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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16026
D.C. No. 4:23-cv-00185-JGZ

HELEN DOE, parent and next friend of Jane Doe; JAMES DOE, parent and next friend of Jane Doe; KATE ROE, parent and next friend of Megan Roe; ROBERT ROE, parent and next friend of Megan Roe,

Plaintiffs-Appellees,

v.

THOMAS C. HORNE, in his official capacity as State Superintendent of Public Instruction; LAURA TOENJES, in her official capacity as Superintendent of the Kyrene School District; KYRENE SCHOOL DISTRICT; GREGORY SCHOOL; ARIZONA INTERSCHOLASTIC ASSOCIATION INCORPORATED,

Defendants,

and

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

Intervenor-Defendants-Appellants.

No. 23-16030
D.C. No. 4:23-cv-00185-JGZ

HELEN DOE, parent and next friend of Jane Doe;
JAMES DOE, parent and next friend of Jane Doe;
KATE ROE, parent and next friend of Megan Roe;
ROBERT ROE, parent and next friend of Megan Roe,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant,

and

LAURA TOENJES, in her official capacity as Superintendent of the Kyrene School District; KYRENE SCHOOL DISTRICT; GREGORY SCHOOL; ARIZONA INTERSCHOLASTIC ASSOCIATION INCORPORATED,

Defendants,

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

Intervenor-Defendants.

OPINION

Appeal from the United States District Court for the District of Arizona
Jennifer G. Zipps, District Judge, Presiding

Argued and Submitted March 14, 2024
San Francisco, California

Filed September 9, 2024

Before: M. Margaret McKeown and Morgan Christen, Circuit Judges, and David A. Ezra,[*] District Judge.
Opinion by Judge Christen

SUMMARY[**]

Preliminary Injunction/Equal Protection

The panel affirmed the district court's order preliminarily enjoining Arizona from barring Plaintiffs Jane Doe and Megan Roe from playing school sports consistent with their gender identity.

Plaintiffs are transgender girls who have not gone through male puberty and who wish to play girls' sports at their Arizona schools. In 2022, Arizona enacted the Save Women's Sports Act, which prohibits "students of the male sex," including transgender women and girls, from participating in women's and girls' sports. The complaint alleges that the Act's transgender ban violates, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment and Title IX. Plaintiffs challenge enforcement of the Act solely as applied to them. The district court concluded that Plaintiffs were likely to succeed on their equal protection and Title IX claims, and preliminarily enjoined enforcing the Act against them.

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[*]The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

[**]This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court did not clearly err by finding that, before puberty, there are no significant differences in athletic performance between boys and girls; treating small differences as insignificant; and finding that transgender girls who receive puberty-blocking medication do not have an athletic advantage over other girls.

The panel affirmed the district court's holding that Plaintiffs were likely to succeed on the merits of their equal protection claim. The district court did not clearly err by finding that the Act was adopted for the discriminatory purpose of excluding transgender girls from playing on girls' sports teams. Accordingly, the district court properly concluded that the Act is subject to heightened scrutiny.

The panel held that Arizona's transgender ban discriminates on its face based on transgender status. To survive heightened scrutiny, a classification must serve important governmental objectives and must be substantially related to the achievement of those objectives. The panel held that, given the district court's well-supported factual findings, the district court properly concluded that Appellants—the State Superintendent of Public Instruction and several legislators—are unlikely to establish that the Act's sweeping transgender ban is substantially related to the achievement of the State's important governmental objectives in ensuring competitive fairness and equal athletic opportunity for female student-athletes. The Act's transgender ban applies not only to all transgender women and girls in Arizona, regardless of circulating testosterone levels or other medically accepted indicia of competitive advantage, but also to all sports, regardless of the physical contact involved, the type or level of

competition, or the age or grade of the participants. The district court therefore did not err by concluding that Plaintiffs are likely to succeed on the merits of their equal protection claim. Because Plaintiffs are likely to succeed on the merits of their equal protection claim, the panel did not reach the issue of whether Plaintiffs are likely to succeed on the merits of their Title IX claim as well.

The panel held that the district court did not abuse its discretion in addressing the remaining preliminary injunction factors—the likeliness of irreparable harm in the absence of relief, the balance of the equities, and the public interest. Accordingly, the panel held that the district court did not abuse its discretion by granting Plaintiffs' motion for a narrow preliminary injunction.

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OPINION

CHRISTEN, Circuit Judge:

We address whether the district court abused its discretion by preliminarily enjoining Arizona from barring Plaintiffs Jane Doe and Megan Roe from playing school sports consistent with their gender identity. Given our limited and deferential review and the district court's well-supported factual findings, including its finding that "[t]ransgender girls who have not undergone male puberty do not have an athletic advantage over other girls," *Doe v. Horne*, 683 F. Supp. 3d 950, 964 (D. Ariz. 2023), we affirm the district court's order granting Plaintiffs' motion for a preliminary injunction.

I.

A.[1]

Gender identity, "the medical term for a person's internal, innate, deeply held sense of their own gender," is a "largely biological phenomenon." *Id.* at 956. "Research suggests that differences in prenatal hormonal exposures, genetic factors, and brain structural differences may all contribute," Decl. of Dr. Daniel Shumer, M.D., MPH, ¶ 19, and "[t]here is a consensus among medical organizations that gender identity is innate and cannot be changed through psychological or medical treatments," *Doe*, 683 F. Supp. 3d at 956–57. "When a child is born, a health care provider identifies the child's sex based on the child's observable anatomy." *Id.* at 957. "This identification is known as an 'assigned sex,' and in most cases turns out to be consistent with the person's gender identity." *Id.* For a transgender person,

[1] At this stage, we accept this uncontested background information as true.

however, "that initial designation does not match the person's gender identity." *Id.* A transgender girl is a girl who was identified as a male at birth but whose gender identity is female, while a cisgender girl is a girl who was identified as female at birth and whose gender identity is also female. Some individuals are nonbinary, meaning they identify with or express a gender identity that is neither entirely male nor entirely female. *Nonbinary, Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/nonbinary (last visited Aug. 27, 2024).

Transgender persons may suffer from gender dysphoria, "a serious medical condition characterized by significant and disabling distress due to the incongruence between a person's gender identity and assigned sex." *Doe*, 683 F. Supp. 3d at 957. "Untreated gender dysphoria can cause serious harm, including anxiety, depression, eating disorders, substance abuse, self-harm, and suicide." *Id.* at 958. "Attempts to 'cure' transgender individuals by forcing their gender identity into alignment with their birth sex are harmful and ineffective." *Id.* "Those practices have been denounced as unethical by all major professional associations of medical and mental health professionals, such as the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, and the American Psychological Association, among others." *Id.*

"At the onset of puberty, adolescents with gender dysphoria may be prescribed puberty-delaying medications to prevent the distress of developing physical characteristics that conflict with the[ir] gender identity." *Id.* A transgender girl given puberty blockers "will experience no progression of physical

changes caused by testosterone, including male muscular development, facial and body hair, an Adam's apple, or masculinized facial structures." Shumer Decl. ¶ 35. "Thereafter, the treating provider may prescribe cross-sex hormones to induce the puberty associated with the adolescent's gender identity." *Id.* ¶ 36. "[A] transgender girl who receives hormone therapy will typically have the same levels of circulating estrogen and testosterone . . . as other girls and significantly lower than boys who have begun pubertal development." *Id.*

B.

On March 30, 2022, Arizona enacted Senate Bill 1165, the Save Women's Sports Act, codified at Arizona Revised Statutes § 15-120.02. The Act prohibits "students of the male sex," including transgender women and girls, from participating in women's and girls' sports. *Id.* § 15-120.02(B). It states:

> A. Each interscholastic or intramural athletic team or sport that is sponsored by a public school or a private school whose students or teams compete against a public school shall be expressly designated as one of the following based on the biological sex of the students who participate on the team or in the sport:
>
> 1. "Males," "men" or "boys."
>
> 2. "Females," "women" or "girls."
>
> 3. "Coed" or "mixed."
>
> B. Athletic teams or sports designated for "females," "women" or "girls" may not be open to students of the male sex.
>
> C. This section does not restrict the eligibility of any student to participate in any interscholastic or

intramural athletic team or sport designated as being for "males," "men" or "boys" or designated as "coed" or "mixed."

D. A government entity, any licensing or accrediting organization or any athletic association or organization may not entertain a complaint, open an investigation or take any other adverse action against a school for maintaining separate interscholastic or intramural athletic teams or sports for students of the female sex.

E. Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a school knowingly violating this section has a private cause of action for injunctive relief, damages and any other relief available under law against the school.

F. Any student who is subject to retaliation or another adverse action by a school or an athletic association or organization as a result of reporting a violation of this section to an employee or representative of the school or the athletic association or organization, or to any state or federal agency with oversight of schools in this state, has a private cause of action for injunctive relief, damages and any other relief available under law against the school or the athletic association or organization.

G. Any school that suffers any direct or indirect harm as a result of a violation of this section has a private cause of action for injunctive relief, damages and any other relief available under law against the government entity, the licensing or accrediting organization or the athletic association or organization.

> H. All civil actions must be initiated within two years after the alleged violation of this section occurred. A person or organization that prevails on a claim brought pursuant to this section is entitled to monetary damages, including damages for any psychological, emotional or physical harm suffered, reasonable attorney fees and costs and any other appropriate relief.
>
> I. For the purposes of this section, "school" means either:
>
> 1. A school that provides instruction in any combination of kindergarten programs or grades one through twelve.
>
> 2. An institution of higher education.

Id. § 15-120.02. The Act's ban on transgender female students playing female sports resides in subsections A and B. Subsection A requires schools to classify sports and students by "biological sex," and Subsection B bans "students of the male sex" from female-designated sports. The Act does not define "biological sex," but the parties agree that the term is synonymous with sex assigned at birth. *See Doe*, 683 F. Supp. 3d at 957.[2] Thus, the Act bans transgender women and girls from women's and girls' sports.

Although the Act purports to ban all "students of the male sex" from female-designated athletics,

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[2] Although the Act treats sex as binary (male or female), about "two percent of all babies are born 'intersex,' or with 'a wide range of natural variations in physical traits—including external genitals, internal sex organs, chromosomes, and hormones—that do not fit typical binary notions of male and female bodies.'" *Hecox v. Little (Hecox II)*, 104 F.4th 1061, 1076–77 (9th Cir. 2024), *petition for cert. filed* (U.S. July 11, 2024) (No. 24-38).

including both cisgender male students and transgender female students, the Act in fact has no effect on the ability of cisgender men and boys to engage in female sports, because they were already excluded from female sports under the pre-Act status quo. *See, e.g.*, *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n (Clark I)*, 695 F.2d 1126, 1127 (9th Cir. 1982) (upholding an Arizona Interscholastic Association (AIA) policy precluding cisgender boys from playing on girls' teams); *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n (Clark II)*, 886 F.2d 1191, 1192, 1194 (9th Cir. 1989) (same). But the Act has a profound impact on transgender women and girls. Under Arizona's pre-Act status quo, transgender women and girls in grade school, high school, and college were permitted to participate in women's and girls' sports, albeit under limited circumstances, consistent with policies established by the National Collegiate Athletic Association (NCAA), the AIA, and individual schools. Under current NCAA policy, for example, transgender women are permitted to compete in women's sports when they meet sport-specific standards for documented testosterone levels. *See Transgender Student-Athlete Participation Policy*, NCAA (May 2024), https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx (last visited Aug. 27, 2024). Under AIA policy, which states that "students should have the opportunity to participate in [AIA] activities in a manner that is consistent with their gender identity," transgender female students were permitted to play on girls' teams when a committee of experts found "that the student's request is appropriate and is not motivated by an improper purpose and there are no adverse health risks to the

athlete." AIA, *AIA Policies & Procedures*, art. 41, § 41.9 (2022-23).[3] The AIA policy also permitted each school district to set its own rules governing transgender students' participation in intramural—i.e., non-interscholastic—sports. *Doe*, 683 F. Supp. 3d at 960.

The Act abrogates these policies by categorically banning transgender women and girls from women's and girls' sports. As the district court explained, "[u]nlike the prior case-by-case basis used to approve a transgender girl's request to play on a team consistent with her gender identity, which considered among other things the age and competitive level relevant to the request, the Act categorically bans all transgender girls' participation." *Id.* at 962.

The Act's sweeping transgender ban admits of no exceptions. The ban applies to all transgender female students, from kindergarten through graduate school; and for all sports, including intramural games, regardless of whether physical contact is involved. Significantly, the ban turns entirely on a student's transgender or cisgender *status*, and not at all on factors—such as levels of circulating testosterone—that the district court found bear a genuine relationship to athletic performance and competitive advantage. The ban thus applies to many transgender women and girls who, according to the district court's

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[3] The AIA is a voluntary association of public and private high schools. In the dozen or so years before the Act's passage, the AIA fielded approximately 12 requests from transgender students seeking to play on teams consistent with their gender identities and approved seven of those requests. *Doe*, 683 F. Supp. 3d at 961. The record does not reveal whether these students were transgender boys or transgender girls. *Id.*

findings, lack an athletic or competitive advantage over cisgender women and girls, including, for example: transgender girls such as kindergartners who are too young to have gone through male puberty; transgender women and girls who have received puberty-blocking medication and hormone therapy and have never gone through male puberty; and transgender women and girls who have experienced male puberty but have received sustained hormone therapy to suppress their circulating testosterone levels.

On its face, the Act treats transgender women and girls less favorably than all other students. After passage of the Act, Arizona allows other students—including cisgender women and girls, cisgender men and boys, and transgender men and boys—to play on teams corresponding with their gender identities; only transgender women and girls are barred from doing so.[4]

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[4] That the Act allows transgender men and boys to play on men's and boys' teams does not preclude a finding that the Act discriminates based on transgender status. As we explained in *Hecox II*, 104 F.4th at 1079, "a law is not immune to an equal protection challenge if it discriminates only against some members of a protected class but not others." *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495, 516–17 (2000) ("Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral."); *Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977) ("The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."); *Mathews v. Lucas*, 427 U.S. 495, 504–05 n.11 (1976) ("That the statutory classifications challenged here discriminate among illegitimate children does not mean, of course, that they are not also properly described as discriminating between legitimate and illegitimate children.").

The Act also singles out women's and girls' *athletics* for unfavorable treatment. As the district court explained, "[t]he Act's creation of a private cause of action against a school for any student who is deprived of an athletic opportunity or suffers any harm, whether direct or indirect, related to a school['s] failure to preclude participation of a transgender girl on a girls' team places an onerous burden on girls' sports programs, not faced by boys' athletic programs." *Id.* at 963. "[O]nly girls' teams fac[e] potential challenges, including litigation, related to suspected transgender players." *Id.*; *cf. Hecox II*, 104 F.4th at 1080 (holding that Idaho's transgender sports ban discriminated based on sex because it subjected "only participants in women's and girls' sports, whether cisgender or transgender, to the risk and humiliation of having their sex 'disputed' and then suffering intrusive medical testing [to have their biological sex verified] as a prerequisite for participation on school sports teams").

In legislative findings, the Arizona Legislature suggested that a categorical transgender ban was justified because, "[i]n studies of large cohorts of children from six years old, '[b]oys typically scored higher than girls on cardiovascular endurance, muscular strength, muscular endurance, and speed/agility, but lower on flexibility,'" and "[t]he benefits that natural testosterone provides to male athletes is not diminished through the use of testosterone suppression." 2022 Ariz. Legis. Serv. ch. 106 (S.B. 1165) (West), at § 2, ¶¶ 6, 13 (second alteration in original) (citation omitted). The legislature also found that "[h]aving separate sex-specific teams furthers efforts to promote sex equality by providing opportunities for female athletes to

demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain recognition, accolades, college scholarships and the numerous other long-term benefits that flow from success in athletic endeavors." *Id.* ¶ 14. In a signing statement, Governor Ducey stated that the Act:

> creates a statewide policy to ensure that biologically female athletes at Arizona public schools, colleges, and universities have a level playing field to compete. This bill does not deny student-athletes the eligibility to play on teams not designated as "female," and it doesn't impact club sports leagues offered outside of schools. Every young Arizona athlete should have the opportunity to participate in extracurricular activities that give them a sense of belonging and allow them to grow and thrive.
>
> This legislation simply ensures that the girls and young women who have dedicated themselves to their sport do not miss out on hard-earned opportunities including their titles, standings and scholarships due to unfair competition. This bill strikes the right balance of respecting all students while still acknowledging that there are inherent biological distinctions that merit separate categories to ensure fairness for all.

2022 Ariz. Legis. Serv. ch. 106 (S.B. 1165) (West) (Governor's Approval Message, Mar. 30, 2022). The Act became effective on September 24, 2022.

C.

In April 2023, Plaintiffs Jane Doe and Megan Roe, by and through their parents, brought this as-applied challenge to the Act. Plaintiffs are transgender girls

who have not gone through male puberty and wish to play girls' sports at their Arizona schools.

Jane is an 11-year-old transgender girl who attends the Kyrene Aprende Middle School, a public school located in Chandler, Arizona, near Phoenix. *Doe*, 683 F. Supp. 3d at 958. She has lived as a girl in all aspects of her life since she was five years old and was diagnosed with gender dysphoria at age seven. *Id.* She has changed her name through a court order to a more traditional female name, and she has a female gender marker on her passport. *Id.* at 958–59. Jane began receiving Supprelin, a puberty-blocking medication, in 2023, at age 11. *Id.* at 959. The district court found that Jane will not experience any of the physiological changes that increased testosterone levels would cause in a pubescent boy. *Id.*

Sports are important to Jane, and she has played soccer for many years. *Id.* Aside from its physical and emotional health benefits, soccer has helped Jane make new friends and connect with other girls, and Jane's teachers, coaches, friends, and members of her soccer team have all been supportive of her gender identity. *Id.* At Aprende, Jane plays (or is interested in playing) on the girls' soccer, girls' basketball, and coed cross-country teams.[5] *Id.* Aprende, which participates in the AIA, has no objection to Jane playing on girls' teams. *Id.*

Megan is a 15-year-old transgender girl attending the Gregory School, a private school in Tucson. *Id.* Megan has always known she is a girl, has lived as a girl in all aspects of her life since she was seven, and

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[5] Boys and girls train together but compete separately on the coed cross-country team. *Doe*, 683 F. Supp. 3d at 959.

was diagnosed with gender dysphoria at age 10. *Id.* at 959–60. Through a court order, Megan has changed her name to a more traditional female name and her gender to female, and she has a female gender marker on her passport. *Id.* at 960.[6] Megan has been taking puberty blockers since she was 11 and began receiving hormone therapy at age 12. *Id.* As a result of these treatments, the district court found that Megan has not experienced the physiological changes that increased testosterone levels would cause in a pubescent boy. *Id.* On the contrary, the district court found that she has developed many of the physiological changes associated with female puberty. *Id.*

As with Jane, sports have figured prominently in Megan's life. *Id.* When she was about seven, Megan joined a swim team, and the coach of the swim team was supportive of her and her gender identity. *Id.* At the Gregory School, Megan is a member of the girls' volleyball team, although the Act has barred her from competing in interscholastic games. *Id.* at 960, 962. Her teammates, coaches, and school are all highly supportive of her and have welcomed her participation on the team. *Id.* at 960. Like Kyrene Aprende Middle School, the Gregory School participates in the AIA.

