No. 24-449

In the
Supreme Court of the United States

WARREN PETERSEN, Senator, President of the Arizona State Senate; BEN TOMA, Representative, Speaker of the Arizona House of Representatives; and THOMAS C. HORNE, in his official capacity as State Superintendent of Public Instruction,

Petitioners,

v.

JANE DOE, by next friends and parents HELEN DOE and JAMES DOE, MEGAN ROE, by next friends and parents KATE ROE and ROBERT ROE, et al.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

"[S]tandards governing transgender participation in sports are evolving." App.49A. Indeed, since Petitioners filed their petition, the Department of Education withdrew a proposed rule governing transgender participation in sports. 89 Fed. Reg. 104,936 (Dec. 26, 2024); *see also* App.52A n.17 (citing proposed rule). Another sports governing body announced new policies to protect female golfers from competing against biological males.[1] And the United Nations Special Rapporteur on violence against women and girls issued a report concluding that, by allowing biological men to compete against women, "over 600 female athletes in more than 400 competitions have lost more than 890 medals in 29 different sports."[2]

Faced with this rapidly evolving debate, the Ninth Circuit picked one side, constitutionalizing the debate over sports participation in that circuit. Its decision conflicts on numerous issues with precedent from this Court and multiple circuits. Respondents cannot explain away these splits.

These important issues can and should be resolved in this case without awaiting the resolution of other appeals. The Court should grant this petition.

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[1] *LPGA, USGA alter gender polices, barring players assigned male at birth*, GOLF (Dec. 4, 2024), https://tinyurl.com/yctsu9pb.

[2] *Violence against women and girls, its causes and consequences*, U.N. A/79/325 (Aug. 27, 2024), ¶ 11, https://tinyurl.com/bdhfveda.

ARGUMENT

I. Review of These Important Issues Is Warranted Now.

Doe and Roe urge procedural detours that will add years of delay without aiding resolution of the important constitutional issues presented by this petition. When examined, these proposed detours point toward the need for review now.

A. *Skrmetti* demonstrates the importance of review now.

Doe and Roe concede that a circuit split exists on the standard of scrutiny that should be applied to laws that allegedly classify based on gender identity. BIO 17, 19. Although Doe and Roe repeatedly contend that *Skrmetti* already tees up this issue, *id.*, the oral argument in *Skrmetti*—which Doe and Roe tellingly do not reference—emphasizes the importance of review now.

First, the Solicitor General argued in *Skrmetti* that Tennessee's SB1 does not implicate the same classification analysis as a sports law. According to the Solicitor General, sports laws involve facial sex classifications, which is "actually not the question teed up here." *See* Tr. in No. 23-477, 52:19-22; *but see id.* at 132:17-133:3.

Second, both the Solicitor General and the private petitioners admitted that laws limiting women's sports to biological women "definitely" can satisfy intermediate scrutiny based on "wholly different state interests" than those asserted in *Skrmetti*. *Id.* at 53:20-23, 54:10-55:15, 108:24-109:14. These "different state interests" include addressing the effects on the rights of biological women and the "external impacts" from competing against biological men. *Id.* at 54:23-55:5.

Third, the Solicitor General suggested that the Court could "preserve space" for the "separate questions" presented by sports laws by including "explicit language [in the *Skrmetti* decision] saying this decision does not in any way or should not be understood to affect the separate state interests [in sports laws] that have to be evaluated on their own terms." *Id.* at 53:23-54:9.

Fourth, Doe and Roe recognize that *Skrmetti* does not implicate all the splits of authority raised in the petition. BIO 17. As discussed below, Doe and Roe misconstrue those issues to erroneously conclude that "[a]side from the issue currently teed up in *Skrmetti*, no circuit split exists." BIO 19.

The Solicitor General and the private petitioners argued that sports laws could be distinguished from the law in *Skrmetti*, perhaps even explicitly by the decision. The Court should grant review to decide these important issues.

B. This case is an ideal vehicle for the Court's review.

Doe's and Roe's other procedural objections are meritless.

