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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Sex is the easiest, safest, fairest, and most administrable way to assign sports teams. That's because sex-based classifications in sports are based on real and enduring physical differences between the sexes.

Hecox wants to force Idaho—and by extension, every state—to instead assign sports teams based on gender identity, insisting that the biological line discriminates based on transgender status. That's wrong. Nothing in the Equal Protection Clause requires Idaho to treat males who identify as women as if they were female, in sports or elsewhere. To the contrary, as Hecox does not contest, the Court's equal-protection cases have always assumed what Idaho's Fairness in Women's Sports Act recognizes by statute: that sex is biological and immutable.

Hecox tries to transform intermediate scrutiny into a student-by-student determination of supposed fairness. That's not how equal-protection challenges work. A sex classification need only be substantially related to an important interest; it need not perfectly advance that interest in every instance. And a sex classification does not become a transgender-status classification simply by failing to make exceptions based on gender identity. The Equal Protection Clause requires equal treatment, not special treatment based on transgender status.

These points are dispositive, and none of them depends on facts that were not in the record in 2020. The Court should uphold Idaho's decision to protect women's sports.

ARGUMENT

I. Hecox has not carried the burden to show this case is moot.

A. The Court can grant Hecox effectual relief.

As the party alleging mootness, Hecox "has the heavy burden of establishing" that the Court "lack[s] jurisdiction." *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983) (citation modified). That means showing "it is impossible for [this Court] to grant any effectual relief." *Gutierrez* v. *Saenz*, 606 U.S. 305, 320 (2025) (citation modified). Hecox has not carried that heavy burden. To the contrary, if this Court rules in Hecox's favor, Hecox won't have to challenge the Act again to play women's sports at BSU. That is effectual relief.

Hecox insists this case is moot because Hecox has decided to stop playing women's sports, "promised never again to challenge" the Act, and insisted judicial estoppel would bar a new suit if the Court dismisses this one. Resp.Br.17 (citing *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001)). But judicial estoppel cuts the other way. That's because Hecox previously swore to the opposite intent before the Ninth Circuit to *avoid* a dismissal for mootness: "I intend to play for the BSU's Women's Club Soccer Team … *through the remainder of my time at BSU*." COA.Dkt.164-2 ¶ 21 (emphasis added). Having defeated mootness based on a promise to *keep* playing women's club soccer, COA.Dkt.190 at 4–6 & 5–6 n.1, Hecox cannot moot this case by "assum[ing] a contrary position" now, "especially if it be to the prejudice of" Idaho. *New Hampshire*, 532 U.S. at 749 (citation omitted).

The district court correctly recognized this when it struck the purported Notice of Voluntary Dismissal: Hecox "could still change [Hecox's] mind" about playing women's sports again. D.Ct.Doc.153 at 11 n.11. And that's especially true given how many times Hecox's plans have changed. Resp.to.Sugg.Mootness 2–4, 8–9. Changing narratives are the opposite of enduring assurances.

Hecox remains enrolled at BSU and has explained how easy it is to join a club team. D.Ct.Doc.97-1 ¶ 25; COA.Dkt.233 at 9. And this Court's cases instruct that parties retain a stake in a case if they could have a change of heart following a favorable ruling. For example, in *Chafin* v. *Chafin*, this Court held a custody dispute "very much alive" even though it appeared from the mother's statements that she might not comply with an order to return her child. 568 U.S. 165, 173–76 (2013). And in *City of Erie* v. *Pap's A.M.*, the Court reached the same result regarding a closed nude-dancing business because the owner "could again decide to operate a nude dancing establishment," and it wasn't "absolutely clear" he wouldn't change his mind about retirement. 529 U.S. 277, 287–88 (2000). The Court reached that conclusion even though the building had been "sold to a real estate developer," and the respondent's sole shareholder had sworn off "'any intention to own or operate a nude dancing establishment in the future.'" *Id.* at 302 (Scalia, J., concurring in the judgment) (quoting sworn affidavit).

In sum, "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured." *Chafin*, 568 U.S. at 175. Hecox's conflicting promises to this Court and the courts below cannot meet Hecox's heavy burden to show mootness.

