

Nos. 24-38, 24-43

In the Supreme Court of the United States

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

v.

LINDSAY HECOX, ET AL.,
Respondents.

WEST VIRGINIA, ET AL.,
Petitioners,

v.

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

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

**BRIEF OF AMICI CURIAE CONSTITUTIONAL
LAW SCHOLARS IN SUPPORT OF RESPONDENTS**

JESSICA A. CLARKE
USC GOULD SCHOOL OF LAW
699 W. Exposition Blvd.
Los Angeles, CA 90089

Counsel for Amici Curiae

BENJAMIN GOULD
Counsel of Record
ALISON CHASE
KELLER ROHRBACK L.L.P.
1201 3rd Ave., Ste. 3400
Seattle, WA 98101
(206) 623-1900
bgould@kellerrohrback.com

TABLE OF CONTENTS

STATEMENT OF IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	4
I. The Equal Protection Clause Requires Heightened Scrutiny of All Sex-Based Classifications.....	4
II. Petitioners’ Contrary Arguments Lack Merit.....	8
A. There Is No Exception to Heightened Scrutiny for Class Definitions.	9
B. There Is No Threshold Similarly Situated Requirement for Heightened Scrutiny.	15
C. The Constitution Does Not Establish a Definition of Sex.....	21
CONCLUSION.....	27
APPENDIX – LIST OF AMICI.....	1a

TABLE OF CITED AUTHORITIES

Page

CASES:

<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995).....	10
<i>B.P.J. v. West Virginia</i> , 98 F.4th 542 (4th Cir. 2024)	1, 9
<i>Bostock v. Clayton County</i> , 590 U.S. 644 (2020).....	26
<i>Bradwell v. Illinois</i> , 83 U.S. (16 Wall.) 130 (1872).....	6
<i>Caban v. Mohammed</i> , 441 U.S. 380 (1979).....	2, 3, 7, 8, 19
<i>Califano v. Goldfarb</i> , 430 U.S. 199 (1977).....	14
<i>Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm’n</i> , 605 U.S. 238 (2025).....	12
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	16
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	23
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	7, 16, 18

Cited Authorities

	<i>Page</i>
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	5, 22, 23
<i>Goesaert v. Cleary</i> , 335 U.S. 464 (1948).....	16
<i>Hecox v. Little</i> , 104 F.4th 1061 (9th Cir. 2024)	21
<i>J.E.B. v. Alabama ex rel. T.B.</i> , 511 U.S. 127 (1994).....	3, 4, 5, 10
<i>Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.</i> , 438 F.3d 195 (2d Cir. 2006)	11, 12
<i>Johnson v. California</i> , 543 U.S. 499 (2005).....	10
<i>Lehr v. Robertson</i> , 463 U.S. 248 (1983).....	19, 20
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	10, 11
<i>McLaughlin v. Florida</i> , 379 U.S. 184 (1964).....	16
<i>Michael M. v. Superior Court</i> , 450 U.S. 464 (1981).....	18

Cited Authorities

	<i>Page</i>
<i>Miller v. Johnson</i> , 515 U.S. 900 (1995).....	4
<i>Miss. Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982).....	3, 5, 14, 16, 17, 18, 20
<i>Moore v. Missouri</i> , 159 U.S. 673 (1895).....	16
<i>Muller v. Oregon</i> , 208 U.S. 412 (1908).....	6
<i>Pace v. Alabama</i> , 106 U.S. 583 (1883).....	16
<i>Parents Involved in Cmty. Schs. v.</i> <i>Seattle Sch. Dist. No. 1</i> , 551 U.S. 701 (2007).....	10
<i>Parham v. Hughes</i> , 441 U.S. 347 (1979).....	18
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976).....	25
<i>Sessions v. Morales-Santana</i> , 582 U.S. 47 (2017).....	4, 6, 13
<i>Shaare Tefila Congregation v. Cobb</i> , 481 U.S. 615 (1987).....	25, 26

Cited Authorities

	<i>Page</i>
<i>St. Francis Coll. v. Al-Khazraji</i> , 481 U.S. 604 (1987).....	25, 26
<i>Stanton v. Stanton</i> , 429 U.S. 501 (1977).....	7
<i>Students for Fair Admissions, Inc. v.</i> <i>President & Fellows of Harvard</i> <i>Coll.</i> , 600 U.S. 181 (2023).....	4, 11, 12
<i>Tigner v. Texas</i> , 310 U.S. 141 (1940).....	16
<i>Tuan Anh Nguyen v. INS</i> , 533 U.S. 53 (2001).....	3, 7, 8, 13, 18, 19
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024).....	24
<i>United States v. Skrmetti</i> , 605 U.S. 495 (2025).....	2, 3, 7, 13, 22
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	2, 6, 7, 10, 13, 14, 17
<i>Weber v. Aetna Cas. & Sur. Co.</i> , 406 U.S. 164 (1972).....	22, 23