The complaint alleges that the Act's transgender ban violates the Equal Protection Clause of the Fourteenth Amendment to the United States

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[6] The court ordered Megan's name changed; ordered the Office of Vital Records to amend Megan's birth record to reflect her new name; and authorized Megan and her parents to correct her gender designation on her personal, vital, medical, financial, educational, and other public documents.

Constitution; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*; and the Rehabilitation Act of 1973, 29 U.S.C. § 794. The complaint names five defendants: Thomas C. Horne, in his official capacity as State Superintendent of Public Instruction; Laura Toenjes, in her official capacity as Superintendent of the Kyrene School District; the Kyrene School District; the Gregory School; and the AIA. In addition, Warren Petersen, President of the Arizona State Senate, and Ben Toma, Speaker of the Arizona House of Representatives (the "Legislators"), have intervened as defendants.

Plaintiffs neither challenge the existence of separate teams for girls and boys nor challenge the Act facially. Rather, they challenge enforcement of the Act solely as applied to them. They seek injunctive and declaratory relief in the form of an order allowing them to participate in their chosen sports.

D.

Contemporaneous with the filing of the complaint, Plaintiffs moved to preliminarily enjoin the defendants from enforcing the Act as applied to them. Plaintiffs sought relief on the grounds that they were likely to succeed on their equal protection and Title IX claims. In July 2023, after considering the parties' briefs, evidentiary submissions from numerous experts, and argument presented at a hearing, the district court granted the motion. *Doe*, 683 F. Supp. 3d at 955–77. The preliminary injunction order includes a number of factual findings relevant to this appeal. The district court found that "[t]he Act was adopted for the purpose of excluding transgender girls from playing on girls' sports teams." *Id.* at 963. The district court also found that, "[b]efore puberty, there

are no significant differences in athletic performance between boys and girls." *Id.* at 968. The court acknowledged studies showing that prepubertal boys outperform prepubertal girls on school physical fitness tests, but the court found "no basis . . . to attribute those small differences to physiology or anatomy instead of to other factors such as greater societal encouragement of athleticism in boys, greater opportunities for boys to play sports, or differences in the preferences of the boys and girls surveyed." *Id.* at 966.

The district court also found that "[t]he biological driver of average group differences in athletic performance between adolescent boys and girls is the difference in their respective levels of testosterone, which only begin to diverge significantly after the onset of puberty," and that puberty typically begins at around age 12. *Id.* at 968. More specifically, the court cited "the scientific consensus that the biological cause of average differences in athletic performance between men and women is . . . the presence of circulating levels of testosterone beginning with male puberty . . . between the ages of about 12 and 18." *Id.* at 964–65. Accordingly, the court found that transgender girls such as Plaintiffs, who begin puberty-blocking medication and hormone therapy at an early age, "do not have an athletic advantage over other girls." *Id.* at 964. The court found that "[t]ransgender girls who receive puberty-blocking medication do not have an athletic advantage over other girls because they do not undergo male puberty and do not experience the physiological changes caused by the increased production of testosterone associated with male puberty." *Id.* at 968. It also found that "[t]ransgender girls who receive hormone

therapy after receiving puberty-blocking medication will develop the skeletal structure, fat distribution, and muscle and breast development typical of other girls" and "will typically have the same levels of circulating estrogen and testosterone as other girls." *Id.* Finally, the district court found that "transgender girls who have not yet undergone male puberty or who have received puberty-blocking medication at the onset of puberty do not present any unique safety risk to other girls." *Id.*

On the strength of these findings, the district court concluded that Plaintiffs were likely to succeed on their equal protection challenge to the transgender ban. As a threshold matter, the court concluded that heightened scrutiny applies because the Act discriminates against transgender girls both purposely and on its face. *Id.* at 971–72. Applying heightened scrutiny, the court concluded that Horne and the Legislators—the only defendants actively defending the ban—failed to "establish[] that categorically banning all transgender girls from playing girls' sports is substantially related to an important government interest." *Id.* at 973. The court concluded that their "argument that the Act is necessary to protect girls' sports by barring transgender girls, who purportedly have an unfair athletic advantage over other girls and/or pose a safety risk to other girls, is based on overbroad generalizations and stereotypes that erroneously equate transgender status with athletic ability." *Id.* at 973–74.

The district court also determined that Plaintiffs were likely to succeed on their Title IX claim, that Plaintiffs would suffer irreparable harm if relief were not granted, and that the public interest and the

balance of the equities favored relief. *Id.* at 974–76. Accordingly, the court granted Plaintiffs motion and preliminarily enjoined Horne from enforcing the Act against Plaintiffs. *Id.* at 977. Horne and the Legislators (collectively, "Appellants") filed separate timely appeals that we subsequently consolidated.

II.

"The 'purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits.'" *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (quoting *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009)). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (brackets in original) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The third and fourth factors, harm to the opposing party and weighing the public interest, "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). With respect to the fourth factor, "it is always in the public interest to prevent the violation of a party's constitutional rights," *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds by Winter*, 555 U.S. 7), because "all citizens have a stake in upholding the Constitution," *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). But "[a] preliminary injunction is an

extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24.

"We review the grant or denial of a preliminary injunction for abuse of discretion." *Johnson*, 572 F.3d at 1078 (quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)). "This review is 'limited and deferential,' and it does not extend to the underlying merits of the case." *Id.* (quoting *Am. Trucking Ass'ns*, 559 F.3d at 1052). "A district court 'necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact.'" *Id.* at 1078–79 (quoting *Am. Trucking Ass'ns*, 559 F.3d at 1052). "But '[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Id.* at 1079 (alteration in original) (quoting *Am. Trucking Ass'ns*, 559 F.3d at 1052); *accord Wildwest Inst. v. Bull*, 472 F.3d 587, 590 (9th Cir. 2006). "A district court's factual finding is clearly erroneous 'if it is illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021) (quoting *Arc of California v. Douglas*, 757 F.3d 975, 984 (9th Cir. 2014)). "Although we review [legislative] factfinding under a deferential standard, . . . [t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932)). We review a district court's finding of discriminatory purpose for clear error. *See Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1240–41 (2024); *Hernandez v. New York*, 500 U.S. 352,

364–65 (1991) (collecting cases); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

III.

We begin with Appellants' contention that the district court's factual findings regarding the expert medical evidence are clearly erroneous. Specifically, Appellants argue that the district court clearly erred by: (1) finding that, before puberty, there are no significant differences in athletic performance between boys and girls; (2) treating small differences as insignificant; and (3) finding that transgender girls who receive puberty-blocking medication do not have an athletic advantage over other girls. We sustain these findings because they are not "illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). Appellants have not shown that the district court clearly erred.

A.

The district court's finding that, "[b]efore puberty, there are no significant differences in athletic performance between boys and girls," *Doe*, 683 F. Supp. 3d at 968, is not clearly erroneous. Dr. Daniel Shumer is a Pediatric Endocrinologist and Medical Director of the Comprehensive Gender Services Program at Michigan Medicine, University of Michigan; the Clinical Director of Child and Adolescent Gender Services at C.S. Mott Children's Hospital; and an Assistant Professor of Medicine at the University of Michigan, where the major focus of his clinical and research work pertains to transgender adolescents. Shumer Decl. ¶ 3. He has personally evaluated and treated over 400 patients for gender

dysphoria and has knowledge of the scientific literature concerning the issues raised in this litigation. *Id.* ¶¶ 7, 14. Dr. Shumer stated that, "[b]efore puberty, there are no significant differences in athletic performance between boys and girls." *Id.* ¶ 38. He acknowledged that "some studies have found small differences between the performance of boys and girls with respect to some discrete activities," but he noted that "these studies did not control for other factors, particularly age, location, or socioeconomic factors." Rebuttal Decl. of Daniel Shumer, M.D., ¶ 10. He further explained, "When research has controlled for those factors by using representative data, researchers have found . . . 'no statistical difference in the capabilities of girls and boys until high-school age (commonly age 12).'" *Id.* ¶ 11. According to Dr. Shumer, "[t]here is no reliable basis . . . to attribute those small differences to physiology or anatomy instead of other factors, such as greater societal encouragement of athleticism in boys, greater opportunities for boys to play sports, or different preferences of the boys and girls surveyed." *Id.* ¶ 13; *see also* Second Rebuttal Decl. of Daniel Shumer, M.D., ¶¶ 16–24.

Appellants point to a handful of studies suggesting that prepubertal boys may be taller, weigh more, have more muscle mass, have less body fat, or have greater shoulder internal rotator strength than prepubertal girls. These studies, however, neither attributed these differences to biological rather than sociological factors nor concluded that these differences translated into competitive athletic advantages. Moreover, the results of these studies are disputed. Dr. Shumer, for example, testified that studies have found "no statistical difference in the [muscle

strength] of girls and boys until high-school age" and that height differences between boys and girls "disappear around age 6 to 8 years of age, and do not begin diverging again until puberty," when girls acquire an advantage. Shumer 2d Rebuttal Decl. ¶¶ 13, 18. On appeal, Appellants cite the findings of these studies selectively. For example, although a 2017 study found that prepubertal boys had greater shoulder internal rotator strength than prepubertal girls, the study also found "no significant . . . differences between strength measures of boys or girls aged 3–9 years" with respect to the 12 other muscle groups studied. Marnee J. McKay et al., *Normative Reference Values for Strength and Flexibility of 1,000 Children and Adults*, 88 Neurology 36, 38 (2017). And Appellants' reliance on a 2023 study, Mira A. Atkinson et al., *Sex Differences in Track and Field Elite Youth* 10–11 (2023) (preprint), https://sportrxiv.org/index.php/server/preprint/view/332/654 (last visited Aug. 27, 2024), is misplaced because it does not appear that Appellants presented this evidence to the district court. "Our review of the district court's findings, pursuant to its action on a motion for preliminary judgment is . . . restricted to the limited record available to the district court when it granted or denied the motion." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982).

On the record before it, the district court did not clearly err by finding that there are no significant differences in athletic performance between prepubescent boys and girls. We recognize that Appellants' experts—including Dr. Emma Hilton, Ph.D., a postdoctoral researcher in developmental biology at the University of Manchester, UK, and Dr.

Gregory A. Brown, Ph.D., FACSM, a Professor of Exercise Science in the Department of Kinesiology and Sport Sciences at the University of Nebraska Kearney—disagree with these findings, but our review of a district court's factual findings is limited and deferential, especially at this stage of the proceedings. Because the challenged findings are firmly grounded in evidence in the record, they are not clearly erroneous.

B.

Appellants contend the district court clearly erred by treating small differences between prepubertal boys and girls as insignificant. They note that small differences can "have an enormous influence in competitive sports, where outcomes are routinely decided by tiny margins." Opening Br. at 56. Appellants overlook the court's finding that the small differences that have been identified by some studies have not been shown to be attributable to biological rather than sociological factors. *Doe*, 683 F. Supp. 3d at 966. The court found that "any prepubertal differences between boys and girls in various athletic measurements are minimal or nonexistent" and that there is "no basis . . . to attribute" the small differences observed in school-based fitness testing of prepubertal boys and girls "to physiology or anatomy instead of to other factors such as greater societal encouragement of athleticism in boys, greater opportunities for boys to play sports, or differences in the preferences of the boys and girls surveyed." *Id.* at 966–67. These

findings are supported by the record and are not clearly erroneous.[7]

C.

Appellants also take issue with the district court's finding that "[t]ransgender girls who receive puberty-blocking medication do not have an athletic advantage over other girls because they do not undergo male puberty and do not experience the physiological changes caused by the increased production of testosterone associated with male puberty." *Id.* at 968. Appellants point to what they describe as "abundant evidence showing that preventing male puberty does not eliminate the advantages that [transgender females] have over [cisgender] females." Opening Br. at 52.

The district court's finding is grounded in the record evidence. Dr. Shumer testified that transgender girls receiving treatment consistent with current standards of care begin puberty blockers "at the first onset of puberty, . . . long before the development of increased muscle mass and strength associated with the later stages of male puberty," and "receive hormone therapy to allow them to go through puberty consistent with their female gender identity." Shumer 2d Rebuttal Decl. ¶¶ 26–27. Consequently, Dr. Shumer testified that these transgender girls "will develop many of the same physiological and

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[7] Because Appellants failed to show that there are differences in athletic performance between prepubertal boys and girls that are attributable to biology, the district court had no occasion to address whether slight differences of that nature would justify a categorical ban on transgender women and girls playing women's and girls' sports. We likewise express no opinion on that question.

anatomical characteristics of non-transgender girls, including bone size, skeletal structure, and distinctive aspects of the female pelvis geometry that cut against athletic performance. . . . Because such girls do not undergo male puberty, they do not gain the increased muscle mass or strength that accounts for why post-pubertal boys as a group have an advantage over post-pubertal girls as a group." *Id.* ¶¶ 27–28. Dr. Shumer testified, there is "no evidence that transgender girls on puberty suppression medication or hormone therapy have an athletic advantage over other girls," there are "no studies that have documented any such advantage," and there is "no medical reason to posit that any such advantage would exist." *Id.* ¶ 36; *see also* Shumer Rebuttal Decl. ¶¶ 14–27. Dr. Shumer also cited "the scientific consensus that the biological cause of average differences in athletic performance between men and women is the rise of circulating levels of testosterone beginning in endogenous male puberty." Shumer Rebuttal Decl. ¶ 8. Dr. Shumer further testified that "a transgender girl who receives hormone therapy will typically have the same levels of circulating estrogen and testosterone levels as other girls." Shumer Decl. ¶ 36.

Relying on several studies, Appellants argue that transgender females who receive puberty blockers have advantages over cisgender females in lean body mass, grip strength, and height. But Appellants overlook that in these studies, male puberty was only *partially* blocked. In the lean body mass study, for example, the transgender women participants "had much more testosterone exposure than transgender girls treated with modern protocols" because they started puberty blockers at an average age of 14.5 years. Shumer 2d Rebuttal Decl. ¶ 33; *see* Maartje

Klaver et al., *Early Hormonal Treatment Affects Body Composition and Body Shape in Young Transgender Adolescents*, 15 J. Sexual Med. 251 (2018). Plaintiffs, by contrast, began receiving puberty blockers at age 11. Similarly, the height study upon which Appellants rely considered "transgender girls who had received puberty blockers from around 13 years of age" and "cross-sex hormones at 16 years of age"—far later than Plaintiffs and others following current protocols. Statement of Emma Hilton, Ph.D., ¶ 11.2; *see* Lidewij Sophia Boogers et al., *Transgender Girls Grow Tall: Adult Height Is Unaffected by GnRH Analogue and Estradiol Treatment*, 107 J. Clinical Endocrinology & Metabolism 3805 (2022). The medications in the grip strength study cited by Appellants "did not fully block puberty" and were "less effective" than the puberty blockers used in the United States. Shumer 2d Rebuttal Decl. ¶ 34; *see* Lloyd J.W. Tack et al., *Proandrogenic and Antiandrogenic Progestins in Transgender Youth: Differential Effects on Body Composition and Bone Metabolism*, 103 J. Clinical Endocrinology & Metabolism 2147 (2018). Given the limited relevance of these studies, the district court did not clearly err.

IV.

The district court concluded that Plaintiffs were likely to succeed on their equal protection and Title IX claims. We discuss these claims in turn, beginning with equal protection.

A.

1.

In *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019), and *Hecox II*, 104 F.4th at 1079, we held that heightened scrutiny applies to laws that

discriminate based on transgender status. Thus, if the Act discriminates based on transgender status, either purposefully or on its face, heightened scrutiny applies.[8]

a.

A discriminatory purpose is shown when "the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). "The 'important starting point' for assessing discriminatory intent under *Arlington Heights* is 'the impact of the official action whether it 'bears more heavily on one race than another.'" *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 489 (1997) (quoting *Village of Arlington Heights*, 429 U.S. at 266). "Other

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[8] We recognize that the Act also classifies based on sex, but Plaintiffs do not challenge the State's decision to require that schools maintain separate teams for girls and boys, so we do not address it. *See Doe*, 683 F. Supp. 3d at 967 ("The Plaintiffs do not challenge the existence of separate teams for girls and boys."); *cf. B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 557 (4th Cir. 2024) ("Because [the challenged law's] requirement that all teams be designated male, female, or co-ed . . . is conceded to be valid and is necessary to the relief [plaintiff] seeks (being allowed to participate in girls cross country and track teams) we need go no further in determining whether the State can justify it."), *petitions for cert. filed* (July 16, 2024) (Nos. 24-43, 24-44).

considerations relevant to the purpose inquiry include, among other things, 'the historical background of the [jurisdiction's] decision'; '[t]he specific sequence of events leading up to the challenged decision'; '[d]epartures from the normal procedural sequence'; and '[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body.'" *Id.* (alterations in original) (quoting *Village of Arlington Heights*, 429 U.S. at 268). Although we start with a presumption that a legislature acted in good faith, a plaintiff need demonstrate only that discrimination against a protected class "was a substantial or motivating factor in enacting the challenged provision," not the sole or predominant factor. *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1139–40 (9th Cir. 2023). Here, the district court found that "[t]he Act was adopted for the purpose of excluding transgender girls from playing on girls' sports teams." *Doe*, 683 F. Supp. 3d at 963. This finding is not clearly erroneous.

First, Appellants' contention that the legislature adopted the Act to ensure competitive fairness and equal athletic opportunities for cisgender female athletes cannot be squared with the fact that the Act bars students from female athletics based entirely on *transgender status* and not at all based on factors the district court found bear a genuine connection to athletic performance and competitive advantage, such as circulating testosterone. The district court concluded that "[t]he Arizona legislature intentionally created a classification, specifically 'biological girls,' that necessarily excludes transgender girls," *id.* at 971, and that "[t]he categorical preclusion of transgender women, especially girls who have not

experienced male puberty, appears unrelated to the interests the Act purportedly advances," *id.* at 967.

