No. 24-43

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,
v.
B.P.J., BY NEXT FRIEND AND MOTHER,
HEATHER JACKSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR CONCERNED WOMEN FOR AMERICA AND SAMARITAN'S PURSE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with about half a million supporters in all 50 states. CWA advocates for traditional values that are central to America's cultural health and welfare. CWA is made up of people whose voices are often overlooked—average American women whose views are not represented by the powerful or the elite. CWA has a substantial interest in this case. CWA's mission includes ensuring that female athletes can fully participate in sports fairly and safely. Thus, CWA advocates for laws that limit participation in female sports to biological females.*

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing crisis relief, sharing the hope and love of Jesus Christ with those in the gutters and ditches of the world in their darkest hour of need. The ministry operates relief programs around the world for vulnerable women who are victims of war, famine, and disaster and through maternal and child

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* Under Rule 37.2, the parties' counsel of record received timely notice of the intent to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

healthcare. Samaritan's Purse's concern arises when concepts of Biblical and scientific reality are threatened by executive, legislative, or judicial action compelling ideologies that diminish common grace related to safety, fairness, privacy, speech, and religious free exercise.

SUMMARY OF THE ARGUMENT

Under the established intermediate scrutiny rule, the district court correctly granted summary judgment against B.P.J. on equal protection. Pitting boys against girls in sports is unfair. The State has an important objective in ensuring equal athletic opportunities for girls. And the Act is substantially related to that objective because boys generally have an athletic advantage over girls. But the Fourth Circuit adopted B.P.J.'s unprecedented as-applied intermediate scrutiny theory that focuses on individual circumstances. On that theory, even if a law satisfies intermediate scrutiny, any person can claim an exemption by showing that the State's objective may not fully apply to that person. That theory transforms intermediate scrutiny into the functional equivalent of strict scrutiny by requiring otherwise constitutional laws to perfectly fit the challenger's individual circumstances.

But never has intermediate scrutiny demanded a plaintiff-by-plaintiff fit; instead, it limits "discriminatory classifications," not applications. *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (collecting cases). After all intermediate scrutiny allows some amount of over-inclusiveness "so long as the means chosen are not *substantially* broader than necessary to achieve the government's interest." *Turner Broad.*

Sys., Inc. v. *FCC*, 520 U.S. 180, 218 (1997) (emphasis added). This Court has explained that courts "should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Rather than allow B.P.J.'s novel as-applied approach to stand—which even the current administration refused to endorse below—this Court should analyze the Act under the accepted intermediate scrutiny standard: a law containing a sex classification is valid if "substantially related" to an "important governmental objective." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (cleaned up). The Act easily meets that standard. B.P.J. agreed that providing equal athletic opportunities for females is an important governmental objective. App. 87a–88a. And the district court found that "sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports." App. 92a.

By correcting the decision below, this Court can preserve the path of women's equality that it charted in *Virginia*. Increasingly, litigants and lower courts are rejecting what this Court recognized: that "[i]nherent differences between men and women" "are cause for celebration." 518 U.S. at 533. Instead, they frame sex as an indeterminate construct based on personal feelings. That understanding of sex would practically eliminate intermediate scrutiny, making it unadministrable and incapable of protecting women's equality. Sex-discrimination claims would devolve

from the objective and administrable immutable male-female binary into chaos, as men hijack women's sports and private spaces. The ongoing devolution of settled intermediate scrutiny rules into class-of-one claims by innumerable undefined, subjective, ever-changing identities demands this Court's attention. The Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

According to the Fourth Circuit, B.P.J. "'challenges [the Act] only as applied to her' and seeks an injunction that would prevent the defendants from enforcing it against her." App. 27a. This claim misunderstands intermediate scrutiny. Unlike strict scrutiny, intermediate scrutiny asks whether a law's group classification is *sufficiently* tailored to the State's interest. That question focuses on the group classification, and the main question about the individual plaintiff is simply whether they are a member of the group subject to the law's classification. Unlike some applications of strict scrutiny, intermediate scrutiny does not require that the law be the least restrictive means of furthering the State's interest. B.P.J.'s as-applied intermediate scrutiny theory—adopted by the Fourth Circuit—collapses this distinction between strict and intermediate scrutiny. That theory is unsupported by precedent. It would upend state regulatory schemes and revolutionize constitutional adjudication in many areas.

