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

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QUESTION PRESENTED

Idaho passed a law in 2020 categorically banning women and girls who are transgender from participating on all women's and girls' sports teams "from primary school through college, and at every level of competition, from intramural to elite teams." Pet. App. 11a. In the decision below, the Ninth Circuit affirmed the district court's preliminary injunction concluding that the law likely violated the Equal Protection Clause as applied to Respondent, Lindsay Hecox, a college senior and transgender woman who currently participates in women's club running and club soccer at her school. The injunction has been in place for four years.

The question presented is:

Did the district court abuse its discretion in issuing a preliminary injunction against enforcement of Idaho's categorical ban as applied to Lindsay?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Lindsay Hecox is a woman who is transgender. This case involves Lindsay's challenge to House Bill 500 ("H.B. 500"), an Idaho law passed in 2020 that categorically bars transgender girls and women from playing on girls' and women's sports teams from primary school through college. Lindsay was a freshman at Boise State University ("BSU") when this case began, and she is now in her senior year. She loves running and team sports. She has been able to participate in women's club soccer and women's club running at BSU because of the preliminary injunction issued by the district court in 2020. The injunction also allowed her to try out for BSU's National Collegiate Athletic Association ("NCAA") NCAA women's cross-country and track teams, but she never made the teams, consistently running slower than her cisgender women competitors. And, as the district court recently clarified, its injunction applies to Lindsay and Lindsay alone.

Petitioners seek to create a false sense of national emergency when nothing of the sort is presented by this case. This case is about a four-year-old injunction against the application of H.B. 500 with respect to one woman, which is allowing her to participate in club running and club soccer in her final year of college. Particularly given the lack of any circuit split on the question presented and the interlocutory posture of this case, as well as Lindsay's upcoming completion of college, which will likely end the conflict between the parties, there is no reason for this Court to step in.

This Court will soon be addressing equal protection scrutiny in the context of laws classifying

transgender people based on their sex and transgender status in *L.W. by & through Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023), *cert. granted sub nom United States v. Skrmetti*, 144 S. Ct. 2679 (U.S. June 24, 2024) (No. 23-477), a case involving a state law banning transgender adolescents from receiving healthcare "inconsistent with" their sex assigned at birth. Lindsay does not object to this Court holding the Petition for *Skrmetti*, and then either denying the Petition or vacating and remanding once this Court resolves that case. But in no event have Petitioners shown an independent basis for granting review in this case—either before or after *Skrmetti* is decided. To the extent that there are unresolved issues in the context of athletics following *Skrmetti*, there will be plenty of future vehicles for this Court to resolve those issues on a complete record and with further development of the issues in the lower courts. By that point, this case will likely be over.

The Petition should be denied or held for *Skrmetti*. If the Petition is held for *Skrmetti*, the Petition should then be denied, or the opinion below should be vacated and remanded in light of *Skrmetti*.

STATEMENT

A. Lindsay Hecox

Lindsay Hecox is a 24-year-old transgender woman who attends BSU. Pet. App. 20a. Lindsay was a freshman at BSU when this litigation began, Decl. of Pl. Lindsay Hecox in Supp. of Mot. for Prelim. Inj. at 2, *Hecox v. Little*, No. 20-cv-00184 (D. Idaho Apr. 30, 2020), ECF No. 22-6 ("Hecox Decl."), and she is now a senior. Lindsay has enjoyed running since grade school and she participated on her high school's

track and cross-country teams. *Id.* At the outset of this litigation, she planned to try out for BSU's NCAA women's cross-country and track teams and was training to do so. *Id.* at 5. However, she was too slow to make the women's NCAA running teams at BSU. *See* Pet. App. 21a, 49a. She has continued to participate in women's club sports even after not making the NCAA teams as she appreciates the camaraderie, exercise, and opportunity for social engagement they offer. *See* Decl. of Lindsay Hecox, *Hecox v. Little*, Nos. 20-35813, 20-35815 (9th Cir. Sept. 23, 2022), ECF No. 164-2; *see also* Pet. App. 22a n.7.