Second, the Supreme Court has long recognized that a policy's discriminatory impact may support a finding of discriminatory purpose. *See Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982) ("In determining whether . . . a [discriminatory] purpose was the motivating factor, the racially disproportionate effect of official action provides 'an important starting point.'" (quoting *Feeney*, 442 U.S. at 274 (in turn quoting *Village of Arlington Heights*, 429 U.S. at 266))). Here, the Act's transgender ban affects *only* transgender female students. To be sure, the statutory language bans all "students of the male sex" from female sports. Ariz. Rev. Stat. § 15-120.02(B). But Appellants have not shown that the Act had any real-world impact on cisgender male students, who have long been excluded from female sports in Arizona and elsewhere. *See Clark I*, 695 F.2d at 1127; *Clark II*, 886 F.2d at 1192.[9]

The Act's burdens instead fall *exclusively* on transgender women and girls. Under the pre-Act status quo, transgender women and girls were permitted to participate in women's and girls' sports consistent with AIA, NCAA, and individual-school

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[9] Appellants contend the Act affects cisgender males because there was no state law explicitly barring cisgender males from female sports before the Act's adoption and because AIA and NCAA policies excluding cisgender males from female sports applied only to *member* schools, not to other schools, and only to *colleges and high schools*, not to kindergarten through eighth grade. This argument fails because the Act merely codifies preexisting rules barring cisgender males from participating on girls' sports teams, and it had no practical effect on cisgender males.

policies. The Act functions solely to abrogate those policies, and thus burdens only transgender female students. *Cf. Hecox II*, 104 F.4th at 1077 ("[T]he Act's discriminatory purpose is . . . evidenced by the Act's prohibition of 'biological males' from female-designated teams because that prohibition affects one group of athletes only—transgender women. . . . The Act's *only* contribution to Idaho's student-athletic landscape is to entirely exclude transgender women and girls from participating on female sports teams."); *B.P.J.*, 98 F.4th at 556 (applying heightened scrutiny where the challenged legislation's "only effect" was "to exclude transgender girls . . . from participation on girls sports teams").[10]

In sum, the district court did not clearly err by finding a discriminatory purpose. Accordingly, the district court properly concluded that the Act is subject to heightened scrutiny on this basis.

b.

Turning to facial discrimination, Appellants contend the Act "is 'facially' neutral with respect to

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[10] The district court also found evidence of discriminatory purpose in the legislative history, noting that Senator Vince Leach explained his vote for the bill by stating, "if we allow transgenders to take over female sports, you will not have females participating," and that Senator Petersen, Chairman of the Senate Committee on Judiciary, questioned whether critics of the bill would "be opposed to having just a trans league, so that they can all compete in their own league." *Doe*, 683 F. Supp. 3d at 963. Speakers at the legislative hearing on the bill also referred to transgender women and girls as "males" and "men." *See* Hearing on Senate Bill 1165, Arizona State Senate, Committee on the Judiciary, Jan. 20, 2022, available at https://www.azleg.gov/videoplayer/?eventID=2022011057&startStreamAt=508 (last visited Aug. 27, 2024).

gender identity" because it "describes who may play on what sports teams 'without referring to' gender identity." Opening Br. at 32. They rely on *Martin v. International Olympic Committee*, 740 F.2d 670, 678 (9th Cir. 1984), which held that an IOC rule was gender neutral because it "describe[d] the procedures for determining events to be included in the Olympic Games without referring to the competitors' sex." Under circuit precedent, however, the Act discriminates on its face based on transgender status.

In *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), we held that state laws defining marriage as between a man and a woman, but making no mention of sexual orientation, discriminated on their face based on sexual orientation. *Id.* at 464 n.2, 467–68. Although the challenged laws prohibited *all* same-sex couples from marrying, whether gay or straight, the laws facially discriminated based on sexual orientation because only gay couples were barred from marrying *consistent with their sexual orientation*. This precedent applies here. The Act bars all "students of the male sex" from playing on female teams, but only transgender female students are prohibited from playing on teams consistent with their gender identity, and this distinction is plain from the face of the statute. Thus, under *Latta*, the Act discriminates on its face based on transgender status.

In *Hecox II*, moreover, we held that an Idaho transgender ban similar to the Arizona law challenged here discriminated on its face based on transgender status. We reasoned that "the Act's use of 'biological sex' functions as a form of '[p]roxy discrimination'" because the Act's "definition of 'biological sex'" was "carefully drawn to target transgender women and girls, even if it does not use

the word 'transgender' in the definition." *Hecox II*, 104 F.4th at 1078 (quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013)).[11] We reach the same conclusion here; under *Hecox II*, Arizona's transgender ban discriminates on its face based on transgender status.

This conclusion is consistent not only with common sense—there is simply no denying that a transgender sports ban discriminates based on transgender status—but also with the decisions of other courts, which have held that transgender sports bans like the one challenged here discriminate on their face against transgender women and girls. *See id.* ("In addition to having a discriminatory purpose and effect, the Act is also facially discriminatory against transgender female athletes."); *B.P.J.*, 98 F.4th at 555–56 ("If B.P.J. were a cisgender girl, she could play on her school's girls teams. Because she is a transgender girl, she may not. The Act declares a person's sex is defined only by their 'reproductive biology and genetics at birth.' The undisputed purpose—and the only effect—of that definition is to exclude transgender girls from

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[11] In *Pacific Shores Properties*, we explained:

> Proxy discrimination is a form of facial discrimination. It arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group. For example, discriminating against individuals with gray hair is a proxy for age discrimination because "the 'fit' between age and gray hair is sufficiently close."

730 F.3d at 1160 n.23 (quoting *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992)).

the definition of 'female' and thus to exclude them from participation on girls sports teams. That is a facial classification based on gender identity."); *Hecox v. Little (Hecox I)*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) ("[T]he Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity.").

c.

Citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *Jana-Rock Construction, Inc. v. New York State Department of Economic Development*, 438 F.3d 195 (2d Cir. 2006), Appellants argue that rational basis review applies to the Plaintiffs' equal protection claim because Plaintiffs assert an underinclusiveness challenge to a remedial statute.

In *Morgan*, 384 U.S. at 656, the Supreme Court considered a Fifth Amendment equal protection challenge to a Voting Rights Act provision prohibiting states from denying the vote to *some* non-English speakers (those educated in schools in Puerto Rico or other U.S. territories) but not to *other* non-English speakers (those educated beyond U.S. territories). Although classifications based on national origin ordinarily trigger strict scrutiny, the Court held that rational basis review applied because "the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise." *Id.* at 657. The Court noted that a "statute is not invalid under the Constitution because it might have gone farther than it did," that a legislature need not "strike at all evils at the same time," and that "reform may take one step at a time, addressing itself to the phase

of the problem which seems most acute to the legislative mind." *Id.* (first quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929), then quoting *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935), and then quoting *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955)). In *Jana-Rock*, the Second Circuit considered a Fourteenth Amendment equal protection challenge to a New York affirmative action program providing benefits to *some* Hispanics (those from Latin America) but not to *other* Hispanics (those from Spain and Portugal). Although racial classifications ordinarily prompt strict scrutiny, the Second Circuit applied rational basis review because "once the government has shown that its decision to resort to explicit racial classifications survives strict scrutiny by being narrowly tailored to achieve a compelling interest, its program is no longer presumptively suspect." 438 F.3d at 200. The court declined "to apply automatically strict scrutiny a second time in determining whether an otherwise valid affirmative action program is underinclusive for having excluded a particular plaintiff." *Id.*; *see also id.* at 206–11.

Relying on *Morgan* and *Jana-Rock*, Appellants argue that rational basis review applies here. They argue that the Act "is a remedial statute" because "[t]he Arizona legislature passed the law to provide girls and women a benefit—participation on their own sports teams—for the purpose of promoting opportunities for female athletes, ensuring the safety of female athletes, and remedying past discrimination." Opening Br. at 18. Further, they argue that Plaintiffs' equal protection claim should be understood as an underinclusiveness challenge because, rather than challenging Arizona's adoption

of "sex-segregated sports teams," in their view Plaintiffs' claim is "that the definition of 'females,' 'women,' and 'girls' in the [Act] is underinclusive—that the definition should be expanded to include not just biological females, but also at least some biological males who identify as females, *i.e.*, transgender athletes like themselves." *Id.* at 2.

Appellants' argument rests on the flawed premise that the Act qualifies as remedial legislation. The district court found that "[t]he Act was adopted for the purpose of excluding transgender girls from playing on girls' sports teams," *Doe*, 683 F. Supp. 3d at 963, and, as discussed earlier, that finding is not clearly erroneous. Thus, the Act is not remedial, and *Morgan* and *Jana-Rock* do not control. Furthermore, even in the context of an underinclusiveness challenge to a remedial statute, heightened scrutiny applies where, as here, the plaintiff "demonstrate[s] that his or her exclusion was motivated by a discriminatory purpose." *Jana-Rock*, 428 F.3d at 200. Thus, even under *Jana-Rock*, heightened scrutiny applies here.

2.

To withstand heightened scrutiny, a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Clark I*, 695 F.2d at 1129 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). The State bears the burden of demonstrating an "exceedingly persuasive justification" for the classification, *United States v. Virginia*, 518 U.S. 515, 531 (1996), and "[t]he justification . . . must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females," *id.* at 533. Here, it is undisputed that the State's asserted interests in ensuring competitive fairness, student safety, and

equal athletic opportunities for women and girls are important governmental objectives. The question is whether the transgender ban is substantially related to the achievement of these objectives.

Four decades ago, we addressed whether an Arizona policy excluding cisgender boys from girls' sports violated the Equal Protection Clause. We upheld that policy because it was substantially related to the state's objectives in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes." *Clark I*, 695 F.2d at 1131. We reached that conclusion because: (1) "boys' overall opportunity" to play school sports was "not inferior to girls'"; (2) "males would displace females to a substantial extent" if cisgender boys were allowed to play on girls' teams; and (3), most importantly, "average physiological differences" between boys and girls "allow[ed] gender to be used as . . . an *accurate* proxy" for athletic ability and competitive advantage. *Id.* (emphasis added). None of these conditions is present here.[12]

First, the Act does not afford transgender women and girls equal athletic opportunities. The Act permits cisgender women and girls to play on *any* teams, male or female, while transgender women and girls are permitted to play *only* on male teams. The Act also permits all students other than transgender women and girls to play on teams consistent with their gender identities; transgender women and girls alone are

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[12] As we noted in *Hecox II*, *Clark I* is also distinguishable from this case because the policy challenged in *Clark I* adversely affected cisgender boys, a historically favored group, rather than transgender women and girls, a historically disfavored minority. *Hecox II*, 104 F.4th at 1082.

barred from doing so. This is the essence of discrimination. *See Bostock v. Clayton County*, 590 U.S. 644, 657 (2020) ("To 'discriminate against' a person . . . mean[s] treating that individual worse than others who are similarly situated.").

Although the Act allows transgender women and girls to play male sports, the district court found that Plaintiffs "cannot play on boys' sports teams." *Doe*, 683 F. Supp. 3d at 968. The court reasoned that Plaintiffs have "athletic capabilities like other girls [their] age," that they would find playing on boys' teams "humiliating and embarrassing," and that "playing on a boys' sports team and competing against boys would directly contradict [their] medical treatment for gender dysphoria and jeopardize [their] health." *Id.* at 968–69. In fact, the court found that "[p]articipating in sports on teams that contradict one's gender identity is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical." *Id.* (quoting *Hecox I*, 479 F. Supp. 3d at 977). As we explained in *Hecox II*, "[t]he argument . . . that the Act does not discriminate against transgender women because they can . . . play on men's teams is akin to the argument we rejected in *Latta*[] that same-sex marriage bans do not discriminate against gay men because they are free to marry someone of the opposite sex." 104 F.4th at 1083 (citing *Latta*, 771 F.3d at 467).[13]

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[13] The generally accepted medical practice is to treat people who suffer from gender dysphoria with "necessary, safe, and effective" gender-affirming medical care. *Doe*, 683 F. Supp. 3d at 957. "The goal of medical treatment for gender dysphoria is to alleviate a transgender patient's distress by allowing them to live

Second, the record does not demonstrate that transgender females would displace cisgender females to a substantial extent if transgender females were allowed to play on female teams. As the district court noted in distinguishing *Clark I*, "[i]t is inapposite to compare the potential displacement [of] allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women." *Doe*, 683 F. Supp. 3d at 961 (footnote omitted) (quoting *Hecox I*, 479 F. Supp. 3d at 977). In the dozen or so years before adoption of the Act, the AIA approved just seven transgender students to play on teams consistent with their gender identities—a tiny number when compared to the roughly 170,000 students playing school sports in Arizona each year. *Id*. During legislative hearings, proponents of the Act were unable to cite a single instance of a transgender girl displacing a cisgender girl on a girls' sports team in Arizona.

Third, after carefully considering the extensive expert evidence in the preliminary injunction record, the district court found that a student's transgender status is *not* an accurate proxy for average athletic

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consistently with their gender identity." *Id*. at 958. This treatment, "commonly referred to as 'transition,'" includes "one or more of the following components: (i) social transition, including adopting a new name, pronouns, appearance, and clothing, and correcting identity documents; (ii) medical transition, including puberty-delaying medication and hormone-replacement therapy; and (iii) for adults, surgeries to alter the appearance and functioning of primary- and secondary-sex characteristics." *Id*. "For social transition to be clinically effective, it must be respected consistently across all aspects of a transgender individual's life." *Id*.

ability or competitive advantage. As noted, the district court cited "the scientific consensus" that "the biological cause of average differences in athletic performance between men and women is . . . the presence of circulating levels of testosterone beginning with male puberty," *Doe*, 683 F. Supp. 3d at 964, and that "[t]he biological driver of average group differences in athletic performance between adolescent boys and girls is the difference in their respective levels of testosterone, which only begin to diverge significantly after the onset of puberty," *id.* at 968.

Contrary to the expert opinion evidence relied upon by the district court, the Act applies to all transgender women and girls, including those who the district court found do not have an average athletic advantage over cisgender women and girls. The district court found that, "[b]efore puberty, there are no significant differences in athletic performance between boys and girls," *id.*, yet the ban applies to transgender kindergartners who are too young to have experienced male puberty. Although prepubertal boys sometimes outperform prepubertal girls on school-based fitness testing, the district court found "no basis . . . to attribute those small differences to physiology or anatomy instead of" sociological factors. *Id.* at 966.

The categorical ban includes transgender women and girls, such as Plaintiffs, who receive puberty blockers and hormone therapy and never experience male puberty. The district court found that "[t]ransgender girls who receive puberty-blocking medication do not have an athletic advantage over other girls because they do not undergo male puberty and do not experience the physiological changes

caused by the increased production of testosterone associated with male puberty." *Id.* at 968. The court also found that "[t]ransgender girls who receive hormone therapy after receiving puberty-blocking medication will develop the skeletal structure, fat distribution, and muscle and breast development typical of other girls," and "will typically have the same levels of circulating estrogen and testosterone as other girls." *Id.*[14]

Given these well-supported factual findings, the district court properly concluded that Appellants are unlikely to establish that the Act's sweeping transgender ban is substantially related to achievement of the State's important governmental objectives in ensuring competitive fairness and equal athletic opportunity for female student-athletes. The Act's transgender ban applies not only to all transgender women and girls in Arizona, regardless of circulating testosterone levels or other medically accepted indicia of competitive advantage, but also to all sports, regardless of the physical contact involved, the type or level of competition, or the age or grade of the participants. Heightened scrutiny does not require narrow tailoring, but it does require a

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[14] The Act also includes transgender women and girls who have gone through male puberty but receive gender-affirming hormone therapy to suppress their circulating testosterone levels. Dr. Shumer testified that "studies on transgender women who have undergone testosterone suppression as adults . . . show that testosterone suppression resulted in significant mitigation of muscle mass and development in adult transgender women." *See* Shumer Rebuttal Decl. ¶¶ 17–18. These transgender women do not appear to have a competitive athletic advantage. *See id.* ¶ 19 (citing Joanna Harper, *Race Times for Transgender Athletes*, 6 J. Sporting Cultures & Identities 1 (2015)).

substantial relationship between the ends sought and the discriminatory means chosen to achieve them. *See Virginia*, 518 U.S. at 533. Appellants have not made that showing here.

We recognize that the research in this field is ongoing and that standards governing transgender participation in sports are evolving. In the last few years alone, both the NCAA and International Olympic Committee have tightened their transgender eligibility policies—although neither organization has adopted anything like Arizona's categorical ban on transgender females participating in female sports. Legislatures are not prohibited from acting "in the face of medical uncertainty," *Carhart*, 550 U.S. at 166, and "[l]ife-tenured federal judges should be wary of removing a vexing and novel topic of medical debate from the ebbs and flows of democracy by construing a largely unamendable Constitution to occupy the field," *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023), *cert. granted*, 2024 WL 3089532 (U.S. June 24, 2024) (No. 23-477). But neither *Carhart* nor *Skrmetti* applied heightened scrutiny, as we are obliged to do, and that standard requires the State to demonstrate an "exceedingly persuasive justification" for a discriminatory classification, without relying on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 531, 533.[15] The district court was bound to rule on Plaintiffs' request for

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[15] *See Carhart*, 550 U.S. at 166 (addressing whether the challenged law was "rational and in pursuit of legitimate ends"); *Skrmetti*, 83 F.4th at 486 (applying rational basis review to an equal protection challenge to state laws prohibiting doctors from providing gender-affirming medical care to minors).

limited injunctive relief based on the evidence in the record before it. To be sure, future cases may have different outcomes if the evolving science supports different findings. But the court did not have the luxury of waiting for further research to be conducted; "we cannot avoid the duty to decide an issue squarely presented to us." *United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005).

We reject Appellants' argument that the Act survives intermediate scrutiny because it directly advances the State's objectives "roughly 99.996 percent of the time." Reply Br. at 26. In Appellants' view, even if the ban does not directly advance the State's legitimate objectives as applied to transgender women and girls who have not experienced male puberty, such as Plaintiffs, the Act is *substantially* related to the State's interests because it advances legitimate State interests as applied to cisgender men and boys, who make up the vast majority of students affected by the legislation. Because, as noted, the Act does not actually affect cisgender men and boys, this argument is unpersuasive.[16]

So, too, is Appellants' argument that the Act satisfies heightened scrutiny because it directly advances the State's objectives as applied to *some* transgender female athletes—those who have experienced male puberty and who have not received hormone therapy to suppress their levels of

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[16] Because Plaintiffs do not challenge the Act's sex classification, the question presented is simply whether "excluding transgender girls from girls sports teams" is substantially related to important governmental interests, not whether excluding all "students of the male sex" from such sports is justified. *See B.P.J.*, 98 F.4th at 559.

circulating testosterone. Appellants correctly point out that "[n]one of [the Supreme 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." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001). But the State does not carry its burden by showing that a classification is capable of achieving its ultimate objective in some circumstances. Heightened scrutiny requires that the means adopted by the State must be "in *substantial furtherance* of important governmental objectives." *Id.* (emphasis added). Moreover, the Act's practical effect is to displace the existing AIA and NCAA policies which already limit the participation of transgender athletes based in part on levels of circulating testosterone.