This Court should also renew its commitment to upholding sex-based classifications that respect the "enduring" "physical differences between men and women" for American women's benefit. *Virginia*, 518 U.S. at 533. Sex discrimination was never about an

individual's psychological autonomy to impose their present identity on others. It has always concerned an immutable characteristic: biological sex. Departing from that standard leaves physical reality, administrable standards, and precedent behind. This Court should stay the biological sex-discrimination course and corral the Fourth Circuit's frolic into an unrestrainable subjective-gender-identity standard.

I. The Fourth Circuit's novel as-applied theory eliminates the distinction between intermediate and strict scrutiny.

The general rule is that "legislation is presumed to be valid," and a law "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. But courts are more suspicious of certain classifications. Thus, laws that "classif[y] by race, alienage, or national origin" "are subjected to strict scrutiny." *Ibid.* Such "classifications are simply too pernicious to permit any but the most exact connection between justification and classification," and the government "must demonstrate that the use of individual racial classifications. . . is narrowly tailored to achieve a compelling government interest." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (cleaned up). In some contexts, strict scrutiny requires the government to "show that it has adopted the least restrictive means of achieving [its] interest," "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997).

Sex-based classifications receive lesser scrutiny. As this Court has recognized, "[t]he two sexes are not

fungible," and there are "inherent differences" between the sexes. *Virginia*, 518 U.S. at 533 (cleaned up). These differences "remain cause for celebration, but not for denigration of the members of either sex." *Ibid.* Thus, sex classifications receive intermediate scrutiny, which requires that the classification "serve[] important governmental objectives" with means that "are substantially related to the achievement of those objectives." *Ibid.* (cleaned up).

Courts also apply intermediate scrutiny outside of Fourteenth Amendment equal protection claims. For instance, courts apply intermediate scrutiny for sex discrimination claims against the federal government under the Fifth Amendment's Due Process Clause. See *Frontiero* v. *Richardson*, 411 U.S. 677, 690–91 (1973). Courts apply intermediate scrutiny to content-neutral time, place, or manner restrictions. In these cases too, "a regulation need not be the least restrictive means," but it cannot "burden *substantially more* speech than is necessary to further the government's legitimate interests." *Turner Broad.*, 512 U.S. at 662 (emphasis added) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989)).

In sum, this Court's precedents teach that intermediate scrutiny has two main requirements: (1) the government must have an important interest, and (2) the law must closely—but not precisely—further that interest.

The Fourth Circuit's novel as-applied intermediate scrutiny theory is flawed for three reasons. First, it requires perfect fit of the sort only required, if ever, by strict scrutiny. Second, it is contradicted by precedent.

Third, it would upend state regulatory schemes and constitutional adjudication in many areas of law.

A. The Fourth Circuit's as-applied intermediate scrutiny theory requires perfect fit.

The Fourth Circuit's theory collapses the distinction between strict and intermediate scrutiny, requiring a perfect fit between an otherwise lawful classification and a specific plaintiff's circumstances. When applying strict scrutiny, at least in some contexts, courts examine whether "application of the [legal] burden *to the person*" represents "the least restrictive means of advancing a compelling interest." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (emphasis added). That approach may make sense when the least restrictive means test applies. If even one burdensome application of a law subject to strict scrutiny is unnecessary to achieve the government's objective, then arguably the law is not the least restrictive means. That would mean it flunks strict scrutiny, and the plaintiff subjected to the unnecessary burden wins. Again, strict scrutiny is not always applied this way, but it is at least logically possible to consider such an "as-applied" strict scrutiny argument.