Cited Authorities

	<i>Page</i>
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975).....	14
<i>Wengler v. Druggists Mut. Ins. Co.</i> , 446 U.S. 142 (1980).....	2, 14
 Statutes	
42 U.S.C. § 1981(a).....	25
42 U.S.C. § 1982	25
 Other Authorities	
Cary Franklin, <i>Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes</i> , 2017 Sup. Ct. Rev. 169.....	7
Cong. Globe, 39th Cong., 1st Sess. 10 (1866).....	25
Giovanna Shay, <i>Similarly Situated</i> , 18 George Mason L. Rev. 581 (2011).....	16
Jessica A. Clarke, <i>Scrutinizing Sex</i> , 92 U. Chi. L. Rev. 1 (2025)	13
Laura Lane-Steele, <i>Sex-Defining Law sand Equal Protection</i> , 112 Calif. L. Rev. 259 (2024).....	22

Cited Authorities

	<i>Page</i>
Maayan Sudai, “A Woman and Now a Man”: <i>The Legitimation of Sex-Assignment Surgery in the United States</i> (1849–1886), 52 Soc. Stud. Sci. 79 (2022).....	24
Shaye J.D. Cohen, <i>The Origins of the Matrilineal Principle in Rabbinic Law</i> , 10 AJS Rev. 19 (1985).....	12
Trina Jones & Jessica L. Roberts, <i>Genetic Race? DNA Ancestry Tests, Racial Identity, and the Law</i> , 120 Colum. L. Rev. 1929 (2020)	13
U.S. Const. amend. II.....	24
U.S. Const. amend. XIV.....2, 3, 4, 5, 9, 10, 11, 15, 16, 17, 22, 23, 24, 25, 26	
U.S. Const. amend. XIV, § 1	3, 25, 26

**STATEMENT OF IDENTITY AND INTEREST
OF *AMICUS CURIAE***

Amici curiae are scholars of constitutional law. Amici submit this brief to explain the equal protection principles that support Respondents' position and warrant affirmance of the judgments below.

A list of amici is set forth in the Addendum.¹ Amici sign this brief in their individual professional capacities and take no positions on behalf of their employers.

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

SUMMARY OF ARGUMENT

This brief addresses a narrow question of significance to equal protection doctrine. In those circumstances in which it is permissible for government to regulate on the basis of a suspect or quasi-suspect classification, what standard of review applies to the government’s definition of who is and is not included in the class? Under the Equal Protection Clause, all sex-based classifications must meet heightened scrutiny, including class definitions.

Heightened scrutiny is a two-part framework. First, it asks whether a law classifies on the basis of sex. See *United States v. Skrametti*, 605 U.S. 495, 510 (2025). Second, it asks whether the sex-based classification at least “serves important governmental objectives” and is “substantially related to the achievement of those objectives.” *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). This standard requires that government demonstrate that the “discriminatory means employed . . . itself substantially serves the statutory end.” *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980). An “undifferentiated distinction” based on sex that “does not bear a substantial relationship to the State’s asserted interests” fails this standard of review. *Caban v. Moham-med*, 441 U.S. 380, 394 (1979).

This brief takes no position on whether the definitions of sex used by Idaho and West Virginia, as applied to Respondents in these cases, are substantially related to those states’ objectives in ensuring fair competition and safety in women’s and girls’ sports. Rather, it argues that Petitioners are wrong to suggest

that the appropriate standard of review is something less than heightened scrutiny.

This brief responds to three novel propositions of law proposed or suggested by Petitioners: (1) that when state actors define protected classes, those definitions receive rational basis review; (2) that there is a threshold requirement that women and men be similarly situated before heightened scrutiny applies; and (3) that rather than prescribing a standard of review for government definitions of sex, the Constitution immunizes laws that define sex as an immutable status ascertained at birth from any scrutiny.

These propositions contravene the plain text of the Equal Protection Clause, which protects every person’s right to be treated as an individual. U.S. Const. amend. XIV, § 1 (“[N]or shall any state . . . deny to *any person* within its jurisdiction the equal protection of the laws.” (emphasis added)). Sex-based classifications must meet heightened scrutiny because they have often been used in the service of “overbroad generalizations” and “stereotypes” that fail to treat people as individuals. *Skrmetti*, 605 U.S. at 510. Sex-based classifications with a basis in biology are not exempt from heightened review. *See, e.g., Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60–61 (2001); *Caban*, 441 U.S. at 391–92. Even generalizations with statistical support may unfairly limit the opportunities of individual women and men. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994).

Important state interests may justify sex-based classifications in “limited circumstances.” *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982). But to give state actors unreviewed discretion to define who

qualifies as “male” or “female” in those contexts would be to abdicate the promise of equal protection. It would license the unchecked use of stereotypes and overbroad generalizations in defining who qualifies as male or female, with damaging implications for sex equality doctrine outside the context of girls’ and women’s sports and for doctrines on racial and religious equality.

The Fourth and Ninth Circuits correctly determined that heightened scrutiny is the standard that applies to Respondents’ challenges to the Idaho and West Virginia laws. Their decisions should be affirmed on equal protection grounds and remanded for further factual development to determine the application of that standard.

ARGUMENT

I. The Equal Protection Clause Requires Heightened Scrutiny of All Sex-Based Classifications.

As this Court recently explained, “[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.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 223 (2023) (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)). For this reason, “all gender-based classifications” are subject to heightened scrutiny. *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017) (quoting *J.E.B.*, 511 U.S. at 136).

