

Nos. 24-38, 24-43

IN THE
Supreme Court of the United States

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

v.

LINDSAY HECOX, ET AL.,
Respondents.

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

B.P.J., BY 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 EQUAL PROTECTION SCHOLARS
AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are scholars who study the Equal Protection clause. *Amici*'s interest in this case is the proper application of Equal Protection law. *Amici* agree that—contrary to the arguments of Petitioners—Equal Protection law recognizes the validity of as-applied claims and claims focused on the circumstances of the individual Plaintiffs (as opposed to the entire class of those assigned male at birth).

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The challenged statutes in these cases adopt an unambiguous sex classification, barring all of those assigned male at birth (including all transgender girls) from participating in sports teams designated for women and girls.² Defendants and their *amici* contend that—in evaluating whether these sex classifications satisfy intermediate scrutiny—this Court is prohibited from considering the circumstances of the Plaintiffs, such as the fact that they are transgender, or the medical treatments they have received. *See, e.g.*, Brief for Petitioners at 42-44, *West Virginia v. B.P.J.*, No. 24-43 (2025); Brief for Petitioners at 50-53, *Little v. Hecox*,

¹ Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

² This brief focuses on the parties' sex discrimination claims. However, many of the arguments made herein would also apply to the Plaintiffs' claims that the laws discriminate based on transgender status, especially to the extent this Court concludes that intermediate scrutiny also applies to those claims.

No. 24-38 (2025); Brief for Concerned Women for America and Samaritan’s Purse as *Amici Curiae* at 5-24, Little v. Hecox, No. 24-38, West Virginia v. B.P.J., No. 24-43 (2025) (hereinafter “*Amici Br.*”). They argue that this is true either because as-applied Equal Protection claims do not exist, or because intermediate scrutiny never requires consideration of such individualized circumstances (as opposed to a class-wide evaluation of “fit”). See, e.g. W.V. Pet. Br. at 42-44; Idaho Pet. Br. at 50-53; *Amici Br.* at 5-24.

Neither of Petitioners’ contentions has merit. As-applied claims are available in the Equal Protection context, just as they are in other areas of constitutional law. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 392-394 (1979) (invalidating a New York statute allowing non-marital mothers, but not fathers, to veto adoption, but only as applied to involved fathers); *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (observing that “[w]e have held that these statutes [i.e., statutes that differentiate between mothers and fathers] may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child”); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727 (1982) (constitutionally invalidating single sex-admissions policy “[a]s applied to the School of Nursing”). See generally *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (taking as-applied approach in the Equal Protection context and observing that as-applied adjudication “is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments”).

And intermediate scrutiny under the Equal Protection Clause *demands* that members of the disfavored sex (here those assigned male) have individual opportunities to show that they are an exception to the usual

rule—even in those limited circumstances where this Court has permitted presumptive sex classifications. *See, e.g., Tuan Ahn Nguyen v. INS*, 533 U.S. 53, 70-71 (2001) (identifying legal opportunities for individual fathers to obtain comparable treatment to mothers as a key feature of whether the law satisfied intermediate scrutiny); *Sessions v. Morales-Santana*, 582 U.S. 47, 65-66 (2017) (invalidating a law lacking such individual opportunities and distinguishing *Nguyen* on this basis); *see also Caban*, 441 U.S. at 392-394 (directly considering the individual father’s circumstances where the state provided no opportunities for individual consideration). This is because “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, *sexual* or national class.” *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citation modified).

As such, under the Equal Protection Clause, a core part of the inquiry into whether a substantial relationship exists—between the government’s interests and its classification by sex—turns on whether the government has provided opportunities for individualized consideration to the disfavored sex (here, those assigned male at birth). *See, e.g., Nguyen*, 533 U.S. at 70-71; *Morales-Santana*, 582 U.S. at 65-66; *Caban*, 441 U.S. at 392-394; *see also Craig v. Boren*, 429 U.S. 190, 199 (1976) (observing that under intermediate scrutiny, state legislatures must “either...realign their substantive laws in a gender-neutral fashion, or...adopt procedures for identifying those instances where [a] sex-centered generalization actually comport[s] with fact”). Where, as here, the government has not provided such opportunities for individual consideration, wholesale invalidation of the challenged sex-discriminatory law is an available and appropriate

remedy. *See, e.g., Morales-Santana*, 582 U.S. at 65-66 (invalidating a law in this circumstance).³

But this Court has *also* held that “as applied” invalidation—focused on the circumstances of the individual, or a sub-class of those assigned male or female—is an appropriate remedy where a state does not provide its own opportunities for individualized consideration. *See, e.g., Caban*, 441 U.S. at 392-394 (invalidating a New York statute without opportunities for individual consideration, but only as applied to involved fathers, not those who “never ha[d] come forward or ha[d] abandoned the child”); *see also Lehr*, 463 U.S. at 267 (affirming that *Caban* was an as-applied case). And Plaintiffs have raised just such as-applied claims—focused on their individual circumstances as a transgender girl (B.P.J.), or the circumstances of the entire sub-class of transgender girls (Hecox)—here.⁴

³ Unlike in *Morales-Santana*, in the instant cases, such invalidation would not eliminate the use of sex *in general* in athletics in Idaho and West Virginia, since the *status quo ante* before the challenged laws was already sex-separated teams. *See, e.g., Hecox v. Little*, 479 F. Supp. 3d 930, 982 (D. Idaho 2020); *B.P.J. by Jackson v. West Virginia State Bd. of Ed.*, 98 F.4th 542, 550 (4th Cir. 2024). Rather, it would simply reinstate that pre-existing system, which provided for sex-separated sports in general, but left decisions about transgender inclusion to the relevant state and national athletic bodies. *See Hecox*, 479 F. Supp. 3d at 982; *B.P.J.*, 98 F.4th at 550-551.