As-applied intermediate scrutiny, by contrast, is incoherent. Intermediate scrutiny is "a less rigorous analysis" than strict scrutiny. *Turner Broad.*, 520 U.S. at 213. By definition, intermediate scrutiny's fit is looser than the "narrow[] tailor[ing]" or "least restrictive means" required by strict scrutiny. *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). Thus, intermediate scrutiny tolerates over-

inclusivity that strict scrutiny would not: a statute can pass intermediate scrutiny even if the states' interest is not achieved every time. *Turner Broad.*, 520 U.S. at 216.

Certainly, intermediate scrutiny does not tolerate too much over-inclusivity. See, *e.g., Craig* v. *Boren*, 429 U.S. 190, 202 (1976) ("[A] correlation of 2%" between sex and the relevant behavior "must be considered an unduly tenuous 'fit.'"). But it tolerates laws with *some* unnecessary applications. While a 2% correlation might be too little, 100% is far too much. See *id.* at 204 (calling for merely "a legitimate, accurate proxy"); *Turner Broad.*, 520 U.S. at 216–17 (acknowledging that a law is not overbroad even when the government's interest is not implicated in every application). Otherwise, intermediate scrutiny is no different from strict scrutiny.

Contrary to the Fourth Circuit's theory, it is incoherent to ask whether the law's application to a single plaintiff is permissibly overinclusive. That inquiry has no meaning. Instead, the over-inclusivity question focuses on the group classification. In other words, the over-inclusivity question is exactly what the traditional intermediate scrutiny standard says: is the law's overall, group-wide classification sufficiently tailored to an important interest? That connection is assessed by group-wide characteristics. The longstanding "two remedial alternatives" confirms this group focus: "withdrawal of benefits from the favored class" or "extension of benefits to the excluded class." *Sessions* v. *Morales-Santana*, 582 U.S. 47, 72–73 (2017). Under intermediate scrutiny, the law cannot be "overbroad[]" simply because its application

to a single plaintiff is unnecessarily burdensome. *Id.* at 63 n.13. That is nonsensical.

The Fourth Circuit did not try explaining how its theory would not collapse intermediate and strict scrutiny, other than noting the irrelevant fact that "winning an as-applied challenge does not impact the state's ability to apply its law to other parties." App. 30a. But that confuses a remedial question with whether the law violates equal protection at all. The Fourth Circuit's explanation is also difficult to credit practically when it comes to an unobservable and subjective criteria like gender identity, a topic addressed more below.

The Fourth Circuit also reasoned that "a defendant may prevail by showing that its refusal to make an exception for the plaintiff's individual circumstances itself satisfies the relevant level of constitutional scrutiny." App. 30a. But this does not distinguish as-applied intermediate scrutiny from strict scrutiny. Certainly, the Fourth Circuit's suggestion might be true in strict scrutiny cases like the free exercise case it relied on. See *ibid.* (discussing *United States* v. *Lee*, 455 U.S. 252 (1982)); see also *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 734 (2014) (explaining "the fundamental point" of *Lee* as "there simply is no less restrictive alternative to the categorical requirement to pay taxes"). But that showing should never be required under intermediate scrutiny, where individual circumstances are irrelevant. The Fourth Circuit has no answer.

The United States provides a helpful contrast, as it refused to press the Fourth Circuit's as-applied intermediate scrutiny theory as *amicus*. Below, the

United States argued that "the State's categorical exclusion of all transgender girls—including those who, like B.P.J., have no sex-based competitive advantage over other girls—from competing in school athletics like the girls' track and cross-country teams is not substantially related to achieving the State's asserted interest in ensuring equal athletic opportunities for girls in West Virginia." Brief for the United States as *Amicus Curiae* 18–19, 2023 WL 2859726, *B.P.J.* v. *W. Virginia State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024). That argument is wrong, but what matters is that the United States is making a subtly but importantly different argument from B.P.J. The United States argued that the law is overbroad as applied to the group of "all transgender girls," merely using the plaintiff as an example to show that supposed over--inclusivity. That is different from B.P.J.'s claim, which is that the law is invalid as applied just because the State's asserted interests supposedly do not apply to B.P.J. Under this theory—adopted by the Fourth Circuit—B.P.J. would win here even if every other transgender girl dominated in girls' sports. As the United States' refusal to sign on to this novel theory suggests, this theory bears no relation to intermediate scrutiny. To maintain the distinction between strict and intermediate scrutiny, the Court should reject the Fourth Circuit's novel theory.

