No. 24-449

IN THE
Supreme Court of the United States

WARREN PETERSEN, Senator, President of the Arizona State Senate, et al.,
Petitioners,

v.

JANE DOE, by next friends and parents HELEN DOE and JAMES DOE, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Arizona's Save Women's Sports Act (SWSA or the Act), Ariz. Rev. Stat. § 15-120.02, categorically bars transgender girls—from kindergarten through graduate school—from participating in school sports consistent with their gender identity. Respondents Jane Doe and Megan Roe are transgender girls, aged 13 and 17, who wish to continue playing on girls' sports teams at their schools. Neither Jane nor Megan has experienced or will experience male puberty, and, as the district court found, both have "athletic capabilities like other girls [their] age and different from boys [their] age." Pet. App. 90A–91A. Based on that finding, the district court found that enforcement of the SWSA against Jane and Megan would likely violate their rights under the Fourteenth Amendment's Equal Protection Clause. Hence, it entered a preliminary injunction preventing the Act from being enforced against them. The Ninth Circuit affirmed.

The question presented is:

Whether the district court abused its discretion in entering a preliminary injunction prohibiting Arizona from enforcing the SWSA's categorical ban against Jane and Megan.

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INTRODUCTION

Respondents Jane Doe and Megan Roe are two transgender girls who wish to continue playing school sports on girls' sports teams. Arizona's Save Women's Sports Act, Ariz. Rev. Stat. § 15-120.02, which categorically bans transgender girls from playing on girls' sports teams, prohibits them from doing so. Together, Jane and Megan filed this as-applied challenge to the SWSA and moved to preliminarily enjoin its enforcement against them on the basis that the Act's categorical ban, as applied to them, violates the Fourteenth Amendment's Equal Protection Clause. After a hearing, the district court concluded that respondents were likely to succeed on the merits of their Equal Protection challenge and granted the requested injunction,[1] as a result of which Jane and Megan have been able to participate in girls' sports at their schools. That preliminary conclusion was based largely on the district court's factual determination that neither Jane nor Megan, who have not experienced and will not experience male puberty and the increased levels of testosterone that go along with it, possess any athletic advantage over other girls their age. *See* Pet. App. 90A–91A.

That narrow, factbound, preliminary conclusion affecting just two out of some 170,000 student athletes

[1] Respondents also sought preliminary injunctive relief based upon alleged violations of their rights under Title IX, and the district court found they were likely to succeed on those claims as well. *See* Pet. App. 101A–103A. But the Ninth Circuit affirmed without reaching the Title IX issue, *see id.* at 51A–53A, so that issue is not presented by this petition, *see* Pet. 11 n.6.

in Arizona does not warrant this Court's attention. And that is particularly so since the question of the propriety of the district court's preliminary injunction may well become moot before this Court can resolve it. Fact discovery in the district court closed on October 21, 2024, and expert discovery is set to close on February 28, 2025. *See* D. Ct. Doc. 232. Dispositive motions are due on March 31, 2025. *Id.* Once those motions are briefed, petitioners' request for a permanent injunction will become ripe for adjudication.

There is no reason this narrow, interlocutory, soon-to-be-moot petition warrants plenary review. There is no circuit split on the Equal Protection rights of transgender students who wish to participate in school sports consistent with their gender identities. Petitioners insist that the decision below implicates a litany of purported circuit splits on subsidiary issues, but with the sole exception of the question this Court will decide in *United States v. Skrmetti*, 144 S. Ct. 2679 (2024) (No. 23-477), no circuit split exists on any question.

This Court appears to have held two other petitions raising related issues pending the decision in *Skrmetti*. *See Hecox v. Little*, 104 F.4th 1061, 1079–80 (9th Cir. 2024), *petition for cert. filed*, 93 U.S.L.W. 3006–07 (U.S. July 15, 2024) (No. 24-38); *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 554–55 (4th Cir. 2024), *petition for cert. filed*, 93 U.S.L.W. 3006 (U.S. July 16, 2024) (No. 24-43). In light of the Court's apparent decision to hold those cases, respondents do not object to this Court likewise holding this petition for

Skrmetti. After *Skrmetti* is decided, the Court should either deny certiorari or grant, vacate, and remand for the Ninth Circuit to consider *Skrmetti*'s effect in the first instance. Plenary review—either now or after *Skrmetti* is decided—is unwarranted.

STATEMENT

A. Jane Doe and Megan Roe

Respondents in this case are two transgender girls who wish to continue playing school sports on girls' sports teams.

Jane Doe, who was 11 years old when this suit was filed and is now 13, *see* D. Ct. Doc. 108-3, is a transgender girl and a middle-school student in Chandler, Arizona, *see* Pet. App. 21A. She has lived as a girl in all aspects of her life since she was five years old, was diagnosed with gender dysphoria at age seven, and began taking puberty blockers at eleven. *Id.* As a result of that medication, the district court found—and petitioners do not meaningfully dispute—that Jane "has not and will not experience" male puberty or "any of the physiological changes that increased testosterone levels would cause in a pubescent boy." *Id.* at 69A.

