Nos. 23-16026 & 23-16030

In the United States Court of Appeals for the Ninth Circuit

HELEN DOE, parent and next friend of Jane Doe; et al.,

Plaintiffs-Appellees,

v.

THOMAS C. HORNE, in his official capacity as State Superintendent of Public Instruction; et al.,

Defendants-Appellants

and

WARREN PETERSEN, SENATOR, President of the Arizona State Senate; BEN TOMA, Representative, Speaker of the Arizona House of Representatives,

Intervenors-Defendants-Appellants.

BRIEF OF *AMICI CURIAE* ALABAMA, ARKANSAS, AND 16 OTHER STATES IN SUPPORT OF APPELLANTS

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The States of Alabama, Arkansas, Alaska, Georgia, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, Utah, West Virginia, and Wyoming (the "*Amici* States") submit this brief in support of Appellees. Many of the *Amici* States have encountered claims substantively similar to those that Plaintiffs push here—claims demanding not that States stop sex segregation but rather that they redefine sex altogether. When federal courts apply the wrong legal analysis to those claims, they force States to engage in protracted litigation and even enlist the help of biologists and other experts just to defend the basic proposition that sex classifications depend on biology. *Amici* States thus have a strong interest in ensuring that courts apply the correct legal framework, which lets States define sex consistent with biology.

INTRODUCTION

There's something strange about Plaintiffs' reading of the Equal Protection Clause. Female applicants to Virginia Military Institute did not seek to maintain VMI's segregation but assert they were really men whom VMI unconstitutionally misclassified and rejected. Nor did Oliver Brown ask the Supreme Court to bless separate-but-equal schooling so long as the Board of Education of Topeka would classify him as white. But Plaintiffs, also traveling under the banner of Equal Protection, ask this Court to ensure that Arizona continues to segregate public interscholastic sports teams based on sex. Plaintiffs just want Arizona to segregate differently.

This is not a sex-discrimination challenge. Far from demanding all sports go coed, Plaintiffs want to take advantage of sex-segregated sports. This is an underinclusiveness challenge. Plaintiffs ask federal courts to compel Arizona to continue segregating on the basis of sex, but to define "girls" broadly enough to include some biological males. That is, Plaintiffs seek the sex-segregated regime's benefits by challenging the contours of the segregation. But though separating males and females for the benefit of girls' sports warrants heightened scrutiny, following the

understanding of sex that has endured for millennia does not. Plaintiffs' argument warrants only rational basis review—and defining sex consistent with biology easily passes muster.

Yet courts continue to apply heightened scrutiny to underinclusiveness claims like Plaintiffs'. The confusion is understandable; claims like Plaintiffs' are novel challenges to well-settled understandings of sex. But the costs of continued confusion are high. Many state and local governments likewise have been forced to wade through years of litigation and employ costly experts to justify decisions as basic as giving a "Female" designation on a driver's license only to females or making a girls' sports team available only to girls. Moreover, compelling States to define sex according to gender identity would jeopardize States' ability to enforce coherent sex-conscious policies. It may even force them to resort to sex stereotyping as they search to define "boy" and "girl" beyond biology. The Constitution compels none of this. This Court should say so and reverse the district court.

ARGUMENT

I. The Constitution Does Not Compel Arizona to Classify Biological Males as Girls.

A. Doe's Sex-Discrimination Claim Is an Underinclusiveness Challenge.

Arizona's Save Women's Sports Act seeks to promote sex equality by providing opportunities for female athletes to demonstrate their skill, strength and athletic abilities." Az. Legis. 106 (2022) (S.B. 1165), Sec. 2(14). Thus, it joins a number of other States in codifying longstanding segregation of girls' and boys' sports teams. *See* Natalie Allen, *Here's How Our Laws Can Protect Fairness in Women's Sports*, ADF (April 13, 2023) (listing states with girls-sports statutes).[1] Recognizing that "[t]here is a sports performance gap between males and females," Az. Legis. 106 (2022) (S.B. 1165), Sec. 2(9), the law calls for public schools' interscholastic sports teams to be "expressly designated" for either "[m]ales, men, or boys," "[f]emales, women, or girls," or "[c]oed or mixed." A.R.S. 15-120.02(A). The baseline for these distinctions is "[w]ith respect to biological sex, one is either male or female" and "[a] person's sex is determined at fertilization and revealed at birth." Az. Legis. 106 (2022) (S.B. 1165),

[1] https://perma.cc/GY8K-26FB.

