Nos. 23-16026, 23-16030

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.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NO. 23-CV-185, HON. JENNIFER G. ZIPPS, PRESIDING

BRIEF OF CONCERNED WOMEN FOR AMERICA AND SAMARITAN'S PURSE AS *AMICI CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* do not have parent corporations, they are not publicly traded companies, and no publicly held corporation owns 10% or more of their stocks.

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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.[1]

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

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and, no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief. All parties consented to this brief.

maternal and child 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.

INTRODUCTION

Under the established intermediate scrutiny rule, the Plaintiffs lose. 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. To avoid this result, the Plaintiffs propose an unprecedented theory of as-applied intermediate scrutiny focused on an individual's 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 individual person. That theory would transform intermediate scrutiny into the functional equivalent of strict scrutiny by requiring otherwise constitutional laws to have a perfect fit with the challenger's individual circumstances.

But never has intermediate scrutiny "demand[ed] an individualized hearing to assess [the] Plaintiff's own personal" circumstances. *Mai v. United States*, 952 F.3d 1106, 1119 (9th Cir. 2020) (cleaned up). After all, "under intermediate scrutiny, some amount of over-inclusiveness" "is permissible," for "[a] statute need not utilize the least restrictive means of achieving its interest in order to withstand intermediate scrutiny." *Id.* at 1115–16, 1119 (describing *United States v. Torres*, 911 F.3d 1253, 1264 n.6 (9th Cir. 2019)). The Supreme 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 before [it].” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Under intermediate scrutiny, “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.” *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989).

Rather than adopt the Plaintiffs’ novel as-applied approach—which even the current administration has refused to endorse in similar cases—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 these requirements. The Plaintiffs do not seem to disagree that “furthering women’s equality and promoting fairness in female athletic teams is an important state interest.” *Hecox v. Little*, No. 20-35813, 2023 WL 5283127, at *13 (9th Cir. Aug. 17, 2023). And the district court found that “adolescent boys” are, “on average, stronger and faster than adolescent girls.” *Doe v. Horne*, No. 23-00185-TUC-JGZ, 2023 WL 4661831, at *13 (D. Ariz. July 20, 2023). Thus, even if Doe and Roe do not have a competitive advantage over biological girls, the Act still

passes intermediate scrutiny because it does not have to be "capable of achieving its ultimate objective in every instance." *Nguyen v. INS*, 533 U.S. 53, 70 (2001). The Court should affirm.

ARGUMENT

The Plaintiffs' claim is that Arizona's law "violates the Equal Protection Clause" because *they* "have not and will not undergo male puberty," allegedly making the law not "substantially related to an important state interest" "as applied to [them]." Compl., ECF No. 1 ¶¶ 4, 72–73. 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. The Plaintiffs' as-applied intermediate scrutiny theory would collapse 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, including rational basis review. Under a proper application of intermediate scrutiny, the Act is easily constitutional because it is substantially related to the

important governmental objective of protecting girls by recognizing biological differences.

I. The Plaintiffs' 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." *Gallinger v. Becerra*, 898 F.3d 1012, 1017 (9th Cir. 2018) (quoting *City of 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." *City of Cleburne*, 473 U.S. at 440. 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 the Supreme Court has recognized, "[t]he two sexes are not fungible," and there are "inherent differences"

between the sexes that "are enduring." *Virginia*, 518 U.S. at 533 (cleaned up). These "inherent differences" "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints." *Id.* 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." *Id.* (cleaned up).

Courts also apply intermediate scrutiny in contexts 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 also apply intermediate scrutiny to certain speech restrictions, such as content-neutral time, place, or manner restrictions. In these cases too, "a regulation need not be the least speech-restrictive means of advancing the Government's interests," but it cannot "burden *substantially more* speech than is necessary to further the government's legitimate interests." *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (emphasis added) (quoting *Ward*, 491 U.S. at 799). And, before the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), this Court applied intermediate scrutiny in Second Amendment cases, which likewise required a law to have "a reasonable fit with an important

governmental interest." *Duncan v. Bonta*, 19 F.4th 1087, 1103 (9th Cir. 2021), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111. "The test [of intermediate scrutiny] is not a strict one, and the government need not use the least restrictive means." *Id.* at 1108 (cleaned up) (quoting *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016)).