B. Precedent contradicts the Fourth Circuit's theory.

The weight of precedent is also against the Fourth Circuit's as-applied intermediate scrutiny theory. Time and again, this Court has said that individual characteristics have no bearing on a law's

constitutionality under intermediate scrutiny. Take *Ward* v. *Rock Against Racism*, where the respondent argued that a city's requirement that it use the city's sound equipment and technician for its performance failed intermediate scrutiny. 491 U.S. at 787–90. The city justified its regulation as it would "eliminate[] the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers." *Id.* at 801. This Court noted that "this concern [was] not applicable to respondent's concerts, which apparently were characterized by more-than-adequate sound amplification." *Ibid.* In other words, the city's interest was not furthered by requiring Rock Against Racism to use the provided equipment and technician. But this "fact [was] beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ibid.* The Court continued: "the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it." *Ibid.*

Likewise, in *Nguyen* v. *INS*, this Court applied intermediate scrutiny to a law providing different citizenship rules for children born abroad and out of wedlock depending on whether the citizen parent was the mother or the father. 533 U.S. 53, 61 (2001). The Court recognized two important governmental interests that this statute served: "assuring that a biological parent-child relationship exists," and

"ensur[ing] that the child and the citizen parent have some demonstrated opportunity" to establish a relationship that connects the child to the "citizen parent and, in turn, the United States." 533 U.S. at 62, 64–65. The plaintiffs argued that there was no "guarantee" that the law would always advance these interests. *Id.* at 69. This Court held that "[t]his line of argument misconceives" "the manner in which we examine statutes alleged to violate equal protection." *Ibid.* "None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Id.* at 70. Instead, it is enough that "the means adopted by Congress are in substantial furtherance of important governmental objectives." *Ibid.*

Many other cases are in accord. See *Rostker* v. *Goldberg*, 453 U.S. 57, 81 (1981) (upholding the exclusion of women from selective-service registration even though "a small number of women could be drafted for noncombat roles"); *Califano* v. *Webster*, 430 U.S. 313, 318 n.5 (1977) (per curiam) (upholding a statute providing higher Social Security benefits for women than for men because "women *on the average* received lower retirement benefits than men." (emphasis added)); *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977) ("[B]road legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples.").

West Virginia's Act operates within those bounds. It prohibits biological boys from competing in girls' sports, without exception. That is the policy choice

that West Virginians made, consistent with intermediate scrutiny. But if the Court lets the Fourth Circuit's as-applied intermediate scrutiny control the Act's constitutionality, that will create a significant, judicially imposed exception to the Act via a perfect fit requirement—something this Court has never required, and the people's representatives never voted for.

To salvage its novel as-applied theory, the Fourth Circuit pointed to *Lehr* v. *Robertson*, 463 U.S. 248 (1983), and *Cleburne*, 473 U.S. at 440. But neither is not about sex. And neither applied intermediate scrutiny.

In *Lehr*, this Court upheld a law that "guarantee[d] to certain people the right to veto an adoption." 463 U.S. at 266. Under the challenged law, "[t]he mother of an illegitimate child is always within that favored class, but only certain putative fathers are included." *Ibid.* Because the father in *Lehr* "never established a substantial relationship with his daughter," the government could constitutionally distinguish between him and others like him and fathers who "are in fact similarly situated [to the mother] with regard to their relationship with the child." *Id.* at 267.