Sec. 2 (quotations omitted). Athletic teams or sports designated as coed or for males are open to all, but the Act provides that female-designated teams "may not be open to students of the male sex." A.R.S. 15-120.02(B).

Plaintiffs do not argue that Arizona's decision to segregate sports teams on the basis of sex violates the Equal Protection Clause. *See* 3-ER-514 (disclaiming any challenge to "whether sex-segregated sports are permissible"). Just the opposite. Plaintiffs *want* Arizona to continue segregating sports teams by sex. *See* 5-ER-664 (Plaintiffs "agree that there should be separate teams for boys and girls"). Rather, according to Plaintiffs, "[t]his case is about one thing only: the exclusion of [Plaintiffs] from girls' sports teams because they are transgender girls." 3-ER-514. So Plaintiffs seek to compel the State to continue segregating—just to adjust the contours of its segregation. All in the name of Equal Protection.

This should give the Court pause. Asking a federal court to compel segregation along protected characteristics is unusual. Doing so under the Equal Protection Clause is bizarre. When the United States sued on behalf of high-school girls seeking admission to VMI, the government argued that the institution's "exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment," *United States*

v. Virginia, 518 U.S. 515, 523 (1996), not that female applicants were in fact males who should be able to avail themselves of an otherwise salutary sex-segregated admissions process. And Oliver Brown was not trying to take advantage of separate-but-equal schooling on the theory that the Board of Education of Topeka should have classified him as white. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). When black students were "denied admission to schools attended by white children under laws requiring or permitting segregation according to race," *id.* at 487-88, the problem was not that the Board had separated Topeka's races too finely; the problem was that the Board had separated races at all. In canonical Equal Protection cases, segregation provides the cause of action. But here, according to Plaintiffs, segregation provides the remedy.

That reveals the truth about Plaintiffs' claim. Contrary to Plaintiffs' framing, their grievance is emphatically *not* that the Act discriminates "on the basis of sex." Doc. 1 ¶ 80.[2] If they wanted to challenge segregation, the relief sought would involve coed teams. So the relief Plaintiffs actually seek—to "compet[e] on *girls'* sports teams," *id.* at ¶ 71(emphasis added)—gives the game away. The grievance in this case is that

[2] "Doc." citations refer to the district-court docket sheet numbering.

by defining "[f]emales, women, or girls" by "biological sex," A.R.S. 15-120.02(A), the class benefiting from the Save Women's Sports Act (*i.e.*, "females, women, or girls") is unlawfully narrow. "Athletic teams or sports designated for females, women, or girls," *id.* at 15-120.02(B), Plaintiffs contend, should include "transgender girls," Doc. 1 ¶ 71—that is, biological males "who identify and live as a girl," *id.* at ¶ 73. So Plaintiffs want Arizona to continue segregating boys' and girls' sports, but to define the class benefiting from the segregation more broadly.

Plaintiffs' claim thus reduces to a textbook underinclusiveness challenge: Plaintiffs like the law's sex-segregation regime and simply seeks inclusion among its beneficiaries. Such challenges warrant only rational basis review. Arizona's law easily passes muster under that standard.

B. While a Challenge to Sex Discrimination Itself Warrants Heightened Scrutiny, an Underinclusiveness Challenge to the Contours of Arizona's Sex Classifications Does Not.