Lindsay has experienced gender dysphoria since grade school and came out as a transgender woman after high school. Hecox Decl. at 4. Since the start of her freshman year of college in September 2019, Lindsay has received medical treatment for gender dysphoria, including testosterone suppression and estrogen. *Id.* at 4–5. This "treatment has dramatically altered her bodily systems and secondary sex characteristics." Pet. App. 42a. For years, Lindsay's testosterone levels have been well below those required to meet NCAA eligibility for women's cross country and track. *See id.*

B. H.B. 500

On March 16, 2020, at the height of the COVID-19 pandemic, Idaho passed H.B. 500, "a categorical ban against transgender women and girls' participation in any public-school funded women's sports." *Id.* at 14a; *see id.* at 173a. Idaho enacted this "first-of-its-kind categorical ban" despite the fact that, at the time, "Idaho had no history of transgender women and girls participating in competitive student athletics," and "Idaho's interscholastic athletics

organization allowed transgender girls to compete on female athletic teams under certain specified conditions." *Id.* at 11a. H.B. 500 also subjects all women and girl athletes to an "intrusive sex verification process if their gender is disputed by anyone." *Id.* at 14a.

H.B. 500 provides for separate school sports teams based on "biological sex." Specifically, it provides that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports" in any public-school funded sports "shall be expressly designated . . . based on biological sex." Pet. App. 267a (citing Idaho Code § 33-6203(1)). Under H.B. 500, "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." *Id.* (citing Idaho Code § 33-6203(2)). H.B. 500 also limits methods for "verify[ing] . . . biological sex" to "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.* (citing Idaho Code § 33-6203(3)).

Prior to H.B. 500, "sex separation on athletic teams for men and women" in Idaho had "long been the status quo" and "[e]xisting rules already prevented boys from playing on girls' teams before the [law]." *Id.* at 246a. Also prior to H.B. 500, the NCAA and Idaho authorities allowed transgender women to participate on women's college and high school sports teams if they suppressed their testosterone for one year. *See id.* at 15a–16a.

H.B. 500 was passed specifically to exclude girls and women who are transgender from girls' and women's teams. Petitioners admit that news of transgender athletes participating in sports outside the state "motivated Idaho to enact the Fairness in

Women's Sports Act," Idaho Code §§ 33-6201–06 (the "Act"), Pet. 6; *see id.* at 5. Representative Barbara Ehardt, the lead sponsor of H.B. 500, described H.B. 500 as crafted to address the "threat" of two transgender high school girls running track in Connecticut and one transgender college woman running track in Montana. Pet. App. 173a. And H.B. 500's legislative findings refer to a hypothetical birth-assigned "man who identifies as a woman and is taking cross-sex hormones." *Id.* at 265a (citing Idaho Code § 33-6202(11)).

As H.B. 500 made its way through the Idaho legislature, government officials and others questioned the bill's legality and the soundness of its legislative findings. Before H.B. 500 passed the Idaho House, Idaho Attorney General Lawrence Wasden "warned in a . . . letter to the House that H.B. 500 raised serious constitutional questions due to the legislation's disparate treatment of transgender and intersex athletes and the potential invasion of all female athletes' privacy inherent in the sex dispute verification process." *Id.* at 16a–17a. And while the bill was on Idaho Governor Bradley Little's desk, a scholar whose research was cited in the legislative findings urged Governor Little to veto the bill, explaining that her research "had been misinterpreted and misused." *Id.* at 17a. Still, H.B. 500 was signed into law at the end of March 2020, with an effective date of July 1, 2020. *Id.*

C. Proceedings in the District Court

On April 15, 2020, Lindsay filed this lawsuit, alleging that she intended to try out for the BSU women's track and cross-country teams as a rising sophomore, and that H.B. 500's ban on her doing so

violated her constitutional and statutory rights. *See id.* at 20a.[1] On April 30, 2020, she filed a motion for preliminary injunction based solely on her equal protection claim. *See* Pet. App. 21a.