B.

The district court concluded that Plaintiffs were likely to succeed not only on their equal protection claim but also on their Title IX claim. *Doe*, 683 F. Supp. 3d at 974–75. Appellants challenge this conclusion, arguing that Title IX is unenforceable in this case because the State lacked clear notice that excluding transgender women and girls from female sports violates the statute. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("Congress has broad power to set the terms on which it disburses federal money to the States, but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" (citations omitted) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))).

Although not addressed by the district court, this is a colorable argument because Title IX regulations

permit schools to "operate or sponsor separate teams for members of each sex," 34 C.F.R. § 106.41(b), and it may not have been clear to the State when it accepted federal funding that this provision does not authorize distinctions based on assigned sex. *Cf. Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 815–16 (11th Cir. 2022) (en banc) ("Under the Spending Clause's required clear-statement rule, the School Board's interpretation that [Title IX's] bathroom carve-out[, 34 C.F.R. § 106.33,] pertains to biological sex would only violate Title IX if the meaning of 'sex' unambiguously meant something other than biological sex, thereby providing the notice to the School Board that its understanding of the word 'sex' was incorrect.").[17]

We need not address this issue at this time. Because Secretary Horne (the only party formally enjoined by the preliminary injunction, *see Doe*, 683 F. Supp. 3d at 977) was properly enjoined based on the district court's conclusion that Plaintiffs are likely to succeed on the merits of their equal protection claim, we need not decide whether Plaintiffs are likely to succeed on the merits of their Title IX claim as well. The district court should address the Spending Clause issue in the first instance if raised in further

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[17] The Department of Education has proposed an amendment to § 106.41(b) that would clarify that Title IX does not authorize the categorical exclusion of transgender female students from female sports. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams*, 88 Fed. Reg. 22,860 (proposed Apr. 13, 2023) (to be codified at 34 C.F.R. § 106.41(b)(2)).

proceedings. We express no opinion on how the issue should be resolved.

V.

Having determined that the district court did not err by concluding that Plaintiffs are likely to succeed on their equal protection claim, we turn to whether the district court abused its discretion in addressing the remaining preliminary injunction factors.

A.

Plaintiffs seeking a preliminary injunction must establish that they are likely to suffer irreparable harm in the absence of relief. *Johnson*, 572 F.3d at 1078. Appellants argue that "Plaintiffs' claim of irreparable harm is inconsistent with their delay in seeking injunctive relief," because "[n]early a year passed . . . before they challenged" the Act. Opening Br. at 67. *See Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (en banc) (noting that delay can undercut a claim of irreparable harm).

We disagree. Plaintiffs sought preliminary injunctive relief just seven months after the Act took effect. This was not a long delay in this context, and even if it were, "delay is but a single factor to consider in evaluating irreparable injury," and "'courts are loath to withhold relief solely on that ground.'" *Arc of California*, 757 F.3d at 990 (quoting *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984)). Furthermore, even a long delay "is not

particularly probative in the context of ongoing, worsening injuries." *Id.*[18]

Appellants argue that Plaintiffs fail to show irreparable harm because their "claims of harm stem from their gender dysphoria diagnosis" rather than the Act. Opening Br. at 68. This misunderstands Plaintiffs' claims. It is Plaintiffs' gender identity, not their gender dysphoria, that causes them to wish to play on girls' teams, and it is the Act, not their medical condition, that prevents them from doing so. In any event, we ordinarily will not consider arguments raised for the first time on appeal.[19]

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[18] Jane was not affected by the transgender ban during the 2023-24 school year. She played soccer on club and recreational teams, which were not subject to the ban. *See* Ariz. Rev. Stat. § 15-120.02(A) (applying only to school-sponsored sports); *Doe*, 683 F. Supp. 3d at 959. Megan *was* affected by the ban in 2023-24; she was a member of the girls' volleyball team at the Gregory School and was allowed to practice with the team but barred from playing in games. *Doe*, 683 F. Supp. 3d at 962. Megan would have been irreparably harmed were she barred from playing in games for a second school year.

[19] Appellants point out that "it is claims that are deemed waived or forfeited, not arguments." *United States v. Blackstone*, 903 F.3d 1020, 1025 n.2 (9th Cir. 2018) (quoting *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004)); *see Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) ("[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." (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992))). But these decisions do not alter our general rule that we ordinarily do not consider arguments raised for the first time on appeal. *See Exxon Shipping*, 554 U.S. at 487 ("'It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below,' when to deviate from this rule being a matter 'left primarily to the discretion of the courts of appeals, to be exercised on the facts of

B.

Appellants argue that the final two preliminary injunction factors—the balance of the equities and the public interest—favor the denial of preliminary injunctive relief because "Plaintiffs will displace biological female athletes" if they are allowed to play on girls' teams. Opening Br. at 69. The record, however, shows that "Megan's teammates, coaches, and school are highly supportive of her and would welcome her participation on the girls' volleyball team," *Doe*, 683 F. Supp. 3d at 960, and that "Jane's teachers, coaches, friends, and members of her soccer team have all been supportive of Jane's identity," *id.* at 959. Appellants have not shown that Plaintiffs would displace other students. In any case, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (quoting *Sammartano*, 303 F.3d at 974).

VI.

We hold that the district court did not abuse its discretion by granting Plaintiffs' motion for a narrow preliminary injunction. We note that nothing in today's decision, or in the district court's decision, precludes policymakers from adopting appropriate regulations in this field—regulations that are substantially related to important governmental objectives. *See Clark I*, 695 F.2d at 1129. States have important interests in inclusion, nondiscrimination, competitive fairness, student safety, and completing

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individual cases'" (citations omitted) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120–21 (1976))); *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985) ("As a general rule, we will not consider an issue raised for the first time on appeal, although we have the power to do so.").

the still unfinished and important job of ensuring equal athletic opportunities for women and girls, who must have an equal opportunity not only to participate in sports but also to compete and win. We hold only that the district court did not abuse its discretion by enjoining Arizona from barring Jane and Megan from playing school sports consistent with their gender identity while this litigation is pending.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16026
D.C. No. 4:23-cv-00185-JGZ
District of Arizona, Tucson
[August 14, 2023]

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,

and

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

Intervenor-Defendants-Appellants.

No. 23-16030
D.C. No. 4:23-cv-00185-JGZ
[August 14, 2023]

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,

Defendant-Appellant,

and

LAURA TOENJES, in her official capacity as Superintendent of the Kyrene School District; et al.,

Defendants,

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

Intervenor-Defendants.

ORDER

Before: SCHROEDER, BERZON, and OWENS, Circuit Judges.

The motions to stay the district court's July 20, 2023 order granting the motion for preliminary injunction (Docket Entry No. 7 in No. 23-16026 and Docket Entry No. 11 in No. 23-16030) are denied. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (defining standard for stay pending appeal).

The motion to consolidate appeal No. 23-16026 and No. 23-16030 (Docket Entry No. 9 in Appeal No. 23-16030) is granted.

The consolidated opening brief is due on September 8, 2023. The consolidated answering brief is due on October 6, 2023. The optional consolidated reply brief is due within 21 days after service of the answering brief.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16026
D.C. No. 4:23-cv-00185-JGZ
District of Arizona, Tucson
[January 4, 2024]

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,

and

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

Intervenor-Defendants-Appellants.

No. 23-16030
D.C. No. 4:23-cv-00185-JGZ
[January 4, 2024]

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,

Defendant-Appellant,

and

LAURA TOENJES, in her official capacity as Superintendent of the Kyrene School District; et al.,

Defendants,

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

Intervenor-Defendants.

ORDER

Intervenor-Defendants-Appellants' Petition for Initial En Banc Consideration and for En Banc Consideration of Motion to Stay Pending Appeal, Docket No. 17, is **DENIED**.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

APPENDIX D

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-23-00185-TUC-JGZ
[July 20, 2023]

Helen Doe, et al.,

Plaintiffs,

v.

Thomas C Horne, et al.,

Defendants.

ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Plaintiffs filed this action on April 17, 2023, seeking preliminary and permanent injunctive relief related to the implementation of A.R.S. § 15-120.02, the Save Women's Sports Act ("the Act"), which Plaintiffs allege precludes them from playing on girls' sports teams because they are transgender girls. Plaintiffs assert that they have not undergone male puberty and do not have a competitive or physiological

advantage over their non-transgender peers on these teams. Plaintiffs ask the Court for declaratory relief that enforcement by Defendants of Ariz. Rev. Stat. § 15-120.02 violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX, 20 U.S.C. § 1681 et seq., the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, et seq.

The Arizona legislature adopted A.R.S. § 15-120.02, effective September 24, 2022, as follows: "Each interscholastic or intramural athletic team or sport that is sponsored by a public school or a private school whose students or teams compete against a public school shall be expressly designated as one of the following based on the biological sex of the students who participate on the team or in the sport: 1) 'males,' 'men' or 'boys'; 2) 'females,' 'women' or 'girls,' and 3) 'coed' or 'mixed'." "Athletic teams or sports designated for 'females,' 'women' or 'girls' may not be open to students of the male sex." The statute does not apply to "restrict the eligibility of any student to participate in any . . . athletic team or sport designated as being for males, men or boys or designated as coed or mixed." The statute creates a private cause of action for injunctive relief and damages for any student for a deprivation of an athletic opportunity or who has suffered any direct or indirect harm as a result of a school knowingly violating this section.

The Motion for Preliminary Injunction asks the Court to enjoin enforcement of A.R.S. § 15-120.02 by Defendant Horne and enjoin implementation of and compliance with the Act by Defendants Kyrene Middle School and The Gregory School (TGS) as to

Plaintiffs. The Court has granted intervenor status to the legislators who adopted the Act. The Motion for Preliminary Injunction was fully briefed by all parties and the Intervenor Legislators ("Intervenors"). The Court will grant the Motion for Preliminary Injunction pursuant to the Findings of Fact and Conclusions of Law set out below. Defendant Arizona Interscholastic Association, Inc.'s ("AIA") transgender policy, allowing transgender girls to play on teams consistent with their gender identity, complies with the terms of the preliminary injunction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 10, 2023, the Court heard oral argument and took evidence pertaining to Plaintiffs' Motion for Preliminary Injunction. Having heard oral argument, having examined the proofs[1] offered by the parties, and having heard the arguments of counsel and being fully advised herein, the Court now finds generally in favor of Plaintiffs and against the Defendants, and hereby makes the following special Findings of Fact and Conclusions of Law pursuant to the Federal Rules of Civil Procedure, Rule 52(a) and (c) which constitutes the decision of the Court herein:

I. Findings of Fact

To the extent these Findings of Fact are also deemed to be Conclusions of Law, they are hereby incorporated into the Conclusions of Law that follow.

A. Gender identity and gender dysphoria.

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[1] By stipulation, the parties offer proof by way of expert declarations filed in advance of the hearing and by supplement thereafter. Accordingly, the Court references the evidence herein by CM/ECF document number, not as a trial exhibit.

1. "Gender identity" is the medical term for a person's internal, innate, deeply held sense of their own gender. (Dr. Daniel Shumer ("Shumer Decl.") (Doc. 5) ¶ 18.) Everyone has a gender identity. (*Id.*)

2. "Gender identity" differs from "gender role," which are behaviors, attitudes, and personality traits that a particular society considers masculine or feminine, or associates with male or female social roles. For example, the convention that girls wear pink and have longer hair, or that boys wear blue and have shorter hair, are socially constructed gender roles. Gender identity does not refer to socially contingent behaviors, attitudes, or personality traits; it is an internal and largely biological phenomenon. (Shumer Decl. (Doc. 5) ¶¶ 19-22.)

3. There is a consensus among medical organizations that gender identity is innate and cannot be changed through psychological or medical treatments. (Dr. Stephanie Budge Rebuttal ("Budge Decl. (Rebuttal)") (Doc. 65-1) ¶ 31; Dr. Stephanie Budge ("Budge Decl.") (Doc. 4) ¶ 21; Daniel Shumer Rebuttal ("Shumer Decl. (Rebuttal)") (Doc. 65-2) ¶¶ 54–58; Shumer Decl. (Doc. 5) ¶ 23.)

4. When a child is born, a health care provider identifies the child's sex based on the child's observable anatomy. (Budge Decl. (Doc. 4) ¶ 18; Shumer Decl. (Doc. 5) ¶ 27.) This identification is known as an "assigned sex," and in most cases turns out to be consistent with the person's gender identity. (Budge Decl. (Doc. 4) ¶ 18; Shumer Decl. (Doc. 5) ¶ 27.)

5. The term "biological sex" is not defined in the Act, but the Court finds that as used by Defendants it is synonymous with the term "assigned sex." (*See* Declaration of Dr. James M. Cantor ("Cantor Decl.")

(Doc. 82-2; Doc. 92-2) ¶¶ 105-107; Declaration of Dr. Gregory A. Brown ("Brown Decl.") (Doc. 82-1; 92-1) ¶ 1; Dr. Emma Hilton ("Hilton Decl.") (Doc. 92-8) ¶¶1.8, ¶ 3.1-3.2 (explaining sex is an objective feature determined at the moment of conception; infants are born male or female, ascertainable by chromosomal analysis or visual inspection at birth).)[2]

6. For a transgender person, that initial designation does not match the person's gender identity. (Budge Decl. (Doc. 4) ¶ 18; Shumer Decl. (Doc. 5) ¶ 27.)

7. Gender dysphoria is a serious medical condition characterized by significant and disabling distress due to the incongruence between a person's gender identity and assigned sex. (Budge Decl. (Doc. 4) ¶ 23; Shumer Decl. (Doc. 5) ¶ 28.) Defendant Horne and Intervenors accept that gender dysphoria is a medical condition. (Preliminary Injunction, Oral Argument: July 10, 2023).

8. Gender dysphoria is highly treatable. Every major medical association in the United States agrees that medical treatment for gender dysphoria is necessary, safe, and effective. (Budge Decl. (Doc. 4) ¶ 25; Shumer Decl. (Doc. 5) ¶ 30.)

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[2] From a medical perspective, the terms "biological sex," "biological male," and "biological female" are imprecise terms because a person's sex encompasses several different biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, and gender identity, which may or may not be in alignment. (Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶44 (citing Joshua D. Safer, *Care of Transgender Persons*, 381 N. Engl. J. Med. 2451 (2019)).

9. "Transgender individuals may experience 'gender dysphoria,' which is 'characterized by significant and substantial distress as result of their birth-determined sex being different from their gender identity.' 'In order to be diagnosed with gender dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning.' If left untreated, symptoms of gender dysphoria can include severe anxiety and depression, suicidality, and other serious mental health issues. Attempted suicide rates in the transgender community are over 40%." *Hecox v. Little*, 479 F. Supp. 3d 930, 945-46 (D. Idaho 2020) (cleaned up), *aff'd* No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023).

10. The major associations of medical and mental health providers in the United States, including the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, and the Pediatric Endocrine Society, have endorsed medical standards of care for treating gender dysphoria in adolescents, which were developed by the World Professional Association for Transgender Health ("WPATH") and the Endocrine Society. (Shumer Decl. (Doc. 5) ¶ 31.)

11. The goal of medical treatment for gender dysphoria is to alleviate a transgender patient's distress by allowing them to live consistently with their gender identity. (Budge Decl. (Doc. 4) ¶ 27; Shumer Decl. (Doc. 5) ¶ 30.)

12. Undergoing treatment to alleviate gender dysphoria is commonly referred to as "transition" and includes one or more of the following components: (i)

social transition, including adopting a new name, pronouns, appearance, and clothing, and correcting identity documents; (ii) medical transition, including puberty-delaying medication and hormone-replacement therapy; and (iii) for adults, surgeries to alter the appearance and functioning of primary- and secondary-sex characteristics. (Budge Decl. (Doc. 4) ¶¶ 26–27; Shumer Decl. (Doc. 5) ¶ 34.)

13. For social transition to be clinically effective, it must be respected consistently across all aspects of a transgender individual's life. (Budge Decl. (Doc. 4) ¶ 27.)

14. At the onset of puberty, adolescents with gender dysphoria may be prescribed puberty-delaying medications to prevent the distress of developing physical characteristics that conflict with the adolescent's gender identity. (Budge Decl. (Doc. 4) ¶ 28; Shumer Decl. (Doc. 5) ¶ 35.)

15. For older adolescents, doctors may also prescribe hormone therapy to induce the puberty associated with the adolescent's gender identity. (Budge Decl. (Doc. 4) ¶ 28; Shumer Decl. (Doc. 5) ¶ 36.)

16. When transgender adolescents are provided with appropriate medical treatment and have parental and societal support, they can thrive. (Shumer Decl. (Doc. 5) ¶ 29.)

17. Untreated gender dysphoria can cause serious harm, including anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. (Budge Decl. (Doc. 4) ¶ 33; Shumer Decl. (Doc. 5) ¶ 28.)

18. Being denied recognition and support can cause significant harm, exacerbate gender dysphoria, and expose transgender adolescents to the risk of

discrimination and harassment. (Budge Decl. (Doc. 4) ¶¶ 33–34; Shumer Decl. (Doc. 5) ¶ 28.)

19. Attempts to "cure" transgender individuals by forcing their gender identity into alignment with their birth sex are harmful and ineffective. Those practices have been denounced as unethical by all major professional associations of medical and mental health professionals, such as the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, and the American Psychological Association, among others. (Shumer Decl. (Doc. 5) ¶ 25.)

B. Plaintiffs are transgender girls who have not and will not experience male puberty.

20. Plaintiff Jane Doe is an 11-year-old transgender girl who will attend Kyrene Aprende Middle School beginning on July 19, 2023. (Jane Doe ("J. Doe Decl.") (Doc. 6) ¶ 1; Helen Doe (Second) ("H. Doe 2nd Decl.") (Doc. 78) ¶ 3.)

21. Jane has lived as a girl in all aspects of her life since she was five years old. (J. Doe Decl. (Doc. 6) ¶ 2; Helen Doe ("H. Doe Decl.") (Doc. 7) ¶¶ 3, 5.)