The Equal Protection Clause of the Fourteenth Amendment prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Supreme Court has explained that laws "provid[ing] that different treatment be accorded to [individuals] on the basis of their sex" warrant heightened scrutiny.

Reed v. Reed, 404 U.S. 71, 75 (1971). And when litigants seek to eliminate "official action that closes a door or denies opportunity to women (or to men)," heightened scrutiny applies. *Virginia*, 518 U.S. at 532-33.

But "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), and "[a] statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen v. Ward*, 279 U.S. 337, 339 (1929). Rather, "reform may take one step at a time"; "[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson*, 348 U.S. at 489; *accord, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 656-57 (1966) (rational basis where Congress extended benefit to citizens educated in "American-flag schools" in Puerto Rico but did "not extend[] the relief … to those educated in non-American-flag schools"); *cf. Peightal v. Metro. Dade Cnty.*, 940 F.2d 1394, 1409 (11th Cir. 1991) ("The Equal Protection Clause does not require a state actor to grant preference to all ethnic groups solely because it grants preference to one or more groups.").

So even assuming the Arizona Legislature might have been able to craft a statute that permitted Plaintiffs or other transgender-identifying

males to play on girls' sports teams while simultaneously "promot[ing] sex equality by providing opportunities for female athletes," Az. Legis. 106 (2022) (S.B. 1165), Sec. 2(14)—which is unlikely—the statute challenged here would still stand. That a group of biological males might also seek the benefit of playing female-only sports does not render the law unconstitutional, for "[t]he state was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way." *Semler v. Ore. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935). Thus, while the State's decision to segregate sports teams by sex in the first instance warrants heightened scrutiny, *see, e.g., Virginia*, 518 U.S. at 532-33, the sex classification that informs how far Arizona's law "extend[s] … relief," *Katzenbach*, 384 U.S. at 656-57, does not.

Underinclusiveness claims like Plaintiffs' have often been raised in the racial-affirmative-action context, and their dispositions underscore why challenges to classification—rather than to discrimination itself—warrant only rational basis review. Where a court "is not asked to pass on the constitutionality of [an affirmative-action] program or of the racial preference itself," but is asked instead "to examine the parameters of the beneficiary class," the court engages in "a traditional 'rational basis'

inquiry as applied to social welfare legislation." *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986). So where, as here, Plaintiffs seek to avail themselves of a sex-segregated program by broadening the "parameters of the beneficiary class," *id.*, the government's decision not to calibrate the class to Plaintiffs' preferences does not warrant heightened scrutiny. *See id.* at 1160-61 (rejecting Equal Protection claim because government's "definition of 'Hawaiian' … ha[d] a rational basis").

The Second Circuit explicated this principle in *Jana-Rock Construction, Inc. v. New York Department of Economic Development*. 438 F.3d 195 (2d Cir. 2006). The case involved "New York's 'affirmative action' statute for minority-owned businesses," which extended to "Hispanics" but did "not include in its definition of 'Hispanic' people of Spanish or Portuguese descent." *Id.* Plaintiff Rocco Luiere owned a construction company and was "the son of a Spanish mother whose parents were born in Spain," but he was not considered Hispanic for purposes of the New York program. *Id.* at 199. (This despite Luiere's sworn affidavit stating, "I am a Hispanic from Spain." *Id.* at 203.) Like the plaintiff in *Hoohuli*, Luiere did not "challenge the constitutional propriety of New York's race-based

affirmative action program," but only the State's decision not to classify him as Hispanic for purposes of the program. *Id.* at 200, 205.

On its way to rejecting Luiere's claim, the Second Circuit confirmed that "[t]he purpose of [heightened scrutiny] is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* at 210. And because "[i]t [was] uncontested by the parties" that New York's affirmative-action program satisfied strict scrutiny—just as it is uncontested here that sex-segregated sports satisfy heightened scrutiny—a heightened level of review retained "little utility in supervising the government's definition of its chosen categories." *Id.* So the Second Circuit "evaluate[d] the plaintiff's underinclusiveness claim using rational basis review" and duly rejected it. *Id.* at 212.