First, Doe and Roe object to reviewing a "preliminary injunction on a preliminary record." BIO 17. But the Court regularly reviews preliminary injunction decisions. *See, e.g.*, Arthur D. Wolf, *Preliminary Injunction Standards in Massachusetts State and Federal Courts*, 35 W. NEW ENG. L. REV. 1, 18 n.116 (2013) ("In the past 15 years, the Supreme Court has reviewed over 100 civil actions involving preliminary injunctions."). *Skrmetti* involves a preliminary injunction record, as did many other recent cases. *See, e.g.*, *Murthy* v. *Missouri*, 603 U.S. 43, 49 (2024); *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2365

(2023); *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 531 (2021).

Second, Doe and Roe mistakenly claim that the lower court decisions are "factbound" and "largely turn[] on factual findings." BIO 17-18. But this petition turns on legal questions regarding deference and scrutiny, not on any factual question. The fact that these legal questions are presented in the context of a well-developed factual record is a strength, not a weakness, of this vehicle. Moreover, the Court has not hesitated to evaluate facts underlying questions of law, including the level of scrutiny and asserted government interests, in preliminary injunction decisions. *See Fulton*, 593 U.S. at 534-42; *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 774 (2018); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014). Doe's and Roe's only supporting case is inapposite; it analyzed what was "fairly included" in a question presented by an appeal after two jury trials. *See* BIO 18 (citing *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 34 (1993)).

Doe and Roe agreed earlier in this case that the appropriate level of scrutiny and issues relating to legislative discrimination were questions of law. *See* D.Ct. Doc. 112, ¶¶ 96-99, 109-110 (Proposed Conclusions of Law). In addition, in a petition for certiorari involving the Kentucky analogue to the law in *Skrmetti*, Doe's and Roe's counsel sought "immediate Supreme Court review" at the preliminary-injunction stage to evaluate the level of scrutiny. Pet. for a Writ of Certiorari, *Jane Doe 1* v. *Commonwealth of Kentucky*, No. 23-492, 31-32. Unlike here, counsel embraced the "extensive factual records that led to detailed findings from the federal district courts" in that case and *Skrmetti*, because the

Court "should have little difficulty applying [the heightened scrutiny] standard based on the existing evidentiary record." *Id.* at 32.

Third, the only true mootness threat supports review now. Roe is 17 years old. BIO 4. Because Roe plays high school volleyball during the fall season, App.72A, in less than one year, Roe may no longer need injunctive relief. Although Doe is younger, possible changes in circumstances or factual remands could delay review by this Court for years. For example, the two challengers to Idaho's sports law filed suit almost five years ago, *Hecox* v. *Little*, 479 F. Supp. 3d 930, 949 (D. Idaho 2020); one challenger's claim is now moot, Pet. for Writ of Cert. in 24-38, at 7 n.1, and the parties dispute whether the other challenger's claim is approaching mootness, Reply Br. for Pet'rs, 24-38, at 10. In a case approaching four years since filing, *B.P.J.* v. *W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220, 225 (S.D. W. Va. 2023), the Fourth Circuit partially remanded the challenge to West Virginia's sports law to resolve *Daubert* issues, *B.P.J. by Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542, 565 (4th Cir. 2024). The Court should grant this petition now to avoid any such issues here.

Doe and Roe warn that review now faces mootness risks, BIO 18-19, which they do not reconcile with their simultaneous argument for "remand for the Ninth Circuit to consider *Skrmetti's* effect in the first instance," *id.* at 3. Regardless, review now does not risk mootness. Upon a grant of certiorari, Petitioners will immediately seek to stay all lower court proceedings. Moreover, under the district court's local rules, oral argument on any dispositive motions could not be held before June 2025 even without any further schedule extensions. *See* D. Ariz. LRCiv. 56.1(d); *see also* D.Ct. Doc. 232 (Order Granting Plaintiffs' Motion

to Extend Fact Discovery (Fourth Request)). The most recent data located from the Federal Judicial Center reported that summary judgment in a civil rights case took a median of 21 weeks from briefing conclusion until a ruling, and was granted in whole barely one-fourth of the time.[3] Indeed, in the only sports law case to proceed through summary judgment, more than seven months elapsed between the end of summary judgment briefing and the summary judgment decision. *Compare* Doc. 337, *B.P.J.* v. *W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. May 26, 2022) *with id.* at Doc. 512 (Jan. 5, 2023). In short, even without a stay below, the case schedule and available data indicate that a complete summary judgment decision is at least one year away, and any bench trial and appellate review will last years.