Classifications based on sex receive heightened scrutiny because, historically, they have been used to limit individual opportunity and autonomy in pervasive ways. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality of the Court would have applied strict scrutiny to sex-based classifications. In so reasoning, it discussed the nation’s “long and unfortunate history of sex discrimination,” the continued, “pervasive” nature of that discrimination, “the high visibility of the sex characteristic,” Congress’s conclusion “that classifications based upon sex are inherently invidious,” and that sex “is an immutable characteristic determined solely by the accident of birth.” *Id.* at 684, 686, 687 (plurality opinion). The plurality reasoned that sex is different from “intelligence or physical disability,” traits which may also be immutable, because sex is generally irrelevant to governmental aims and sex-based classifications have often been used to assign women to an “inferior legal status.” *Id.* at 686–87.

Because the Equal Protection Clause protects individual rights, men have also succeeded in challenging sex-based classifications. *See, e.g., Hogan*, 458 U.S. at 733 (striking down a state statute excluding men from a nursing school). In the 1970s and 1980s, this Court invalidated a “broad range of statutes” that used sex-based classifications in the service of “traditional, often inaccurate, assumptions about the proper roles of men and women.” *Id.* at 726. As a matter of constitutional principle, the harm in laws that enforce sex stereotypes is not merely that they may be incorrect; it is that they put the individual in a “cage,” assigning him or her to a particular role in life at birth. *J.E.B.*, 511 U.S. at 133 (quoting *Frontiero*, 411

U.S. at 684 (plurality opinion)). “Overbroad generalizations” based on sex “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. Even if, for example, almost all women could not meet the demanding standards of an elite military institution, the Constitution would not permit the state to exclude those individual women who could. *See Virginia*, 518 U.S. at 550 (“[G]eneralizations 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.”).

That sex classifications may have a biological basis does not exempt them from heightened scrutiny. Historically, invidious sex-based classifications were often justified by recourse to women’s unique biology. *See Muller v. Oregon*, 208 U.S. 412, 420 (1908) (upholding a law limiting women’s working hours based on “a widespread belief that woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil”); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment) (reasoning that women could be excluded from the practice of law because “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman”).

The purpose of heightened scrutiny is to determine whether proffered biological justifications are “acting as smokescreens, obscuring a set of social judgments inconsistent with contemporary equal protection

principles.” Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 Sup. Ct. Rev. 169, 176. Accordingly, in its cases applying heightened scrutiny, the Court has often analyzed and rejected arguments from biology as justifications for sex-based discrimination. *See, e.g., Virginia*, 518 U.S. 540–41 (rejecting the arguments that women could be excluded from the Virginia Military Academy (VMI) because most women could not meet VMI’s physical standards and would not thrive in VMI’s adversative environment due to “gender-based developmental differences” (citation omitted)); *Caban*, 441 U.S. at 391–92 (rejecting the argument that mothers and fathers have different levels of “natural parental interest”); *Stanton v. Stanton*, 429 U.S. 501, 503 (1977) (striking down a Utah rule setting different ages of maturity for men and women, notwithstanding the Utah Supreme Court’s assertion that “[t]o judicially hold that males and females attain their maturity at the same age is to be blind to the biological facts of life” (citation omitted)).

This is not to say that the “mere reference to sex,” for example, in the context of medical research or for purposes of data collection, requires heightened scrutiny. *Skrmetti*, 605 U.S. at 512. Rather, Supreme Court precedent requires heightened scrutiny for laws that use “gender” as an “overt . . . criterion” for distributing benefits, burdens, or opportunities. *Craig v. Boren*, 429 U.S. 190, 198 (1976).

Nor is this to say that laws that classify on the basis of sex for reasons related to biology are categorically constitutionally impermissible. *See, e.g., Nguyen*, 533 U.S. at 61. In *Nguyen*, the Court applied heightened scrutiny to a provision of the Immigration

and Nationality Act requiring unwed citizen fathers, but not unwed citizen mothers, to take some formal step to demonstrate a parental relationship to confer U.S. citizenship on a child. *See id.* at 60–61. The Court upheld the provision because, by virtue of pregnancy, mothers, unlike fathers, must be present at birth and therefore have an opportunity to form a relationship with the child. *Id.* at 61. Importantly, the requirements that the law imposed on fathers to confer citizenship were “minimal,” *id.* at 70—a written acknowledgment of paternity under oath, for example, would suffice, *id.* at 71. By contrast, the Court rejected an “undifferentiated distinction between unwed mothers and unwed fathers” in the context of a law denying unwed fathers the right to consent to the adoption of a child. *Caban*, 441 U.S. at 394. That law afforded fathers no opportunities to obtain rights comparable to those afforded mothers. The unwed father in that case had a substantial relationship with his children, and so the law failed heightened scrutiny as applied to him. *See id.* at 389.

II. Petitioners’ Contrary Arguments Lack Merit.

Petitioners recognize that Supreme Court precedents require that all sex-based classifications receive heightened scrutiny. But they advance three arguments that would permit lawmakers to make an end-run around that requirement. First, they assert that, when state actors define protected classes, those definitions receive no heightened scrutiny. Br. for Idaho Pet’rs 21 (No. 24-38); Br. for W. Va. Pet’rs at 47–48 (No. 24-43). Second, they argue that, in some cases, in lieu of heightened scrutiny for sex-based classifications, the Constitution requires only that similarly

situated groups not be treated differently. Br. for W. Va. Pet’rs at 33–37 (No. 24-43). And third, they suggest that rather than prescribing a standard of review for government definitions of sex, the Constitution immunizes from review laws that define sex as an immutable status ascertained at birth. *See* Br. for Idaho Pet’rs at 22–23 (No. 24-38); Br. for W. Va. Pet’rs at 36 (No. 24-43). Petitioners’ arguments lack basis in constitutional text, history, precedent, and principle.

