**Nos. 24-38, 24-43**

# In the Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO ET AL., *Petitioners*,

*v.*

LINDSAY HECOX ET AL., *Respondents*.

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WEST VIRGINIA ET AL., *Petitioners*,

*v.*

B.P.J., by next friend and mother, HEATHER JACKSON, *Respondent*.

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**On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits**

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## BRIEF OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENTS

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November 17, 2025

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## INTEREST OF *AMICI CURIAE*[*]

*Amici* are legal scholars who study and teach constitutional law, including the Equal Protection Clause of the U.S. Constitution. The decisions below, as well as the arguments offered by the parties, raise important issues regarding whether classifications based on transgender status trigger heightened scrutiny under the Equal Protection Clause.

*Amici* submit this brief to call attention to considerations that should guide courts in identifying classifications warranting heightened scrutiny. *Amici* urge the Court to recognize transgender status as suspect and to reject the proposition that whether a trait is ascertainable at birth should play a role in evaluating whether heightened scrutiny applies. It should not.

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[*] Pursuant to Supreme Court Rule 37, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no one other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Classifications based on transgender status warrant heightened scrutiny under the Equal Protection Clause. *Amici* submit this brief to explain why the *Carolene Products* framework requires such a result and to clarify that a characteristic need not be ascertainable at birth to trigger heightened scrutiny.

In *Carolene Products*'s famous Footnote Four, this Court recognized that classifications disadvantaging "discrete and insular minorities" deserve "more searching judicial inquiry" than ordinary legislative

classifications because "prejudice" against these minorities "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Four traits tend to characterize such minorities: (1) a history of discrimination; (2) an equal ability to contribute to society; (3) immutability; and (4) political powerlessness. But no one of the four is either necessary or sufficient. This flexibility helps courts accomplish Footnote Four's goal: preventing the law from codifying unjustifiable discrimination, where the minority group is unlikely to defeat it at the polls.

Transgender status satisfies all four factors, as the Fourth and Ninth Circuits correctly recognized below. Transgender people have suffered persistent discrimination; their defining characteristic—a discordance between their gender identity and sex assigned at birth—is immutable and bears no relationship to their ability to contribute to society; and they lack sufficient political power to protect themselves through electoral politics.

Absent from decades of assessments of suspectness is any hint of "ascertainab[ility] at the moment of birth"—a requirement some jurists have recently imposed. *See, e.g.*, *Ondo v. Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015). That is because ascertainability at birth is irrelevant; grafting such a requirement onto *Carolene Products* contradicts the precedent, history, and purpose of the Equal Protection Clause. The Court should not inject this new requirement into equal protection doctrine.

Indeed, Footnote Four itself rejects such a requirement. Notably, it identifies discrimination against "religious ... minorities" as warranting heightened scrutiny. *Carolene Products*, 304 U.S. at 152 n.4. Yet religion cannot be ascertained at birth; an adult who converts to Christianity is entitled to protection against anti-Christian discrimination despite having been born into a different religion. National origin likewise receives strict scrutiny, even though multi-generational Americans may bear no "at birth" markers of their ancestors' origins. If external ascertainability at birth were required, these suspect classifications specifically enumerated in *Carolene Products* would not qualify.

Moreover, requiring ascertainability at birth creates untenable circularity where, as here, the discrimination stems from incongruence between internal identity and external assignment at birth. The laws challenged here discriminate based on the *discordance* between gender identity and sex assigned at birth. Denying protection from discrimination because an individual's transgender status was not "ascertainable at birth" to those making the initial assignment would deny constitutional protection for discrimination flowing from discordance with that assignment.

## ARGUMENT

## TRANSGENDER INDIVIDUALS SATISFY THE *CAROLENE PRODUCTS* FRAMEWORK FOR HEIGHTENED SCRUTINY

### I. Classifications Based On Transgender Status Are Suspect

Under this Court's precedents, once a classification is deemed suspect,[1] its use will usually trigger heightened scrutiny, regardless of whether it advantages or disadvantages any group whose characteristics were front of mind in deeming the classification suspect in the first place. *See*, *e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."). However, in making the threshold determination whether a classification is suspect, courts focus on groups who experience the greatest disadvantage by the classification, such as Blacks (for race) or women (for sex). The cases look to four primary considerations derived from *Carolene Products*'s Footnote Four:

(1) Whether the group historically has "been subjected to discrimination," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986);

(2) Whether the group has a characteristic that "bears no relation to [the] ability to perform or

[1] For simplicity, we use "suspect" to refer to any classification that triggers heightened scrutiny, whether strict, intermediate, or otherwise. *See United States v. Skrmetti*, 605 U.S. 495, 549 n.2 (2025) (Barrett, J., concurring, joined by Thomas, J.) (adopting this convention).

contribute to society," *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985);

(3) Whether members of the group have "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638; and

(4) Whether the group lacks the capacity to protect itself adequately within the political process, *see id.*

Crucially, "[n]o single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide." *City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part, joined by Brennan and Blackmun, JJ.).