Consider also the case of Ralph Taylor. In 2010, Taylor "received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African." *Orion Ins. Grp. v. Wash. State Off. of Minority & Women's Bus. Enters.*, 2017 WL 3387344, at *2 (W.D. Wash. Aug. 7, 2017), *aff'd sub nom. Orion Ins.*

Grp. v. Wash.'s Off. of Minority & Women's Bus. Enters., 754 F. App'x 556 (9th Cir. 2018). This was big news for a man who "grew up thinking of himself as Caucasian." *Id.* Once Taylor "realized he had Black ancestry, he 'embraced his Black culture.'" *Id.* He "joined the NAACP" and began to "take[] great interest in Black social causes." *Id.* at *3. Finally, Taylor classified himself as "Black" and applied for special benefits under State and federal affirmative-action programs. *Id.* at *2-3.

But the programs' managers weren't convinced. They rejected Taylor's proposed racial classification and denied his application. So Taylor brought suit alleging, among other things, that the State and federal governments' restrictive definition of "Black" violated his constitutional and statutory rights. *Id.* at *4. He advocated an expansive definition of "Black," asserting he fit into the category because "Black Americans are defined to include persons with 'origins' in the Black racial groups in Africa" and his genetic testing revealed he had African ancestry. *Id.* at *11. The court summarily dispatched with Taylor's claim. *Id.* Rather than apply heightened scrutiny and force the State to justify its definition of "Black," the court applied rational basis review and rejected Taylor's

claim accordingly. *Id.* at *13 ("Both the State and Federal Defendants offered rational explanations for the denial of the application.").

The relief Plaintiffs seek ("to try out for and play on the school sports' teams" designated for girls, Doc. 1 at 20) presumes the constitutionality of sex-segregated sports teams, in turn requiring Plaintiffs to challenge the lawfulness of "designat[ing]" an "[a]thletic team" for "girls" based solely on "biological sex." A.R.S. 15-120.2(A). This is a challenge to the "contours," *Jana-Rock*, 438 F.3d at 210, "parameters," *Hoohuli*, 631 F. Supp. at 1159, or "narrower definition," *Orion*, 2017 WL 3387344 at *11, along which the Act discriminates—not a challenge to discrimination itself. Plaintiffs thus follow in the footsteps of Rocco Luiere and Ralph Taylor, not in those of the female VMI applicants and Oliver Brown.

Just as Luiere and Taylor sought to benefit from racially discriminatory regimes but contested how the races were defined, Plaintiffs endorse sex-segregated sports teams and challenge only Arizona's decision to "base[]" its definition of "[f]emale" on "biological sex" rather than gender identity. A.R.S. 15-120.2(A). But because the "purpose" of heightened scrutiny "is to ensure that the government's choice to use [protected]

classifications is justified," not to police the classifications' "contours," *Jana-Rock*, 438 F.3d at 210, the "contours" attendant to Arizona's sex-segregated sports teams warrant only rational basis review. *Cf. Hoohuli*, 631 F. Supp. at 1159 n.23 ("The mere mention of the term 'race' does not automatically invoke the 'strict scrutiny' standard.").

And lower-court judges have recognized this distinction in the transgender context, too. Dissenting from the panel opinion that the en banc Eleventh Circuit would later vacate, Chief Judge Pryor explained that while "[s]eparating bathrooms by sex treats people differently on the basis of sex," by contrast "the mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex." *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1326 (11th Cir. 2021) (*Adams II*) (Pryor, C.J., dissenting); *accord, e.g.*, *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("[T]he 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation.").