⁴ Plaintiffs B.P.J. and Hecox raised somewhat different arguments below about the relevance of as-applied claims and individualized circumstances to their claims. *See, e.g.*, Brief of Plaintiff-Appellant B.P.J. at 33-36, 98 F.4th 543 (4th Cir. 2024) (raising an as-applied claim, focused specifically on B.P.J.’s individual circumstances); Brief for Appellees Lindsay Hecox & Jane Doe at 39-40, *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024) (arguing that it was appropriate to focus on the “fit” only with respect to transgender athletes, since the status quo before Idaho’s H.B. 500 already excluded cisgender boys from women’s

Finally, applying this Court’s precedents, as-applied invalidation based on the Plaintiffs’ circumstances is appropriate here. It is undisputed that the states in these cases have *not* adopted “procedures for identifying those instances where [a] sex-centered generalization actually comport[s] with fact.” *Craig*, 429 U.S. at 199. Indeed, the laws at issue in these cases were designed specifically to *eliminate* any opportunities for such inquiry. As such, under this Court’s intermediate scrutiny precedents, an assessment of whether the government’s interests apply to the Plaintiffs is not only appropriate, but required. *See, e.g., Caban*, 441 U.S. at 392-394; *Lehr*, 463 U.S. at 267; *Morales-Santana*, 582 U.S. at 63 n.12. And if the government’s interests are not implicated by the Plaintiffs’ circumstances, as-applied invalidation is the *minimum* that intermediate scrutiny requires. *See, e.g., Caban*, 441 U.S. at 392-394; *Lehr*, 463 U.S. at 267; *Morales-Santana*, 582 U.S. at 63 n.12.

ARGUMENT

I. AS-APPLIED CLAIMS ARE AVAILABLE UNDER THE EQUAL PROTECTION CLAUSE, AND OPPORTUNITIES FOR INDIVIDUALIZED CONSIDERATION ARE AN IMPORTANT PART OF THIS COURT’S INTERMEDIATE SCRUTINY JURISPRUDENCE

The Equal Protection Clause “protect[s] *persons*, not *groups*.” *Adarand Constructors, Inc. v. Peña*, 515 U.S.

sports). Nevertheless, both of the Petitioners raise similar arguments in their briefing—arguing against any consideration of the Plaintiffs’ individualized circumstances (such as the fact that Plaintiffs are transgender, or the medical treatments they have received), and against as-applied claims. *See, e.g., W.V. Pet. Br.* at 42-44; *Idaho Pet. Br.* at 50-53. As such, this brief addresses these issues in a single discussion.

200, 227 (1995) (emphasis in the original). In the context of strict scrutiny, this means that the government may almost never rely on race, for any purpose. *See, e.g., Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181, 207 (2023) (listing the few limited contexts in which this Court has found use of race justified under strict scrutiny). So too in the context of sex, where intermediate scrutiny applies, this Court has ordinarily found that the law cannot use sex assigned at birth as a proxy for other factors—such as in this case, safety and competitive fairness. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 688-690 (1973) (plurality); *Craig*, 429 U.S. at 201-204; *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151-152 (1980); *United States v. Virginia (“VMI”)*, 518 U.S. 515, 542-546 (1996).

Thus, even where sex is mostly an accurate proxy, the Equal Protection Clause ordinarily prohibits its use. As this Court put it in *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017), even if sex-based rules “have ‘statistical support,’ our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn.” (Citation omitted). This is true even where the number of men or women who defy the ordinary rule may be small in number. *See, e.g., VMI*, 518 U.S. at 542 (striking down sex-based admissions standards at Virginia Military Institute, even though “[i]t may be assumed...that most women would not choose VMI’s adversative method”); *see also id.* at 550 (observing that “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description”) (emphasis in the original); *see also Hogan*, 458 U.S. at 735-736 (Powell, J., dissenting) (observing

in dissent that the majority constitutionally invalidated single-sex admissions to the nursing school based on “a case instituted by one man, who represents no class”); *see generally* Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L. Rev. 1447, 1449-1450 (2000) (observing that “virtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate”).

In most cases, this principle has led this Court to invalidate even *presumptive* sex classifications in the law, i.e., laws which set sex as the default but allow an individualized opportunity for obtaining comparable treatment to the favored sex.⁵ Thus, for example in *Frontiero v. Richardson*, this Court invalidated a rule that presumed that men were not dependent on their servicemember wives—even though an opportunity for individualized assessment of men’s dependency was provided. *See Frontiero*, 411 U.S. at 688-690 (plurality); *id.* at 691-692 (Powell, J., concurring). So too in the case of *Wengler v. Druggist Mut. Ins. Co.*, this Court invalidated a statute which presumed women but not men dependent for the purposes of workers’ compensation benefits—even where men had the opportunity to prove they too were dependent and thus entitled to benefits. *See Wengler*, 446 U.S. at 150-152.