A. There Is No Exception to Heightened Scrutiny for Class Definitions.

Petitioners assert that there is some subset of challenges to sex-based classifications that require only rational basis review. West Virginia calls this subset challenges to the law’s “*definition* of sex.” Br. for W. Va. Pet’rs at 47–48 (No. 24-43). Idaho calls this subset “underinclusiveness challenge[s].” Br. for Idaho Pet’rs at 21 (No. 24-38). This Court has never held there are any such exceptions to heightened scrutiny—not for sex, and not for other suspect and quasi-suspect classifications. As the Fourth Circuit explained, “even when lines may—or must—be drawn, the Constitution limits how and where they may fall.” *B.P.J. v. West Virginia*, 98 F.4th 542, 555 (4th Cir. 2024).

Laws that define who qualifies as a male, female, man, or woman for purposes of eligibility for government burdens or benefits are literally sex-based classifications. Therefore, equal protection precedent and principles require heightened scrutiny.

The text of the Constitution guarantees the right of equal protection to the individual, not the class. The Equal Protection Clause “protect[s] *persons*, not

groups.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). “The neutral phrasing of the Equal Protection Clause, extending its guarantee to ‘any person,’ reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question).” *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring in judgment).

The Equal Protection Clause is concerned with facial classifications because they pose a unique “danger to individual freedom.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in judgment); *see also id.* at 789 (explaining that the problem with facial classifications, as opposed to racially neutral means, is that they “tell[] each student” they are defined by a “crude” category). Thus, an “express” classification “is ‘immediately suspect,’” even if it might be said to be “neutral” in the sense that it “neither benefits nor burdens one group or individual more than any other group or individual.” *Johnson v. California*, 543 U.S. 499, 506 (2005) (citations omitted). The harm in categorical exclusions is that they fail to treat people as individuals. *See Virginia*, 518 U.S. at 546 (holding that the “categorical exclusion” of women from VMI “in total disregard of their individual merit” violated the Equal Protection Clause).

This principle applies *a fortiori* in cases in which the state classifies an individual as a member of a group who is ineligible for a government program reserved for a protected class. History teaches that state actors may define protected classes in ways that raise constitutional concerns. *See, e.g., Loving v. Virginia*,

388 U.S. 1, 7 (1967) (discussing the administration of Virginia anti-miscegenation law through “certificates of ‘racial composition’”); *id.* at 5 n.4 (quoting the Virginia Code’s definitions of “white persons” based on “blood” quanta); *id.* at 11 n.11 (“[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”).

Thus, the Court has considered, as a component of heightened scrutiny, whether suspect classifications are carefully defined. This is because poorly defined categories may “undermine[], instead of promote[]” state interests. *Students for Fair Admissions*, 600 U.S. at 217; *see id.* at 216 (criticizing the “Asian” category used by universities for purposes of affirmative action as “overbroad,” the “Hispanic” category as “arbitrary or undefined,” and the six-category definition of “race” as “underinclusive” because counsel for one university could not explain how to classify individuals from Middle Eastern countries). They may also perpetuate stereotypes. *See, e.g., id.* at 291–92 (Gorsuch, J., concurring) (criticizing the use of “Asian” as a category for affirmative action because it “sweeps into one pile East Asians (*e.g.*, Chinese, Korean, Japanese) and South Asians (*e.g.*, Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world’s population”).

It is true that one circuit court applied rational-basis review to definitions of racial group membership in the affirmative-action context. *Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 209 (2d Cir. 2006) (applying rational basis review to

uphold an affirmative-action plan’s definition of “Hispanic” to exclude people of Spanish national origin). In *Jana-Rock*, the Second Circuit reasoned that definitions of racial categories are, by necessity, always over- and underinclusive. *Id.* at 210–11. But *Jana-Rock* is inconsistent with Supreme Court doctrine. See *Students for Fair Admissions*, 600 U.S. at 216 (analyzing whether categories were “underinclusive” as a component of narrow tailoring); cf. *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 241–42 (2025) (applying strict scrutiny to Wisconsin’s definition of a “religious” employer for purposes of a tax exemption).

This is for good reason. On petitioners’ theory, a state law that requires schools to provide religious accommodations, including excused absences for Jewish students on High Holidays, could define “Jewish” to include only individuals with proof of matrilineal descent, with no heightened scrutiny.² A student whose mother is not Jewish, but who has a sincere commitment to her Jewish identity, should be permitted to challenge her classification. The correct standard of review for the state’s definition of “Jewish” is not the rational basis standard that applies to ordinary economic legislation.

Or imagine a public institution that acknowledged its own recent race discrimination against black people and sought to remedy it with a settlement fund defining all potential beneficiaries based on DNA

² See generally Shaye J.D. Cohen, *The Origins of the Matrilineal Principle in Rabbinic Law*, 10 *AJS Rev.* 19, 19 (1985) (noting that traditional rabbinic law treats Jewish identity as matrilineal only).

tests. An individual perceived by discriminators to be black due to his identity and appearance, but whose DNA test placed him in the white category,³ should be able to challenge the DNA-based definition on equal protection grounds. *See* Jessica A. Clarke, *Scrutinizing Sex*, 92 U. Chi. L. Rev. 1, 94 (2025). Courts should test that definition based on whether it is narrowly tailored to serve the institution’s compelling remedial interest.