So when the full Eleventh Circuit eventually held that separating bathrooms based on biological sex did not violate the federal

Constitution, the en banc majority limited its application of intermediate scrutiny to the question whether "the School District's policy of assigning bathrooms based on sex violate[d] the Equal Protection Clause." *Adams by and through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 799 (11th Cir. 2022) (en banc) (*Adams III*). Because "th[e] case ha[d] never been about" the "means by which the School Board determine[d] biological sex," *id.* at 799 n.2, the court had no cause to address the propriety of the School Board's sex classifications—which "d[id] not treat anyone differently on the basis of sex," *Adams II*, 3 F.4th at 1326 (Pryor, C.J., dissenting), and thus would have warranted only rational basis review.

Nor does this Court's decision in *Hecox v. Little*, No. 20-35813, 2023 WL 5283127 (9th Cir. Aug. 17, 2023), mean heightened scrutiny applies here. For one, Arizona's law lacks the "sex dispute verification process" that the Court determined likely discriminated against women there. *Id.* at *13. Moreover, the Court did not consider whether legislative line-drawing in defining "sex" as that term has been traditionally and

historically understood can itself be discrimination based on sex under the Constitution. *Id.* at *12-13.[3]

C. Classifying Males and Females by Biological Sex Is Rational.

The Supreme Court "hardly ever strikes down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018). But "[o]n the few occasions where [it] ha[s] done so, a common thread has been that the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group." *Id.* (cleaned up). This means that the only way Plaintiffs could attack a rational basis for Arizona's Save Women's Sports Act would be through a plausible allegation that the legislation is "inexplicable by anything but animus." *Romer v. Evans*, 517 U.S. 620, 632 (1996); *see also, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of . . . discriminatory intent or purpose is required to show a violation of the Equal

[3] To the extent this Court disagrees and reads *Hecox* to require heightened scrutiny whenever a State chooses to define sex as biological sex, Amici States agree with Appellants that en banc review is warranted to address that circuit split.

Protection Clause."); *Jana-Rock*, 438 F.3d at 211 ("[Plaintiffs] must show New York's intent to harm the groups of Hispanics that were excluded.").

But Plaintiffs failed to establish that claim. Indeed, nothing in their complaint suggests that "invidious gender-based discrimination" pervaded Arizona's decision to classify sex according to biology, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979), let alone "that [the Act] lack[s] any purpose other than a bare desire to harm" transgender individuals, *Hawaii*, 138 S. Ct. at 2420 (cleaned up). The district court's (ambiguous) finding on this point has no support in the record, s*ee* 1-ER-14-15 (referencing statements by Arizona legislators and Governor), and does not come close to overcoming the "presumption of good faith" to which State legislators are entitled. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

II. Defining Sex Based on Biology Does Not Violate Title IX.

Plaintiffs also argue that Arizona's law violates Title IX because it discriminates against transgender-identifying boys by "barring Plaintiffs from playing on girls' sports teams because they are transgender." Doc. 1 ¶ 80. But the Act plainly does not segregate boys based solely on their transgender status. The statute never once mentions "transgender girls,"

and it permits participation in sports by students of any sex or gender expression. So Plaintiffs' argument relies on the proposition that segregating sports according to "biological sex," A.R.S. 15-120.02(A), necessarily constitutes "discrimination on the basis of sex." Doc. 1 ¶ 77. But the conclusion does not follow from the premise. *See Adams III*, 57 F.4th at 809 ("[A] policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status.").

Nonetheless, Plaintiffs assert that the Act violates Title IX by defining sex as biological sex, since "[n]either Title IX, nor its regulations, purport to define 'sex' as something that is determined at fertilization and revealed at birth or in utero." Doc. 1 ¶ 79. But "[t]here is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex." *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, — F. Supp. 3d —, 2023 WL 111875, at *9 (S.D.W. Va. Jan. 5, 2023). Indeed, "[r]eputable dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, *i.e.*, discrimination between males and females." *Adams III*, 57 F.4th at 812 (collecting dictionary definitions). That definition was unambiguous. *See id.* at 813.