In certain limited circumstances—often where there are genuine biological differences between the sexes—

⁵ Just as in prior cases, there is a “favored” sex under the laws challenged here. Both laws bar only those assigned male at birth from certain athletic teams, without adopting a comparable bar for those assigned female. *See* W.Va. Code § 18-2-25d(c)(2) &(3); Idaho Code § 33-6203(2).

this Court has recognized that the sexes can *presumptively* be treated differently under the law. *See, e.g., Nguyen*, 533 U.S. at 65-68. But even in those rare circumstances, Equal Protection allows only for a presumption—not an inflexible line. Thus, the state must ordinarily afford the disfavored sex (today, typically those assigned male) opportunities to obtain comparable status to women on an individual basis.⁶ *See, e.g., id.* at 70 (emphasizing the “minimal” effort it would require for a father to obtain comparable rights in finding no constitutional violation); *Parham v. Hughes*, 441 U.S. 347, 359-361 (1979) (Powell, J., concurring in judgment) (finding a substantial relationship between sex-based distinction and government’s interests where “the State has provided a simple, convenient mechanism by which” the father could obtain equal rights); *see also Craig*, 429 U.S. at 199 (emphasizing that states must eliminate sex-based distinctions in the law or “adopt procedures for identifying those instances where the sex-centered generalization actually comport[s] with fact”); *see generally* Serena Mayeri, *The State of Illegitimacy After the Rights Revolution*, in *Intimate States: Gender, Sexuality and Governance in Modern U.S. History* 235, 241-244 (Margot Canaday et al. eds., 2021) (observing the importance of such state-provided opportunities to constitutional validity in the context of intermediate scrutiny challenges to discrimination against non-marital children).⁷

⁶ As taken up in Part II, *infra*, there are a small number of cases where the Court has affirmed sex-discriminatory statutes that lacked such opportunities, but only where the Court’s understanding of the government’s interest meant that no exceptions existed (and thus individual opportunities for consideration were not pertinent).

⁷ This Court also applies intermediate scrutiny to discrimination against non-marital children. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988). Thus, Equal Protection precedents from the

And where the state has failed to provide its own opportunities for such individual consideration, this Court has repeatedly made clear that as-applied invalidation—focused on the specific circumstances of the individual plaintiff—is appropriate. *See, e.g., Caban*, 441 U.S. at 394 (finding that “undifferentiated” distinction between mothers and fathers “applicable in all circumstances” and without opportunities for non-marital father to obtain comparable treatment was unconstitutional on “the facts of this case”); *see also id.* at 411-412, 416 (Stevens, J., dissenting) (disagreeing with the Court’s focus on the plaintiff’s specific circumstances and its as-applied approach, but recognizing that the majority deemed such an approach appropriate); *Lehr*, 463 U.S. at 267-268 (distinguishing *Caban* on the grounds that it was an as-applied case).

To be sure, the state need not permit *all* manner of individualized factual challenges in order to satisfy the intermediate scrutiny standard. For example, where the government affords the disfavored sex the opportunity to secure equal rights to the favored sex through a variety of easy options, it need not allow individualized factual challenges at the moment of a later contested proceeding.⁸ *See, e.g., Nguyen*, 533 U.S. at 70-71 (declining to allow individualized challenge in moment of a contested proceeding where the law afforded non-

context of discrimination against non-marital children are also relevant here.

⁸ Many of the citations that Petitioners and their *amici* rely on deal with this circumstance, i.e., where the government *provided* opportunities for individual members of the disfavored sex to obtain comparable treatment, but the plaintiff did not take advantage of them, and later sought individualized treatment at the moment of a contested proceeding. *See, e.g.* Idaho Pet. Br. at 52 (citing *Nguyen*); W.V. Pet. Br. at 42, 44 (same); *Amici* Br. at 18-19 (same).

marital father a number of easy options to obtain the same rights as mothers, including “a written acknowledgment of paternity under oath”); *cf. Mills v. Habluetzel*, 456 U.S. 91, 97 (1982) (observing that the opportunity to obtain comparable treatment “must be more than illusory”). But where, as here, the government has provided no such opportunity *at all*, this Court has held that sex-specific rules “may not constitutionally be applied” to those who “are in fact similarly situated” to the favored sex.⁹ *Lehr*, 463 U.S. at 267; *see also Morales-Santana*, 582 U.S. at 63 n.12 (in a case where no individual opportunities were available, favorably citing this language from *Lehr*, though ultimately striking down the sex classification in its entirety).

Individualized consideration is thus not a *deviation* from the intermediate scrutiny standard, but a requirement of it.¹⁰ In order to demonstrate a

⁹ Petitioner West Virginia argues that if those assigned male and female at birth are not—as a general matter—“similarly situated” vis-à-vis the government’s interests, the law challenged here need not satisfy intermediate scrutiny and indeed may be categorically constitutional. *See* W.V. Pet. Br. at 37 (arguing that “The Act does not offend the Equal Protection Clause, as it does not treat similarly situated students differently.”). But this is not the way that Equal Protection analysis works. This Court applies intermediate scrutiny to sex classifications regardless of whether those assigned male and female are similarly situated vis-à-vis the government’s interests. *See, e.g., Nguyen*, 533 U.S. at 63 (concluding that fathers and mothers were not similarly situated but nevertheless applying intermediate scrutiny to the sex classification). And cases like *Lehr* and *Morales-Santana* also use the similarly situated construct not as a gatekeeper to heightened scrutiny, but instead as the metric of when an as-applied challenge, focused on more individualized circumstances, must prevail. *See Lehr*, *e.g.*, 463 U.S. at 267; *Morales-Santana*, 582 U.S. at 63 n.12.

¹⁰ For this reason, *Bucklew v. Precythe*, 587 U.S. 119 (2019), which Petitioners cite, does not aid their argument. In *Bucklew*, this

“substantial relationship”—or as this Court has also described it, an “exceedingly persuasive justification”—the government must typically provide opportunities for members of the disfavored sex to obtain comparable treatment on an individual basis.¹¹ *See, e.g., Nguyen*, 533 U.S. at 70-71 (examining such opportunities as a key feature of whether the law satisfied intermediate scrutiny); *Morales-Santana*, 582 U.S. at 65-66 (observing the absence of such opportunities in distinguishing *Nguyen*); *see also VMI*, 518 U.S. at 531, 550 (holding that intermediate scrutiny demands an “exceedingly persuasive justification,” and emphasizing that even true generalizations were not sufficient to sustain a bar on admission to the exceptional few).