If rational-basis review is not the standard that applies to definitions of race and religion, there is no principled reason to hold definitions of sex to that standard either. Heightened review applies when the state classifies an individual as a “male” or a “female” who is ineligible for a government program reserved for the other group. Such a classification is no “mere reference” to sex. *Cf. Skrimetti*, 605 U.S. at 512. To be sure, there may be important interests that justify the state’s sex-based classification. But its definitions of “female” and “male” must be substantially related to those interests.

While narrow tailoring is not required for sex-based classifications, the “fit between the means and the important end” must be “exceedingly persuasive.” *Nguyen*, 533 U.S. at 70 (quoting *Virginia*, 518 U.S. at 533); *see also Morales-Santana*, 582 U.S. at 68 (requiring that the relationship between means and

³ *See* Trina Jones & Jessica L. Roberts, *Genetic Race? DNA Ancestry Tests, Racial Identity, and the Law*, 120 Colum. L. Rev. 1929, 1945–47 (2020) (explaining how DNA ancestry tests “may fail to accurately predict a person’s genetic ancestry,” and even if they could, “it would still be a mistake to conflate those results with race”).

ends be “close”). There is no exception to the rule that a sex-based classification must be substantially related to the government’s aims for situations in which the ends it pursues are of “great” importance. *Virginia*, 518 U.S. at 545–46; *see also Hogan*, 458 U.S. at 724 n.9 (“While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.”).

Sex-based classifications that are underinclusive without an exceedingly persuasive reason lack the requisite fit. The Court has struck down a number of sex-based classifications favoring widows because those classifications excluded individual widowers who were similarly situated with respect to the statutes’ aims. *Wengler*, 446 U.S. at 151; *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (plurality opinion); *id.* at 224 (Stevens, J., concurring); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975). It has rejected the argument that the “administrative convenience” of providing easy relief to widows, who were more likely than widowers to be dependent on their deceased spouses, could justify rules holding widowers to a different standard. *Wengler*, 446 U.S. at 151–52. In *Virginia*, the Court held that the “estimation” of “expert witness[es]” that women, on average, lacked the “capacities or preferences” to attend the Virginia Military Institute could not justify the exclusion of those women with “the will and capacity” to succeed at its unique training program. 518 U.S. at 542.

A rule exempting definitions of sex from heightened scrutiny would give state actors free rein to deploy overbroad generalizations and sex-based stereotypes in defining eligibility for permissible sex-based standards and programs. For example, an all-boys

public school might define “boys” to exclude any young men with conventionally feminine interests or behaviors. Or an institution administering an affirmative-action plan to remedy its own past discrimination against women might exclude those women who do not meet traditional stereotypes about feminine comportment or appearance. Such definitions should not be permitted if not substantially related to some important state purpose.

To apply rational basis review to government definitions of sex would undermine the Equal Protection Clause’s purpose of protecting the rights of the individual. The Constitution and Supreme Court precedents permit no such result.

B. There Is No Threshold Similarly Situated Requirement for Heightened Scrutiny.

West Virginia suggests that heightened scrutiny is not required if a sex-based policy treats similarly situated individuals equally. Br. for W. Va. Pet’rs at 33–37 (No. 24-43). It further suggests that laws are immune from heightened review if they draw lines based on “biology.” *Id.* at 34, 36. Under Supreme Court precedent, however, there is no threshold requirement that women challenging a sex-based classification demonstrate that they are similarly situated to those men who are preferred by the law. Nor is it the case that a similarly situated inquiry might replace the strictures of heightened scrutiny. Laws that draw sex-based lines based on biology are not immune from heightened review.

In cases applying rational-basis review, the Court has sometimes referred to the principle behind the Equal Protection Clause as the ancient maxim that

likes should be treated alike. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). At one time, this maxim was the entirety of the legal rule that applied to sex classifications. In a 1948 case, *Goesaert v. Cleary*, the Supreme Court upheld a Michigan law that prohibited women from working as barmaids unless their husbands or fathers owned the bar. 335 U.S. 464, 465 (1948). That case reasoned that men and women are *not* alike, and so the Constitution did not require that legislatures treat them the same. *See id.* at 466 (“[T]he Constitution does not require situations ‘which are different in fact or opinion to be treated in law as though they were the same.’” (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940))). The Court believed it was reasonable to think that female bartenders required the “protecting oversight” of their husbands or fathers, while male bartenders did not. *Id.* *Goesaert* is no longer good law. *See, e.g., Hogan*, 458 U.S. at 725 n.10; *Craig*, 429 U.S. at 210 n.23.

Decisions asking freewheeling questions about whether classes are similarly situated preceded the development of the modern tiers of scrutiny. Giovanna Shay, *Similarly Situated*, 18 George Mason L. Rev. 581, 587 (2011). For example, in 1883, *Pace v. Alabama* upheld a law criminalizing interracial intimacy on the ground that the same punishment applied to each offending member of the couple “whether white or black.” 106 U.S. 583, 585 (1883). On this reasoning, the Equal Protection Clause required only that “similarly situated” individuals—both members of the couple—be treated the same. *McLaughlin v. Florida*, 379 U.S. 184, 190 n.9 (1964) (quoting *Moore v. Missouri*, 159 U.S. 673, 678 (1895)). In 1964, *McLaughlin* overruled *Pace*, holding that all racial

classifications must be “necessary” to achieve some “overriding” purpose. 379 U.S. at 191–92. This is because the rights protected by the Equal Protection Clause are not merely the rights of some groups to be treated the same as others. Rather, that Clause protects individual rights to be treated without regard to certain classifications, absent sufficient justification.