Finally, the district court will confront the same important issues at summary judgment that are presented by this petition. Doe and Roe identify no factual development needed to resolve any of these issues now. The Court should review now.

II. The Ninth Circuit's Decision Creates Conflicts on Important Issues That Need Resolution.

A. The Ninth Circuit's decision on deference to legislative findings directly conflicts with this Court and splits with other circuits.

Contrary to Doe's and Roe's argument, BIO 20-22, Petitioners expressly preserved the issue of deference

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[3] *Report on Summary Judgment Practice Across Districts with Variations in Local Rules*, THE FEDERAL JUDICIAL CENTER (Aug. 13, 2008), Tables 3 & 5, https://tinyurl.com/mr2ucucr.

to legislative findings. Petitioners consistently relied on Arizona's legislative findings to support the SWSA. *See, e.g.*, D.Ct. Doc. 82, at 7, 12; C.A.9 Doc. 20-1, at 7-9; C.A.9 Doc. 103-1, at 28. Counsel for both sides and multiple judges on the Ninth Circuit panel specifically discussed deference to legislative findings at oral argument. Tr. 4:04-4:26, 24:49-25:34, 32:04-35:00, 38:53-41:29. The Ninth Circuit addressed the issue in its opinion, App.27A, 49A, which would allow the Court to review the issue even if Petitioners had not raised it. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Doe and Roe cite no authority requiring specific case citations or submission of expert evidence to preserve an issue for appeal. Instead, Doe and Roe acknowledge that Petitioners challenged the district court's factual findings as clearly erroneous, BIO 20, and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

On the merits, Doe and Roe notably do not defend the Ninth Circuit's reasoning that deference to legislative findings only applies under rational basis scrutiny. App.40A. Instead, Doe and Roe first respond to the "slew of court of appeals decisions" deferring to legislative findings by distinguishing them on the most narrow ground possible: "whether Megan and Jane's participation in girls' sports has any meaningful impact on the health or safety of other girls playing those sports." BIO 22. But with perhaps only one exception, individuals do not "singlehandedly generate[] a circuit split." *Acheson Hotels, LLC* v. *Laufer*, 601 U.S. 1, 3 (2023). Doe and Roe have no other answer to the conflict between the Ninth

Circuit's decision and the many courts of appeals' decisions requiring courts to give "substantial" and "especially broad" deference to legislative findings in areas of medical and scientific uncertainty. Pet. 19.

Doe and Roe next misstate Petitioners' position as "legislature-always-wins deference." BIO 22. Petitioners explicitly argued the opposite. Pet. 18 ("this deference is not absolute").

Finally, Doe and Roe rely heavily on the judiciary's "independent judgment" when evaluating legislative findings, BIO 23, but as the case cited by Doe and Roe explains, this "is not a license to reweigh the evidence *de novo,* or to replace Congress' factual predictions with our own." *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 666 (1994) (plurality op.). The courts below violated this instruction. Doe and Roe emphasize *Carhart*'s factual inaccuracy findings, BIO 23, but they have no response to its ultimate conclusion deferring to Congress on an issue of "medical and scientific uncertainty." *Gonzales* v. *Carhart*, 550 U.S. 124, 163-67 (2007).

The Ninth Circuit's holding directly conflicts with this Court and multiple courts of appeal, and this split in authority warrants this Court's review.

B. The Ninth Circuit's decision directly conflicts with the Second Circuit's decision in *Jana-Rock*.

Doe and Roe do not dispute that they challenge "the contours of the specific [sex-based] classification that the government chooses to use," rather than the classification itself. Pet. 29 (quoting *Jana-Rock Constr., Inc.* v. *New York State Dep't of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006)). A direct conflict thus exists between the Second Circuit's decision that heightened scrutiny does not apply to an

underinclusiveness challenge to a statutory definition, *Jana-Rock*, 438 F.3d at 209-11, and the Ninth Circuit's decision that it does. App.43A.