Where, as here, the state has not provided opportunities of its own for obtaining individualized consideration, an assessment by the Court of whether the states’ interests are implicated in the plaintiff’s case is not only permitted—it is the *least* that this Court’s precedents require. *See, e.g., Caban*, 441 U.S. at 394 (in the context of a law lacking such opportunities, granting as-applied invalidation based on individualized circumstances); *see also Morales-Santana*, 582 U.S. at 65-66 (wholly invalidating a law lacking such opportunities). And where the governments’ interests

Court rejected the plaintiff’s argument that an established requirement of Eighth Amendment jurisprudence should not be applied to him because he brought an as-applied challenge. *Id.* at 135-139. In contrast, Respondents here simply seek the application of the existing Equal Protection intermediate scrutiny standards.

¹¹ As noted in *supra* note 5, the rare exceptions to this rule are sex classifications where there are no exceptions vis-à-vis the government’s interest, and thus no need for individual consideration. This is an issue taken up more fully in Part II, *infra*.

are not substantially related to the plaintiff's circumstances, as-applied invalidation is an appropriate remedy. *See, e.g., Caban*, 441 U.S. at 394 (invalidating law as applied to a man who was comparably situated to women vis-à-vis the state's interests); *see also Lehr*, 463 U.S. at 267-268 (as applied, finding no constitutional violation *with respect to the same law at issue in Caban*, and reaffirming that *Caban* was an as-applied decision).

This aspect of intermediate scrutiny doctrine has arisen most frequently (though not exclusively) in cases involving non-marital fathers, and its principles are illustrated most clearly by those cases. *See generally* Katie Eyer, *As-Applied Equal Protection*, 59 Harv. C.R.-C.L. L. Rev. 49, 54-59 (2024) (discussing the relevant precedents). Differential (and less favorable) treatment of non-marital fathers (as compared to non-marital mothers) remains a common area of continuing sex differentiation in the law today. *See, e.g.,* Children's Bureau, U.S. Dep't of Health & Human Services, *Consent to Adoption* at 2 n.2 (2021), <https://www.childwelfare.gov/resources/consent-adoption/> (observing that in many states unwed fathers, but not mothers, must fulfill certain steps to have the right to object to an adoption). This Court has held that such sex-based distinctions may be constitutional—but only where the state has afforded some opportunity for non-marital fathers to establish that they are similarly-situated to non-marital mothers (i.e., they are aware of and desire a legal relationship to their child). *See, e.g., Nguyen*, 533 U.S. at 70-71; *see also Morales-Santana*, 582 U.S. at 65-66 (observing the absence of such opportunities in distinguishing *Nguyen*).

In cases where the government has failed to provide such opportunities, this Court has (as described above)

afforded individualized as-applied consideration itself. For example, in *Caban v. Mohammed*, this Court addressed § 111 of the New York Domestic Relations Code, which granted non-marital mothers, but not fathers, the right to object to an adoption. As this Court observed, § 111 adopted an “inflexible gender-based distinction”—with no opportunities for involved fathers to show they show that they, like mothers, had “affection and concern” for their children. 441 U.S. at 392. This Court thus held the law unconstitutional as applied to the factual circumstances of the plaintiff, who was an actively involved father. *See id.* at 392-394; *see also id.* at 411-412, 416 (Stevens, J., dissenting) (dissenting, but also characterizing the *Caban* majority opinion as an as-applied holding).

Four years later, in *Lehr v. Robertson*—addressing the *very same New York statute at issue in Caban*—this Court explicitly reaffirmed that *Caban* was an as-applied case, which had focused on the plaintiff’s specific factual circumstances.¹² *See Lehr*, 463 U.S. at 267 (distinguishing *Caban* on the ground that it was an as-applied holding, limited to involved fathers like *Caban*). In *Lehr*, the father challenged, among other things, the same sex-based distinction in § 111 of the New York Domestic Relations Code that had been challenged in *Caban*. *See id.* at 266. But this Court reiterated that *Caban* was limited to “that class of cases

¹² There were amendments to the law in the wake of *Caban*, but only after the adoption in *Lehr* had been granted without the father’s consent. *See, e.g.*, Appellant’s Br. at 16-18, *Lehr v. Robertson*, 463 U.S. 248 (1983) (discussing the timing and the nature of the amendments to § 111 and § 111a). For this reason, the state courts ruled the amendments inapplicable. *See In re Adoption of Jessica XX*, 430 N.E.2d 896, 899 n.4 (N.Y. 1981) (rejecting arguments of father that the amendments should apply retroactively).

where the mother and father are in fact similarly situated with regard to their relationship with the child.” *Id.* at 267; *see also* Brief of Appellee Attorney General of the State of New York at 44-48, *Lehr v. Robertson*, 463 U.S. 248 (1983) (arguing that even if *Caban* was retroactive, “[t]he majority opinion clearly shows that it did not hold the statute unconstitutional in all cases” and that “[a]s applied” to the father in *Lehr*, the law was constitutional).¹³

As the non-marital father cases reflect, permitting consideration of individual circumstances—and ordering as-applied invalidation where those circumstances lack a “substantial” relationship to the government’s interests—does not convert intermediate scrutiny into strict scrutiny. To the contrary, this Court’s as-applied approach has allowed the Court to *avoid* wholesale invalidation of statutes that lacked the requisite state opportunities for individual consideration, but that were partially undergirded by “important” government interests. *See, e.g., Lehr*, 463 U.S. at 266-267 (affirming application of sex-differentiated law to an uninvolved father, even though that same law had previously been declared invalid as applied to involved fathers); *see also Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (finding law disfavoring non-marital father constitutional “as applied” because father had “never shouldered any significant responsibility with respect to the...child”). It therefore represents an

¹³ Petitioners’ *amici* contend that “*Lehr* did not apply intermediate scrutiny at all.” *Amici Br.* at 15. This is wrong. The *Lehr* opinion specifically cited the *Craig* standard and stated that the law “may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose.” *Lehr*, 463 U.S. at 266 (citing *Craig*, 429 U.S. at 197-199).

exceptionally modest judicial approach to review of sex classifications in the law.

