NO. 24-38

IN THE

Supreme Court of the United States

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; MADISON KENYON; MARY MARSHALL, et al.,

Petitioners,

v.

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL ARGUMENT SUMMARY

The Court has been holding this petition pending a decision in *United States* v. *Skrmetti*, No. 23–477. But that decision does not answer the questions presented here. Unlike *Skrmetti*, this petition addresses classifications that are indisputably based on sex. And it asks the Court to resolve a mature circuit split over whether the meaning of sex in equal-protection cases is biologically based and objective or perception-based and subjective. Pet.10–15.

Because this Court concluded in *Skrmetti* that Tennessee's law lacked sex-based classifications, nothing in *Skrmetti* resolves that split. Absent this Court's review, the circuits will remain divided "over whether a law that classifies based on sex discriminates against people who identify as transgender." Pet.10. The circuits will also remain divided over whether transgender identity qualifies as a quasi-suspect class, Pet.16–17, another question that the Court did not resolve in *Skrmetti* v. *United States*, 605 U.S. ___, 2025 WL 1698785, at *11 (June 18, 2025).

Accordingly, this petition presents the opportunity to resolve both these well-developed splits, and this Court should grant review. Whether designating sports teams based on biological sex violates the Equal Protection Clause is a critically important issue that has been roiling the lower courts, frustrating female student athletes, and confounding every level of government for years. A GVR, while possibly helpful to Idaho, would only delay the inevitable: no matter what the lower courts might rule on remand, these circuit splits would persist.

While this petition has been paused pending *Skrmetti*, the movement to protect girls' and women's sports has kept making progress. In recent months both the federal government and the NCAA have announced policies excluding male athletes from female competitions, and the number of states with laws like Idaho's has now reached 27.

But the Ninth Circuit and many other courts still deny female athletes a level playing field, requiring them to compete against biologically male athletes. As a result, women and girls have missed out on hundreds of medals, podium spots, and opportunities to compete in their own sports. The Court should grant certiorari and resolve these issues now.

ARGUMENT

I. Even after *Skrmetti*, a circuit split over whether sex can be subjectively defined in equal-protection cases remains unresolved.

This Court's cases have long regarded sex as an "immutable characteristic," *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973), defined by "our most basic biological differences," *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 73 (2001). Those differences "between men and women" are "real," *ibid.*, "enduring," "inherent," and "physical," and they "remain cause for celebration," *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (citation modified).

Despite the clarity of the Court's precedents on this point, the lower courts remain divided. The en banc Eleventh Circuit applies this Court's objective, biological understanding of sex to hold that a policy that distinguishes between "biological boys" and

"biological girls" is a "sex-based classification" subject to traditional intermediate scrutiny. *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022) (en banc).

In contrast, the Fourth, Seventh, and Ninth Circuits have all held that such laws discriminate against those who identify as transgender by treating "sex" as a subjectively defined term. Pet.10–12, 14 (discussing *Hecox* v. *Little*, 104 F.4th 1061 (9th Cir. 2024), *as amended* (June 14, 2024); *B.P.J. ex rel. Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024); *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); and *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017)). *Skrmetti* did not explicitly address—much less resolve—this ongoing split about the meaning of sex under the Fourteenth Amendment.

That split matters because it fundamentally changes the equal-protection analysis. If sex is objective, then biological males who identify as female are *not* "similarly situated" with biological females "in all relevant respects" because "biological sex *is* the relevant respect." *Adams*, 57 F.4th at 803 n.6 (emphasis added) (citation modified) (raising but not deciding this issue). That key point permeates the equal-protection inquiry, including how to select and apply the relevant standard of review. *E.g.*, *Michael M.* v. *Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion) (rejecting an equal-protection challenge because boys and girls were "not similarly situated" for the purposes furthered by the law in question); *Clark, By & Through Clark* v. *Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir.

1982) (finding sex separation in sports satisfied intermediate scrutiny). Bottom line, when sex is defined objectively, states that assign athletic teams by sex should prevail in equal-protection challenges.