22. Jane was diagnosed with gender dysphoria when she was seven years old. (H. Doe Decl. (Doc. 7) ¶ 7.)

23. Jane has changed her name through a court order to a more traditional female name and has a female gender marker on her passport. (Pls. Exs. 13 (Doc. 90-1), 15 (Doc. 90-3).)

24. Jane has been monitored by her doctor for signs of the onset of puberty as part of her medical treatment for gender dysphoria. (H. Doe Decl. (Doc. 7) ¶ 11.)

25. At an appointment on June 27, 2023, Jane's doctor prescribed a Supprelin implant, which is a puberty-blocking medication. (Helen Doe (Third) ("H. Doe 3rd Decl.") (Doc. 97-1) ¶ 4.)

26. Jane is in the process of scheduling the implant procedure for as soon as possible. (*Id*.)

27. Accordingly, Jane has not and will not experience any of the physiological changes that increased testosterone levels would cause in a pubescent boy. (Shumer Decl. (Doc. 5) ¶ 45; Budge Decl. (Doc. 4) ¶ 28.)

28. Sports are very important to Jane and her parents. (J. Doe Decl. (Doc. 6) ¶ 5; H. Doe Decl. ¶ 12.)

29. Jane particularly loves playing soccer and has played soccer on girls' club and recreational sports teams for nearly five years. (J. Doe Decl. (Doc. 6) ¶¶ 6–8; H. Doe Decl. (Doc. 7) ¶ 12.)

30. Aside from its physical and emotional health benefits, soccer has helped Jane make new friends and connect with other girls. (J. Doe Decl. (Doc. 6) ¶ 7; H. Doe Decl. (Doc. 7) ¶ 13.)

31. Jane's teachers, coaches, friends, and members of her soccer team have all been supportive of Jane's identity. (H. Doe Decl. (Doc. 7) ¶ 9; Stipulation in Lieu of Answer ("Kyrene/Toenjes Stip.") (Doc. 59) ¶ 1.)

32. When Jane enters Kyrene Aprende Middle School this July, she intends to participate and compete with the cross-country team and try out for the girls' soccer and basketball teams. (J. Doe Decl. (Doc. 6) ¶ 9; H. Doe 2nd Decl. (Doc. 78) ¶ 4.)

33. Both the soccer and basketball teams at Kyrene Aprende Middle School have separate teams for boys and girls. (J. Doe Decl. (Doc. 6) ¶ 9.)

34. The cross-country team trains together, but boys and girls compete separately. (*Id.*)

35. Registration for the cross-country team began on July 1, 2023. (H. Doe 2nd Decl. (Doc. 78) ¶ 6.)

36. The registration occurs online and involves the submission of registration forms and supporting documents, such as a physical report signed by a doctor. (*Id.*)

37. Typically, a student's registration takes at least two to three days to process after it is submitted. (*Id.*)

38. The first practice for cross country is on July 31, 2023, and the first cross-country competitive meet will occur the week of August 14, 2023. (*Id.* ¶ 7.)

39. Jane is excited to participate and compete on the girls' teams with her friends and peers. (J. Doe Decl. (Doc. 6) ¶¶ 8–9.)

40. If not for the Act, the Kyrene School District would permit Jane Doe to play on girls' sports teams. (Kyrene/Toenjes Stip. (Doc. 59) ¶ 1.)

41. However, if the Act is applied to Jane, she will not be able to play on the girls' soccer and basketball teams or compete with the girls' cross-country team. (*Id.*)

42. Plaintiff Megan Roe is a 15-year-old transgender girl who attends TGS. (Megan Roe ("M. Roe Decl.") (Doc. 8) ¶¶ 2, 5.)

43. Megan has always known she is a girl. (Kate Roe ("K. Roe Decl.") (Doc. 9) ¶ 3.)

44. Megan has lived as a girl in all aspects of her life since she was seven years old. (M. Roe Decl. (Doc. 8) ¶ 3; K. Roe Decl. (Doc. 9) ¶¶ 4–5.)

45. Through a court order, Megan has changed her name to a more traditional female name and her gender to female. (Pls.' Ex. 14 (Doc. 90-2).) She also has a female gender marker on her passport. (Pls.' Ex. 16 (Doc. 90-4).)

46. Megan was diagnosed with gender dysphoria when she was ten years old. (K. Roe Decl. (Doc. 9) ¶ 6.)

47. Before starting school at TGS, Megan's parents shared with administrators and teachers at the school that Megan is a transgender girl. (M. Roe Decl. (Doc. 8) ¶ 5.) TGS has been very supportive of Megan and her identity. (*Id.*; Defendant TGS Motion to Dismiss ("TGS Mot. to Dismiss") (Doc. 37) at 3.)

48. Megan has been taking puberty blockers since she was 11 years old as part of her medical treatment for gender dysphoria. (M. Roe Decl. (Doc. 8) ¶ 6; K. Roe Decl. (Doc. 9) ¶ 6.) This prevented Megan from undergoing male puberty. (K. Roe Decl. (Doc. 9) ¶ 6.)

49. Megan began receiving hormone therapy when she was 12 years old. (M. Roe Decl. ¶ 6; K. Roe Decl. (Doc. 9) ¶ 6.)

50. As a result of the puberty blockers and hormone therapy, Megan has not experienced the physiological changes that increased testosterone levels would cause in a

pubescent boy. (K. Roe Decl. (Doc. 9) ¶ 6; Shumer Decl. (Doc. 5) ¶ 47; Budge Decl. (Doc. 4) ¶ 29.)

51. The hormone treatment that she has received has caused Megan to develop many of the physiological changes associated with puberty in females. (Shumer Decl. (Doc. 5) ¶ 47; see also Budge Decl. (Doc. 4) ¶ 29.)

52. Sports have always been a part of Megan's life. (M. Roe Decl. (Doc. 8) ¶ 4.)

53. When she was about seven years old, Megan joined a swim team. (K. Roe Decl. (Doc. 9) ¶ 7.)

54. The coach of the swim team was supportive of Megan and her gender identity. (Id.)

55. Megan intends to try out for the girls' volleyball team at TGS for this year's fall season. (M. Roe Decl. (Doc. 8) ¶ 7.)

56. Volleyball is an important part of the TGS community and many students attend the games. (M. Roe Decl. (Doc. 8) ¶ 8; K. Roe Decl. (Doc. 9) ¶ 8.)

57. Megan is excited to play on the girls' volleyball team with her friends. (M. Roe Decl. (Doc. 8) ¶ 7; K. Roe Decl. (Doc. 9) ¶ 8.)

58. Megan's teammates, coaches, and school are highly supportive of her and would welcome her participation on the girls' volleyball team. (M. Roe Decl. (Doc. 8) ¶ 5; K. Roe Decl. (Doc. 9) ¶ 5; TGS Mot. to Dismiss (Doc. 37) at 3; Dr. Julie Sherrill ("Sherrill Decl.") (Doc. 37-1) ¶ 5.)

59. If not for the Act, TGS would permit Megan to play on the girls' volleyball team. (Sherrill Decl. (Doc. 37-1) ¶ 5.)

60. If the Act is applied to Megan, she will not be able to compete with the girls' volleyball team. (*Id.*)

C. Prior to enactment of A.R.S. § 15-120.02, Plaintiffs would have been allowed to play on girls' sports teams.

61. Defendant AIA sets rules for governing interscholastic sports, grades 9-12, and cutoff age of 19, for member schools, with membership being voluntary, but compliance with AIA rules being

mandatory for all membership schools. (AIA Constitution; Article 2. Membership (Doc. 51-1).)

62. Each school or school district set its own rules on transgender students' participation in intramural sports. (*Id.* ¶¶ 2.5.2–3 (vesting "[f]inal authority and ultimate responsibilities in all matters pertaining to interscholastic activities of each school shall be vested in the school principal," with school administration assuming responsibility for verification of all student eligibility rules).)

63. Prior to the enactment of the Act, A.R.S. § 15-120.02, transgender girls in Arizona were permitted to play on girls' sports teams, under the AIA Constitution, Bylaws, Policies and Procedures § 41.9, as follows: "[A]ll students should have the opportunity to participate in Arizona Interscholastic Association activities in a manner that is consistent with their gender identity, irrespective of the sex listed on a student's eligibility for participation in interscholastic athletics or in a gender that does not match the sex at birth." (AIA Resp., Ex. 1 (Doc. 51-1).)

64. By December 2018, the AIA formalized its policy to permit transgender students to play on teams consistent with their gender identity so long as they had a letter of support from their parent or guardian explaining when they realized they were transgender. (Compl. (Doc. 1) ¶ 21; AIA Answer (Doc. 50) ¶ 21; AIA Transgender Policy § 41.9 (Doc. 51-1).)

65. Under the AIA policy, a student request to play on a team consistent with his or her gender identity is reviewed by a committee of medical and psychiatric experts, and consistent with AIA health and safety policy and if not motivated by an improper purpose, the request is approved or denied. (AIA Resp., Ex. 1

(Doc. 51-1) § 41.9.3; Consideration of Bills: Hearing on S.B. 1165 Before S. Comm. on Judiciary, Jan. 20, 2022, 55th Leg., 2d Reg. Sess. 50:12–52 (Ariz. 2022).)

66. In the past 10 to 12 years, the AIA fielded approximately 12 requests consistent with their policy and approved seven students to play on a team consistent with their gender identity. Consideration of Bills: Hearing on S.B. 1165 Before S. Comm. on Judiciary, Jan. 20, 2022, 55th Leg., 2d Reg. Sess. 52:10 (Ariz. 2022).

67. The parties do not provide the Court with a breakdown of the gender identity for these seven transgender students but even assuming they were all transgender girls, the Court finds that seven students over 10 to 12 years is not a substantial number, particularly when compared to the "roughly 170,000 students playing sports in Arizona." (Preliminary Injunction, Oral Argument: July 10, 2023).[3]

68. Less than one percent of the population is transgender, with male and female transgender people being roughly the same in number. *Hecox*, 479 F. Supp. 3d at 977–78. "Presumably, this means approximately one half of one percent of the population is made up of transgender females. It is inapposite to compare the potential displacement allowing approximately half of the population

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[3] The record is missing the relevant number of participants in girls' sports and in sports generally over this same 10-to-12-year period. Based on its independent research, the Court accepts the 170,000 number as representing the total number of students playing sports per year because in 2018-19, there were 52,817 girls and 68,520 boys playing sports in Arizona. https://www.statista.com/statistics/202219/us-high-school-athletic-participation-in-arizona.

(cisgender[4] men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women. It appears untenable that allowing transgender women to compete on women's teams would substantially displace female athletes." *Id.* at 977-978.

69. The Arizona Bill Summary for the Act, SB 1165 transmitted to the Governor on May 11, 2022, expressly cites the AIA's "policy allowing transgender students to participate in activities in a manner consistent with their gender identity. (AIA Policies and Procedure, Art. 41 § 9)." (2022 Reg. Sess. S.B. 1165, Bill Summary).

70. Despite enactment of the Act, the AIA has not changed its transgender policy. (AIA Resp. (Doc. 51) at 5.) Yet, organizations like the AIA do not have discretion to disregard validly enacted laws of the State of Arizona. (AIA Resp. (Doc. 51) at 4.)

71. The Act prohibits "any licensing or accrediting organization or any athletic association or organization," including the AIA, from "entertain[ing] a complaint, open[ing] an investigation or tak[ing]any other adverse action against a school for maintaining separate interscholastic or intramural athletic teams or sports for students of the female sex." A.R.S. § 15-120.02(D).

72. The Act creates a private cause of action for students or schools to sue schools or organizations like

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[4] "The term 'cisgender' refers to a person who identifies with the sex that person was determined to have at birth." *Hecox*, 479 F. Supp. 3d at 945 (relying on *Doe v. Boyertown*, 897 F.3d 518, 522 (3rd Cir. 2018)).

the AIA if the school or organization violates the ban or retaliates in response to the reporting of a violation of the Act. A.R.S. § 15-120.02(F)-(G).

D. A.R.S. § 15-120.02 prevents Plaintiffs from playing on girls' sports teams at their schools.

73. On March 30, 2022, Arizona enacted the Act (S.B. 1165), with an effective date of September 24, 2022. Ariz. Rev. Stat. § 15-120.02.

74. As of the effective date of the Act, School Year 2022-23, first quarter (July-September) sports, including volleyball, were almost over. Second quarter (October-December) girls' sports are softball and soccer. The Third quarter (January-March) sports for girls, includes basketball. The Fourth quarter (March-May) sport is track and field.

75. In School Year 2022-23, Megan was allowed to practice as a member of the team, but not allowed to participate in TGS interscholastic competitions (games). (TGS Mot. to Dismiss (Doc. 37) at 3, n3.)

76. In School Year 2022-23, Jane played soccer but not at her elementary school because it did not have a school team; she will attend Kyrene Middle School for the first time this year. (Preliminary Injunction, Oral Argument: July 10, 2023).

77. The Court finds that the challenged conduct, passage of the Act precluding transgender girls from playing on girls' sports teams, occurred at a time when the Plaintiffs had an opportunity to play on girls' sports teams consistent with their gender identity.

78. Unlike the prior case-by-case basis used to approve a transgender girl's request to play on a team consistent with her gender identity, which considered

among other things the age and competitive level relevant to the request, the Act categorically bans all transgender girls' participation by requiring each team that is sponsored by a public school or a private school team that competes against a public-school team to be designated as "male," "female," or "coed," based on the "biological sex of the students who participate." Ariz. Rev. Stat. § 15-120.02(A).

79. The Act applies equally to kindergarten through college teams although the problems identified as being addressed by the Act-- opportunity and safety-- are limited to high school and college sports. *See e.g.* Consideration of Bills: Hearing on S.B. 1165 Before S. Comm. on Judiciary, Jan. 20, 2022, 55th Leg., 2d Reg. Sess., 0:9:56 (Ariz. 2022) (Sharp testimony explaining problem being addressed is AIA policy that allows males in a matter of weeks to dominate a sport, break a girl's record, and cause a girl to lose her championship or scholarship opportunity); same at 1:24:00 (Sen. Burley explanation for vote "yea" to protect integrity of high school sports by preventing victimization of girls that are trying to compete for sports scholarships).[5]

80. "Biological sex" is not defined in the statute. Ariz. Rev. Stat. § 15-120.02. However, the S.B. 1165 Legislative Findings state that for purposes of school sports, a student's sex is determined at "fertilization and revealed at birth, or, increasingly, in utero." S.B. 1165, 55th Leg., 2d Reg. Sess. (Ariz. 2022), § 2.

81. The Act states that "athletic teams or sports designated for 'females', 'women' or 'girls' may not be

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[5] http: https://www.azleg.gov/videoplayer/?clientID=6361162879&eventID=2022011057

open to students of the male sex." Ariz. Rev. Stat. § 15-120.02 (B).

82. The Act was adopted for the purpose of excluding transgender girls from playing on girls' sports teams. *See, e.g.* Consideration of Bills: Hearing on S.B. 1165 Before S. Comm. on Judiciary, Jan. 20, 2022, 55th Leg., 2d Reg. Sess., 1:17:32–39 (Ariz. 2022) (statement of Sen. Vince Leach, Member, S. Comm. on Judiciary) (explaining his vote for the bill by stating, "if we allow transgenders to take over female sports, you will not have females participating"); 1:28:28–55 (statement of Sen. Warren Petersen, Chairman, S. Comm. on Judiciary) (questioning whether those opposing the bill would "be opposed to having just a trans league, so that they can all compete in their own league"); (Pls.' Ex. 25, Gov. Douglas Ducey Signing Letter) ("S.B. 1165 creates a statewide policy to ensure biologically female athletes at Arizona public schools, colleges, and universities have a level playing field to compete….This legislation simply ensures that the girls and young women who have dedicated themselves to their sport do not miss out… due to unfair competition.")

83. Precluding transgender girls, who have not experienced male puberty, from playing girls sports, treats transgender boys and transgender girls differently and treats boys' and girls' sports differently, with only girls' teams facing potential challenges, including litigation, related to suspected transgender players. *Compare* Consideration of Bills: Hearing on S.B. 1165 Before S. Comm. On Judiciary, Jan. 20, 2022, 55th Leg., 2d Reg. Sess., 0:18:16 (inviting legislators to come see purported transgender girl on a team and describing need to challenge suspected transgender girls on opposing

teams) *with Hecox*, 479 F. Supp. 3d at 988 (explaining all biological women are subject, in the event of a challenge, to the statutory verification process in order to play on a team, and this creates a different, more onerous set of rules for women's sports when compared to men's sports).

84. Contrary to the asserted safety goal, the Act does not protect transgender boys—identified by Defendant Horne and Intervenors as "biological girls." In fact, the Act allows "biological girls" to play on boys' sports teams, subjecting them to the alleged risks of that association. This is allowed prepuberty and without regard for whether the transgender boy is receiving testosterone enhancements.

85. The Act's creation of a private cause of action against a school for any student who is deprived of an athletic opportunity or suffers any harm, whether direct or indirect, related to a schools' failure to preclude participation of a transgender girl on a girls' team places an onerous burden on girls' sports programs, not faced by boys' athletic programs.

86. The record does not support a finding that prior to the Act's enactment, there was a problem in Arizona related to transgender girls replacing non-transgender girls on sports teams. Consideration of Bills: Hearing on S.B. 1165 Before S. Comm. on Judiciary, Jan. 20, 2022, 55th Leg., 2d Reg. Sess., 1:15:30–36 (Ariz. 2022) (statement of Sen. Warren Petersen, Chairman, S. Comm. on Judiciary) (acknowledging to another Senator that "we're not aware of a specific instance" where any cisgender girl had lost a place on a team to a transgender girl).

87. The record does not support a finding that during the 10 to 12 years prior to passage of the Act

there was a risk of any physical injury to or missed athletic opportunity by any girl as a result of allowing seven transgender girls to play on sports teams consistent with their gender identity.

E. Excluding Plaintiffs from school sports causes very serious injury to Plaintiffs

88. School sports offer social, emotional, physical, and mental health benefits. (Budge Decl. (Doc. 4) ¶¶ 35–38.)

89. The social benefits of school sports include the opportunity to make friends and become part of a supportive community of teammates and peers. (*Id.* ¶ 35.)

90. School sports provide an opportunity for youth to gain confidence and reduce the effects of risk factors that lead to increases in depression. (*Id.* ¶ 36.)

91. Students who play school sports have fewer physical and mental health concerns than those that do not. (*Id.* ¶ 37.)

92. Students who participate in high school sports are more likely to finish college and participation in high school sports has a positive impact on academic achievement. (*Id.* ¶ 38.)