Lehr did not apply intermediate scrutiny at all. Instead, it found no equal protection violation because the plaintiffs were not "similarly situated" to those in the supposedly favored group. *Ibid.*; see *Morales-Santana*, 582 U.S. at 64 n.12 ("The 'similarly situated' condition was not satisfied in *Lehr*."). In other words, the Court held that the regulation discriminated between parents with "a substantial relationship"

with their child and parents without that relationship, not based on sex. *Lehr*, 463 U.S. at 266.

Cleburne does not support the Fourth Circuit's approach, either. There, this Court considered whether denying a conditional use zoning permit to a group home violated equal protection. *Id.* at 435. Rather than create a new suspect class, the Court asked if the zoning "rational[ly]" met "a legitimate end." 473 U.S. at 442. In that inquiry, courts "should look" to whether the "classification is valid *as a general matter*." *Id.* at 446 (emphasis added).

The Fourth Circuit emphasized that *Cleburne* "held that 'the ordinance [was] invalid *as applied in this case*.'" App. 28a (quoting 473 U.S. at 448). "But applying rational-basis review in a '*case*' is not the same as applying it to the unique circumstances of a specific plaintiff." *Jones* v. *Governor of Fla.*, 975 F.3d 1016, 1036 (CA11 2020) (Pryor, C.J.). "After the passage cited by the [Fourth Circuit]," *Cleburne* "evaluated whether the city's proffered reasons for requiring a permit for a group home of people with intellectual disabilities but not for comparable facilities rationally reflected relevant differences between 'the mentally retarded *as a group*' and others." *Ibid.* (citing *Cleburne*, 473 U.S. at 448–50). "The Court did not focus on factors unique to the particular disabled people involved," *ibid.*, and its application as a remedial matter was appropriately limited to the zoning permit before it. *Cleburne*'s analysis—rational basis for a zoning application by one party—is not some hidden sea change in constitutional jurisprudence.

In sum, the Fourth Circuit's as-applied intermediate scrutiny approach finds no basis in this Court's precedents, which reject that theory.

C. The consequences of the Fourth Circuit's theory would be significant.

Beyond disregarding precedent, the Fourth Circuit's novel theory would have significant negative consequences. It would permit a plaintiff to demand perfect tailoring to his situation, forcing the government to abandon the law's enforcement writ large to avoid plaintiffs with often undetectable unique circumstances. The Fourth Circuit's intermediate scrutiny reformulation would also alter vast swaths of law, including Fourteenth Amendment equal protection, Fifth Amendment due process, and First Amendment speech. Decades of precedent would be disturbed, and intermediate scrutiny would essentially morph into strict scrutiny, which is supposed to be reserved for the most inherently suspect laws.

First, the practical consequences of the Fourth Circuit's theory would be severe. Laws that are facially valid—and further important government interests like protecting girls and women from harm—would no longer be enforced. That is because states will be unable to predict when some plaintiff with unique (and, as here, unapparent) circumstances might come along and suffer a supposed as-applied violation. And under the Fourth Circuit's theory, any state-run single-sex homeless shelter, prison, or restroom could create an equal protection violation for gender identity—as applied to an individual. Rather than face a steady trickle of lawsuits and potentially

crushing liability, states and local governments will simply not enforce these laws or programs, even if they are valid as against every other person in the world.

In the intermediate scrutiny realm, those laws protect important state interests. Individuals protected by those laws—here, young girls—will suffer. In places where biological men who identify as women have competed against biological women, these harms are real. Young girls have lost not just individual competitions, but the chance to compete on a fair playing field against their peers.[1] Certainly, this is not the "celebration" of women's physical capabilities that intermediate scrutiny is supposed to preserve. *Virginia*, 518 U.S. at 533. Instead, the Fourth Circuit's theory would allow biological men to "denigrate" women's "physical differences" by infiltrating women's sports and ultimately excluding women from the highest levels of athletic achievement. *Ibid.*