Conversely, if sex is defined *subjectively*, such that biological males who identify as female are treated *as females* for equal-protection purposes, courts have concluded that these males *are* similarly situated with females. E.g., Pet.App.42a (relying on the district court's finding that it was "not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women"). That makes all the difference. *Ibid.*; accord *B.P.J. by Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542, 559 (4th Cir. 2024) (highlighting that biologically male athlete "presented evidence that transgender girls with her background and characteristics possess no inherent, biologically-based competitive advantages over cisgender girls when participating in sports").

Skrmetti did not explicitly address this split on the basic definition of "sex" in an equal-protection analysis. That conflict warrants this Court's immediate review. As the Seventh Circuit said two years ago, litigation over these issues "is occurring all over the country," but until this Court "step[s] in with more guidance than it has furnished so far," lower courts will "stay the course and follow" their own past decisions. *A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 764 (7th Cir. 2023). This Court can expect lower courts to do exactly that on the fundamental question of how sex should be defined for purposes of the equal-protection analysis. Even in a hypothetical world where the Ninth Circuit changes

course, the circuit split would merely move from 3–1 to 2–2. The Court should grant review and resolve that split and protect women's sports immediately.

II. After *Skrmetti*, a circuit split persists over whether gender identity and transgender identity are quasi-suspect classes.

The circuit split over the definition of sex is only one of two circuit splits implicated by this case. Courts have also split over "whether gender identity or transgender identity are quasi-suspect classifications that trigger intermediate scrutiny." Pet.16. "That important question has divided the Courts of Appeals," and since the Court did "not confront it" in *Skrmetti*, the Court "will almost certainly be required to do so very soon." *Skrmetti*, 2025 WL 1698785, at *34 & n.5 (Alito, J., concurring in part and in the judgment) (citation modified) (collecting cases, including the decision below here).

Two circuits, the Fourth and the Ninth, have held that gender identity and transgender identity are quasi-suspect classifications. Pet.16 (comparing the Fourth Circuit's decisions in *Grimm*, *B.P.J.*, and *Kadel* v. *Folwell*, 100 F.4th 122 (4th Cir. 2024) (en banc), with the Ninth Circuit's decisions in *Karnoski* v. *Trump*, 926 F.3d 1180 (9th Cir. 2019) (per curiam), and this case).

On the flip side, the Sixth and Tenth Circuits have held that they are not. Pet.16 (citing *Brown* v. *Zavaras*, 63 F.3d 967 (10th Cir. 1995), *Fowler* v. *Stitt*, 104 F.4th 770 (10th Cir. 2024), and *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023)). And the Eleventh Circuit in *Adams* expressed

"grave 'doubt' that transgender persons constitute a quasi-suspect class." 57 F.4th at 803 n.5; accord *Eknes-Tucker* v. *Governor of Ala.*, 80 F.4th 1205, 1230 (11th Cir. 2023).

In *Skrmetti*, the Court did not resolve that conflict. The Court concluded the case did "not raise that question because" Tennessee's law did "not classify on the basis of transgender status." 2025 WL 1698785, at *11. It classified based on age and medical use, *ibid.*, classifications not at issue here.

Until the Court resolves this issue, courts in some circuits "will inevitably be in the business of closely scrutinizing legislative choices" in "areas of legitimate regulatory policy—ranging from access to restrooms to eligibility for boys' and girls' sports teams." *Id.* at *27 (Barrett, J., concurring) (citation modified). And the results can be disastrous for the people affected, as the decision below proves. If states hope to preserve some semblance of a level playing field for women and girls, they must do it by subjecting those women and girls to intrusive blood draws to determine their "levels of circulating testosterone." Pet.App.28a, 42a.

Meanwhile, states in other circuits will remain free to pursue the "many valid reasons [they have] to make policy in these areas" so long as they select "a rational means of pursuing a legitimate end." *Ibid.* And so long as that disparity exists, women and girls living in states where courts have tied the legislatures' hands will continue to pay the price through lost athletic opportunities, intrusions into their private spaces, and so on.

III. Plenary review, not remand, is warranted here.

For multiple additional reasons, plenary review, rather than a GVR, is warranted here.