B. This Court's cases distinguish genuine abandonment from tactical retreat.

Hecox says that a case is moot "when a plaintiff abandons their claims." Resp.Br.17 (citing *Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988)). But that's not true if there is a "reasonable" basis "not to credit" the plaintiff's alleged abandonment based on the plaintiff's own statements and "past actions." *City of Erie*, 529 U.S. at 304 n.3 (Scalia, J., concurring in the judgment). Hecox overlooks the "critical eye" the Court applies to "postcertiorari maneuvers" that appear "designed to insulate a decision" from review. *Knox* v. *Service Employees*, 567 U.S. 298, 307 (2012). For example, in *City of Erie*, the Court was "influenced" by the respondent's failure to raise mootness at the cert stage. 529 U.S. at 288. And the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction" further counseled against mootness. *Ibid.*

Here, the district court worried about manipulation when it rejected Hecox's voluntary-dismissal attempt. D.Ct.Doc.153 at 11 n.11. And this Court need not accept Hecox's declaration either. An unaccepted offer of judgment does not moot a case. *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 156 (2016). Nor does an unaccepted declaration. Otherwise, the respondent in *Dobbs* could've mooted the case by filing a post-leak declaration disclaiming an intent to perform abortions in Mississippi after 15 weeks. If that were enough, every case would be capable of repetition while evading this Court's review.

The Court should protect its post-certiorari jurisdiction, hold that this case is not moot, and reach the merits of the Ninth Circuit's ruling.

II. Idaho's Fairness in Women's Sports Act is a constitutional, sex-based classification.

A. Rational-basis review applies to Idaho's definition of sex.

Under equal-protection analysis, the Act draws a single sex-based classification—biological females may play in women's sports; biological males may not. Idaho Code § 33-6203(2). And both parties agree that Idaho may assign sports teams by sex. Resp.Br.48 ("the longstanding pedigree of sex separation in sports … is not at issue here").

Instead, Hecox brings an underinclusiveness challenge, objecting to the Act's definition of sex. Hecox tries to deny this. Resp.Br.38. But Hecox purports to "challenge[] the fact that" the Act assigns athletes based on "'reproductive anatomy, genetic makeup, or normally endogenously produced testosterone levels'"—rather than "gender identity." *Ibid.* (quoting Idaho Code § 33-6203(3)). That's a challenge to the Act's definition of sex: Hecox wishes the Act defined sex more expansively to treat certain testosterone-suppressing males as female. Resp.Br.41 (complaining that the Act "excludes circulating testosterone … from its definition of sex").

This Court has never suggested a plaintiff could trigger heightened scrutiny by challenging a statute's definition of sex without challenging the sex-based classification itself. So rational basis applies to Hecox's underinclusiveness challenge. Pet.Br.27–30; Alabama.Br.9–18. The Act's definition fits the longstanding and scientific understanding of the term. Do.No.Harm.Br.3–7. And it tracks this Court's cases and the understanding at the Fourteenth Amendment's ratification. Pet.Br.22–27. That is enough.

B. Hecox's as-applied theory fails.

Hecox also misapplies intermediate scrutiny. According to Hecox, barring males from women's sports fails intermediate scrutiny as applied to males who identify as women and who "have no meaningful athletic advantage that would warrant exclusion." Resp.Br.46. That misapplication of intermediate scrutiny would require student-by-student sports-team assignments focused on individual hormone levels or physical abilities.

Fundamentally, that theory would convert intermediate into strict scrutiny, replacing the substantial-relationship test with a person-by-person least-restrictive-means requirement. Contrary to *Nguyen*, Hecox's version of intermediate scrutiny would require "that the statute under consideration must be capable of achieving its ultimate objective in *every* instance," *Tuan Anh Nguyen* v. *I.N.S.*, 533 U.S. 53, 70 (2001) (emphasis added), allowing any overbreadth to lead to partial invalidation. That would destroy legitimate sex-based distinctions in every context.

1. Intermediate scrutiny considers the law as a whole, not its effect in specific cases.

Hecox's theory of as-applied intermediate scrutiny is wrong. Intermediate scrutiny focuses on the overall problem targeted, not individual cases. Pet.Br.50–53. A long line of this Court's cases shows that "the State does not have to engage in perfect line-drawing to advance its interests." Pet.Br.50–52 (collecting cases). And Hecox's attempts to distinguish those cases fail. Resp.Br.46–47.

