history of the Fourteenth and Nineteenth Amendments, this Court has long held that "all gender-based classifications . . . require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny." *J.E.B.*, 511 U.S. at 136 (quoting *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 273 (1979)); *see Morales-Santana*, 582 U.S. at 57-58; *Virginia,* 518 U.S. at 531-33. This Court's insistence on "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history," *Virginia,* 518 U.S. at 531, and reflects the fact that sex-based laws "carry the inherent risk of reinforcing . . . stereotypes," *Orr*, 440 U.S. at 283, and "generalizations about the way men and women are," *Morales-Santana*, 582 U.S. at 57.

The "heightened standard" required by this Court's longstanding precedents "does not make sex a proscribed classification," *Virginia*, 518 U.S. at 533, but does require judges to hold government entities to a "demanding" burden of justifying sex-based discrimination, *id.*, because "sex 'generally provides no sensible ground for differential treatment'" of individuals, *Skrmetti*, 145 S. Ct. at 1828 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)). Heightened judicial review ensures that government actors do not indulge in "archaic," *J.E.B.*, 511 U.S. at 135 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)), or "overbroad generalizations about the different talents, capacities, or preferences of males and females," *Virginia*, 518 U.S. at 533. Such "[o]verbroad generalizations," this Court has realized, "have a constraining impact, descriptive though they

may be of the way many people still order their lives." *Morales-Santana*, 582 U.S. at 63.

Importantly, the right to equal protection inheres in individuals, safeguarding "any person" from impermissible mistreatment. U.S. Const. amend. XIV, § 1; *see Adarand Constructors Co. v. Pena*, 515 U.S. 200, 230 (1995) (discussing "the long line of cases understanding equal protection as a personal right"). That right does not depend on a person's adherence to, or deviation from, any group-based norm but instead protects both those who conform to gendered expectations and those who fall "outside th[at] average description" from discrimination based on sex. *Virginia,* 518 U.S. at 550. Indeed, this Court has long recognized that as-applied adjudications play an important role in vindicating the individual right to equal protection of the laws. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (striking down a law disfavoring unmarried fathers as applied to the challenger and noting that "[t]he facts of this case illustrate the harshness" of the sex-based distinction at issue); *Cleburne*, 473 U.S. at 448 (invalidating a zoning ordinance as applied to the challenger where the "record does not reveal any rational basis for believing that the [group] home would pose any special threat to the city's legitimate interests"); *see also* Katie Eyer, *As-Applied Equal Protection*, 59 Harv. C.R-C.L. L. Rev. 49, 59 (2024) ("[T]he availability of as-applied consideration has been a central feature of the Supreme Court's intermediate scrutiny jurisprudence.").

1. Idaho's HB 500 bars Lindsay Hecox from competing on the women's sports teams she attempted to join because the law identifies her as a "student[] of the male sex," Idaho Code § 33-6203(2), based on her sex assigned at birth. And because Hecox sought to

participate on women's teams, HB 500 subjects her to an invasive sex-verification process that, if triggered, entails a mandatory investigation of her "reproductive anatomy, genetic makeup, or normal endogenously produced [sex-hormone] levels" to "resolve[]" and "verify" her "biological sex." *Id.* § 33-6203(2), (3).

So too in West Virginia, where HB 3293 uses B.P.J.'s sex—"based solely" on her "reproductive biology and genetics at birth," W. Va. Code § 18-2-25d(b)(1)—to determine the athletics teams and sports in which she can participate. Her options are directly constrained by her sex: because she was identified as male at birth, she is barred from playing on girls' sports teams, while students identified as female at birth are not. *See id.* § 18-2-25d(c)(1), (2). Under West Virginia's law, sex, and sex alone, determines B.P.J.'s eligibility to participate on any girls' athletic team.

In short, as the courts below correctly recognized, the Idaho and West Virginia statutes rely on sex classifications that sort transgender women and girls like Hecox and B.P.J. based on their "biological sex" and thereby restrict their participation in public-school athletics. These laws confirm that "transgender status" is necessarily "inextricably bound up with sex." *Bostock v. Clayton County*, 590 U.S. 644, 660-61 (2020).

Indeed, as *Bostock* recognized, "sex plays an unmistakable . . . role" where, as in both cases here, a law "penalizes a person identified as male at birth for traits or actions that it tolerates in an [individual] identified as female at birth." *Id.* at 660. That describes both HB 500 and HB 3293 to a tee: under these laws, Hecox and B.P.J. are singled out for being transgender girls—*i.e.*, those identified as male at birth—and are therefore barred from girls' sports teams, whereas cisgender girls who were identified as

female at birth are not. And Hecox and B.P.J. are subject to these categorical bans, even though they do not possess *any* traits that distinguish them from other girls participating on such teams in a way relevant to the sport at issue. The Idaho and West Virginia statutes straightforwardly treat Hecox and B.P.J. "differently because of their sex." *Id.* at 661.

2. Such sex-based classifications "prompt heightened review" by courts to determine whether they can "pass constitutional muster." *Skrmetti*, 145 S. Ct. at 1828; *see Virginia*, 518 U.S. at 555. That "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history," *Virginia*, 518 U.S. at 531, including the fact that our nation's "long and unfortunate history of sex discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion), is, in large respects, a story of state-sponsored discrimination rooted in sex-based stereotypes about physical bodies and social roles.