While no single factor is necessary to trigger heightened scrutiny, some are more important than others. The key factors have been a history of discrimination and the use of overly broad stereotypes. By contrast, "[i]mmutability and lack of political power are not strictly necessary factors to identify a suspect class." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd,* 570 U.S. 744 (2013).[2] To be sure,

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[2] *See also, e.g.*, *City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting argument that alienage did not trigger strict scrutiny because it was not immutable).

"[p]ersonal immutability of characteristic is sometimes used by the Court to explain a requirement of heightened scrutiny," Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1615 (2d ed. 1988), but this Court has never deemed it a *necessary* characteristic, *see id.* at 1614-15 (pointing to other criteria, including status as a discrete and insular minority and whether the classification is the basis for stereotypes and stigmatization).

The Footnote Four factors also may be interconnected, so that one factor informs another.[3] Further, one or more factors may point towards suspectness only partially. *See* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 962-68 (2002) ("None of the criteria has anything remotely like an on/off character.").

Although courts recognize suspect classifications only sparingly, it makes sense that transgender status has achieved such recognition in the lower courts: All four *Carolene Products* considerations support recognizing transgender status as suspect.[4]

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[3] *See* William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 15 (2010) (arguing the Supreme Court historically focused on whether prejudice infects political process when assessing whether to treat classification as suspect).

[4] Transgender status satisfies all four factors for the reasons explained in detail by the Fourth and Ninth Circuits and in the party briefs submitted to the Court. *See* Hecox Br. 28-37 (citing cases); B.P.J. Br. 43-45. Many courts agree. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019); *see also, e.g.*, *Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020); *Flack v. Wis. Dep't of Health Servs.*,

*First*, it cannot be seriously disputed that transgender people have faced and continue to face persistent and pervasive discrimination.[5] A 2024 survey reports that 82 percent of transgender employees in the U.S. have experienced workplace discrimination or harassment.[6] And it is getting worse—a 2025 survey found that 85 percent of transgender adults say recent

328 F. Supp. 3d 931, 952-53 (W.D. Wis. 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144 (D. Idaho 2018); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719-22 (D. Md. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) ("*Highland Local*"); *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015). The Seventh Circuit also recognizes that "discrimination based on transgender status is a form of sex discrimination" warranting heightened scrutiny. *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023). *Cf. Bostock v. Clayton County, Georgia*, 590 U.S. 644, 668-69 (2020) (holding that discrimination based on homosexuality or transgender status is proscribed sex discrimination within the meaning of Title VII).

[5] *See, e.g.*, *Highland Local*, 208 F. Supp. 3d at 874 ("there is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare"); *Adkins*, 143 F. Supp. 3d at 139 (that "transgender people have suffered a history of persecution and discrimination … is not much in debate") (quotations omitted); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) (similar).

[6] Brad Sears et al., *Workplace Experiences of Transgender Employees*, THE WILLIAMS INST. (Nov. 2024), https://williamsinstitute.law.ucla.edu/publications/transgender-workplace-discrim/.

anti-LGBTQ+ policies and rhetoric have negatively impacted their mental health.[7]

*Second*, transgender status has no bearing on one's competence, skill, or ability to contribute to society. Transgender Americans have demonstrated a capacity to thrive in every walk of life.[8]

*Third*, "being transgender marks the group for different treatment." *Grimm*, 972 F.3d at 613. Regardless of when a person begins to reckon with their gender identity, and regardless of the degree of biological explanation for its occurrence, gender identity cannot be controlled at will, as "gender identity is formulated for most people at a very early age, and … being transgender is not a choice." *Id.* at 612 (citation omitted). In any event, "obvious" or "distinguishing" characteristics that define a "discrete group," and not only "immutable" characteristics, satisfy this factor. *Lyng*, 477 U.S. at 638.

*Fourth*, there is little question that "transgender people are a politically powerless minority group" and cannot fully protect themselves in the political process against a hostile majority. *See Highland Local*, 208 F. Supp. 3d at 874. Consider the recent deluge of state

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[7] DATA FOR PROGRESS, *Americans Are Divided on Issues Related to Transgender People, but Often Don't Want the Federal Government Involved* (Mar. 27, 2025), https://www.dataforprogress.org/blog/2025/3/27/americans-are-divided-on-issues-related-to-transgender-people-but-often-dont-want-the-federal-government-involved.