The Fourth Circuit's theory will also unsettle precedent. Under that theory, many cases from this Court would have been decided differently. For example, in *Ward* this Court would likely have held

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[1] *See, e.g.*, R. Pollina, *High school track star appears to give 'thumbs-down' after she's pushed out of state champs by transgender competitor: 'Cheated'*, NY Post (May 22, 2023) https://perma.cc/XJH4-ZD95; W. Martin & M. Cash, S*wimmer Lia Thomas beat 2 Olympic medalists amid protests to make history as the first trans athlete to win an NCAA title*, Business Insider (Mar. 18, 2022), https://perma.cc/XZG2-MXTH; E. Lips, *Bearded MA 'Trans' HS Athlete Injures Multiple Girls; Now Story Part of NH Debate*, NH Journal (Apr. 4, 2024), https://perma.cc/SDR8-BGNB.

that forcing Rock Against Racism to comply with the city's amplification requirements did not further the city's justification for the regulation because Rock Against Racism's amplification was "more-than-adequate." 491 U.S. at 801. And it would be a rare city that would continue to enforce such a law, notwithstanding the damage such nonenforcement would cause to important interests.

Likewise, this Court in *Nguyen* would likely have found that the "ultimate objective" of the statute at issue was not furthered by enforcing it against Nguyen, and thus the statute would have been held unconstitutional. *See* 533 U.S. at 70. As discussed, *Nguyen* considered a statute providing different steps for immigrants to attain citizenship depending on whether the unwed father or unwed mother was a citizen. *Id.* at 62. The government's asserted interests in parent-child relationships were not implicated by the facts in *Nguyen*, as the petitioner's relation to his citizen father was shown through a DNA test, and the petitioner lived with his father in the United States from ages five to 22. *Id.* at 57. Though *Nguyen* held that the statute need not "be capable of achieving its ultimate objective in every instance," *id.* at 70, the Fourth Circuit's theory would require the opposite.

Further, if this Court accepts the Fourth Circuit's theory and permits a challenger to demand a perfect fit between a law and that challenger's unique circumstances, the Court would be sanctioning formerly meritless claims. As the Supreme Court has warned, if a plaintiff can change the substantive law by labeling a claim "as-applied," the courts will be plagued with "pleading games." *Bucklew* v. *Precythe*,

587 U.S. 119, 139 (2019). While the "line between facial and as-applied challenges can sometimes prove amorphous," "the label is not what matters." *Id.* "To hold now, for the first time, that choosing a label changes the meaning of the Constitution would only guarantee a good deal of litigation over labels, with lawyers on each side seeking to classify cases to maximize their tactical advantage. Unless increasing the delay and cost . . . is the point of the exercise, it's hard to see the benefit in placing so much weight on what can be an abstruse exercise." *Ibid.* Rather than deny that reality, the Fourth Circuit embraced it, explaining that "an as-applied challenge" "'affects the extent to which the invalidity of the challenged law must be demonstrated.'" App. 29a.

Finally, what's sauce for intermediate scrutiny is sauce for rational basis review. As suggested by its reliance on *Cleburne*, the Fourth Circuit's theory would revolutionize rational basis review. It would mean that courts must consider whether the government's regulation of a *particular person* is rationally related to a legitimate government interest. That has never been the test. Under rational basis, this Court has long held that "a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour* v. *City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012). "[S]tate classifications" that are subject to rational basis review "cannot be determined on a person-by-person basis." *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 85–86 (2000). "Our Constitution permits States to draw

lines [for non-suspect classes] when they have a rational basis for doing so at a class-based level, even if it is 'probably not true' that those reasons are valid in the majority of cases." *Id.* at 86; *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 473 (1991) (upholding mandatory retirement for judges while acknowledging that "[i]t is probably not true that most" judges suffer deterioration in old age, and "[i]t may not be true at all"); *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979) (holding that a mandatory retirement law passed rational basis review even though "individual" "employees may be able to perform past" the age limit); *Mass. Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 311, 314–17 (1976) (holding that mandatory retirement for police officers passed rational basis review even though the challenger was in "excellent physical and mental health" and was still "capable of performing the duties of a uniformed officer").