After holding oral argument and permitting intervention by two cisgender women athletes who attended Idaho State University, *see id.* at 171a, 195a, the district court issued a preliminary injunction against H.B. 500 on August 17, 2020. *See id* at 21a. The court concluded that Lindsay was likely to succeed on the merits of her as-applied equal protection challenge to H.B. 500; that she would suffer irreparable harm absent an injunction; and that the balance of equities favored an injunction. *See id*. The district court applied heightened scrutiny to H.B. 500 "because the Act discriminates against transgender women by categorically excluding them from female sports, as well as on the basis of sex by subjecting all participants in female athletics, but no participants in male athletics, to invasive sex verification procedures." *Id.* at 25a. And the court determined that H.B. 500 was likely to fail heightened scrutiny because "the Act's means—categorically banning transgender women and girls from all female athletic teams and subjecting all participants in female athletics to intrusive sex verification procedures—likely are not substantially related to, and in fact undermine, those asserted objectives." *Id.* at 40a.

In ruling on the preliminary injunction motion, the district court received substantial evidence in the

[1] Lindsay's co-plaintiff was Jane Doe, a cisgender woman who played on high school varsity teams in Idaho and feared that her sex would be "disputed" under the Act (as did Lindsay). Pet. App. 20a. Jane's claims eventually became moot due to her graduation and attendance of college out of state. *Id.* at 121a n.17.

form of declarations from lay and expert witnesses. *See* Pet. App. 167a n.2. Whereas Lindsay "presented compelling evidence," including expert testimony, "that equality in sports is *not* jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women's teams," *id.* at 241a, Defendants' expert relied largely on "the differences between male and female athletes in general," as opposed to "the difference between cisgender women athletes and transgender women athletes who have suppressed their testosterone," *id.* at 243a. The district court explained that it ultimately "must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence." *Id.* at 247a. However, at the preliminary injunction stage, it determined that Lindsay was likely to succeed on the merits, as

> the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho.

Id. at 248a.

The district court's preliminary injunction has now been in continuously in place with respect to

Lindsay for over four years.[2] As a result of that injunction, Lindsay was able to try out for the women's NCAA running teams at BSU, but she failed to qualify. *See id.* at 21a, 49a. Also because of the injunction, she "has been playing for the BSU women's club soccer team since Fall 2022," Pet. App. 22a n.7, and has participated in women's club running. "Absent the preliminary injunction against the Act's enforcement to her, Linsday would be banned from participating on the BSU women's club soccer team." *Id.*

D. Proceedings on Appeal

The Ninth Circuit first held oral argument in this case in May 2021, by which time Lindsay had failed to make BSU's NCAA cross country team and had subsequently withdrawn temporarily from BSU classes for personal reasons. *See id.* at 21a; Pls.-Appellees Lindsay Hecox & Kayden Hulquist's Opp'n to Intervenors-Appellants' Suppl. Br. at 8, *Hecox v. Little*, Nos. 20-35813, 20-35815 (9th Cir. Sept. 23, 2022), ECF No. 165. Citing "unanswered factual questions as to whether Lindsay's claim was moot," the Ninth Circuit remanded the case to the district court for further factual development. Pet. App. 21a.

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[2] The Ninth Circuit determined that the scope of the district court's injunction initially was "not clear" because it did "not specify whether enforcement of the Act is enjoined in whole or in part, nor does it specify whether enforcement of the Act is enjoined facially or as applied to particular persons." Pet. App. 58a. The Ninth Circuit thus "vacate[d] the injunction as applied to nonparties, and remand[ed] to the district court to address the scope and clarity of the injunction." *Id.* at 61a. The district court has since clarified that the injunction applies to Lindsay alone and has modified the injunction accordingly. *See* Order Modifying Prelim. Inj., *Hecox v. Little*, No. 20-cv-00184 (D. Idaho Aug. 22, 2024), ECF No. 138 ("Order Modifying Prelim. Inj.").