[8] *See*, *e.g.*, *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 209 (D.D.C. 2017) ("the Court is aware of no argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society"); *Highland Local*, 208 F. Supp. 3d at 874 (similar); *Adkins*, 143 F Supp. 3d at 139 (similar).

legislation[9] and federal executive orders[10] discriminating against transgender people. These laws target transgender individuals in all aspects of life.

These considerations uniformly cut in favor of heightened scrutiny.

## II. Ascertainability At Birth Is Not A Requirement Of The *Carolene Products* Framework

Some have posited that a suspect classification must be "definitively ascertainable at the moment of birth." *Ondo*, 795 F.3d at 609; *see also Skrmetti*, 605 U.S. at 550-51 (Barrett, J., concurring) (quoting *Ondo*). But this has no sound basis in equal protection doctrine. A third party's ability to ascertain the protected characteristic (at the moment of birth or otherwise) has never been a prerequisite for constitutional protection.

**A.** First, an "ascertainability-at-birth" requirement finds no support in the text of *Carolene Products*, which certainly did not require that a characteristic be "definitively ascertainable at the moment of birth" to be suspect, *Ondo*, 795 F.3d at 609. Rather, as restated by this Court in *Lyng*, the test asks whether members of a group "exhibit obvious, immutable or

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[9] *See, e.g., 2025 anti-trans bill tracker*, https://translegislation.com/ (last accessed Nov. 16, 2025) (identifying 1,011 anti-transgender bills under consideration in 49 states).

[10] *See, e.g.*, Exec. Order No. 14,201, 90 Fed. Reg. 9279 (Feb. 5, 2025) (banning transgender girls from participating in school sports); Exec. Order No. 14,190, 90 Fed. Reg. 8853 (Jan. 29, 2025) (prohibiting recognition of students' gender identity in school); Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (cancelling grants for transgender medical research).

distinguishing characteristics that define them as a discrete group." 477 U.S. at 638. This formulation is notably *disjunctive*: group members need only possess a characteristic that is obvious *or* immutable *or* distinguishing. Characteristics that are "obvious" or "distinguishing" plainly need not be ascertainable "at birth." And even when focusing on immutability, courts consistently interpret this term to mean not literally unchangeable, but rather traits "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them." *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc).

Consider religion. Footnote Four identifies "religious ... minorities" as groups whose treatment warrants "more searching judicial inquiry." 304 U.S. at 153 n.4. Religious identity is neither ascertainable at birth nor immutable; yet religious classifications trigger heightened scrutiny. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). A newborn cannot be observed to be Christian, Jewish, Muslim, Hindu, or of any other faith based on external appearance alone. Religious identity is instead assigned by parents, develops through socialization and personal conviction, and can change throughout an individual's lifetime.[11]

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[11] *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 469 (2017) (Gorsuch, J., concurring in part, joined by Thomas, J.) ("[The Free Exercise] Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status).") (emphasis in original).

Moreover, even to the extent that religion is ascertainable at birth by observing an infant's parents' religion, that observation is irrelevant to future discrimination claims in cases of conversion. Equal protection rightly forbids antisemitic laws as applied to converts to Judaism.

**B.** From the fact that immutability is not a necessary condition for a classification's status as suspect, it follows *a fortiori* that neither is ascertainability at birth a necessary condition. Nor has anyone advanced any sound reason for requiring ascertainability at birth. Those few jurists who have suggested such a position appear to treat it as an aspect of immutability.[12] To the extent the reasoning can be inferred, it apparently goes like this:

*a. immutability is relevant to suspectness because people are not responsible for the traits with which they are born;* →

*b. thus, immutable traits are those present from birth; so* →

*c. therefore, a trait that qualifies as suspect must be ascertainable at birth.*

However, the foregoing syllogism is deeply flawed. As described above, immutability is not required for

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[12] We say "appear" because the cases cited do not provide any reasoned argument for this proposition. In *Ondo*, for example, the Sixth Circuit rested its ascertainability claim entirely on the contention that "the [Supreme] Court has never defined a suspect or quasi-suspect class on anything other than a trait that is definitively ascertainable at the moment of birth, such as race or biological gender." 795 F.3d at 609. This contention is inconsistent with the *Carolene Products* footnote's reference to religion and national origin as suspect classifications.

suspectness at all. And even if immutability were a necessary condition, and even if only those immutable traits present from birth qualified, there would be no good reason why such traits would need to be *ascertainable* at birth; in fact, this Court's cases plainly reject any such requirement.