The similarly-situated inquiry appeals to common intuitions about group differences. It asks: Do the differences between two groups mean that to treat them fairly requires that they be treated differently? But heightened scrutiny is a two-step inquiry that includes questions of fairness on the second step, which asks, with respect to sex, whether the classification is “substantially related” to achieving “important governmental objectives.” *Virginia*, 518 U.S. at 533 (quoting *Hogan*, 458 U.S. at 724). When a law classifies on its face, heightened scrutiny is required, regardless of whether males and females are similarly situated. *Hogan*, 458 U.S. at 728 (holding that the “same searching analysis must be made, regardless of whether the State’s objective is . . . to balance the burdens borne by males and females”).

To ask questions about whether men and women are similarly situated at the first step of the heightened scrutiny inquiry is to introduce confusion and invite judicial decision-making unrestrained by facts and law. On the heightened-scrutiny standard, courts must examine whether individuals are similarly situated vis-à-vis the law’s “actual purpose.” *Id.* at 730; *see also Virginia*, 518 U.S. at 533 (“The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”). That purpose must be “important,” not merely legitimate. *Virginia*, 518 U.S.

at 533 (citation omitted). Heightened scrutiny requires a “close relationship” between means and ends to ensure that “the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.” *Hogan*, 458 U.S. at 725–26.

Supreme Court precedents on unwed fathers do not substitute a similarly-situated inquiry for heightened scrutiny; those cases apply heightened review. *Nguyen*, 533 U.S. at 73 (holding that, under heightened scrutiny, immigration authorities were justified in applying a different standard to determine paternity that reflected “the fact that a mother must be present at birth but the father need not be”). West Virginia cites Justice Stewart’s plurality opinion in *Parham v. Hughes*, 441 U.S. 347 (1979), in support of its assertion that a generalized inquiry into substantial similarity applies. Br. for W. Va. Pet’rs at 37 (No. 24-43) (citing *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion)). But Justice Powell, the fifth vote in *Parham*, concurred to clarify that the Court’s precedents require that “gender-based distinctions must ‘serve important governmental objectives and must be substantially related to achievement of those objectives.’” *Id.* at 359 (Powell, J., concurring in the judgment) (quoting *Craig*, 429 U.S. at 197).⁴ As *Nguyen* demonstrates, questions about whether men and women are similarly situated are

⁴ *Michael M. v. Superior Court*, 450 U.S. 464 (1981) was also a plurality opinion, and the fifth vote, Justice Blackmun, concurred to clarify that the applicable test was the heightened-scrutiny standard announced in the cases leading to *Craig*. *Id.* at 483 (Blackmun, J., concurring).

relevant only to the second step of the heightened scrutiny analysis, to be analyzed with respect to whether the sex-based classification is substantially related to an important state interest. 533 U.S. at 63.

In *Lehr v. Robertson*, for example, the Court applied heightened scrutiny to partially uphold a New York law allowing unwed mothers to veto adoptions but denying that right to unwed fathers. 463 U.S. 248, 266 (1983). The New York law required notice of an adoption proceeding to be sent to “seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children,” *id.* at 263, including fathers who had taken the minimal step of mailing a postcard to register with the state’s putative father registry, *id.* at 264. In *Lehr*, the father in question took no such steps and had no relationship with the child. *Id.* at 251–52. But in *Caban*, the father did have a relationship with his children, and so the law was invalid as applied to him. *Id.* at 267–68 (distinguishing *Caban*). *Lehr* observed that, even if a sex-based classification survives facial challenge, it may not constitutionally be applied to fathers who are similarly situated to mothers vis-à-vis the state’s important interest; *Lehr* did not purport to replace heightened scrutiny with a similarly-situated requirement untethered to important interests, nor did it impose any similarly-situated requirement at the threshold. *Lehr*, 463 U.S. at 267.

Lehr and *Caban* applied heightened scrutiny to sex-based distinctions between unwed mothers and unwed fathers. *Id.* at 266. *Lehr* noted that rational basis review applied to the determination of which “classes of fathers,” delineated on bases other than sex, had demonstrated the requisite relationship with

their children. 463 U.S. at 268 n.27. By contrast, West Virginia and Idaho’s restrictions on participation in girls’ and women’s sports do not classify on some basis other than sex. Those laws do not ask which “classes of individuals designated male at birth” may play girls and women’s sports. Rather, they are blanket bans on all individuals that the state defines as biological males at birth. These sex-based classifications must meet heightened scrutiny as applied to the plaintiffs. *See* Br. of Equal Protection Scholars as *Amici Curiae* in Support of Resp.’s (Nos. 24-38, 24-43).

