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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

According to a recent UN report, "over 600 female athletes in more than 400 competitions [worldwide] have lost more than 890 medals in 29 different sports" to "males who identify as women."[1] And in Idaho, women recently lost an athletic opportunity on a smaller scale when Boise State's women's volleyball team chose to forfeit a match rather than risk injury competing against a dominant male player.[2] Several teams in other states have since followed suit.[3]

These are exactly the harms Idaho's law aims to address and the problems the Ninth Circuit's decision bars states from tackling. Although the injunction in this case applies only to Hecox, the Ninth Circuit's erroneous holdings are binding precedent in nine states. The Ninth Circuit now defines "sex" using a subjective multifactor test, and it treats statutes that define sex based on biology as intentional discrimination against people who identify as transgender. So state laws providing that only females may participate in women's sports trigger and fail intermediate scrutiny—or even rational basis review—because such laws somehow "undermine" Idaho's interest in fairness and equality for women. App.40a.

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[1] United Nations: Report of the Special Rapporteur, *Violence against women and girls, its causes and consequences* 5 (Aug. 27, 2024), https://bit.ly/3Yxsd5Q.

[2] Shaun Goodwin, *Boise State forfeits volleyball game against Mountain West team with transgender athlete*, IDAHO STATESMAN (Sept. 27, 2024), https://bit.ly/3BVTxll.

[3] Jo Yurcaba, *Four college volleyball teams forfeit against San José State over possible trans player*, NBC NEWS (Oct. 4, 2024), https://nbcnews.to/4faY1mq.

These holdings stop Idaho from enforcing its law and thwart similar laws passed to protect women's sports in Alaska, Arizona, and Montana.[4] And other states within the Ninth Circuit will be deterred from passing such laws at all.

These issues will not be resolved by *Skrmetti*. That case concerns neither the definition of sex nor the application of intermediate scrutiny to women's sports laws. And the questions presented can be cleanly answered in this case: they are legal issues requiring no further factual development, and the controversy remains live because Hecox cannot possibly graduate this school year.

There is no better time than now to protect women and girls on the field of competition and in the locker room. The Court should grant the petition here and in *State of West Virginia* v. *B.P.J.*, No. 24-43.

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[4] Alaska Admin. Code tit. 4, § 06.115(b)(5)(D) (2023); Ariz. Rev. Stat. Ann. § 15-120.02 (2022); Mont. Code Ann. § 20-7-1306 (2023).

ARGUMENT

I. The Ninth Circuit's erroneous decision presents an important and acknowledged circuit split on the definition of sex.

Hecox does not dispute that the circuits are divided over whether the meaning of sex is subjective for equal-protection purposes. Instead, Hecox argues that the split is not implicated because, according to Hecox, the Ninth Circuit did not adopt any particular definition of sex.

That argument is untenable—the subjective conception of sex that Hecox advanced below is integral to the Ninth Circuit's decision and irreconcilable with this Court's precedents. This Court should grant review promptly to address it.

A. The Ninth Circuit's decision hinged on a subjective definition of sex.

A subjective definition of sex—the subject of the circuit split—was essential to the Ninth Circuit's decision; the court could not have reached its holding without it. The decision below relied on the subjective definition when it chose its ideologically charged terminology, and again when it decided that Idaho's objective definition, based on biology, was not a "neutral and well-established medical and legal concept." App.29a. Without the subjective definition, the court could not have concluded that Idaho's objective definition was "designed precisely by the Idaho legislature to exclude transgender and intersex people." *Ibid.*

1. The terminology the Ninth Circuit used in its opinion shows that, from the outset, the court baked a subjective concept of sex into its decision and thus into the Fourteenth Amendment. The Ninth Circuit derived that subjective definition from Hecox's expert declarations. App.13a. Relying on the declarations—rather than this Court's precedents, see Pet.10—the Ninth Circuit characterized sex as merely "*assigned* at birth," rather than observed or ascertained. App.13a (emphasis added). And it reasoned that the so-called "assignment" can prove wrong if it at some later time does not "align" with an individual's controlling subjective sense of "gender identity." *Ibid.*

