No. 24-38

IN THE
Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, *ET AL.*,
Petitioners,
v.
LINDSAY HECOX, *ET AL.*, *Respondents.*

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

**Brief *Amicus Curiae* of
America's Future, Public Advocate of the United States, Eagle Forum, Eagle Forum Foundation, Clare Boothe Luce Center for Cons. Women, Leadership Institute, U.S. Constitutional Rights Legal Def. Fund, Fitzgerald Griffin Foundation, One Nation Under God Foundation, and Conservative Legal Def. and Education Fund in Support of Petitioners**

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Public Advocate of the United States, Eagle Forum, Eagle Forum Foundation, Clare Boothe Luce Center for Conservative Women, Leadership Institute, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

In March 2020, Idaho enacted the "Fairness in Women's Sports Act," Idaho Code §§ 33-6201-06 (2020). The law required that only biological females may compete on interscholastic women's and girls' teams in Idaho state schools, restricting biological males to men's and boys' teams and teams in designated mixed sports. *Hecox v. Little*, 479 F. Supp. 3d 930, 943-944

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

(D. Id. 2020) ("*Hecox I*"). The law was challenged by a biological male wishing to try out for the women's cross country and track teams at Boise State University.

The Idaho district court enjoined the Act, declaring it violated the Fourteenth Amendment's equal protection guarantee. *Id.* at 988-989. The injunction barred enforcement of any portion of the Act against any person. The injunction was upheld by the Ninth Circuit in August 2023 in *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023). Following this Court's ruling in *Labrador v. Poe*, 144 S. Ct. 921 (2024), the Ninth Circuit issued an amended opinion (*Hecox v. Little*, 2024 U.S. App. LEXIS 13929 (2024) ("*Hecox II*") remanding the case and stating that "the scope of the injunction is not clear.... [T]he court's order does not specify whether enforcement of the Act is enjoined in whole or in part.... On remand, the district court should tailor the injunction to provide ... specificity." *Hecox II* at *60-61. The Ninth Circuit then denied petitions for rehearing *en banc* as moot. *Hecox v. Little*, 2024 U.S. App. LEXIS 14077 (9th Cir. 2024).

SUMMARY OF ARGUMENT

The Idaho Fairness in Women's Sports Act was enacted to protect women's sports as a logical consequence of the reasonable factual findings of the legislature. The Ninth Circuit rejected any thought that the Act was reasonable and well motivated, preferring to deem it an act of invidious discrimination borne of animus. The Ninth Circuit grounded its opinion on the notion that the new concept of transgenderism must completely displace the concept

of biological sex. It views all distinctions in law between males and females are inherently suspect if they are not subordinated to transgender identity.

The Equal Protection Clause of the Fourteenth Amendment was written into the Constitution to ensure that African Americans would have the same rights as white persons — not to overturn age-old distinctions in law based on the most eternal and enduring aspect of humans — biological sex.

The circuit court believed that "heightened scrutiny" was required by this court's *VMI* decision, which assumption requires correction. There is nothing in the text, history, or relevant ratification era tradition of the Equal Protection Clause that demonstrates that it should govern women's sports. Even where special rights have been granted to homosexuals, that decision was based on the notion that homosexuality is an inherent and immutable characteristic like race. In stark contrast, transgenderism is based on "feelings" and how one currently "identifies" which are the polar opposite of an immutable characteristic.

Homosexual rights are predicated on the notion "its all about biology." Transgender rights are predicated on the notion that "biology is irrelevant." To the extent that the *Bostock* Decision was invoked by the Ninth Circuit, it helped lead the court into error. *Bostock* was a case about statutory interpretation in the employment context. This case is about constitutional interpretation in the context of sports.

Bostock does not control this case and should not be extended beyond Title VII.

ARGUMENT

I. THE IDAHO FAIRNESS IN WOMEN'S SPORTS ACT IS FIRMLY GROUNDED IN REALITY AS SHOWN BY CLEAR LEGISLATIVE FINDINGS.

The Idaho Fairness in Women's Sports Act, enacted in March 2020, was designed by the Idaho legislature to respond to a problem that had arisen across the country. Certain biological males were "identifying" as females and seeking to compete unfairly in girls and women's sports. The Idaho law was predicated on clear legislative findings, including the following:

> (3) men have denser, stronger bones, tendons and ligaments; larger hearts; greater lung volume per body mass; higher red blood cell count; higher hemoglobin;
> (4) men have higher natural levels of testosterone which affects other physical traits including muscle fibers;
> (5) the different sex characteristics of males and females cause different strength, speed, and endurance in sports;
> (10) in every sport except sailing, shooting, and riding, males have significant physiological advantages over women;
> (11) puberty blockers and cross-sex hormones do not diminish advantages to male athletes; and

> (12) having sex-specific teams furthers sex equality. *See* Idaho Code § 33-6202; App. 263a-266a.