This does not mean, however, that such opportunities for individualized consideration—effectuated via as-applied claims—are unimportant. The promise of Equal Protection, even in the intermediate scrutiny context, is that one is not judged “solely by the accident of birth,” as opposed to the specific facts. *Frontiero*, 411 U.S. at 686. Where, as here, the state adopts an across-the-board sex-based rule—with no opportunity for individualized consideration—as-applied consideration of individual circumstances by this Court is the minimum required to fulfill that promise. *See, e.g., Caban*, 441 U.S. at 392-394 (taking this approach).

II. THE PETITIONERS’ ARGUMENTS AGAINST AS-APPLIED CLAIMS AND THE CONSIDERATION OF INDIVIDUAL CIRCUMSTANCES ARE MERITLESS

Petitioners and their *amici* argue against individualized consideration of Respondents’ circumstances—and against as-applied Equal Protection claims. *See, e.g.,* W.V. Pet. Br. at 42-44; Idaho Pet. Br. at 50-53; *Amici* Br. at 5-24. But their arguments ignore—or, at times, grossly mischaracterize—the relevant precedents. There is no question that as-applied invalidation is permitted in the Equal Protection context. *See, e.g., Caban*, 441 U.S. at 392-394 (granting as-applied invalidation); *Cleburne*, 473 U.S. at 447-450 (same); *Hogan*, 458 U.S. at 727 (same). Nor is there any question that opportunities for consideration of individual circumstances play an especially important role in intermediate scrutiny under the Equal Protection clause. *See, e.g., Caban*, 441 U.S. at 392-394 (looking to individual circumstances); *Lehr*, 463 U.S. at 267 (affirming this approach); *see also Nguyen*, 533 U.S. at 70-71 (examining opportunities provided by the

government for individualized consideration as a key feature of whether the law satisfied intermediate scrutiny). Petitioners attempt to avoid this conclusion by, for example, ignoring the relevant discussion, or misleadingly quoting inapposite language.

A particularly problematic example of this is Petitioners' and their *amici*'s treatment of *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In *Cleburne*, this Court constitutionally invalidated the denial of a special use permit to a home for people with intellectual disabilities ("the Featherston home"). While *Cleburne* was not an intermediate scrutiny case, it unambiguously endorsed—and adopted—an individualized and as-applied approach in the Equal Protection context. Thus, the Court indicated in *Cleburne* that it was only considering "whether requiring a special use permit for the Featherston home in the circumstances here" violated Equal Protection, *id.* at 447, rather than "whether the special use permit provision is facially invalid." *Id.* It stated moreover that such an approach "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *Id.* The Court then went on to consider the specific reasons given for the denial of the permit—and to invalidate the government's action "as applied to the Featherston home." *Id.* at 450.

Petitioners and their *amici* attempt to avoid the implications of *Cleburne* by quoting out of context a sentence from an entirely different part of the opinion, where the Court rejected across-the-board intermediate scrutiny for people with intellectual disabilities. See W.V. Pet. Br. at 43; *Amici* Br. at 15. That passage, reproduced in full (with the line misleadingly quoted by Petitioners italicized) states:

Doubtless, there have been and there will continue to be instances of discrimination against

the [intellectually disabled] that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. *Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us.*

Cleburne, 473 U.S. at 446.

To characterize Petitioners’ cherry-picked sentence as about the Court’s unwillingness to entertain as-applied invalidation, or to consider individualized circumstances, is simply inaccurate. Rather, this sentence in context was clearly about whether across-the-board intermediate scrutiny should be applied to disability classifications. *Id.* And indeed, the Court goes on in *Cleburne* to do *the very thing* that Petitioners contend it repudiates, considering the specific circumstances of the denial of the permit to the Featherston Home, and invalidating the denial on an “as applied” basis. *See id.* at 448-450 (looking to the specific reasons given by the government for the denial of the permit to the Featherston Home, and whether those reasons were actually substantiated in the case); *see also id.* at 447, 450 (ruling on an “as applied” basis and observing that “[t]his is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments”).