For most of them, Hecox highlights supposed distinctions without explaining why any make a difference here. Resp.Br.47. For example, Hecox highlights *Kahn*'s reliance on the "large leeway" states enjoy in exercising their taxing powers. *Id.* (quoting *Kahn* v. *Shevin*, 416 U.S. 351, 355 (1974)). But the states have equally "great latitude" to exercise their police powers to protect their citizens, which is what Idaho has done here. *Gonzales* v. *Oregon*, 546 U.S. 243, 270 (2006).

Similarly, Hecox says what "made the difference" in *Nguyen* was that the statute gave men "an opportunity to show that they were, in fact, similarly situated to women." Resp.Br.46–47. But the Court discussed that in a separate subsection only *after* holding that "the means adopted by Congress [were] in substantial furtherance of important governmental objectives." *Nguyen*, 533 U.S. at 70. That fact did not drive the Court's analysis.

The same goes for *Michael M.* Hecox says that case is distinguishable because the Court "rejected a facial challenge to a criminal statute." Resp.Br.47. But the plurality there expressly rejected the petitioner's claim "that the statute [was] unconstitutional *as it [was] applied to him*." *Michael M.* v. *Superior Ct. of Sonoma Cnty.,* 450 U.S. 464, 475 (1981) (plurality) (emphasis added). And Hecox doesn't explain why the criminal nature of the case should affect the analysis.

None of the cases Hecox cites support Hecox's as-applied theory of intermediate scrutiny either. In *Caban*, the challenged statute allowed unmarried mothers, but not unmarried fathers, to stop a child's adoption by withholding their consent. *Caban* v. *Mohammed*, 441 U.S. 380, 393 (1979). This violated

equal protection because the law's sex-based line was based on "overbroad generalizations" about mothers and fathers. *Id.* at 394. Specifically, the Court rejected (1) the "apparent presumption" that "maternal and paternal roles are … invariably different in importance," *id.* at 389, and (2) the suggestion that there is a "profound difference between the affection and concern of mothers and fathers for their children," *id.* at 392; accord *Sessions* v. *Morales-Santana*, 582 U.S. 47, 63–64 (2017) (finding unconstitutional a law that was based on "stunningly anachronistic" and "overbroad generalizations" and "stereotypes about women's domestic roles") (citation modified). At no point did *Caban* suggest that, to survive intermediate scrutiny, laws must be substantially related to a state's interests in "all" applications. Resp.Br.46. Instead, it used the facts of the plaintiff's case to "illustrate[]" the problems with the statute generally. 441 U.S. at 391, 394.

Lehr v. *Robertson* does not support Hecox either. 463 U.S. 248 (1983). Contra Con.Law.Scholars.Br.19–20. *Lehr* shows that a litigant can *lose* an as-applied equal-protection challenge if his specific circumstances show that applying the classification to him substantially advances the state's important interest. 463 U.S. at 267–68. That sinks the case of a male like Hecox who identifies as female but enjoys the benefits of male puberty. But *Lehr* doesn't show that a litigant can *win* an as-applied equal-protection challenge based on a mismatch with his specific circumstances if the substantial relation exists more broadly. Otherwise, statutes would fail intermediate scrutiny for failing to achieve their "ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. And that is not the law.

Finally, nothing in *VMI* requires a different analysis. Hecox takes various quotes from *VMI*'s remedy discussion out of context, Resp.Br.45, but *VMI*'s merits analysis rejected the exclusion of women from VMI because it served an illegitimate goal: to protect VMI's "adversative method of training" from "typically female tendencies," like thriving "in a cooperative atmosphere." *United States* v. *Virginia*, 518 U.S. 515, 540–41 (1996) (citation modified).

So *VMI* was resolved *based on sex stereotyping*; it did not reach the tailoring prong of intermediate scrutiny, much less mandate an as-applied tailoring analysis. Because Virginia relied on impermissible sociological stereotypes and generalizations, it did not provide an "exceedingly persuasive justification." *Id.* at 546; *id.* at 564 (Rehnquist, C.J., concurring) (citation modified) ("agree[ing] with the Court that [Virginia's] justification does not serve an important governmental objective").