93. It would be psychologically damaging for a transgender girl to be banned from playing school sports on equal terms with other girls. (*Id.* ¶ 39; Budge Decl. (Rebuttal) (Doc. 65-1) ¶ 10.)

94. Transgender girls will internalize the shame and stigma of being excluded for a personal characteristic (being transgender) over which they have no control and which already subjects them to prejudice and social stigma. (Budge Decl. (Doc. 4) ¶ 40.)

95. For transgender girls who are already playing on girls' teams, a law that requires them to be excluded from continued participation on girls' teams would have a further negative impact on their health and well-being, causing them to feel isolated, rejected, and stigmatized, and thereby putting them at high risk for severe depression and/or anxiety. (*Id.*)

96. For transgender girls, who are gender transitioning to address gender dysphoria, the benefits from playing sports on teams compatible with their gender identity is important because to be clinically effective, gender transitioning must be respected consistently across all aspects of her life.

F. Transgender girls who have not undergone male puberty do not have an athletic advantage over other girls.

97. The Plaintiffs' experts' opinions are based on the scientific consensus that the biological cause of average differences in athletic performance between men and women is caused by the presence of circulating levels of testosterone beginning with male puberty. (Shumer Decl. (Rebuttal) (Doc 65-2) ¶ 8 (citing Brown Decl. ¶¶ 127–30 relying on Handelsman (2018) at 823 ("summarizing evidence makes it highly likely that the sex difference in circulating testosterone of adults explains most, if not all, of the sex differences in sporting performance.")); (Brown Hecox Decl. ¶¶ 20a, 25–28, 77–85).

98. A large part of the record created by the Defendants is not relevant to the question before the Court: whether transgender girls like Plaintiffs, who have not experienced male puberty, have performance advantages that place other girls at a competitive disadvantage or at risk of injury. For example,

Defendants submit evidence that girls have more body fat than boys at birth. (Brown Decl. (Doc. 82-1; 92-1) ¶ 79.) Without more, this evidence is not relevant to the question before the Court.

99. Defendant Horne and the Intervenors submit expert declarations, including the declaration by Dr. James Cantor, which in large part are not relevant criticisms of medical treatments for gender dysphoria. The appropriateness of medical treatment for gender dysphoria is not at issue in this case. (Pls Ex. (Doc. 88-3) at 39-40 (dated March 30, 2022, describing purpose of Act to ensure a level playing by preventing unfair competition in women's sports).) Protecting transgender girls from any such risk is not a rationale or purpose of the Act.

100. Defendants' expert Dr. Brown admits that many of the specific male physiological advantages he describes are a result of testosterone levels in men post-puberty. This evidence is not relevant because the Plaintiffs have not and never will experience male puberty. The Court is not concerned with Dr. Brown's opinion that such advantages are not reversed by testosterone suppression after puberty or are reduced only modestly, leaving a large advantage over female athletes. Dr. Brown agrees it is well documented that the large increases in physiological and performance advantages for men result from increases in circulating testosterone levels that males experience in puberty, "or generally between the ages of about 12 through 18." (Brown Decl. (Doc. 82-1; 92-1) ¶¶ 163-164.)[6]

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[6] A categorical bar to girls and women who are transgender stands in "stark contrast to the policies of elite athletic bodies that regulate sports both nationally and globally—including the

101. Defendants rely on school-based fitness testing of boys and girls, comparisons between 10th/50th/90th percentile scores for girl and boy students ages 6 through 11 reflecting, for example, that 50% of 6-year-old boys completed more laps in the 20-meter shuttle (14) than girls (12). (Brown Decl. (Doc. 82-1; 92-1) ¶ 84.) Other fitness data reflects differences between 9 through 17-year-old boys and girls, with 9-year-old boys always exceeding girls' running times by various percentages ranging from 11.1-15.2%, *id.* ¶ 89; arm hang fitness scores (7.48 boys, 5.14 girls), *id.* ¶ 92; standing broad jump (128.3 boys, 118.0 girls), *id.* ¶ 99. (*See also* Brown Decl. (Doc. 82-1; 92-1) ¶106 (quoting Thomas 1985 study at 266) ("Boys exceed girls in throwing velocity by 1.5 standard deviation units as early as 4 to 7 years of age . . ." and throwing distance by 1.5 standard deviation units as early as 2 to 4 years of age).)[7] (*But see* Shumer

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National Collegiate Athletic Association ("NCAA") and the International Olympic Committee ("IOC")—which allow transgender women to participate on female sports teams once certain specific criteria are met," primarily specified levels of circulating testosterone. *Hecox*, 479 F. Supp. 3d at 944.

[7] The Court does not know whether Dr. Brown's opinion that hormone and testosterone suppression cannot fully eliminate physiological advantages once an individual experienced male puberty has been revised since the peer review of the Handelsman study. *See Hecox* 479 F. Supp. 3d at 980 (criticizing Brown's opinion because not updated subsequent to peer review and noting some of the studies Dr. Brown relied on "actually held the opposite").This evidence, relating to transgender girls/women who have experienced male puberty, is not directly relevant in this case, except to the extent the Court might extrapolate that if testosterone suppression in transgender females who have experienced male puberty, can bring them into athletic alignment with other girls/women, then preventing transgender girls from experiencing male puberty in the first

Decl. (2nd Rebuttal) (Doc. 65-2) ¶12 (opining clear scientific consensus that athletic ability does not diverge significantly until puberty (citing e.g., David Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 Clinical Endocrinology 68, 70–71 (2017) ("The gender divergence in athletic performance begins at the age of 12–13 years"); Ps Motion for PI, Jonathon W. Senefeld et al., *Sex Differences in Youth Elite Swimming*, 14 PLOS ONE 1, 1–2 (2019) (Doc. 88-2) at 42-43 (studying child and youth swimmers and concluding that the data suggests "girls are faster, or at least not slower, than boys prior to the performance-enhancing effects of puberty"); M.J. McKay, *Normative reference values for strength and flexibility of 1000 children and adults* (Doc. 88-3) at 12 (finding no significant ($p<0.05$) differences between the strength measures of boys or girls aged 3-9, except for shoulder internal rotators where boys were stronger).

102. The World Rugby Transgender Women's Guidelines 2020 , which Dr. Brown cites throughout his declaration, allow transgender girls and women to participate in women's rugby if they did not experience endogenous male puberty, stating: "Transgender women who transitioned pre-puberty and have not experienced the biological effects of testosterone during puberty and adolescence can play women's rugby." (Pls.' Ex. 24 (Doc. 88-3); Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶ 35.)

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place would result in even greater equity. The Court does not draw such a conclusion for purposes of deciding the request for preliminary injunction.

103. The physical fitness data relied on by Defendant Horne and Intervenors merely observes phenomena across a population sample in isolated areas and does not determine a cause for what is observed. There is no basis for these experts to attribute those small differences to physiology or anatomy instead of to other factors such as greater societal encouragement of athleticism in boys, greater opportunities for boys to play sports, or differences in the preferences of the boys and girls surveyed. (Dr. Linda Blade ("Blade Decl.") at 7–9; Hilton Decl. (Doc. 92-8) ¶¶ 7.3–7.5; Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶¶ 21, 46.) The Court finds that transgender girls, who are being raised in conformance with their gender identity, will be subject to the same social/cultural factors that girls face that correlates to lower physical fitness scores.

104. There is no evidence to support Dr. Hilton's opinion that girls have "delicate brain structures" making them prone to injury; brain MRIs reveal no differences based on sex, except for size. (Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶ 40.) Evidence suggests the difference between male and female sports' concussions occurs because girls, post-puberty, have weaker neck muscles than boys. (Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶ 41 (citing Abigail C. Bretzin et al., Association of Sex with Adolescent Soccer Concussion Incidence and Characteristics, 4 JAMA Network Open 4, 6 (2021); Ryan T. Tierney et al., Gender Differences in Head-Neck Segment Dynamic Stabilization During Head Acceleration, 37 Med. & Sci. Sports & Exercise 272, 272 (2005)).

105. The Court rejects Dr. Hilton's idea that "sporty-girls" will be "as well-trained as their male peers" and, therefore, higher win scores at Kyrene

Middle School for boys cannot be explained by social cultural factors and must be biological. (Hilton Decl. (Doc. 92-8) (citing Thomas and French, 1985, *Gender differences across age in motor performance a meta-analysis:* Psychol Bull 98(2): 260-282)).

106. Height differences in babies are negligible, with differences disappearing altogether between ages 6 and 8 but reappearing when girls enter puberty and overtake boys in height and weight for a few years until boys experience puberty and grow taller on average than girls/women. (Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶¶ 12-15.)

107. The Plaintiffs do not challenge the existence of separate teams for girls and boys. Defendants do not explain why the minor differences in physical fitness scores for prepuberty boys compared to girls reflect a significant athletic advantage of boys over girls, prepuberty. There are many other reasons why boys' and girls' sports teams are separated: (1) women historically were deprived of athletic opportunities in favor of men; (2) as a general matter, men had equal athletic opportunities to women; and (3) according to stipulated facts, average physiological differences meant that "males would displace females to a substantial extent" if permitted to play on women's teams. *See Hecox*, 479 F. Supp. 3d at 976 (distinguishing *Clark by and Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982) finding these factors do not apply for transgender women).

108. Defendants ask the Court to rely on evidence they allege supports separating sports teams by sex to conclude that transgender girls, who have not experienced puberty, should not play on girls' teams

solely because they are boys, regardless of whether they have experienced puberty.

109. The Court will not make this leap because Plaintiffs present expert evidence that any prepubertal differences between boys and girls in various athletic measurements are minimal or nonexistent. (Shumer Decl. (Rebuttal) (Doc. 65-2) ¶ 5) (citing Alison McManus & Neil Armstrong, *Physiology of elite young female athletes*, 56 Medicine & Science Sports & Exercise 23, 24 (2011) ("Prior to 11 years of age differences in average speed are minimal"); *id.* at 27 ("[S]mall sex difference in fat mass and percent body fat are evident from mid-childhood"); *id.* at 29 ("[B]one characteristics differ little between boys and girls prior to puberty"); *id.* at 32 ("There is little evidence that prior to puberty pulmonary structure or function limits oxygen uptake"); *id.* at 34 ("[N]o sex differences in arterial compliance have been noted in pre- and early- pubertal children")).

110. Based on the evidence, transgender girls' physical characteristics, especially in terms of height, weight, and strength, overlap with those of other girls. In other words, some girls may be taller than average, and some transgender girls may be taller than average. The rationale for excluding transgender girls with above average physical characteristics is equally applicable to excluding taller than average girls, but height, weight, or strength factors are not used at any level of competition to protect girls or women athletes. (Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶¶ 42-43; *see also Hecox*, 479 F. Supp. 3d at 980 (describing evidence of similar bell curve differences for transgender women, who have gone through male puberty and are using gender affirming interventions, including lowering testosterone as "a transgender

woman who performed 80% as well as the best performer among men of that age before transition would also perform at about 80% as well as the best performer among women of that age after transition.")

111. The categorical preclusion of transgender women, especially girls who have not experienced male puberty, appears unrelated to the interests the Act purportedly advances. A "justification must be genuine, not hypothesized." *United States v. Virginia,* 518 U.S. 515, 533 (1996). The proponents of the Act fail to provide persuasive evidence of any genuine, not hypothesized problem. *Hecox*, 479 F. Supp. 3d at 979.

112. Before puberty, there are no significant differences in athletic performance between boys and girls. (Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶ 16; Shumer Decl. (Rebuttal) (Doc. 65-2) ¶¶ 9–13; Shumer Decl. (Doc. 5) ¶ 38; Pls.' Exs. 19–20, 22–23 (Doc. 88-2).)

113. After puberty, adolescent boys begin to produce higher levels of testosterone, which over time causes them to become, on average, stronger and faster than adolescent girls. (Shumer Decl. (Doc. 5) ¶ 39; Pls.' Exs. 18–19 (Doc. 88-2).)

114. The biological driver of average group differences in athletic performance between adolescent boys and girls is the difference in their respective levels of testosterone, which only begin to diverge significantly after the onset of puberty. (Shumer Decl. (Rebuttal) ¶¶ 4, 8; Shumer Decl. (Doc. 5) ¶ 39; Pls.' Exs. 18–19.)

115. Transgender girls who receive puberty-blocking medication do not have an athletic advantage over other girls because they do not undergo male puberty and do not experience the physiological

changes caused by the increased production of testosterone associated with male puberty. (Shumer Decl. (Rebuttal) (Doc. 65-2) ¶¶ 15–16; Shumer Decl. (Doc. 5) ¶¶ 35, 38–42.)

116. Transgender girls who receive hormone therapy after receiving puberty-blocking medication will develop the skeletal structure, fat distribution, and muscle and breast development typical of other girls. (Budge Decl. (Doc. 4) ¶ 29; Shumer Decl. (Rebuttal) (Doc. 65-2) ¶ 22; Shumer Decl. (Doc. 5) ¶¶ 35–36.)

117. A transgender girl who receives hormone therapy will typically have the same levels of circulating estrogen and testosterone as other girls. (Shumer Decl. (Doc. 5) ¶ 36.)

118. Knowing that a girl is transgender, if she has not gone through male puberty, reveals nothing about her athletic ability. (Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶ 31, 48; Shumer Decl. (Rebuttal) (Doc. 65-2) ¶¶ 26–27; Shumer Decl. (Doc. 5) ¶ 42.)

119. Similarly, transgender girls who have not yet undergone male puberty or who have received puberty-blocking medication at the onset of puberty do not present any unique safety risk to other girls. (Shumer Decl. (2nd Rebuttal) (Doc. 113) ¶¶ 25, 36; Shumer Decl. (Rebuttal) ¶ 41.)

120. In short, transgender girls, who have not experienced male puberty, play like girls. There is no logical connection between prohibiting them from playing on girls' sports teams and the goals of preventing unfair competition in girls' sports or protecting girls from being physically injured by boys.

G. Plaintiffs cannot play on boys' sports teams.

121. Jane cannot play on boys' teams or compete with the boys because she is a girl, with athletic capabilities like other girls her age and different from boys her age who are beginning to experience puberty and increased testosterone levels. Jane will not experience male puberty and will experience female puberty. Assuming there are safety issues created if girls compete with boys, Jane would be subjected to such risks by playing on boys' teams.

122. Jane's medical health depends on her ability to live her life fully as a girl, and playing on a boys' sports team and competing against boys would directly contradict her medical treatment for gender dysphoria and jeopardize her health. (H. Doe Decl. (Doc. 7) ¶ 15; Budge Decl. (Doc. 4) ¶¶ 33–34.)

123. "Participating in sports on teams that contradict one's gender identity 'is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.'" *Hecox*, 479 F. Supp. 3d at 977.

124. Jane would find it humiliating and embarrassing to play on a boys' team because everyone at school knows her as a girl. (J. Doe Decl. (Doc. 6) ¶ 11; H. Doe Decl. (Doc. 7) ¶ 15.)

125. If she is not allowed to play sports on a girls' team, Jane will be very upset. (J. Doe Decl. (Doc. 6) ¶ 10; H. Doe Decl. (Doc. 7) ¶ 16.)

126. Jane will not participate in sports at all if she is forced to be on a boys' team. (J. Doe Decl. (Doc. 6) ¶ 11; H. Doe Decl. (Doc. 7) ¶ 15.) The last thing she wants to do is draw attention to herself by drawing into question her gender identity. She wants to go to school like other girls. (Jane Decl. (Doc. 6) ¶ 11.)

127. Jane will also lose the opportunity to receive the physical, social, and emotional benefits that school sports provide. (H. Doe Decl. (Doc. 7) ¶ 16).

128. Megan cannot play on boys' teams or compete with the boys because she is a girl, with athletic capabilities like other girls her age and different from boys her age, who have experienced puberty and increased testosterone levels. Megan has not experienced male puberty and has experienced female puberty. Assuming there are safety issues created if girls compete with boys, Jane would be subjected to such risks by playing on boys' teams.

129. Playing on a boys' team would directly conflict with Megan's medical treatment for gender dysphoria, and her medical health depends on her ability to live her life fully as a girl. Playing on a boys' team would be emotionally painful and humiliating for her. (M. Roe Decl. (Doc. 8) ¶ 9; K. Roe Decl. (Doc. 9) ¶ 10.)

130. "Participating in sports on teams that contradict one's gender identity 'is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.'" *Hecox*, 479 F. Supp. 3d at 977.

131. If she is not allowed to play on the girls' volleyball team, Megan will not compete on the boys' volleyball team. (M. Roe Decl. (Doc. 8) ¶ 9; K. Roe Decl. (Doc. 9) ¶ 10.)

132. Megan will be distraught if she loses the opportunity to try out for the girls' volleyball team. (K. Roe Decl. (Doc. 9) ¶ 11.)

133. Megan will also lose the opportunity to receive the physical, social, and emotional benefits that school sports provide. (*Id.* ¶ 9.)

II. Conclusions of Law

To the extent these Conclusions of Law are also deemed to be Findings of Fact, they are hereby incorporated into the preceding Findings of Fact.

134. A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). Instead, in every case, the court must balance competing claims of injury and must consider the effect on each party of granting or withholding relief. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).

135. A preliminary injunction may take one of two forms: 1) a prohibitory injunction prohibits a party from taking action and "preserve[s] the status quo pending a determination of the action on the merits." *Chalk v. United States Dist. Court,* 840 F.2d 701, 704 (9th Cir. 1988). A mandatory injunction goes beyond simply maintaining the status quo and requires a heightened burden of proof and is particularly disfavored. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (citing *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980)).

136. "Status quo" for the purpose of an injunction "refers to the legally relevant relationship between the parties before the controversy arose." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (emphasis in original); *see also Regents of Univ. of California v. Am. Broad. Companies, Inc.*, 747 F.2d 511, 514 (9th Cir. 1984) (for purposes of injunctive relief, the status quo means "the last uncontested status which preceded the pending controversy") (cleaned up).

137. For the purpose of issuing a preliminary injunction, the Court's findings that both Jane and Megan could have played on girls' sports teams last year prior to passage of the Act, cannot play on sports teams consistent with their gender identity now, and want to participate in girls' sports programs at Kyrene Middle School and TGS this year, warrant issuance of a mandatory prohibitory injunction to preserve the status quo.

138. The purpose of a preliminary injunction or temporary restraining order is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions until the merits of the action are ultimately determined. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

139. A party seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

140. When the government is a party, the third and fourth factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021).

A. Likelihood of success on the merits.

Equal Protection Clause Claim

141. There is a strong presumption that gender classifications are invalid and the burden rests on the state to justify the classification. *Virginia*, 518 U.S. at 533. This burden tracks for purposes of considering

the likelihood of the merits of the Plaintiffs' claim. Defendants must show that it is "more likely than not" that the Act is constitutional. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 429–30 (2006) (finding evidentiary equipoise insufficient and issuing a preliminary injunction).