Accordingly, § 33-6203 first provides that each sports team would be designated either for males, females, or mixed, and then provides:

> (2) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.

The simple rule enacted by the legislature is the logical outgrowth and natural consequence of the collective wisdom of the ages, actual science, and the best interests of female athletes. The Ninth Circuit could not see the logic behind the statute, being blinded by the political and religious dogma of "transgenderism." The court first attempted to make it appear that the issue being addressed by Idaho was completely fabricated, stating: "[a]t the time, Idaho had no history of transgender women and girls participating in competitive student athletics.... The Act, however, bars all transgender girls and women from participating in, or even trying out for, public school female sports teams at every age...." *Hecox II*, lla. The court said "no student in Idaho had ever complained about participation in public school sports by transgender athletes." *Id.*, 16a. The implication was that unless the problem had already manifested in Idaho, the state legislature had no reason to address it other than malice and "'invidious discrimination.'" *Hecox II*, 35a.

However, Idaho is not powerless to address a problem that had arisen across the country. What would be wrong for a state legislature to anticipate and seek to prevent such abuses in Idaho? The Ninth Circuit disparages the state legislature elected by the People of Idaho, preferring the opinions of "five former Idaho Attorneys General [who] implored Governor Little to veto the Act." *Hecox II*, 87a.

Since males have an inherent and intractable advantage over females in school sports, it is logical, and indeed essential, that males would be excluded from sports designated for females. This is all that this law does. The Ninth Circuit rushes to revise the law of Equal Protection to protect the Left's newest oppressed class. Thus, the court imputes a malicious motive to Idaho legislatures, as that is what is required for the Court to assume to itself power to root out what transgender ideology views as bigotry. The law applies to all males, regardless of their so-called "gender identity." While there may be few "cisgender" males who would want to play on the girls' teams,[2] the law applies to them as well.

Women should be protected from those males who take their place on the podium, knowing full well that

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[2] Rather, in years gone by, most boys and men find competing with girls profoundly unfair and indeed unmanly. "Iowa High School Wrestler Defaults Match So He Wouldn't Face Girl," *AP* (Feb. 17, 2011) ("A standout Iowa high school wrestler refused to compete against a girl at the state tournament on Thursday, relinquishing any chance of becoming a champion because he says wrestling a girl would conflict with his religious beliefs.").

their victory is largely due to biology, not ability. The fact that such an act is not considered shameful, rather than constitutionally protected, tells us much of where the Ninth Circuit is ideologically. Consider the fairness of University of Pennsylvania swimmer Lia (formerly William) Thomas, who first competed as a male before switching to compete as a female.

> During the last season Thomas competed as a member of the Penn **men's team**, which was 2018-19, she ranked **554th** in the 200 freestyle, **65th** in the 500 freestyle and **32nd** in the 1650 freestyle. As her career at Penn wrapped, she moved to **fifth**, **first** and **eighth** in those respective events on the **women's deck**. [J. Lohn, "A Look at the Numbers and Times: No Denying the Advantages of Lia Thomas," *Swimming World Magazine* (Apr. 5, 2022) (emphasis added).]

In truth, everyone should be able to understand the reasons that the Idaho legislature acted — except for those whose intellect has been captured by the Cult of Transgenderism,[3] a political and religious theory which seeks to completely displace biological reality

[3] *See, e.g.,* D. Kennedy, "Anguished parents of trans kids fight back against 'gender cult' trying to silence them," *New York Post* (May 11, 2022); A. Hendershott, "How long can the cult of transgenderism last?" *The Catholic World Report* (Apr. 23, 2022); K. Hayes, "Gender Ideology's True Believers," *Quillette* (May 19, 2022); R. Butterfield, "What is Transgenderism?" *Ligonier.org* (June 24, 2024); J. Cahn, The Return of the Gods (Frontline: 2022).

with subjective and transitory "feelings" about identity.