Idaho's Act does not depend on sociological stereotypes. It recognizes the real "physical differences between men and women" that are "enduring." *Id.* at 533. *VMI authorized* schools to recognize these differences, approving alterations that "afford members of each sex privacy" in "living arrangements" and that "adjust aspects of the physical training programs." *Id.* at 551 n.19. Hecox's reading of *VMI* would make these authorized alterations improper; turn enduring differences into cultural stereotypes; and force schools to admit males into women's showers, locker rooms, and sports. That would foreclose the very equal opportunity for women that *VMI* ensured.

2. Intermediate scrutiny does not depend on the preexisting policies of private athletic associations.

Hecox briefly suggests a narrower version of the intermediate-scrutiny argument, insisting that the substantial-relationship test should not consider the law's effects on all male athletes but only male athletes *who were previously allowed in women's sports under preexisting NCAA policies*. Resp.Br.39. Hecox cites no authority for this novel approach.

During this litigation, the NCAA has had three different rules: (1) the permissive rule that existed when Hecox sought an injunction, (2) the rule of deference to the governing bodies for specific sports, and (3) the current rule matching Idaho's statute. Resp.Br.4; Pet.Br.14, 49. Under Hecox's argument, each of these rules would require a new substantial-relationship analysis as different sets of athletes were barred by each rule. That's backwards. The validity of the NCAA's rules and school policies depends on state and federal law—not the other way around.

3. The law passes intermediate scrutiny even as applied to Hecox.

Hecox repeatedly claims to have "circulating testosterone levels typical of cisgender women" but cites no evidence to support that factual claim. Resp.Br.49; see also Resp.Br.i, 2, 40, 43. The single cite Hecox gives, Resp.Br.40, says only that Hecox "receive[d] hormone therapy," Pet.App.48a. It does not say Hecox *achieved* typical female levels.

The evidence shows the opposite. When the preliminary injunction was filed, Hecox's circulating testosterone level was allegedly "*almost* compliant with the rules for women in the Olympics," which, at the time, set a maximum of 10 nmol/L. J.A.208 (emphasis added), 233. According to Hecox's own expert, the "typical female range" for circulating testosterone is "at or below 1.7 nmol/L." J.A.233–34. So Hecox's "almost compliant" testosterone was not "typical" of women's levels. J.A.208. It was at least six times higher.

Hecox's results are not unusual. In a study relied on by Hecox's expert, only one quarter of males on testosterone suppression were able to reliably reduce their testosterone to typical female levels. Pet.Br.10. So even among the male athletes whom the NCAA allowed to compete in women's sports because they had completed a year of testosterone suppression, at least three-quarters likely retained an unfair testosterone advantage that Idaho had an interest in prohibiting.

4. Hecox's novel theory of intermediate scrutiny has drastic consequences.

Hecox's misapplication of intermediate scrutiny would end sex-designated sports teams. That's because males who identify as female are not the only ones who might claim they "have no meaningful athletic advantage that would warrant exclusion." Resp.Br.10. Short males, obese males, males with chronic illness or disabilities, and simply unathletic or untalented males—all of whom could compete with women without undermining Idaho's interests in fairness and safety—could likewise argue that they are being excluded based on their sex.

From a practical perspective, Idaho cannot easily make such case-by-case determinations. Hecox says the Court doesn't need to worry because *all* males who identify as women face unique, stigmatic harm when they can't play female sports that other males don't face. Resp.Br.41–42. But that argument ignores the challenges disabled or unathletic males experience. And it ignores that the Constitution treats all such subjective harms the same because it allows sex-based lines when biological differences matter.

III. The Act is not an unconstitutional transgender-status classification.

A. The Act does not facially classify based on transgender status.

Hecox says "the Act is not neutral on its face" concerning transgender status. Resp.Br.27. But Hecox does not argue that the Act expressly mentions transgender status or that its application "turns on" transgender status. Cf. *United States* v. *Skrmetti*, 605 U.S. 495, 511–12 (2025) (limiting the Court's facial analysis to the classifications appearing in the statute's text). Instead, Hecox offers two novel facial-classification arguments. Both fail.