"Sports are very important to Jane," and she played on girls' club and recreational soccer teams for nearly five years prior to the initiation of this lawsuit. *Id.* Now in middle school, Jane wishes to continue playing soccer—and to take up basketball and cross-country—consistent with her gender identity. *Id.* "Jane's teachers, coaches, friends, and members of her soccer team have all been supportive of Jane's identity," and

her school does not object to her desire to participate in sports alongside the other girls in her class. *Id.*

Megan Roe, who was 15 years old when this lawsuit began and is now 17, *see* D. Ct. Doc. 108-4, is a transgender girl who attends high school in Tucson, Arizona, *see* Pet App. 21A, 70A. Megan, who "has always known she is a girl," has lived as a girl since she was seven, was diagnosed with gender dysphoria when she was ten, has taken puberty blockers since she was eleven, and began receiving hormone therapy when she was twelve. *Id.* at 70A–71A. As a result of this combined course of treatment, the district court found—and again, petitioners do not meaningfully dispute—that Megan has not experienced any of the physiological changes associated with male puberty. *Id.* at 71A. To the contrary, Megan's hormone therapy has led her "to develop many of the physiological changes associated with puberty in females." *Id.*

Like Jane, sports have "always been a part of Megan's life." *Id.* at 72A. Megan now wishes to continue playing for her high school's girls' volleyball team, a sport that forms "an important part of the [school's] community." *Id.* For their part, "Megan's teammates, coaches, and school are highly supportive of her and would welcome her participation on the girls' volleyball team." *Id.*

B. Arizona's Save Women's Sports Act

In March 2023, the Arizona Legislature passed, and Governor Ducey signed, the Save Women's Sports Act, Ariz. Rev. Stat. § 15-120.02. The Act, which applies to all schools in the state, from kindergarten through

graduate school, *see id.* § 15-120.02(I)(1), requires that any "interscholastic or intramural athletic team or sport that is sponsored by a public school or a private school whose students or teams compete against a public school shall be expressly designated . . . based on the biological sex of the students who participate on the team or in the sport" as either a male team, a coed team, or a team for "'[f]emales', 'women' or 'girls,'" *id.* § 15-120.02(A)(1). It goes on to provide that "[a]thletic teams or sports designated for 'females', 'women' or 'girls' may not be open to students of the male sex." *Id.* § 15-120.02(B)(1). The Act does not define the terms "biological sex" or "male sex," but all parties agree that these terms refer to "sex assigned at birth." Pet. App. 15A.

The SWSA also includes a section on "[l]egislative findings and purpose." *Id.* at 121A. Among the factual findings contained therein: that there are two biological sexes; that biological sex is determined at fertilization; that there are inherent physiological differences between the two sexes; that these physiological differences—most centrally, higher natural levels of testosterone among men—correlate with athletic performance; and that "[t]he benefit[] that natural testosterone provides to male athletes is not diminished through the use of testosterone suppression." *Id.* at 121A–125A. Based on these findings, the legislature determined that the categorical exclusion of transgender girls and women from women's sports would "promote sex equality by providing opportunities for [biologically] female athletes to demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain recognition, accolades,

college scholarships and the numerous other long-term benefits that flow from success in athletic endeavors." *Id.* at 125A–126A.

For most student athletes in Arizona, the SWSA did nothing to change the status quo. For example, it has long been the policy of the Arizona Interscholastic Association (AIA)—the largest voluntary membership organization of Arizona schools (Megan's high school among them), which "sets rules for governing interscholastic sports" in the State, *id.* at 72A–73A—that males may not play on teams designated for women or girls. *See id.* at 15A–16A; *see also Clark ex rel. Clark v. Ariz. Interscholastic Ass'n (Clark I)*, 695 F.2d 1126, 1127 (9th Cir. 1982) (upholding that policy against an Equal Protection challenge). Likewise, the AIA has always permitted girls and women to play on men's teams, *see Clark I*, 695 F.2d at 1127, and the SWSA left that policy unchanged, *see* Ariz. Rev. Stat. § 15-120.02(C).