II. THE NINTH CIRCUIT OPINION IS FOUNDED ON UNEXAMINED PRESUPPOSITIONS.

The operative text of the Idaho law makes a distinction based on one of, if not the most, well-established classifications existing in the natural world — the difference between men and women. Perhaps for that reason, the statute's text received little attention from the court. Although the operative provisions of the statute made no reference to so-called transgenderism, that was the only focus of the Ninth Circuit. The Ninth Circuit gave the legislative findings no deference, but rather assumed the role of a super-legislature, dismissing facts that supported the statute. Actually, the legislative findings are significant irrespective of whether the Ninth Circuit agreed with them, because they clearly demonstrated a laudable objective for the statute — and completely undermined the unsupported claims made by the court of invidious discrimination. *See Hecox II* at 35a.

Even though the operative provisions of the law logically followed the legislative findings, the court found nothing but malice because:

> the Act explicitly references transgender women,[4] as did its legislative proponents, and

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[4] This one "explicit reference" on which the court relies is contained at the end of the finding that biological advantage is not

> its text, structure, findings, and effect all demonstrate that **the purpose** of the Act was to categorically **ban transgender women and girls** from public school sports teams that correspond with their gender identity. [*Id*. at 25-26 (emphasis added).]

Until a few years ago, before the Ninth Circuit got "woke" on Transgenderism, the court likely would have described the Act quite differently:

> the purpose of the Act was to categorically **ban men** from public sports teams designated for **females**.

Naturally, the Ninth Circuit could not phrase the issue in that way because of its fashionable political presuppositions, which reject science and the common understanding of humankind since the Garden of Eden.[5] This is the way that it always has been, and still is, until the Cult of Transgenderism arrives on the scene. The fact that this Cult is spreading is not a reason to indulge its destructive political agenda and those suffering from the mental condition of "gender dysphoria," for if it is allowed to spread, it threatens to completely destroy women's sports.

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ended with hormone treatment: "'Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen.'" Finding (11) (citation omitted); 265a.

[5] *See Genesis* 1:27, 2:20-23.

To be sure, the Idaho law distinguishes between males and females, but this in no way violates the Equal Protection Clause, and the fact some people have gender dysphoria does not change this rule. Males and females are different in ways highly relevant to sports. The law says nothing about whether the males barred from the female teams are transgender or cisgender or otherwise. If there is a problem to be found in the Idaho law, it is in the eye of the beholder — not the Idaho legislature.

As to the second standard asserted by the Court:

> The state may not discriminate against classes of people in an "arbitrary or irrational" way or with the "bare ... desire to harm a politically unpopular group." *Id.* at 446–47. [*Hecox II*, 24a.]

Nothing is "arbitrary or irrational" about the distinction made by the State. The State is applying distinctions between men and women — not discriminating against either. It is not distinguishing between men by gender, and therefore certainly not "discriminating" against anyone. Where is the desire to harm anyone? Rather, the desire is to protect females. A law against males being put into situations where they can harm females is an effort to protect females, not discriminate against all males or a subset of males.

The notion that transgender persons are a "politically unpopular group" is absurd. Indeed, to the media, many politicians, and many federal judges, they

are perhaps the most favored of all persons in our society. In states where it is permitted, they can unfairly compete against females and take home the trophies and college scholarships based largely on their inherent biological advantages, rather than their hard work and achievements. And they can do damage to women participating in sports.

Real danger to women athletes exists at the high school level. Payton McNabb was spiked in the face by a male competing with the women. Her testimony before the North Carolina legislature illustrates the harm the Idaho law was designed to prevent.

> McNabb indicated that, to this day, she is still recovering from her injuries, and continues to face other health struggles as a result of what happened, such as impaired vision, partial paralysis on the right side of her body, constant headaches, anxiety and depression. [6]

Thus, to rule against Idaho, the Ninth Circuit took a straightforward law designed to accomplish a straightforward objective of protecting women in sports, and twisted it to impute malice and animus to the Idaho state legislature. The Ninth Circuit obviously cares more about political correctness than women athletes, but there is no constitutional authority for that court to negate the actions of the Idaho legislature.

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[6] A. Schemmel, "Injured volleyball player speaks out after alleged transgender opponent spiked ball at her," *ABC 13 News* (Apr. 21, 2023).

Finally, other sports governing bodies have seen the damage that male athletes can unfairly do to female athletes and are beginning to adopt rule changes to protect them.[7] Will this Court be less sensitive to the protection of women than the North American Grappling Association?