Petitioners similarly simply ignore the relevant language from cases like *Lehr* and *Morales-Santana*, which explicitly recognize that as-applied challenges focused on the plaintiff’s individual circumstances are an important part of the intermediate scrutiny

inquiry. Those cases—which reaffirm the individualized as-applied approach decades apart—are unambiguous in both their holdings and their language. As they state, even where presumptive sex distinctions are permitted in the law, such distinctions “may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child.” *Lehr*, 463 U.S. at 267; *see also Morales-Santana*, 582 U.S. at 63 n.12 (quoting this language approvingly in 2017). In *Lehr* this language was, moreover, critical to the holding, since the plaintiff was, among other things, challenging the very same statute that the Court had found could not constitutionally be applied in *Caban*. *See generally* Part I, *supra* (extensively discussing *Lehr* and *Caban*). It was only because *Caban* was an as-applied case, focused on the father’s individual circumstances, that *Lehr* could be decided as it was. *Id.*¹⁴

So too, the petitioners overlook the fact that the statutes at issue in many of the cases they cite—like *Nguyen*—*had* the type of government-provided alternatives for the disfavored sex to secure equal rights on

¹⁴ Petitioner West Virginia also misleadingly cites to *O’Connor v. Board of Ed. of School Dist. 23*, 449 U.S. 1301 (1980), a one-Justice ruling by Justice Stevens declining to vacate a Court of Appeals stay. *See* W.V. Pet. Br. at 43. It is true that in *O’Connor* Justice Stevens declined to look at whether the state’s interests extended to the plaintiff’s specific circumstances. *O’Connor*, 449 U.S. at 1306. But in the same opinion, Justice Stevens candidly acknowledged that *Caban v. Mohammed*—a case in which he dissented—would, contra his opinion, permit the plaintiff’s request for individualized assessment. *See O’Connor*, 449 U.S. at 1306 n.4 (observing that the plaintiff’s arguments on this front were “supported by the Court’s equal protection analysis in *Caban v. Mohammed*” but noting his own dissent in *Caban*). Thus, *O’Connor* was an order in which Justice Stevens applied his own dissenting position in *Caban*, not the majority rule.

an individualized basis that are lacking here. Unlike here, where the states have sought to eliminate *any* individual opportunity for the plaintiffs to show that they ought to be permitted to join a girls' athletic team, the statute in *Nguyen* afforded several "simple" ways for a father to obtain access to equal rights to the mother. *Nguyen*, 533 U.S. at 71. Moreover, this fact was key to the *Nguyen* Court's conclusion that the intermediate scrutiny standard was satisfied. The *Nguyen* Court specifically pointed to such alternatives as evidence that Congress's framework in fact promoted its "substantial interest of ensuring...an opportunity for a parent-child relationship to develop" before citizenship could be parentally conferred. *Id.* at 69. While the Court held that it would not micromanage such government-provided opportunities where they were provided, the fact that they *were* provided was essential to the *Nguyen* holding. *See id.* at 69-71; *see also Morales-Santana*, 582 U.S. at 65-66 (distinguishing *Nguyen* on this basis and invalidating a sex-differentiated law where it lacked such opportunities).

Petitioners' and their *amici*'s discussion of *VMI* is also misleading and selective. *See, e.g.,* W.V. Pet. Br. at 42; *Amici* Br. at 6. *VMI* *invalidated* a state policy which refused to provide individual opportunities for consideration to women and instead, like the laws at issue here, imposed a blanket rule. *See VMI*, 518 U.S. at 556. Despite the fact that it was only a small group of women who would desire and be suited to admission to VMI, the Court emphasized that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550 (emphasis in the original). *VMI* thus in no way contradicts, and indeed supports Plaintiffs' arguments that they

must be judged as individuals, rather than based on “generalizations”—even if the state’s sex-based assumptions may hold true in most individual cases (as was also the case in *VMI*). *Id.*

Moreover, Petitioners’ and *amici*’s reliance on cases such as *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality), *Califano v. Webster*, 430 U.S. 313 (1977), *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Kahn v. Shevin*, 416 U.S. 351 (1974) is also misplaced. *See, e.g.*, Idaho Pet. Br. at 51; *see also Michael M.*, 450 U.S. at 473-476 (plurality) (affirming statutory rape penalty applicable only to men); *Webster*, 430 U.S. at 318-320 (affirming modestly more favorable wage-based formula for women’s old-age benefits); *Rostker*, 453 U.S. at 72-82 (affirming sex-based Selective Service registration); *Kahn*, 416 U.S. at 352-356 (affirming small tax exemption for widows). Only in *Michael M.* was an as-applied claim, seeking consideration of the plaintiff’s individual circumstances, even raised. But the Court properly found that Michael M.—who had no risk of pregnancy and beat his underage victim into compliance—was no exceptional case with respect to the state’s interests, i.e., the prevention of teen pregnancy. *Michael M.*, 450 U.S. at 475 (finding no viable as-applied challenge, since the state’s interest in preventing underage pregnancies was implicated); *see also id.* at 483 n.* (Blackmun, J., concurring) (reproducing the female victim’s testimony).

Indeed, the Court in each of these cases (*Michael M.*, *Califano*, *Rostker*, *Kahn*) defined the government’s interests in ways that meant, by definition, there would be no exceptions among the disfavored (male) class.¹⁵

¹⁵ In addition, *Kahn v. Shevin* was decided before this Court applied intermediate scrutiny to sex classifications. *See Kahn*, 416 U.S. at 355 (applying the general standards for evaluating tax code provisions and finding the classification not “arbitrary”).

See, e.g., *Kahn*, 416 U.S. at 353 (government interest in small tax exemption for widows was ameliorating the effects of the “inhospitable” job market for women); *Webster*, 430 U.S. at 317-318 (government interest in modestly more favorable wage-based formula for women’s old-age benefits was to compensate for “the long history of discrimination against women” in the jobs market); *Michael M.*, 450 U.S. at 473 (government interest in punishing male but not female participant in statutory rape law was preventing underage pregnancies, and specifically deterring “the participant who, by nature, suffers few of the consequences of his conduct”); *Rostker*, 453 U.S. at 77 (government interest in sex-based “selective service” registration was “to prepare for a draft of combat troops”—a category that then was exclusively comprised of men).¹⁶

Equal Protection cases like *Caban*, *Lehr*, *Morales-Santana*, and *Cleburne* are the relevant precedents in this case. Collectively they make clear that individualized consideration is not only available but required under this Court’s Equal Protection intermediate scrutiny jurisprudence. So too they make clear that as-

And *Michael M.* was a plurality opinion, not joined by a majority of the Court. See *Michael M. v. Superior Court*, 450 U.S. 464 (1980) (plurality).