If, as West Virginia suggests, any law that draws lines between the sexes based on “biology” is nondiscriminatory and immune from heightened review, institutions would be able to skirt heightened scrutiny simply by defining the sexes in biological terms. For example, a military institute could evade the *Virginia* decision by defining the excluded class as “individuals with reproductive systems designed to produce ova.” A nursing school could evade the *Hogan* decision by excluding all “individuals with reproductive systems designed to fertilize ova.” Such results would upend equal protection doctrine on heightened scrutiny for sex-based classifications.

There is no basis in Supreme Court precedent for requiring a showing that males and females are similarly situated prior to applying heightened review or for substituting that standard for heightened review. Nor are sex distinctions immune from review simply because they are defined by biology. All sex-based classifications must receive heightened scrutiny.

C. The Constitution Does Not Establish a Definition of Sex.

Petitioners assert that laws defining sex as an immutable classification ascertained at birth are immune from heightened review, or perhaps even required by the Constitution or Supreme Court precedent. Br. for Idaho Pet'rs at 22–23 (No. 24-38); Br. for W. Va. Pet'rs at 36 (No. 24-43). Whether the Constitution requires some definition of sex is not the question before the Court. Even if it were, constitutional text, history, and precedent provide no support for any all-purpose definitions of “men,” “women,” or other protected classes. To the extent that the Constitution permits government to classify on the basis on sex, it requires that the definitions selected by government be substantially related to important purposes.

1. The Idaho petitioners assert that this Court must define sex to correct the Ninth Circuit's definition, which supposedly included gender identity. Br. for Idaho Pet'rs at 24 (No. 24-38). As an initial matter, the Ninth Circuit did not define sex, nor did it hold that sex necessarily includes gender identity. Rather, the Ninth Circuit criticized Idaho's definition of sex as “likely an oversimplification of the complicated biological reality of sex and gender.” *Hecox v. Little*, 104 F.4th 1061, 1076 (9th Cir. 2024), *as amended* (June 14, 2024). This point was in support of the Ninth Circuit's conclusion that the Idaho law had the discriminatory *purpose* of excluding transgender athletes. *Id.* Questions of discriminatory purpose are distinct from the question whether the Acts' definitions of sex constitute sex-based classifications.

2. The text of the Equal Protection Clause and precedents interpreting it do not define “sex,” “male,” “female,” or any other suspect or quasi-suspect classifications. In none of this Court’s equal protection cases has it had occasion to define sex or membership in the groups “male” or “female.” This is for the simple reason that, in this Court’s past equal protection cases, no one contested whether any party was a man or woman. *See* Laura Lane-Steele, *Sex-Defining Laws and Equal Protection*, 112 Calif. L. Rev. 259, 263 (2024).⁵

The Idaho petitioners call on this Court to define sex as “immutable” and “determined solely by the accident of birth,” quoting the plurality opinion in *Frontiero*, 411 U.S. at 686. Br. for Idaho Pet’rs at 22 (No. 24-38). *Frontiero*, however, used the term “immutable” to explain why some *classifications* are suspect, not to define protected *classes*. *Id.* at 686 (explaining that classifications based on immutable statuses assigned at birth violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility” (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))).

Immunizing immutable classifications from heightened scrutiny runs contrary to equal protection principles. Legal rules that classify based on immutable characteristics require heightened review because

⁵ In *Skrimetti*, the Court held that the Tennessee statute at issue classified on the bases of age and medical use alone. *Skrimetti*, 605 U.S. at 511–22. Thus, that statute’s definition of “sex” played no role in the decision, nor did the Court address the appropriate classification of any plaintiff as “male” or “female.”

they pose a threat to the principle that every person be treated as an individual. In *Weber*, the Supreme Court struck down a worker's compensation law that denied benefits to illegitimate children upon the death of their father. 406 U.S. at 165. The Court explained: "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust." *Id.* at 175. While the Court was "powerless" to change the "social opprobrium" suffered by these "hapless children," the Equal Protection Clause required that it "strike down discriminatory laws relating to status of birth." *Id.* at 175–76. Thus, the Constitution requires that classifications based on illegitimacy, like sex, receive heightened scrutiny. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988).

The principle is that official classifications must be related to individual responsibility or some other important state interest. It is perverse to suggest that *Frontiero* requires that the state impose classifications on individuals at birth, or that it permits the state to do so as long as those classifications are unchangeable. Accordingly, the assertion that, because petitioners define sex as biological for all students, they do not thereby discriminate, is backwards. *See Br. for United States as Amicus Curiae Supporting Pet'rs* at 31 (Nos. 24-38, 24-43). This argument inverts the purpose of the Equal Protection Clause, assuming that it requires that all groups be consigned to roles assigned at birth in equal measure.

If *Frontiero* immunized from review any definition of sex as immutable and ascertainable at birth, then

an institution administering an affirmative-action policy as a remedy for its own intentional discrimination against women might require original birth certificates as proof of sex before distributing benefits, rather than using a definition of “women” based on whether an individual had been recognized in her workplace as a woman and treated adversely on that basis. Administration of the program in such a manner would offend the principle of individualism and subvert the remedial purpose of the affirmative-action policy.