The district court determined that Lindsay's claim was not moot, and the Ninth Circuit affirmed that ruling. *Id.* at 21a–22a. As the Ninth Circuit explained, not only did Lindsay have "a concrete plan to re-enroll and try out for BSU sports teams" at the time of her withdrawal from BSU, but she "followed through on those plans." *Id.* at 22a n.7.

The Ninth Circuit held oral argument again in November 2022 and by opinion dated August 17, 2023, affirmed the district court's preliminary injunction ruling, with Judge Morgan Christen concurring in part and dissenting in part. *Id.* at 70a–162a. Judge Christen "agree[d] with much of the majority opinion," *id.* at 135a, including "that the district court did not abuse its discretion by granting preliminary injunctive relief," *id.* at 134a–135a, but concluded that "the injunction is not appropriately tailored" because "[t]he district court appears to have enjoined [H.B. 500] as applied to all transgender female athletes," *id.* at 136a. The Ninth Circuit later withdrew that opinion in light of this Court's ruling in *Labrador v. Poe*, 144 S. Ct. 921 (2024) (limiting preliminary injunction to the named plaintiffs pending resolution of the appeal on the merits). Pet. App. 62a–65a.

The Ninth Circuit then issued a unanimous amended opinion on June 7, 2024. *Id.* at 1a–61a. With respect to "the narrow question of whether the district court, on the record before it, abused its discretion in finding that Lindsay was likely to succeed on the merits of her equal protection claim," it concluded that the district court did not abuse its discretion and thus "affirm[ed] the district court's order granting preliminary injunctive relief as applied to Lindsay." *Id.* at 61a. The Ninth Circuit "vacate[d] the injunction as applied to nonparties, and

remand[ed] to the district court to address the scope and clarity of the injunction," *id.*, including under *Labrador*, *id.* at 59a.

Regarding Lindsay's likelihood of success on her equal protection claim, the Ninth Circuit held that the "district court did not err in concluding that heightened scrutiny applies because the Act discriminates against transgender women by categorically excluding them from female sports." *Id.* at 25a. As the Ninth Circuit explained, "while the Act certainly classifies on the basis of sex, it also classifies based on transgender status, triggering heightened scrutiny on both grounds." Pet. App. 25a. In particular, "the Act explicitly references transgender women, as did its legislative proponents, and 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 25a–26a. Indeed, H.B. 500's "definition of 'biological sex' was designed precisely as a pretext to exclude transgender women from women's athletics." *Id.* at 35a.

The Ninth Circuit then held that "[t]he district court correctly concluded that the Act likely does not survive heightened scrutiny." *Id.* at 39a. The Ninth Circuit recognized, as did the district court, "that furthering women's equality and promoting fairness in female athletic teams is an important state interest." *Id.* at 40a. Yet, as the Ninth Circuit explained, "on the record before us, the district court correctly determined that the Act's means—categorically banning transgender women and girls from all female athletic teams"—was likely "not substantially related to, and in fact undermine[s],

those asserted objectives." *Id.* In particular, the "Act's categorical ban" excludes all transgender women "regardless of their testosterone levels" or whether "they take puberty blockers and never experience endogenous puberty," and even "includes transgender students who are young girls in elementary school or even kindergarten." Pet. App. 48a. Acknowledging that "the scientific understanding of transgender women's potential physiological advantage is fast-evolving and somewhat inconclusive," the Ninth Circuit explained that the record in this case does not support "the conclusion that all transgender women, including those like Lindsay who receive hormone therapy, have a physiological advantage over cisgender women." *Id.* The Ninth Circuit emphasized that it was not deciding whether *any* "policy would justify the exclusion of transgender women and girls from Idaho athletics," but simply that "the profound lack of means-end fit here demonstrates that the Act likely does not survive heightened scrutiny." *Id.* at 55a.