Doe and Roe attempt to avoid the direct conflict with the Second Circuit by contending that *Jana-Rock* "does not apply in this case" because "the SWSA does not extend a benefit to anyone."[4] BIO at 25. But *Jana-Rock* is not so limited. As *Jana-Rock* correctly observed, "[t]he purpose of [heightened scrutiny] is to ensure that the government's choice to use [disfavored] classifications is justified, not to ensure that the contours of the specific [suspect] classification that the government chooses to use are in every particular correct." *Jana-Rock*, 438 F.3d at 210. "Once it has been established that the government is justified in resorting to the 'highly suspect tool' of [disfavored] classifications, [heightened] scrutiny has little utility in supervising the government's definition of its chosen categories." *Id.* Thus, courts do not apply heightened "scrutiny a second time" to evaluate whether a statute "is underinclusive for having excluded a particular plaintiff." *Id.* at 200. Yet the Ninth Circuit's decision does precisely that: it applied heightened scrutiny to the SWSA's definitions of "females," "women," and "girls."

Because it derives from the nature of heightened scrutiny itself, *Jana-Rock*'s reasoning applies—at least implicitly—whenever courts employ heightened

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[4] While not relevant to the applicability of *Jana-Rock*'s legal principles, contrary to Doe's and Roe's assertions, the SWSA *does* confer a benefit: it guarantees female athletes the opportunity to compete on a level playing field, without competing against male athletes who enjoy significant biological advantages. Indeed, if the SWSA did not extend any benefit, Doe and Roe would not have filed this litigation seeking to partake in that benefit.

scrutiny. Doe and Roe believe that the SWSA's fit is "too tight," *id.* at 207, because its definitions exclude them. But when sex-separated sports passed unchallenged here, heightened scrutiny accomplished its purpose "to ensure that the government's choice to use [sex-based] classifications is justified." *Id.* at 210.

Finally, Doe and Roe embrace the Ninth Circuit's impermissibly lax standards for finding intentional discrimination by a state legislature, BIO 26, again in conflict with *Jana-Rock*: Plaintiffs must show "intent to harm the groups . . . excluded" to trigger heightened scrutiny of an underinclusiveness challenge. *Jana-Rock*, 438 F.3d at 211. "[T]o equate a 'desire to eliminate the discriminatory impact' on some disadvantaged groups with 'an intent to discriminate against' other groups 'could seriously stifle attempts to remedy discrimination.'" *Id.* (citation omitted). Moreover, affording the SWSA's benefits to individuals who do not face a predominant athletic biological disadvantage vis-à-vis male athletes, like Doe and Roe, could jeopardize the whole statute, since a gender-based classification violates equal protection unless "members of the gender benefitted by the classification actually suffer a disadvantage related to the classification." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 728 (1982).

The Ninth Circuit's holding directly conflicts with *Jana-Rock*, and this split in authority warrants this Court's review.

C. The Ninth Circuit's lax standard for inferring discriminatory intent conflicts with the holdings of other circuits.

Doe and Roe defend the Ninth Circuit's standard for attributing intentional discrimination to a state legislature by distinguishing conflicting cases solely

on the ground that they applied rational-basis review. BIO 26-28. Their argument rests on a fundamental misunderstanding of equal protection doctrine.

"[C]lass-based equal protection jurisprudence generally proceeds in two steps." *SECSYS, LLC* v. *Vigil*, 666 F.3d 678, 685 (10th Cir. 2012) (Gorsuch, J.). "First, [courts] ask whether the challenged state action intentionally discriminates between groups of persons." *Id.* State action violates the Equal Protection Clause only if it rests on a discriminatory intent. *Vill. of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).

Where government action is facially neutral, however, a plaintiff must produce evidence that the government acted with a discriminatory intent. *SECSYS*, 666 F.3d at 686. Only after a plaintiff establishes intentional discrimination—"either by presumption or evidence and inference"—does a court move to the second step to evaluate "whether the state's intentional decision to discriminate can be justified by reference to some upright government purpose." *Id.* The level of scrutiny is chosen and applied at this second step. *Id.* at 686-87.

Doe's and Roe's argument jumbles this two-step framework. As explained above, the question whether the State has intentionally discriminated against a group arises under the first step of the analysis. The existence of intentional discrimination determines whether the court will proceed to the second step, not which level of scrutiny will be applied at the second step. Thus, the case law regarding a finding of intentional discrimination cannot be limited to rational-basis review.

Doe and Roe have identified no way to square the Ninth Circuit's holding with the contrary approach

taken by other circuits. The Court should grant review to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

January 6, 2025

Respectfully submitted,

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