First, Hecox says the Act classifies facially because it draws lines based on the biological meaning of sex rather than on levels of circulating testosterone. Resp.Br.24. Hecox says that has the effect of excluding males who identify as female. *Ibid.* But all that shows is that the Act classifies based on sex and *not* gender identity: the Act excludes males "regardless of" their gender identity. *Skrmetti*, 605 U.S. at 511. It "does not exclude any individual … on the basis of transgender status." *Id.* at 518.

Moreover, Hecox is wrong to suggest that Idaho specially chose its definition of sex only to exclude biological males who identify as female. Resp.Br.24–26. The Act's definition of sex is the ordinary one—the one that comports with the traditional and scientific understanding of the term and aligns with how this Court has uniformly used it. Pet.Br.22–27.

It is telling that Hecox has not offered *any* definition of sex that would include males who identify as female. Hecox relies on the amicus brief cited by the Ninth Circuit that says sex "encompasses the sum of several biological attributes," Pet.App.30a, to suggest that Idaho could have defined sex to turn on circulating testosterone levels. But Hecox does not cite a single source that defines sex based on that fluctuating trait.

Second, Hecox tries to prove a facial classification by again pointing to private athletic-association policies. According to Hecox, because NCAA and IHSAA policies in 2020 already excluded male athletes who identify as male from female sports teams, the Act's practical effect was only to exclude men who identify as women. Resp.Br.25. That's a disparate-impact theory—not a facial classification. And those policies have no bearing on the law's facial classifications, especially now that the NCAA and IHSAA disallow males' participation in women's sports, regardless of gender identity. Pet.Br.49 (noting NCAA policy); Michael Lycklama, *Following Trump's order, IHSAA bans transgender athletes from girls sports*, Idaho Statesman (Apr. 9, 2025), perma.cc/9T28-5GSF. It can't possibly be the case that the current status of shifting background policies determines whether a statute discriminates on its face.

B. The Act does not implicitly classify based on transgender status.

Hecox rightly disclaims any theory of proxy discrimination against transgender status. Resp.Br.27–28. The record proves the Act's purpose is to protect women. Pet.Br.35. That's why the Act's findings focus on men's inherent competitive advantage, Idaho Code § 33-6202(1)–(5), (8)–(10), (12), and the Act mentions hormone therapy and puberty blockers only to say they do not negate that advantage, *id.* § 33-6202(11).

Representative Barbara Ehardt's legislative testimony reinforces this reading. The Act was "designed to do one thing"—"protect opportunities for girls and women in sports," lest they become "spectators in [their] own sports." J.A.105. "[T]his is not about identification or how we feel," it is about the "physical advantages the boys and men have" that make competition against women unfair. J.A.109.

Hecox makes little effort to show otherwise. Hecox recites the Ninth Circuit's conclusions about legislative history, Resp.Br.26 (citing Pet.App.26a–27a), but those gloss over the Act's clear purpose to protect women. And while Hecox makes much of the Act's single reference to the word "transgender," Resp.Br.26, that word appears only in the law's citation of a scientific article explaining how even hormone therapy does not eliminate the male advantage. Idaho Code 33-6202(11) (citing Tommy Lundberg et al., *Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen*, Karolinska Institutet (Sept. 26, 2019)). The objective of the law is to protect women, not to discriminate based on transgender status.

Even the most generous reading of the record for Hecox suggests only that the Act's "adverse consequences" on men who identify as women were "volitional" and "foreseeable"—a showing that does not prove purposeful discrimination. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 278 (1979). And that makes sense given the emerging national awareness, even in 2020, that males identifying as women had begun taking women's athletic opportunities.

Nor can Respondents distinguish *Feeney*. Just like the law in *Feeney* classified based on veteran status to protect veterans (even though legislators knew it would disparately affect women), the Act here classifies based on sex to protect women (even though legislators knew it would disparately affect men who identify as women). This "awareness of consequences" is not the same as intent to impose "adverse effects." *Id.* at 279. Contra Resp.Br.27–28. And simply referring to the Act's effect on men who identify as women proves only awareness of consequences, not an invidious intent to discriminate. Otherwise, every law with a sex classification would qualify as transgender discrimination—a result *Feeney* forecloses.