First, unlike in *Skrmetti*, the parties agree that Idaho's Save Women's Sports Act classifies based on sex. Cf. *Skrmetti*. 2025 WL 1698785, at *7–8. Second, unlike *Skrmetti*, Respondents here have argued that the Act's "prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals." 2025 WL 1698785, at *11. The Ninth Circuit agreed, holding that it "appears that the definition of 'biological sex' was designed precisely as a pretext to exclude transgender women from women's athletics—a classification that" this Court's decision in "*Geduldig* prohibits." Pet.App.35a.

Third, a GVR would have no chance of resolving the judicial disagreement over these issues. No matter whether the Ninth Circuit stayed the course or changed its mind, the two circuit splits implicated here would persist and require this Court's resolution—needlessly wasting valuable lower-court and party resources on remand.

Fourth, this case is an ideal vehicle to resolve the important equal-protection issues implicated here for all the reasons mentioned in the petition. Pet.29. The mootness risk that Respondents raised has not come to pass: Hecox has not applied for graduation and is currently enrolled in classes for fall semester.

And this is an especially good vehicle "when paired with the request for review in" *West Virginia* v. *B.P.J.*, No. 24-43, West Virginia's women's sports case. *Ibid.*

This case presents the equal-protection question, and that case presents the Title IX issue. This case involves an adult male in the higher-education context; that case involved a pre-pubertal male in the K–12 setting.

The cases are currently on the exact same track and ready to be resolved together this next Term. Cf. *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (the Court granted two petitions to address equal protection *and* Title VI claims in the affirmative-action context). If the Court GVRs both cases instead, they may not come back before the Court again at the same time or in similar postures, preventing the Court from addressing at once all the relevant legal issues in all the relevant educational settings.

Fifth and finally, the women and girls who are missing out on medals, podium spots, and opportunities to compete in their own sports deserve answers sooner rather than later. Given the percolation that already has occurred, granting, vacating, and remanding is not likely to add anything to this Court's ultimate analysis. On the other side of the ledger, the collegiate distance runner who's bumped off the podium will never get back the opportunity to celebrate her achievement in front of a stadium filled with her biggest supporters. The high-school girls' basketball player who gets cut from her team will never get back that season of learning and competing in the sport she loves. And the girls' volleyball player who suffers a serious injury will never get back the games she has to miss as a result.

These are not hypothetical injuries; these are harms that women and girls are experiencing right now. *E.g.*, Br. of 35 Athletic Officials and Coaches of Female Athletes, pp. 12–18; Br. of 102 Female Athletes, pp. 9–23.

And the ruling below places public schools and universities in the Ninth Circuit's nine states and two territories in an untenable position. On the one hand, they are bound by the court's ruling below, which, according to the panel, requires that athletic teams be divided based on circulating testosterone levels. Pet.App.97a–98a.

On the other hand, public universities are subject to the NCAA's recently amended policy prohibiting males from participating in women's sports, including males who identify as women. NCAA, *NCAA announces transgender student-athlete participation policy change* (Feb. 6, 2025), perma.cc/6842-5LHS (NCAA's new policy "limits competition in women's sports to student-athletes assigned female at birth only"). Federal courts should not be constitutionalizing "circulating testosterone" as the gauge for assigning athletic teams.

And public schools of every type risk a wholesale loss of federal funding if they follow the Ninth Circuit's order instead of the recent athletic directives from the United States. President Donald J. Trump, *Keeping Men Out of Women's Sports*, Section 1 (Feb. 5, 2025), perma.cc/VMK3-QQ25.

In sum, this is not the typical held case. A GVR would be pointless and cause continuing irreparable harm to countless women, girls, universities, and public schools. There is no time to lose.

* * *

By now, 27 states have passed laws to correct the injustice of male athletes competing against women and girls in their own sports. *LGBT Youth: Bans on Transgender Youth Participation in Sports*, Movement Advancement Placement (June 9, 2025), perma.cc/RA5J-BCXE. The issues presented here were not decided in *Skrmetti*, and a remand is unlikely to accomplish anything but more harm to women and girls. In these circumstances, the Court should promptly grant this petition and the one in *B.P.J.*, reverse the lower courts in both cases, and restore fair competition consistent with the recently announced policies of the NCAA and the United States.

CONCLUSION

For these reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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