142. The Supreme Court has addressed the Defendants' concern that legislation must be written for the population generally, therefore, "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Hecox*, 479 F. Supp. 3d at 972); (Preliminary Injunction, Oral Argument: July 10, 2023). There are three tiers of judicial scrutiny depending on the characteristics of the disadvantaged group or the rights implicated by the classification. *Hecox*, 479 F. Supp. 3d at 972.

143. When the state restricts an individual's access to a fundamental right, the policy must withstand the strictest of scrutiny. *San Antonio Indep. Sch. District. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). Access to interscholastic sports is not a constitutionally recognized fundamental right. *Walsh v. La High Sch. Athletic Ass'n*, 616 F.2d 152, 159-60 (5th Cir. 1980). Strict scrutiny also applies if a government policy discriminates against a suspect class such as race, alienage, and national origin because government policies that discriminate based on race or national origin typically reflect prejudice. *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432, 440 (1985).

144. The least stringent level of scrutiny is rational basis review, which is applied to laws that impose a difference in treatment between groups but do not infringe upon a fundamental right or target a suspect

or quasi-suspect class. *Heller v. Dow,* 509 U.S. 312, 319-321 (1993).

145. Heightened scrutiny is an intermediate scrutiny, a slightly less stringent standard than strict scrutiny, but greater than rational basis review. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Virginia*, 518 U.S. at 533. Heightened scrutiny applies to statutes that discriminate on the basis of sex, a quasi-suspect classification. "'The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment.'" *Hecox*, 479 F. Supp. 3d at 973 (quoting *Latta v. Otter* (*Latta I*), 19 F. Supp. 3d 1054, 1073 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014) (citing *Virginia*, 518 U.S. at 533)). To withstand heightened scrutiny, a classification by sex "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197.

146. Laws that discriminate against transgender people are sex-based classifications and, as such, warrant heightened scrutiny. *See Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (analyzing a policy barring transgender people from military service as sex-based discrimination and applying heightened scrutiny); *see also D.T. v. Christ*, 552 F. Supp. 3d 888, 896 (D. Ariz. 2021) ("Discrimination against transgender people is discrimination based on sex; as such, heightened scrutiny applies.").

147. Defendant Horne's and Intervenors' argument that the Act does not mention transgender girls and, therefore, does not discriminate based on transgender status or gender identity fails. The Act's disparate treatment of transgender girls because they are transgender is clear on the face of the statute and

makes it facially discriminatory even if the statute does not expressly employ the term "transgender". *See e.g. Hecox*, 479 F. Supp. 3d at 975 (rejecting defendants' argument that similar Idaho statute "does not ban athletes on the basis of transgender status, but rather on the basis of the innate physiological advantages males generally have over females"); *A.M.*, 617 F. Supp. 3d at 965–66 (holding that a virtually identical Indiana statute discriminated against transgender individuals despite not using the term "transgender"); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 353–54 (S.D. W. Va. 2021) (holding that a virtually identical West Virginia statute "discriminates on the basis of transgender status"), *B. P. J. v. W. Virginia State Bd. Of Educ.,* No. 2:21-CV-00316, 2023 WL 111875, at *6 (S.D.W. Va. Jan. 5, 2023) (cleaned up), *stayed pending appeal B.P.J. v. W. Virginia State Bd. of Educ.*, No. 23-1078, 2023 WL 2803113, at *1 (4th Cir. Feb. 22, 2023).

148. The Arizona legislature intentionally created a classification, specifically "biological girls," that necessarily excludes transgender girls, and expressly allowed only that exclusive classification to play girls sports to the exclusion of transgender girls.

149. The legislative history demonstrates that the purpose of the Act is to exclude transgender girls from girls' sports teams. Therefore, the Court applies heightened scrutiny to the Act, does not make a presumption of constitutionality, and does not defer to legislative judgment. *SmithKline Beecham Corp. v. Abbott Laboratories,* 740 F.3d 471, 483 (9th Cir. 2014).

150. Plaintiffs Jane and Megan are transgender girls, members of a quasi-protected class. The Court applies heightened scrutiny in this case, placing the

burden on the government to show "an exceedingly persuasive justification" for the alleged discriminatory treatment, *Virginia*, 518 U.S. at 531, which must not be based on "generalizations" or "stereotypes," *id.* at 549–50, 565. "The justification 'must be genuine, not hypothesized or invented post hoc in response to litigation,' and 'must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Karnoski*, 926 F.3d at 1200 (quoting *Virginia*, 518 U.S. at 533).

151. In applying heightened scrutiny review, the Court must examine the Act's "'actual purposes and carefully consider any resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.'" *Latta II,* 771 F.3d at 468 (quoting *SmithKline,* 740 F.3d at 483).

152. According to Defendants, the Act is to protect girls from physical injury in sports and promote equality and equity in athletic opportunities, which are, in addition to redressing past discrimination against women in athletics, considered legitimate and important governmental interests justifying rules excluding males from participating on female teams. *Clark,* 695 F.2d at 1131.

153. However, the well-established scientific consensus is that, before puberty, there are no significant physiological differences in athletic performance between boys and girls. Instead, there is overlap between the sexes, with some boys being better athletically than some girls and some girls outplaying some boys. There is also no evidence that transgender girls who do not undergo male puberty because they have taken puberty suppressing

medication at the onset of male puberty have an athletic advantage over other girls. There are no studies that have documented any such advantage, and there is no medical reason to posit that any such advantage would exist. (*Id*. ¶ 26.)

154. The testimony by Drs. Brown and Hilton that boys have some biological advantages related to physical fitness before puberty does not support a conclusion that Plaintiffs, who have not experienced male puberty, have any athletic advantage over other girls or pose a safety risk to other girls by playing on girls' sports teams.

155. Defendant Horne and Intervenors discuss *Clark,* 695 F.2d at 1131, throughout their briefs but *Clark* strongly supports Plaintiffs. In *Clark*, the Ninth Circuit held that it was lawful to exclude boys from girls' volleyball teams because: (1) women had historically been deprived of athletic opportunities in favor of men; (2) as a general matter, men had equal athletic opportunities compared to women; and (3) according to the stipulated facts in the case, average physiological differences meant that males would displace females to a substantial extent if permitted to play on women's volleyball teams. *Hecox*, 479 F.Supp. 3d at 1131.

156. None of the *Clark* premises hold true for girls who are transgender: (1) far from being favored in athletics, "women who are transgender have historically been discriminated against;" (2) transgender women—unlike the boys in Clark—would not be able to participate in any school sports; and (3) based on the very small numbers of transgender girls in the population, "transgender women have not and could not 'displace' cisgender women in athletics 'to a substantial extent.'" *Hecox*,

479 F. Supp. 3d at 977 (quoting *Clark*, 695 F.2d at 1131). Hecox's analysis of *Clark* is more compelling here, where Plaintiffs have not experienced male puberty and will experience female puberty. *See Hecox*, 479 F. Supp. 3d at 981 (transgender girls who do not experience male puberty "do not have an ascertainable advantage over cisgender female athletes").

157. Under *Clark,* the legislature need not pick the wisest alternative for addressing a problem, but it must show that the policy is "substantially related to the goals of providing fair and equal playing opportunities for girls and protections to ensure the safety of girls playing sports. *Clark,* 695 F.2d at 1132.

158. The Court finds that Defendant Horne and Intervenors fail to produce persuasive evidence at the preliminary injunction stage to show that the Act is substantially related to the legitimate goals of ensuring equal opportunities for girls to play sports and to prevent safety risks:

- There is no evidence in the record that transgender girls who have not experienced male puberty, have presented an actual problem of unfair competition or created safety risks to other girls.

- There is no empirical evidence in the record that transgender girls who have not experienced puberty, have any physiological advantages over other girls that create unfair competition for positions on girls' sports teams and other athletic opportunities, or pose a safety risk to other girls.

- The Act is overly broad, reaching sports at all grade levels, including grades when athletes are prepuberty; it bans transgender girls, who have

not experienced male puberty and who, instead, will or have experienced female puberty. "The Supreme Court has long viewed with suspicion laws that rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *B. P. J.* 2023 WL 111875, at *6. Laws that discriminate based on sex must be backed by an "exceedingly persuasive justification." *Virginia,* 518 U.S. at 531.

- The Act treats transgender boys and transgender girls and boys' and girls' sports differently. Transgender boys who, according to Defendants' reasoning and classifications are "biological girls", are allowed to play on boys' sports teams, subject to the alleged risks of that association which the Act proports to address. The Act creates a private cause of action that burdens only girls' sports programs with transgender challenges, investigations, and litigation. The Act subjects only female athletes, transgender and otherwise, to gender challenges and investigations. Boys playing on boys' teams do not have to worry about any gender challenge or investigation.

159. Defendant Horne and Intervenors have not established that categorically banning all transgender girls from playing girls' sports is substantially related to an important government interest. *Virginia*, 518 U.S. at 524.

160. Defendant Horne's and Intervenors' argument that the Act is necessary to protect girls' sports by barring transgender girls, who purportedly have an unfair athletic advantage over other girls and/or pose a safety risk to other girls, is based on overbroad generalizations and stereotypes that erroneously equate transgender status with athletic

ability. *See Hecox*, 479 F. Supp. 3d at 982 (holding that the asserted advantage between transgender and non-transgender female athletes "is based on overbroad generalizations without factual justification"). Therefore, the Act does not withstand heightened scrutiny. *Karnoski*, 926 F.3d at 1200 (citing *Virginia*, 518 U.S. at 533).

161. Because the Court's findings of fact reflect that the Act's categorical bar against transgender girls' participation on girls' sports teams is not a genuine justification, the Plaintiffs are likely to prevail on the merits. Heightened scrutiny requires more than a hypothesized problem. *Virginia,* 518 U.S. at 533.

162. In fact, the Act fails even under the rational basis test because it is not related to any important government interest. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Title IX Claim

163. Title IX provides, in relevant part, that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a).

164. Defendants Kyrene School District (administered and overseen by Defendant Toenjes) and the AIA receive federal financial assistance, and Defendant Horne is a grant recipient of federal funds.

All Defendants must comply with Title IX's requirements. (See Compl. ¶¶ 9–13.)[8]

165. Discriminating against an individual on the basis of transgender status is discrimination based on sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.").

166. The Ninth Circuit has held that discrimination based on transgender status also constitutes impermissible discrimination under Title IX. *See Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023) (holding that *Bostock* Title VII case applies to Title IX); *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022).

167. The Act discriminates against Plaintiffs based on their status as transgender girls by providing that for purposes of school sports a student's sex is fixed "at birth." S.B. 1165, 55th Leg., 2d Reg. Sess. (Ariz. 2002), § 2.

168. The Act's classification of all transgender girls as male and its prohibition of students who are "male" from playing on girls' teams, Ariz. Stat. § 15-120.02(B), intentionally excludes all transgender girls, including Plaintiffs, from participating on girls' teams.

169. Exclusion from athletics on the basis of sex is a cognizable harm under Title IX because it deprives Plaintiffs of the benefits of sports programs and

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[8] TGS has filed a motion to dismiss on the basis that it does not receive federal financial assistance and therefore is not required to comply with Title IX requirements. The Court will address this motion by separate order.

activities that their non-transgender classmates enjoy. *See Grabowski*, 69 F.4th 1121–22 (holding that being removed from the team was an adverse action under Title IX); *see also A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950 (S.D. Ind. 2022), appeal dismissed sub nom. *A.M. by E.M. v. Indianapolis Pub. Sch. & Superintendent*, No. 22-2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023) (granting a preliminary injunction of a similar Indiana law that banned transgender girls from playing on girls' sports teams based on Title IX).

170. The Court rejects Defendant Horne's and Intervenors' arguments that Plaintiffs' schools offer teams for both boys and girls and, therefore, Plaintiffs are not excluded from participating in sports on teams consistent with their "biological sex." The Court's findings of fact reflect that Plaintiffs, who are transgender girls, cannot play on boys' teams because they are transgender girls who have not and will not go through male puberty and will go through female puberty. Moreover, playing on a boys' team would be shameful and humiliating for Plaintiffs as well as in direct conflict with ongoing treatment for gender dysphoria, a serious medical condition.

B. Plaintiffs Will Suffer Irreparable Harm if Relief Is Not Granted.

171. Plaintiffs face irreparable harm if this Court does not enjoin the Act as to them.

172. Enforcement of the Act in violation of the Equal Protection Clause in and of itself is sufficient to presume irreparable harm to justify a preliminary injunction. *Hernandez v. Sessions*, 872 F.3d 976, 994–95 (9th Cir. 2017) ("It is well established that the deprivation of constitutional rights unquestionably

constitutes irreparable injury.") (internal quotation marks and citation omitted); *Hecox,* 479 F. Supp. 3d at 987 (noting this "dispositive presumption").

173. A violation of Title IX also causes irreparable harm. *See Anders v. Cal. State Univ., Fresno*, 2021 WL 1564448, at *18 (E.D. Cal. Apr. 21, 2021) (finding irreparable harm under Title IX given the "presumption of irreparable injury where plaintiff shows violation of a civil rights statute" and in light of "the insult that comes from unequal treatment"); *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 973 (D. Minn. 2016) ("Plaintiffs have a fair chance of succeeding on their Title IX claim, and Congress passed Title IX pursuant to its power to enforce the Fourteenth Amendment. Plaintiffs' expectation that they may be treated unequally in violation of Title IX's terms is an irreparable harm.") (cleaned up).

174. Plaintiffs will also suffer severe and irreparable mental, physical, and emotional harm if the Act applies to them because they cannot play on boys' sports teams. Playing on a boys' team would directly contradict Plaintiffs' medical treatment for gender dysphoria and would be painful and humiliating. Plaintiffs' mental health is dependent on living as girls in all aspects of their lives.

175. Enforcing the Act against Plaintiffs will effectively exclude Plaintiffs from school sports and deprive them of the social, educational, physical, and emotional health benefits that both sides acknowledge come from school sports. This exclusion is a cognizable harm. *Grabowski*, 69 F.4th at 1121.

176. Plaintiffs will also suffer the shame and humiliation of being unable to participate in a school activity simply because they are transgender—a

personal characteristic over which they have no control. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 625 (4th Cir. 2020) (explaining that the stigma of exclusion "publicly brand[s] all transgender students with a scarlet 'T'") (internal quotation marks and citation omitted).

177. In addition, Plaintiffs will suffer the cognizable and irreparable "dignitary wounds" associated with the passage of a law expressly designed to communicate the state's moral disapproval of their identity, wounds that "cannot always be healed with the stroke of a pen." *Obergefell v. Hodges*, 576 U.S. 644, 678 (2015); *Hecox,* 479 F. Supp. 3d at 987 (finding such wounds constitute irreparable harm).

178. Plaintiffs have established that they will suffer irreparable harm if the Act is enforced against them.

C. The Public Interest and Balance of Equities Favor Injunctive Relief.

179. When an injunction is sought against a governmental entity, the public interest and balance-of-the-hardships factors merge. *Nken*, 556 U.S. at 435–36.

180. As an initial matter, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

181. The balance of equities favors Plaintiffs as well. Defendant Horne and Intervenors "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Plaintiffs, however, face

serious and ongoing harm if the Act is enforced against them.

182. The alleged harm to Defendants and Intervenors—"that biological girls will be forced to compete against transgender girls who allegedly have an athletic advantage"—is unsupported by the record. *A.M.,* 617 F. Supp. 3d at 968. Moreover, there is no evidence in the record "that allowing [Plaintiffs] to play on the girls' [teams] will make this [purported] harm a reality." *Id.* On the contrary, the record suggests the opposite. Based on the record for the preliminary injunction, the Court has found that Plaintiffs do not have a competitive advantage over other girls, and they do not pose a safety risk.

183. But for the Act, Defendants TGS, Kyrene School District, Superintendent Toenjes, and the AIA would all permit Plaintiffs to play on girls' teams.

184. There is no evidence that any Defendant will be harmed by allowing Plaintiffs to continue playing with their peers as they have done until now. *Hecox*, 479 F. Supp. 3d at 988 ("[A] preliminary injunction would not harm Defendants because it would merely maintain the status quo while Plaintiffs pursue their claims.").

185. Accordingly, the public interest and balance of equities favor a preliminary injunction.

CONCLUSION

The Court's findings of fact support Plaintiffs' assertions that very serious damages will result from a change in the status quo, and as a matter of law and fact, this is not a doubtful case. *See Anderson*, 612 F.2d at 1114 (generally, mandatory injunctions require extreme or very serious damage and not issued in doubtful cases). Because Plaintiffs have

satisfied all elements necessary to obtain a preliminary injunction, the Court grants Plaintiffs' motion for a preliminary injunction.

The Court has the discretion to determine whether the moving party is required to post a bond as a condition for the granting of a preliminary injunction. *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (citing *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009)). Here, a bond is not required because "there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003).

Accordingly,

IT IS ORDERED that the Motion for Preliminary Injunction (Doc. 3) is GRANTED.

IT IS FURTHER ORDERED that Defendant Horne is enjoined from enforcing A.R.S. § 15-120.02 as to Plaintiffs.

IT IS FURTHER ORDERED that the Act shall not prevent Plaintiffs from participating in girls' sports and, as agreed by Kyrene School District and Laura Toenjes, in her official capacity, pursuant to the Stipulation in Lieu of an Answer (Doc. 59), and by TGS in open Court at the hearing for the Preliminary Injunction, the Plaintiffs shall be allowed to play girls' sports at their respective schools.

IT IS FURTHER ORDERED that the AIA transgender policy, § 41.9, complies with the terms of this preliminary injunction.

Dated this 20th day of July, 2023.

/s/ Jennifer Zipps
Honorable Jennifer G. Zipps
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV-23-00185-TUC-JGZ
[July 31, 2023]

Helen Doe, et al.,
Plaintiffs,
v.
Thomas C Horne, et al.,
Defendants.

ORDER ON MOTION FOR STAY PENDING APPEAL AND REQUEST FOR ADMINISTRATIVE STAY

Before the Court is Intervenor-Defendants' Motion for Stay Pending Appeal and Request for Administrative Stay. (Doc. 132.) Intervenor-Defendants request that the Court stay its July 20, 2023 preliminary injunction. In the alternative, they request an administrative stay of the injunction for seven days to allow time for the United States Court of Appeals for the Ninth Circuit to consider an emergency motion to stay and request for

administrative stay.[1] The preliminary injunction at hand enjoins Defendant Horne from enforcing A.R.S. § 15-120.02 (Save Women's Sports Act) as to 11-year-old Jane Doe and 15-year-old Megan Roe. The injunction allows Plaintiffs to participate in girls' sports at their schools when athletics begin in July 2023. Neither school opposes the injunction.