But the SWSA did change the State's policy with respect to transgender girls. Prior to the SWSA's enactment, transgender girls and women were generally "permitted to participate in women's and girls' sports, albeit under limited circumstances, consistent with policies established by the National Collegiate Athletic Association (NCAA), the AIA, and individual schools." Pet. App. 16A. The AIA's policy required transgender girls wishing to play girls' sports to obtain approval from "a committee of medical and psychiatric experts" who would determine whether the request was "motivated by an improper purpose." *Id.* at 73A. The NCAA's

policy was stricter, permitting transgender women to play on women's sports teams only so long as they could meet requirements for "specified levels of circulating testosterone." *Id.* at 82A–83A n.6. In the "10 to 12 years" prior to the initiation of this lawsuit, the AIA fielded just 12 requests by transgender students seeking to play on teams consistent with their gender identity, and approved only seven of those requests. *Id.* at 74A. For context, approximately 170,000 students play sports in Arizona each year. *Id.*

C. Proceedings in the District Court

Shortly after Governor Ducey signed the SWSA into law, respondents filed this lawsuit alleging (as relevant here) that the Act, as applied to them, "violates the Equal Protection Clause because it impermissibly discriminates based on [their] transgender status and on account of their sex because being transgender is a sex-based trait." Compl. ¶ 4 (D. Ct. Doc. 1).[2] Alongside the

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[2] Respondents named as defendants Jane's school district and its superintendent and Megan's high school ("the school defendants"); the AIA; and Thomas C. Horne, the State Superintendent of Public Instruction, in his official capacity. *See* Compl. ¶¶ 9–13. But the school defendants all filed stipulations indicating that they did not wish to defend the SWSA and were not adverse to respondents except as required by that law. *See* D. Ct. Doc. 59 (Jane), 215 (Megan). And the AIA's response to the preliminary injunction motion likewise indicated that it did not oppose respondents' requested relief on the merits. *See* D. Ct. Doc. 51. Indeed, as the district court would eventually determine, but for the SWSA, the AIA's policy would permit respondents to participate on the teams of their choice. *See* Pet. App. 63A. With petitioner Horne thus left as the only party defending the Act,

complaint, respondents filed a motion for a preliminary injunction prohibiting the SWSA from being enforced against them. *See* Pet. App. 23A.

In advance of the preliminary injunction hearing, the parties jointly agreed to "offer proof [in support of their positions on the preliminary injunction motion] by way of expert declarations." *Id.* at 63A n.1; *see also* D. Ct. Doc. 80 (text entry documenting "the parties' decision to present declarations in lieu of witness testimony").

On July 20, 2023, after hearing oral argument on the motion, the district court granted respondents' request for a preliminary injunction. Pet. App. 63A, 107A.

1. Pertinent Factual Findings

As most relevant here, the district court reviewed the evidence presented by the parties and made findings as to (1) the biological drivers of differences in athletic performance between males and females, (2) the Arizona Legislature's intent in enacting the SWSA, and (3) respondents' athletic abilities.

Biological differences between men and women. The district court found that respondents had presented persuasive evidence that "the biological cause of average differences in athletic performance between men and women is . . . the presence of circulating levels of testosterone beginning with male puberty," Pet. App. 81A, such that "[t]ransgender girls who receive

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petitioners Senator Warren Petersen, the President of the Arizona State Senate, and Representative Ben Toma, the Speaker of the Arizona House of Representatives, sought and were granted leave to intervene. *See* Pet. App. 23A.

puberty-blocking medication" before the onset of male puberty "do not have an athletic advantage over other girls," *id.* at 88A–89A. By contrast, the district court found that petitioners had submitted evidence that was largely "not relevant to the question before the [c]ourt: whether transgender girls like [respondents], who have not experienced male puberty, have performance advantages that place other girls at a competitive advantage or at risk of injury." *Id.* at 81A.

The Legislature's intent in enacting the SWSA. The court also assessed the history of school sports in Arizona and the legislative history of the SWSA to determine whether the Arizona Legislature had acted with a discriminatory purpose in enacting the SWSA.

First, the district court found that the record lacked evidence showing that either of the Act's purported purposes—"ensuring equal opportunities for girls to play sports and . . . prevent[ing] safety risks" to those girls, *id.* at 99A—was actually a problem that needed solving. Transgender girls had been able to play sports in Arizona consistent with their gender identity for at least the last "10 to 12 years." *Id.* at 74A. But the court found no evidence that, during that period prior to the SWSA's enactment, there was either (1) "a problem in Arizona related to transgender girls replacing non-transgender girls on sports teams" or (2) "a risk of any physical injury to or missed athletic opportunity by any girl as a result of allowing . . . transgender girls to play on sports teams consistent with their gender identity." *Id.* at 79A–80A.

Second, the district court found that the SWSA's legislative history suggested its intent was to prohibit transgender girls from participating in girls' sports. For example, the summary of the bill transmitted to Governor Ducey specifically referenced "the AIA's 'policy allowing transgender students to participate in activities in a manner consistent with their gender identity.'" *Id.* at 75A. And statements from proponents of the Act indicated that the Legislature was concerned about "allow[ing] transgenders to take over female sports." *Id.* at 78A–79A.

These statements, together with the facts indicating the legislature's stated purposes were pretextual, led the district court to find that "[t]he Act was adopted for the purpose of excluding transgender girls from playing on girls' sports teams." *Id.* at 78A.