After all, the long-accepted purpose of Title IX in sports is to ensure that "overall athletic opportunities for each sex are equal," given that "biological males are not similarly situated to biological females for purposes of athletics." *Id.* And "[a]s other courts that have considered Title IX have recognized, although the regulation 'applies equally to boys as well as girls, it would require blinders to ignore that the motivation for the promulgation of the regulation' was to increase opportunities for women and girls in athletics." *Id.* (quoting *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993)).

Plus, presuming anti-transgender discrimination wherever an entity enforces biological sex classifications would call into question Title IX itself. The statute adopts biology-based sex classifications and insulates from liability various forms of sex segregation—including "separate teams for members of each sex." 34 C.F.R. § 106.41(b); *see also id.* §§ 106.32 (housing), 106.33 (facilities). If "sex" included "gender identity," these carveouts "would be rendered meaningless." *Adams III*, 57 F.4th at 813-14.

And if the relevant dictionaries and logical implications of Title IX's implementing regulations left any doubt about the proper definition of

"sex," the Spending Clause resolves it. Under the Spending Clause's clear-statement rule, "[t]he crucial inquiry [is] … whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981); *see also South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). Thus, if Congress intended to condition Title IX spending on States' acquiescence to a non-biological definition of sex (contrary to all historical evidence), then Congress would have had to "unambiguously" state those "conditions" and "consequences of … participation." *Dole*, 483 U.S. at 207; *see also, e.g.*, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022) (explaining States must "clearly understand" in advance the obligations that they are undertaking in exchange for federal funds). Only such unambiguous clarity keeps Spending Clause legislation from undermining States' status as "independent sovereigns." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576–77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.). But Congress could hardly have been clear about lumping in gender identity with sex since "gender identity [is] a concept that was essentially unknown" when Title IX was enacted. *Bostock v. Clayton Cnty.,* 140 S. Ct. 1731,1755 (2020)

(Alito, J., dissenting). Plaintiffs fail to cite such unambiguous conditions because they do not exist. *Accord, e.g.*, *Adams III*, 57 F.4th at 815-17.

III. Forcing States to Classify "Sex" on the Basis of "Gender Identity" Would Render Many Sex-Conscious Laws Unworkable.

A moment's reflection on the implications of Plaintiffs' position reveals the problems it invites. Start with defining "girls" and "boys" based on an individual's averred "gender identity." Doc. 1 ¶ 30. Whereas "biological sex," A.R.S. 15-120.02(A), offers a stable, objective definition of "sex," the concept of "gender identity" is fluid, subjective, and resists coherent line-drawing. After all, according to some, "[g]ender … refers to 'a set of socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate,'" and "gender identity … is 'a person's deeply held core sense of self in relation to gender.'" Op. 16 (quoting *PFLAG, PFLAG National Glossary of Terms*, https://perma.cc/L4Q8-V93M (cleaned up) (last accessed September 11, 2023); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 636-37 (4th Cir. 2020) (Niemeyer, J., dissenting) (noting that the plaintiff's "transgender status, both at a physical and psychological level," required "over 20 pages [of] discussion" in the majority opinion). Indeed, the American Psychological

Association (APA) notes that "gender identity is internal," so "a person's gender identity is not necessarily visible to others." Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Non-conforming People*, 70 Am. Psychologist 862 (Dec. 2015), https://perma.cc/JL56-92XT (hereafter "APA Guidelines"); *see also id.* at 836 (asserting some individuals "experience their gender identity as fluid").

And according to the American Academy of Pediatrics (AAP), "gender identity can be fluid, shifting in different contexts." Jason Rafferty, *Policy Statement, Am. Academy of Pediatrics, Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, 142 Pediatrics no. 4 at 2 (Oct. 2018), https://perma.cc/EE6U-PN66 (hereafter "AAP Statement"); *see also* Op. 16 ("[G]ender is fluid."). There are also those who seek to "redefine gender" or who "decline to define themselves as gendered altogether"—who "think of themselves as both man and woman (bi-gender, pangender, androgyne); neither man nor woman (genderless, gender neutral, neutrois, agender); moving between genders (genderfluid); or embodying a third gender." APA Guidelines at

862. No State can coherently classify men and women based on private, "internal," "fluid" feelings that might not even be "visible to others."