The Ninth Circuit then built its subjective definition of sex into the sex-based terms it used throughout its decision. For example, in speaking of "transgender women" and "transgender females," the Ninth Circuit referred not to people with female biological characteristics but the opposite: those with male biology who identify as female. *E.g.*, App.11a, 13a–16a, 20a–21a, 25a–28a, 31a–33a, 35a, 40a, 42a–48a, 50a–52a, 54a–55a, 57a, 59a, 61a. And in quoting the Act, the Ninth Circuit appended a "[sic]" to the law's reference to "'a man who identifies as a woman,'" effectively declaring in a published opinion that it is objectively wrong to conceive of such a person based on objective sex rather than as a "transgender woman." App.26a (quoting Idaho Code § 33-6202(11)). By so doing, the Ninth Circuit tarred the Fairness Act as "a categorical ban against transgender women" in women's sports, App.14a, and "facially discriminatory against transgender female athletes." App.32a. And the Ninth Circuit wrote this subjective definition of sex into the Fourteenth Amendment for all purposes.

2. That subjective definition of sex led the Ninth Circuit to dismiss as simplistic what this Court has long regarded as fundamental: "Physical differences between men and women" are "[i]nherent" and "enduring," and the "two sexes are not fungible." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (*VMI*) (cleaned up).

Idaho anchored its defense of the Fairness Act in the objective, biological understanding of sex that this Court has applied and the Fourteenth Amendment's ratifiers understood. But the Ninth Circuit declared that definition "an oversimplification." App.30a. Resting again on Hecox's declaration (based on guidelines prepared by an advocacy organization), the Ninth Circuit said defining sex based on biology alone "can cause confusion." *Ibid.* (quoting Hecox's expert's report). So the court replaced that objective definition with Hecox's view that sex is determined by a long list of factors that includes "gender identity," a subjective trait that is "not always aligned" with biology. *Ibid.* What's more, the Ninth Circuit clearly considered subjective gender identity dispositive—it did not acknowledge *any* situations in which objective, biological characteristics could override it.

Armed with amicus briefs by advocacy organizations, the Ninth Circuit then cast aside the "original meaning" of sex that prevailed at the Fourteenth Amendment's ratification (and for centuries before and after that). See *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 271–72 (2022). In the Ninth Circuit's telling, that historical meaning was not relevant because the ratifiers "would have had no concept of what 'endogenously produced testosterone levels' meant" or understood how genetics purpor-

tedly "influence[ ] sex." App.29a n.9. The Ninth Circuit then used the purported lack of scientific knowledge in 1868 to justify ignoring that original meaning. The court replaced that historical understanding with a modern, subjective conception completely foreign to the Amendment's ratifiers.

3. Having rejected the historical meaning of sex, the Ninth Circuit concluded that the Idaho Legislature's use of the objective definition was evidence of intentional discrimination—mere "pretext to exclude transgender women from women's athletics." App.35a. The Ninth Circuit held that the Act's objective definition of sex "functions as a form of '[p]roxy discrimination,'" because its "'seemingly neutral criteria'"—i.e., biological features—"'are so closely associated'" with transgender status that they amount to facial discrimination. App.33a (quoting *Pac. Shores Props., LLC* v. *City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013)). The Ninth Circuit cited the Fourth Circuit's decision on these issues, App.32a, which held that the only reason to use a biological definition of sex is "to exclude transgender girls from the definition of 'female.'" *B.P.J. ex rel. Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542, 556 (4th Cir. 2024).

In sum, the Ninth Circuit held that (1) an objective, biological definition of sex is discriminatory per se, and (2) the Fairness Act's use of immutable biology is unfair because "most" medical interventions to affirm gender identity "will not or cannot alter the characteristics" relevant to an objective definition of sex. App.27a. So in the Ninth Circuit, the Equal Protection Clause mandates a subjective definition of sex based on gender identity.