Respondents' athletic abilities. Finally, the district court made several relevant factual findings about respondents themselves. Specifically, the court found that neither Jane nor Megan has experienced or will experience "any of the physiological changes that increased testosterone levels would cause in a pubescent boy." *Id.* at 69A (Jane), 71A (Megan). Accordingly, the court found that both Jane and Megan have "athletic capabilities like other girls [their] age and different from boys [their] age" who either already have or "are beginning to experience [male] puberty and [the resultant] increased testosterone levels." *Id.* at 90A (Jane), 91A (Megan). And so, the court concluded, "[a]ssuming there are safety issues created if girls

compete with boys," both Jane and Megan "would be subjected to such risks by playing on boys' teams." *Id.*

2. Pertinent Legal Conclusions

On the basis of the foregoing findings, the district court drew conclusions of law that led it to grant respondents' request for a preliminary injunction.

The district court held that respondents were likely to succeed on the merits of their Equal Protection claims, that they would suffer irreparable harm if an injunction were not issued, and that both the public interest and the balance of the equities favored an injunction. Pet. App. 93A–106A. On the likelihood of success on the merits, the district court found that the SWSA was subject to heightened scrutiny because "[l]aws that discriminate against transgender people are sex-based classifications." *Id.* at 95A. En route to that conclusion, the court rejected petitioners' argument that, because "the Act does not mention transgender girls," it does not discriminate against them, finding that "[t]he Act's disparate treatment of transgender girls because they are transgender is clear on the face of the statute" and adding that the Act's "legislative history demonstrates that the purpose of the Act is to exclude transgender girls from girls' sports teams." *Id.* at 95A–96A.

The district court next concluded that the Act was not likely to pass heightened scrutiny. *Id.* at 97A. The court acknowledged that the Act's stated purposes—"protect[ing] girls from physical injury in sports and promot[ing] equality and equity in athletic opportunities"—are important governmental interests.

Id. But it found that petitioners had "fail[ed] to produce persuasive evidence at the preliminary injunction stage to show that the Act is substantially related to th[ose] legitimate goals." *Id.* at 99A. Specifically, it concluded that there was no evidence "that transgender girls who have not experienced male puberty[] have presented an actual problem of unfair competition or created safety risks to other girls" or that transgender "girls who have not experienced [male] puberty[] have any physiological advantages over other girls." *Id.*

For these reasons, the district court held that petitioners had "not established that categorically banning all transgender girls from playing girls' sports is substantially related to an important government interest," and thus concluded that respondents were likely to succeed on the merits of their Equal Protection claims. *Id.* at 100A.

The district court further concluded that respondents would suffer "severe and irreparable mental, physical, and emotional harm" if an injunction were not issued. *Id.* at 104A. The court added that respondents would "also suffer the shame and humiliation of being unable to participate in a school activity simply because they are transgender—a personal characteristic over which they have no control." *Id.* at 105A. Finding the remaining requirements for a preliminary injunction satisfied, *id.* at 105A-106A, the district court granted respondents' motion and enjoined the SWSA from being enforced against them, *id.* at 107A.

D. The Ninth Circuit's Decision

On September 9, 2024, the Ninth Circuit panel unanimously affirmed the district court's preliminary injunction. *See* Pet. App. 1A–56A.

The Ninth Circuit began by addressing—and rejecting—petitioners' contention that several of the district court's factual findings were clearly erroneous. Specifically, the Ninth Circuit upheld the district court's determinations that "before puberty, there are no significant differences in athletic performance between boys and girls" and that "transgender girls who receive puberty-blocking medication do not have an athletic advantage over other girls," *id.* at 28A, concluding that these findings were "grounded in the record evidence," *id.* at 32A.

The court of appeals then turned to the district court's legal conclusions. The Ninth Circuit had previously held that laws that discriminate based on transgender status are subject to heightened scrutiny. *See Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Hecox*, 104 F.4th at 1079–80. The court's first task was therefore to determine whether the SWSA did so, "either purposefully or on its face." Pet. App. 35A.

On the first question, the court explained that a finding of purposeful discrimination required a showing that the Act was passed "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). And it held that "the district court did not clearly err by finding a discriminatory purpose" under that standard. *Id.* at

38A. The court observed that the SWSA "bars students from female athletics based entirely on *transgender status* and not at all based on factors the district court found bear a genuine connection to athletic performance and competitive advantage, such as circulating testosterone." *Id.* at 36A. And the court saw further support for a finding of purposeful discrimination in the "policy's discriminatory impact," which in this case was total: "The Act's burdens . . . fall *exclusively* on transgender women and girls," the court explained, because males had "long been excluded from female sports in Arizona." *Id.* at 37A.