But it gets worse. Attempting to define a "transgender" class is a fool's errand. As the AAP points out, "transgender" is "not [a] diagnos[i]s," but a "personal" and "dynamic way[] of describing one's own gender experience." AAP Statement at 3. And while some guidelines note that not all "gender diverse" people identify as "transgender," AAP Statement at 2, others use "transgender" as "an umbrella term" that includes "a diverse group of individuals." Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guidelines*, 102 J. Clinical Endocrinology & Metabolism 3869 (Nov. 2017) (hereafter "Endocrine Society Guidelines"); *see also* World Professional Ass'n for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender-Conforming People* 97 (7th Version) (2012) (hereafter "WPATH Guidelines"). Depending on whom you ask, the term covers people who identify with any of the following gender identities: "boygirl," "girlboy," "genderqueer," "eunuch," "bigender," "pangender," "androgyne," "genderless," "gender neutral," "neutrois," "agender," "genderfluid," and "third

gender," and many others. WPATH Guidelines at 96; APA Guidelines at 862; Endocrine Society Guidelines at 3875. States forced to define sex according to subjective perceptions lose the ability to meaningfully distinguish between males and females. Even if gender identity is a "core part of [a person's] identity," Doc. 64 at 19, States should not be forced to reduce their definitions of sex to incoherence. *Cf. Orion*, 2017 WL 3387344, at *11 (rejecting expansion of "Black" that would render classification "devoid of any distinction" and thus "strip the provision of all exclusionary meaning").

It is no answer to claim, as Plaintiffs do, that by receiving "[p]uberty blocking medication" Plaintiffs will "not experience the physiological changes caused by the increased production of testosterone associated with male puberty." Doc. 1 ¶ 35. And even if the district court's conclusion that biological males who have not undergone male puberty do not "have any athletic advantage over" females were correct, 1-ER-14, it does not matter because States are not required to tailor laws (let alone the contours of the terms informing the law's application) to every individual's unique circumstances. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("A classification does not fail rational-basis review because it is not made

with mathematical nicety or because in practice it results in some inequality." (internal citations, quotation marks omitted)).

Worse, Plaintiffs' requested carveout to Arizona's definition of sex rests on the assumption that Plaintiffs fit in better with biological females because, as the district court put it, they "play like girls." 1-ER-22. But defining sex in terms of athletic performance and "socially constructed gender roles," 1-ER-3, would push Arizona to rely on "overbroad stereotypes about the relative abilities of men and women"—"the very stereotype[s] the law condemns." *J.E.B. v. Alabama*, 511 U.S. 127, 131, 138 (1994).

Indeed, defining sex according to gender identity would place Arizona in the perilous position of having to classify its sports teams based on whoever "walk[s] more femininely, talk[s] more femininely, dress[es] more femininely, wear[s] make-up, ha[s] her hair styled, and wear[s] jewelry." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality op.) (quotation omitted). Can it really be that federal law permits Plaintiffs to play on a girls' team so long as a State (or federal court) decides that they run or throw "like girls"? Should a child's sex be determined by her or his time on the mile run? Must States define sex based on "fixed

notions" about the "abilities of males and females"? *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

Of course not. States need not define sex based on crude sex stereotypes. Defining sex based on sex will do.

CONCLUSION

This case is about whether States may objectively classify "[f]emales, women, or girls" based on their "biological sex." A.R.S. 15-120.02(A). Because no federal law compels otherwise, the answer is yes. *Amici* States therefore respectfully ask the Court to reverse the district court.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i). This brief contains 4,943 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Century Schoolbook font, using Microsoft Word.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

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CERTIFICATE OF SERVICE

I certify that on September 15, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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