C. Transgender status does not meet any of the criteria for recognizing a new quasi-suspect class.

Quasi-suspect classes first have to be classes, i.e., sharing enough distinguishing features to be a discrete group. If they clear that hurdle, they also must be victims of de jure discrimination—unable to defend themselves through the political process and, for that reason, in need of special judicial protection. Hecox cannot satisfy the high burden of showing these requirements are satisfied here.

1. People who identify as transgender are not a discrete group.

Hecox says that people who identify as transgender share "obvious, immutable, or distinguishing characteristics that define them as a discrete group." Resp.Br.32 (quoting *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987)). "Specifically, they share the common trait of having a gender identity that does not align with their birth sex." *Ibid.* But this supposed "common trait" is not obvious, immutable, or distinguishing; it hardly even qualifies as a trait.

To begin, it is defined in purely negative terms—all people with any gender identity *except* the one that matches their biology. Hecox does not contest that people have claimed many dozens of gender identities, including "non-binary" and "fluid or unfixed." Pet.Br.23. Within that spectrum of innumerable self-selected identities, there is no reason to assume a man adopting a fluid identity in college but keeping male pronouns has anything meaningful in common with a woman who has identified as male since before puberty. That shows the proposed group is the opposite of "discrete."

Further, unlike any suspect or quasi-suspect classification the Court has ever recognized, transgender status depends on a person's subjective internal impressions—the "*sense* of being male, female, neither, or some combination," as the Ninth Circuit put it. Pet.App.13a (citation omitted). That makes gender identity the very opposite of "obvious" and "distinguishing." According to Hecox, it is secret unless disclosed and unfalsifiable once asserted. Resp.Br.33–34.

As for immutability, Hecox admits transgender status is not ascertainable at birth and does not "carry an obvious badge" of identity. Resp.Br.33–34. Hecox also admits that some who identify as transgender later detransition, a concession Hecox tries to limit by insisting (without evidence) that detransition is rare. Hecox's only attempt to show immutability is to quote the Ninth Circuit's speculation that transgender identity has "some biological explanation." Resp.Br.32–33. But Hecox concedes that no "specific cause" has "been established," and that transgender status is not "absolute[ly]" immutable. Resp.Br.32–33.

Since these factors aren't satisfied, Hecox says they're unnecessary because some classes lack them. These arguments are wrong: illegitimacy is both ascertainable at birth and immutable, *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972); *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 360 (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ, concurring in part); gender identity lacks the historical protection that religion enjoys, see *Hassan* v. *City of New York*, 804 F.3d 277, 299 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (surveying cases); and "[a]liens as a class are a prime example of a 'discrete and insular' minority," *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) (citation omitted).

If a proposed class is not obvious *and* not immutable *and* not ascertainable at birth *and* is determined by a subjective internal "sense," then it is not a discrete class at all. So even if none of these were disqualifying standing alone, zero plus zero plus zero plus zero still equals zero. Here, membership in Hecox's proposed suspect class lacks the stability and commonality necessary to qualify as a judicially administrable class.

Finally, Hecox's raw-numbers argument—that "trans-gender individuals are a 'discrete' minority" because they are "roughly one percent of the population," Resp.Br.32—ignores that "discrete" means "[i]ndividual; separate; distinct." Black's Law Dictionary (12th ed. 2024). The question is how separate and distinct the group is—the percentage of the population is meaningless.

2. Transgender status does not deprive people of political power.

Unlike women, those who identify as transgender have always been able to vote, hold office, and participate in the political process. Those are the most relevant factors for determining whether a group has political power for quasi-suspect class analysis—not whether the group is a majority or always succeeds in enacting its preferred policies. *Skrmetti*, 145 S. Ct. at 1862 (Alito, J., concurring). If mere lack of political success or underrepresentation created a quasi-suspect class, there would be many more such classes.

Overstating the transgender movement's political failures, Hecox claims that, "[i]n 2024, 691 bills targeting transgender individuals … were introduced across forty-three states and the federal legislature." Resp.Br.35 (quoting E. A. Zott, Office Politics: Green v. Finkelstein's Consequences for Trans Employees, 54 Stetson L. Rev. 597 (2025)). Hecox does not explain the criteria by which the bills were classified as "targeting transgender individuals," *ibid.*, and many cannot fairly be described as targeting anyone—such as bills protecting religious freedom for foster parents, *e.g.*, Ark. HB 1669, perma.cc/Z3PB-E4JM.