To be sure, closer scrutiny is warranted under intermediate scrutiny. But the question is whether the relevant equal protection scrutiny level in an as-applied case is adjudicated by reference to the plaintiff's own circumstances. If intermediate scrutiny requires that the government's interests be borne out in the individual case, rational basis scrutiny logically would as well. That is true even if a lesser interest suffices under rational basis review. And "[n]early any statute which classifies people may be irrational as applied in particular cases." *Jones*, 975 F.3d at 1036 (quoting *Beller* v. *Middendorf*, 632 F.2d 788, 808 n.20 (CA9 1980) (Kennedy, J.)). Once again, the Fourth Circuit's theory would upend constitutional law.

The Fourth Circuit did not address these consequences, though presumably they account in part, for the United States' reticence to endorse the theory. Yet B.P.J. and the Fourth Circuit well understand what the United States has tried to avoid: that plaintiffs in these cases can only succeed if courts accept an unprecedented reformulation of intermediate scrutiny. The Fourth Circuit's theory is logically incoherent and incompatible with precedent. Its consequences would be severe. The Court should reject it.

II. Under equal protection, "sex" is not a subjective category divorced from physical, biological reality.

A through-line in this Court's equal protection cases is that the government cannot discriminate based on certain immutable characteristics. See *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race" is "odious in all aspects."); *Virginia*, 518 U.S. at 532 (denouncing any "law or official policy [that] denies to women, simply because they are women," "equal opportunity to aspire, achieve, participate in and contribute to society"). Each time this Court has recognized a protected class, it has understood that whether the individual is part of the class is an objective fact. See *Engquist* v. *Oregon Dep't of Agr.*, 553 U.S. 591, 601 (2008) ("The basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes." (cleaned up)). Sex is no different.

But the Fourth Circuit's decision here, and the Ninth Circuit's similar decision in *Hecox* v. *Little*, 104

F.4th 1061 (CA9 2024), try to break this link between sex and biology. The United States too now asserts that what was formerly understood as sex is *not* immutable, but a matter of changing preferences and identities. Adopting this theory would erode the foundation of heightened scrutiny and undermine the quest for equal rights for women.

Echoing "today's faddish social theories," litigants and courts have started to "embrace" the idea that sex is a mutable, undefinable construct. *Parents Involved*, 551 U.S. at 780 (Thomas, J., concurring). The Ninth Circuit, for instance, quoted a strident proponent of gender transitioning procedures to declare that "[t]he phrase 'biological sex' is" "imprecise," because "[a] person's sex encompasses the sum of several biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, and gender identity," each of which may not "align[]." *Hecox*, 104 F.4th at 1076. (Note the inclusion of gender identity as a supposed component of sex.) The trendy view is that, "[i]n the truest scientific sense, gender and sex are multidimensional concepts with complex expressions that are related—and distinct from each other—in ways that modern science is still exploring."[2]

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[2] M. McNamara et al., *An Evidence-Based Critique of "The Cass Review" on Gender-affirming Care for Adolescent Gender Dysphoria* 24-25 (July 1, 2024), https://perma.cc/9D5Q-D6JC.

Adopting this theory, the United States has taken it another step by arguing that "assert[ing] that a person's sex 'cannot be changed'" is so obviously false that it betrays "animus."[3] In this topsy-turvy world, sex is mutable, gender identity immutable—"and the two simultaneously equivalent to each other."[4]

This new word-salad paradigm of sex would detonate intermediate scrutiny and subordinate women to biological men. Under this new paradigm, sex discrimination is not about whether a person was treated differently as biological man or women, this Court's longstanding dividing line. Instead, it misappropriates and redefines sex to mean (at least in part) an individual's internal sense of self—their gender identity—and unknown other criteria.