III. THE CIRCUIT COURT EXTENDED THE EQUAL PROTECTION CLAUSE TO PROTECT "TRANSGENDER RIGHTS" WITHOUT ANY CONSIDERATION OF ITS TEXT, HISTORY, OR TRADITION.

A. The Circuit Court Erroneously Believed It Was Required to Use Heightened Scrutiny.

The Ninth Circuit asserted as an unquestionable truth that the Idaho Act "discriminates against transgender women by categorically excluding them from female sports...." *Hecox II*; 25a. Had the court stated the issue correctly — "the Act discriminates against all men by excluding them from female designated sports" — it would have had an insurmountable problem striking it down, as it is unlikely it would find that the Idaho legislature exhibited invidious discrimination against "all men." Further, "all men" is not, and is never likely to be deemed, a suspect class such as race, national origin, and religion, triggering strict scrutiny. Neither would

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[7] *See also*, M. Koenig, "Martial arts competition changes rules after female fighters pull out over safety fears after facing trans grapplers," *New York Post* (Oct. 31, 2023).

"all men" ever be designated as a quasi-suspect class, triggering intermediate scrutiny.

The court below cited *United States v. Virginia*, 518 U.S. 515, 555 (1969) ("*VMI*") for the proposition that "'all gender-based classifications today' warrant 'heightened scrutiny.'" *VMI* at 555 (citation omitted); *Hecox II*; 24a. Even if one believes heightened scrutiny was properly applied to help women's education by integrating male-only VMI, it certainly does not fit here where its use would harm women by allowing men to compete unfairly against them in women's sports.

In one of his classic dissenting opinions, Justice Scalia exposed the completely arbitrary nature of the Court's use of the "equal protection clause":

> [O]ur current equal protection jurisprudence ... regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely **up to us which test will be applied** in each case. [*VMI* at 567 (Scalia, J., dissenting) (emphasis added).]

Justice Scalia asserted that the *VMI* court was writing its educational preferences "into the Constitution ... by application of custom-built 'tests.' This is not interpretation of a Constitution, but the

creation of one." *VMI* at 570. Justice Scalia explained that this Court not only was trying to re-shape the nation according to the Justices' political views, but changing tests it applies on the fly. For most of our history, no one dreamed that single-sex education was a problem:

> The tradition of having government-funded **military schools for men** is as well **rooted in the traditions** of this country as ... sending only men into military combat. The people may decide to change one tradition ... but the assertion that either tradition has been unconstitutional through the centuries is **not law, but politics-smuggled-into-law**. [*Id.* at 569 (emphasis added).]

Along the way, the Court settled on intermediate scrutiny to decide such challenges. In *Clark v. Jeter*, 486 U.S. 456, 461 (1988), Justice O'Connor stated for a unanimous Court, that we evaluate a statutory classification based on sex under a standard "[b]etween the extremes of rational basis review and strict scrutiny." *Id*. Yet in *VMI*, even intermediate scrutiny was deep-sixed in favor of "heightened scrutiny."

Now, after *VMI*, the Ninth Circuit believes this Court requires it to use "heightened scrutiny." This progression demonstrates that when judges analyze "equal protection," they do not conduct a search for authorial intent of the clause,[8] but rather some see a

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[8] *See* E.D. Hirsch, Validity in Interpretation at vii, 1, 5, 212-23 (Yale Univ. Press: 1973).

grant of unlimited authority to courts to decide public policy questions. Yesterday, intermediate scrutiny; today, heightened scrutiny; tomorrow, who knows?

In truth, the Equal Protection Clause provides no guidance at all on the issue of men participating in women's sports. In finding that it does, however, the Ninth Circuit exercised raw and arbitrary federal power the Framers of our Constitution sought to end. This is not the rule of law, but of men, and it is causing this Court to lose the confidence of the people.

B. The "Tiers of Scrutiny" Approach Leads to Constitutionally Unfaithful Results.

The Ninth Circuit's use of tiers of scrutiny in this Equal Protection challenge is exactly what this Court has termed a **"judge-empowering interest-balancing inquiry**." *See District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). Under heightened scrutiny, the balancing test includes considering whether the State has presented an "'**exceedingly persuasive' justification**" for its classification. *Hecox II* at 39a (emphasis added). Is the desire to protect women in women's sports "exceedingly persuasive?" Is the fact that the law prevents some men who suffer from gender dysphoria from unfairly competing against women "exceedingly persuasive?" These are political, not legal questions, unrelated to any meaningful interpretation of constitutional text.