In sum, courts understand intermediate scrutiny to have two main requirements: (1) the government must have an important interest, and (2) the law must closely—but not precisely—further that interest. These are the defining components of intermediate scrutiny.

The Plaintiffs' novel as-applied intermediate scrutiny theory is flawed for three reasons. First, it would require perfect fit of the sort required, if ever, only by strict scrutiny. Second, it is unsupported by precedent. Third, it would upend state regulatory schemes and constitutional adjudication in many areas of law.

A. The Plaintiffs' as-applied intermediate scrutiny theory would require perfect fit.

The Plaintiffs' proffered theory would collapse the distinction between strict and intermediate scrutiny, requiring a perfect fit between an otherwise lawful classification and the contours of 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, 423 (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 *could not* be 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, and this application may be arguable in some circumstances, but it is at least logically possible to consider such an "as-applied" strict scrutiny argument.

An as-applied intermediate scrutiny theory, by contrast, is incoherent. Strict scrutiny is a "greater level of scrutiny" than intermediate scrutiny. *Retail Digit. Network, LLC v. Prieto*, 861 F.3d 839, 849 (9th Cir. 2017) (internal citation omitted). By definition, the tailoring required by intermediate scrutiny is less than the "narrow tailoring" or "least restrictive means" required by strict scrutiny. *See Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 579–81 (9th Cir. 2014). Thus, intermediate scrutiny tolerates overinclusivity that strict scrutiny would not: a statute can pass intermediate scrutiny even if it "is overinclusive and applies to more people than it should." *Silvester*, 843 F.3d at 828.

Certainly, intermediate scrutiny does not tolerate too much overinclusivity. *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 must tolerate laws that have *some* unnecessary applications. While a 2% correlation might be too little, 100% is far too much to demand. *See id.* at 204 (calling for merely "a legitimate, accurate proxy"); *infra* pp. 25–26 (collecting more cases). Otherwise, intermediate scrutiny is no different from strict scrutiny.

Thus, in an equal protection challenge to gender-based prison regulations, this Court explained that the government could "successfully justify its" regulations "by comparing the number of violent incidents at lower security male facilities or by lower security male prisoners with the number of violent incidents at female prisons or by higher security female prisoners." *Harrison v. Kernan*, 971 F.3d 1069, 1081 (9th Cir. 2020). Necessarily, this type of statistical justification will be overinclusive, but intermediate scrutiny "do[es] not require scientific precision." *Mai*, 952 F.3d at 1118 (cleaned up)).

Contrary to the Plaintiffs' 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 overinclusivity question must focus on the group as classified by the law. In other words, the overinclusivity question is exactly what the traditional

intermediate scrutiny standard says: whether the law's overall, group-wide classification is sufficiently tailored to an important interest. That connection is assessed by reference to 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 invalid simply because its application to a single plaintiff is unnecessarily burdensome. Again, it is nonsensical to ask whether the law is too "overbroad[]" as it pertains to a single person. *Id.* at 63 n.13.

The United States provides a helpful contrast, as it has refused to press this as-applied intermediate scrutiny theory as *amicus* in similar cases. In the Fourth Circuit's *B.P.J.* case, 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." *Amicus* Br. 18–19, *B.P.J. v. W. Virginia State Bd. of Educ.*, No. 23-1078 (4th Cir. Apr. 3, 2023). That argument is wrong, but what matters is that the United States is making a subtly but importantly different argument from the Plaintiffs here (and in

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 overinclusivity. That is different from the Plaintiffs' claim, which is that the law is invalid as applied just because the State's asserted interests supposedly do not apply to Doe and Roe. Under this theory, Doe and Roe would win here even if every other transgender girl were proved to be dominant in girls' sports. As the United States' refusal to sign on to this novel theory suggests, the Plaintiffs' theory bears no relation to intermediate scrutiny. To maintain the distinction between strict and intermediate scrutiny, the Court should reject the Plaintiffs' novel theory.