B. The Ninth Circuit erred in adopting and applying a subjective definition of sex.

Hecox tries to dodge the Ninth Circuit's subjective definition of sex but does not attempt to defend it. That's because it is indefensible.

1. The Ninth Circuit's subjective definition of sex is contrary to the legal meaning of the term—as binary, inherent, and biological—that has persisted throughout the Court's modern jurisprudence. *E.g.*, *VMI*, 518 U.S. at 533; *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973); *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 73 (2001). Yet as just explained, it permeates every aspect of the court of appeals' decision, including its conclusion that the law intentionally discriminates against those who identify as transgender. The Ninth Circuit did not simply repudiate this Court's objective definition of sex; it deemed that definition itself to be evidence of unlawful discrimination. The Ninth Circuit's decision cannot stand apart from its subjective conception of sex.

As a purported alternate ground, Hecox points to the Ninth Circuit's supposition that Idaho passed the Fairness Act "'at least in part "because of," not merely "in spite of," its adverse effects upon' girls and women who are transgender." Opp.15 (citing App.26a). But none of the findings or statements cited by the Ninth Circuit even mentioned the word transgender, much less a desire to exclude people who identify as transgender from participating in sports.

Instead, those statements referred to male athletes and their unfair competitive advantage: "a man … who identifies as a woman and is taking cross-sex hormones 'ha[s] an absolute advantage' over

female athletes." App.26a (quoting Idaho Code § 33-6202(11)). If the law's purpose was to exclude people who identify as transgender, it did a poor job of it, since the law allows women who identify as male to compete on men's teams. The Ninth Circuit lacked any adequate answer to this clear counterexample, yet it still found purposeful discrimination.

2. Neither does Hecox account for the many flaws in the Ninth Circuit's intermediate scrutiny analysis. Hecox does not dispute the Act's animating interest in protecting fairness: that "it is neither myth nor outdated stereotype that there are inherent differences" between males and females and that "those born male … have physiological advantages in many sports." *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., specially concurring). Nor does Hecox dispute that Idaho could constitutionally enact the legislation without showing that harm had already occurred in-state. Pet.23. Hecox also does not address the Ninth Circuit's error in targeting its intermediate scrutiny analysis on Hecox only—that is, focusing on "the government's interests in an individual case," rather than "the overall problem the government seeks to correct." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989).

And while Hecox denies that the Ninth Circuit imposed a narrow tailoring requirement, a demand that states assign sports teams based on levels of circulating testosterone instead of sex is exactly that. App.28a. So when a public school in the Ninth Circuit holds soccer tryouts, it is obliged to test every student's circulating testosterone and assign teams on that basis instead of sex.

3. Finally, rather than following this Court's statutory decision in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), the Ninth Circuit's holding contradicts it. *Bostock* used the objective meaning of "sex" in holding that "to discriminate against a person for being … transgender" is necessarily "discriminating against that individual based on sex." *Id.* at 660. Here, the Ninth Circuit erroneously reasoned the opposite: that to classify based on sex is to classify based on transgender status by proxy. App.33a. If classifying according to a biological definition of sex discriminates against transgender identity, then Title VII's provisions themselves discriminate against transgender status rather than protecting it. See *Bostock*, 590 U.S. at 655 (assuming a biological definition of sex under Title VII). But *Bostock*, of course, did not hold that Title VII is at war with itself. This conflict, too, warrants this Court's review.

II. Review of these exceptionally important issues is warranted here and now.

A. This case is an excellent vehicle, and there is no need for further percolation.

Immediate review is necessary to address the Ninth Circuit's rewrite of the Fourteenth Amendment and to protect women and girls who are harmed by it in sports and other contexts. At the same moment that national and international authorities are calling attention to the dangers of allowing men to compete in women's sports, the Ninth Circuit's decision prevents states from doing anything about it. This Court should grant certiorari now and restore state legislatures' authority to craft solutions to this pressing problem.