In *Heller*, and again in 2022, this Court declared a method to achieve constitutionally faithful resolution for challenges under the Second Amendment right to

keep and bear arms. *See N.Y. State Rifle & Pistol Ass'n v. Bruen.* 597 U.S. 1 (2022). If conduct being restricted comes within the Amendment's plain text, courts must strike down the regulation of that conduct unless the government demonstrates it comports with the history of gun regulations that existed around the time of the Amendment's adoption. In these Second Amendment cases, this Court expressly "relied on text and history," and "did not invoke any means-end test such as strict or intermediate scrutiny." *Bruen* at 22.

Unfortunately, this Court's Equal Protection jurisprudence has been largely oblivious to the Amendment's text and history. This Court's manufactured "tiers of scrutiny" allows it to create out of whole cloth new "rights" never envisioned by the Framers of the Fourteenth Amendment. During oral argument in *District of Columbia v. Heller*, Chief Justice Roberts quite properly noted, "these standards ... just kind of developed over the years as sort of baggage that the First Amendment picked up."[9] In *Heller*, their use was ended for Second Amendment challenges. They should also be ended for Equal Protection challenges.

Tiers of scrutiny enable judges to obscure the arbitrariness of decisions with a patina of judicial rhetoric, and determine the scope of a particular constitutional right based on little more than each "judges' assessments of its usefulness." *Heller* at 634.

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[9] Statement of Roberts, C.J., Tr. of Oral Arg. at 44, *Dist. of Columbia v. Heller*, 554 U.S. 570 (U.S. Supreme Court No. 07-290).

As Professor Richard H. Fallon, Jr. has correctly noted, "The words 'strict judicial scrutiny' appear nowhere in the U.S. Constitution. Neither is there ... any foundation in the Constitution's original understanding, for the modern test under which legislation will be upheld ... only if ... 'narrowly tailored' to promote a 'compelling' governmental interest."[10]

As then-Judge Kavanaugh once noted, "Strict and intermediate scrutiny tests are not employed in the Court's ... application of many other individual rights provisions of the Constitution." *Heller v. District of Columbia*, 670 F.3d 1244, 1283 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). He laid out a long list of rights regarding which this Court has never applied "balancing," including rights to jury trial and against self-incrimination and cruel and unusual punishment. *Id.* In the Equal Protection context, courts have used tiers of scrutiny to divine "rights" that the Framers of the Fourteenth Amendment would never have dreamed about. This Court should take this opportunity to follow the example of *Heller* and *Bruen* to interpret the Equal Protection Clause based on text, context, history, and tradition.

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[10] R. Fallon, "Strict Judicial Scrutiny," 54 UCLA L. REV. 1267 (2006-2007).

C. The Text and History of the Equal Protection Clause Leave No Room for Imposing "Transgender Care" Requirements on States.

As this Court recognized 150 years ago, the Fourteenth Amendment (including its Equal Protection Clause) was designed to ensure equal treatment for African Americans *vis a vis* white citizens. The Court found it "necessary to look to the purpose which we have said was the pervading spirit of them all, **the evil which they were designed to remedy**...." *Slaughter-House Cases*, 83 U.S. 36, 72 (1873) (emphasis added). Addressing specifically the Equal Protection Clause, this Court noted:

> In the light of the history of these amendments, and the pervading purpose of them, ... it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was **the evil to be remedied** by this clause.... [*Id*. at 81 (emphasis added).]

A review of the debates over the Fourteenth Amendment, and its immediate predecessor the Civil Rights Act of 1866, makes clear that preventing unequal treatment by race was the purpose of its Framers. Radical Republican leader Rep. Thaddeus Stevens stated for history the Amendment's purpose:

"Whatever law protects the white man shall afford 'equal' protection to the black man."[11]

D. "Transgender" Advocates Seek to Adopt the Strategy Employed by Homosexuals to Achieve Constitutional Protections.

Legal protections designed especially for homosexuals logically do not apply to transgender persons. For years, the dominant narrative has been that homosexuals possess an immutable trait — that homosexuality is inherent in a person, like race. Homosexuals are "born that way,"[12] and no persons should be discriminated against because of their immutable nature. Assuming, *arguendo*, that homosexuality is inherent and unchangeable, that claim has helped justify special rights being bestowed upon homosexuals.