B. Precedent opposes the Plaintiffs' theory.

The weight of precedent is also against the Plaintiffs' as-applied intermediate scrutiny theory. Time and again, the Supreme Court and this Court have 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 sound technician for its performance failed intermediate scrutiny. 491 U.S. at 787–90. The city justified its regulation on the ground that it would "eliminate[] the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers in the past." *Id.* at 801. The Supreme Court noted that "this concern [was]

not applicable to respondent's concerts, which apparently were characterized by more-than-adequate sound amplification." *Id.* 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." *Id.* 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." *Id.*; *see also One World One Family Now v. City & Cnty. of Honolulu*, 76 F.3d 1009, 1013 n.6 (9th Cir. 1996) (using this analysis).

Likewise, in *Nguyen*, the Supreme 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. 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 "consists of the real, everyday ties that provide a connection between child and

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. The Court held that "[t]his line of argument misconceives" "the manner in which we examine statutes alleged to violate equal protection." *Id.* "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." *Id.*; *accord 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.").

Similarly and as noted above, when this Court has applied intermediate scrutiny in both equal protection and Second Amendment contexts, it has not required a perfect fit based on unique circumstances. Considering a government preference for women-owned businesses, the Court upheld it: "[w]hile [it] may well be overinclusive" because "[w]e have no reason to believe that women are disadvantaged in each of the many industries covered," the law "hews closely enough to the city's goal of compensating women for disadvantages they have suffered." *Associated Gen.*

Contractors of Cal., Inc. v. City & Cnty. of San Francisco, 813 F.2d 922, 941 (9th Cir. 1987).[2]

Likewise, applying Second Amendment intermediate scrutiny, this Court said that "[t]he fit need only be reasonable, not perfect." *Jones v. Bonta*, 34 F.4th 704, 730 (9th Cir. 2022); *see id.* (applying equal protection precedent). In *Mai*, for example, this Court explained that it did not matter if the individual barred from possessing a firearm was "not a perfect match for [the] circumstances" targeted by the restriction. 952 F.3d at 1117. The Court sought to "assess[] congressional judgment about a category of persons, not about Plaintiff himself." *Id.* at 1118. That is because intermediate scrutiny "do[es] not require scientific precision" or "demand an individualized hearing to assess [the challenger's] own personal" characteristics. *Id.* at 1118–19 (cleaned up). "Either [the law] is a permissible burden on" *everyone's* constitutional rights, "or it is not." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014); *see also Torres*, 911 F.3d at 1264 n.6 (under intermediate scrutiny, a law "may be over-inclusive"); *accord Harley v. Wilkinson*, 988 F.3d 766, 770 (4th Cir. 2021) ("The challenger's [suggested approach to review his individual

[2] The Court mentioned the possibility of a narrower challenge "as applied to *an industry* where women are not disadvantaged." 813 F.2d at 942 (emphasis added). Such a challenge constitutes a partial facial challenge, not an as-applied challenge focused on a single plaintiff's "particular circumstances," so must "satisfy [the] standards for a facial challenge." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010).

characteristics] is fundamentally flawed because it effectively would create an exception to the statute that does not exist. The statute imposes a flat prohibition, with no reference to individual circumstances.").

Of course, these Second Amendment cases were abrogated by the Supreme Court in *Bruen*, but not because of this Court's misunderstanding of what intermediate scrutiny requires. This Court's explanation of the standard was correct: whether a law passes intermediate scrutiny does not turn on the challenger's individual circumstances.

Arizona's Act prohibits biological boys from competing in girls' sports, and it contains no exceptions. If the Court lets Doe's and Roe's individual circumstances control its adjudication of the Act's constitutionality, "a significant exception to [the statute] would emerge," alongside a novel perfect fit requirement for intermediate scrutiny cases. *United States v. Chovan*, 735 F.3d 1127, 1142 (9th Cir. 2013).