In the alternative, the Ninth Circuit held that heightened scrutiny applied because the SWSA facially discriminates based on transgender status, since the plain terms of the statute dictate that "only transgender female students are prohibited from playing on teams consistent with their gender identity," and because the Act uses the term "'biological sex'" as a "'carefully drawn [proxy] to target transgender women and girls.'" *Id.* at 39A–40A (quoting *Hecox*, 104 F.4th at 1078).

In reaching the conclusion that heightened scrutiny applies here, the court rejected petitioners' contention that only rational basis review should apply because, "rather than challenging Arizona's adoption of 'sex-segregated sports teams,'" respondents had merely argued that "the [Act's] definition [of 'females'] should be expanded to include" transgender females—a so-called "underinclusiveness challenge." *Id.* at 41A–43A. The Ninth Circuit explained that the underinclusiveness cases start from the premise that the law being

challenged is "a remedial statute," and here, the Ninth Circuit held that the SWSA was *not* remedial because it was enacted for a discriminatory purpose. *Id.* at 43A. The court thus found the underinclusiveness line of cases inapposite. *Id.*

Turning to the application of the heightened scrutiny standard, the Ninth Circuit held that the district court did not abuse its discretion in concluding that petitioners were not likely to meet their burden to show that the SWSA is "substantially related" to the achievement of "important governmental objectives." *Id.* at 43A–48A. That conclusion was based primarily on the district court's factual findings that (1) there is no risk "that transgender females would displace cisgender females to a substantial extent if transgender females were allowed to play on female teams"; (2) "a student's transgender status is *not* an accurate proxy for average athletic ability or competitive advantage"; (3) "[b]efore puberty, there are no significant differences in athletic performance between boys and girls"; and (4) "[t]ransgender girls who receive puberty-blocking medication do not have an athletic advantage over other girls because they do not undergo male puberty." *Id.* (internal quotation marks omitted). Given these findings, which the court called "well-supported," the court determined that petitioners "are unlikely to establish that the Act's sweeping transgender ban is substantially related to achievement of the State's important governmental objectives in ensuring competitive fairness and equal athletic opportunity for female athletes." *Id.* at 48A.

With respondents' likelihood of success on the merits established, the Ninth Circuit went on to hold that the district court did not abuse its discretion in finding that the remaining preliminary injunction factors likewise supported the relief granted in this case. *See id.* at 53A–55A. The Ninth Circuit emphasized the district court's determinations that "Megan's teammates, coaches, and school are highly supportive of her and would welcome her participation on the girls' volleyball team, and that Jane's teachers, coaches, friends, and members of her soccer team have all been supportive of Jane's identity." *Id.* at 55A (citations and quotation marks omitted). Having done so, it concluded that the district court "did not abuse its discretion by granting [respondents'] motion for a narrow preliminary injunction" prohibiting "Arizona from barring Jane and Megan from playing school sports consistent with their gender identity while this litigation is pending." *Id.* at 55A–56A.

E. Subsequent Proceedings

While the appeal of the preliminary injunction was pending, the district court got back to work, holding a conference on August 25, 2023, to set deadlines for discovery and dispositive motions. *See* D. Ct. Doc. 144–145. The parties have been engaged in discovery ever since. Fact discovery in the district court closed on October 21, 2024; expert discovery is set to close on February 28, 2025; and dispositive motions are due by March 31, 2025. *See* D. Ct. Doc. 232.

REASONS FOR DENYING THE WRIT

The Court should either deny the petition or hold the petition pending the Court's disposition of *Skrmetti*.

Plenary review is unwarranted. To the extent petitioners seek review on the appropriate standard of Equal Protection scrutiny to apply in cases alleging discrimination based on transgender status, *Skrmetti* already tees up that issue. As to all other issues, this petition is not worthy of Supreme Court review because it is factbound, splitless, premised on a preliminary and incomplete record, and soon to be moot.

I. The Petition Is Factbound, Interlocutory, and Soon to Be Moot.

The Court should deny certiorari because the Ninth Circuit's decision was a factbound affirmance of a preliminary injunction on a preliminary record. Although petitioners attempt to frame this case as presenting important issues of law, the district court's decision to issue the preliminary injunction in this case—and the Ninth Circuit's decision affirming it—largely turned on factual findings about Jane and Megan that are not clearly erroneous. Specifically, after closely analyzing the parties' evidentiary submissions, the district court found based upon the record before it that Jane and Megan, because they have not and will not experience male puberty, have "athletic capabilities like other girls [their] age and different from boys [their] age" and would not pose any safety threat to other girls they competed against. Pet. App. 90A–91A.

Therefore, the district court found as a matter of fact that applying the Act to respondents in this case would further neither of the governmental interests—the equality of athletic opportunity or the safety of female athletes—relied upon to justify the law. It was only

"[o]n the strength of these findings" that the district court entered the preliminary injunction petitioners now challenge. *Id.* at 25A. And the Ninth Circuit, correctly reviewing those factual determinations only for clear error, deemed the findings "well-supported" in the record. *Id.* at 28A–34A, 48A.