The notion of immutability does not relate to "transgender persons." After all, the essence of "trans" is that it is based on "gender identity" which can change. It is based on feelings and self-perception of "identity." A Harvard Medical School publication makes a desperate attempt to explain terms that never existed before and which most find impenetrable: "Gender fluidity refers to change over time in a

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[11] A. Kelly, "The Fourteenth Amendment Reconsidered, The Segregation Question," 54 MICH. L. REV. 1049, 1078 (1955-1956).

[12] *See generally* Joanna Wuest, Born This Way: Science, Citizenship, and Inequality in the American LGBTQ+ Movement (Univ. Chicago Press: 2023).

person's gender expression or gender identity, or both. That change might be in expression, but not identity, or in identity, but not expression. Or both expression and identity might change together."[13]

With homosexuality, we are told it is all about biology. With transgenderism, we are told biology is irrelevant. Those are very different concepts. One thing that is certain: transgender status is not an immutable characteristic justifying suspect class treatment such as race.[14]

Another suspect classification is being a class of persons politically powerless to protect themselves — thereby giving the group victim status.[15] The trans movement is attempting to follow the victimhood strategy set out 35 years ago by two leaders of the homosexual movement, which has been adopted by the transgender movement. Theologian Albert Mohler explains: "Authors Marshall Kirk and Hunter Madsen combined psychiatric and public relations expertise in devising their strategy. Kirk, a researcher in neuropsychiatry, and Madsen, a public relations consultant, argued that homosexuals must change their presentation to the heterosexual community if

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[13] S. Katz-Wise, "Gender fluidity: What it means and why support matters," *Harvard Health Publishing* (Dec. 3. 2020).

[14] *See, e.g.*, "4 out of 5 kids who question gender 'grow out of it': Transgender expert," *New York Post* (Feb. 22, 2023).

[15] *See United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938) ("discrete and insular minorities").

real success was to be made."[16] Mohler explains the strategy:

> **Portraying homosexuals as victims** was essential to their strategy. Offering several principles for tactical advance in their cause, the authors called upon homosexuals to "portray gays as victims of circumstance and depression, not as aggressive challengers." This would be necessary, they argued, because "gays must be portrayed as victims in need of protection so that straights will be inclined by reflex to adopt the role of protector." [*Id.*]

The authors of that strategy were candid that they sought to take advantage of the plague of AIDS:

> As cynical as it may seem, AIDS gives us a chance, however brief, to **establish ourselves as a victimized minority legitimately deserving of America's special protection and care**.
>
> The campaign we outline in this book, though complex, depends centrally upon a program of **unabashed propaganda**, firmly grounded in long-established principles of **psychology and advertising**. [Marshall Kirk & Hunter Madsen, After the Ball: How America Will Conquer Its Fear & Hatred of Gays in the 1990's (Doubleday: 1989) at xxv-xxvi (emphasis added).]

[16] A. Mohler, "After the Ball - Why the Homosexual Movement Has Won," *Albert Mohler.com* (undated).

Today, many homosexuals are among the most wealthy and politically powerful members of the society, but the benefits of the early victimhood strategy remain.[17] As that manipulative strategy once worked for homosexuals, it is being trotted out once again.

IV. THE *BOSTOCK* DECISION, RELIED ON BY THE COURTS BELOW, SHOULD BE CONFINED TO TITLE VII.

Granting certiorari would give this Court the opportunity to clarify that it has not already ruled that transgender rights override all other rights and considerations in all contexts, particularly since its 2020 decision in *Bostock v. Clayton County,* 590 U.S. 644 (2020). There, this Court naively dismissed any concerns that its decision would have consequences beyond the Title VII employment context:

> What are these consequences anyway? The employers worry that our decision will **sweep beyond Title VII to other federal or state laws that prohibit sex discrimination**. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But **none of these other laws are before us**; we have not had the

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[17] *See, e.g.*, B. Glassman, "Same-Sex Married Couples Have Higher Income Than Opposite-Sex Married Couples," *Census.gov* (Sept. 17, 2020); T. Ring, "Get to Know Biden's Many LGBTQ+ Appointed Officials," *The Advocate* (June 10, 2021).

> benefit of adversarial testing about the meaning of their terms, and **we do not prejudge any such question today**. Under Title VII, too, we **do not purport to address bathrooms, locker rooms, or anything else of the kind**. [*Bostock* at 681 (emphasis added).]