The Plaintiffs have asserted that "Ninth Circuit precedent actually *requires* courts to consider the as-applied implications as to the plaintiffs." Resp. to Emergency Stay Motion, No. 23-16026, ECF No. 14-1, at 7. But neither case the Plaintiffs cite adopted their theory, or even analyzed this issue in any meaningful way. Both involved a discussion of a "three-factor test" for heightened scrutiny under the Due Process Clause that this Court applied in *Witt v. Dep't of Air Force*, 527 F.3d 806,

818–19 (9th Cir. 2008), to laws that "'intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence v. Texas*, 539 U.S. 558 (2003).'" *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (cleaned up) (quoting *Witt*, 527 F.3d at 819). The Court said only that "*this* 'heightened scrutiny" approach 'is as-applied rather than facial.'" *Id.* (emphasis added) (quoting *Witt*, 527 F.3d at 819). It said nothing about whether this as-applied approach is required in equal protection cases. To the contrary, in *Witt*, it affirmed the dismissal of the plaintiff's equal protection claim even as it remanded on the due process claim. 527 F.3d at 821. This narrow due process test has nothing to do with standard Equal Protection Clause intermediate scrutiny. *Cf.* Resp. to Emergency Stay Motion, No. 23-16026, ECF No. 14-1, at 9 (Plaintiffs dismissing the relevance of cases that did not "involve[] an equal protection challenge).

Grimm v. Gloucester County School Board, 972 F.3d 586 (4th Cir. 2020), and *Lehr v. Robertson*, 463 U.S. 248 (1983), two cases relied on by plaintiffs in similar cases, also do not support the Plaintiffs' theory. In *Grimm*, the Fourth Circuit affirmed summary judgment for a transgender student who challenged a school board's policy that required individuals to use the restroom that corresponded to their biological sex. 972 F.3d at 608, 613–15. Despite a few references to an "as applied" challenge, the court in *Grimm* did not purport to change the established intermediate

scrutiny test. Rather, it applied that test in the same way the United States has: using the plaintiff as an example of why the law was supposedly overbroad—*not* holding the law invalid solely because of the student's individual characteristics.

Thus, in the section of *Grimm* applying heightened scrutiny, the Fourth Circuit said that "the Board ignores the reality of how *a transgender child* uses the bathroom" ("by entering a stall and closing the door")—then gave Grimm as an example. 972 F.3d at 613–14 (emphasis added) ("Grimm used the boys restrooms for *seven weeks* without incident."). The focus was on the class of "transgender child[ren]," *not* Grimm's unique characteristics. Likewise, the court said that "[t]he Board does not present any evidence that a transgender student" "is likely to be a peeping tom," considering evidence "in school districts across the country." *Id.* at 614. All this led the court to conclude that the "nature of the asserted privacy concerns" was "hypothetical." *Id.* at 615. Based on these findings, it held that "the Board's policy [was] not substantially related to its important interest in protecting students' privacy." *Id.* at 613. The focus of intermediate scrutiny remained on the group classified by the regulation, with the individual plaintiff merely serving as an example.

Lehr is far afield. There, the Supreme Court upheld a law that "guarantee[d] to certain people the right to veto an adoption and the right to prior notice of any adoption proceeding." 463 U.S. at 266. Specifically, under the challenged law, "[t]he

mother of an illegitimate child is always within that favored class, but only certain putative fathers are included." *Id.* Because the unwed father in *Lehr* "never established a substantial relationship with his daughter," the government could constitutionally distinguish between him and others like him and unwed 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. *Id.*; *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 such a relationship, not based on sex. *Lehr*, 463 U.S. at 266. Here, by contrast, all appear to agree that intermediate scrutiny applies. If anything, *Lehr*'s focus on the comparator group underscores the flaws with Doe's individual-focused theory. That theory is contrary to precedent.

C. The consequences of the Plaintiffs' theory would be significant.

Beyond disregarding precedent, the Plaintiffs' novel theory would have significant negative consequences. It would permit a plaintiff to demand perfect tailoring to his situation, forcing the government to abandon enforcement of the law writ

large to avoid plaintiffs with often undetectable unique circumstances. The Plaintiffs' reformulation of intermediate scrutiny 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 Plaintiffs' 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. Rather than face a steady trickle of lawsuits and potentially crushing liability, states will simply not enforce these laws, even if they are valid as against every other person in the world. And again, in the intermediate scrutiny realm, those laws protect important state interests. All those who are protected by the laws—here, young girls—will suffer.