E. Proceedings on Remand to the District Court

On remand to the district court, the parties stipulated that the injunction should apply only to Lindsay, *see* Order Re: Jane Doe, Boise School Dist. Defs., Intervenors, Prelim. Inj., Stay of Proceedings & Caption at 3–4, *Hecox v. Little*, No. 20-cv-00184 (D. Idaho Aug. 22, 2024), ECF No. 137 ("Order"), and the district court modified the preliminary injunction order to that effect on August 22, 2024, *see* Order Modifying Prelim. Inj. The district court also dismissed the intervenors (who had graduated from college) by stipulation of the parties and stayed

further district court proceedings pending resolution of the Petition in this Court. *See* Order at 3–4.

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED DOES NOT WARRANT REVIEW.

A. There Is No Circuit Split with Respect to the Equal Protection Clause's Protections for Transgender Students in School Sports.

There is no circuit split on whether categorically excluding transgender girls from girls' teams because of their sex designated at birth violates the Equal Protection Clause. The only other court of appeals to address that issue is the Fourth Circuit, and it agreed with the Ninth Circuit that categorical exclusions of transgender girls from girls' school sports teams may violate equal protection. *See B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024), *petition for cert. filed* (U.S. July 16, 2024) (No. 24-43).

This case is also in an interlocutory posture, making this Court's review particularly inadvisable. Lindsay's case is only at the preliminary injunction stage, and as the district court observed, it "must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence" to ultimately resolve this case on the merits. Pet. App. 247a. If a circuit conflict arises, the Court will surely have opportunities to take up the question on review of final judgment on a complete record.

Petitioners argue that this case implicates a broader purported circuit split regarding "whether

transgender identity is a quasi-suspect class," Pet. 16. But, as Petitioners concede, this Court is already poised to address that question in *Skrmetti*. *See id.* at 17. There is no reason for a grant in this case to answer the same question.

Moreover, if any circuit split remains after *Skrmetti* regarding the proper level of scrutiny for cases involving discrimination against transgender people, cases involving transgender students' use of restrooms provide better vehicles for resolving such issues. The courts of appeals have been considering and deciding restroom-related cases for the past seven years, often with the benefit of robust factual records. *See A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F. 4th 760 (7th Cir. 2023), *cert. denied* (Jan. 16, 2024) (No. 23-392); *Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). By contrast, none of the cases involving sports have even compiled a complete factual record, much less reached final judgment.

A restroom case is also a superior vehicle for addressing Petitioners' other claimed split regarding "whether sex is a subjective term." Pet. 10. Nearly all the cases Petitioners cite in support of that amorphous split are restroom cases. *See id.* at 10–14 (citing restroom cases from the Fourth, Seventh, Ninth, and Eleventh Circuits). Petitioners concede that their claimed split matters "to any law that contains a classification by sex." *Id.* at 15. Accordingly, there is no need for this Court to intervene here—in an interlocutory posture, and without a circuit split on the specific issue—instead of waiting to grant review in one of the many restroom cases pending in the lower courts. *See, e.g.*, *Roe v. Critchfield*, No. 23-2807

(9th Cir.) (challenge to Idaho restroom ban); *Bridge v. Oklahoma*, No. 24-6072 (10th Cir.) (challenge to Oklahoma restroom ban); *D.H. v. Williamson Cnty. Bd. of Educ.*, No. 3:22-cv-00570 (M.D. Tenn.) (challenge to Tennessee restroom ban).

B. The Ninth Circuit's Equal Protection Analysis Follows This Court's Precedent and Is Correct.

The decision below is also correct on the merits and faithfully follows this Court's precedent. In arguing to the contrary, Petitioners misconstrue both the Ninth Circuit's decision and this Court's equal protection jurisprudence in seeking to create a conflict with this Court where there is none. Petitioners simply disagree with the Ninth Circuit's application of this Court's precedent to Idaho's statute, which is not a basis for this Court's review. Sup. Ct. R. 10.