"[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes," *id.* at 685, based on the now-outmoded notion that, in "the general constitution of things," the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother" and that her "natural and proper timidity and delicacy . . . evidently unfits it for many of the occupations of civil life." *Bradwell*, 83 U.S. at 141-42 (Bradley, J., concurring); *see also Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) ("[W]omen's biology and ability to bear children have been used as a basis for discrimination against them . . . . This discrimination has had a devastating effect on women."). In contrast to the sweeping sex-based stereotypes of the past, this Court has emphasized that "the Government must treat

citizens as *individuals*, not as simply components of a . . . sexual . . . class." *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 223 (2023) (emphasis added) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

Courts therefore "subject laws containing sex-based classifications to intermediate scrutiny, under which the State must show 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 *Virginia*, 518 U.S. at 533). Here, the courts below properly applied heightened scrutiny to the challenged sex-based statutes, asking "whether the proffered justification is 'exceedingly persuasive.'" *Virginia*, 518 U.S. at 532-33. "Th[is] burden of justification is demanding and it rests entirely on the State," whose offered justification "must be genuine" and cannot be "hypothesized or invented *post hoc*." *Id.* at 533.

Idaho and West Virginia seek to justify HB 500 and HB 3293, respectively, by invoking a government interest in promoting opportunities for, and maintaining competitive fairness within, public-school women's sports. *See* Hecox Pet. App. 45a ("equal participation and opportunities for women athletes"); B.P.J. Pet. App. 31a ("competitive fairness"); *see also id.* (noting that "the defendants do not seriously assert that excluding B.P.J. [from non-contact sports] is substantially related to the government's interest in participant safety"). The challenged state laws fall short, however, because they are not "substantially related" to furthering that interest as applied to Hecox and B.P.J.

Idaho's law, for example, is remarkably overbroad and covers "many students who do *not* have athletic

advantages over cisgender female athletes," Hecox Pet. App. 42a, including Lindsay Hecox, who is barred from participating on women's sports teams even though she "takes medically prescribed hormone therapy to suppress her testosterone and raise her estrogen levels," a treatment that has "lowered her circulating testosterone levels," "dramatically altered her bodily systems," and removed "'physiological characteristics' that would lead to enhanced athletic prowess" compared to cisgender peers, *id.* at 42a, 47a. In identifying a "lack of means-ends fit between [Idaho's] categorical ban of transgender female athletes and [its] Legislature's purported purpose of promoting athletic equality," the Ninth Circuit further emphasized a dearth of evidence that transgender women had displaced cisgender women in sports settings, as well as the law's aggressive sex-verification protocol that "subjects *all* participants in female athletics to the threat of an invasive physical examination." *Id.* at 51a-52a, 46a (emphasis added). The court below thus correctly recognized that banning Hecox from women's teams based on her sex assigned at birth "does not further" Idaho's stated interest in supporting "athletic opportunities for [its] female students," *id.* at 55a, suggesting that Idaho's "true objective[]" was instead to "convey a message of disfavor to transgender women and girls," *id.* at 51a (internal quotation marks omitted). It therefore affirmed the district court's entry of a preliminary injunction.

West Virginia's statute fares no better. HB 3293 effectively bans all transgender girls and women from playing on all public-school sports teams "designated" for "[f]emales, women, or girls." W. Va. Code § 18-2-25d(c)(2). But preventing B.P.J.—a transgender girl who received puberty blockers and has therefore

"never experienced elevated levels of circulating testosterone," and is undergoing "gender affirming hormone therapy, which . . . will cause her to experience physical changes to her bones, muscles, and fat distribution that are typically experienced by cisgender girls"—does not further competitive fairness in women's sports. B.P.J. Pet. App. 34a; *see id.* at 32a (noting that "B.P.J. presented evidence that transgender girls with her background and characteristics possess *no* inherent, biologically-based competitive advantage over cisgender girls when participating in sports"). As the Fourth Circuit held in reversing the district court's grant of summary judgment to the state, "[b]ecause B.P.J. has never felt the effects of increased levels of circulating testosterone, the fact that those who do benefit from increased strength and speed provides no justification" for HB 3293's insistence that she be excluded from girls' sports. *Id.* at 34a.

The Idaho and West Virginia laws thus cannot survive heightened judicial review as applied here. The core aim of heightened scrutiny is to smoke out laws and policies like HB 500 and HB 3293 that deny men and women "equal opportunity to aspire, achieve, participate in and contribute to society based on their *individual* talents and capacities" or perpetuate "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 532, 533 (emphasis added).

In painting with as broad a statutory brush as they do, the challenged classifications deny Hecox and B.P.J. consideration as individuals, subjecting them to overbroad and inaccurate stereotypes about their physiology and abilities based simply on the fact of their sex. The Idaho and West Virginia laws' categorical restrictions are thus "marked by

misconception[s] and prejudice," *Nguyen v. INS*, 533 U.S. 53, 73 (2001), which "denigrate[] the dignity" of the particular women and girls they affect, *J.E.B.*, 511 U.S. at 142. The Constitution does not countenance that type of sex-based discriminatory treatment. Indeed, it is "axiomatic" that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause" of the Fourteenth Amendment. *J.E.B.*, 511 U.S. at 130-31.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the courts of appeals.

Respectfully submitted,

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