Hecox also does not mention that (according to Hecox's own source), of the 691 "targeting" bills introduced, 643 of them (more than 93%) were successfully defeated. Those numbers exhibit tremendous political power, not a lack of it. See Cent.Am.Liberty.Br.16–17 (discussing the "unique political power" exercised by people who identify as transgender, as evidenced by the "many state laws [that] prohibit discrimination" against them).

3. There is no serious history of de jure discrimination based on transgender status.

After defining transgender status as asserting a gender identity that does not align with one's sex, Resp.Br.32, Hecox fails to identify a single act of de jure discrimination that categorized on that basis. Instead, Hecox mostly cites laws targeting behavior that was deemed sexually deviant but that bears no necessary connection to transgender status.

For example, Hecox cites laws against cross-dressing, drag shows, and "transvestism," activities that Hecox says were sometimes criminally prohibited or could disqualify a person from immigrating. Resp.Br.31. Yet many people who identify as transgender do not dress in opposite-sex clothing, and some people who do *not* identify as transgender occasionally do. "Doing drag and being transgender are not the same thing." *Is Drag the Same as Transgender?*, Planned Parenthood (Oct. 13, 2025), perma.cc/2F6U-AW57.

Some of Hecox's citations lack even a tenuous connection to transgender status. The most horrifying are eugenic sterilization laws from the 1930s, "many of which"—Hecox does not provide a number—"targeted 'sexual perverts.'" Resp.Br.31. Yet Hecox's only citation suggesting that "sexual perversion" in these statutes had anything to do with transgender status is a mention of "transvestism" in a footnote in a dissent in a 1967 immigration case. Resp.Br.31. (quoting *Boutilier* v. *INS*, 387 U.S. 118, 135 (1967) (Douglas, J., dissenting)). Petitioners agree that no one should be forcibly sterilized because of their transgender status, but Hecox cites no evidence that it ever happened.

Stretching further, Hecox cites state-court cases allegedly terminating parental rights based on a parent's transgender status. Resp.Br.32. But that is not what the cited courts actually did. *E.g.*, *M.B.* v. *D.W.*, 236 S.W.3d 31, 37 (Ky. Ct. App. 2007) (affirming termination for father who underwent sex change where father had not supported child financially, had emotionally injured child, and admitted that sex change would not be good for child); *Daly* v. *Daly*, 715 P.2d 56 (Nev. 1986) (similar). Hecox cites a law review article citing cases that are even more inapposite. *E.g.*, *In re Marriage of Simmons*, 825 N.E.2d 303, 311–12 (Ill. App. Ct. 2005); *In re Marriage of B.*, 585 N.Y.S.2d 65, 66 (App. Div. 1992).

This stretching and bending shows just how weak Hecox's argument is. Consider the paradigm cases of black people and women, whose rights were denied by countless laws expressly based on their race or sex. *Skrmetti*, 605 U.S. 495, 571–72 (Alito, J., concurring)

(scrutiny for sex classifications "developed" on model of race). For much of American history, black people and women couldn't vote or serve on juries and were legally barred from public offices and some professions. Cf. *id.* at 572–73 (sex and race discrimination were "historically entrenched and pervasive" and "included barriers to full participation in the political process."); Elizabeth D. Katz, *Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Public Office*, 33 Yale J.L. & Feminism 110, 117–18, 131–32, n.161 (2022). For many years, married women could not own property, and black people could be treated *as* property.

Hecox falls woefully short of the high bar to show circumstances establishing that transgender status is a quasi-suspect classification.

IV. The Court can resolve this case without analyzing recent scientific developments, but it may consider them as legislative facts.

In a final attempt to prevent a merits decision, Hecox argues that Idaho's reference to the current science on athletic competition and sex requires remand since the latest data was not in the record. This is meritless.

Countless studies show males' well-documented physiological advantages over females in athletic contests—advantages that manifest before puberty and remain despite testosterone suppression. Pet.Br.6–12. That's why athletic associations have amended their rules to preserve women's sports for females without an exception for males who have taken puberty blockers or suppressed their testosterone. Pet.Br.13–14.

Hecox says the Court must ignore all this, and that it should rule based on five-years-ago science. Resp.Br.18–23. But not one word of Idaho's argument above relies on any scientific fact that was not in the district-court record in 2020.