1. The Ninth Circuit Did Not Adopt a Definition of Sex, Much Less One That Conflicts with This Court's Precedents.

Though Petitioners recognize that Idaho's ban "is based on sex," Pet. 26, they claim that the Ninth Circuit's understanding of the word "sex" "contradicts this Court's equal-protection cases on sex discrimination," which "universally regard sex as an 'immutable characteristic.'" *Id.* at 17–18 (citation omitted). But the Ninth Circuit did not say otherwise. In discussing why Idaho's ban discriminated on the basis of sex, the Ninth Circuit explained, in accordance with this Court's reasoning in *Bostock v. Clayton County*, that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex,"

even if sex is defined as sex designated at birth. Pet. App. 37a (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020)).

Petitioners focus on a different portion of the Ninth Circuit's opinion in which the court explained that—in addition to triggering heightened scrutiny by classifying based on sex—Idaho's ban also independently triggered heightened scrutiny under Ninth Circuit precedent because it was adopted for the purpose of discriminating against transgender girls and women. *See id.* at 25a–32a. Here, too, the Ninth Circuit did not declare that sex is not "biological and objective." Pet. 14. Instead, it explained that Idaho adopted its ban "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" girls and women who are transgender——based on the statute's own statement of legislative findings, the legislative history, and the statute's unusual definition of "biological sex," which cherry-picks which biological sex characteristics should be included or excluded. *See* Pet. App. 26a. Indeed, "[t]he Act's *only* contribution to Idaho's student-athletic landscape is to entirely exclude transgender women and girls from participating on female sports teams." *Id.* at 31a–32a.

The Ninth Circuit also contrasted the existence of a discriminatory purpose in this case with the "inapposite" decision in *Adams ex rel. Kasper v. School Board of St. John's County*, where "there was 'no [record] evidence suggesting that the School Board enacted the [] policy [at issue] because of . . . its adverse effects upon transgender students.'" Pet. App. 34a (quoting *Adams*, 57 F.4th at 810). Regardless of whether Idaho's definition of sex is—or is not—a "well-established medical and legal concept," Pet. 14,

under this Court's precedents, Idaho may not employ that definition for a discriminatory purpose.

2. The Ninth Circuit Faithfully Applied Heightened Scrutiny in Accordance with This Court's Equal Protection Precedents.

Petitioners next claim that the Ninth Circuit "flouted this Court's intermediate scrutiny jurisprudence" and applied "something more akin to strict scrutiny." *Id.* at 20, 22. To the contrary, the Ninth Circuit applied this Court's settled heightened-scrutiny standard. *See* Pet. App. 39a–55a. Specifically, it asked whether Idaho "demonstrate[d] 'that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id.* at 39a (quoting *United States v. Virginia*, 518 U.S. 515, 516 (1996)) (cleaned up).

The Ninth Circuit, like the district court, recognized that "furthering women's equality and promoting fairness in female athletic teams is an important state interest." *Id.* at 40a. The Ninth Circuit then detailed why the district court had not abused its discretion in determining that Idaho had failed to establish the required substantial relationship. *See id.* at 45a–55a. In particular,

> the Act's sweeping prohibition on transgender female athletes in Idaho—encompassing all students, regardless of whether they have gone through puberty or hormone therapy, without any evidence of transgender athletes

> displacing female athletes in Idaho, and enforced through a mechanism that subjects all participants in female athletics to the threat of an invasive physical examination—is likely too unrelated to the State's legitimate objectives to satisfy heightened scrutiny.

Id. at 46a.