Hecox suggests review may be too late because Hecox "will complete college in a matter of months." Opp.21. But Hecox does not name any graduation date, and the credits Hecox needs to earn a degree cannot possibly be completed before Boise State's summer term ends next August. Cf. *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000) (gamesmanship will not moot cases). Nor is there merit to Hecox's suggestion that it is also too *soon* to review before a full record and trial on the merits. The critical matters on which the circuits are split are legal, not factual. And no development will change the Ninth Circuit's redefinition of "sex" in the Fourteenth Amendment.

Hecox also says the Court should wait to address this split in a case about bathroom policies or after a deeper split materializes in the specific context of sports. Opp.12–13. But this Court has already twice declined to grant merits review in bathroom cases. *Gloucester Cnty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 580 U.S. 1168 (2017); *Metro. Sch. Dist. of Martinsville* v. *A.C.*, 144 S. Ct. 683 (2024). And given the expert and factual support for male and female athletic differences, the context of women's sports presents an excellent vehicle to review these questions—particularly given the petition involving the Fourth Circuit's Title IX holding in *B.P.J.* Pet.29.

As long as the Ninth Circuit's decision remains precedential, Idaho and three other Ninth Circuit jurisdictions cannot enforce their laws without risking liability. See Alaska Admin. Code tit. 4, § 06.115(b)(5)(D) (2023); Ariz. Rev. Stat. Ann. § 15-120.02 (2022); Mont. Code Ann. § 20-7-1306 (2023). Delay is untenable.

B. The Court should grant the petition now rather than hold it for *Skrmetti*.

Hecox suggests the Court should hold the petition pending its resolution of *Skrmetti*. But *Skrmetti* does not present the Court with an opportunity to fix the Ninth Circuit's rewrite of the Fourteenth Amendment or to decide the unique equal-protection considerations at issue in the athletics context. A hold would further delay resolution of this critical question—by at least a year, or, in the case of a subsequent remand, by *three* years—needlessly subjecting female athletes to ongoing harm.

Hecox contends a hold is appropriate because *Skrmetti* will likely decide whether classifications based on transgender identity trigger intermediate scrutiny. But even if *Skrmetti* concludes that they do not, there is no "reasonable probability" that such a holding would cause the Ninth Circuit to reconsider its decision. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). In the Ninth Circuit's view, the Fairness Act cannot survive heightened scrutiny *or* rational-basis review because its means "*undermine*" Idaho's interests in "furthering women's equality and promoting fairness in female athletic teams." App.40a (emphasis added). The Ninth Circuit concluded that "the Act perpetuates historic discrimination against both cisgender and transgender women by categorically excluding transgender women from athletic competition." App.43a. The court went even further to indicate that it believes Idaho lacks a legitimate state interest, suggesting (incredibly) that the State's "true objectives" are to "convey a message of disfavor toward transgender women and girls." App.50a–51a (cleaned up).

Skrmetti provides no opportunity for this Court to correct this egregiously flawed means-end analysis in the athletics context. Hecox apparently concedes as much and instead advocates for further percolation. But such percolation harms women and girls now and makes no sense when the closely related Title IX issue concurrently before this Court, see *West Virginia* v. *B.P.J.*, No. 24-43, is undeniably ripe for this Court's review. The two issues are birds of a feather in legal challenges to laws protecting women's sports. They should be resolved together to preserve both judicial resources and the equal playing field women have fought so hard to secure.

Holding the petition will neither aid the ultimate resolution of this case nor serve the interests of justice. There is no good reason for this Court to delay its inevitable review of an issue of such widespread importance, especially when doing so would prolong the substantial and ongoing harm inflicted on young female athletes by the Ninth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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