Because the ultimate legal question here—the propriety of the preliminary injunction—is inextricably bound up with the district court's factual findings, the applicability of the court's reasoning to other cases is limited. In its current posture, then, this case turns on "factbound issue[s]" that "do[] not meet the standards that guide the exercise of [the Court's] certiorari jurisdiction." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993).

Review is unwarranted for the additional reason that the preliminary injunction petitioners ask this Court to review will soon be moot. The preliminary injunction in this case was entered in July of 2023, and in the 17 months since, district court proceedings have continued apace. Fact discovery in the district court closed this past October, expert discovery will close in February, and dispositive motions will be filed at the end of March. *See* D. Ct. Doc. 232. The district court will then decide—either on summary judgment or, if necessary, through a bench trial—whether to enter a permanent injunction in favor of respondents or to enter judgment for petitioners. Either way, the result will be that the preliminary injunction presently under review will be dissolved, thus rendering this petition moot—possibly before this Court would have time to weigh in.

Even if the petition does not become moot, the Court should not grant certiorari to review factual findings that were rendered on a preliminary record. When the district court decides those dispositive motions, it will have before it a much more comprehensive record than it had at the preliminary injunction stage—the result of the extensive discovery conducted by the parties in the 17 months since the preliminary injunction issued. There is no need for this Court to weigh in now.

II. There Is No Circuit Split Warranting Review.

Petitioners urge this Court to grant review to resolve "multiple splits of authority with other federal Circuits." Pet. 4. But there is no circuit split on the constitutionality of laws banning transgender girls from sports teams. Only two other court of appeals decisions—one in the Fourth Circuit and another, like this case, in the Ninth—have addressed similar challenges, and the students prevailed in both cases. *See Hecox*, 104 F.4th at 1090–91; *B.P.J.*, 98 F.4th at 554–55.

Petitioners claim that this case implicates several "underlying circuit splits." Pet. 33. That contention is incorrect. Aside from the issue currently teed up in *Skrmetti*, no circuit split exists.

A. Petitioners' Argument Regarding the Appropriate Level of Deference Owed to Legislative Findings in Cases Like This Is Unpreserved and Does Not Implicate a Split of Authority.

Petitioners assert that certiorari is warranted on the ground that the decision below "conflicts with this Court and splits with other circuits on the question whether to defer to state legislative factfinding in cases of medical or scientific uncertainty." Pet. 18. But petitioners did not press this argument below, so this Court should not consider it for the first time. In any event, the decisions below comport with this Court's precedents and the decisions of other courts of appeals.

1. Petitioners' Argument Is Unpreserved.

Petitioners never argued below that the district court was required "to defer to Arizona's explicit legislative findings." Pet. 19–20. Just the opposite: In the district court, the parties jointly stipulated to "offer proof by way of expert declarations." Pet. App. 63A n.1.

Nor did this argument appear anywhere in petitioners' submissions to the Ninth Circuit. In their opening brief on appeal, petitioners argued that several of the district court's factual findings were clearly erroneous, but in support of that argument they relied exclusively on the evidence in "[t]he record" before the district court—which is to say the various expert declarations submitted by the parties, *not* the findings incorporated into the SWSA itself. *See* Ct. App. Doc. 20, at 51–59. As a result, the Court of Appeals's ultimate conclusion was that the district court's factual findings

were not clearly erroneous "[o]n the record before it." Pet. App. 30A.

What is more, while petitioners in this Court now marshal a litany of cases in support of their purported deference requirement, *see* Pet. 18–24 (citing, *inter alia*, *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180 (1997); *Marshall v. United States*, 414 U.S. 417 (1974); and several court of appeals decisions), petitioners did not cite a single one of these precedents in either their opposition briefs in the district court, *see generally* D. Ct. Doc. 40, 82, or their opening brief in the Ninth Circuit, *see generally* Ct. App. Doc. 20. And while petitioners did cite *Turner II* in their reply brief on appeal, they did so only once, and only in passing in a paragraph about why it was appropriate for them to rely on First Amendment precedents interpreting the intermediate scrutiny standard. *See* Ct. App. Doc. 103, at 27–28.

Despite these repeated failures of preservation, petitioners now argue that "the fact that Respondents' experts disagreed with Petitioners' experts should have led the Ninth Circuit to *uphold* Arizona's legislative findings, not reject them." Pet. 24. But neither the district court nor the court of appeals had before it the argument petitioners now advance—that the legislative findings in the SWSA were owed dispositive deference notwithstanding the district court's determination that the parties' factual presentations refuted them. Neither court, therefore, had occasion to decide whether, notwithstanding the parties' evidentiary submissions,

any such deference should be paid. Because this Court "is 'a court of final review and not first view,' . . . it does not '[o]rdinarily . . . decide in the first instance issues not decided below.'" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

2. The Ninth Circuit's Decision Is Not in Conflict with the Decisions of this Court or Any Court of Appeals.

In any event, the Ninth Circuit's decision neither implicates a circuit split with other courts of appeals nor conflicts with this Court's guidance on the deference owed to legislative fact-finding.