¹⁶ The ban on women serving in combat roles was not challenged in *Rostker*. See Br. for Appellant at 22, *Rostker v. Goldberg*, 453 U.S. 57 (1981). Moreover, the passage of *Rostker* that Petitioners and their *amici* misleadingly quote was a passage that *rejected* the male plaintiffs’ arguments that the ability to draft women into a small number of non-combat roles was relevant to the government’s interest *which was to fill combat positions*. 453 U.S. at 81-82. Indeed, the Court in *Rostker* observed that “Congress determined that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility,” and thus would have *adverse* effects on the government’s interest in filling combat roles. See *id.*

applied challenges are available under the Equal Protection Clause, just like in other areas of constitutional law. Petitioners have pointed to no cases overruling these Equal Protection precedents or undermining their continued validity. And doing so here would have no small stakes, as it would call into question the careful balance that this Court has created with respect to how sex classifications are assessed in the non-marital father context.¹⁷

Finding no support in this Court’s Equal Protection case law, Petitioners and their *amici* try to argue that this Court’s *First Amendment* precedents have somehow tacitly overruled the controlling precedents. *See, e.g.*, W.V. Pet. Br. at 42; Idaho Pet. Br. at 52; *Amici* Br. at 11-13. This is wrong. *See, e.g., Barr v. Am. Ass’n of Political Consultants*, 591 U.S. 610, 621 n.5 (2020) (plurality) (observing that “[b]efore overruling precedent, the Court usually requires that a party ask for overruling, or at least obtains briefing on the overruling question, and then the Court carefully evaluates the traditional stare decisis factors”—none of which transpired in the First Amendment cases cited by Petitioners and their *amici*).

But even if one were to overlook the Court’s binding Equal Protection precedent (which the Court should not), Petitioners’ First-Amendment-based arguments lack merit. As an initial matter, Petitioners’ and their

¹⁷ There may be independent arguments for reevaluating the differential rights afforded non-marital fathers, in view of the prevalence of non-marital families today. *Amici*’s observation that the overturning of this Court’s precedents in cases such as *Caban*, *Lehr*, and *Morales-Santana* would *require* reevaluation of the constitutionality of such differential rights should not be understood to express an opinion on whether such reevaluation might be appropriate in a case in which the issue was directly presented.

amici's reporting of the First Amendment cases is (like their discussion of the Equal Protection cases) selective, misleading, and sometimes outright wrong. Thus, for example, the very cases they cite establish that "as applied" challenges are available and that "the validity of the statutes' application to [the plaintiff]" is a relevant consideration in First Amendment cases.¹⁸ See *United States v. Edge Broadcasting*, 509 U.S. 418, 427-428 (1993); see also *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 570-571 (1980) (looking to whether the reasons given for the ban on commercial speech were applicable to the plaintiff's proposed speech, and concluding that "[t]o the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation," it violated the First Amendment).

But more importantly, there is no reason to think that anodyne First Amendment precedents on commercial speech and time, place and manner restrictions are even relevant to this Equal Protection case. On its face, the tests that Petitioners and their *amici* would have this Court apply—like the 4-factor *Central Hudson* test—are not the same test as the intermediate scrutiny Equal Protection test. See, e.g., Idaho Pet. Br. at 52 (relying on *Edge Broadcasting*, a commercial speech case); *Edge Broadcasting*, 509 U.S.

¹⁸ In another example, Petitioners' *amici* state that "[b]y definition, [Equal Protection] intermediate scrutiny's fit is looser than the narrow tailoring...required by strict scrutiny." *Amici Br.* at 8 (quotation modified). But other First Amendment cases that Petitioners and *amici* cite make clear that "narrow tailoring" is the standard for intermediate scrutiny in the First Amendment context. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Thus, Petitioners' claim that First Amendment intermediate scrutiny is coextensive with Equal Protection intermediate scrutiny is inconsistent even with their own arguments about what Equal Protection requires.

at 424 (articulating a four-part test which is facially not the same as the Equal Protection standard); *see also* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 827 (distinguishing “the relatively deferential form of intermediate scrutiny that is applied to First Amendment claims” from that applied “to equal protection claims”).

Nor, as the facts of the cited cases demonstrate, is the Equal Protection Clause’s demand that people be treated as individuals implicated in the same way by commercial speech, or time, place and manner restrictions. *See, e.g., Ward*, 491 U.S. at 787 (challenge to time, place and manner requirement that concert promoter use city-provided sound technician and equipment); *Edge Broadcasting*, 509 U.S. at 424 (commercial speech challenge to law restricting the ability of broadcaster to broadcast lottery advertisements). For example, it is absurd to suggest that the constitutional interest in individual treatment is the same in the context of a concert promoter complaining about having to use city-provided sound equipment and technicians, *see Ward*, 491 U.S. at 787, as it was in *Caban*, where the law threatened to forever divest a father of a legal relationship with his children based on his sex. *See Caban*, 441 U.S. at 383-384. The Equal Protection clause demands more, even under intermediate scrutiny, precisely because of the weight that it places on protecting the individual. *See, e.g., VMI*, 518 U.S. at 541-542 (emphasizing the importance of treating people as individuals, not simply members of a particular sex).