3. History does not support petitioners’ arguments. The Equal Protection Clause does not enumerate or define any proscribed classifications or protected classes. Thus, it could not possibly trap in amber any definitions of “male” or “female” as those terms might have been understood in 1868. *Cf. United States v. Rahimi*, 602 U.S. 680, 691 (2024) (“[T]he reach of the Second Amendment is not limited only to those arms that were in existence at the founding.”). To the extent that history is relevant, in 19th century America, designations at birth were not always determinative of sex; rather, medical and legal authorities applied varying definitions. *See, e.g.,* Maayan Sudai, “A Woman and Now a Man”: *The Legitimation of Sex-Assignment Surgery in the United States (1849–1886)*, 52 Soc. Stud. Sci. 79, 98 (2022) (detailing conflicting and contested definitions of sex in the mid-19th century and discussing cases in which surgical intervention played a role in constituting legal sex).

The Idaho petitioners point to two statutory decisions on race to support their assertion that the Constitution enshrines some definition of sex. Br. for Idaho Pet’rs at 26 (No. 24-38). Those decisions do not

interpret the Equal Protection Clause. They interpret statutes guaranteeing to all citizens certain rights “enjoyed by white citizens.” 42 U.S.C. §§ 1981(a), 1982; see *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609–10 (1987) (interpreting § 1981); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616–17 (1987) (interpreting § 1982).

But the text of the Equal Protection Clause includes no such language. The Reconstruction Congress declined to adopt a proposed amendment prohibiting “discrimination . . . on account of race or color.” Cong. Globe, 39th Cong., 1st Sess. 10 (1866). Because the Equal Protection Clause guarantees the “equal protection of the laws” to “any person,” Supreme Court doctrine has not endeavored to determine who does or does not count as a member of any particular race. U.S. Const. amend. XIV, § 1.

Moreover, *Shaare Tefila* and *Al-Khazraji* do not support a definition of any protected classification as immutable or ascertained at birth. Those cases define “*racial*” discrimination” while declining to refine the boundaries of racial group membership. *Al-Khazraji*, 481 U.S. at 609 (emphasis added) (quoting *Runyon v. McCrary*, 427 U.S. 160, 168, 174–75 (1976)); see *Shaare Tefila*, 481 U.S. at 617. The defendants in *Al-Khazraji* and *Shaare Tefila* argued that the Jewish and Arab plaintiffs were white citizens and so fell outside the protection of §§ 1981 and 1982. *Al-Khazraji*, 481 U.S. at 610–13; *Shaare Tefila*, 481 U.S. at 617–18. The Court rejected these arguments, refusing to cabin the language of these civil rights statutes to any

enumerated set of groups⁶ or to adopt any all-purpose definition of race based in “modern scientific theory” or “distinctive physiognomy.” *Al-Khazraji*, 481 U.S. at 613. Rather, the Court held that these statutes protected the principle that no one may be denied equality on the basis of “their ancestry or ethnic characteristics.” *Id.*

The Equal Protection Clause does not enumerate permissible classifications, define any protected classes, or immunize immutable classifications from heightened scrutiny. The requirement that any sex-based classification have a substantial relationship to the important interests it serves is necessary to fulfill the Equal Protection Clause’s promise that every person be treated as an individual.

⁶ The Idaho petitioners quote *Shaare Tefila* for the proposition that the question is what “group of people” Congress “intended to protect.” Br. for Idaho Pet’rs at 26 (No. 24-38) (quoting *Shaare Tefila*, 481 U.S. at 617–18). But it is the text of a civil rights statute that governs, not the expected applications of its drafters. *Bostock v. Clayton County*, 590 U.S. 644, 677–78 (2020). In any event, this reasoning has no bearing on the Equal Protection Clause, which protects “any person.” U.S. Const. amend. XIV, § 1.

CONCLUSION

The Court should affirm the judgments of the Fourth and Ninth Circuits and remand these cases for further consideration in accord with the proper level of scrutiny.

Respectfully submitted,

Benjamin Gould
Counsel of Record
Alison Chase
KELLER ROHRBACK L.L.P.
1201 3rd Ave., Ste. 3400
Seattle, WA 98101
206-623-1900
bgould@kellerrohrback.com

Jessica A. Clarke
USC GOULD SCHOOL OF LAW
699 W. Exposition Blvd.
Los Angeles, CA 90089

Counsel for Amici Curiae

APPENDIX

TABLE OF APPENDICES

APPENDIX – LIST OF AMICI	1a
--------------------------	----

APPENDIX – LIST OF AMICI*

Noa Ben-Asher, Professor of Law, St. John's University School of Law

Jessica A. Clarke, Robert C. and Nanette T. Packard Professor of Law, University of Southern California Gould School of Law

David S. Cohen, Professor of Law, Drexel University Kline School of Law

David B. Cruz, Newton Professor of Constitutional Law, University of Southern California Gould School of Law

Deborah Dinner, Dorothea S. Clarke Professor of Law, Cornell Law School

Aziz Huq, Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School

Courtney G. Joslin, Distinguished Professor of Law, UC Davis School of Law

Laura Lane-Steele, Assistant Professor, Joseph F. Rice School of Law

Holning Lau, Willie P. Mangum Distinguished Professor of Law, University of North Carolina School of Law

Naomi Schoenbaum, William Wallace Kirkpatrick Dean's Research Professor of Law, George Washington University Law School

* This brief presents the views of the individual signers. Institutions are listed for identification purposes only.

Scott Skinner-Thompson, Professor & Dean's Scholar, University of Colorado Law School

Brian Soucek, Martin Luther King Jr. Professor of Law, UC Davis School of Law

Deborah Widiss, John F. Kimberling Professor of Law, Indiana University Maurer School of Law