"The bar for obtaining a stay of a preliminary injunction is higher than the *Winter* standard for obtaining injunctive relief." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 824 (9th Cir. 2020). In deciding whether to grant a stay, "a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (cleaned up). "The first two factors are the most critical; the last two are reached only once an applicant satisfies the first two factors." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (cleaned up). Applying the *Nken* factors here, the Court denies Intervenor-Defendants' Motion for Stay.

Failure to Demonstrate Strong Showing of Success on Merits

Applicants for a stay pending appeal must make a strong showing that they are likely to succeed on the merits. *Al Otro Lado*, 952 F.3d at 1010. Under the

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[1] Intervenor-Defendants request a ruling on their Motion by Monday, July 31, 2023, to allow them time to seek prompt appellate relief, if necessary. (Doc. 132 at 15.)

Ninth Circuit's sliding scale approach to preliminary injunctions, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). For example, where there is a weak irreparable harm showing, the applicant must make a strong showing of a likelihood of success on the merits. *Al Otro Lado*, 952 F.3d at 1010. This sliding scale approach also applies to stays pending appeal. *Id.* at 1007. It is insufficient that the chance of success is better than negligible; the applicant must demonstrate "more than a mere possibility of relief." *Nken*, 556 U.S. at 434. Intervenor-Defendants fail to make the required showing.

Intervenor-Defendants argue they are likely to succeed on the merits for four reasons. (Doc. 132 at 2.) They argue that the Act is subject to rational basis review "[f]or the reasons stated" in their prior briefing. *Id.* at 9. But binding precedent holds that laws that discriminate against transgender persons are sex-based classifications subject to heightened scrutiny. *See Karnoski v Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) ("We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies."). Therefore, rational-basis review does not apply.

Intervenor-Defendants assert that the Court's finding that transgender females who do not undergo male puberty have no competitive advantage over female athletes is clearly erroneous because "all the competent evidence in the record suggests the opposite." (Doc. 132 at 7.) They also argue that "[t]he

evidence of male competitive advantage pre-puberty is overwhelming and effectively uncontradicted." (*Id*.) These arguments misstate the record and the evidence. Experts cited by both parties agree that male physiological advantages are largely the result of circulating testosterone levels in men post-puberty. (Doc. 127 at ¶¶ 97, 100, 112-117.) In addition, Plaintiffs' expert provided persuasive evidence that any prepubertal differences between boys and girls in various athletic measurements are minimal or nonexistent. (*Id*. at ¶¶ 109-110.) Defendants' data regarding differences in prepubescent girls' and boys' physical fitness performance was not credited because the data is observational, does not determine a cause for what is observed, and fails to account for other factors which could explain the data. (*Id*. at ¶¶ 101, 103-106, 109-110.)

Intervenor-Defendants argue that the Court misapplied heightened scrutiny. (Doc. 132 at 3-7.) To withstand heightened scrutiny, a classification by sex "must serve important governmental objectives and must be substantially related to achievement of those objectives." (Doc. 127 at ¶ 145) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). According to Intervenor-Defendants, the Court required perfect tailoring of the Act to Plaintiffs rather than assessing the validity of the classification as a whole. (Doc. 132 at 5-7.) Intervenor-Defendants argue that the Court disregarded extensive evidence of the competitive advantages for the large majority of transgender–female athletes, *i.e.*, those that transition after undergoing male puberty, simply because the

individual Plaintiffs claim they did not, or will not, undergo male puberty.[2] (*Id.* at 4.)

This argument is unpersuasive. First, it imagines facts that were not presented. Intervenor-Defendants did not introduce any evidence, let alone extensive evidence, that the majority of transgender-female athletes have undergone male puberty. The evidence at the hearing showed only that in the past ten to twelve years, the Arizona Interscholastic Association (AIA) fielded twelve requests and approved seven students to play on a team consistent with their gender identity. (Doc. 127 at ¶ 66.) No evidence was presented as to whether any of those seven students were transgender females, and no evidence was presented as to whether any of those seven students had undergone puberty. This lack of evidence suggests that the Act's categorical bar against transgender female athletes is unrelated to the purpose of the Act.

In addition, Intervenor-Defendants' argument disregards much of the Court's heightened scrutiny analysis. In applying heightened scrutiny, the Court examined the Act's "actual purposes and carefully consider[ed] the resulting inequality." *SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 471, 483 (9th Cir. 2014). The Court found that Defendant Horne and Intervenors failed to produce "persuasive evidence at the preliminary injunction stage to show that the Act is substantially related to the legitimate goals of ensuring equal opportunity for girls to play

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[2] Although Intervenor-Defendants disparage Plaintiffs' "claims" that they have not, and will not, undergo male puberty, Plaintiffs provide evidentiary support for their statements. *See* Doc. 127 at ¶¶ 24-27, 48-51.

sports and to prevent safety risks," and cited the breadth of the Act and its effect on individuals other than Plaintiffs as support. (*Id.* at ¶¶ 158-161.) Intervenor-Defendants claim in their Motion for Stay that the State's purpose is to regulate unfair advantages caused by transgender-female athletes who have undergone male puberty, but the Act broadly and categorically prohibits all transgender athletes, including prepubescent transgender athletes. The Act bans all education levels of transgender athletes—from kindergarten through college—although there is no evidence of injuries or unfair competitive advantages occurring at the kindergarten level. And despite the State's claim that the Act is intended to protect girls, the Act only bans "biological boys" from girls' teams, without prohibiting "biological girls" from playing on boys' teams, including teams made up of boys who have undergone puberty. (Doc. 127 at ¶¶ 157-160.) Given the Act's overbreadth, it cannot be said that the Court required a "perfect fit." Rather, the State failed to show "an exceedingly persuasive justification" for its discriminatory treatment, *United States v. Virginia*, 518 U.S. 515, 531 (1996), or a justification that is genuine and not reliant on overbroad generalizations, *id.* at 533.

Finally, Intervenor-Defendants argue that the Court's conclusion that the Act violates Title IX is unlikely to be upheld on appeal because Title IX specifically authorizes separation of sports teams based on biological sex which *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and *Grabowski v. Arizona Board of Regents*, 69 F.4th 1110 (9th Cir. 2023), do not change. (Doc. 132 at 10.) Whether legislation that prohibits all transgender athletes

from participating in competitive sports violates Title IX is currently subject to debate. A mere "possibility of relief," however, fails to demonstrate a strong showing of likely success on the merits, particularly in light of Plaintiffs' equal protection claim.

The Court concludes that Intervenor-Defendants fail to make a strong showing that they are likely to succeed on the merits of their claim. This failure is particularly detrimental because, as discussed below, Intervenor-Defendants' showing of irreparable harm is weak. *See Al Otro Lado*, 952 F.3d at 1010 (where there is a weak irreparable harm showing, the applicant must make a strong showing of a likelihood of success on the merits). Thus, the first *Nken* factor favors Plaintiffs.

Intervenor-Defendants Will Not Suffer Irreparable Harm Absent Stay

An applicant for stay pending appeal must demonstrate that a stay is necessary to avoid likely irreparable injury to the applicant while an appeal is pending. *Al Otro Lado*, 952 F.3d at 1007. Showing a possibility of irreparable injury is insufficient. *Id*. The applicant is required to show that irreparable harm is likely to occur before the appeal is decided. *Id*. The applicant's irreparable harm burden "is higher than it is on the likelihood of success prong, as [it] must show that an irreparable injury is the more probable or likely outcome." *Id*.

In its Order granting the preliminary injunction, the Court concluded, "There is no evidence that any Defendant will be harmed by allowing Plaintiffs to continuing playing with their peers as they have done until now." (Doc. 127 at ¶ 184.) Intervenor-Defendants advance little argument as to their irreparable harm,

citing only "the sovereign interest of the State of Arizona in enforcing its valid statutes." (Doc. 132 at 14.). Clearly, however, there is no irreparable harm if the statute is not valid. Intervenor-Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). The second *Nken* factor favors Plaintiffs.

Substantial Injury to Other Parties

Because Intervenor-Defendants fail to establish the first two *Nken* factors, the Court need not address the last two factors. *See Al Otro Lado*, 952 F.3d at 1007 ("The first two factors are the most critical; the last two are reached only once an applicant satisfies the first two factors.") (cleaned up). However, factors three and four also do not support Intervenor-Defendants' request for stay.

The third factor, "whether issuance of the stay will substantially injure the other parties interested in the proceeding," weighs against granting a stay. Plaintiffs will suffer injury in the absence of a stay. Prior to the Act, there were no bars to Plaintiffs participating in girls' sports at their schools. If a stay is granted, Plaintiffs will suffer severe and irreparable mental, physical, and emotional harm if the Act applies to them because they cannot play on boys' sports teams; the Act will effectively exclude Plaintiffs from school sports and deprive them of the social, educational, physical, and emotional health benefits that both sides acknowledge come from school sports; and Plaintiffs will suffer the shame and humiliation of being unable to participate in a school activity simply because they are transgender—a personal characteristic over which they have no control. (Doc. 127 at ¶¶ 174-176.) The school year has started, and

Plaintiffs want to participate in girls' sports. The issuance of a stay would deprive Plaintiffs the opportunity to participate in girls' first quarter sports—which are currently in progress—including the first cross-country meet scheduled for August 14, 2023. (Doc. 127 at ¶¶ 32, 35, 38, 41, 55, 57-60.)

Intervenor-Defendants argue that the preliminary injunction imposes irreparable harm on other interested parties. (Doc. 132 at 12-14.) They argue that, absent a stay, "biological girls" will be unfairly displaced from participation in girls' sports by Plaintiffs, whose involvement will necessarily exclude "biological girls" who try out for the team, and that Plaintiffs' involvement will reduce the other girls' playing time and success. (*Id*. at 12-13.) However, there is no evidence that Plaintiffs' participation will cause such harms to other participants. There is no evidence that the schools limit the number of girls who participate in any of the sports at issue and there is no evidence that either Plaintiff would present an advantage, let alone an unfair advantage, if allowed to participate.

Public Interest Lies in Plaintiffs' Favor

Intervenor-Defendants argue that the public interest favors a stay because the public has an interest in upholding the laws passed by their elected officials. (Doc. 132 at 15.) However, as discussed above, a state cannot suffer harm from an injunction that merely ends a discriminatory practice. *Rodriguez*, 715 F.3d at 1145. Thus, it follows that, "it is always in the public interest to prevent the violation of a party's constitutional rights." (Doc. 127 at ¶ 180) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). The fourth *Nken* factor supports denial of the Motion for Stay.

Administrative Stay Would Disrupt Status Quo

As an alternative to their request for a stay pending appeal, Intervenor-Defendants request a seven-day administrative stay to allow the Circuit Court of Appeals time to consider their emergency motion to stay the preliminary injunction order. (Doc. 132 at 15.) An administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits." *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). The *Nken* factors do not support imposition of an administrative stay. Moreover, prohibiting Plaintiffs from participating in girls' athletics would disrupt the status quo. Accordingly,

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IT IS ORDERED that Intervenor-Defendants' Motion for Stay Pending Appeal and Request for Administrative Stay (Doc. 132) is DENIED.

Dated this 31st day of July, 2023.

/s/ Jennifer Zipps
Honorable Jennifer G. Zipps
United States District Judge

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. XIV

> … No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. …

Save Women's Sports Act, 2022 Ariz. Sess. Laws ch. 106, S.B. 1165 (codified at ARIZ. REV. STAT. § 15-120.02)

> AN ACT AMENDING TITLE 15, CHAPTER 1, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 15-120.02; RELATING TO ATHLETICS.
>
> Be it enacted by the Legislature of the State of Arizona:
>
> **Section 1.** Title 15, chapter 1, article 1, Arizona Revised Statutes, is amended by adding section 15-120.02, to read:
>
> **15-120.02.** Interscholastic and intramural athletics; designation of teams; biological sex; cause of action; definition
>
> **A.** Each interscholastic or intramural athletic team or sport that is sponsored by a public school or a private school whose students or teams compete against a public school shall be expressly designated as one of the following based on the

biological sex of the students who participate on the team or in the sport:

1. "Males", "men" or "boys".

2. "Females", "women" or "girls".

3. "Coed" or "mixed".

B. Athletic teams or sports designated for "females", "women" or "girls" may not be open to students of the male sex.

C. This section does not restrict the eligibility of any student to participate in any interscholastic or intramural athletic team or sport designated as being for "males", "men" or "boys" or designated as "coed" or "mixed".

D. A government entity, any licensing or accrediting organization or any athletic association or organization may not entertain a complaint, open an investigation or take any other adverse action against a school for maintaining separate interscholastic or intramural athletic teams or sports for students of the female sex.

E. Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a school knowingly violating this section has a private cause of action for injunctive relief, damages and any other relief available under law against the school.

F. Any student who is subject to retaliation or another adverse action by a school or an athletic association or organization as a result of reporting a violation of this section to an employee or representative of the school or the athletic association or organization, or to any state or federal agency with oversight of schools in this

state, has a private cause of action for injunctive relief, damages and any other relief available under law against the school or the athletic association or organization.

G. Any school that suffers any direct or indirect harm as a result of a violation of this section has a private cause of action for injunctive relief, damages and any other relief available under law against the government entity, the licensing or accrediting organization or the athletic association or organization.

H. All civil actions must be initiated within two years after the alleged violation of this section occurred. A person or organization that prevails on a claim brought pursuant to this section is entitled to monetary damages, including damages for any psychological, emotional or physical harm suffered, reasonable attorney fees and costs and any other appropriate relief.

I. For the purposes of this section, "school" means either:

1. A school that provides instruction in any combination of kindergarten programs or grades one through twelve.

2. An institution of higher education.

Section 2. Legislative findings and purpose

The legislature finds that:

1. "With respect to biological sex, one is either male or female." Arnold De Loof, *Only Two Sex Forms but Multiple Gender Variants: How to Explain?*, 11(1) COMMUNICATIVE & INTEGRATIVE BIOLOGY (2018),

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5824932.

2. A person's "sex is determined at [fertilization] and revealed at birth or, increasingly, *in utero*." Lucy Griffin et al., *Sex, gender and gender identity: a re-evaluation of the evidence*, 45(5) BJPSYCH BULLETIN 291 (2021), https://www.cambridge.org/core/journals/bjpsych–bulletin/article/sex–gender–and–gender–identity–a–reevaluation–of–the–evidence/76A3DC54F3BD91E8D631B93397698B1A.

3. "[B]iological differences between males and females are determined genetically during embryonic development." Stefanie Eggers & Andrew Sinclair, *Mammalian sex determination—insights from humans and mice*, 20(1) CHROMOSOME RES. 215 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3279640.

4. "Secondary sex characteristics that develop during puberty ... generate anatomical divergence beyond the reproductive system, leading to adult body types that are measurably different between sexes." Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 SPORTS MED. 199 (2021), https://doi.org/10.1007/s40279–020–01389–3.

5. There are "'[i]nherent differences' between men and women," and that these differences "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints

on an individual's opportunity." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

6. In studies of large cohorts of children from six years old, "[b]oys typically scored higher than girls on cardiovascular endurance, muscular strength, muscular endurance, and speed/agility, but lower on flexibility." Konstantinos Tambalis et al., *Physical fitness normative values for 6–18–year–old Greek boys and girls, using the empirical distribution and the lambda, mu, and sigma statistical method*, 16(6) EUR J. SPORT SCI. 736 (2016), https://pubmed.ncbi.nlm.nih.gov/26402318. *See also*, Mark J Catley & Grant R Tomkinson, *Normative Health-related fitness values for children: analysis of 85347 test results on 9–17 year old Australians since 1985*, 47(2) BRIT. J. SPORTS MED. 98 (2013), https://pubmed.ncbi.nlm.nih.gov/22021354.

7. Physiological differences between males and females relevant to sports performance "include a larger body size with more skeletal-muscle mass, a lower percentage of body fat, and greater maximal delivery of anaerobic and aerobic energy." Øyvind Sandbakk et al., *Sex Differences in World–Record Performance: The Influence of Sport Discipline and Competition Duration*, 13(1) INT'L J. SPORTS PHYSIOLOGY & PERFORMANCE 2 (2018), https://pubmed.ncbi.nlm.nih.gov/28488921.

8. Men also have higher natural levels of testosterone, which affects traits such as hemoglobin levels, body fat content, the storage and use of carbohydrates, and the development of Type 2 muscle fibers, all of which result in men being able to generate higher speed and power

during physical activity. Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 74 (2017) (quoting Gina Kolata, *Men, Women and Speed. 2 Words: Got Testosterone?*, N.Y. Times (Aug. 21, 2008).

9. There is a sports performance gap between males and females, such that "the physiological advantages conferred by biological sex appear, on assessment of performance data, insurmountable." Hilton, *supra* at 200.

10. While classifications based on sex are generally disfavored, the Supreme Court has recognized that "sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, ... to promote equal employment opportunity, ... [and] to advance full development of the talent and capacities of our Nation's people." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal citations and quotation marks omitted).

11. One place where sex classifications allow for the "full development of the talent and capacities of our Nation's people" is in the context of sports and athletics.

12. Courts have recognized that the inherent, physiological differences between males and females result in different athletic capabilities. *See, e.g.*, *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) ("Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition."); *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting that "high school boys [generally possess physiological advantages over] their girl

counterparts" and that those advantages give them an unfair lead over girls in some sports like "high school track").

13. The benefits that natural testosterone provides to male athletes is not diminished through the use of testosterone suppression. A recent study on the impact of such treatments found that policies like those of the International Olympic Committee requiring biological males to undergo at least one year of testosterone suppression before competing in women's sports do not create a level playing field. "[T]he reduction in testosterone levels required by [policies like those of the International Olympic Committee] is insufficient to remove or reduce the male advantage, in terms of muscle mass and strength, by any meaningful degree." The study concluded that "[t]he data presented here demonstrate that superior anthropometric, muscle mass and strength parameters achieved by males at puberty, and underpinning a considerable portion of the male performance advantage over females, are not removed by the current regimen of testosterone suppression" permitted by the International Olympic Committee and other sports organizations. Rather, the study found that male performance advantage over females "remains substantial" and "raises obvious concerns about fair and safe competition." Hilton, *supra* at 207, 209.

14. Having separate sex-specific teams furthers efforts to promote sex equality by providing opportunities for female athletes to demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain recognition, accolades, college scholarships and

the numerous other long-term benefits that flow from success in athletic endeavors.

Section 3. Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 4. Short title

This act may be cited as the "Save Women's Sports Act".