Petitioners also complain that "the Ninth Circuit erroneously imposed a narrow-tailoring requirement" and that, under heightened scrutiny, the state need only show a "reasonable" fit, not a "perfect" one. Pet. 23 (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). But the Ninth Circuit did not require a perfect fit, it held that the "the profound lack of means-end fit here demonstrates that the Act likely does not survive heightened scrutiny." Pet. App. 55a. This is consistent with *Nguyen*, which makes clear that the government must still show that the "fit between the means and the important end is 'exceedingly persuasive,'" and that means-end fit depends not only on whether the government's classification serves as an accurate proxy for achieving an important interest, but also based on the burdens and harms imposed by the law. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70–71 (2001) (citing *Virginia*, 518 U.S. at 533).

In arguing that the Ninth Circuit's analysis departed from this Court's precedents, Petitioners note that this Court has sometimes upheld sex classifications under heightened scrutiny "where the gender classification [was] not invidious, but rather realistically reflect[ed] the fact that the sexes are not similarly situated in certain circumstances." Pet. 24

(citing *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1129 (9th Cir. 1982) (quoting *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981))). Far from departing from that principle, the Ninth Circuit examined the factual record compiled at the preliminary injunction stage and affirmed the district court's conclusion that the evidence did not establish that Idaho's sweeping ban was justified by real differences between cisgender and transgender girls and women. The Ninth Circuit reasoned, some "transgender women take puberty blockers and never experience endogenous puberty, yet the Act indiscriminately bars them from participation in women's student athletics, regardless of their testosterone levels." Pet. App. 48a. "[W]e are limited to reviewing the record before the district court," and "the record in this case does not ineluctably lead to the conclusion that all transgender women, including those like Lindsay who receive hormone therapy, have a physiological advantage over cisgender women." *Id.* Whether Idaho's ban does or does not "realistically reflect" differences relevant to athletics is precisely the question that will be resolved on remand—with the benefit of a complete factual record.

If anything, it is Petitioners who disregard this Court's settled intermediate scrutiny framework; they claim, incorrectly, that "only an exceptionally compelling case can override the statute under intermediate scrutiny." Pet. 25. The opposite is true. The burden rests with "a party seeking to uphold government action based on sex [to] establish an 'exceedingly persuasive justification' for the classification." *Virginia*, 518 U.S. at 524 (citation omitted).

3. The Ninth Circuit's Recognition of Transgender Status as a Quasi-Suspect Classification Does Not Contravene This Court's Precedents.

Finally, Petitioners argue that the Ninth Circuit "ignore[ed] this Court's precedents" by treating "transgender identity" "as a quasi-suspect class." Pet. 25, 27. To the contrary, whether transgender status is a quasi-suspect classification remains an open question in this Court.

Applying this Court's traditional criteria for recognizing a quasi-suspect classification, the Ninth Circuit and the Fourth Circuit have both concluded that discrimination against transgender people satisfies all four criteria: (1) they have historically been subject to discrimination; (2) they have a defining characteristic that bears no relation to their ability to contribute to society; (3) they are defined by obvious, immutable, or distinguishing characteristics; and (4) they are a minority lacking political power. *See Grimm*, 972 F.3d at 610–13; *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019).

Other circuits disagree with that conclusion, and this Court may ultimately resolve the question in a future case, but nothing in this Court's precedents forecloses the issue. *See infra* Section III (discussing questions currently pending before this Court in *Skrmetti*).

II. THIS CASE IS A POOR VEHICLE FOR REVIEW.

As explained above, certiorari should be denied because the question presented does not warrant this Court's review. But this case is also not a proper vehicle for resolving the question presented given its interlocutory posture—an appeal from the grant of a preliminary injunction—and the further factual development that will necessarily occur below. *See, e.g.*, *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096–97 (2022) (Alito, J., respecting denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting denial of certiorari).

Because Petitioners' request for this Court's review relies on disputed empirical factual assertions about athletic advantage that will be addressed in further proceedings below, review should be denied at this juncture so that those issues can be developed. As the district court made clear, it ultimately "must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence" before reaching any conclusive determination in this case. Pet. App. 247a. Likewise, the Ninth Circuit explained that its decision was only with respect to the "narrow" and "fact-bound" "question of whether the district court, on the record before it, abused its discretion in finding that Lindsay was likely to succeed on the merits of her equal protection claim." *Id.* at 61a.