Justices Thomas and Alito knew better:

> What the Court has done today – interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity – is virtually certain to have **far-reaching consequences**. Over 100 federal statutes prohibit discrimination because of sex.... The Court's brusque refusal to consider the consequences of its reasoning is irresponsible.... [T]he position that the Court now adopts **will threaten freedom of religion, freedom of speech, and personal privacy and safety**.[18] No one should think

[18] It took only weeks for the Fourth Circuit to cite *Bostock* in holding that Title IX must be interpreted as Title VII, to guarantee a biological male identifying as "transgender" access to women's and girls' school bathrooms. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 617 (4th Cir. 2020). On his first day in office, President Joe Biden applied *Bostock* to every federal law banning discrimination "on the basis of sex" and directed every federal agency to enforce his interpretation. Executive Order 13988, 86 F.R. 7023 (Jan. 20, 2021). On March 26, 2021, the Department of Justice sent a memo to federal civil rights agencies instructing that, according to *Bostock*, they were to consider all bans on discrimination "on the basis of sex" to interpret "sex" as

> that the Court's decision represents an unalloyed victory for individual liberty. [*Id.* at 724-25 (Alito, J., and Thomas, J., dissenting).]

The district court quoted *Bostock* for the proposition that "the prohibition on discrimination because of sex in Title VII includes discrimination based on an individual's transgender status." *Hecox I* at 962. The district court also invoked *Obergefell v. Hodges*, 576 U.S. 644 (2015). It claimed that the argument that "transgender women are not excluded from school sports because they can simply play on the men's team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex." The district court believed that this Court had "rejected such arguments" in *Bostock*. *Hecox I* at 984.

The Ninth Circuit also relied on *Bostock*. "The Supreme Court recently held in the Title VII context that 'it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.'" *Hecox II* at 37a (citation omitted).

This Court's decision in *Bostock* was certainly considerably narrower than the propositions for which

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including "sexual orientation" and "gender identity." U.S. Department of Justice, "Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972" (Mar. 26, 2021). The downstream effects of *Bostock* continue unabated.

it is being cited, only addressing statutory interpretation.

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex **plays an unmistakable and impermissible role** in the discharge decision. [*Bostock* at 660 (emphasis added).]

As a matter of statutory (not constitutional) interpretation, this Court found that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" (*id.*), and asserted that it was upholding Title VII's prohibition on employment discrimination "on the basis of sex." *Bostock* claimed fidelity to "textualism": "[T]hese cases involve no more than the straightforward application of legal terms with plain and settled meanings." *Id.* at 662. However, the *Bostock* Court made a critical error. As Justices Alito, Thomas, and Kavanaugh all correctly observed in dissent, the Court mistakenly confused textualism with hyperliteralism. Justice Alito noted that "[t]he Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice

Scalia excoriated – the theory that courts should 'update' old statutes so that they better reflect the current values of society." *Id.* at 685 (Alito, J., dissenting). Similarly, quoting the late Justice Scalia, Justice Kavanaugh pointed out:

> Adhering to the fair meaning of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text.... The full body of a text contains implications that can alter the literal meaning of individual words. [*Id.* at 788 (Kavanaugh, J., dissenting) (quoting A. Scalia & B. Garner, Reading Law at 356 (2012)) (footnote omitted).]

Whether in some hyperliteral sense an employer discriminates "on the basis of sex" if it fires a biological male for "identifying" and presenting as a female, while retaining a biological female employee who does the same, is perhaps arguable. But this is indisputably not the ordinary public understanding of the meaning of those words, neither in 1964 when Title VII was passed, nor even today. The ordinary public understanding was and remains that an employer cannot treat employees of one biological sex in a discriminatory manner *vis-a-vis* employees of the other biological sex. Whether those who joined the *Bostock* decision agree that it incorporates a serious mistake in interpretation, each now has a duty to ensure that the assumption made by the courts below — that this Court has already decided the matter of girls sports — is corrected.

CONCLUSION

The Ninth Circuit has incorrectly decided an important question of federal law because it erroneously believed the issue had been resolved by this Court. The same issue has arisen in the Fourth Circuit and other circuits. Granting certiorari in this case as well as *B.P.J. v. West Virginia* would allow the issue of state laws protecting girls' and women's school sports to be settled by this Court.

Respectfully submitted,

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