The Plaintiffs' theory will also unsettle precedent. Under that theory, many cases from this Court and the Supreme Court would have been decided differently. For example, the Supreme Court in *Ward* would likely have held 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, the Supreme 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 had lived with his father in the United States from age five until at least age 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 Plaintiffs' theory would require the opposite holding.

Further, if this Court accepts the Plaintiffs' 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*, 139 S. Ct. 1112, 1128 (2019). While the "line between facial and as-applied challenges can sometimes prove amorphous, and not so well defined," "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." *Id.*

Finally, what's sauce for intermediate scrutiny is sauce for rational basis review. The Plaintiffs' theory would revolutionize rational basis review, for 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 the rational basis test, a [law] survives an equal protection challenge if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *United States v. Ayala-Bello*, 995 F.3d 710, 715 (9th Cir. 2021) (cleaned up). "[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. Once again, the Plaintiffs' theory would upend constitutional law.

The Plaintiffs have not addressed any of these consequences, though presumably they account, at least in part, for the United States' reticence to endorse their theory. Yet the Plaintiffs 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 Plaintiffs' theory is logically incoherent and incompatible with precedent. Its consequences would be severe. The Court should not adopt it.

II. The Act satisfies intermediate scrutiny.

As shown, the proper question before this Court is whether the law's means "are substantially related" to "important governmental objectives." *Virginia*, 518 U.S. at 533 (cleaned up). They are.

Even if it is true that Doe, Roe, and other biological boys who have halted or not started endogenous puberty have no significant advantage over biological girls—an unlikely proposition to any casual viewer of fourth grade sports—the Act passes intermediate scrutiny. As discussed, this Court addressed a similar claim in an as-applied challenge to a firearm restriction for domestic violence misdemeanants. Applying intermediate scrutiny, the Court held that "Congress permissibly created a

broad statute": "Congress is not limited to case-by-case exclusions of persons." *Chovan*, 735 F.3d at 1142. Even if a "requirement likely is neither narrowly tailored nor the least restrictive means for achieving [the legislature]'s goal," "it doesn't have to be: it only has to be a reasonable fit." *Jones*, 34 F.4th at 728.

Here, Doe asserts that the State "failed to demonstrate that transgender girls who have not undergone male puberty have an athletic advantage over other girls." Resp. to Emergency Stay Motion, No. 23-16026, ECF No. 14-1, at 10. But the State had no burden to make that showing on the Plaintiffs' as-applied claim. Even if the State had "failed to demonstrate" that, it would merely suggest that the Act is "an imperfect match for [a small number of individuals'] precise circumstances." *Mai*, 952 F.3d at 1121. That is not enough to invalidate the law, given that it requires only "a reasonable fit," not a perfect one. *Id.*

Indeed, under well-settled equal protection precedent, intermediate scrutiny only requires a "substantial relation." *E.g.*, *Virginia*, 518 U.S. at 533; *id.* at 573–74 (Scalia, J., dissenting); *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)). The Supreme Court has held that a "substantial relation" is shown where a classification, "*in the aggregate*," advances the underlying objective, even if the classification does not do so "in every case." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579 (1990) (emphasis added), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Once again, "[n]one of [the Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Instead, "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." *Ward*, 491 U.S. at 801.

The Plaintiffs' argument contradicts all this precedent. The Plaintiffs ignore the Supreme Court's directive to consider the Act's "relation to the overall problem," and instead urges this Court to analyze the "extent to which it furthers the government's interests in [Doe's and Roe's] case." *See id.* That is why Doe and Roe focus so much on their own circumstances rather than the Act's overall goal of providing equal athletic opportunities for biological girls. Even if their exclusion does not achieve this interest—which is far from clear—the focus of the "substantial relation" prong is on the Act's "relation . . . to the overall problem the government seeks to

address." *Ward*, 491 U.S. at 801. Thus, whether Doe and Roe will outperform, replace, or hurt biological women is irrelevant. *See Jobst*, 434 U.S. at 55 (noting that courts must "judge[] by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples"). The State has shown that, "in the aggregate," biological girls are better served when biological boys are not competing against them. *Metro Broad.*, 497 U.S. at 579. The Act is substantially related to the State's important interest in providing equal athletic opportunities for girls and is thus constitutional.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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