In particular, "both the science and the regulatory framework surrounding issues of transgender women's participation in female-designated sports is rapidly evolving." *Id.* at 59a. Among other things, since Lindsay brought suit, the

International Olympic Committee and the NCAA have amended their policies as to transgender women's participation in women's sports, and the U.S. Department of Education has proposed new Title IX regulations regarding the participation of transgender students in school sports. *See id.* at 59a–60a. Issues involving these developments can and should be addressed by the courts below.

Moreover, this case has been pending for four and a half years and may soon be resolved. While it began with Lindsay's dream of competing on BSU's NCAA women's cross country and track teams, she ultimately was not fast enough to qualify for those teams, and thus currently is playing women's club soccer and running in her final year of college. *Id.* at 21a, 22a n.7, 49a. Lindsay has continually enjoyed the protection of the injunction for over four years (without any attempt by Petitioners to stay it) and she will complete college in a matter of months. This case is thus an exceptionally poor vehicle for resolving any broader issues involving women's sports, as it involves one woman playing club sports who will soon complete school altogether.

III. LINDSAY DOES NOT OBJECT TO THIS COURT HOLDING THE PETITION PENDING RESOLUTION OF *SKRMETTI*.

Although certiorari should be denied for all the reasons above, Lindsay acknowledges that this Court currently has before it a case presenting the questions about the level of equal protection scrutiny that applies when the government regulates transgender people. *See Skrmetti*, 144 S. Ct. 2679. Lindsay thus does not object to the Petition being held by the Court pending its resolution of *Skrmetti*, at which point the

Court should either deny the Petition or vacate the Ninth Circuit's opinion and remand in light of *Skrmetti*.

In *Skrmetti*, this Court will address whether a law banning transgender adolescents from receiving healthcare "inconsistent with" their sex designated at birth violates the Equal Protection Clause. *See* Brief for the Petitioner at I, *United States v. Skrmetti* (Aug. 27, 2024) (No. 23-477). A central question in *Skrmetti* is whether the law triggers heightened equal protection scrutiny, either because it classifies based on sex under this Court's precedent, including the Court's reasoning in *Bostock*, or because discrimination against transgender people independently warrants heightened scrutiny as a quasi-suspect classification. *See id.* at 30–31.

As Petitioners acknowledge, the Sixth Circuit's decision in *Skrmetti* is part of the basis for their claim that a circuit split exists with respect to "whether gender identity or transgender identity are quasi-suspect classifications that trigger intermediate scrutiny." Pet. 16. It follows that *Skrmetti* may resolve that claimed split and there is thus no reason for a grant now.

Petitioners' arguments against holding this case for *Skrmetti*, *id.* at 31–32, fall flat. As explained above, the other claimed split regarding "whether sex is a subjective term," *id.* at 10, does not warrant review here, and, in any event, may be affected by *Skrmetti*. Petitioners also argue that *Skrmetti* will not resolve Lindsay's equal protection claim because the resolution of that case will not directly engage in an equal protection analysis in the context of athletics. *See id.* at 32. But, as explained, *see supra* Section I.A,

there is no circuit split regarding whether laws banning transgender girls from girls' sports violate equal protection. Once the Court resolves the equal protection question in *Skrmetti*, lower courts will apply that decision in the context of athletics going forward, allowing for further percolation in the ordinary course. There is no good reason to short-circuit that percolation by granting certiorari here. Finally, Petitioners claim that this case involves a Title IX claim whereas *Skrmetti* does not, Pet. 32, but the decision below is based on equal protection only, not Title IX, and thus this case does not presently present any Title IX issue for this Court's review.

CONCLUSION

The Petition should be denied or held for *Skrmetti*. If the Petition is held for *Skrmetti*, the Petition should then be denied, or the opinion below should be vacated and remanded in light of *Skrmetti*.

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