Petitioners cite a slew of court of appeals decisions purportedly "deferr[ing] to state legislative factfinding in cases that involve significant medical or scientific uncertainty," Pet. 19 (collecting cases), but the decision below does not conflict with any of these authorities. None of the cases on which petitioners rely concern the social, medical, or scientific issues pertinent to *this* case—namely, whether Megan and Jane's participation in girls' sports has any meaningful impact on the health or safety of other girls playing those sports. And more importantly, none of the cases apply the sort of legislature-always-wins deference petitioners now say is required—deference, in other words, that applies even when legislative findings of fact are refuted by the evidence actually submitted to the court.

For good reason: This Court has never approved—much less required—such limitless deference. Instead,

this Court has explained that, "whatever deference is due legislative findings," that deference does "not foreclose [courts'] independent judgment of the facts bearing on an issue of constitutional law." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."); *see also, e.g.*, *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). So, while the Court "review[s legislative] factfinding under a deferential standard," those findings are not entitled to "dispositive weight." *Carhart*, 550 U.S. at 165 (2007). Were it otherwise, a legislature could perform an end-run around the Constitution and immunize its laws from judicial scrutiny by purporting to make one or more findings, irrespective of the correctness of those findings. Thus, in *Turner Broadcasting System, Inc. v. FCC* (*Turner I*), this Court reversed a grant of summary judgment in favor of the government because of the "paucity of evidence" supporting its legislative findings. 512 U.S. 622, 665, 667–68 (1994) (plurality opinion). And in *Carhart*, the Court declined to apply "[u]ncritical deference to Congress' factual findings" where "[t]he evidence presented in the District Courts contradict[ed some of the legislature's] conclusion[s]," revealing them to be "factually incorrect" or "superseded." 550 U.S. at 165–66. These cases confirm that this Court has already rejected the legislature-always-wins version of deference petitioners now advance.

The district court properly struck the balance required by these cases. It took seriously the Legislature's findings, but, upon considering the parties' evidentiary submissions, found that while respondents had presented persuasive evidence that, among other things, "[t]ransgender girls who receive puberty-blocking medication" before the onset of male puberty "do not have an athletic advantage over other girls," Pet. App. 88A–89A, much of petitioners' evidence was "not relevant to the question before the [c]ourt," *id.* at 81A. It thus concluded that petitioners had "fail[ed] to produce persuasive evidence . . . to show that the Act is substantially related to the legitimate goals of ensuring equal opportunities for girls to play sports and to prevent safety risks." *Id.* at 99A. In these circumstances, the Legislature's "unsupported legislative conclusions," *Hecox*, 104 F.4th at 1085–86 (quoting *Latta v. Otter*, 771 F.3d 456, 469 (9th Cir. 2014)), which were "contradict[ed]" by "[t]he evidence presented in the District Court[]," are not entitled to "[u]ncritical deference," *Carhart*, 550 U.S. at 166.

B. The Ninth Circuit's Rejection of Petitioners' Underinclusiveness Argument Does Not Implicate a Split of Authority.

Petitioners next argue that the Ninth Circuit erred in failing to analyze respondents' request for preliminary injunctive relief as an "underinclusiveness challenge" warranting only rational basis review under this Court's decision in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and the Second Circuit's decision in *Jana-Rock Construction, Inc. v. New York State Department of*

Economic Development, 438 F.3d 195 (2d Cir. 2006). *See* Pet. 27–30. Certiorari is not warranted on this basis, either.

As the Ninth Circuit recognized, *Morgan* and *Jana-Rock* both involved claims that a statute extending a benefit "might have gone farther than it did." Pet. App. 41A (quoting *Morgan*, 384 U.S. at 657). In *Morgan*, the federal voting law at issue prohibited states from denying the vote to non-English speakers educated in schools within United States territories—so-called "American-flag schools." 384 U.S. at 656–57. As this Court explained, the case involved "not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote"—it could not involve such a claim because the challenged law "in effect *extend[ed]* the franchise to persons who otherwise would be denied it by state law"—"but rather that Congress violated the Constitution by not extending the relief effected . . . to those educated in *non*-American-flag schools." *Id.* (emphases added). Likewise, the plaintiffs in *Jana-Rock* challenged a state affirmative action program providing benefits to Hispanic-owned small businesses because the statute excluded persons of Spanish or Portuguese dissent from its definition of "Hispanic." 438 F.3d at 202.