But courts cannot apply intermediate scrutiny based on some undefinable, unascertainable characteristic that varies in each individual and may not align with other characteristics—and could vary day-by-day. That standard would create as many "class[es]-of-one" as there are people on the planet—and thus be wholly administrable. Cf. *Engquist*, 553 U.S. at 608–09. It is unclear how courts could even identify policies that facially discriminate based on sex if sex is a "multidimensional concept with complex expressions." Who's to say that VMI's students used to be "male"? How do we know that? How are courts supposed to decide which "components" of "complex

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[3] U.S. Resp. in Opp. to Mot. for Summ. J. 66, *Boe* v. *Marshall*, No. 22-cv-184, Doc. 627 (M.D. Ala. July 1, 2024).

[4] Defs' Reply in Support of Mot. for Summ. J. 116–17, *Boe*, Doc. 650 (M.D. Ala. Aug. 5, 2024).

expressions" represent sex, such that a classification by those components (but not others) gives rise to heightened scrutiny? How should courts decide the appropriate comparators? What happens if a litigant's "sex" changes? Would these answers change as "modern science" continues to "explore"?

The proponents of redefinition have no answers. And their standard is incompatible with this Court's sex discrimination precedents that acknowledge the "enduring" "physical differences" between "men and women." *Virginia*, 518 U.S. at 533. ("Animus," the United States would cry![5]) Rather than reimagine what sex means, this Court should stick with the sex discrimination paradigm from *Virginia*. In *Virginia*, this Court evaluated VMI's single-sex admissions policy under intermediate scrutiny. *Id.* at 520. Virginia's single sex admissions program ultimately failed because there was no "substantial[ly] equa[l]" single-sex educational alternative available to women. *Id.* at 554.

The core problem, then, with VMI's policy was that it categorically excluded biological women from an opportunity afforded to men. Seemingly nothing in VMI's policy would have prevented a qualified biological man who had a female gender identity from enrolling.[6] Likewise, that policy would not have let a biological woman enroll even if the woman identified

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[5] *Supra* n.3.

[6] VMI did not consider asking prospective students about their gender identity in the admissions process until as late as October 2023. Editorial, *VMI's Transgender Policy*, The Cadet (Nov. 17, 2023), https://perma.cc/258X-VL6M.

as a man. Those identities are irrelevant to the constitutional understanding of sex. When addressing how intermediate scrutiny would apply to sex-based classifications going forward, the Court tied its analysis to the physical differences between men and women. See *Virginia*, 518 U.S. at 533. As Justice Ginsburg explained, "[p]hysical differences between men and women" "are enduring" and "the two sexes are not fungible." *Ibid.* (This view is now labeled "animus" by the United States.) A "community made up exclusively of one sex"—like girls' sports teams—"is different from a community composed of both" sexes. *Ibid.* This is "cause for celebration" (*ibid.*)—just as women's sports are for so many girls and women.

The sex as complex construct theory, however, ignores biological reality and upends this Court's analysis. It would shred women's athletic equality by making women's sports co-ed—the opposite of the Court's vision in *Virginia*. It would allow biological men who say they are women to hijack women's athletic competitions, even when those men possess inherently different athletic capabilities. The result would be fewer opportunities for girls and women; less privacy in personal spaces; and physical dangers in many spheres.[7] Rather than adopt the radical position offered by the United States and several lower courts,

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[7] See, *e.g.*, J. Tasch, *Team forfeits after girls basketball player allegedly hurt in play with male who identifies as female*, New York Post (Feb. 20, 2024), https://perma.cc/HAQ6-54V9; O. Land, *Male Rikers Island inmate who was 'instructed to claim he was transgender' raped female prisoner: lawsuit*, New York Post (Jan. 24, 2024), https://perma.cc/ZX4W-KNQG.

this Court should stay on the intermediate scrutiny path that Justice Ginsburg blazed in *Virginia*, which respects the biological differences between the sexes and promotes women's equality.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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