For example, the Court need not make or review any factual findings about the science to determine the constitutional meaning of sex, § II.A., *supra*; to hold that the Act satisfies rational-basis review or intermediate scrutiny as a sex-based classification (since Hecox's specific ability is irrelevant), § II.B., *supra*; to hold that the Act classifies based on sex, not transgender status, § III.A.–B., *supra*; or to hold that transgender status is not a quasi-suspect class, § III.C., *supra*. After all, courts have upheld sex-designated sports for decades. And there isn't even a factual dispute about Hecox's physiological advantages because the trial-court evidence showed that Hecox's circulating testosterone levels remained roughly *six times greater* than the typical female range. § II.B.3, *supra*. That's more than sufficient to rule for Idaho.

That said, the Court can choose to consider the studies cited in Brown's 2025 declaration and the many amicus briefs as matters of legislative fact. Respondents mistakenly treat athletic-performance studies as addressing adjudicative facts, i.e., facts pertaining to the parties rather than general truths about the world. Resp.Br.18–19 (citing numerous cases dependent on witness testimony). But adjudicative-fact standards are irrelevant to legislative facts—"established truths, facts or pronouncements that do not change from case to case but apply universally." *United States* v. *Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

This Court routinely considers scientific developments as matters of legislative fact. *E.g. Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494–95 & n.11 (1954); *Roper* v. *Simmons*, 543 U.S. 551, 569 (2005); *Obergefell* v. *Hodges*, 675 U.S. 644, 661 (2016); see also *Moyle* v. *United States*, 603 U.S. 324, 342 n.* (2024) (Jackson, J., concurring and dissenting in part) (discussing legislative facts in several amicus briefs). So do circuit courts—including the panel below. Pet.App.30–32 (discussing scientific statements in amicus briefs—with Hecox's endorsement—to determine the definition of sex). Indeed, because different circuits may reach different decisions on matters of legislative fact, those facts are not subject to clear-error review, and this Court may instead decide them de novo. *E.g.*, *Lockhart* v. *McCree*, 476 U.S. 162, 168 n.3 (1986).

Hecox relies on *Ashcroft*, Resp.Br.22–23, in which the Court applied strict scrutiny and remanded for further factfinding to determine whether filtering software was a less-restrictive alternative to keep children away from online pornography. *Ashcroft* v. *ACLU*, 542 U.S. 656, 671–72 (2004). But *Ashcroft* did not involve the more lenient intermediate-scrutiny standard, nor did it demean legislative facts. Quite the opposite, in recognizing the problems inherent in a five-year delay between a preliminary injunction hearing and this Court's review, the Court favorably cited a law-review article highlighting cases where the Court found legislative facts based on information cited in merits and amicus briefs. *Id.* at 672 (citing Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 Texas L. Rev. 269 (1999)); see also Benjamin, 78 Texas L. Rev. at 345–52 & nn. 276–301 (discussing *Brown*, *Roe*, and several other cases).

So while the Court need not consider scientific developments to resolve this case, it may look to the most recently published studies cited in Brown's 2025 declaration and the parties' amicus briefs because they concern issues of legislative fact.

These studies show that (1) differences in male and female athletic performance cannot be fully erased by drugs, Sports.Physiologists.Br.22–25, Prof.Auchus.Br.18–23, Ped.Endocrinologists.Br.5 (making that point for adults like Hecox); (2) testosterone suppression does not erase the male advantage, Sport.Scientists.Br.10–14; and (3) testosterone suppression does not prevent harm to female safety, Drs.of.Sports.Medicine.Br.22–31.

The developing science in these studies proves the Legislature's predictive judgment was correct: Males cannot compete fairly or safely in girls' and women's sports, regardless of the males' gender identities and testosterone levels. That means that even if the Court accepted the Ninth Circuit's inversion of intermediate scrutiny to focus on that small subset of males (which the Court should not do, Pet.Br.50–54), Hecox would still lose.

* * *

This case is not about whether states *could* assign sports teams based on gender identity or circulating testosterone. The question is whether the Equal Protection Clause prohibits assigning sports teams based on the traditional, biological definition of sex. It does not. Accordingly, the Court should uphold Idaho's Act protecting women's sports.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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