The Ninth Circuit correctly determined that the reasoning of those cases does not apply in this case. At the outset, the SWSA does not extend a benefit to anyone. As the Ninth Circuit recognized, the SWSA "functions solely to abrogate [preexisting AIA, NCAA, and individual-school] policies" permitting transgender girls to play on girls' sports teams in some

circumstances; for everyone else, the Act left the status quo undisturbed. Pet. App. 37A–38A. Accordingly, respondents' request in this case is not that the SWSA should have "gone farther than it did," *Morgan*, 384 U.S. at 657 (quotation marks omitted). Instead, respondents' allegation is that Arizona, by enacting the SWSA, *withdrew* from transgender girls (and only from transgender girls) a benefit they had previously enjoyed—the ability to play sports consistent with their gender identity.

Under those circumstances, the Ninth Circuit correctly determined that *Morgan* and *Jana-Rock* do not apply. And petitioners have not identified any case holding to the contrary. Indeed, in *Jana-Rock* itself, the Second Circuit recognized that even a claim that alleges underinclusiveness can trigger heightened scrutiny if the underinclusiveness "is motivated by a discriminatory purpose." 438 F.3d at 211. That is precisely the finding that the district court made—and the Ninth Circuit affirmed—in this case: that the SWSA "was adopted for the purpose of excluding transgender girls from playing on girls' sports teams." Pet. App. 78A.

The decision below was therefore correct to reject petitioners' underinclusiveness framing, and this Court's review is not warranted on this basis.

C. The Ninth Circuit's Finding of Intentional Discrimination Does Not Implicate a Split of Authority.

Finally, in a single paragraph at the end of their petition, petitioners contend that the district court's

determination that the Arizona Legislature enacted the SWSA for the purpose of discriminating against transgender girls was not supported by a sufficiently compelling showing of animus. Pet. 30–31. Specifically, petitioners argue that "Arizona's law, which reflects traditional practice and promotes fairness, safety, privacy, and equality for female athletes, is not 'inexplicable by anything but animus.'" Pet. 31 (quoting *Trump v. Hawaii*, 585 U.S. 667, 706 (2018)).

But petitioners overlook the fact that the "inexplicable by anything but animus" phrasing comes from cases where this Court applied rational basis review. *See Trump v. Hawaii*, 585 U.S. 667, 705–06 (2018); *Romer v. Evans*, 517 U.S. 620, 631–32 (1996). And in both of those cases, the Court's reasoning indicates that the phrase was merely intended as a restatement of the rational basis standard. *See Romer*, 517 U.S. at 632 (holding that, because the challenged law's "sheer breath is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests"); *Trump*, 585 U.S. at 705–06 (finding that the challenged policy was not "inexplicable by anything but animus" and stating that "the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review"). And in the only court of appeals decision petitioners have identified that employs this standard, *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023), *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024), the Sixth Circuit likewise applied rational basis review, *see id.* at 488–89.

Here, by contrast, the Ninth Circuit correctly applied heightened scrutiny, which does not require application of the "inexplicable by anything but animus" standard.

Petitioners also assert that *Adams ex rel. Kasper v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022), applied a "similar" test for discriminatory purpose, Pet. 31, but it did not. In *Adams*, a case involving intermediate scrutiny, the court stated that a discriminatory purpose could be shown if the government took the challenged action "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Adams*, 57 F.4th at 810 (quoting *Feeney*, 442 U.S. at 279).

The Ninth Circuit in this case applied precisely the same standard. *See* Pet. App. 35A (quoting *Feeney*, 442 U.S. at 279). Petitioners have therefore failed to demonstrate any split of authority with respect to the standard for finding intentional discrimination employed by the Ninth Circuit.

III. If the Court Holds this Case for *Skrmetti*, It Should Either Deny Certiorari or Grant, Vacate, and Remand After *Skrmetti* Is Decided.

Petitioners also suggest that this Court's review is warranted because this case implicates a series of broader circuit conflicts as to the appropriate level of Equal Protection scrutiny to apply in cases concerning discrimination against transgender individuals. *See* Pet. 5, 24–27.

This Court may address that issue this Term in *Skrmetti*, and there is no reason to grant review in this

case to decide the same issue. Further, the Court appears to have held *Little v. Hecox*, No. 24-38, and *West Virginia v. B.P.J.*, No. 24-43, which present related issues, for *Skrmetti*. As such, respondents do not object to holding this case, too, for *Skrmetti*.

After the Court decides *Skrmetti*, the Court should either deny review or grant, vacate, and remand to give the Ninth Circuit the opportunity to address *Skrmetti*'s effect in the first instance. Given the factbound and interlocutory nature of this case, plenary review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied or held for *Skrmetti*. If the petition is held for *Skrmetti*, the petition should be denied upon the handing down of the decision in that case, or the opinion below should be vacated and the case should be remanded in light of *Skrmetti*.

Respectfully submitted,

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