Indeed, the very language of the Equal Protection Clause confirms that it protects individuals in a way the language of the First Amendment, on its face, does not. Under the Equal Protection Clause, “[n]o State

shall...deny to any *person* within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV § 1 (emphasis added). As members of this Court have observed, this language is unambiguously focused on the individual. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (observing that “[t]he neutral phrasing of the Equal Protection Clause, extending its guarantee to ‘any person,’ reveals its concern with rights of individuals, not groups”). In contrast, the First Amendment’s text is, by its own terms, not so focused. *See* U.S. Const. amend. I (“Congress shall make no law...abridging the freedom of speech”).

Lastly, in addition to inapposite First Amendment precedents, Petitioners and their *amici* rely on a hodge-podge of overruled precedents, lower court precedents, and cases that are both (such as lower court precedents from the Second Amendment context, applying a version of intermediate scrutiny pre-*Bruen*). Suffice it to say that none of this authority in any way undermines or overrides this Court’s valid and binding Equal Protection precedents. Thus, for example, this Court’s opinion in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), does not govern federal affirmative action disputes today—nor does it govern this case. *But cf.* Idaho Pet. Br. at 51 (arguing for the application of *Metro Broadcasting* to this case).

III. IDAHO AND WEST VIRGINIA HAVE NOT PROVIDED THEIR OWN OPPORTUNITIES FOR INDIVIDUALIZED CONSIDERATION AND THUS INDIVIDUALIZED ASSESSMENT BY THIS COURT IS APPROPRIATE

As set out above, this Court has held that—even where presumptive sex differentiation is permissible due to biological differences—the government must

afford opportunities for the disadvantaged sex to show that the “sex-centered generalization” the state has adopted does not “comport[] with fact.” *Craig*, 429 U.S. at 199; *see also Nguyen*, 533 U.S. at 70-71 (emphasizing the importance of such opportunities in finding law constitutional). These opportunities need not be perfectly individualized but must offer some reasonable chance for specific members of the disfavored sex to show they are similarly situated to the favored sex with respect to the government’s interests. *See* Part I, *supra*. In the context of these cases, this would mean affording individual transgender girls some opportunity to demonstrate that the government’s interests in safety and competitive fairness are not implicated by their participation in women’s athletics. *See, e.g., W.V. Pet. Br.* at 2 (identifying safety and competitive fairness as the government’s interests).

Historically, such opportunities were in fact provided to transgender athletes in West Virginia and Idaho. Indeed, the challenged laws *replaced* systems that allowed at least some opportunities for more individualized assessment. *See Hecox*, 479 F. Supp. 3d at 982; *B.P.J.*, 98 F.4th at 550-551. Thus, sex-separated athletics existed in both states before the challenged laws were enacted—but transgender athletes did have some opportunities to participate where state and national athletic bodies had concluded that their participation did not implicate safety or competitive fairness. *See Hecox*, 479 F. Supp. 3d at 982; *B.P.J.*, 98 F.4th at 550-551.

The laws at issue here were adopted for the purpose of eliminating such individualized opportunities. Instead, the challenged laws were tailored precisely to avoid the possibility of *any* transgender girl being able to participate in girls’ athletics, no matter what her individual circumstances might be. *See W.Va. Code* § 18-

2-25d(b)(1) (defining sex solely on the basis of “the individual’s reproductive biology and genetics at birth” and not permitting anyone designated “male” at birth to participate on girls’ teams); Idaho Code § 33-6203 (identifying only “reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels” as relevant to determining a student’s ability to participate in girls’ athletics). This includes transgender girls as to whom there is no possible claim that their inclusion would implicate safety or competitive fairness. For example, a transgender girl who has not gone through puberty, is in all ways recognized as female at school, and who wishes to participate in a girls’ cheerleading squad simply to be with her friends, would be barred from doing so, even though her participation would not implicate safety or competitive fairness.

To be sure, the question of how to determine where to draw the line in where transgender girls’ participation implicates safety or competitive fairness is an evolving question. But intermediate scrutiny demands that states at least attempt to afford fair procedures for assessing individualized inclusion, if they wish to rely on sex classifications in the law. *See Craig*, 429 U.S. at 199 (emphasizing the importance of such opportunities); *Nguyen*, 533 U.S. at 70-71 (same); *see also Morales-Santana*, 582 U.S. at 65-66 (invalidating a law lacking such opportunities). Nor is the mere fact of additional administrative burden a sufficient basis for refusing to provide individualized assessments, where sex discrimination is concerned. *See, e.g., Frontiero*, 411 U.S. at 690 (plurality); *Orr v. Orr*, 440 U.S. 268, 281 n.12 (1979).

Because Petitioners have failed to provide their own opportunities for individualized assessment, consideration of Respondents’ individual circumstances by the

courts is the *least* that this Court's precedents require. *See, e.g., Caban*, 441 U.S. at 392-394 (looking to the father's relationship to his child in finding as-applied invalidation of New York Domestic Relations Code § 111 appropriate); *see also Morales-Santana*, 582 U.S. at 65-66 (wholly invalidating a law where government had failed to provide opportunities for individual consideration). Moreover, to the extent such an inquiry reveals that the Respondents' circumstances do not implicate the states' interests in safety and competitive fairness, as-applied invalidation is the minimum that the law requires. *See, e.g., Caban*, 441 U.S. at 392-394; *Lehr*, 463 U.S. at 267; *see also Morales-Santana*, 582 U.S. at 65-66 & n.15 (wholly invalidating a law in these circumstances).

CONCLUSION

For the foregoing reasons, the Court should reject Petitioners' and their *amici*'s arguments that as-applied claims are not available in the Equal Protection context, and that consideration of Respondents' individual circumstances by this Court is inappropriate.

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