For example, in addition to religious classifications, national origin classifications receive strict scrutiny. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944), *overruled by Trump v. Hawaii*, 585 U.S. 667 (2018). Yet second- and third-generation Americans, or even first-generation Americans, may bear no visible ("ascertainable") markers of their ancestors' national origin at their moment of birth or even later in life; yet discrimination against such individuals is properly subject to heightened scrutiny. Appearance, accent, and other observable characteristics do not always reveal an individual's national origin, and subsequent changes to family names and records can remove other indicators that could perhaps otherwise make national origin ascertainable, particularly for those whose families have been in the United States for multiple generations. A child born in Ohio to parents who were born in Ohio, but whose grandparents immigrated from Italy, can invoke the Equal Protection Clause to block state discrimination based on her derivative Italian national origin; yet that child's appearance at birth may not reveal this fact to observers. Nevertheless, state action discriminating based on national origin triggers strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

**C.** The irrelevance of ascertainability at birth accords with the goals underlying *Carolene Products*: protecting groups whose characteristics make them

vulnerable to prejudice that cannot be fully remedied through the political process. The core inquiries include: (1) whether the characteristic in question is sufficiently fundamental to an individual's identity that the person should not be required to change it, *see Plyler v. Doe*, 457 U.S. 202, 220 (1982); *Watkins*, 875 F.2d at 726 (Norris, J., concurring); and (2) whether discrimination based on that characteristic reflects the kind of prejudice that cannot be fully remedied through ordinary politics. The answer to these questions for a particular characteristic can be "yes," whether or not the characteristic is ascertainable at birth.

Accordingly, equal protection case law has never required external observability.

*Plessy v. Ferguson*, 163 U.S. 537 (1896), is illustrative in this regard. Although Homer Plessy was a white-passing man, he was one-eighth Black[13] and thus subject to Louisiana's discriminatory Separate Car Act under the state's "one-drop rule." Notably, neither the parties, the Court, nor Justice Harlan in his prophetic dissent ever suggested that Plessy had not suffered race discrimination because his race was not visible. Rather, the case proceeded on the understanding that the Equal Protection Clause bars race discrimination regardless of whether the race of the person in question is visible to observers. While the *Plessy* Court's obtuse conclusion that Louisiana's segregation law did not discriminate based on race was wrong the day it was decided, its underlying assumption remains clear: Homer Plessy was classified by the

[13] Historical accounts observe that Plessy looked white: "the mixture of colored blood was not discernible in him." *Plessy*, 163 U.S. at 541.

government based on his race, despite the fact that his race was not readily ascertainable even in adulthood, much less at birth.

Even today, the race and ethnicity of persons of mixed race are often difficult to identify at birth or thereafter. Yet that hardly means that official discrimination against them based on (actual or perceived) race or ethnicity is exempted from strict scrutiny—much less that race and ethnicity are not suspect classifications in the first place.

## III. Applying An "Ascertainability At Birth" Requirement Here Would Impose Circular Logic On Transgender People

In these cases especially, ascertainability at birth cannot be a necessary condition for suspect status. Such a criterion would be perversely circular: denying protection against discrimination that flows from the incongruence between an internal characteristic and its external assignment at birth.

Transgender status reflects a fundamental incongruence between internal gender identity and external sex assignment at birth that nonetheless forms a characteristic that can, as is the case here, form the basis for government classification and discrimination. A transgender girl—an individual assigned male at birth whose gender identity is female—experiences discrimination under the laws in question because of the difference between her gender identity and the sex assigned to her at birth. The basis for the discrimination is the fact that the individual's gender identity was *not* externally observable to those assigning sex at birth. To find that the act of "ascertaining at birth"—the assignment at birth that resulted in the

discrimination later experienced due to incongruity with that assignment—somehow disqualifies a transgender person from protection from discrimination stemming from that mislabeling is cruelly tautological.

In general, and especially as applied here, suspect classification status cannot require ascertainability at birth without frustrating the very purpose of the suspect classification doctrine—which exists to protect discrete minority groups without political power from discrimination by the majority. Narrowing the Equal Protection Clause to protect only those characteristics that a majority can "ascertain" (at birth or later) would threaten the legal protection long afforded based on existing suspect classifications and be especially perverse here, where incongruity with sex assigned at birth is the essence of the identity that results in discrimination. The Court need not and should not take that unprecedented step.

## CONCLUSION

The judgments of the Fourth and Ninth Circuits should be affirmed.[14]

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[14] This brief argues that laws that discriminate based on transgender status trigger heightened scrutiny. In the context of the as-applied relief sought by respondents, neither the Idaho nor West Virginia law at issue is sufficiently tailored to an important government interest, and therefore the judgments under review should be affirmed (unless the Idaho case is dismissed as moot). *Amici* take no position on whether a narrowly drawn limit on participation by some transgender female athletes in particular girls' and women's sports in which experiencing male puberty may confer competitive advantages could satisfy any form of scrutiny (be it rational basis or heightened).

Respectfully submitted,

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